CHAPTER ONE

BACKGROUND

1.1 Evolution of the MCA

The Nigerian Matrimonial Causes Act (MCA) is the country's first indigenous statute on Matrimonial Causes.[1] The Act came into force on 17th March, 1970 under a military government. Hitherto, it was the law on matrimonial causes, which was in force, from time to time in England that was in use in Nigeria.

It therefore follows that to get a true picture of the present MCA of Nigeria, it is pertinent to trace the evolution of the divorce law of England. Prior to 1857, in England, no court could grant a decree dissolving marriage. There were mere ecclesiastical courts with jurisdiction to annul marriages and give orders relieving parties of the duty to cohabit without option for the parties to remarry. Any party that wishes to remarry must go through the rigorous procedure of sponsoring private Act of Parliament. Such a party must also obtain from common law courts, judgment awarding damages for adultery[2]. In 1857, the situation changed for better with the emergence of an English Act[3] from where the present Nigerian MCA borrowed the bulk of its contents. The Act created courts of divorce and matrimonial causes which had jurisdiction over the matters in ecclesiastical courts. Again, the Act removed family matters away from the influence of the church and religion. Also, under the Act, the newly created courts grant decree for dissolution of marriage, nullity and separation.

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[1] EI Nwogugu, *A Critical Analysis of the Grounds of Divorce Under the Matrimonial Causes Decree 1970'* (4th edn, London: Butterworths, 1971) p. 171

[2] SM Cretney, *Principles of Family Law* (London: Sweet & Maxwell, 1984) p. 99

[3] English Matrimonial Causes Act, 1857

The 1857 Act went through amendments in 1923 and 1937 to include more grounds of divorce such as adultery, cruelty, desertion and insanity. These were followed by another English Act[4] in 1969 which took care of the views contained in the reports of 'Putting Asunder' committee of 1966 set up by the then Archbishop of Canterbury as well as the report of the English Law Commission.[5]

According to Adesanya[6] on the evolution of the Nigerian MCA,

> …many of the provisions of the Decree are based, with certain modifications and at times with some fundamental differences, largely upon the Matrimonial Causes Act, 1959, of Australia and to a limited extent on the Divorce Reform Act 1969 of England… In enacting the 1959 Act, the Australian legislature did not fail to take into account the decisions of the English courts and of certain English statutes…, the Australia Act also drew part of its inspiration from the Divorce and Matrimonial Causes Act, 1920 of New Zealand.

From the foregoing, it could be seen that the Nigerian MCA evolved mainly from the English Reform Act of 1969 and the Australian Divorce Act of 1959, though with modifications.

1.2 Problems Emanating from the Military Background of the Act

As earlier stated, the birth of the Nigerian Matrimonial Causes Act was during a military regime in the country. Some problems therefore emanated in view of the

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[4] English Divorce Reform Act, 1969
[5] PM Bromely, *Family Law* (London: Butterworths, 1971) p. 171
[6] SA Adesanya, Laws of Matrimonial Causes (Ibadan: Ibadan University Press, 1973) p. 2

military background of the law. For instance, the law could not be subjected to any form of parliamentary debate. The law which certainly would affect the lives of a substantial number of members of the Nigerian community ought to have been given adequate publicity but that was not done due to the military nature of the government that promulgated it[7].

Again, necessary public discussions and arguments ought to have come from legal practitioners, members of the Bench and law teachers, but those were absent due to the military background of the law. Such discussions and arguments also ought to have come from social workers, sociologists, religious groups and the church hierarchy[8] but the law came into being without all that. It is also necessary that in enacting such laws, women and people in related disciplines ought to have been involved since it would certainly affect them in the main.

Here below is the step by step model on the basic process of making a law[9] as opposed to a Decree which formed the MCA.

Step One: Introduction of the law by way of Bill by a member of the House of Assembly, House of Representatives or Senate.

After initial reading, it goes to a Chamber's committee which refers it to a standing committee.

Step Two: Committee consideration and its report may be unfavourable, favourable, or favourable with amendments.

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[7] E N U Uzodike 'A Decade of Matrimonial Causes Act 1970'(1983) Current Law Review, 57.

[8] E I Nwogugu, *Family Law in Nigeria* **(**Revised edn, Ibadan: Heinemann Educational Books,1990) p. 76

[9]'Legislative Research Commission-Making Law 101'< internet www.Google.com>, Accessed 7th Nov. 2010

Step Three: First Reading: Favourable reported bills have their first reading on the floor of the chamber.

Step Four: Second Reading: The Bill is read a second time by title and sent to the Rules Committee. This powerful committee can vote to send it back to a standing committee, thus hindering its chances for passage or place it on the agenda for a vote by the full chamber.

Step Five: Third Reading and passage: Usually, the majority leader makes a motion to have the bill placed upon its passage. Then open debate on it follows. The bill can be amended on the floor. To pass, a regular bill must be approved by at least two thirds of the General Assembly. However, bills defeated on the floor can be re-considered: if two members who voted against, request its re-consideration and a majority approves.

Step Six: Bills approved on the floor go to the other chamber where they follow the same procedure as in the first Chamber.

Step Seven: This is the stage of concurrence or conference whereby both chambers must agree or concur on the final form of each bill. If either chamber refuses, the difference must be reconciled by a 'Conference committee' made up of members from both Chambers. Such committees can make significant changes in the bills, but their compromises must be approved by both members.

Step Eight: After passage by both chambers, each bill is read carefully to make sure its wording is correct and then it is signed by the presiding officer of each chamber and sent to the President or Governor, as the case may be.

Step Nine: The President or Governor may sign a bill, permit it to become law without his signature or veto it.

Step Ten: Back to the legislature, the bill can be passed over a Governor's veto by a majority of the members of both chambers. The foregoing is obtained in a civilian Government where there is typical democracy. But on the other hand, Nigerian Decree 107 of 1993 contains prescription of the mode of exercising the law-making powers vested in the Federal Military Government. Section 3 (1) of the that Decree states 'the power of the Federal Military Government to make laws shall be exercised by means of Decrees signed by the Head of State'. The said Decree 107 of 1993 is also silent as to the procedure of the exercise of such power. In the case of *Guardian Newspaper Ltd v AG Federation*[10], it was held that there is nothing to support the submission that Decree 107 makes it mandatory that other members of the Provisional Ruling Council (PRC) must participate in the process of law-making. The import of this conclusion by the Court of Appeal is that where the military Head of State signs a Decree, it becomes irrelevant whether it went through a formal procedure or not. However, in a civilian regime, a law can be passed even without the assent of the President, as long as it goes through a formal procedure, which is provided for by the 1999 Constitution as amended[11.] This is a total contradiction to the military regimes.

In a civilian regime, it is worthy to note that legislators are guided by the provisions of the Constitution and their affiliation with the people who are their primary constituency. Section 58 through section 61 of the Constitution as amended[12] carefully state the processes to be followed when a law is to be passed. When a bill is introduced to either Senate or the House of Representatives, it is responsible for the content of that

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[10] ***(1999) 5 WLR (pt. 398) p. 7136***

[11] *Section 58 (5) of the Constitution of the Federal Republic of Nigeria,1999,* as amended

[12] *Ibid*

bill. The committee carries out, where necessary, a public hearing on the bill, inviting public contributions to the bill.

Thereafter, it is referred to the general assembly for its first reading, where it is introduced, then it goes through its second reading where comments, debates, criticisms and contributions are made on the bill by the Senators/Home members, which is then followed by the third reading, after which it is passed by a single majority of both houses voting independently of each other. The required quorum needed for the bill to be passed into law is two-thirds. The bill does not become effective until it is assented to by the President, but where he withholds his assent; the National Assembly can still pass the bill into law by the provision of Section 58 (5). The Section states as follows: 'Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become Law and the assent of the President shall not be required.'

Unfortunately, the military regime is unitary in its command structure. The same structure exists in its form of government.

There is a fusion of the executive and legislative arms into one under the Military. In the Provisional Ruling Council (PRC) of the Nigeria's Military Government, the PRC was both the executive and legislature, its authority is provided by the Constitution (Suspension and Modification Decree No 107 of 1993, section 2, which provides that 'the Federal Military Government shall have the power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever'.

Thus the Federal Military Government was saddled with the responsibility of governing the country and making laws, whilst under the 1999 Constitution as amended,

Section 47 provides that 'there shall be a National Assembly'. This provision is in consonance with the notion that there are three arms of government in a democratic setting as propounded by Baron De Montesquieu. The National Assembly which comprises both the Senate and House of Representatives are both saddled with the responsibility of law making in any democratic setting as distinct from a military regime.

In conclusion it is necessary to note the statement of a former Attorney General of the Federation, Dr. Olu Onagoruwa in his article[13] that 'while civilian regimes provide fundamental laws upon which natural laws are based including the right to be governed by choice, the military regimes are a reflection of a failing State'. It follows therefore that the Nigerian MCA 1970 which was a product of the military owes part of its problem and criticisms to its military background.

1.3 Foreign Background of the Act as a Problem

Part of the criticisms of the Nigerian MCA is the nature of its foreign background. Admittedly, while only a few, if any, countries can afford the necessity of evolving an entirely new system of laws without borrowing from other countries in varying degrees, the way and manner, the Nigerian Act was enacted left much to be desired. Commenting on this foreign background of the Act, Ifemeje in her book[14]stated that 'the bulk of the provisions of the Nigerian Act were closely fashioned after the English Reform Act of 1969 and the Australian Divorce Act of 1959 though with slight modifications'.

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[13] '*Law Making Process in Nigeria'* March 18, 2009 Nig. Forum< website www. Google.com> accessed 5th November, 2011.

[14] S C Ifemeje, *Contemporary Issues in the Nigerian Family Law* (Enugu: Nolix Educational Publications Nigeria, 2008) p.46

As pointed out by Kasunmu[15], the most important and controversial section of the Decree dealing with the grounds of dissolution of marriage is also derived from sections 1 and 2 of the *English Divorce Reform Act 1969.* He cited as an example sections 15 (2) (b) of the Nigerian Act which deals with adultery and intolerability as being contrary to the social attitudes in Nigeria for while adultery by a woman is grievous sin, it is not so in the case of a man. Professor Kasunmu wrote,

> ….but how far can the law relating to adultery under the Decree be said to be representative of the social attitude in Nigeria, where adultery by the man is not looked upon with as much disfavour as adultery by the woman.

An analysis of divorce petitions reveals that it is the men who rely more on adultery as a ground for divorce and that in the majority of cases where the wife petitions on the ground of adultery, this is often not the real cause of the breakdown of the marriage.

Yet the Act has not only stopped at incorporating the current English law, it has gone further by giving the women a right to damages from the co-respondent.

Till date, even with the conferment of these rights on women, there are still no remarkable changes in the statistics of women who rely solely on Section 15(2) (b). Rather in the cases where adultery is alleged as a ground, it is more often the case that in addition to the adultery, the man has deserted her in favour of another woman or has actually brought another woman into the matrimonial home, and expects the wife to put up with the new arrangement, while at the same time subjecting her in some cases to physical violence and humiliating neglect. This situation invariably leads to living apart and in a petition that may subsequently be brought, it is not unusual to find such facts as

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[15] A B Kasunmu, 'The Matrimonial Causes Decree 1970: A Critical Analysis' (1971) Vol. I, The Nigerian Journal of Contemporary Law, 49.

adultery, Section 15 (2) (c), desertion and living apart included in the ground for divorce. However, the emphasis is invariably on the other facts and not on the adultery. In other words, having regard to the psychological make-up of the average African female and to the social and economic pressures that often surround her, it is not likely that the existence of a right such as that conferred by Section 15 (2) (c) and Section 31 would affect adversely her general or personal attitude to marriage. Perhaps, the provisions are meant to serve as a deterrent and to point out that adultery, whether by a man or a woman is wrong, since it very often produces undesirable results. Moreover, it is no gainsaying that there is no justification for encouraging a harmful social attitude or culture.

Again, the criticism of the Nigerian Act because of its foreign background and over borrowing is also manifest in S. 15 (2) (a)[16] which is one of the species of the grounds of divorce. It says that 'the respondent has willfully and persistently refused to consummate the marriage'. But the truth is that practically, petitioners rarely rely on this very ground for divorce. According to Ifemeje[17] the paucity of petitions based on this ground, is indicative of the fact that it is infrequently applied and ought to be expunged.

The sum total of my submission here is that, it is unfortunate that Western values form the basis of our Matrimonial Causes Act.

1.4 MCA Vis-à-vis Applicable English Law[18]

At the commencement of the Nigerian Matrimonial Causes Act (MCA) in 1970, almost the entirety of English Law on matrimonial Causes applicable in the English superior courts used to apply in Nigeria by virtue of section 4 of the State Court (Federal

[16] Wilful and persistent refusal to consummate a marriage
[17] Ibid p. 73
[18] 'matrimonial causes transition nigeria' http://en..wikipedia org/wikienglish accessed 01/05/2011

Jurisdiction) Act. The Act provided that the jurisdiction of the High court of a State in regard to monogamous marriages, the dissolution, annulment and other matrimonial causes relating to such marriages shall, subject to the provision of any laws of a State in so far as practice and procedure are concerned, be exercised in conformity with the law and practice for the time being in force in England. The result was that the Nigerian Law of matrimonial causes used to change with law in England regardless of the fact that the needs, values and conditions of the two places often differ.

In other words, the MCA only effected a partial break with the English law. For instance, by section 98 of the MCA, the law and practice to be followed in relation to proceedings for divorce, nullity or judicial separation which were pending at the commencement of the Act are those existing at that time, although the court could entertain jurisdiction under either the then existing law or under the Act, and could grant the amendment of the pending petition to include new grounds set out in the Act and could also take into consideration the bars to relief created by the Act. Although Section 112 (1) of the Act provided that the Chief Justice of Nigeria, after consultation with the Chief Judges of States and in the appropriate cases, with the Presidents of the Courts of Appeal, may make rules of practice and procedure for local courts in regard to the Act, it is provided at the same time that until this has been done, the English rules of practice and procedure immediately in force at the commencement of the Act shall continue to apply. Till date, Nigeria, being disturbingly slow in law reform had not given the citizens what they deserve for purposes of matrimonial causes and stability of marriage institution.

Even the English rules of common law, including the doctrines of equity and some English statutes of general application having been expressly received into the local law, shall apply as residual laws in filling the gaps existing in the Act. For example while the Act deals with the annulment of void and voidable marriages, it is silent on the rules that only the parties to a voidable marriage can bring proceedings for its annulment and that this must be done during the lives of both spouses. It seems certain that the above rules still apply as part of the received common law. The rules of common law still apply in determining the meaning or the characterization of certain concepts referred to in the Act. Thus on a question whether a domicile of choice has been acquired or whether a petitioner's conduct amounts to condonation or connivance, common law rules still apply.

Again, many of the provisions of the Act are based, with certain modifications and at times with some fundamental differences, largely upon the Matrimonial Causes Act 1959 of Australia and to a limited extent, on the Divorce Reform Act 1969 of England. The Australian Act of 1959 itself is the first attempt to federalize the law on matrimonial causes in that country. Hitherto, each State had its own law, though the laws are in certain respects similar.

In enacting the 1959 Act, the Australian Legislature did not fail to take account of the decisions of the English courts and of some English statutes. The Australian Act itself drew part of its inspiration from the Divorce and Matrimonial Causes Amendment Act 1920 of New Zealand.

No doubt, while enacting the English Act, a thorough study of the laws of matrimonial causes of many countries particularly Australia was made. Hence the English Act today

did not fail to find inspiration in the Australian provisions. The result is that current Nigerian Law of Matrimonial Causes (MCA) was based on the MCA of several parts of the commonwealth countries. It is noteworthy that while a relevant foreign case law, particularly on the Nigerian MCA would normally be treated with great respect by Nigerian courts, it has no more than a persuasive authority and in the case of conflict the local case law would prevail. The supreme court stated in clear terms on the scope for the application of foreign source materials in the Nigerian courts, when commenting on counsel's argument, in the case of *Ogunmade v Fadayiro*[19]**.** He said

> the argument clearly overlooks the provisions of our law which must be interpreted and applied. The statement in Halsbury's laws of England was based on English Law and/or practice whereas for the case in hand what we have to consider is the express or implied provision of our Law. A court of law must refuse to be let into construing a legislation clear in its own words and language by reference to extraneous matters of inference or supposed tendencies.

It is hereby submitted that reliance on foreign source materials in regard to the Nigerian MCA will drastically reduce if the MCA is duly reviewed and reformed coupled with case law on the Act which our local courts are expected to successfully build up.

On recognition of foreign decrees, the Nigerian MCA deals with inter-State recognition of such decrees. By Section 81 (1) of the Act, a decree of dissolution or annulment made before, or in accordance with the transitional provisions of the Act by a court in Nigeria shall be recognized as valid in all States of the Federation. As for decrees made under the

[19](1972) 8/9 SC 1 at p. 15

Act itself, section 80 MCA provides that such decrees shall have effect in all the States of the Federation.

The Act equally attempted a codification of the local rules of private international law relating to the recognition of foreign decrees of dissolution and annulment. In determining the extent to which the Act reflects the applicable English rules of private international law at its commencement, those rules as well as the relevant provisions of the Act will be examined. Section 81(9) defines a foreign country as 'a country, or part of a country outside the Federation of Nigeria'. On the question whether a decree of dissolution or annulment granted other than by a court of law is a 'decree' for the purposes of recognition under the Act, Section 81 (8) has provided an affirmative answer by declaring that 'subsection (2) to (7) shall apply in relation to dissolutions and annulments effected, whether by decree, legislation or otherwise before or after' its commencement. Thus, under the sub-section, the Nigerian courts can recognize in the appropriate cases, decrees of dissolution and annulment granted by statutes, for example by an Act of the Canadian Parliament to parties domiciled in Quebec where the local courts do not exercise divorce jurisdiction. In view of the very wide meaning of the word 'otherwise', it is submitted that such decrees would include those granted by administrative as opposed to judicial processes, or under a religious law, for example under Islamic Law, which permits unilateral divorce by Talak or under the Jewish law by a bill of divorcement or under an agreement.

As for circumstances in which foreign decrees of dissolution and annulment would be recognized in Nigeria, these have similarly been enumerated by the Act.

(a) Domicile: Section 81 (2) provides:

> A dissolution or annulment of a marriage effected in accordance with the law of a foreign country shall be recognized as valid in Nigeria where, at the date of the institution of the proceedings that resulted in the dissolution or annulment was effected (or if it was effected at the instance of both parties, either of those parties): (a) in the case of the dissolution of a marriage or the annulment of a voidable marriage, was domiciled in that foreign country; or (b) in the case of the annulment of a void marriage, was domiciled or resident in that foreign country.

The above is a reflection of the common law rules of private international law applicable before the commencement of the Act. The reason why a decree granted under the petitioner's domicile is recognized in such cases is that since all problems of domestic status are subject to the exclusive jurisdiction of the courts of domicile, decrees granted by such courts ought to be recognized. Moreover, reciprocity demands such recognition since Nigerian courts would exercise jurisdiction on the basis of the petitioner's domicile.

Worthy of note is that for no stated reason, section 81 (2) (b) provides that a decree of nullity of a void marriage pronounced by a court of the place of residence of the petitioner at the institution of the proceedings shall be recognized. It should be noted that in so far as the jurisdiction of local courts in regard to such a marriage is concerned, the only basis is domicile (real, or deemed) of the petitioner, therefore the above provision cannot be said to have been founded upon 'reciprocity'. Moreover, before the commencement of the Act, apart from domicile of common residence by both parties,

only the residence of the respondent as opposed to that of petitioner would found jurisdiction. A plausible explanation of how Section 81 (2) found its way into the Nigerian MCA is that, by section 23 (5) of the Australian Act, residence of the petitioner alone is one of the basis for jurisdiction in proceedings for the annulment of the void marriage and by way of reciprocity, section 95 (2) (b) of the same Act provides that a foreign decree granted in a similar circumstance shall be recognized. Since large part of the Nigerian Act is uncritically based on the Australian Act, Section 81 (2) (b) has been based on section 95 (2) (b) of its Australian model, without giving due consideration to the fact that the basis of jurisdiction of local courts in both countries, in nullity of void marriages differ. The effect of section 81 (2) (b) is that Nigerian courts are bound to recognize, at times, a foreign decree of nullity of a void marriage in a situation in which the local courts have no jurisdiction.

(b) Section 81 (3) provides as follows:

> For purposes of sub-section (2) above (a) where a dissolution of a marriage was effected in accordance with the law of a foreign country at the instance of a deserted wife who was domiciled in that foreign country either immediately before her marriage or immediately before the desertion, she shall be deemed to have been domiciled in that foreign country at the date of the institution of the proceedings that resulted in the dissolution, and
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> (b) a wife who, at the date of the institution of the proceedings that resulted in a dissolution or annulment of her marriage, in accordance with

> the law of a foreign country, was resident in that foreign country, and had been so resident for a period of three years immediately preceding that date shall be deemed to have been domiciled in that foreign country at that date.

What follows the above provision is that a decree granted by a foreign court in circumstances in which Nigerian courts would have entertained jurisdiction under section 7 (a) or (b) of the Act by virtue of a wife's 'deemed domicile' would be recognized in Nigeria.

The above corresponds to the popular rule in *Travers v Holley*[20] where courts in England recognize a foreign decree pronounced in situations corresponding to those in which the English courts would have entertained jurisdiction under Section 40 (1) (a) and (b) of the Matrimonial Causes Act, 1965.

Moreover, a foreign decree granted in situations factually corresponding to section 7 (a) and (b) of the Act would still be recognized in Nigeria, even though the fact-situations are given a different name, for example, residence in another country. In fact, the Act says that in such a situation, the wife shall be deemed to be domiciled in that foreign country. It is noteworthy here that the principle of reciprocacy has not been carried to its logical conclusion. While Nigerian courts can entertain jurisdiction by virtue of Section 7 (a) in proceedings for any form of the principal reliefs, by section 81 (3) (a) only a foreign decree of dissolution granted in situation corresponding to the former subsection will be recognized; a decree of nullity granted in such a situation will not be recognized.

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[20] (1953) 2 All ER 794

The present MCA of Nigeria gave no reason for this restriction. It is certainly one of the problems of the Act arising from its uncritical copying of Section 96 (3) (a) and (b) of the Australian Act.

It should be added here that since section 7 (a) and (b) of the Nigerian MCA do not correspond for all purposes to section 40(1) (a) and (b) of the 1965 Act of England, a decree recognized in Nigeria by virtue of Section 81 (3) (a) and (b) will not necessarily be recognized in England. Thus, if H, a domiciled Englishman married W. a domiciled Somalian and the parties lived in Ghana after marriage until H behaved in a way which w could not reasonably be expected to live with him, assuming that under Somalian law, a woman domiciled in Somalia immediately before her marriage could petition and W did so, the decree would be recognized in Nigeria by virtue of section 81 (3) although it would not be recognized in England by virtue of the rule in *Travers v Holley*. This is because, according to English law, the wife was still domiciled in England at the date of the petition.

Also, by section 81 (4) which provides as follows:

> A dissolution or annulment of a marriage effected in accordance with the law of a foreign country, not being a dissolution or annulment to which sub-section 2 above applied, shall be recognized as valid in Nigeria which validity could have been recognized under the law of the foreign country which, in the case of a dissolution, the parties were domiciled at the date

> of the dissolution or in which in the case of an annulment, either party is domiciled at the date of the annulment.

The above sub-section provides for the recognition of a foreign decree even though the decree was not granted in the country of the petitioner's domicile, so long as the decree is recognized in that country. Thus, if H obtained a decree of dissolution in Gambia on the basis of two-year residence, while he was domiciled in Ghana, although the decree could not be recognized in Nigeria under Section 81 (2), it would be recognized under section 81 (4) so long as the decree is recognized in Ghana (H's country of domicile). This is the popular rule in *Armitage v Attorney-General*[21]**.** The rule allows "the domiciliary jurisdiction to be interpreted in widest sense so that any decree recognized by the courts of domicile would similarly be recognized in Nigerian Law.

From the foregoing it is uncertain whether the petitioner's country of 'domicile referred to in subsection (4) means domicile in the 'real' or 'traditional' sense alone would include in the case of a wife petitioner the place of her 'deemed domicile'. If the word 'domicile' is taken as referring to both, it would mean that because of the wider meaning of domicile provided by section 81(3) of the Act, a Nigerian court can recognize a foreign decree where the decree would not have been recognized in English law since it failed to fall within the rule in *Armitage v Attorney-General* (as the rule is understood in England). Thus a foreign decree which the English court did not recognize in *Mountbatten v Mountbatten*[22] would be recognized in Nigeria by virtue of subsections 81

[21](1906) 2 All ER 135
[22] (1959) 2 All ER 43

(3) (b) and (4) of Nigerian MCA . In the Mountbatten's case, H and W were domiciled in England but had been resident in New York for more than three years. W petitioned for divorce in Mexico. She appeared personally while H appeared through a Attorney and a decree was granted. The Mexican decree was recognized in New York. H later petitioned in England for a declaration that the Mexican decree had validly dissolved the marriage. He urged the court to adopt a combination of the rules in *Travers v Holley* and in *Armitage v Attorney-General*. But the court declined to do so and held that the former, of these two cases did not apply since the decree was not granted in New York which was the place of the W's residence for more than three years. The court also held that the latter case did not apply since New York which recognized the Mexican decree was not the place of the W's domicile.

However, if the case had come before a Nigerian court since the commencement of the Act, the Mexican decree would have been recognized. This is because W having resided in New York for at least three years would have been deemed to be domiciled there by virtue of section 81 (3) (b), and since the Mexican decree was recognized in New York, it would be recognized in Nigeria by virtue of section 81 (4) of Nigerian MCA.

Again the Nigerian MC A in section 81 (5) provided as follows:

> Any dissolution or annulment of marriage that would be recognized as valid under the rules of private international law but to which none of the preceding provisions of this section applied shall be recognized as valid in Nigeria, and the operation of this subsection shall not be limited by any implication from those provisions.

The above provision is by far the widest in so far as the criteria for the recognition of foreign decrees are concerned. It enables the local courts to recognize a decree which would otherwise not have been recognized because section 81 (2) to (4) do not apply. Moreover, the subsection provides for the recognition in Nigeria of any foreign decree which would be recognized under any common law rule of private international law that has not been enacted in the Act. Thus the rule in *Indyka v Indyka*[23] that an English court would recognize a foreign decree that is granted in a country with which the party has a 'real and substantial' connection, is now part of Nigerian law. In this case of Indyka, H, a Czech national who was domiciled in Czechoslovakia married W another Czech in that country in 1938. The spouses continued to live in Czechoslovakia until 1939 when H escaped from the country following the German invasion and acquired a domicile of choice in England. W remained in Czechoslovakia. She refused to join H when requested to do so and was therefore in desertion. In 1949, W obtained a decree of dissolution in Czechoslovakia on the ground of deep disruption of their matrimonial relationships. The decree took effect about ten months before the commencement of the Law Reform (Miscellaneous Provisions) Act, 1949 which for the first time gave English courts jurisdiction on the basis of the wife's residence in England for at least three years. Therefore, the Czech decree could not be recognized under the rule in *Traverse v Holley*. In 1959, H married R in England. R petitioned for the dissolution of the marriage, where upon she alleged that the marriage was void because the Czech decree had not effectively dissolved his first marriage.

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[23] (1967) 2 All ER 689

The House of Lords held that because of W's real and substantial connection with Czechoslovakia, the decree had dissolved the marriage and would therefore be recognized. As for what would amount to a 'real and substantial connection' with the foreign country where a decree was granted, the answer to this is a question of fact depending on the circumstance of each case. In the case of *Indyka v Indyka*[24], the connecting factors consisted of the wife's residence in Czechoslovakia, her Czech nationality and pre-marital domicile. Moreover, the only matrimonial home which the spouses had ever shared was situated in that country. But a connection which does not involve all the above factors may nonetheless be regarded as real and substantial. In *Blair v Blair*[25], it was held that the acquisition of a domicile of choice in a foreign country (though that domicile was later abandoned) coupled with the location of the matrimonial home in that country amounted to a real and substantial connection. Similarly, two and half years residence in a foreign State coupled with evidence that the petitioner intended to live permanently in the State has been regarded as such a connection. Moreover, a foreign decree has been recognized where wife was the respondent and it was she who had the real and substantial connection with the foreign country. This was because the decree affected the status of both spouses and therefore it was irrelevant whether or not she was the petitioner. In effect, section 81 (5) is an omnibus provision permitting the recognition in Nigeria of foreign matrimonial decrees which are recognized under English common Law rules of private international Law, in circumstances not already covered in part of the Act. It should be noted that under Part

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[24] Supra

[25](1968) 3 All ER 639

VI of the Act, Nigerian courts will recognize a foreign decree of nullity at times in circumstances in which they cannot entertain jurisdiction. Thus, the basis for recognition is wider than that on which the local courts can assume jurisdiction. Defending a similar situation in England, Wilberforce L.J. stated as follows:

> … I am willing to accept either that Law as to recognition of foreign divorce must be geared to the haphazard movement of our legislative process. There is no reason why this should be so, for the courts decisions as regards recognition are shaped by considerations of policy which may differ from those which influence Parliament in changing the domestic law. Moreover, as a matter of history, it is the law as to recognition which has led and that as to domestic jurisdiction which has followed…

It is noteworthy that there is no express provision permitting the recognition of a foreign decree of nullity of a void marriage granted under the *Lex loci celebrations.* Neither is there an express provision in the Act permitting the recognition of a foreign decree of nullity granted on the basis of the respondent's residence. It is submitted that section 81 (5) is already wide enough and would enhance the proposed reform and review of other sections of the Nigerian MCA.

However, there are limits to the recognition of foreign decrees. For example section 81 (7) of Nigerian MC A states as follows:

> A dissolution or annulment of a marriage shall not be recognized as valid by virtue of subsection (2) or (4) above where, under the rules of private

> international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice or that the dissolution or annulment had been obtained by fraud.

Thus, it is clear that a decree which normally ought to be recognized would not be recognized if in making the decree, a party to the marriage has (i) been denied natural justice or (ii) if the decree was obtained through fraudulent means. The phrase 'natural justice' is very wide and in fact has no precise connotation. However, undoubtedly it implies *inter-alia***,** absence of prejudice or bias on the part of the tribunal. It also implies that the respondent shall be notified of the proceedings and that each party shall be given the opportunity of substantially presenting his or her case. Thus, the rules of natural justice will be in breach if the respondent is not notified of the proceedings owing to a fraudulent representation by the petitioner that he did not know the respondent's address. Expatiating on the circumstances in which failure to notify the respondent of the proceedings would and would not amount to a denial of natural justice, Sach, J (as he then was) in the case of *Macalpine v Macalpine*[26] said:

> … where the respondent has had no notice of the proceedings, the decree is *prima-facie* one obtained by a procedure contrary to natural justice… Where it is proved to be the case or where it can be assumed to be the case that on information bonafide given to it the foreign court has held that its own rules as to service or substituted service have been duly complied

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[26] (1957) 3 All ER 140

> with, and that it is despite that fact that no notice of the proceedings has been received by the respondent, then the courts of this country, by way of exception, will not generally regard the absence of notice … as being contrary to natural justice.

Notwithstanding the fact that the above dictum is concerned with judicial approach in England, it must be taken to be applicable *mutatis mutandis* in Nigeria, since it is assumed and has been argued that the rules of private international law referred to by the Act means the English rules. As has been shown earlier, fraud of the petitioner may amount to a denial of natural justice. So also is the fraud of the court. In the latter case, the fraud would also be a defence to the enforcement of the foreign judgment. Fraud by the parties may take a variety of forms. In *Midleton v Midleton*[27] where the petitioner had falsely sworn he had fulfilled the requirement as to residence in the State where the marriage was dissolved, the decree was not recognized in England. Fraud can also take the form of collusion or conspiracy between the parties whereby a false statement was made which induced the foreign court to entertain jurisdiction in circumstances in which it would have normally declined to do so.

From the wording of sub-section (7), or denial of natural justice would only prevent the recognition of a decree which would have otherwise been recognized under subsection (2) and (4). A case is hereby made that as part of the reform which the Nigerian MCA needs, let the limitation equally apply to subsections (3) and (4). In regard to subsection (3), this conclusion is reinforced by the fact that the subsection is merely an amplification of subsection 2. This is borne out by the phrase in that

[27] (1966) 1 All ER 168

subsection which speaks of 'for the purpose of subsection (2)'. As regards subsection (5), only a decree recognized according to English rules of private international law will be recognized in Nigeria and before a decree is recognized in English law, it must have passed through all the exclusionary tests which include, amongst other things, absence of fraud, and compliance with the rules of natural justice.

On findings of foreign courts, section 81 (6) of the Nigerian MCA provides as follows:

> For the purposes of this section, a court in Nigeria, in considering the validity of a dissolution or annulment effected under the law of a foreign country may treat as proved any facts found by a court of the foreign country or otherwise established for the purposes of the law of the foreign country.

The object of the above subsection is to avoid litigating the same issue twice. So, it is consistent with the Maxim: *Nemo debet bis vexari pro eadem caus*, ***meaning*** no one should be sued twice on the same ground. It is also designed to put an end to litigation. In effect, the findings of the foreign court may be treated as creating *estoppel per rem judicatam*. The main difficulty which the local courts face consists in deciding which facts were proved or were established before the foreign court; once the local courts have determined these, the judgment or findings of the foreign courts may be treated as creating an estoppel in Nigeria.

CHAPTER TWO

MARITAL PROPERTY DISCRIMINATIONS

2.1 Gender Discrimination in the Adjustment of Rights in Marital Property

Part of the criticisms of the MCA of Nigeria is the complaint in some quarters that there is massive gender discrimination occasioned by the Act in the adjustment of rights in marital property in the event of divorce. According to Ifemeje in her book[1], Section 72 of the Nigerian MCA has woefully failed to provide a well-cut out or defined criterion that will assist our courts in determining what is fair in the distribution of the marital property on divorce.

Section 72, states as follows:

> (1) The Court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such as settlement of property to which the parties are, or either of them is entitled/whether in possession or reversion as the court considers just and equitable in the circumstances of the case.

The court may, in proceedings under this Act make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of the marriage, of the whole or part of the property dealt with by anti-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

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[1]SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publications, 2008) p.8

From the foregoing, the continued use of the phrase 'as the court considers just and equitable' is to say the least, unacceptable, in view of the current proposals in this area of the law, in most foreign jurisdictions. The Court of Appeal in *Kafi v Kafi*[2] also saw the phrase 'as the Court considers just and equitable' as a limitation in the settlement of property. There are other Nigerian cases that have shown that Nigerian Judges and Justices exercise this discretional power vested on them by virtue of Section 72 (2) of the MCA in a very discriminatory manner. For instance in *Nwanya v Nwanya*[3], Olatawura, J. of the Court of Appeal declared that his court was 'no father Christmas'. The appeal in this case arose from the decision of an Enugu High Court presided over by Nwokedi, who after dissolving the said marriage had to settle the property in dispute. The wife claimed that she made a contribution to the tune of N6000 (six thousand naira) in the acquisition and construction of their country home in Nnewi. No evidence was tendered before the trial judge but he went ahead to award the sum of N5000 (five thousand naira) to her, as part of her visible and invisible contributions, to the construction of the building in issue.

The Court of Appeal frowned at this award to the woman by the trial court, as according to the court, it was not part of the trial court's duty to make an award to a party who failed to prove her case. Commentators like Ipaye[4] had criticized this decision of the Court of Appeal for its discriminatory tendencies. She was of the view that the decision was not in tune with current social realities. She saw the judgment of the Appeal Court to mean that every woman even in non-troubled marriage should be keeping accurate record of every of her contributions in the home. For instance, 'ensuring the receipts for the

[2] [1986] 3 NWLR (pt. 27) 175
[3] [1987] 3 NWLR (pt. 62) 697
[4] O A Ipaye 'Reflections on the Law and Practice of Family Law in Nigeria' (1997) Perspectives in Laws and Justice, Essay in Honour of Justice Eze-Ozobu, 224

purchase of marital property, are issued in the joint names of the couple and invite third parties to witness who bought what in the marriage'. According to Ipaye, the case gives the impression that it is the spouse who is the better record keeper and accountant, who would find favour in the eyes of the law. This, she said, does not take cognizance of the reality that exists between parties when happily married.

It is necessary for courts to consider the invisible contributions of women in running of the home. These should inform the way and manner our courts should take decisions where and when the MCA gets reviewed and reformed.

Another germane case in this issue is that of *Sodipo v Sodipo*[5]. In this case, the court having placed the value of the marital property in question to N10,000,000 (ten million naira), refused to consider the wife's contribution to the 43 years old marriage and awarded a lump sum of N200,000 (two hundred thousand naira) to her. This decision, with all due respect to the court, was highly discriminatory. What could be said to be the criteria with which the judge arrived at such paltry sum of award. The N200,000 awarded represented just 1/50th of the total value of the marital property. This is far from what is presently obtainable in some other jurisdictions, where marital property, is shared into two equal parts or in other equitable manner. It is further submitted that the Court ought to have considered the woman's age. Her productive years must have been spent during the continuance of the failed marriage, and the prospects of her settling down again was very slim in view of the 43 years duration of the marriage in question. The other question is what about her invisible sacrifices or contributions to the smooth-running of the home, including dutiful carrying of her

[5] (1990) 5 WBRN 98

children and spouse? With the English case of *Lambert v Lambert*[6], Nigeria should borrow a leaf from the House of Lords' decision in that case. The House of Lords in that case decided that marital property on divorce should be shared on equal basis (50/50). The presiding Justices in that case categorically stated that anything short of this should amount to gender discrimination. It is therefore submitted that Section 72 (2) of the Nigerian MCA dealing on powers of the court in settlement of marital property is ill-defined and without categorical criteria as to what the court uses as reference point in determining the sharing of the martial property. It should be reformed and amended to give no room for discrimination against the woman of the house.

2.2 Discrimination Against Women in Divorce Matters, the World Over

Gender discrimination against women in divorce is not a new phenomenon. It had been in existence in the 19th century in England. The 1857 English Divorce Act was highly discriminatory against women. Under the Act, a wife could get divorced because of adultery committed by her, but if it were to be the husband that committed such, divorce could only be granted when, the act is repeatedly done. This Act before its passage was strongly attacked in the House of Lords by Lord Lyndhurst[7] whose outburst was as follows:

> One of the problems which I entertain to the principles of the Bill, as it stood, was the great inequality between the sexes, the inequality was extreme. No extent of adultery on the part of the man could, according to

[6] (2002) ECWA at 1685

[7] H Finbay, "*Divorce and Status of Women, Beginning in 19th Century Australia*" www.gov.aula accessed Fri 19th October 2012

> the bill, entitle the wife to a divorce, and hence, the trite, but not altogether unjust observation that man made the laws and women were the victims.

The bill was eventually passed into law, notwithstanding the attacks and oppositions. Though the Act in issue is today history (abolished), it gives insight into what married women all over the world had suffered and are still contending with up till this 21st century. Again, women the world over lose out financially in divorce. According to the custodians of the U.N. treaty on Women's rights, the U.N is presently reviewing what the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) says on the matter with a new general recommendation expected.

Ruth Halper in-kaddari[8] who is the Vice-President of the U.N. committee overseeing implementation of CEDAW during a meeting held on July 20 to August 7 2012 stated 'In industrialized countries, men usually experienced minimal income losses after divorce . Most women experience a substantial decline in household income and an increased dependence on social welfare where it is available'. She continued, **'**Throughout the world, female headed households are the most-likely to be poor', Ruth further said that women's income drops by 20 percent or so in the United States and 24 percent in the European Union. But the financial impact of men isn't as drastic. According to recent U.S. Census data, 21 percent of recently-divorce women were living below the poverty line while only 9 percent of men were.

[8] R Halper in-Kaddari, 'Divorced Households' 2013 httpp://cedaw/unitednations/newsline.com> accessed12-2-13

Finally, CEDAW targets that member-countries should create an egalitarian legal regime under which the economic benefits of marriage and the costs and economic consequences of marital breakdown are equally borne by men and women.

2.3 What is Marital Property?

Marital property has been defined as property that a person gains, earns or purchases while married. It includes all property acquired during the marriage even if it is not titled in both names[9].

Marriage is an economic contract and economic partnership. Everything you and your spouse buy or acquire during the marriage is legally owned by the two of you and is marital property. It does not matter whose money was used to purchase the asset. The illustrating cases are *Coker v. Coker*[10], *Egunjobi v Egunjobi*[11] and *Mueller v Mueller*[12]**.** The facts of Mueller's case which is a court of Appeal case are as follows:

The petitioner/respondent who is a German citizen married the respondent/appellant in 1989 at Port Harcourt city council;. Before their marriage, the respondent/appellant was a cleaner with the hotel where the petitioner/respondent lodged. It was at the hotel that the couple met each other. While the marriage lasted, the couple jointly acquired some landed properties among other acquisitions. That was a typical example of marital property. When the marriage broke down, the petitioner/respondent filed a petition in the High Court of Rivers State, Port Harcourt, where he prayed the court *inter- alia,* for

[9] www.my Lawyer.comm.com/glossary.htm (accessed 10th Feb. 2011)
[10] (1964) LLR 188
[11] (1974) 4 ECSLR 52
[12] [2006] 6 NWLR (pt. 977) 672

dissolution of the marriage and equitable partition of properties he jointly owned with the wife. The respondent/appellant on her own reacted by praying for dismissal of the petition. She also cross-petitioned for dissolution of the marriage.

Both petitions were heard at the same court and on the 20th December 1999, the trial court of Justice Port-Harcourt Rivers State made an order of decree nisi dissolving the marriage. This was followed with an order partitioning three houses they jointly owned whereby two of the three houses were granted to the husband. The respondent/appellant was also ordered to return two generators to the petitioner/respondent who admitted the return of the said generators. Subsequently, the petitioner respondent discovered an omission in the judgment entered on the 20th December, 1999 and applied to the High court for an order to correct the omission. Consequently, the trial court on the 15th February, 2000 further granted the undeveloped part of the premises in dispute to the petitioner/respondent. The respondent/appellant unhappy with the two decisions of the trial court appealed to the Court of Appeal. The court of Appeal used the occasion to hold that partitioning of joint matrimonial property must be done on the basis of equity. According to the Court of Appeal, equity is equality and that a just order which the courts, including appellate courts, must always give is one in which equality and goodness find expression. Accordingly, the court of appeal, in the instant case, held that, in principle of equity, the petitioner/respondent who was awarded two of the three houses on the land should not be further awarded the undeveloped portion of the land.

The Court of Appeal also used the Mueller's case to decide on the propriety of a husband or wife buying family property in the name of one of the parties. On this, the Appeal Court held:

> Between husband and wife, there is nothing wrong in buying property in the name of one of the parties. Such a property remains matrimonial property which belongs to the parties jointly. In the instant case, there was evidence that the property in question were bought in the appellant's name which was not out of ordinary as their rented apartment was also in the appellant's name.

Another salient point in settlement under the MCA is that in instances where a marriage is void *ab initio* in accordance with the provisions of Section 3 of the MCA, the properties acquired by both parties will be shared equitably between them. In *Oghoyone Oghoyone*[13] , the court made an equitable sharing of the property under Section 17 of the Married Women Property Act.

2.4 Marital Adjustment in U.S.A.

In U.S, most States have the equitable distribution laws for martial property. However, states like California, Nevada, Arizona, New Mexico, Texas, Louisiana, Washington have community property laws. In community- property States**,** property distribution is a 50/50 split. In equitable-distribution States, the court determines a fair, reasonable and equitable distribution which may be more than or less than 50% of any asset to either party. The equitable distribution law in New Jersey is similar to most

[13] [2010] All FWLR (pt. 543) at 1844

equitable distribution States. New Jersey law directs the court to consider fifteen factors in determining what is an equitable, fair and just division of assets. They are:

(a) The duration of the marriage

(b) The age, physical and emotional health of parties

(c) The income or property brought to the marriage by each party

(d) The standard of living established during the marriage.

(e) Any written Agreement made by the parties before or during the marriage concerning an arrangement of property distribution or adjustment.

(f) The economic circumstances of each party at the time the division of property becomes effective.

(g) The income and earning capacity of each party including education background, training, employment, skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonable comparable to that enjoyed during the marriage.

(h) The contribution of each party to the education training or earning power of the other.

(i) The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker.

(j) The tax consequences of the proposed distribution to each party.

(k) The present value of the property.

(l) The need of a parent who has physical custody of a child to own or occupy the martial residence and to sue or own the household effects.

(m) The debts and liabilities of the parties.

(n) The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children.

(o) Any other factor which the court may deem relevant.

Based on these factors, the court can award a wife anywhere from zero to 100% of each marital asset and the same for the husband. Most of the time, the court awards anywhere from 40% to 60%.

Exceptions: The only exceptions are the following property if kept separate.

1. Inherited property**:** This is real estate or money or any other properties inherited through a will or through inheritance laws of the State.

2. Property acquired prior to marriage.

3. Gift by a third person- gifts from one spouse to another are marital assets.

4. Gifts to your husband by a third person.

5. If an asset was acquired prior to the marriage, and there is an increase in value due to direct action or work by the other partner, the increase in value may be a marital asset but not the asset itself.

Marital Assets: The court will order equitable distribution of all property acquired during the marriage. The assets commonly distributed are:

1. Real Estate

2. Automobiles and other vehicles.
3. Stocks, Bonds, Cash and Savings Accounts
4. Individual Retirement Accounts, Pensions plans, and other funds set aside for retirement
5. Cash value of life Insurance Policies.
6. Furniture and Fixtures in all houses.
7. Business owned by one or both spouses.

Marital Liabilities: The court not only orders equitable distribution of marital property but also marital liabilities and debt.

Marital Debt: These include

1) The mortgage balance on the home
2) Any debts owed to banks, Savings and Loan, Association or any lending institutions
3) Car Loans, school loans (if not pre-marital), home improvement loan, any money borrowed during the marriage and have not paid back in full.
4) Loans payable to relatives or friends.
5) Unpaid bills at the time of the divorce.

Equitable Distribution

1. Equitable distribution is not automatically a 50/50 split.
2. Title does not count. It does not matter whose name the asset is in.

3. Every asset acquired from the date of marriage to the filing of divorce petition is subject to equitable distribution if acquired in contemplation of marriage.
4. Assets for Distribution can include (a) Retirement benefits through employment (b) Business or professional practices started during the marriage.
5. Assets which husband dissipated may still be subject to equitable distribution. Example: You tell your husband you are going to see a lawyer. He goes to the bank and takes out 5000.00 dollars from the savings account. He later says he lost track of it or does not know where he spent it. The court may consider the 5000.00 dollars he spent as his share of assets and award you 5000.00 from the remaining assets. The obligation to prove the existence of the marital assets is that of either of the spouses as one spouse may try to hide some of the marital assets. The foregoing should be emulated in reforming the Nigerian MCA.

The factors to be considered by the court in marital property adjustment should be clearly defined in the Nigerian MCA and the discretionary powers given the Court by the MCA should be qualified by expressly providing in the Act, all-embracing factors in the adjustment of all items that fall within marital property. The needed reform has already started with the Nigerian case of *Mueller v. Mueller*[14] where it was held by the Court of appeal that the partitioning of joint matrimonial property must be done on the basis of equity and that equality is equity.

Though the above is a Court of Appeal decision, the Supreme Court is enjoined to toe the same line to make the hue and cry on discrimination against women in marital

[14] Supra

property rights adjustment a thing of the past. In the alternative, let the relevant authorities reflect the 50/50 formula or a situation near it as part of the reform being agitated for in the Nigerian MCA.

CHAPTER THREE

FAMILY MAINTENANCE AND CHILD CUSTODY

3.1 Maintenance Vis-a-vis Gender Discrimination in the Act

The law of maintenance enforces support of the divorced spouse whom the divorce had deprived of the expectation of support inherent in the marital obligation of the spouse. The law of maintenance also punishes fault reducing the entitlement of the at-fault spouse. It also serves as compensation to a spouse (particularly the wife) for his or her contribution to the defunct home[1]. The Nigerian Matrimonial Causes Act (MCA)[2] gives the court the power to make two types of orders on Maintenance, depending on the application brought before it. It could be maintenance after dissolution of marriage or maintenance pending the disposal of divorce proceedings. Section 70 of the MCA provides as follows:

> (1) Court may, in proceeding with respect to the maintenance of a party to a marriage or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

Under the forgoing provision of the Act, 'a party' could mean a man or woman. In other words, maintenance is no longer the sole responsibility of the husband. The wife is

[1] www.mayidavison.com/glossary.htm accessed 17/5/2012
[2] CAP M7 LFN 2004

now equally liable to pay maintenance to the husband if the court directs. In my view, this heightens the problem of women folk in Nigeria. Going by Nigeria's social background, it is odd to ask a woman to maintain a man particularly in marriage situation. But by so providing for it in our MCA, some courts have applied it in their judgments.

For instance, in *Ajidahun v Ajidahun*[3]**,** the petitioner was Daphine Oteri Ajidahun who was not only granted custody of the only child of the marriage but was also given the responsibility for the education of the child from kindergarten school to the university level, and the cost of such education was to be borne by Mrs. Ajidahun, the petitioner. That was the judgment of the trial court. However, it is settled law that under the common law, a wife has right to be maintained by the husband. The court of Appeal in *Erhahon v Erhahon*[4] held as follows: 'Now the right of a wife to maintenance as against her husband is not contractual in nature. A man has common law duty to maintain his wife and such a wife then has a right to be maintained.'

In *Onabolu v. Onabolu*[5] , Ige, J stated that 'a husband is obliged to maintain his wife, and may by law be compelled to find her necessaries as meat, drinks, cloths, physic etc. suitable to the husband's degree, estate or circumstance'. On factors to be considered in making awards concerning maintenance of a party, Aderemi, JCA in *Hayse v Hayse*[6] articulated the factors to be taken into account as follows:

1. The station in life of the parties and their lifestyle.

[3] [2000] 4 NWLR (pt. 654) 605
[4] [1997] 6 NWLR (pt. 510) 667 at 698 (b)
[5] (2005) 2 SMC 135

[6] [2000] 3 NWLR (pt 648) 276

2. Their respective means and existence or non-existence of child or children and
3. The conduct of the parties.

Also in *Menakaya v Menakaya*[7]**,** the Court of Appeal laid down the guiding principles for our courts in awarding maintenance in divorce petition. The major principles according to the court are:

a. The income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future.
b. The financial needs, obligations and responsibilities, which each of the parties has or likely to have in the foreseeable future.
c. The standard of living enjoyed by the family before the breakdown of the marriage.
d. The age of each party to the marriage
e. Any physical or mental disability of either of the parties to the marriage.
f. The contributions made by each of the patties to the welfare of the family including any contribution made by looking after house or care for the family and
g. In proceedings for divorce or nullity of marriage, the value of either party or any benefit like pension which by reason of the dissolution or annulment of the marriage, a party will lose the chance of acquiring.

[7] [1996] 6 NWLR (pt. 422) 250

In Menakaya's case, the Court of Appeal further stated that when children are involved, the court must lean in favour of their welfare in assessment of their maintenance and education. This, according to the court, is of paramount importance in the whole matter, which must attract the attention of the court over and above other considerations. The court stressed that it must ensure that social and economic life of the children do not diminish on account of the divorce of the parties. The children, according to the court, should not suffer further pains as that would amount to punishing them twice.

It is pertinent to note that the phrase 'the conduct of the parties' which is equally contained in the MCA of Nigeria[8] as one of the determining factors in the award of maintenance to a party in Nigeria, is a clear departure from the no-fault innovation of the Act and by implication, a re-introduction of the element of fault that the Act desired to do away with.

On the wife's maintenance, the Court of Appeal in *Akinbuwa v Akinbuwa*[9] held that relevant consideration in award of maintenance of a wife is the background of the standard of life which the husband previously maintained before he and his wife parted.

In *Anyaso v Anyaso*[10]**,** "the court appeared to have introduced a new factor. It was held that 'in assessing the amount of maintenance, the court should consider the current or prevailing market force, as dictated by the price index'. In this case, the court took into consideration the current and not the previous buying power of the Naira. Consequently, the court, in so doing, awarded a sum of money that could afford the

[8] Section 70
[9] [1998] 2 NWLR (pt. 559) 661
[10] [1998] 2 NWLR (pt 554) 100

respondent and her baby a decent life approximate to and not one different from, what they were used to in the appellant's name.

On various modes of payment of maintenance by a spouse, the Nigerian MCA[11] in its wisdom provided that it could be periodic, weekly, monthly or yearly. An order of lump sum payment can also be made by the court. However, the following principles with regard to lump sum payment have been laid down by the Court of Appeal in the case of *Menakaya v Menakaya*[12]**.** Firstly, the court is to consider the ability of the husband to pay the lump sum. The court in this regard, is expected to consider the financial state of the husband, particularly in terms of capital assets. Secondly where there is evidence that the lump sum award will cripple the earning power of the husband, the court will hesitate to make the award.

Thirdly, if the husband is in a good financial position to make such payments, the courts should not hesitate to make the order, as it will enable the wife to invest it and live on the income. Fourthly, in assessing the sum, the court would take into consideration the standard of living of the wife when she was with the husband.

Finally, the court will anticipate what other foreseeable financial benefits the wife could have enjoyed in the matrimonial home, but for the divorce. The court therefore held that it is reasonable for a lump sum to be awarded to her to anticipate or reflect such benefit.

In a 2010 case of *Doherty v Doherty*[13]**,** a marriage solemnized on 8th December 1960 was dissolved on 26th October, 1995 (35 years marriage).

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[11] Section 73
[12] Supra
[13] [2010] All FWLR (pt. 519) p. 1145

The petitioner was dissatisfied with the court judgment as to maintenance and settlement of property and therefore filed an appeal in the Court of Appeal.

The Court held as follows:

1) The Alimony is a financial provision made by a husband and is claimable by the wife while the marriage still subsists, including the intention period between decree nisi and absolute. Maintenance, on the other hand, is a provision made by a man to his former wife after final dissolution of the marriage. A claim for both maintenance and alimony is a complete sham.
2) The relevant consideration in the award and assessment of maintenance under section 70(1) MCA, 1970 are:

(a) The station of life of the parties and their life style;
(b) The existence of defendant children; and
(c) The conduct of the parties.

3) On settlement of property, in making an order, it is the primary duty of the court to appraise and evaluate the evidence adduced before it and equitably considering the surrounding circumstances, as settlement of property is based on what the court considers just and equitable (section 72 (1) MCA 1970).

Again in 2009 case of *Ugbah v Ugbah*,[14] at the trial court, Veronica the respondent as plaintiff sued Patrick, her husband the appellant at High Court of Lagos State for

[14] [2009] All FWLR (pt. 472) 1103 at 1118 CA

dissolution of the marriage and an order to compel the husband to pay her maintenance and the welfare and education of the children of the marriage.

However, the action was instituted by a writ of summons and not by way of a petition as stipulated by the Nigerian MCA and the court held that 'by section 54 of MCA, proceedings under the Matrimonial Causes Act are regarded as special class of action which requires to be instituted by way of petition and no other way save by leave of court.'

The Problem Created by the MCA, CAP M7 LFN 2004

The Act, unfortunately, made all the guiding principles enunciated in the foregoing cases discretionary and not mandatory on any court. The principles merely assist the court in the exercise of its discretion under section 70 of the MCA. In *Akinboni v Akinboni*[15]**,** the Court of Appeal clearly noted this problem created by the Act by conceding that the principle was mere guides in exercise of its discretion. It is my submission therefore that in view of the vital nature of the financial aspect of divorce, the MCA ought to make these 'guiding principles': mandatory. By so doing, this very important area of our law would no longer be based on the whims and caprices of the presiding judges who could be adversely influenced by their own personal marital experiences.

3.2 Maintenance at Common Law[16]

Under common law, the husband as the head of the family is bound to maintain the wife and there is no corresponding duty on the wife to maintain the husband. The

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[15] [2002] 9 NWLR (pt. 761) 564

[16] 'Common Law Maintenance'< www.commonLaw maintenance/marriage.comm.uk> accessed 01/05/2011

common law operates the doctrine of unity of husband and wife and it is the duty of the husband to provide the wife with necessities of life and these comprise, among other things food, clothing and suitable accommodation. The duty to maintain the wife extends to the wife's right to the husband's consortium. The wife loses the right to maintenance once the right to the husband's consortium is lost. Thus she will not be entitled to the husband's consortium as well as maintenance if she commits adultery, or if by her conduct she leads the husband to a reasonable belief that she has committed adultery.

The same is true of desertion; but in this case, the right to maintenance does not cease for all purposes as in a case where she commits adultery. The right is merely suspended in that case and will revive on the cessation of the desertion. Where a wife has lost her right to maintenance, it is irrelevant that the husband had himself committed adultery or other wrongs. In short, the husband's conduct is irrelevant. But if the husband has condoned or connived at, the alleged adultery by the wife, he will be obliged to maintain her.

As a means of enforcing the right to maintenance where the husband has failed to do so, the law creates in favour of the wife an agency of necessity. This enables her to pledge her husband's credit for necessaries so long as she is entitled to be maintained by the husband. A husband who has failed to maintain his wife cannot terminate the agency by giving an instruction to tradesman that he should not contract with his wife. However, a tradesman who deals with the wife runs a risk in that the wife's right to pledge her husband's credit ceases once she loses the right to maintenance.

The decision of the Court of Appeal in England in *Biberfield v Berens*[17] that the wife's agency of necessity only exists when she does not have sufficient means of her own must be read subject to the provision in section 42 (3) of the Act that if 'in consequence to his wife, and the maintenance is not duly paid, husband shall be liable for necessaries supplied for the wife's use'. Here it would seem to be irrelevant that the wife has sufficient means of her own so long as the maintenance ordered has not been paid by the husband.

3.3 Origin of Maintenance as a Statutory Duty[18]

The origin of the statutory duty to maintain a wife by her husband can be traced back to the practice of the Ecclesiastical Courts in England. Before the commencement of the Matrimonial Causes Act 1857 in England, the Ecclesiastical Courts used to order a decree of divorce a *mensa et thoro* meaning from bed and table in matrimonial proceedings, the husband to pay the wife alimony pending suit (or pendente lite), and on grant of the decree, permanent alimony. The Act not only transferred this power to the Divorce court, it also empowered the latter court on grant of a decree of divorce to order the husband to secure maintenance for the wife's life. By the Matrimonial Causes Act of 1866, the Court was given the additional power to order the husband to pay the wife an unsecured maintenance. All the above powers were later extended to nullity proceedings in 1907. By 1963, the court could order a lump sum payment in proceedings for divorce, nullity or judicial separation. It was not until 1937 that the wife became obliged to maintain her husband and this was in very limited circumstances, namely in proceedings

[17] (1952) 2 QB 770
[18] 'Statute Law Maintenance'<www.statute law maintenance/marriage.com.uk> accessed 01/05/2011

for judicial separation or divorce on the ground that the husband had become insane. However, it should be added that since 1857, the court could order the settlement of a wife's property in proceedings for divorce or judicial separation by the husband on the ground of the wife's adultery. This ground was later extended to include the wife's desertion and cruelty as well as where the husband obtained a decree of restitution of conjugal rights. It should be noted that in all the above cases, financial reliefs could only be granted as ancillary reliefs. It was not until 1949 that a wife could obtain financial relief in the superior courts in an independent proceeding. Before the order could be made, the husband must have been guilty of wilful neglect to maintain the wife or any child to which the provision applies and the court would have had jurisdiction to entertain proceedings for judicial separation by the wife. It should be noted that under the summary Jurisdiction (Married Women's Property Act) (1895-1949), a Magistrate's Court in England could entertain jurisdiction and make an order in an independent proceeding for maintenance by the wife.

Before the commencement of the Act (MCA of Nigeria) it was not certain whether independent proceedings for financial relief could be instituted in Nigeria by virtue of the above mentioned English statutes. The question of the applicability of the 1895 Act was considered in a 1947 case of *Okpaku v Okpaku*[19] by the Supreme Court of Nigeria and it held that it was applicable and granted maintenance to the wife. The decision was reversed by the West African Court of Appeal which held that the Act was not a statute of General application and therefore not applicable in Nigeria. In the above case, the question of the applicability or otherwise of the 1895 Act was determined by

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[19] (1947) 12 WACA 137

reference to the Supreme Court Ordinance, 1943, which provided for the application in Nigeria of the common Law of England, the doctrines of equity and the Statutes of General Application in force in England on the 1st January, 1960.

In so far as the applicability of section 22 of the Matrimonial Causes Act, 1965 is concerned, this is undoubtedly a post-1900 imperial legislation, therefore if it is applicable at all, it is by virtue of a different enabling provision. In *Ekisola v Ekisola*[20] W instituted proceedings for a maintenance order in favour of herself and the children of the marriage.

She alleged wilful neglect to maintain on the part of the husband and that he drove her away from the matrimonial home. The proceedings were brought under Section 23 of the Matrimonial Causes Act, 1950, a provision which was later re-enacted in Section 22 of the 1965 Act. Coker J. (as he then was) upheld the wife's claim on the ground that Section 16 of the High Court of Lagos Act, Cap. 80 enjoined the High Court to exercise its jurisdiction in matrimonial causes in conformity with the Law and practice for the time being in force in England and that the English Law referred to included Section 23 of the 1950 Act.

At present, unless the prevailing MCA of Nigeria is reviewed and reformed, the above decision will continue to be criticized on the ground that although the High court was empowered to apply current Law on Matrimonial Causes, an independent proceeding for ancillary relief is not a Matrimonial Cause, and that the court ought not to have granted the wife's application.

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[20] (1961) LLR 8

3.4 Custody Vis-à-vis Gender Discrimination in the Act

The Nigerian Matrimonial Causes Act (MCA) in its Section 71 provided powers of the court in custody proceedings. Section 71 (1) reads as follows:

> In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration, and subject thereto, the court may make such order in respect of those matters as it thinks proper.

By the above provision and indeed the entire Section 71 of the MCA, the issue of discrimination in custody matters had been reduced to the barest minimum. Before the MCA, the father, under the common law was automatically the custodian of his legitimate children, until they attain 16 years of age[21]. The womenfolk naturally saw this law as unjust but gradually the mother (particularly of a child of tender years) came to be considered as the more appropriate caregiver, unless she had been disqualified by reason of her conduct[22]

Few exceptions are cases like *Odogwu v Odogwu*[23] where the trial judge behaved as if he was operating under the common law where custody must go to the father. The summary of Odogwu's case is that the parties who were married in 1982 had three children aged nine, eight and six years but a High court sitting in Lagos presided over by Adeyinka, J upon a petition by the husband, Mr. Onwochei Odogwu alleging adultery, announced a

[21] Thomasset v. Thomasset (1894) 71 LT 148

[22] SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publications, 2008) p. 136.

[23](1992) 2 NWLR (pt. 255) 239

decree of dissolution of the marriage. The wife was ordered by the trial court to release the three children of the marriage to the husband forthwith. The wife did not obey the order instead she appealed against the decision of the High court and followed it up with an application to the High court for stay of execution which was refused. She filed a similar application in the Court of Appeal but it was struck out for want of prosecution. It was at this point that the children were taken away from her custody by their father, her husband.

However, on hearing a new application filed by the appellant, the court allowed the appeal and ordered the children's father to return them to their mother, within seven days from date of ruling at the Court of Appeal. Awogu, J.C. A. (as he then was) in that case observed as follows:

> In matters such as this, the paramount interests of the children constitute the golden rule. We are here not dealing with shares in a company, or a piece of land in dispute. We are dealing with human beings, who find themselves in a situation created by the refusal of the parents to live together as husband and wife.

The husband did not stop here. He appealed to the Court of Appeal and Supreme court for stay of execution pending the determination of his appeal, which was refused. Belgore, JSC here made the following vital pronouncements bordering on the interest of the children which is required to be taken into consideration:

> Welfare of a child is not the material provision in the house- goods, cloths, food, air conditioners, television, all gadgets normally associated with the

> middle class; it is more of the happiness of the child and his psychological development. While it is good for a child to be brought up by complementary care of the two parents living happily together, it is psychologically detrimental to their welfare and ultimate happiness and psychological development if the material care available is denied them.

The way and manner this Odogwu's case ended showed that the Nigerian MCA cannot be said to have expressly perpetrated gender discrimination by its provision on custody matters dealt with in section 71.

In fact, by the case of *Williams v Williams,*[24] Section 71(1) MCA is said to have by implication recognized equalities of the parents to the custody of their children.

In that case, it was stated that 'the equality might be tilted by other factors, one way or the other as circumstance dictates'.

All these are great and welcome departures from the common law in which the father is the automatic custodian of his legitimate children under 16 years of age whether or not the decision serves the children's best interest. Some decided cases on custody matters in Nigeria would throw light on when and how other factors could tilt the equality of the two parents in the award of custody of their children.

In *Otti v Otti*[25] it was proper arrangement for the children's care and attention that made the court to award custody of the children to their father who was a

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[24] [1981] 2 NWLR (pt. 54) 66 at 74

[25] [1992] 7 NWLR (pt.252) 187 at 210

medical practitioner and showed evidence that he was already in good custody of the children as against the children's mother who was said to be a very busy University lecturer who had not made proper arrangements for the children's care and attention during period of work.

In *Anyaso v Anyaso*[26]**,** it was the age of the only child of the marriage that tilted the decision of the court in favour of the mother to take custody of the seven-year daughter. In that case, though the Court of Appeal agreed that the father (the Appellant) had all financial means to take care of Chioma, it held that the child needed more than financial care. According to the court, the 7 year old child was still at tender age which required the child to be under the care and control of the mother.

In a more recent case of *Nanna v Nanna*[27]**,** the Court of Appeal denied the petitioner who is the father of the two children of the marriage custody because the court saw the custody arrangement put up by him the petitioner/appellant as cosmetic.

According to Abba-Aji, JCA, 'in the instant case having regards to the antecedents of the appellant in relation to the welfare of the children of the marriage during the subsistence of the marriage, the trial court rightly awarded the custody of the children of the marriage to the respondent' He cited *Hayes v Hayes*[28], *Damulak v Damulak*[29], *Akinbuwa v Akinbuwa*[30], *Anyaso v Anyaso*[31].

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[26] [1998] 9 NWLR (pt 252) 187
[27] [2006] 3 NWLR (pt. 966) 1
[28] *Supra*
[29] (2004) 8 NWLR (pt. 874) p. 151
[30] *Supra*
[31] *Supra*

In the Nanna's case, Abba-Aji J.C.A., stated further as follows:

> I have stated above the evidential account of the arrangement of the appellant put together for the well-being of the children. If same is considered against the background of the evidence adduced by the respondent, can that be said to be sufficient as to warrant the grant of the custody of the children to the appellant? I think not. There is nothing therein to persuade the court to grant custody of the children to the appellant. I agree with the respondent's counsel that such arrangements are merely cosmetic in view of the antecedents of the petitioner during the subsistence of the marriage. What the children need is not a mere endowment policy and a 5-bedroom apartment; the appellant's aunty cannot take the place of their mother. The antecedents of the appellant reveals it all. It will amount to a negation of the well-stated principle that the welfare and interest of the child or children of the marriage must be accorded paramountcy where an order of custody of the children of the marriage be made in favour of the appellant based on the said cosmetic arrangement.

The Nigerian MCA[32] went further to provide that the court may if it considers it in the best interest of the child, place him or her in the custody of a third party while access could be granted to both parents to visit the custodial third party at reasonable period and time to meet their children. I personally

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[32] Section 71 (3)

consider this arm of Section 71 of the Act as a further step by the Act to shun gender discrimination in the award of custody. The custody is neither awarded to the father of the children nor their mother but to a neutral 3rd party, the cardinal point being the overall best interest of the child. Let me end this discourse with few recent Nigerian cases on custody.

In *Alabi v Alabi*[33]**,** the appellant filed a petition for divorce against the respondent before the Kwara State High Court seeking the following reliefs:

a) A declaration that the respondent's behaviour is one which the petitioner cannot reasonably be expected to live with
b) A decree of dissolution on the ground that the marriage has broken down irretrievably.
c) An order of custody of the only child, Elizabeth Oyeronke. Respondent cross-petitioned alleging matrimonial offences such as adultery and cruelty. She equally asked for dissolution of the marriage.

Trial court dismissed the appellant's petition and granted the respondent's cross-petition and awarded the custody of the only child to the respondent. Not satisfied with the out come in the trial court, the appellant appealed to the court of Appeal.

Issues Canvassed:

1) Whether on the evidence before the lower court, the allegation of adultery against the appellant is sustainable to warrant the award of N20,000 damages against him.

[33] [2008] All FWLR (pt. 418) 245 C.A.

2) What the court considered paramount in award of custody of a child in dissolved marriage.

The Court of Appeal in dismissing the appeal held as follows:

(1) **PROOF OF ADULTERY**: Adultery is usually proved by circumstantial evidence. This could take various forms, but a few are:

(i) Familiarity and opportunity

(ii) Venereal diseases

(iii) Brothel

(iv) Confession and admission

(v) The birth of a child … the evidence believed by the trial court is that the appellant had two children by the other party. The court of appeal then held thus. This is good evidence of Adultery.

3.5 What Court Considers in Award of Custody of Children

Award of custody of the children of a marriage that has broken down irretrievably is governed by section 71 (1) of the Matrimonial Causes Act, which enjoins the court to take the interest of the children as paramount consideration and the court in this regard is given wide discretionary powers which it can exercise according to the peculiar circumstances of each case[34]. The welfare of the infant is not only the paramount consideration but a condition precedent. The award of custody should therefore not be granted as a punitive measure on a party guilty of matrimonial offences.

[34] Olayinka v Adeparusi (2012) Vol. 43 WRN p. 128 CA

The case of *Buwanhot v Buwanhot*[35] reported in 2009 is relevant here and it has the following facts: The appellant filed for divorce on the ground that the marriage had broken down irretrievably and custody of the four children of the marriage.

The respondent filed an amended answer in which she prayed for the dismissal of the petition and custody of the four children. The court ordered dissolution of the marriage and gave custody of the four children to the respondent. On principles guiding the grant of custody of children of marriage in matrimonial cases, the court held that the welfare of the children of the marriage in terms of their peace of mind, happiness, education and co-existence is the prime consideration in granting custody.

Finally, *Tabansi v Tabansi*[36] is another relevant case and the facts are as follows: The appellant and the respondent were married at the Marriage Registry of Enugu North Local Government on 3rd September 2002. They had a wedding ceremony at St. Michael Catholic Church, Asata, Enugu on 5th October 2002. After the marriage, they cohabited from 5th October, 2002 to 7th February, 2004; within the period, they went abroad for honeymoon for two weeks, first in London, then in America for another two weeks. The respondent remained in America for five months and delivered her baby girl there, on 7th February 2003.

Subsequently, recrimination and quarrels ensued between the couple. The appellant accused the respondent of consorting with her former lover from whom she received telephone calls at night. The respondent eventually moved out of the house. Series of family meetings were later held but the appellant insisted that he would not

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[35] [2009] 16 NWLR (pt. 1166) p.22

[36] [2009] 12 NWLR (pt. 1155) 415 CA

allow the respondent to return to their matrimonial home even though she was prepared to do so.

Consequently, the appellant filed a petition before the High Court of Anambra State sitting at Otuocha, for dissolution of the marriage between him and the respondent, access to the only child of the marriage until she attained the age of ten years and thereafter custody of the child. The respondent on her part filed a cross petition wherein she sought an order dismissing the petition filed by the appellant, a decree of dissolution of her marriage and the sum of N80,000.00 per month from the appellant for the maintenance of the child. In its judgment, delivered on 15th March 2006, the trial court dismissed the petition.

3.6 Arbitrary Power of Judges under the Act Vis-à-vis Gender Discrimination

Black's law dictionary[37]gave the meaning of arbitrary power as power exercised in an unreasonable manner and done at one's pleasure and not founded according to reason or judgment. It went further to use such expression as non-rational, capriciously, tyrannical and despotic to explain arbitrary power.

In the Matrimonial Causes Act (MCA) of Nigeria, an example of arbitrary power given to the court is found in Section 72 (1) which reads as follows:

> The court may, in proceeding under this Act, by order require the parties to the marriage, or either of them to make for the benefit of all or any of the parties to, and the children of the marriage such a settlement of property to which the parties are, or either of them is entitled, (whether in

[37] Garner, A (ed), *Black's Law Dictionary*, (6th edn, Minnesota: West Group, 1998) p. 108

> possession or reversion) as the court considers just and equitable in the circumstances of the case.

Again, it is repeated in sub-section 2 of that Section 72. It reads,

> The Court may, in proceeding under this Act, make such orders as the Court considers just and equitable with respect to the application for the benefit of all or any property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

Ifemeje in her book[38] succinctly identified the arbitrary powers in the above section of the MCA and its discriminating nature against women when she stated as follows:

> A close scrutiny of the above express provision of our law, on settlement of property and its application in Nigeria, shows that this area of divorce law has suffered an intense attack as being discriminatory against women. It is equally seen as *ill defined***,** as there are **no clear-cut criteria** as to what the judge uses as his reference point in determining who gets what. Everything, from all indications, depends squarely on the wide arbitrary discretion of the judge. This is unacceptable as such discretion may be adversely influenced by the judge's personal marital experiences. This is definitely not acceptable to the women folk. The continued retention of the phrase "as the court considers just and equitable in the circumstance of the case", is to say the least, unacceptable, in view of the current proposals in this area of law in most foreign jurisdictions.

[38] Ibid p. 174

The sum total of the above is that the courts have been given a free-hand to decide, in the light of justice and equity, what interest to vest in either of the spouses or the children of the marriage.

How this arbitrary power given to the court by MCA has occasioned marginalization or discrimination against women in divorce could be seen in cases like *Nwanya v Nwanya*[39] *and Sodipo v Sodipo*[40].

In Nwanya's case, the wife claimed that she made a contribution to the tune of N6,000 in the acquisition and construction of their country home in Nnewi. However, no evidence was tendered before the trial judge to buttress the wife's claim but the court awarded N5,000 to her as part of her visible and invisible contributions to the construction of the country home in issue. On appeal, the court of appeal frowned at this award to the woman by the trial court saying that it was not part of the trial court's duty to resort to mere conjecture, so as to make an award to a party who failed to prove her case. This attitude of court to the award made to Mrs. Nwanya amounts to discrimination against her. According to Ipaye[41], the decision of the court of appeal Justices amounted to asking every woman in stable marriage to be keeping every record of her contributions in the home; such as ensuring that receipts for the purchase of marital property are issued in the joint names of the couples. She should also invite third parties to witness who bought what in the marriage. This means that a woman would continue to live under fear, whether real or imaginary, that the marriage may collapse at any time and would act in a

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[39] [1987] 3 NWLR (pt. 62) 687

[40](1990) 5 WRN 98

[41] O.A. Ipaye "Reflections on the Law and Practice of Family Law in Nigeria" (1997) Perspectives in Laws and Justice, Eassay in Honour of Justice Eze-Ozobu, 224.

way and manner that would reflect such anticipation of divorce. Ipaye further criticized the Court of Appeal Judgment in Nwanya's case as most unfair.

According to her, the case gives the impression that it is the spouse that keeps better record and accounts that would be favoured by the court. This, she further argued does not take cognizance of the reality that exists between parties during happy days of the marriage. The truth is that the parties never thought of divorce, much less what should happen to their marital property in the event of divorce.

In Sodipo's case, the same arbitrary power exercised by the court occasioned discrimination against the female spouse of the divorced marriage, Mrs. Sodipo. In that case, the marital property in question was valued at ten million naira, but the court knowing fully well that the dissolved marriage lasted for up to 43 years still awarded a paltry sum of two hundred thousand naira to the divorced wife as her contribution to the 43 years old marriage. This amounts to $1/50^{th}$ of the value of the marital property. The question therefore is what was the yardstick the judge relied on in arriving at such paltry sum of award?

Ifemeje in her book[42]commented on the above court's judgment in Sodipo's case as follows:

> Did the learned judge take the woman's age into consideration? Her productive age must have been spent during the continuance of the failed marriage and the prospects of her settling down again was apparently, very

[42]Ibid . p. 176

> slim in view of the 43 years duration of the marriage in question. Finally, what about her invisible sacrifices or contributions to the smooth running of the home, including dutiful caring of her children and spouse; should all these intangible services be thrown to the winds, with just a wave of the hand. Definitely not, the position of our law right now, is definitely far form being satisfactory. It has to be revisited, as a matter of urgency, in order to mitigate the suffering and hardship which our women have to contend with, even in this 21st century.

The analysis above has said it all and that is the essence of this topic on arbitrary powers of judges under the MCA and the hardships, discrimination and marginalization that emanate from them. It is my earnest submission therefore that the Nigerian MCA should be reformed to include statutory guidelines for the determination of ancillary reliefs to eliminate any form of arbitrariness.

3.7 How Arbitrary Powers were checked in Foreign Jurisdictions[43]

In England, the English Law Commission made a recommendation for the expansion of court's powers, to make property and financial orders on divorce or nullity proceedings. They made a case for the provision of statutory guidelines within which the discretionary power of the English courts would be exercised. These recommendations of the said Commission, led to the enactment of the *Women Property Act* of England, 1882.

[43] http.//.www.international divorce > accessed 10th Feb. 2011

The 1882 Act on providing the needed guidelines stated that the court in England in awarding maintenance using its discretional powers should consider all circumstances including:

a) The income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future.
b) The financial needs, obligations and responsibilities, which each of the parties has or is likely to have in the foreseeable future.
c) The standard of living enjoyed by the family before the breakdown of the marriage;
d) The age of each party to the marriage;
e) Any physical incapacity of the parties to the marriage;
f) The contributions made by each of the parties to the welfare of the family including any contributions made by looking after the home or caring for the family;
g) The value to either of the parties of any benefit (for example, a pension), which by reason of dissolution or annulment of the marriage, that party will lose the chances of acquiring.

In New Zealand jurisdiction, the law on maintenance is more intricately constructed than that of England and Wales. The courts in New Zealand while awarding maintenance using their discretional powers are guided by:

(a) The ability of the wife
(b) The contribution of the wife where capital payment is concerned. In the

> British Columbia, the Berger Commission provided a good guide for martial adjustment by the courts. The Commission rejected the argument that marital award should be confined to necessary support. The Commission's stand was that women may have a legitimate claim to compensation especially where the marriage ended as the husband was at the verge of a successful career.

The commission also stated that women ought to be maintained by their former spouses, in view of the fact that their employment prospects were inferior to those of man. In Canadian jurisdiction, the courts follow such guideline as (a) Conduct of parties and (b) the condition, means and other circumstances of each of them while making financial adjustment on divorce. However, the Canadian Law Reform Commission has proposed an entirely different basis of maintenance law after divorce. It would be premised on the proposition that marriage, per se, should not create a right to receive, or an obligation to make financial provision after dissolution. Therefore, under the Canadian law, maintenance awards are only made to meet reasonable needs, following divorce eg. Custodial arrangement made for the children, physical and mental health of the parties, and then, ability to find employment. In Canada, a maintained spouse is expected under the Canadian legislation to assume responsibility for him or herself within a reasonable time following dissolution.

In Australian jurisdiction, the law which is the Australian Family Law Act of 1975, has the new concept of "need" as its cornerstone. It provides:

> A party to a marriage is liable to maintain the other party, to the extent that the first mentioned party is reasonably able to do so if and only if, that other party is unable to support herself or himself adequately, whether by reason of having the care of control of a child of the marriage who has not attained the age of 18years, or by reason of incapacity for appropriate gainful employment or for any other adequate reason…

From the foregoing, the overall objective of these guidelines was to maintain the positions of the parties, as it would have been, if the marriage had not broken down. It is also pertinent to observe that Nigeria is not too far away from these guidelines in view of the decision in the case of *Menakaya v Menakaya*[44] where the Court of Appeal in Nigeria propounded a principle of law tailored closely to the English Property Act provision in its award of maintenance. All that is left to be done is to use it to reform the existing Nigerian MCA.

The Court of Appeal in the case of *Adegoroye v Adegoroye*[45] enunciated principles that should guide the exercise of discretion by a court of law as follows:

(a) A Judge must act judicially, on known principles;

(b) The Court should not take into consideration extraneous matters and it should not fail to consider something which it ought to have taken into consideration.

(c) The court should also act judiciously; and

(d) There must be a balanced consideration of the facts for each party before the court arrives at a proper exercise of its discretion..

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[44] Supra

[45] [1996] 2 NWLR (pt 433) 722.

In conclusion, it is my considered view that the present Section 72 (1) and (2) of the Nigerian MCA are not acceptable. I say so because the discretionary powers given to presiding officers of courts in these sub-sections are arbitrary, too wide and inherently discriminatory.

There is urgent need therefore to reform the MCA of Nigeria in such a way to bring it up to international best practices.

CHAPTER FOUR

DEFINITION OF MARRIAGE

4. 1 Failure of the Act to Define Marriage

Part of the criticisms of the Nigerian MCA is its failure to define marriage. The only clue of what the Act envisages as marriage is contained in Section 3 (1) of the Act which inter-alia states as follows: 'A marriage is void, where either of the parties is at the time of the marriage, lawfully married to some other person.[1]'

However, the conduct and incidents of statutory marriage in Nigeria are regulated principally by the Marriage Act[2] and the Matrimonial Causes Act[3].

4.2 Essential Validities of Statutory Marriage

(a) Neither party must be already married

The statutory marriage being a monogamous marriage means that parties must not be into a subsisting marriage be it statutory or customary at the time of contracting the statutory marriage. This was decided by the Court in *Obele v Obele*[4] The marriage Act makes it clear in Section 33 (1) that a party to a subsisting marriage under customary law has no capacity to contract a statutory marriage with a third party. It however allows the same parties to contract a subsequent valid statutory marriage[5]**.**

In *Mgwamgwa v Ngwangwa*[6]**,** the court stated as follows:

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[1] Motoh v Motoh (2011) 16 NWLR (pt. 1274) 431-631 CA
[2] Cap M6 laws of the Federation of Nigeria, 2004
[3] Ibid
[4] (1973) 1 NMLR 155
[5] Section 35, Marriage Act, Ibid
[6] [1997] 10 NWLR (pt. 526) 1559

> … in order to convert a customary law marriage into a statutory law marriage, the parties must consciously take the steps and adopt the procedure contained in the Marriage Act.

(b) **Consent of the Parties**

Marriage being a voluntary union presupposes that each party has given his or her consent freely, without duress or fraud or mistake as to the identity of the other party, or as to the nature of the ceremony performed[7] **.** Absence of such consent vitiates the marriage as provided in S.3 (1) (d) of the Matrimonial Causes Act.

(c) **Sanity**

Section 3 (1) (d) (iii) of the Matrimonial Causes Act states specifically that parties to a marriage must be sane and therefore capable of understanding the nature of the marriage contract.

(d) Age

The issue of marriageable age is not very clear, as the Marriage Act did not stipulate the age of marriage. The Matrimonial Causes Act merely indicated that a marriage is void, where 'either of the parties is not of marriageable age'[8]**.** The learned *Nwogugu*[9] is of the view that in the absence of a statutory definition of age of marriage, recourse may be had to the common law age of puberty-fourteen years in case of a boy and twelve years for a girl as held in *Harrod v Harrod*[10]**.** It is my humble opinion in this work that the common law age is rather too young for embarking on such an enterprise

[7]Section 3 (1) (d) of the MCA 2004
[8] Section 3 (1) (e) of the MCA, LFN 2004
[9] EI Nwogugu, *Family Law in Nigeria* (Revised edn, Ibadan: Heinemann Educational Books , 1990) p.24.
[10] (1854) 69 ER 344

as marriage. It is recommended that the age of twenty one be adopted, since it is the age at which the Marriage Act dispenses with parental consent[11]. Alternatively, the Constitutional age for adulthood (eighteen years) may be adopted, which is also now stipulated by the Child's Right Act.

(e) Prohibited Degrees of Consanguinity and Affinity

According to statute[12] parties are prohibited from contracting marriage with any person who falls within their degrees of consanguinity or affinity. Schedule 1 (section 3) of the Matrimonial Causes Act sets out the prohibited degree of consanguinity of a man to include those who is or has been the man's ancestress, descendant, sister, father's sister, mother's sister, brother's daughter and sister's daughter while marriage within his degree of affinity include that between a man and his wife's daughter, father's wife, grand-father's wife, son's wife, son's wife and daughter's son's wife . The reverse position applies to a woman. The same section states that it is immaterial whether the relationship is of whole blood or half-blood, or whether it is traced through, or to any person of illegitimate birth. S.4 of the Matrimonial Causes Act however, provides that persons who wish to marry each other but are within the prohibited degree of affinity may under exceptional circumstances apply to a judge of the High court (one with the extended jurisdiction) for permission to do so. The judge if satisfied with the circumstances may, by order permit the applicant to so marry. Violation of the prohibited degrees makes a marriage void.

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[11]S. 48 of the MCA *Ibid*
[12] S. 3 (1) (b) *Ibid*

(f) Parental Consent

Besides the consent of the parties to a marriage, parental consent is required where either party is under twenty-one years of age and is not a widow or a widower[13]. The written and signed consent of the father not mother is required, but if he is dead or of unsound mind or absent from Nigeria, that of the mother, or if both are dead or of unsound mind or absent from Nigeria, that of the guardian of such party. S. 19 of the Marriage Act provides for signature of consent by persons unable to write or to understand English Language while S. 20 of the same Act provides for consent where no parent or guardian is capable of consenting.

It is my submission that the provision which requires only the consent of a father is rather discriminatory against women. It is my humble suggestion that this particular provision be reviewed so that the rights of mothers may be recognized and duly exercised.

It is important to note that unlike all the other rules for essential validity of statutory marriage, absence of parental consent does not vitiate the marriage by virtue of S. 33 (3) of the Marriage Act[14] This is also the holding of the court in *Agbo v Udo*[15] **.**

4.3 Formal Validity of Marriage

In addition to the foregoing conditions which parties must meet in order to celebrate a valid statutory marriage, the statutes set down formalities which parties ought to go through before the solemnization of marriage.

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[13]. S. 18 of the Matrimonial Causes Act *Ibid*
[14] Ibid
[15] (1947) 18 NLR

a. **Notice of marriage**

Either of the parties intending to marry shall apply to and obtain forms of notice from the Registrar of the marriage district in which the marriage is intended to take place. This is signed and returned to the Registrar[16] **. S.8** provides for persons unable to write or understand English language. Upon receipt of the notice, the Registrar shall enter it into the marriage notice book and publish a copy of it for public perusal for a period not less than twenty one days but not more than three months[17]. The essence of the publication is to give the opportunity to any person whose consent to the marriage is required by law or to any one who knows of any just cause why the marriage should not be celebrated to enter a caveat against the issue of the Registrar's certificate[18].

b. **Registrar's Certificate**

Where no caveat is entered or where it was entered and has been removed,[19] the Registrar shall at any time after the expiration of twenty one days and before the expiration of three months from the date of the notice upon payment of the prescribed fee, and proof of conditions by affidavit shall issue his certificate[20]. The affidavit which shall be sworn by the applicant shall state that:

(i) One of the parties has been resident within the district in which the marriage is intended to be celebrated for at least fifteen days preceding the granting of the certificate;

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[16] Section 7 of the Marriage Act 2004
[17] S. 10 *Ibid*
[18] S. 14 *Ibid*
[19] S. 16 *Ibid*
[20] S. 11 *Ibid*

Each of the parties to the intended marriage (not being a widower or widow) is twenty-one years old, or that if he or she is under that age, the consent hereinafter made requisite has been obtained in writing and is annexed to such affidavit;

(ii) There is no any impediment of kindred or affinity or any other lawful hindrance to the marriage;

(iii) Neither of the parties to the intended marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted.[21]

Section 13 of the Marriage Act provides for the grant of special licence in some cases to the applicant. This automatically, circumvents the procedure for the notice of marriage and the registrar's certificate and authorizes the celebration of marriage between the parties by a registrar or a recognized minister of a religious denomination or body.

c. Celebration of Marriage

Parties to a statutory marriage having obtained the registrar's certificate, may celebrate their marriage in a licensed place of worship[22], in a registrar's office[23] or at a place other than licensed place of worship or the office of a registrar of marriage under special licence[24]. Marriage under such license may be celebrated by a minister of religion or a registrar. It is important to note that the Marriage Act (Amendment) Decree 1971[25] provides for the valid celebration of marriage

[21] S. 11 of the Marriage Act *Ibid*
[22] S. 21 *Ibid*
[23] S. 27 *Ibid*

[24] S. 29 *Ibid*
[25] No 14 of 1971

outside Nigeria, where at least one of the parties is a Nigerian. Such marriages must be contracted before a Nigerian diplomatic or consular officer of the rank of Secretary or above in a Nigerian diplomatic or consular mission office.

The statute states succinctly that whether a marriage is celebrated in a licensed place of worship, Registrar's office or in a place other than the licensed place of worship or Registrar's office, the officiating personnel shall immediately after the celebration, complete in duplicate and issue to the parties, a marriage certificate. A copy of the said certificate shall also be filed with the registrar of marriages for the district in which the marriage took place.[26]

4.4 Legal Effects of Statutory Marriage

The change of status which statutory marriage accords parties, who contract it, bestows attendant rights, duties and privileges on the parties. These relate to property, maintenance, consortium and other civil matters.

a. Consortium

The learned jurist Scrutton, LJ rightly held in *Place v Searle*[27] that each spouse has the right to the other's consortium. Consortium is easier described than defined, as affirmed by the learned pundit Bromley,[28] who described it as the 'living together as husband and wife with all the incidents that flow from the

[26] Section 25, 26,28 and 29 Ibid
[27] (1932) 2 KB 497
[28] Family Law 3rd edition (Butterworth, London 1966). 157

relationship', In *Best v Samuel Fox & Co*[29] it was referred to *Per Lord Reid* as 'a bundle of rights some hardly capable of precise definition'. These incidents include: change of name, duty to cohabit, sexual intercourse (that is why a husband cannot be guilty of an offence of unlawful carnal knowledge of his wife)[30] mutual defense and so on.

b. **Relationship between Husband and Wife**

The relations between validly married couples acquired much leverage from the provisions of the law. The Married Women's Property Act 1882[31] and The Married Women's Property Law 1958[32] liberated the married woman from her contractual disability under the common Law and empowered her to enter into binding contracts and to maintain actions in contract against anyone in respect of her separate property as if she were a feme sole[33]. The court elucidated this principle in the case of *Debenham v. Mellon*[34] where it held *inter alia* that a husband is not liable for contracts entered into by his wife, unless the wife pledges his credit for necessaries under certain circumstances.

The emancipation given to married woman by the said provisions of the Act extends to tortuous actions. However, neither spouse can sue the other in tort.

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[29] (1952) AC 716, 736, (1952) 2 All ER 394, 401
[30] Section 6 of Criminal Code
[31] *Applicable in Nigeria as a Statute of General Application*
[32] In force in Lagos, Ogun, Oyo, Ondo and then Bendel States
[33] Ss I and 12 resp. of Married Women's Property Act 1882 & Married Women's Property Act 1958
[34] (1880) 6 AC 24

The legal provisions on relations between husband and wife equally extends to the damages either of the spouses can recover if the other is killed by the wrongful act of a third party.[35]

Significantly, the Criminal law and Evidence law give special considerations to spouses who are statutorily married. The Criminal Code Act does not hold a wife of a statutory marriage criminally responsible for an act which she is compelled by her husband to do in his presence, provided that such an act is not an offence punishable by death or one in which grievous bodily harm is an element.[36] Again, a spouse of a statutory marriage is not guilty as an accessory after the fact of an offence if he or she assists the other spouse to escape punishment.[37]

Similarly, they are not criminally responsible for conspiring between themselves alone[38], but the case is different when a third party is involved.

Also the offence of stealing is foreign to spouses of a statutory marriage as long as they are living together. This is because they are regarded as one in law. They cannot therefore institute criminal proceedings against each other.[39]

The Evidence Act equally makes each spouse of a statutory marriage, a competent witness for the other in civil proceedings.[40] He or she is also a competent and

[35]The Fatal Accident Law 1956, Cap 52 Laws of Eastern Nigeria, 1963; The Fatal Accident Law 1956 Cap 43 Laws of Northern Nigeria 1963.
[36] S. 33 of Criminal Code
[37] S. 10 Ibid
[38] S. 34 Married Women's Property Act, 1882
[39]S.36 Ibid
[40] S. 158 of the Evidence Act CAP E 14 LFN 2004

compellable witness for the prosecution or defence without the consent of the other when charged with the offences enumerated in S.161 (1), a spouse is a competent and compellable witness only upon the application of the person charged.

The Act also holds as privileged, communications between a husband and a wife during the subsistence of their union. As such, none of them can be compelled to disclose it unless with the consent of the other party, or in suits between them, or proceedings in which one married person is prosecuted for an offence specified in subsection (1) of section 161 of the Act.[41] A spouse is a competent witness for the other in any proceedings instituted in consequence of adultery of that other spouse as provided by the statute.[42]

In concluding this discussion on the legal effects of statutory marriage, it is worthy of note that marriage to a foreigner does not confer on or withdraw Nigerian citizenship from the parties under the Nigerian constitution. A female Nigerian automatically loses her Nigerian citizenship upon acquiring a foreign citizenship by virtue of marriage.[43]

4.5 Propounding Suitable Definition of Marriage

The oldest definition of marriage is that propounded in 1882 by Lord Penzance in the case of *Hyde v Hyde*[44] where he stated as follows: 'I perceive that marriage as understood

[41] S. 164 Ibid
[42] S. 36 *Ibid*
[43] Ss. 24 and 25 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.
[44] . (1886) LR I P & D 130 at 133

in the Christendom for this purpose, be defined as a voluntary union for life of one man and one woman, to the exclusion of all others.'

The above definition of marriage seemed to have been adopted by the *Nigerian Interpretation Act*[45], which defined monogamous marriage as follows:

> A monogamous marriage is one which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others, during the continuance of the marriage.

This failure of the Nigerian MCA to define Marriage made the authors of Crises in *Family Law* to lament as follows:

> This is the definition which we are constrained to accept by the simple reason that the Marriage Act as well as the Matrimonial Causes Act made no attempt at offering a definition of the term Marriage not minding the copious and extended provision bracing up the entire incidents of monogamous marriages, their essential validities, effects and the character of celebrations in Nigeria.

It is pertinent to note that Lord Penzance was categorical in his age-long definition that he defined marriage from the Christian perception. His definition and the one it gave birth to in the Nigerian Interpretation Act could best be described as the traditional concept of marriage. No doubt, this traditional concept of marriage is no

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[45] CAP 123 LFN, 2004

longer tenable in many countries of the world. It no longer represents the true meaning of marriage in today's world.

Umobi and Umobi[46] further stated as follows:

> The introduction into the Marriage arena of hermaphrodites, transsexuals, same-sex marriages, surrogate motherhood in one-man one-woman marriage, free methods of medically-assisted methods of conceptions, all stand out as topical and have actually paralyzed the accepted definitions of Act Marriage and Monogamous Marriage recognized in Nigeria

Again a Family Law expert, Peter Spring in his article[47] stated that in defending the traditional concept of marriage, one is probably defending some thing that no longer exists. He defended his stand by stating the various changes in the concept of marriage, which he had observed. Firstly he said that the divorce revolution has undermined the concept that sexual relations should be confined to marriage. Paternity of a child has therefore become an issue.[48]

The above issues raised by Peter Spring go to show that the Lord Penzance's definition of marriage is even faulted as a definition of marriage in the Christian perspective.

In Nigeria, the Lord Penzance definition cannot be accepted as a complete definition of marriage because it did not cover the customary and Islamic marriages which are equally recognized by law. Item 61 of the Exclusive Legislative List in the

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[46] *Arinze-Umobi & Umobi***,** op cit p. iv
[47] 'Changing Concept of Marriage' Frc:org.11th March 2006 at I
[48]Rabiu v Amadu (2013) Vol. 43 WRN p. 111

Constitution of the Federal Republic of Nigeria 1999, as amended recognizes the power of the National Assembly to legislate on the 'formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial proceedings relating thereto'. Therefore by virtue of Section 4 (2), (3) and (5) of the 1999 Constitution, no State House of Assembly can legislate on marriage except those contracted under Customary Law or Islamic law.

From the foregoing constitutional provision, it is therefore clear that two or three forms of marriages are recognized in Nigeria. Marriage under the Act (Statutory Marriage), Marriage under Customary Law (traditional marriage) and Marriage under Moslem law (Islamic marriage).

It is therefore safe to conclude that the definition of marriage propounded by Lord Penzance was deficient in the situation in Nigeria.

In line with the belief that the definition of marriage by Lord Penzance does not give a true picture of a generally – accepted definition of marriage in Nigeria, the Nigerian Law Reform Commission in 1981 did submit Report to redress this flaw in our law. The definition of marriage as contained in Section 1 of the Marriage Bill proposed by the Law Reform Commission was as follows: 'Marriage is a union intended for life between (a) a male person and a female person, to the exclusion of all others (b) a male person, and one or more female persons.'

The above proposed definition of marriage by the Nigerian Law Reform Commission has actually accommodated both the monogamous and the polygamous marriages but unfortunately, the bill never saw the light of the day.

On those clamoring for a definition of marriage that would accommodate same sex marriage otherwise called homosexuality, it is hereby submitted that for countries that have legalized same sex marriage, two different definitions of marriage be formulated. One definition shall apply to heterosexual marriage, while the other shall apply to same sex marriage or homosexuals.

For Nigeria, same sex marriage is no longer an issue. It is seen as a taboo and un-African and in fact the Nigeria's National Assembly has finally outlawed it and made it a criminal act.

In conclusion, I strongly recommend that the Nigerian MCA be urgently reviewed to accommodate among other things, an all embracive definition of Marriage. In this work (Chapter nine), I have proposed a suitable definition of Marriage for Nigeria.

CHAPTER FIVE

BREAKDOWN THEORY AND GROUNDS OF DIVORCE

5.1 Purported Introduction of Breakdown Theory

The truth is that the impression created that the Nigerian MCA introduced exclusive breakdown theory is false.

For instance, Ifemeje in her book[1] states as follows:

> Despite the change-over to no fault principle, the fact still remains that a marriage breakdown invariably means pain, bitterness, sadness and upheaval in people's lives and these conflicts occasioned in the process of divorce in our traditional judicial setting, are often carried over to post-divorce arrangements.

According to Nwogugu[2], 'our Nigerian divorce law is based partly on the offence principle and partly on breakdown theory'.

The Act[3] which was enacted in 1970, while introducing the breakdown theory otherwise known as non-fault principle, also retained the elements of matrimonial offences principle. In other words the Act is a mixed doctrine.

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[1] S C Ifemeje, *Contemporary Issues in the Nigerian Family Law* (Enugu: Nolix Educational Publications, 2008) p.199

[2] E I Nwogugu, *Family in Nigeri*a, (Revised edn, Ibadan:Heinemann Educational Books, 1990) 156

[3] Matrimonial Causes Act (MCA) Cap M 7, LFN, 2004

The problem and unpopularity created by this situation in the Nigerian MCA was highlighted by A.B. Kasunmu[4] who questioned the continued relevance of the absolute bars of condonation, connivance, collusion and even the discretionary bars in an Act purportedly based on non-fault principle and may I add an Act which was following British and Australian standard.

Many Nigerian cases buttress the above situation in our courts whereby cases are still decided based on fault principle even after the purported introduction of exclusive breakdown theory. For instance, in 1972, after the enactment of the 1970 Nigerian MCA, the case of *Oladetohun v Oladetohun*[5] where the petition was successful based on practice of black charms, juju and talisman in the matrimonial home.

Salako v Salako[6]**,** which was a case of ungovernable temper and intemperate drinking *Olagundoye v Olagundoye*[7]*, Shasore v Shasore*[8]and *Ayangbayi v Ayangbayi*[9] all decided on fault principle (physical violence).

Also in the case of *Bassey v Bassey*[10] it was dissolution of marriage based on refusal of sexual intercourse with the petitioner.

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[4] AB Kasunmu, 'Matrimonial Causes Decree 1970: A Critical Analysis' (1971) Vol. 2 No. 2 The Nigerian Journal of Contemporary Law, 141

[5] (1972) 2 UIR 289

[6] Salako v Salako (1973) II CCHCJ 105

[7] (1976) 2 FNR 255

[8] Shasore v Shasore (1977) 5 CCHCJ 105

[9] (1979) 10-12 CCHCJ 225

[10] (1978) 10-12 CCHCJ 242

Samples of more recent cases on the same fault-based principle are given below to illustrate that the Nigerian MCA till today cannot be said to have introduced Breakdown theory of divorce exclusively in dissolving marriages.

The case of *Anagbodo v Anagbodo*[11] was a 1992 case based on adultery. However, the court held in that case that where sexual relations persist between the husband and wife after adultery, the court is entitled to hold that the petitioner does not find it intolerable to live with the Respondent. The above is a case of absolute bar of condonation and it is still provided for in a law that purported to be based on Breakdown theory.

In some foreign jurisdiction like England, which truly based their divorce laws on Breakdown theory, such bars have been expunged from the divorce law. Another recent Nigerian case based on fault principle is *Nanna v Nanna*[12] where the court held inter-alia that two sets of facts call for proof under Section 15 (2) (c) of the Matrimonial Causes Act and they are:

(a) The sickening and detestable or condemnable conduct of the respondent; and

(b) The fact that the petitioner finds it unreasonable to continue to live with the respondent[13].

In other words, the petitioner must prove the detestable act and condemnable conduct and then proceed to prove that he finds it intolerable to live with the respondent.

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[11] (1992) 1 NWLR (pt. 216) 207

[12] [2006] 3 NWLR (pt. 966) 1 at 30

[13] Section 15 (2) (c) MCA op cit p. 82

Another recent case on fault-based principle is *Ibrahim v Ibrahim*.[14] In that case, the appellant and the respondent got married under the Marriage Act on 15th December, 1979. They both cohabited at various places. The appellant filed a petition at the trial Court for a decree of dissolution of the marriage between him and the respondent. The fault relied upon by the appellant as constituting the ground leading to the breakdown of the marriage as specified in the petition included mainly:

1) That since the marriage, the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent due to infidelity, adulatory and hostility, and
2) That the parties to the marriage had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

The respondent filed an amended answer to the petition and a cross-petition, but later abandoned both and did not defend the petition nor prosecute her cross-petition. The appellant testified on his own behalf but called no other witness to corroborate his testimony. In his evidence, he testified that for four years, there had been no sexual intercourse between him and the respondent because the respondent always resisted his demands; that the respondent returned the dowry of N190.00, which the petitioner paid on her; that the respondent was violent, idolatrous and fetish; that she was partly responsible for the loss of his service pistol, which act he alleged partly linked to his retirement from Army; and that she had an extra marital relationship at the early point of

[14] [2004] 1 NWLR (pt. 1015) 383 CA

their marriage, that led to pregnancy she aborted after he denied the paternity of the pregnancy. In its judgment delivered on 9th June 2000, the trial court found that the appellant did not prove all the facts he relied upon to show that the marriage had broken down irretrievably to the satisfaction of the court to warrant the making of a decree dissolving the marriage. The trial court therefore dismissed the petition. The appellant being not satisfied, appealed to the Court of appeal but the court of Appeal unanimously dismissed the appeal.

A more recent case on fault-principle is *Okoro v Okoro*.[15] In this case, the petitioner, Mr. Tobias Okoro, on the ground that his wife Mrs. Nkechi Okoro had behaved in a way that he cannot reasonably be expected to live with her, i.e. Fault, instituted an action for judicial separation at rivers State High Court and later for dissolution of the marriage. The court held that in determining whether cruelty has been proved in matrimonial causes, court must bear in mind the fact that cruelty may arise from a single act or accumulation of acts. The court therefore set aside the ruling of the High court which granted joint custody of the children to both parties and dissolved the marriage. The point being made here is that the prevailing MCA in Nigeria still contained fault-based grounds of divorce.

In another 2011 case, *Bibilari v Bibilari*[16] the appellant as petitioner, in the High Court filed a petition against the respondent for the dissolution of their marriage contracted in accordance with the Marriage Act on the 21st of April 1990 at All Saints Cathedral Onitsha, Anambra State. The appellant and the respondent cohabited at Army Barracks Onitsha, Anambra State after the marriage and later in the year 2000 moved to

[15] [2011] All FWLR (pt. 572) 1749 at 1775
[16] [2011] 13 NWLR (pt. 1264) 207-426

No 4, Persian gulf close, Maitama, Abuja. The marriage was blessed with 3 children. The petitioner alleged that the petitioner finds the respondent intolerable, that the respondent has behaved in such a way that he cannot reasonably be expected to live with her; that marriage has broken down irretrievably. The respondent with leave of Court filed an amended Answer/Cross Petition.

The learned judge of the trial court in a considered judgment refused to grant the prayer for dissolution of the marriage and for injunction. The Cross-petition of the respondent also failed. The learned judge of the court struck out the petition and cross-petition. The petitioner dissatisfied with the decision of the High Court appealed to the Court of Appeal.

The Court of Appeal dismissing the appeal held that 'a petitioner who desires a dissolution of marriage must discharge the standard of proof stipulated by the Act and established in evidence one of the facts set out under Section 15 and Section 16 of the same Act, and that there must be a conduct or act that can be described as a behaviour for which court will hold that the petitioner cannot reasonably be expected to live with'.

With the above sampled cases, it is evidently clear that the Nigerian MCA has not done away with the fault-principle of dissolving marriages. It is therefore my strong suggestion that the fault-based grounds listed earlier under this topic be expunged from the Act. In other words, the Act requires a reform to make it truly an Act based on Breakdown theory as this is more acceptable in Nigeria and in many other commonwealth jurisdictions including New Zealand, Australia and England from where we borrowed most, if not all the contents of our present divorce law.

Among other advantages, it will help achieve a better post-divorce family. However, to make a balance in this topic, it is necessary to cite some cases decided on pure Breakdown theory which is equally provided for in the Nigerian MCA.

A 1970 case based in Section 15 (2) (f) of the Act which is a clear case of breakdown theory is *Ogunsawo v Ogunsawo*[17] where the court reached the conclusion that the marriage had broken down irretrievably because the parties had lived apart for a continuous period of three years immediately preceding the presentation of the petition. Also, the case of *Nwamkpele v Nwamkpele*[18] based on Section 15 (2) (h) which is another sub-section of the Act purely on Breakdown Theory. The sub-section, that is 15 (b), says, that a marriage may dissolved on the fact that the respondent has been absent from the petitioner, for such a time and in such circumstances as to provide reasonable grounds for presuming that the respondent is dead. In the above case of Nwamkpele, the court held that this ground may be proved by establishing the respondent's continuous absence for seven years immediately before the petition, and the fact that the petitioner has no reason to believe that the other party was alive at anytime within the seven years period. However, the court stated that proof of seven years absence would not suffice if it was shown that the respondent was alive at anytime within that period.

The case of *McDonald v McDonald*[19] decided in 1964, before the Nigerian MCA took effect, seemed to have prepared ground for this impression that the Act had introduced a Breakdown theory in place of the fault principle. In that case of McDonald, Heron, C.J. explained the section as follows:

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[17] (1970) 2 All NLR 214
[18] (1972) 2 CCHCJ 101
[19] (1964) 6 FLR 58

> Parliament evidently concluded that the time had come to recognize that matrimonial offences are in many cases symptomatic of breakdown of marriage and that there should also be a provision for divorce in cases where, quite apart from the commission of such offences, the marriage has broken down completely. Courts are relieved of the difficult task of assigning where fault lay, an issue in matrimony oftentimes too subtle for the average man to determine. Parliament has recognized that there is an element of artificiality in the matrimonial offence doctrine with its emphasis of legal guilt and innocence. In real life it is rare to find all the right on one side and all the wrong on the other.

5.2 The Propriety of Ground/Grounds for Divorce Under Section 15 (2)

Section (15) (1) of the Nigerian Matrimonial Causes Act (MCA) provides:

> That a petition under the Decree may be presented to the court by either party, upon the ground that the marriage has broken down irretrievably.

But the Section's marginal note reads 'Grounds for dissolution of marriage'. The question that follows from the above is whether the Act contains only one ground for Divorce or many Grounds?

According to Nwogugu in his book[20], Section 15 (1) of the Act

'established a single ground for divorce – irretrievable breakdown in place of several which existed under the old law'.

In 1989, Uche Omo, JCA (as he then was) in the case of *Harriman v Harriman*[21] stated as follows:

> ...firstly, there is only one ground for dissolution of all marriages under the Matrimonial Causes Act, to wit, "that the marriage has broken down irretrievably" vide Section 15 (1) of the Act. The sub-paragraphs of sub-section 2 thereof, eight of them (a) to (h), are only various species of the breakdown, or to put it differently, a petitioner who satisfies the court on anyone or more of those facts would be entitled to a finding that the marriage has irretrievably broken down, and consequently be entitled to a decree dissolving same. They do not constitute separate grounds on the basis of which a dissolution can be granted.

The salient points in the above statement of Hon. Justice Uche Omo are:

1) That there is only one ground for dissolution of all marriages under the Act.
2) That paragraphs (a) to (h) of the Section 15 (2) are only various species or facts of the breakdown.
3) That they do not constitute separate grounds.

On the contention that the marginal note to the section reads 'grounds for dissolution of marriage', such contention cannot hold water in view of the clear words of

[20] Nwogugu, op cit, p. 56
[21] [1989] 5 NWLR (pt. 1199) 6 at 15

the Section 15 (1) which uses the word 'ground' and it has long been held that clear words of a statute must prevail over the marginal note[22]

In a more recent case of *Ekrebe v Ekrebe*[23], the petition to the court did not contain the wordings 'the marriage has broken down irretrievably' as required by section 15 (1). The court made it clear that 'irretrievable breakdown' of marriage was the only ground for dissolution of marriage under Nigerian Law and that the appellant could not therefore be heard to plead the marriage has broken down irretrievably notwithstanding, that the petition itself contained the words 'cruelty, desertion and adultery', as those were not only part of the relevant facts to be considered.

However, I must add that having believed that the Act contains only one ground for divorce, it does not mean that the said paragraphs (a) to (h) are useless. The value of the paragraphs to the single ground for divorce in Section 15 (1) was well put across by Nnaemeka Agu, J.C.A. in the case of *Ezirim v Ezirim*[24] were he stated as follows:

> It is necessary to bear in mind the fact that although the Act (Matrimonial Causes Act) created only one ground of divorce, to wit: that the marriage has irretrievably broken-down; yet that the facts which may lead to the marriage breaking down irretrievably are categorized under sub-section(a) to (h) to section 15 (2). Only those facts can suffice to found a petition for divorce. In other words, a court hearing a petition for divorce ought not to hold that the marriage has irretrievably broken down unless the

[22] AG v Prince Ernest (1957) AC 436
[23] [1999] 3 NWLR (pt. 596) 514
[24] (Unreported) FCA/L/56/78 delivered on Feb. 6 1981 CA Lagos

petitioner or cross-petitioner as the case may be, satisfies the court on one or more of the --- facts—

In a 2007 case of *Ibrahim v Ibrahim*[25], the appellant and the respondent married under the Act. The appellant petitioned for dissolution of marriage on the ground that since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent due to infidelity, idolatry and hostility and that the parties have lived apart for a continuous period of three years immediately preceding the presentation of the petition. The court held that a petition for dissolution may be presented only where the marriage has broken down irretrievably and that what amounts to irretrievable breakdown is contained in Section 15 (2) of the MCA.

In 2011, the Court of Appeal in *Bibilari v Bibilari*[26] upheld the decision in the above Ibrahim's case. From the fore-going, I therefore submit that the Act contains only one ground for divorce and not many grounds. The eight paragraphs in Section 15 (2) (a) to (h) which the marginal note calls grounds should be regarded as 'facts' or 'species' of the breakdown. And I accordingly recommend that in the urgent reform which the Nigerian MCA requires, that marginal note to Section 15 (1) should read 'Ground' not 'Grounds' for dissolution of marriage. By so correcting it, the confusion, dissipation of energy and criticisms it has caused the law would abate.

5.3 Unpopularity of the Three Years Separation

Part of the problems and criticisms against the Nigerian MCA is its Section 15(2) (f) on ground of divorce which provides as follows: 'That parties to the marriage have

[25] Supra

[26] Supra

lived apart for a continuous period of a least three years immediately preceding the presentation of the petition.'

The above Section is more serious than its preceding paragraph [Section 15 (2) (e)] which requires two years living apart but equally requires the consent or objection of the spouse being divorced, before the Court could grant the petition for divorce.

The contention is that a longer period than three years separation prescribed in sub-section (f) would be necessary to show adequately that the marriage has broken down irretrievably.

According to *Nwogugu*[27], 'there are serious doubts as to whether separation for three years without more should be sufficient to ground the dissolution of a marriage. The period seems rather short in view of the fact that an innocent spouse may be divorced against his or her will on this fact'.

It is pertinent to point out that in several commonwealth Jurisdictions, longer periods of separation are required. For instance, Section 1 (2) (e) of English Matrimonial Causes Act, 1973, five years is required. Also by Section 28 (m) of the Australian Matrimonial Causes *Act,* 1959-65, five years separation is also required. In New Zealand, seven years separation is required by virtue of Section 21 (1) (0) of the New Zealand Matrimonial Proceedings Act 1963.

I therefore recommend five years separation for Nigeria in view of the fact that England and Australia from where the Nigerian MCA originated are operating a minimum of five years separation to ground granting petition for divorce without requiring consent or objection from the respondent.

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[27] Nwogugu, op cit, p. 89

CHAPTER SIX

THE BARS AND CONSUMMATION

6.1 Contradiction and Absurdities Occasioned by the Bars

The Nigerian MCA still contains both absolute and discretional bars. The absolute bars are condonation and connivance[1] as well as collusion[2].

Discretionary bars are also three namely petitioner's adultery, petitioner's desertion and conduct – conducing to the commission of the matrimonial offence or misconduct[3]

(a) Condonation occurs where a spouse with full knowledge of the matrimonial wrong committed by the other spouse, reinstates the offending spouse to his or her former marriage position, with the intention of forgiving or remitting the wrong, on the condition that the spouse whose wrong is so condoned does not thereafter commit any matrimonial offences[4].

Condonation was further explained in the case of *Olutayo v Olutayo*[5] as follows:

> Condonation of Matrimonial Offences means the conditional forgiveness of all such offences as are known to or believed by the offended spouse, so as to restore as between the spouses the *status quo ante*. As the forgiveness is conditional and not a forgiveness in the true sense of the

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[1] Section 26 of the M C A CAP M 7 LFN, 2004
[2] Section 27 of the MCA *Ibid*
[3] Section 28 of the MCA Ibid
[4] I Sagay, *Nigerian Family Law, Cases, Statutes Commentaries* (Lagos Malthouse Press, 1999) p. 393
[5] (Unreported) Suit No 1/96/69 of 20/2/70, per Oyemade Ag. CJ (Western State)

> word, the real import of condonation is a conditional waiver of the right of the spouse to take matrimonial proceedings. Whether or not there has been condonation is a question of fact. Unless it appears to the contrary, the condition subject to which the offending spouse is forgiven is that no further matrimonial offence shall occur.

(b) Connivance – This occurs where a petitioner has consented, encouraged, willfully contributed to the commission of the matrimonial misconduct on which a petition for divorce is based, he will be refused a decree of divorce on the ground that he connived at the misconduct[6]. By Section 26 of the MCA, a decree of dissolution of marriage shall not be made if the petitioner has connived at the conduct constituting the facts on which the petition is based. The only exception is where the respondent is of unsound mind under Section 16 (1) (g) of the same MCA of Nigeria.

Again Connivance may be express or passive. It is express where there is express authority or consent given by the petitioner to the alleged misconduct. An example occurred in *Obiagwu v Obiagwu*[7] where the parties were married in 1942. From 1944, the relationship of the parties started to grow cold because of the childlessness of the petitioner. In 1954, the wife/petitioner consented to the respondent cohabiting with one Patricia Nkwudo in the matrimonial home, for the purpose that she would bear children for the respondent. As a result of the respondent's adultery with Patricia, four children were born. In 1966, the wife petitioned for divorce on the ground that the petitioner had

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[6] E I Nwogugu, *Family Law in Nigeria* (Revised edn, Ibadan: Heinemann Educational Books, 1990) p.24

[7] (Unreported) Suit No 0/5D/1966 delivered on 20th June 1947 at Onitsha High Court

committed adultery with Patricia. The court refused to grant a decree of divorce on the ground that the petitioner connived at the respondent's adultery.

It is passive connivance where a spouse stands by and permits the act to take place. He or she is said to have acquiesced to the act.

However, it must have been done with the intention that the misconduct will be committed. Also connivance can be spent if there is withdrawal of consent. There must be a causal connection between the initial connivance and the latter act complained of. In such a case, connivance would still be on[8]. Absence of such a nexus automatically removes the inference of such connivance.

(c) Collusion – This implies an agreement or acting in concert, to procure the initiation or prosecution of a suit for divorce with intent to cause a pervasion of justice[9]. By Section 27 of the Matrimonial Causes Act, a decree of dissolution of marriage shall not be made if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a pervasion of justice. Collusion has been defined as "an agreement or bargain between the spouses or their agents or between the petitioner and the co-respondent as to procuring the initiation or conduct of the divorce proceedings[10].

From the forgoing, the two ingredients of collusion are agreement and improper motive or purpose to pervert the course of justice. For instance, it has been held in *Bell v Bell*[11] that if one party has the intention and the other does not, there is no agreement. Also,

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[8] Godfrey v Godfrey (1964) 3 All ER 154
[9] Nwogugu, op cit, p. 200
[10] Kasunmu and Salacuse, op cit, p. 147
[11] (1963) 4 FLR 273 at 276-7

where a party is paid to initiate divorce proceedings, or a party agrees to commit a matrimonial misconduct, collusion arises[12].

Discretionary Bars

The Matrimonial Causes Act[13] provides that the court, may in its discretion, refuse to make a decree of dissolution of marriage if since the marriage –

(a) The petitioner has committed adultery that has not been condoned by the respondent or having been so condoned has been revived.

(b) The petitioner has willfully deserted the respondent before the happening of the matters relied upon by the petitioner or where those matters involved other matters occurring during or extending over, a period, before the expiration of that period; or

(c) The habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the matters relied upon by the petitioner.

Petitioner's Adultery – This is a situation where the petitioner has committed an uncondoned adultery or where having been condoned is revived, it becomes a discretionary bar to a petition. It is also required that he files a discretion Statement irrespective of the ground upon which the petition is based. The Discretion Statement is a written confessional statement made to the court by the petitioner as to his adultery asking specifically for the court's exercise of discretion in his favour[14].

Petitioner's Desertion – This is a situation where the petitioner has wilfully deserted before the occurrence of the acts relied upon in the petition, the court then has a

[12] *Crew v Crew* 162 ER 1102
[13] Section 28
[14] Order XI Rule 29 Matrimonial Causes Rules

discretion to refuse a decree of divorce in his favour[15]. It follows that the desertion must be wilful. However Section 28 (b) of the Act does not state a specific period for the desertion.

Conduct Conducing – By Section 28 (c) of the MCA, if the habits of the petitioner have or conduct of the petitioner has, conduced or contributed to the existence of the matters relied upon by the petitioner, the court may on its discretion refused to make a decree of dissolution of marriage.

The case of *Negbenebor v Negbenebor*[16] is pertinent here. In that case, the husband without just cause forced his wife out of the matrimonial home and abandoned her for three years without any maintenance. The court held that it was the husband's wilful neglect and misconduct that led (conduced) to the wife's adultery. The petition was accordingly dismissed.

Where then lies the Contradiction and Absurdities? Nigerian Matrimonial Causes Act is reputed to have introduced the Breakdown Theory of Divorce which means divorce devoid of fault element.

However, the truth has been said as earlier quoted from Nwogugu's book[17] that Nigerian divorce runs the two regimes of fault and non-fault principles. But the absurdities and contradiction are seen where the absolute or discretionary bars are

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[15] Section 28 (b) MCA Ibid p. 94

[16] (1971)1 All NLR 210

[17] Nwogugu, op cit, p. 204

extended to all the seven species of the breakdown of the marriage listed in the MCA[18]. For example, it is quite difficult to understand how the petitioner could be said to have condoned or connived with the respondent where the fact/specie of breakdown being relied upon is that the respondent has been continuously absent from the petitioner for such time, and circumstance as to provide reasonable ground for presuming that he or she, is dead.

According to Ifemeje in her book[19] 'as far as living apart provision is concerned, under Section 15 (2) (e) and (f), it is uncertain what the petitioner must condone, connive at or collude with, to absolutely bar his or her petition…'

The absurdity and contradiction occasioned by the bars were highlighted in the case of *Bengho v Bengho*[20] where Ovie-whiskey, J. held inter-alia, that the discretionary bars in Section 28 were inappropriate to petitions filed under the Separation grounds.

It was clear in this case that the petitioner's repulsive conduct was chiefly responsible for the separation of the petitioner, he however, prayed the court to dissolve the marriage, based on the ground that the parties had lived apart for a continuous period of three years, immediately preceding the presentation of the petition. The court apparently, realizing that absurdity of the law, stated as follows:

> In my view, if I refuse to make the decree, asked for, by the petitioner, the purpose of Section 15 (2) (e) and (f) of the MCD, which appear to me, mandatory, will be rendered nugatory and of no effect, as a refusal to

[18] Section 15 (2) (a) to (h)
[19] Ifemeje, op cit, p. 56
[20] (Unreported) Suit No. W/53/70 of 31/7/7 delivered by Ovie-Whiskey, J.

make the decree, will amount to my refusing to dissolve a marriage that has irretrievably broken down.

Again, Ipaye[21] equally stated that 'any attempt to extend the absolute and discretionary bars to the other grounds of divorce would be irrational'.

From the foregoing, it is my humble submission that since Nigerian divorce Law (MCA) is still running both fault and breakdown principles, the bars should apply to the sections relating to faults, to avoid cases of contradiction and absurdities.

6.2 Examination of Incapacity to consummate and Wilful Refusal to Consummate Marriage[22]

The distinction between incapacity to consummate a marriage or impotence on one hand and wilful refusal on the other is that in the case of incapacity to consummate, non-consummation results from inability, whereas in the case of wilful refusal non-consummation results from a definite and settled decision without cause by the respondent . Furthermore, in the case of incapacity to consummate either party may petition, provided that where it is the petitioner who is suffering from the incapacity, he was not aware of it at the time of the marriage whereas only the wilful refusal of the respondent can be the basis for a petition.

However, the parties need not have lived together for any length of time if the petition is based on incapacity, provided it is established that the consummation of marriage has been found to be practically impossible. In *B v B*[23] , W petitioned for the

[21] Ipaye, op cit, p. 83
[22] 'wilful refusal to consummate/incapacity' www.crosswalk.com/family marriage(Accessed 01/05/2011)
[23] (1958) 2 All ER 76

annulment of her marriage to H on the ground of H's impotence. There had been three unsuccessful attempts to consummate the marriage during the first seven days after which the parties parted for good. H argued that a week was not long enough to enable the court to be able to determine whether he could not consummate the marriage, and that his inability during the alleged period was due to excessive beer drinking. But the court held that the fact that the spouses had lived together for a short time is not in itself a bar to a decree on the ground for impotence, and as it also found that H was infact impotent, a decree was granted.

But where a petition is based on the respondent's willful refusal, it must be established that there was a request which had been turned down by the respondent. In *Owobiyi v Owobiyi*[24]**,** the parties were married in June 1960. A few days after the marriage, the respondent left for the United Kingdom for further studies. Although sexual intercourse took place between them before the marriage, none took place between the time of the marriage and the time of the respondent's departure for the United Kingdom. The petitioner did not complain of lack of intercourse and the parties never lived under the same roof. The petitioner made some abortive efforts to join the respondent in the United Kingdom. When the respondent returned in January, the petitioner made some efforts to resume cohabitation with him but these also proved abortive. In November of the same year, a petition was presented for the annulment of the marriage on the ground of wilful refusal by the respondent to consummate the marriage. Taylor CJ. (Lagos State) held that while he was not unmindful of the petitioner's eagerness for cohabitation with the respondent, in the absence of clear

[24](1965) 2 All NLR 200

evidence of a request for sexual intercourse which had been refused by the respondent, he could not make a finding of willful refusal. However, he dissolved the marriage on the ground of desertion.

One may at this juncture ask whether it was not possible to have held that the petitioner's request for cohabitation and the respondent's refusal of the request amount to a request and refusal of sexual intercourse respectively.

This is more so because of the case of *Boggins v Boggins*[25] that a husband who deserted his wife as a result of which desertion their marriage could not be consummated, was guilty of willful refusal. It is unclear whether the request should be for sexual intercourse or for the fulfillment of an agreed condition precedent to the consummation of the marriage. In *Jodla v Jodla*[26], H and W were married in the Registrar's office in England on the understanding that the marriage would not be consummated until a church ceremony had been held. But this was not held and the marriage was never consummated. H did not request W for sexual intercourse; On the contrary, W repeatedly requested H for a Church ceremony which he did nothing about. Each party later petitioned alleging that the other had willfully refused to consummate the marriage. It was held that W was not guilty of willful refusal since H did not asked her for sexual intercourse. On the other hand, it was held that W's request for a church ceremony in the circumstance amounted to a request for inter course and H had refused this without excuse; therefore a decree was granted in favour of W.

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[25] (1966) 5 CLR 102
[26] (1960) 1 All ER 625

It was however held in the case of *Gordon v Gordon*[27] which had similar facts with Jodla's case that refusal to go through a church ceremony does not amount to willful refusal to consummate a marriage.

With the prevailing Nigerian MCA, it would seem a better conclusion and a way of avoiding reliance on technicality to hold that the request must be for sexual intercourse and not for something else if sexual intercourse is regarded as an essential incidence of marriage.

By Section 15(2) (a) of the Nigerian MCA, which says that the respondent must have 'wilfully and persistently refused to consummate the marriage', it is not entirely clear whether a spouse who deserts after a single request for intercourse by the other party can be said to have acted contrary to this provision. Presumably, he would be guilty of wilful refusal, if after the desertion following the single refusal, the petitioner still approaches or makes request to the respondent for intercourse. This idea is based on the assumption that the petitioner knows the where-about of the respondent; but what of if she does not know of his where-about? In such a case, it is submitted that a reasonable solution would be to hold that the fact of desertion, because the respondent is unwilling to consummate the marriage, constitutes persistent rejection of the petitioner's requests for intercourse since her intention to have the respondent back in the matrimonial home for the consummation of the marriage would be deemed to have continued.

The distinction between impotence and wilful refusal was further elaborated upon in *S v S (otherwise C)*[28] . In that case, H and W were married in 1949. They made

[27](1948) NLJ 174
[28] (1954) 3 All ER 736

genuine but unsuccessful attempts to consummate the marriage. H advised W once that year and four times during the succeeding two years that she should see a doctor but he did not offer to take her to see one, neither did he see one himself. On April 8, 1953, H petitioned for the annulment of the marriage on the ground of W's impotence and of her wilful refusal to consummate the marriage. On the 22nd April, W went to see a doctor who told her that her hymen was unusually thick and that it could be corrected by a minor operation. In answer to H's petition, she denied both allegations and cross-petitioned for the dissolution of the marriage on the ground of H's adultery with X. The case came up for hearing in July 1954 but was adjourned. In October, W successfully underwent the operation. In November, the case was heard and H argued tht W's impotence should be determined as at the date when the petition was filed. That is April 8, 1953.

The court held as follows:

(i) That where willful refusal and impotence or incapacity are alleged, it is necessary that they should be considered separately.

(ii) That since the practical impossibility of consummating a marriage is the test of incapacity or impotence, there is no impotence if it is curable.

(iii) That impotence is incurable if the spouse's condition can only be improved by a dangerous operation.

(iv) That the date for determining practical impossibility of consummating a marriage is the date of the hearing (i.e July 1954 in this case) and since W was willing to undergo an operation at that date and underwent that operation which cured her, the petition based on impotence or incapacity must fail.

(v) That in so far as willful refusal was concerned; this must persist up to the date of the petition (i.e 8th April 1953 in the instant case).

(vi) That willful refusal to take treatment not attended by any serious danger could amount to willful refusal to consummate the marriage, but there was no evidence of this on the part of W. Furthermore, willful refusal implies a conscious act of volition to prevent Consummation, but W's attitude in this case showed that she was willing to consummate the marriage. Therefore H's Petitions also failed on this ground and W was granted a *decree nisi* of the dissolution of the marriage on the ground of H's adultery.

By the above case, there is no impotence (or incapacity) if the incapacity is curable. The Nigerian MCA by its section 36 provides as follows:

(1) A decree of nullity of marriages shall not be made on the ground that the marriage is voidable by virtue of section 5 (1) (a) (i.e incapacity) of the Act unless the Court is satisfied that the incapacity to consummate the marriage also existed at the time when the hearing of the petition commenced and that:

(a) The incapacity is not curable;

(b) The respondent refuses to submit to such medical examination as the court considers necessary for the purpose of determining whether the incapacity is curable; or

(c) The respondent refuses to submit to proper treatment for the purpose of curing the incapacity.

The first rule stated above is already covered by section 36 (1) (a). Secondly, the case also decided that the date for determining whether impotence or incapacity is

curable is the date of the hearing and this rule is also reflected by Section 36 (1). Thirdly, it was also held that wilful refusal to submit to medical treatment not attended by a serious danger would amount to wilful refusal to consummate the marriage. The last rule has also been reflected in section 36 (1) (c) which says that it shall amount to evidence of impotence (or incapacity). Since section 36 (1) (b) says that refusal to submit to a medical examination ordered by the court for the purpose of determining whether incapacity exists shall be evidence of incapacity, it may be asked whether it must be taken that by implication, the court now has power to compel the respondent to submit to medical examination. In *Ogunmuyiwa v Ogunmuyiwa*[29], W petitioned for nullity on the ground of H's impotence. She also applied under order 24 rule 1 of the Matrimonial Causes Rules (1957) for an order that she and the respondent should undergo an examination of relevant organs. H denied impotence and stated that he was willing to undergo medical examination. There was evidence that the petitioner/applicant had been pregnant on two occasions by the respondent and that she unfortunately aborted on these occasions. The respondent also stated that before his marriage to the petitioner, he had had a child by another woman although he did not allege that the petitioner was impotent. It was held that in making an order for medical examination, the paramount consideration is the utility of such examination and that in the instant case, the examination would serve no useful purpose in the case of the petitioner but it was desirable in the case of the respondent. Since the respondent was willing to undergo the examination, it was ordered accordingly.

Under the Nigerian MCA, the wilful refusal must persist to the commencement of the hearing. It is hereby recommended that while reviewing and reforming the Act, be it

[29] (1965) 2 All NLR 236

stated that the refusal need only persist to the date of the petition because unless section 21 of the MC A is carefully interpreted, it may work injustice. For example, H and W were married on the 1st January. From that day, W requested H for sexual intercourse but H refused. The requests and the refusals persisted; On 1st June, W petitioned for a decree of dissolution alleging wilful refusal by H. H was served on the 3rd June and on the 5th June, with a view to avoiding litigation and in order to defeat W's claim, he approached W for sexual intercourse or communicated his willingness to do so to her. The case came up for hearing in October. Here if section 21 is literarily construed, W's petition would fail and this can create financial hardship as well as mental agony for her, in addition to being a waste of her time and that of her counsel Perhaps, the solution in such a case would be to hold that H's consent after the petition has been filed was not genuine but one designed to defeat the course of justice, and that only a genuine consent would negative an allegation of wilful refusal. Even here, if the consent is genuine, W would still be at a loss. It is submitted that the better solution is to follow the decision in *S v S otherwise C*[30], by holding that the refusal must persist to the date when petition was filed. If having adopted such an approach it becomes known to the court at the hearing that H is sincerely willing to consummate the marriage after the petition had been filed, the provisions for Reconciliation in Sections 11 to 14 of the Act could be invoked.

Another flaw of the Nigerian MCA is that by making wilful refusal a ground for divorce while incapacity remains a ground for annulment, the Act did create a special problem for counsels to the parties. For example, W approached B, a legal practitioner for legal advice and with a view to instituting proceeding under the Act. All that W told B her counsel was that she had been married to H during the past thirty months and

[30] (1954) 3 All ER 736

despite her persistent requests, H had not consummated the marriage. Moreover, W was not aware that the non-consummation was due to H's incapacity. On the facts presented to B, he instituted proceedings on behalf of W for the dissolution of the marriage. During the hearing, it becomes obvious that non-consummation was not due to a deliberate and unjustified refusal by H but that it was in fact due to H's impotence. Here, the counsel must apply for leave to amend the petition since section 29 of the Nigerian MCA provides:

> Where both a petition for a decree of nullity of a marriage and a petition for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the petition for a decree of nullity of the marriage.

In the alternative, counsel must petition for both a decree of a dissolution and of annulment at the same time and that would invariably be more expensive. A problem as regards the law relating to consummation of marriages, particularly the law on impotence may arise in the case of a converted marriage. If for example H and W were married under customary law in 1948 and three children A, B and C had been born to that marriage. In 1968, the spouses went through a marriage ceremony under the Marriage Act. On the day following the ceremony, H was involved in a serious accident which rendered him incapable of having sexual intercourse and W petitioned alleging incapacity. Should the court grant her a decree of nullity? By Section 5 (1) (a) of the MCA, Nigeria, the court should. But it would become harsh and oppressive to the

respondent. Such harshness and other problems created by the prevailing MCA should be taken care of if the call for reforming the Act is heeded to.

CHAPTER SEVEN

JURISDICTION/DOMICILE

7.1 Jurisdictional Flaws

Jurisdictional flaws constitute part of the criticisms of the Nigerian Matrimonial Causes Act. The jurisdictional problems the Act came with are hereby referred to in this work as flaws. One of the flaws is found in Section 2 (1) of the Act which provides as follows:

> Subject to this Act, a person may institute a matrimonial cause under this Act in the High court of any State of the Federation and for that purpose, the High Court of each State of the Federation shall have jurisdiction to hear and determine –
>
> (a) Matrimonial causes instituted under this Act, and
>
> (b) Matrimonial causes (not being matrimonial causes to which Section 101 of this Act applies) continued in accordance with the provisions of Part IX of this Act in respect of matrimonial causes within this paragraph shall be restricted to the court in which the matrimonial cause was instituted, and in any case where maintenance is ordered in proceedings in a High Court, a court of summary jurisdiction in any State shall have jurisdiction to enforce payment in a summary manner.

From the foregoing, a petitioner who resides in any part of Nigeria is allowed to institute divorce petition or any of the matrimonial causes in any part of Nigeria. This has been abused, many a time, by mischievous litigants who deliberately leave their State of domicile e.g Anambra and file a divorce in *Gongola State*[1]. The above is true and possible because of the express provisions of Section 2 (3) of the Act which provides as follows:

> For the avoidance of doubt, it is hereby declared that a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of this Act and may institute proceedings under this Act in the High court of any State whether or not he is domicile in that particular State.

Prominent authors like Adesanya[2] did not mince words in criticizing and pointing out the problem of the above Section 2 which he described as 'perpetuation of hardship and could result in pervasion of justice if not judiciously implemented'. He stated as follows:

> For instance, a petitioner in order to put things outside the ease or convenient reach of the respondent, (or of the respondent's witness), may leave the State where he resides and institutes proceedings in a distant State, such an exercise may create difficulty as regards the service of court processes, in addition to increasing unduly the costs of litigation. Moreover, if a husband petitions in the High court of one State, the wife

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[1] S C Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publications, 2008) p. 211

[2] S A Adesanya, *Laws of Matrimonial Causes* (Ibadan: Ibadan University Press, 1973) p. 24

> instead of cross-petitioning in the same court, may react by filing another petition in the High court of another State. Furthermore, a petitioner who has gone to a different State to petition, may realize that he has brought undue inconvenience upon himself, abandons that petition and institutes a fresh and identical or similar proceedings in a nearer and more convenient court.

Few examples of cases illustrating that though Nigeria is a federation there is a single domicile for the purpose of jurisdiction under Matrimonial Causes are *Adegoroye v Adegoroye*[3], and *Ani v Ani*[4]**.** The facts of the Adegoroye's case are as follows:

The respondent as petitioner filed a divorce petition against the wife, the appellant in the case, at Benin High court, claiming dissolution of their marriage together with other ancillary reliefs. After pleadings had been filed, the appellant filed an application praying the court for an order transferring the divorce proceedings to the Lagos High court, Lagos State. The said application was supported by a 13 paragraph affidavit in which the main reasons for the application were

(1) that both the appellant and the respondent as well as their four children of the marriage were all resident in Lagos

(2) That the appellant was an elderly woman of 65 years of age and would undergo great strain and stress in shuttling between Lagos and Benin if the matter was heard in Benin.

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[3] [1996] 4 NWLR (pt. 433) p. 712
[4] [2002] 6 NWLR (pt. 762) p. 166

(3) That the appellant was a retired nurse, currently on a small monthly pension and could be financially inconvenienced by traveling to and from Benin for the hearing of the matter.

The respondent did not file any counter-affidavit to controvert any of the stated averments but relied on legal argument made by his counsel to the effect that the court had no power to make an inter-State transfer of cases; that the court could only make inter-State transfer by virtue of Section 9 (2) of the Matrimonial Causes Act 1970. At the end of arguments, the trial court found that both the appellant and the respondent were living in Lagos and that they were about the same age group, they shall both suffer the same burden and further held that the appellant has not been able to show any exceptional circumstance why the petition should be transferred to Lagos. It therefore refused the application and struck it out with no order as to costs. The appellant being dissatisfied with the said ruling appealed to the Court of Appeal, contending, *inter-alia*, that the trial court failed to properly exercise its discretion in considering her application. In determining the appeal, the Court of Appeal considered the provisions of Section 9 of the Matrimonial Causes Act 1970 which provides:

1) Where it appears to a court in which a matrimonial cause has been instituted under this Act that a matrimonial cause between the parties to the marriage or purported marriage has been instituted in another court having jurisdiction under this Act, the court may in its discretion stay the matrimonial cause for such time as it thinks fit.
2) Where it appears to a court in which matrimonial cause has been instituted under this Act (including a matrimonial cause in relation to which subsection (1) of this

section applied that it is in the interest of justice that the matrimonial cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the matrimonial cause to the other court.

3) The court may exercise its power under this section at anytime and at any stage either on application by any of the parties, or of its own motion.

The Court of Appeal unanimously allowing the appeal held that on the power of the High Court of a State to transfer matrimonial proceedings instituted before it to the High court of another State, 'by virtue of section 2 (1) (a) of the Matrimonial Causes Act CAP 220 Laws of the Federation of Nigeria, 1990, the High Court of any State in Nigeria has jurisdiction to hear and determine matrimonial causes instituted under the Act. It follows therefore that although there is no specific provision in the Matrimonial Causes Rules for the transfer of a petition for dissolution of a marriage from one High court of a State to another, such power can be inferred since the entire country constitutes one jurisdiction under the Act'.

The foregoing pronouncement showed that the problem is the Act which makes the entire place called Nigeria one jurisdiction in matrimonial causes, quite unlike the provision of other Nigerian laws in non-matrimonial causes. In other words, for the hardship being suffered by parties in matrimonial causes to be taken care of, the Act has to be reviewed and reformed so that one can only be validly sued where he or she lives or does business.

In this Adegoroye's case also, the court also pronounced on principles guiding the exercise of discretion by a Court of Law as follows:

(a) A Judge must act judicially, on known principles.

(b) The court should not take into consideration extraneous matters and it should not fail to consider something which it ought to have taken into consideration;

(c) The court should also act judiciously; and

(d) There must be a balanced consideration of the facts for each party before the court arrives at a proper exercise of its discretion.

According to the Appeal Court, applying the above principles to the facts of the instant case, although the trial court acted judicially in that the counsel for both parties duly appeared before it on the dates of the hearing and the affidavit of appellant and the legal arguments canvassed by both parties were considered by the trial court before making up its mind, however, it cannot be said to have acted judiciously in that there was no balanced consideration of the facts for each party before the court exercised its discretion to grant or refuse the applicant's application.

In that Adegoroye's case, Akpabio, JCA went further to pronounce as follows:

> Lastly, is the fact that the appellant rightly complained about the health and financial hardship which she was likely to suffer, if the proceedings was left to be conducted at Benin, while she was resident in Lagos. This to my mind was a legitimate complaint which should have been accepted. But it was turned down by the learned trial judge simply because the respondent who also lived in Lagos, was not complaining. According to him, "they shall both suffer the same burden". On the totality of the foregoing, I am of the firm view that appellant made out a good case in her affidavit, and her application should have been granted. It was an

injudicious exercise of the court's discretion for the learned trial judge to have refused to transfer the divorce proceedings from Benin City to Lagos

The case of *Ani v Ani*[5] showed that the prevailing MCA of Nigeria gives room for abuse of court process. In that case, the appellant took a petition at the High Court of the Federal Capital Territory Abuja against the respondent seeking for reliefs that the purported marriage between him and the respondent be declared a nullity on the ground that the marriage is void; that he be granted custody of the children of the purported marriage and that the respondent be ordered to pay the cost of the suit. Before commencement of trial, the respondent filed a Motion on Notice on 29/2/2000 praying for an order striking out the suit on the ground that same constituted an abuse of court process. The ground for the application was that there was a pending suit No ID/190WD/98 before the High court No 9, Ikeja Lagos between the same parties in which the respondent was the petitioner on the same subject-matter, that is the marriage of the parties. The application was moved on the 21st March 2000 and a ruling delivered on 10th April 2000, whereby the trial court struck out the petition for being an abuse of court process.

Being dissatisfied with the ruling of the trial court, the appellant appealed against it to the Court of Appeal. In determining the appeal, the Court of Appeal considered the provisions of Sections 2 (2) (b), (c) and 29 of the Matrimonial Causes Act which states as follows:

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[5]*Supra*

> Subject to this Act, a person may institute a matrimonial cause under this Act in the High court of any State of the Federation; and for that purpose, the High Court of each State of the Federation shall have jurisdiction to hear and determine proceedings for a decree – (b) of nullity of a voidable marriage; or (c) of nullity of a void marriage.

It is worthy of note that Section 9 of the MCA merely solved problems posed by duplication of similar suits. It did not solve the problem where only one suit is instituted outside the convenience of any or all of the parties. I therefore submit in this work that there is genuine urgent need for review and reform of the Nigerian MCA to take care of all sorts of abuse of Court process occasioned by the Act.

7.2 Failure of MCA to Define Domicile

One other flaw in the Nigerian MCA is that it did not define domicile; So, our courts fall on the received common Law and for persuasive authority on the Australian Matrimonial Causes Act on domicile.

However, an interesting and easy-to-understand explanation of domicile was made in the case of *Koku v Koku*[6] where the Court of Appeal stated as follows:

> Domicile succinctly put is the permanent abode or home of a party whether he goes to the North, South, East or West, he would always return to the place.

[6] [1999] 8 NWLR (pt. 616) 672

In that Koku's case, it was further stated that the determinant factor on jurisdiction for divorce proceedings is the domicile of the husband and not residency or nationality of the husband. This was equally stated earlier in *Bhojwani v Bhojwani*[7]. In Bhojwani's case, the Court of Appeal emphasized the importance of domicile as follows:

> The issue of domicile is a threshold one which must be considered because if it is found that the petitioner is not domiciled in Nigeria, the question of whether the trial court has jurisdiction to entertain the divorce petition will forthwith be settled and that will be the end of the matter. To ascertain whether or not the petitioner has chosen Nigeria as his country of domicile, the facts of his residence in Nigeria and his *animus manendi* will have to be considered. Is there evidence of the intention of the petitioner to make Nigeria his permanent home? Has the petitioner made Nigeria his permanent residence and principal establishment to which whenever he is absent, he has the intention to returning? The determination of legal domicile of a person is paramount since it, rather than the actual residence, often controls or determines where a person may exercise his right to vote or other legal rights and privileges including ascertainment of matrimonial domicile.

The facts of Bhojwani's case are as follows:

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[7] [1996] 6 NWLR (pt. 475) 661 SC

The respondent who was the petitioner in the High Court, was born in Singapore on 27th July 1960; the appellant herein, who was the respondent, in Lagos, on 10th May 1963. Both are of Indian stock. The respondent has been in Nigeria since 1979 for business purposes, where he met the appellant then a spinster with the surname Gulab. On 15th July 1987, they were married in the Registrar's office in the District of Westminster, London. After the marriage, they lived together in Nigeria. There were two children of the marriage. Sonali, female, born on 4th November 1990 and Viren, male, born on 14th January, 1994. They were both born in London. Within six weeks of the marriage, the respondent had the marriage registered in Singapore. Soon, there was difficulty with the marriage. The appellant and the children were sent to Singapore by the respondent sometime in mid 1994. It was alleged by the respondent that it was due to uncertain political and social situation in Nigeria at that time. It appears the respondent resisted staying in the respondent's family house there. She left with the two children on 15th November 1994 to London. She said she was trapped there in Singapore. The said children have been made the wards of court in London. The respondent later in London sought to have the two children returned to Singapore. He swore an affidavit in support of this on 13th December 1994.

In the affidavit, he deposed to the effect that he had a permanent attachment to Singapore that he hoped to make Singapore his permanent residence. His bid to remove the children to Singapore having failed, the respondent filed a petition of decree of dissolution of marriage at the High court of Lagos. On the question of domicile and in proof of his domicile in Nigeria, he stated as follows:

(i) The petitioner is employed in Nigeria in the responsible position of Company Director.

(ii) The petitioner is responsible for management of Nigerian business interests and has remained in Nigeria since 1979 for both his livelihood and residence without interruption.

(iii) The petitioner has a settled intention to remain in Nigeria where he presently has his only permanent residence and where he established his matrimonial residence after meeting his wife in Lagos, Nigeria where she was born, maintained ordinary residence up to marriage and feels perfectly at home.

(iv) The petitioner has ordinary right to residence or abode in Nigeria and has no intention for this abode to cease.

The appellant then took issue with the petitioner on the question of the domicile asserted by him. She brought a motion on 20th March 1995 to have that decided. Her contention was that the petitioner has no commitment to Nigeria and has never had the intention to stay here indefinitely. She swore an affidavit in support. Her main trust as it relates to the domicile of the petitioner is that he leans decidedly towards Singapore which is his domicile of origin. In paragraph 8 of that affidavit, the respondent deposed that the petitioner has several properties in Singapore but did not deem it fit to own a single property anywhere in Nigeria. The particular fact was neither denied nor explained in the respondent's counter-affidavit sworn on his behalf by one Titilola Omisore on 17th March, 1995 or the one sworn by him on 29th March 1995. the appellant in her affidavit carried some paragraphs of the respondent's affidavit he swore in London on 13th December, 1994. She later filed the entire affidavit as part of her

contention against the respondent's claim to Nigerian domicile. The respondent admitted swearing and relying on the affidavit in London proceedings. The trial High Court in its ruling held that the respondent has shown the fact of residence and the necessary a*nimus manendi* to remain in Nigeria. The appellant was dissatisfied with the ruling and she appealed to the Court of Appeal which allowed the appeal.

Domicile could either be (i) of Origin (ii) of choice or (iii) of dependence (a kind not a type of Domicile)[8]

Domicile of Origin A person acquires this type of domicile at birth or upon the person's adoption. It is the domicile of a child's father (or mother if the child is illegitimate, or the father is dead) at the time of birth.[9] This type of domicile remains in abeyance or dormant when another type of domicile is acquired.

Domicile of Choice An infant on attaining majority (18 years) as provided by the Child's Right Act, or the married woman on the termination of the marriage can acquire this type of domicile. The first ingredient to be proved here is that a party is

resident in a country for many years without an intention to change his domicile during the whole of the continuance of such residence. Proof of this intention may be difficult but where a party proves that he has been resident for a long time in Nigeria and intends to reside permanently or indefinitely, a domicile of choice may be inferred.[10]

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[8] J O Ige *The Law of Divorce* & Matrimonial Proceedings (Ibadan: Crown Goldmine, 2010) pp 6-8

[9] E I Nwogugu, *Family Law in* Nigeria (Ibadan: Heinemann Educational Books, 1974) p.109

[10] Lefevre v Lefevre (1974) 4 UILR 48

Domicile of Dependence: Married women come under this category as their domicile automatically follows that of their husbands and they cannot change it while the marriage subsists. However, Uwaifo, J C A, in the case of *Bhojwani v Bhojwani*[11] rejected this third classification of domicile.

He stated as follows:

> There are strictly two types of domicile. One is domicile of origin and the other domicile of choice. There is no separate domicile known as domicile of dependence as was canvassed by Professor Adesanya in the present case.

Again, I consider it as a flaw in the Nigerian MCA the absence of an express provision to the effect that on the raising of objection by the respondent as to the hardship occasioned by the institution of divorce action in a distant place, outside the State of residence, the presiding judge should consider the circumstances of the case and strike a balance, by transferring the matter to a venue convenient to both parties.

Another way of checking this problem is by introducing a provision in the MCA restricting a divorce petitioner to the last State of residence before they separated or ceased to co-habit. In other words, the present Section 2 (3) should be amended to effect the above restriction of divorce parties to file their petitions in their last state of co-habitation.

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[11] Supra

The said Section 2 (3) of the MCA is abused to the extent that one petitioner institutes same matrimonial proceedings in more than one States' High court. The court of Appeal in the case of *Harriman v Harriman*[12] addressed the above problem squarely by stating as follows:

In the first place, this will at best, even if it were legally permissible, be an abuse of the process of the court. On the other hand, it can be very properly regarded as 'a fishing expedition' by any party who files two of such actions, on the ground that he does not seem to know what set of facts he really wishes to rely on to succeed. Further, it is at best a hypothetical proposition because all the set of facts that can be canvassed in the different courts can be relied on the same in the same action in one single court. Finally, it is the type of situation in which Section 9 (1) is applicable to stay all other but one of the actions. In my view therefore there cannot co-exist at one and the same time two or more actions for dissolution of marriage between same parties in respect of the same marriage in different courts in this country.

It is therefore suggested that where there are two or more pending actions for the same matrimonial reliefs in two or more courts, counsel can file an application for stay of proceeding in the other courts or to strike out the actions for abuse of the process of court.

7.3 Problem of Going to Only High Courts for all Matrimonial Causes

The existing Matrimonial Causes Act (MCA) of Nigeria restricts the original jurisdiction in all Matrimonial Causes under the Act to be entertained by only the High courts in the States of the Federation including the High Court of

[12][1989] 5 NWLR (pt. 119) 6 at 16

the Federal Capital Territory (FCT) Abuja. This is found in Section 2 (1) of the MCA which reads as follows:

(i) Subject to this Act, a person may institute a matrimonial cause under this Act in the High court of any State of the Federation and for that purpose the High court of each State of the Federation shall have jurisdiction to hear and determine –

(a) Matrimonial Causes instituted under this Act; and

(b) Matrimonial causes (not being matrimonial causes to which Section 101 of this Act applies)

Continued in accordance with the provisions of part IX of this Act, so however that jurisdiction under this Act in respect of matrimonial causes within this paragraph shall be restricted to the Court in which the matrimonial cause was instituted, and in any case where maintenance is ordered in proceedings in a High Court, a court of summary jurisdiction in any State shall have jurisdiction to enforce payment in a summary manner.

In other words, the jurisdiction of courts of summary jurisdiction (the Magistrate's courts and the District Courts) is categorically stated to be limited in scope. Nwogugu in his book[13] described the above provision of the Nigerian MCA as 'short of what is adequate in this field' According to him, 'these Courts could profitably be empowered to make orders for maintenance and judicial separation'. Professor Nwogugu

[13]Nwogugu, op cit, p. 108

cited the powers of Magistrate's courts in respect of matrimonial causes in England by virtue of an English Act promulgated in 1960 – the Matrimonial Proceedings (Magistrate's Courts) Act 1960. He supported his above stand as follows:

> This view is strengthened by the fact that Magistrate's courts are more readily accessible to remote localities than the High Courts. Moreover, proceedings in Magistrate's courts would have saved time, and expense for litigants and relieved the traditional congestion in the High court lists.

The learned Professor stated that while there may be good reasons of public policy for conferring exclusive jurisdiction for dissolution of statutory marriages on High courts, the same could not be said of the jurisdiction to grant minor matrimonial reliefs.

Adesanya, another learned writer, in his book[14] equally reasoned alike with Nwogugu as follows:

> It is most desirable and expedient that jurisdiction should in fact, be conferred upon courts of summary jurisdiction to make orders stated in Section 2 (a). Firstly, it will remove the pressure on the High court and would enable the latter court to deal adequately with more serious issues which often arise in proceedings for principal reliefs. Secondly, it would lessen the costs of litigation. Thirdly, it would be possible for spouses, particularly the wife to obtain a maintenance for herself or/and for the

[14] Adesanya, op cit, pp 26-27.

children, as well as to obtain custody of, or access to children, without seeking a principal relief.

In view of the foregoing, it is my humble submission that the present MCA of Nigeria be reviewed and reformed to confer jurisdiction on Magistrate's, Courts to handle at least ancillary reliefs such as maintenance or making orders for judicial separation in addition to the present powers of enforcing payments of maintenance order by a High Court. In the alternative, let every State and the FCT Abuja create Family Courts as contained the Nigeria's Child's Right Act (2003). The jurisdiction of the family Courts should centre on only matrimonial causes to lessen the load of High Courts of States and the FCT Abuja which presently exclusively handle all matrimonial causes.

7.4 What Constitutes Matrimonial Causes Under the Act

Section 114 (1) (a), (b) and (c) of the Matrimonial Causes Act (MCA) of Nigeria defined a matrimonial cause as follows:

(a) Proceedings for a decree of:

(i) Dissolution of marriage

(ii) Nullity of marriage

(iii) Judicial separation

(iv) Restitution of conjugal rights; or

(v) Jactitation of marriage

(b) Proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree, or otherwise, or of a decree of judicial separation, or for a declaration

of the continued operation of a decree of judicial separation, or an order discharging a decree of judicial separation.

(c) Proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceeding of a kind referred to in paragraph (a) or (b) above, including proceedings of such a kind pending at, or completed before the commencement of this Act.

The flaw in this Section 114 of the Act lies on its sub-paragraph (1) (c) quoted above which amounts to the effect that, proceedings for maintenance, settlement of property, damages for adultery, custody, guardianship, would only be deemed to be matrimonial causes, if they are ancillary to proceedings in relation to concurrent, pending or completed proceeding of a kind referred to in paragraphs (a) or (b) of Section 114.

Equally, Section 54 (3) of the MCA provides-

> Proceedings of a kind referred to in paragraph (c) of the definition of "matrimonial causes" in Section 114 (1) of this Act for a decree or declaration of a kind referred to in paragraph (a) or (b) of that definition.
>
> (a) May be instituted by the same petition as that by which the proceedings for that decree or declaration are instituted; and
>
> (b) except as permitted by the rules or by leave of the Court, shall not be instituted in any other manner.

Again by Section 75 of the MCA, it is expressly provided that where the petition for the principal relief has been dismissed, no ancillary relief can be made.

Equally pertinent here is Section 70 (3) of the MCA which provides that a Court may make an order for maintenance of a party notwithstanding that a decree is or has been made against the party in the proceedings to which the proceedings with respect to maintenance are related.

From all the above, it is clear that under the existing MCA of Nigeria, an independent action for ancillary relief is outside the jurisdiction of the High Court.

However, with a case like *Esua v Esua*[15]**,** there is a conflicting decision on this principle. In the Esua's case, there was an application for order to strike out the original application brought by the respondent on the ground that it is
not a matrimonial cause and that there have been no proceedings for the principal relief as required under the provisions of Section 75 of the Matrimonial Causes Act (MCA).
The argument of the applicant was that in so far as the original application was not a matrimonial cause within the meaning of Section 114 (1) of the Act, the respondent could not, having regard to the provisions of Section 75, bring the original application separately without including it in any petition for the principal relief as defined in Section 75 (4).

It was held (Per Kazeem) after reference to Section 75 that the Section makes special provisions for the making of orders for maintenance prescribed therein and it

[15] (Unreported) Suit No M/63/70 of 4/12/70 (per Kazeem, J) George, J in a ruling delivered on 3/7/70 in the case held that it could not be brought independently.

contemplates the making of such orders only when the application for such orders are included in the matrimonial causes (otherwise called principal reliefs) mentioned in Section 114 (1) (a) and (b) of the Act.

The Esua's case was followed by the case of *Adekoya v Adekoya*[16]

However, Justice Adefarasin in the case of *Akinwumi v Akinwumi*[17] held in an application for maintenance and custody that:

> Although an application for periodical payments and custody independent of a principal relief is not a matrimonial cause within the meaning of Section 114 (1) (c) of the Decree, such an application can be properly brought under Sections 70 and 71 of the Decree. as it can also be brought under Section 12 of the High court of Lagos and Sections 22 and 35 of the English Matrimonial Causes Act, 1965 and the rules made thereon.

In the case of *Nakanda v Nakanda*[18] the Court of Appeal went further and held that a spouse can bring an action for maintenance without joining it with any principal relief like divorce, judicial separation etc.

In Nakanda's case, the respondent (the wife) had applied to the High court, five years after she and her husband had been living apart, for an order of maintenance in her favour, without at the same time bringing the action along with a petition for divorce,

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[16] (1973) 2 CCHCJ 73

[17] (Unreported) Suit No M/66/70/ of 19/3/71 delivered by Adefarasin, J.

[18] (Unreported) Suit No CA/L/99/81 of 17/6/88 delivered by the Court of Appeal Lagos

judicial separation, or any of the other types or matrimonial causes defined in Section 114 (1) (a) of the Matrimonial Causes Act. One of the questions that arose for determination was whether such an action for maintenance, independent of a matrimonial cause was valid. The trial judge held that it had jurisdiction relying on.

Section 70 (1) of the MCA and made an order for maintenance The matter went further on appeal and the Court of Appeal held that under Section 70 of the Matrimonial Causes Act, parties are entitled to institute action for maintenance independently of a matrimonial causes.

Ademola, J.C.A., stated as follows:

> First I must say that the wording of Section 70 sub-section 1 is different from Section 70 sub-section 2, Section 70 sub-section 1 as it has been emphasized in the respondent's briefs, requires the court in proceedings for maintenance other than proceedings for maintenance in a pending suit, to make such orders as it thinks proper having regard to the means, earning capacity and conduct of the parties --- This wording to my mind has introduced a distinction between that Section 75 sub-section 3 on the question of maintenance. It is possible to maintain an action for maintenance under Section 70 sub-section 1 as an independent proceeding unrelated to any pending proceedings relating to Matrimonial Causes under the principal Decree. In other words, any party to a marriage that is about to collapse, if he so wishes, can ask for the maintenance under that

> Section 70 sub-section 1. This he can do with a hope that parties may reconcile their differences and the need to have a dissolution of the marriage or a judicial separation may not come about. After all, it is one of the stated policy of the Act that the Court should permit reconciliation and for the time being one of the spouses gets maintained.

Inspite of the above decisions, prominent authors like *Kasunmu*[19] described the reason given by the court in *Akinwumi v Akinwumi*[20] in arriving that the MCA of Nigeria allows institution of maintenance, or custody as an independent action, as very doubtful.

According to Kasunmu, the court based its decision on the fact that Sections 70 and 71 of the Act, are similar to Sections 22 and 35 of the 1965 English MCA, which were applicable to Nigeria prior to 1970. The court went further to say that as a result of the fact that the said Sections 22 and 35 allowed independent actions for maintenance, that our Sections 70 and 71 of Nigerian MCA must have the same effect. This Kasunmu vehemently disagreed with and I agree with Kasunmu in this work.

Kasunmu[21] went further to attack the other reason the court gave for holding that independent action for maintenance could be instituted in Nigeria.

The second reason of the court is as follows:

--- It is my view that the Matrimonial Causes Rules of the United Kingdom would apply to the kind of application of the applicant wife.

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[19] A B Kasunmu, 'The Matrimonial Causes Act 1970: A Critical Analysis' (1971) The Nigerian Journal of Contemporary Law, 117.

[20] Supra

[21] Ibid p. 118

Section 112 (1) of the **Matrimonial Causes Decree** 1970 provides that the Chief Justice of Nigeria, after consultations, may make rules for, or in relation to the practice, and procedure of the courts with regard to Matrimonial Causes under the Decree. Section 112 (4) also provides that until such rules are made, the rules of the court in force immediately, before the commencement of the Decree, shall continue to be in force. Those rules are the rules applicable to Matrimonial causes in the Supreme Court in England, and I think, they are applicable here for the time being, in the absence of any other rules. Hitherto, our courts had applied them by virtue of the provisions of Section 12 of the High court of Lagos Act. Since the provisions of Section 114 (1) (c) of the Matrimonial Causes Act would not apply to applications for maintenance and custody of children, independent of a principal relief, and it is assumed for the sake of argument, that Sections 70 and 71, do not operate to permit such applications, then there are no rules as yet made under section 112 (1) of the Decree, to cover such applications. The English Matrimonial Causes Act, 1965, Sections 22 and 35, would apply, and the application can be brought under and by virtue of the Act. Had I been wrong in my decision, that the substantive application of the wife could be brought under Sections 70 and 71 of the Decree 1970, I would still hold that the application is right and proper under the English Act.

In disagreeing with above reasoning of the court, *Kasunmu*[22] stated that Section 112 (4) of the MCA was only intended to provide for the continued application of English Rules of Court as to practice and procedure, pending the making of such rules of Court by the Chief Justice of Nigeria under Section 1 (2) of the MCA. In other words, the section was not meant to introduce substantive rules of the Law.

In view of the foregoing, it is therefore my submission that the Nigerian Matrimonial Causes Act (MCA) needs clear reform that would make it allow filing of independent ancillary reliefs like Maintenance and custody. This is necessary considering the fact that in some situations, a spouse in a troubled marriage may not wish for an outright break of the marriage. Such a spouse should be given the option of being allowed by the Divorce Law to file a relief like maintenance as an independent matrimonial suit as is presently the case with nullity of marriage, dissolution of marriage and others recognized under the existing Nigerian MCA as independent Matrimonial Causes.

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[22] Ibid p. 118

CHAPTER EIGHT

CONTEMPORARY ISSUES, SEPARATION AND DEFINITION OF SIMPLE DESERTION

8.1 Contemporary Issues and the Nigerian MCA

Contemporary issues revolving around the institution of marriage and divorce globally constitute part of the reasons why the Nigerian Matrimonial Causes Act (MCA) needs to be reviewed and strengthened urgently.

The contemporary issues include same sex marriage, hermaphrodites, pseudo-hermaphrodites, trans-sexualism, single-parenthood, in-vitro fertilization and surrogate motherhood.

Same Sex Marriage: Simply put, this refers to a ceremonial marriage between man and man or woman and woman. It is one of the contemporary issues that have greatly disturbed the one man, one woman element of the statutory marriage. Many countries of the world have today either fully legalized it or have conceded certain rights to them (the gays and the lesbians). It is variously called lesbianism, gay marriage, same gender marriage, gender neutral marriage or civil marriage depending on the State or country in question.

Arinze-Umobi and Umobi in their book[1] uniquely simplified the meaning of Same-Sex Marriage as follows:

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[1] C Arinze- Umobi and D A Umobi, *Crisis in Family Law***.** (Onitsha: Folmech Printing and Publishing Co. Ltd. 2009), p.27

> When sexual desire is directed towards members of one's own sex, then homosexuality is said to have come in place. On the female side, it is known as lesbianism.

The homosexuals have not only fought for the legalisation of their union but are also asking for a redefinition or expansion of the word 'marriage' to accommodate their relationship. Greater demand is been made on marriage consequent on the spread of education, higher standard of living and the social emancipation of women. The usual old restraints on sexual relations have been weakened and there is a tendency to regard the assertion of one's own individuality as a right and to pursue one's own gratification regardless of the consequences to others or the society. But then, marriage has always been understood as the union of one man and one woman and regardless of religion, culture or tradition. Societies have always agreed on the nature of marriage as the union of two opposite sexes. Unfortunately, same sex marriage have been recognized and even given legal acceptance and subsequently legislated in many countries of the world such as Canada, South Africa, some States in United States of America, Spain, Asia etc.

Denmark fired the first shot in the recognition of same sex marriage when in 1989, it registered 'Partnership' that extended property and inheritance rights to Same Sex couples[2]. However, church weddings were not allowed for such partners. Norway, Sweden and a host of other countries in Europe and South America enacted similar legislation in 1995. In 2001, Netherlands became the first country to offer full civil

[2] www.pedia.orga/wk/samesex marriage p.15 Accessed 2/8/12

marriage rights to gay couples. In 2003, Belgium followed, then Spain and Canada in 2005 and South African and Mexico in 2006. In Canada, an Appeal Court in 2003 declared Canada's definition of Marriage as 'a union of a man and a woman' invalid and changed it to a union between two people. In 2005, a bill to legalize same sex marriage became Law in Canada. They were given legal right similar to those of heterosexual couples, except adoption and inheritance rights[3]

California started issuing marriage license to same sex couples in February 2004. The move was annulled by the State Supreme Court. But in March 2005, a San Francisco Judge ruled that the law banning same-sex marriage was unconstitutional. Massachusetts equally issued marriage license to gay couples in 2004. Furthermore, the Massachusetts legislators have proposed a constitutional amendment that would allow civil unions. Portland area started issuing marriage license to same sex couples in 2004. This was before an amendment to the State constitution banning such wedding as approved by voters in November 2004. The governor, Ted Kuton-goski, has said that he would back a new law which would allow gay couples to form civil unions.[4]

On the other hand, in 2004, the Prime-Minister of Australia, John Howard proposed to amend Australian Federal Law so that, neither foreign nor domestic same-sex unions could be recognized as marriages. In the UK, they are given the status of civil partnership not marriage.

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[3] Ibid p. 18
[4] Ibid p.19

It is worthy of note that it is only South Africa that is the only African country that has authorized same-sex marriage. The High court of South Africa in 2002 at Bloemfontein, ruled that to deny same sex couples right to marry is discriminatory and unconstitutional. The South African National Assembly, approved a bill in November 2006, legalizing same sex marriage.

Even though South Africa had joined the western world in permitting the same sex marriage, such marriage is still a taboo in African societies. Clayton, J in 2005 while commenting on legalization of same sex marriage in South Africa stated as follows:

> South Africa has broken an important regional taboo yesterday, by becoming the first African country to authorize same sex marriage[5]

Same Sex Marriage Vis-a-vis Nigerian Legislations

In Nigeria, the same-sex marriage is seen as a social taboo. Though not specifically mentioned, the following Nigerian Statutes expressly prohibited and made them offences when committed such acts relating to same-sex practices.

Criminal Code: Chapter 21[6] reads thus 'offences against morality' and under that chapter, the sections provide as follows:

> A person who has carnal knowledge of any person against the order of nature or has carnal knowledge of animals or permits a male person to

[5] www.religion-on-line org/show article, accessed Thursday 2/8/12
[6] Criminal Code Cap C 38 LFN 2004

have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for fourteen years.

An attempt to commit any of these offences under S. 21, the person will be liable to imprisonment for seven years. Also S. 21[7] which provides for indecent practices between males stated that any person who whether in public or private commits any act of gross indecency with him or attempts to procure the commission of any such act by any male person with himself or another male person whether in public or private is guilty of a felony and is liable to imprisonment for three years. The above sections contemplates situations where there is a carnal knowledge against the order of nature. That is to say, a sexual intercourse between a male and another male or a female in an order which is against nature.

Again, by the penal code in Nigeria, same-sex activity is punishable by death by stoning in the 12 States that operate Sharia Law. The States are Bauchi, Borno, Gombe, Kaduna, Kano, Katsina, Kebbi, Jigawa, Niger, Sokoto, Yobe and Zamfara. However, the Sharia Penal Code does not apply to non-Muslims. According to Chapter 21, Sections 214 and 217 of the Penal code, same sex activity can be punished by imprisonment of up to 14 years throughout Nigeria. In the 12 Northern States that operate Sharia law, anal intercourse (Liwat) is punished with 100 lashes (for unmarried Muslim men) and one year imprisonment and death by stoning for married or divorced Muslim men.

Section 214 of Penal Code states as follows:

[7]Criminal Code Ibid

> Any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and liable to imprisonment for 14 years.

Section 215 states as follows:

> Any person who attempts to commit any of the offences defined in the last preceding section is guilty of a felony and liable to imprisonment for seven years.

Section 217 provides as follows:

> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him or attempts to procure the commission of any such act by any male person, whether in public or private, is guilty of a felony and is liable to imprisonment for three years.

Again, under Section 352 of the Penal Code, assault with intent to have carnal knowledge with a man (or woman) against the order of nature also carries a maximum penalty of 14 years imprisonment.

The Federal Government of Nigeria initiated a bill in 2006 to criminalize homosexuality. The bill *inter alia* provided as follows:

> Any person who is involved in registration of gay clubs, societies and organizations, sustenance, procession or meetings, publicity and such public shows of the same sex amorous relationship, directly or indirectly in public and in private is guilty and liable on conviction to a term of five years imprisonment.

In 2007, Police in Bauchi State arrested 18 suspects (men) having same sex relationship and were actually charged for unlawful relationship, committing indecent acts and criminal conspiracy.

Presently, the National Assembly in Nigeria has finally passed the Same-Sex Marriage (Prohibition) Bill. The President of the Federal Republic of Nigeria in January 2014 signed the bill into law. According to the law, 'persons who enter into a same-sex marriage contract or civil union commit an offence and are each liable on conviction to a term of 14 years imprisonment.' It adds that 'any person who registers, operates or participates in gay clubs, societies or organizations or makes public show of same sex amorous relationship in Nigeria commits an offence and shall be liable on conviction to a term of 10 years imprisonment'.

The National Assembly and indeed the majority of Nigerian people see Gay Marriage as strange and alien to the Nigerian culture and violates all the values and mores that the people recognize and cherish.

Meanwhile, the British Prime-Minister, David Cameron had warned that countries that do not recognize the right of gays would be sanctioned. He hinted that his country would withhold aid to such countries. The British High commissioner to Nigeria Andrew Lloyd amplified this after the Nigerian Senate's prohibition of the practice. He said that his country and other Western countries would not tolerate any law that prescribes punishment for gays as that would infringe on their fundamental human rights.

Reacting to the foregoing, the Nigerian Senate President, David Mark, stated as follows:

> If such countries are not comfortable with us on criminalizing same-sex marriage in Nigeria and they want to tie their aid or grants to it, they may keep their grants[8].

The advocates of same-sex marriage are saying that the amalgamation of the right to freedom as guaranteed in the Constitution and other international human rights instruments, directly translate such right by extension to mean entitlement to relate, cohabit or marry. They find their authorities in instruments like International Covenant on Civil and Political Rights (ICCPR), Universal Declaration on Human Rights (UDHR) and others holding that sexual orientation should be understood to be a status also covered and protected by the provision prohibiting all forms of discrimination. In a debate, Evans Woolfen, a superior court Judge later argued in support of same-sex marriage and said that there is enough marriage to share, what counts, he said, is not family structure but the quality of dedication, commitment, self sacrifice and love in the household. According to him, family structure does not count.

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[8]G Anyanwu, 'David Mark Replies Britain',SUN newspaper of Monday, 12th December 2011, p. 10

But then, if family structure does not count, what is marriage for?

Why have laws about it? When the sexual desires of adult clash with the interest of children, which carries more weight socially and legally? These are questions that arise in respect of same-sex marriage. The answer will affect not only gay and lesbian families but marriage as a whole. In the light of these there has been much argument in support of same sex marriage by homosexual. They believe that the institution of marriage conveys dignity and respect towards a couple that makes a lifelong commitment to support each other. They believe that they deserve this dignity and respect. They also want the symbolism that marriage brings the extra sense of obligation and commitment as well as the social recognition. They believe that allowing gays to marry would add to social stability for it would increase the number of gay couples that take real rather than passing commitments as this is the most effective way that couples could use to prove their commitment to each other.[9] Gays have also argued that denying marriage to same sex couples removes from them, a fundamental human right, the right to marry the person that one loves and to whom one has made a commitment which they say is unfair and unjust in a democratic society. They also believe that denying them of the right to marry has many adverse emotional and financial consequences such as medicare, social security and other benefits such as property inheritance, the right to visit their spouse in hospital and make medical decisions if any of them is incapacitated.

On the other hand, there has been argument against this same sex marriage. This argument is so strong that countries like Nigeria had vehemently refused recognizing the group, legally speaking. A summary of this argument is as follows:

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[9]'The Case of Gay Marriage: The Economist Print Edition', www.economist.com/opinion accessed 26th Feb 2009

1. Over the years, marriage has been naturally an institution between a man and a woman which among others ensures procreation, but same-sex marriage does not guarantee propagation of human species.

According to researchers in New York, there are very high rates of sexual proximity among the homosexual population with short duration of committed relationships. For instance, Bell Weinberg in a study of homosexual found that more than 75 percent of homosexuals admitted to having sex with more than 100 different males in their lifetime, 15 percent claimed to have had sex with 100-249 sex partners, 10 percent claimed to have had sex with more than 250 sex partners in their lifetime.

2. Again, homosexuals suffer increased rate of mental ill-health compared to the heterosexuals. In a recent US study of the mental health of homosexuals, it was found that gay men had a more than threefold increased risk of panic disorder. They also have fourfold increased risk of general anxiety disorder and are usually drug addicts[10]

From the foregoing, it is clear that homosexuality is really a bad phenomenon and a wind that will blow the society no good. It is doubtful if children are put in contemplation in same sex marriage, since no conception can take place and the couples can only resort to adoption if they want children. There have been contentions whether

[10]S. Colhran; "Prevalence of Mental Disorders; Psychological Distress and Mental Health Services among Lesbians, Gsays and Bisexual Adults in the US" Clinical Psychology 2003. vol. 71 pp 53-61.

they are really fit for parenting[11]. This is because the idea of homosexuals as custodial parents remains repugnant to many. It is also doubtful the kind of children raised in such homes, their mental behavioural, psychological social responses or attitudes they will exhibit later in life. Flowing from this, there has been many arguments and contentions against raising children in homosexual households. They are against adoption by homosexuals contending that what else they would want with children since they decided to marry someone of the same sex and gender. The following are the reasons given against adoption and raising of children in homosexual families.

The kids will turn out gay. The likelihood of kids raised in homosexual families turning gay is high. Studies indicate that children raised by such parents are substantially greater risk of being drawn into homosexual behaviour themselves.[12] This is based on the theory that homosexuality is a learned response and predicts that children in same-sex households will come to regard homosexual behaviour as a norm

(a) Homosexual households create troubled young adult. The children raised in homosexual household run a high variety of risks of often associated with homosexual orientation or conduct such as suicidal behaviour, prostitution, running away from home, substance abuse, HIV infection, high promiscuous behaviour with multiple sex partners and premature sexual activities[13].

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[11] A Taub, 'Fit or Unfit, Homosexuality and Parenting ' (2001), The Journal of Contemporary Issues, Vol. 16, p. 22 Accessed 29/9/12

[12] L D Wardle, 'The Potential Impact of Homosexual Parenting on Children' (1997) cited by A Taub in the Contemporary Issues Vol 16, p. 25 www.homosexuality parenting> Accessed 29/9/12

[13] Ibid p.30

(b) Homosexual parents are bad models. Proponents of dual parent households believe that fathers as well as mothers are extremely important for child development.

Fathers provide more leadership and are more judgmental than the mothers who provide more nurturance. Even when fathers nurture and care for their children, they do so not to substitute mothers. Growing children progress through various developmental stages in which their relationship with a same sex parents is different from their relationship with opposite sex parent.[14] Same sex relationship do not provide the same type of learning model or experience for children as male-female parenting because there is overabundance of information about one gender and little information about the other gender[15].

Different sex parents are important because both parents serve as models and as objects for a child's learning and development. Again in response to the agitation of homosexuals to re-define marriage to include their union, one legal question emerges.

The parties to this marriage, will they be accorded rights and privileges which accrue to the spouses of monogamous marriage as provided by the MCA and enforced legally such as consortium and all the ingredients of consortium one of which is the right to consummate marriage (which in this situation, there has to be a redefinition of the word consummation). Consummation legally means sexual intercourse between the husband and wife of opposite sexes. Where sexual relationship is partial or imperfect, there is no consummation. Consummation therefore requires a full penetration of the

[14] K D Pruette, 'Family Law Reporter' (2001) cited by Alyson Taub in the Journal of Contemporary Issues Vol. 16, p. 27

[15] Pruett Ibid p. 27

female organ by the male organ[16]. According to Arinze-Umobi and Umobi,[17] 'one wonders the possibility of achieving perfect consummation in same sex marriage giving that they have same biological make-up. Also, the duty to cohabit, right to mutual chastity/fidelity, and conjugal rights protected and defended by the MCA,[18] the rights of actions, right of immunity enshrined in criminal prosecutions, Law of evidence, succession Laws, Law of contract and Law of tort will they be enjoyed by gay couples? Again, what is the propriety of the application of the irretrievable breakdown of marriage considering the circumstances advanced by S. 15, MCA[19] as grounds for the dissolution of marriage, the circumstances stipulated in S. 15 (2)[20], when a marriage will be said to have broken down irretrievably which include;

(i) Willful and persistent refusal to consummate marriage. As already stated, the ingredients of consummation involved the penetration of female organ by the male organ, which must not be partial, transient or imperfect.

The words 'wilful and persistent' obviously are problematic in consideration of this Section in relation to gay/lesbian marriages. Petitioner must under this section, be able to establish that there was refusal to consummate not minding protracted, consistent and repeated demands, the respondent continuously refused to engage in copulation. On these issues of gay/lesbian husband and wife, the problem in reaction to section 15(a)[21], will obviously not revolve around willful and persistent refusal but that of incapacity to

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[16] E I Nwogugu, *Family Law in Nigeria* (Ibadan: Heinemann Educational Books, 1974) p. 158

[17] Crisis in Family Law op cit p. 30

[18] Cap M7 LFN 2004

[19] Ibid

[20] Ibid

[21] Ibid

offer to each other what has been explained to be consummation. Even if they want to consummate the marriage, their genetic make-up will make it impossible. One can safely conclude that the desired effect that spouses must not fall short of willful and persistent refusal to consummate the marriage otherwise the decree of divorce may occasion cannot and is impossible for it to occur.

(ii) Adultery and intolerability: Another ingredient a petitioner can establish in court to hold that a marriage has broken down irretrievably. But adultery which has been defined as a voluntary sexual intercourse between a spouse and a third party of the opposite sex, not being the wife or the husband during the subsistence of the marriage,[22] cannot be said to have committed by a spouse in a gay/lesbian partner. Except the phrase 'a third party of the opposite sex' is given a broader interpretation to make this possible, there is no sexual violation that would have occasioned. In that case, it means that the definition of adultery will be expanded to include not just a third party of the opposite sex but also of the same sex.

(iii) Section 15 (2) (c) also provides that the petitioner for the decree must satisfy the court that 'since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent' what will constitute this state of affairs that can now be classified as having fallen within that category which the petitioner is not expected to put up with are called 'offensive conducts'. The act lightens the task of unacceptable behaviour by providing those conducts that fall within the purview of S.15 (2) (c). This means that all those not expressly mentioned in Section 15 (2) MCA can conveniently be grouped under S. 16 (1) namely that 'since the

[22] Nwogugu, op cit p. 202

marriage, the respondent has committed rape, sodomy or bestiality.' The word sodomy has caught the attention of several authors,[23] Sodomy[24] has been defined as oral or anal copulation between two humans especially of the opposite sex. It is a 'crime against nature, abominable and detestable. It is a carnal copulation against nature, to wit, a man or a woman of the same sex or either of them with a beast'. Under the MCA, sodomy forms an act which a petitioner can establish in proof of S. 15

(2) (c) of MCA. When there is an application under this Section by a lesbian/gay spouse, that the respondent has committed sodomy, the legal substratum has obviously failed under the Maxim ***ex turpi causa, non action oratio.*** The gay/lesbian petitioner cannot be allowed any relief since his or her marriage/sexual relationship is rooted on sodomy as defined.'

That being the legal dilemma, there has to be a review of S. 16 (1) of MCA if it is to be relevant in an application for the grant of a decree of divorce. Finally, it can be seen from the above that same sex marriage cannot constitute a real marriage or family and these unions would distort what should be communion of love and life between a man and woman in a reciprocal gift open to life. Also, redefining marriage as homosexuals are agitating, for goes beyond redefining the word marriage. Other effects of marriage or rights that flow from marriage will also have to be reviewed. Marriage has been viewed as a religious sacrament or ceremony. If the definition of marriage is changed to allow same sex individuals to marry, some religious individuals and groups will feel that they will be at risk of having to violate their beliefs and priests may be forced to marry same sex couples. More than that, children thrive best when reared in a home with a married

[23] Arinze-Umobi and Umobi, op cit p.23

[24] B A Garner, *Black's Law Dictionary* (8th edn, Minnesota: West Publishing Co., 2004) p. 1555

mother and father. This is because boys and girls have needs that are uniquely met by parents of the opposite sex. These children need to acquire a healthy perception of gender based relationships and studies have shown that children do not need parents of the same sex in the household to achieve healthy gender identification. Children may learn gender typed behaviour from either parent in an opposite sex marriage than from a parent of the same sex to model what is deemed appropriate gender. The role of the marriage in the society is a major topic taught in public schools. If same sex is legalized, schools will be required to teach that same sex marriage is equivalent to opposite sex marriage starting as early as kindergarten. That would violate the beliefs of many parents. It is therefore asserted that the right kind of family based on marriage to be protected, promoted and preserved by society and the State must recognize this and legislate same to ensure its stability and survival. That explains the case being made for reforms and strengthening of the prevailing MCA of Nigeria.

Transsexualism and Sex Reassignment

This is another contemporary issue that requires attention in the MCA. It is a term used to describe the process in which a person born with physical features of one sex makes a sex change by surgery and hormonal treatment. It is otherwise called sex re-assignment[25]. Transsexual has been described as a form of gender identity disorder (gender dysophoria) in which a person with a normal particular anatomical sexual differentiation is convinced that he or she is actually a member of the opposite sex. Such person experiences a sense of discomfort and in-appropriateness about his or her anatomic sex and has a desire to be rid of his or her genitals and live as a member of the

[25] Garner, op cit, p. 17

opposite sex. Over the years, there have been numerous cases of successful sex transplants especially in the advanced countries of the world. This category of people which has undergone a delicate surgical operation to effect a change of their gender had started demanding for the legal enforcement of their right to marry in their newly acquired sexual identity. According to Arinze-Umobi and Umobi[26] these sex changes and transformation are matters of serious legal concerns, for through the introduction and injection of these foreign and unfamiliar concepts, the marriage institution and its inviolability is greatly threatened. Thus also bringing up the question whether such a marriage is still that as contemplated by Lord Penzance in *Hyde v Hyde*[27] and in the Interpretation Act[28] in the definition of monogamous marriage. The legal question then is whether these people can validly contract a legally valid marriage with a person of the opposite sex since the law recognizes marriage as a union between a man and a woman. This also brings up the issue of what the word 'woman' means in the context of marriage and likewise a man having regard to the essentially heterosexual character of marriage.

In *Corbett v Corbett*[29]**,** a man, April Ashley had successfully undergone a sex transplant to become a woman and later as a woman went through a celebration of marriage with a man called Arthur Corbett. He Corbett, knew of the operation by Ashley but when the relationship collapsed, Corbett applied for a decree of nullity on the ground that April Ashley was infact a man. Omrod J, held that a person's sexual identity is fixed at birth by reference to chromosomes and gonads and cannot be subsequently changed

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[26] Crisis in Family Law op cit p. 19
[27] Supra
[28] CAP 192, LFN, 2004.

[29] (1970) 2 All E R 33

either by natural developments of organs of the opposite sex or by medical or surgical means. The judge conceded that doctors might assign a person to another gender for the purpose of treatment but argued that the marriage institution is one in which the family is built and in which 'capacity to natural heterosexual intercourse is an essential element.' According to the judge, 'to determine the legal sex of a person, the criteria must be biological that is the chromosomal, gonads and genital tests'. He concluded that if the three are congruent, they determine the sex for the purpose of marriage accordingly and ignore any operative intervention. Since the decision in Corbett's case, transsexuals have continued agitating for the enforcement of their right to marry in their newly acquired gender. Many cases subsequently followed the Corbett's case. In *R v Tan*[30], Parker J. for instance held that both common sense and desirability for certainty and consistency demand that the decision in Corbett's case should apply. The English judge's refusal to give into all the formidable objections and stick to their compromising stand was apparently as a result of their resolute stand to protect the sanctity of the marriage institution. The European court of Human recently refused to follow the above case. In *Goodwin v The United Kindgom,*[31]it was in violation of the plaintiff's gender re-assignment for pension purposes. In reaching this conclusion, they referred to the cases of *AG v Otahuhu Family Court*[32] and *Re-Kevin*[33] where in New Zealand and Australia respectively, transsexuals assigned sex were recognized for the purpose of validating their marriages.

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[30] (1986) Q B p. 17
[31] (2002) 35 EERE
[32] (1995) WLR 605 (High Court of Wellington)
[33] (2001) 28 Family LR 158 (Family Court of Australia)

In Re Kevin's case, Justice Chisholm stated as follows:

> Because the word man and woman have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of Law, that the question in a particular case will be determined applying a single criterion or limited use of criteria. Thus, it is wrong to say that a person's sex depends on any single factor such as the state of the person's gonads, chromosomes or genital (whether at birth or at some other time). Similarly, it would be wrong to say that the question can be resolved by reference to the person's psychological state or by identifying the person's brain sex.

He further proposed the method of determining a person's sex for the Law of marriage. According to him 'to do so, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factor necessarily has more importance than the other. To him, the relevant factors include the person's biological and physical characteristics at birth including the sex in which he or she was brought up and the person's attitude to it. The person's self perception as a man or woman, the extent to which the person has functioned in society as a man or woman, any hormonal surgical or other medical sex re-assignment treatment the person has undergone and the consequences of such treatments and the person's biological, psychological and physical characteristics at the time of marriage under Australian Law. The world has become a global village and therefore cannot validly claim that cases of gender reassignment have not and will not occur here'.

Nigeria and Transsexualism

In Nigeria, the law makers are yet to recognize the marriage of transsexuals. Infact, no case of sex reassignment has been recorded in Nigeria even if there are people who wish to undergo such exercise. Nigeria being a conservative society which clings very much to tradition, as has been witnessed in the recent outright rejection of Homosexual practice by the country's law makers, the existing MCA of Nigeria should be strengthened to discourage and disallow transsexualism.

Transsexualism in other Jurisdictions

Transsexuals have been recognized in the United Kingdom. This is by virtue of the Gender Recognition Act passed in UK in 2004 after the case of *Goodwin v United Kingdom*[34]. In Canada, the bill to recognize transsexuals caused controversy in the parliament as majority of them were against it. In South Africa, the Alteration of Sex Description and Sex Status Act (2003) was enacted. This enabled them to alter their birth record and identity document. In the USA, the issue of transsexuals was assigned to the various States and that the Federal Government should not legalize it or reject it.

Hermaphrodites and Pseudo Hermaphrodites

Still on contemporary issues in Matrimonial Causes, a hermaphrodite is a person who possesses the sexual organs of both male and female. What is usually done is to let the hermaphrodite grow and decide with which gender to take since he or she would know his or her identity internally. Sometimes, surgery is elected to make the decision permanent by altering the body to represent one or the other gender, which seems to be a

[34] Supra

reasonable choice to make. It appears that most, if not all hermaphrodites have a definite side they take as they develop since there is an internal genetic (XX, XY) dominance even though there is an external ambiguity. It is the internal genetic dominance that determines male and female even though sometimes mutations occur that affect both sexual organs. In some cases, there are hermaphrodites who are distinctly male in appearance yet have female sexual organs. There are also those who appear decidedly feminine in physical appearance yet possess male sexual organs. Either way, the genetic dominance is the gender and the person will manifest that dominance as he or she matures. The people may decide to undergo surgery to correct such abnormalities and marry subsequently and then comes the issue of the recognition of such union. Whoever marries a hermaphrodite unknowingly will succeed in Court for an order of nullity. For instance in C.v.D. 29[35]**,** the petitioner discovered that she was married to a hermaphrodite and sought a decree of nullity on the ground that she was mistaken as to the physical identity of the respondent. He had undergone certain operation before their marriage. The court held that the Australian MCA provision rendered the marriage void since the wife contemplated and did infact believe that she was marrying a male rather than a combination of male and female. However, like transsexuals, such cases are still rare in Nigeria. On the other hand are the Pseudo-hermaphrodites. The pseudo-hermaphrodites are either with testis or ovaries as well as other organs of sex which are not in agreement with the gonads present. Therefore, for this category of persons, that is the hermaphrodites and the pseudo-hermaphrodites, it is very necessary to apply medical caution in reaching a legal conclusion as to their biological gender. The Nigerian MCA

[35] (1979) FLR 90

should take cognizance of this category of persons in interpretation and identification of sexes of the parties to be married.

Single Parenthood is one of the contemporary issues the MCA needs to address in the reform process. It means rejection of attachment to a man or a woman all in the name of Marriage and its commitments. The man or the woman decides to stay alone, chooses partners for his/her sexual enjoyment, and begetting of children. The partner chosen disappears as soon as the aim is achieved and he or she goes about taking care of his or her begotten children. Under this arrangement, the single parent lives as he or she likes without accounting to any person. So, one may not be wrong to say that single parenthood more or less promotes permissiveness.

According to Arinze-Umobi and Umobi in their book[36] **'**there are traces of single parenthood in Nigeria crystallizing
into a formidable style of life, yearning for legal recognition, probably in response to the demand and guarantees of the provisions of our chapter IV of the Nigerian Constitution'[37].

From the foregoing, single parenthood negates and challenges the marriage institution. It obviously offends the essential element of one man, one woman benchmark in the definition of marriage by Lord Penzance. There is therefore the need to reform the existing MCA to categorically outlaw or provide for contemporary issues such as the single parenthood.

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[36] Ibid p. 64

[37] Constitution of the Federal Republic of Nigeria 1999, as amended

In-vitro fertilization is another contemporary issue in family law, which the existing MCA has not taken care of. It is a method of begetting a child. By this means, the egg and the sperm are obtained from the commissioning couple, and implanted in the carrying mother. It is now possible for a child to have multiple parents using this means. The MCA should therefore make categorical provision on this issue.

Surrogate Motherhood is yet another contemporary issue that has emerged in family law. It is a process of carrying and delivering a child for another person. It could be Gestational Surrogacy or Traditional Surrogacy. **Gestational Surrogacy** is a pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (Surrogate mother) carries the fetus and gives birth to the child, while **Traditional Surrogacy** means a pregnancy in which a woman provides her own eggs, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person. This arrangement is usually formalized by what is called surrogate-parenting-Agreement which is a contract between a woman and an infertile couple under which the woman provides her uterus to carry an embryo throughout pregnancy. The agreement provides that the surrogate mother will bear the child for the intentional parent and relinquish any and all rights to the child. If the surrogate mother is married, her husband must also consent to the terms of the surrogacy contract. Surrogacy has many forms. The commissioning mother may be the genetic mother in that she provides the egg or she may make no contribution to the establishment of the pregnancy. The genetic father is the husband of the commissioning mother or he may be an anonymous donor. There are thus many possible combinations of the person who are

relevant to the child's conception, birth and early environment.[38] Of all these, the one that is rampant is surrogacy that involves the artificial insemination in situations where the carrying mother is also the genetic mother, who has become inseminated with sperm from the male partner of the commissioning couple through the method of In vitro fertilization. Issues may arise concerning who is the parent of the resulting child. Is it the genetic donor of the egg or sperm, a spouse of donor, the surrogate, or the person intending to care for the resulting child? American jurisdictions are split on interpreting and enforcing these contracts. In *Re P(Minor) wardship: Surrogacy*,[39] a woman offered her services as surrogate to a married man, who agreed to pay a lump sum to adopt the resultant child. During the course of pregnancy, the surrogate began to have misgivings over handing the child to the commissioning couple. When she gave birth to twin, her disinclination grew. While regretting disappointing the couple, she decided to keep the children. The court ruled in her favour holding that 'she bore the children and carried them for the term of their gestation, and even since, has conferred upon them the maternal care which they have enjoyed, and has done so successfully'.

Infertility in women has been held as one strong factor why surrogacy is practised. It is now an established fact that the surrogate mother carried a child in pursuance of an agreement, made before she began to carry the child. The Surrogacy Arrangement Act[40] controls surrogacy arrangements.

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[38] Ibid p. 53

[39] (1987) 2 FLR 421

[40] (1985) Chapter 49, United Kingdom

However, there is a legal problem that follows surrogacy and that is the bifurcation of parenthood through the introduction of a third party, such a situation was not contemplated by Lord Penzance and even the Interpretation Act in the definition of Act Marriage which made man and woman mandatory for the purposes of child bearing and upbringing. For surrogacy, a man and two women are present and it creates problem of determining the best interest of the child and who the natural or adoptive parents of the child are. In Re C (A minor) Wardship: Surrogacy), the issue of the 'best interest of the child' was effectively considered. In this matter, the commissioning woman had a congenital defect, which prevented her from having a child. The commissioning couple was resident in the USA.

In 1983, the commissioning man contacted an agency in the USA, and entered into a contract whereby he paid a sum of money, and the agency under took to find a surrogate to bear a child that would be genetically related to him, but not his wife. The resultant insemination of the woman (in the UK) was successful. When the child was born, the local authority (Barnet) obtained a place of safety order in relation to the child. Immediately after this, the genetic father issued a wardship summons. It was so established that the biological mother had voluntarily relinquished all rights in relation to the child. The local authority itself fully supported the application by the father that the child be given into the care of the commissioning couple. The judge forcefully stated that the morality, ethics and legality of surrogacy were not the courts main concern. He further stated that due to the very specific and basic nature of wardship proceedings 'all that matters is what is best for her now that she is here and not how she arrived'. As a

result of the agreement, between all concerned, it was held that it was on the best interest of the child to be placed with the commissioning couple.

A school of thought is of the view that surrogate motherhood is illicit both from the legal and moral point of view, maintaining that surrogacy has challenged the central fabric of marital unity of a man and woman. In this regard, many Christian churches insist that techniques that entail the disassociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus) are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage; they betray the spouse's right to become a father and a mother only through each other.

According to Professor Osagie,[41]surrogacy is allowed in law only in cases where it is impossible or highly undesirable for medical reasons for the intended mother to carry a child herself.

I therefore submit that in reviewing the Nigerian MCA surrogacy if at all to be legalized, should be an option of last resort in procreation. The interest of the potential child must be paramount.

Forced Marriage involves coercion of a man or girl into getting married.[42] Forced Marriage is for example where a girl is impregnated by a man and due to the fact that the man is wealthy, parents of the girl now force her to get married to the man that

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[41] G Osagie (ed) *compendium of Medical Law*, (Lagos: Maiyati Chambers, 2006)

[42] www.pedia.org/wiki/marriages 5 of 12 accessed 12/5/2010

impregnated her. In other words, the marriage is no longer voluntary but by force and this negates the essential principle of marriage that marriage must be a voluntary union. Three elements vitiates voluntariness:

Firstly, where the consent was obtained under duress or fraud, secondly, where one party is mistaken as to the identity of the other party or as to the nature of ceremony performed and thirdly where a party is mentally incapable of understanding the nature of Marriage contract. By the existing MCA of Nigeria[43], two parties must express their willingness to enter into the marriage without any form of fraud, duress and coercion. Once it is established that any of the elements of this Section has been violated, to that extent, the marriage is void and a void marriage is that marriage which never took place in the eyes of law[44].

Force, duress and coercion once they can overpower the will of the victim, will amount to vitiating factors. In *Buckland v. Buckland*[45]**,** the court held that threatening, beating and compulsory imprisonment of a spouse will vitiate a marriage. A school of thought is of the view that though duress vitiates marriage, it depends on the degree of it. It is hereby submitted that once the duress has the capacity to alter the original feelings, perceptions and convictions of the victim, then no matter how slight the degree is, it must be regarded as a vitiating factor. Once the will and voluntariness are by force, even if the force is constructive, consent has been defeated. This duress or force could be economic,

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[43] S. 3 (d) (1) (III) of Matrimonial Causes Act Cap M7 LFN 2004
[44] Reneville v Reneville (1948) 1 All ER 56
[45] (1967) 3 All ER 300

physical, psychological, meted out once or instalmentally, provided it has the capacity of dissipating the victim's resistance up to zero level of tolerance or acceptance.

Again, moral persuasion, no matter how slight and the degree of application, can be considered as a kind of duress or constructive force, once it has the propensity of refocusing the victim, forcing the victim to see from another person's view point, be it from the parents, guardian or the loco parents.

Trial Marriage: This is another contemporary issue that ought be trashed while reviewing the MCA with a view to stabilizing the marriage institution. Trial Marriage otherwise called short-time marriage is a situation where two people, a man and a woman who intend to marry first, enter into a first order, but trial session of the experience. The continuation or breakup thereafter depends on what transpired in the trial. No matter the firmness of purpose, between such two persons on trial marriage, the fact is that such a situation can never ensure mutual sincerity and fidelity. Mutual fidelity, *uberrimae fidei* being a key factor in marriage relationship, is indeed absent in this situation called trial marriage. It is therefore my opinion that if the marriage institution must be stabilized and its sacredness restored, the MCA needs reform in that direction by outlawing so called trial marriages.

8.2 MCA, Nigeria, Vis-à-vis Separation Provisions[46]

The prevailing Nigerian Matrimonial Causes Act (MCA) in its Section 15 (2) (e) and (f) provided as follows:

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[46] www.lectLaw.com./separation 2/moo4/html.> accessed 01/05/2011

> The court hearing a petition for dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts:
>
> (e) That parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted.
>
> (f) That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

The above section 15 (2) (e) of the MCA, Nigeria is similar to section 2 (1) (d) of the Divorce Reform Act, 1969 of England in the sense that the two provide that continuous separation for at least two years shall be deemed evidence of irretrievable breakdown of the marriage. However, while the 1969 English Act provides that in addition to such separation, the respondent should consent to the decree being granted, the Nigerian MCA uses the phrase 'the respondent does not object to the decree being granted'. On the other hand, the Australian Matrimonial Causes Act, does not contain either of the above provisions. The question that follows may be why the use of 'consent' by the English Act and 'does not object' by the Nigerian Act. While the phrase 'does not object' could be regarded literally as synonymous with the word 'consent' used by the English Act, it is clear that they have different connotations in the contexts in which they are used in the two Acts respectively. 'Consent' as used in the English Act presupposes some positive act showing agreement that a decree should be granted. This is borne out by the fact that there is express provision in section 2 (6) of the Act whereby rules of court shall be made

requiring that general information shall be given to the respondent as will enable him to understand the consequences to him of his consenting to a decree being granted and the steps which he must take to indicate that he consents. Moreover, the fact that the phrase was deleted from the English Act at the Bill stage and replaced with the word 'consent', on the ground that the phrase would not provide an adequate safeguard in ensuring that the respondent really agrees that the conjugal relationship should be terminated by a decree, reinforces the argument that the two are not the same thing.

It is further submitted that the phrase 'does not object' is wider than the word 'consent' although the former could include the later. To me, the phrase 'does not object' or 'non-objection' could take the form of (a) the respondent taking some positive step or doing some positive acts to indicate that he agrees that a decree should be granted; for example, if he declares orally or in writing in court his concurrence in the decree, in which case the phrase is synonymous with 'consent' as used in the English Act. or (b) passive acquiescence or a negative form. For example, if the respondent with full knowledge that a petition has been presented against him, deliberately sits back without making any effort to defend it; in this sense, it is wider than 'consent'. Failure without cause to defend a petition may amount to non-objection is supported by the case of (though unreported) *Omatsola v Omatsola*.[47] In this Omatsola's case, H petitioned for divorce following at least two years continuous separation from W. According to the presiding Judge, Dosunmu J., 'the petition was practically undefended except that the wife seeks reasonable access to her children if the petitioner is awarded the custody – a relief she does not resist as well'. The court then granted a decree in favour of the

[47](Unreported) Suit No HD/97/70 of 23/3/71, Lagos High Court delivered by Dosunmu, J.

husband. It should be added that the court did not expressly deal with the issue of 'non-objection' mentioned in Section 15 (2) (e) of the Act. However, there is little doubt that it would have granted H a decree, although W did not take a positive step in showing her objection.

It would seem a fair approach to say that only a failure to defend a petition in the absence of fraud, misrepresentation or other satisfactory explanation would amount to 'non-objection'. On the other hand, it can be argued that the above qualifications are not necessary in view of the fact that Section 61 of the Act already gives the Court power to rescind a *decree nisi* before it becomes absolute if in granting the *decree nisi*, there has been a miscarriage of justice by reason of 'fraud, perjury, suppression of evidence or any other circumstances'

Although this argument looks attractive, it nevertheless has a serious weakness, in that the power of rescission of a decree must be exercised before the decree becomes absolute. The question then is, what can a defrauded respondent do where he does not detect the fraud until the decree has become absolute? For example, if he does not know of the proceeding because a neighbour who impersonated him, collected all the relevant documents served on him by the petitioner and also made a fictitious acknowledgment of them. It is submitted here that the qualification becomes very useful in that one of the conditions precedent for granting a decree under Section 15 (2) (e) is 'non-objection', it follows that the decree nisi itself, although technically absolute, is a nullity. Assuming there has been fraud, perjury, suppression of material facts etc. which led the respondent into not defending the petition, must the fraud etc be that of the respondent alone or could it also be that of a third-party? For example, supposing a respondent did not defend the

petition owing to the intervention of a friend or his family who promised to effect a reconciliation and advised the respondent not to defend the petition because they would persuade the petitioner to withdraw it. In England, by virtue of Section 5 of the Divorce Reform Act, only the act of the petitioner which misled the respondent into consenting would lead to the rescission of the decree nisi. Thus a decree would not be set aside simply because the respondent has been misled into consenting by the act of a third party. Moreover, the respondent must have taken the fact which misled him into account in consenting to the decree being granted. However, it is immaterial that such fact would not have affected or influenced the decision of a reasonable man.

In Nigeria, by Section 61 of the MCA it seems that a different consideration applies. The Section which resembles Section 5 of the English Act provides as follows:

> Where a decree nisi has been made but has not become absolute, the court by which the decree was made may, on the application of a party to the proceedings, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the decree and if it thinks fit, order that the proceedings be reheard.

Evidently, there is nothing in the above section restricting the rescission of the decree nisi to cases of miscarriage of justice caused by the act of the petitioner, therefore, the decree can also be rescinded where the miscarriage of justice is caused by the act of a

third party. The provision of the Nigerian MC A in its section 61 is certainly wider than section 5 of the English Act because rescission can be made under the latter section only where the fact alleged is separation for two years, whereas it can be made under the former (i.e section 61) whatever are the facts alleged as the evidence of the irretrievable breakdown of the marriage.

It would seem that the facts alleged as ground for the rescission need not specifically involve an element of dishonesty; this is because section 61 also speaks of 'any other circumstance' resulting in a miscarriage of justice. It is unclear whether the above phrase will cover a case where the respondent is ignorant of the law. For example, if he does not know that he has a right to defend the petition or the step to take in order to defend it. It is a general rule that ignorance of the law is no defence, save in exceptional circumstances.

On a question of approbation of a marriage which is voidable on the ground of the respondent's impotence, it has been held that the petitioner's knowledge of his legal right is one of the re-requisites of such approbation. In the case of *Slater v Slater*[48], the parties were married in 1945 but the marriage was never consummated owing to H's impotence. In April 1949, W started receiving A.I.D. treatment and in the same month the couple adopted a boy and got the adoption order in August. The A.I.D. was stopped three days before the adoption was made and W was still not pregnant. In November W learnt for the first time that she could petition on the ground of H's impotence and she later did so. It was held that neither the A.I.D. nor the adoption amounted to approbation because at the time when these things were being done, she was not aware of her legal rights.

[48](1953) 1 All ER 246

However, unless the petitioner proves lack of knowledge of her legal rights, she would be presumed to know what the law is. (that was the decision in *W. v W.*[49] What follows is whether the court should extend by analogy the above principle to the words "any other circumstance' used in section 61 of the MCA. It would seem that the court is unlikely to do so bearing in mind that even where a respondent has failed to put up a reply to a petition, he is normally still given notice of the hearing by the court. Moreover, it is hard to imagine, in the context of the situation in Nigeria, any party to a monogamous marriage who does not know he or she has a right to defend a petition, bearing in mind that parties to such marriages are mostly literate persons and at times highly educated. It is equally uncertain whether temporary poverty of the respondent which precludes him from defending the petition until decree nisi would be regarded as 'any other circumstance' for the purpose of rescinding the decree. I submit that there is no reason why it should not. It is equitable that such poverty, provided it is genuine, should come within the phrase, bearing in mind the increasing prohibitive cost of divorce, and litigation generally.

Omatsola's case is also instructive here because it establishes by implication that the respondent's objection to ancillary reliefs, for example, custody of the children, does not amount to non-objection for the purpose of granting a decree of dissolution. This approach appears to be in keeping with the Act as it speaks only of 'does not object to a decree being granted'. Does it amount to non-objection if the respondent in his reply denies the facts alleged by the petitioner as constituting evidence of the irretrievable

[49] (1952) 1 All ER 858 at 863-4

breakdown but at the same time cross-petitions seeking a dissolution on some facts stated in his own. In principle, this should be regarded as 'non-objection' because his reply is merely, a denial that the marriage has broken down as alleged and as seen by the petitioner. To hold otherwise is to ignore the import of section 15 (2) (e) of the Act. This section does not speak of non-objection to the allegation made by the petitioner which is the purpose of denial in a reply. It merely speaks of non-objection to granting a decree that is to say it does not bother on the merits or faults of the marriage but on agreeing that the marriage should come to an end.

Need to Make Section 15 (2) (e) Clearer

The sub-section once more provides as follows:

> That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted (underlining mine)

The aspect of this sub-section that needs to be made clearer, if the clarion call to reform the Nigerian MCA is granted, is the word 'decree' contained in the sub-speciation. Does it refer to decree nisi or decree absolute? If it refers to decree nisi, it means a respondent cannot be allowed to raise any objection to the granting of the dissolution of the marriage after the decree nisi has been made. But if it refers to decree absolute, it means the respondent can still raise objection even after the decree nisi but before the decree absolute is made. The status of husband and wife existing between parties in matrimonial proceedings persists until decree nisi has become absolute. Again, the proceedings

between the parties cannot be said to have finally disposed of until the decree nisi becomes absolute.

But because of the clear and un-ambiguous provisions of Section 15 (2) (e) MCA Nigeria which speaks of the respondent not objecting to a decree being granted. Again by virtue of sections 57 and 58 of the same Act only one decree which is the decree nisi, of the dissolution of a valid marriage is necessary and this normally becomes absolute without the necessity of the court making a formal pronouncement of a decree absolute at the expiration of the three months from the making of the decree nisi. This being so, it means that the decree being referred to in Section 15 (2) (e) could only mean the decree nisi. It is hoped that the MCA, Nigeria when reviewed will take care of such existing cases of unclarity and ambiguousness.

On paragraph (f) of sub-section 15 (2) of the MCA Nigeria still on separation, a marriage is deemed to have broken down irretrievably if the parties have lived apart for at least three years immediately proceeding the presentation of the petition and the decree can be granted even if the respondent object to its being granted. Worthy of note is that while the rule of making separation *simplicite*r a basis for dissolution of marriage requires period of three years in Nigeria, the period requires in England and Australia, where Nigeria borrowed the law, is five years. What explanation could be offered for making the period shorter in the case of Nigeria? The African setting and the traditional attitude of Africans go a long way to explain the difference. In Africa, litigation in regard to matrimonial matters only comes as a last resort and it invariably takes place only after family intervention has failed.

Again while the Nigerian Act as well the English Act use the words 'lived apart', the Australian Act uses the words 'have separated and thereafter have lived separately and apart'. The Canadian Act uses the phrase 'living separate and apart'. The question is whether all these foregoing phrases mean different things. What should be adopted while reforming the MCA, Nigeria to suit Nigeria and equally meet international best practices?

Denning, LJ in the case of *Hopes v Hopes*[50] while commenting on the above phrases stated:

> The simple intention of the Act of 1925 was that a maintenance order was not to be enforceable whilst husband and wife were residing with one another or cohabiting with one another, but only whilst they were living apart or separately and apart. This distinction is conveyed by various phrases. The parties must not be 'residing with' one another: they must be living separately and apart or living apart from one another: they must be living separately and apart or they must not be cohabiting with one another. All these phrases mean the same thing to my mind. At least I can see no sensible distinction between them. They all express the fact of separation.

From the foregoing, all that is required is *de facto* separation. This factum separation could occur even though the parties are living under the same roof provided they are living as separate households. This is by virtue of Section 15 (3) of the MCA, Nigeria, which states as follows:

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[50](1948) All ER 920

> For the purposes of sub-section 2 (e) and (f) above, the parties to a marriage shall be treated as living apart unless they are living with each other in the same household.

Denning, LJ made a classic exposition of the above when he stated as follows:

> How, can anyone say that, at one and the same time, a wife is residing with her husband and that he has deserted her? She may be residing at her husband's house but she is not residing with him.

The truth is that for the spouses to live as separate households, they must have brought cohabitation to an end. In *Naylor v Naylor*[51], following a quarrel, W cast off her wedding ring. Although H and W and the children lived in the matrimonial home, the spouses lived separate lives. He slept alone, W performed no wifely services and there was complete absence of family life. It was held that W who caused the state of affairs was in desertion

A similar case was *Shilston v Shilston*[52] where after a violent quarrel W moved into a separate bedroom and denied H his marital rights. H also kept his own rations in his own room and the only meal he usually had in the bungalow was breakfast which he cooked himself. W also made it clear by letters to H that she did not intend to have anything to do with H again. It was held that W was in desertion. It is worthy of note that the fact that W denied H sexual intercourse will not bring cohabitation to an end so long as other marital rights are exercised and wifely duties are performed. In *Weatherly v*

[51] (1961) 2 All ER 129
[52] (1945) 174 LT 105

Weatherly[53] for two years, W refused H sexual intercourse although she continued to prepare his meals and they went out together socially. For the next two years successively W refused to have anything to do with H. It was held that there had been no desertion during the first two years because cohabitation had not ceased then, it only ceased during the next succeeding two years. However, it should not be taken that denial of sexual intercourse has no part to play in desertion. If the spouses are already living apart, refusal of intercourse may amount to evidence of animus deserendi.

Another issue which should not be allowed while reforming the MCA, Nigeria, is the law in some matrimonial jurisdictions, like Australia, where prior co-habitation is not considered necessary before spouses could be held to have lived apart. In an Australian case of *Mradakovic v. Mradakovic*[54]**,** H who was resident in Australia married W who was then living in Yugoslavia, by proxy. When W arrived in Australia, she was met by H. After seeing H's home and discussing her future with him, W decided that H was good enough for her. She spent only one night at H's home during which they slept in separate rooms. After five years, W petitioned for divorce. It was held that the parties had lived separately and apart for the required period. The presiding judicial officer, Jenkyn, J. stated *inter alia* as follows: '…so a husband and wife who part at the church door as the result of an agreement, express or implied, for separation have 'separated'.

8.3 Failure of the MCA, Nigeria to Define Simple Desertion

As part of the amendments and reformation which the Nigerian Matrimonial Causes Act (MCA) needs, it is submitted that simple desertion be given an express

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[53] (1947) 1 All ER 563 H/L
[54] (1966) 7 FLR 427

definition as the Act did for Constructive desertion. The following could be a guide in formulating a suitable definition of a simple desertion.

According to[55] Lord Merrivale in the case of *Pullord v Pullord*[56], 'desertion is not the withdrawal from a place, but from a state of things.' The state of things here is a complete cessation of cohabitation. Thus, there can be dissertation (simple desertion) even though the spouses are living under the same roof, so long as they are living as separate households. In the case of *Bull v Bull*[57], W deserted H. After about twelve months, W returned to the matrimonial home at H's request, cooked his meals and did his clothe mending. However, apart from these, there was a little communication between the two of them and this situation persisted until the petition was presented. There had been no sexual intercourse between them since 1936. He petitioned alleging desertion but it was held that there had been no desertion since there was no total cessation of matrimonial life. Similarly, in *Hopes v Hopes*[58] intercourse between the parties had ceased and they slept in separate bedrooms. Although they quarreled frequently and the wife refused to wash or mend clothes for the husband, she cooked for him and he continued to have common meals with the family and shared the rest of the house with his wife and children. The husband eventually left the matrimonial home. It was held that as there was still one household, the wife was not guilty of desertion. On the other hand, in *Walker v Walker*[59] the parties lived in the same house but the wife withdrew to a

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[55] Internet Articles: Statutory Marriage and Desertion http://www.marriage dissolution.org.uk/167 (Last Accessed Jan 10, 2010)

[56] (1923) p. 18 at 21

[57] (1953) 2 All ER 601

[58] (1948) 2 All ER 920

[59] (1952) 2 All ER 139

separate bedroom, which she kept locked. She refused to perform any domestic duties for her husband, who therefore did household jobs for himself. He had most of his meals outside but on Sundays, the parties were compelled to use the same kitchen, though at different times. They communicated with each other by the exchange of notes. It was held that the parties were not living together in the same household and that the wife was therefore guilty of desertion.

As earlier stated, mere refusal of sexual intercourse, (though it may be evidence of cessation of cohabitation, and if unjustified could amount to a just cause and therefore constitute the basis for constructive desertion) does not of itself amount to desertion, particularly if other matrimonial rights and duties still take place between the spouses. Once there is cessation of cohabitation, the fact that spouses said 'Good Morning' to each other would not prevent a finding of simple desertion. In *Powell v Powell*[60], the court found for the wife that 'in March, 1919, her husband forsook her bed, avoided her society, shut himself in a separate part of the house, refused her access to it and told her that he was introducing another woman and this continued until November 1921 when he found rooms elsewhere and left the house'

It was also established that H wished W 'Good morning' during the above period, but it was nevertheless held that H had been in desertion (simple desertion) for at least two years which was the minimum period required under the then applicable Matrimonial Causes Act, 1857 of England.

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[60] (1922) 1 All ER p. 278

Again where spouses are forced to live in the same apartment and in circumstances in which no marital services are necessary and therefore there could be no *factum* of separation, simple desertion will start as soon as it becomes possible for them to live apart and the respondent shows the necessary animus. In *Beeken v Beeken*[61] H and W were imprisoned by the Japanese in china. They occupied a twin-bed in the same room. W formed an attachment to another man, X, and refused H sexual intercourse. She also performed no wifely duty and spent most of her time with X. In December 1942, W told H that her attitude would not change towards him. In 1943, the spouse were moved into different camps. In March 1944, W visited H and told him that she was going to marry X. The parties were released in 1945 and they returned to England where they lived separately until the presentation of the petition by H on the ground of W's desertion. It was held that it was doubtful whether there was any desertion up to the end of 1942 because the parties were living together *albeit* by compulsion and even though no matrimonial duties were being performed. The court also added that although the parting in 1943 was involuntary and since *animus deserendi* had supervened this involuntary parting in 1944 when W told H that she was going to marry X, H was entitled to a decree because three years had expired since then. Furthermore, where the *factum* of separation is imposed on the parties, there could be no desertion unless it is clear that the respondent intends to desert the petitioner at all events. In the unreported case of *Wachukwu v Wachukwu*[62]**,** W also a medical practitioner of Western State origin and H, a legal practitioner man of East Central State origin. They were married in Dublin in 1962 and lived together there until December 1962 when H returned to Nigeria and set up legal

[61] (1948) All ER p. 302

[62] (Unreported) Suit No 1/18/70 delivered on 30th July 1970 by Ibadan High Court

practice in Aba in the East Central State. W returned to Nigeria in October 1963 and on arrival she took up medical practice in Ibadan, Western State. According to W, it was agreed between H and herself that on arrival in Nigeria, H would set up legal practice and settle down with W in Lagos and that he would also approach her parents for the performance of customary marriage rites (even though the parties were already monogamously married). Furthermore, it was established that the respondent, visited the petitioner occasionally (though inadequately according to the petitioner) since the petitioner's arrival in 1963 until December 1965 when communication between them totally ceased. It was also deposed that during one of these occasional visits, the petitioner became pregnant by the respondent and gave birth prematurely to a set of twins a boy and a girl in June 1964, but unfortunately the boy died on the day of delivery. The petitioner also alleged that the respondent failed to provide her with adequate maintenance and cared little for her parents. The facts relied upon were simple desertion for one year and separation for at least three years both of which are governed by Section 15 (2) (d) and (f) respectively of the Nigerian MCA. On the question of simple desertion, the learned trial judge, Aguda, J. found that this had not been proved and therefore the petition failed on that ground. However, the court went on to find that the spouses had lived apart for at least three years and proceeded to grant decree on the basis of this.

The reasons for the court's findings are illuminating and very interesting. In holding that simple desertion had not been established, the Judge stated as follows:

> The view I take is that a petitioner who is relying on paragraph (d) i.e desertion of Section 15 (2) must prove desertion as was known under the existing law before the Act came into operation. As it is well known,

> desertion is the separation of one spouse from the other with the intention of bringing cohabitation between the parties permanently to an end without reasonable cause … I take judicial notice of the fact that there was a military coup in this country in January 1966, and that it became risky to travel from Eastern Nigerian as it then was, to Ibadan. This is a matter of public history (Section 73(2) of the Evidence Act). The Civil War ended in January 1970 and then this petition was presented in May 1970. There is no evidence that the petitioner made any efforts whatsoever to trace the respondent and to resume cohabitation with him after the end of the civil war… Even assuming that the respondent stopped paying occasional visits to the petitioner, there may be evidence of the *factum* of desertion but I will still require evidence of animus *deserendi*: I am left in very serious doubt as to whether the separation in this case was not a compulsory separation in which case there would be no desertion.

Thus, the learned Judge found that the military coup and the civil war which took place between January 1966 and January 1970 imposed a compulsory separation on the parties as to make it impossible to hold that the respondent had the necessary animus deserendi. The court did not consider whether the animus deserendi still continued despite the compulsory separation which supervened as a result of the military coup and the civil war. A supervening compulsory separation would not by itself alone terminate an existing desertion if there is evidence that the respondent would still have continued to desert the petitioner had the supervening events not taken place.

In *Czepeck v Czepeck*[63], H and W were Polish nationals and they lived in Poland. In 1935, W deserted H and the 2nd World War 1939-1945 made it impossible for W to join H who was then in the Polish army. After the war,

H settled in England, while W remained in Poland. W wrote to H that she had married Y and has had two children by him. H replied that he would never return to Poland and would apply for a decree of dissolution, and did so. It was held that W's intent to desert H continued notwithstanding the compulsory continuation of the separation brought about by the war. It was also held that although H had shown by his letter an intention not to resume cohabitation with W, this did not terminate the desertion since W herself was still determined to resume cohabitation with him. The court was probably right in not considering this point in Wachukwu's case above since on the evidence before the court, communication ceased between the spouses in December 1965 and the military coup which was followed by the civil war took place on the 15th January 1966, so that the interval between the two events was too short to be able to determine when precisely the alleged desertion began. On the question whether the spouses have lived apart for a continuous period of three years within Section 15 (2) (f) of the Act, the court said:…

> The language of paragraph (f) of Section 15 (2) is quite different from that of paragraph (d). It only requires the parties to "have lived apart" from each other "for a continuous period of at least three years immediately preceding the presentation of the petition" Now on the evidence, I have no hesitation in coming to the conclusion that the petitioner and the respondent have been living apart from each other since

[63] (1962) 3 All ER 990

> at least January 1966; and this petition was presented on May 7 1970. But then, there was a civil war of which again, I must take judicial notice under Section 73 (2) of the Evidence Act … The question that arises is whether I should discard the period of civil war. If I do this, then the facts of this case do not come within paragraph (f). However, in my view, I cannot do this on a proper interpretation and intendment of the Act.

From the foregoing, simple desertion may be defined as the unilateral withdrawal from cohabitation by one spouse, without just cause and with the intention of bringing cohabitation permanently to an end.

The Nigerian MCA has already defined constructive desertion in its Section 18 as follows:

> A married person whose conduct constitutes just cause or excuse for other party to the marriage to live separately or apart and , and occasions that other party to live separately or apart, shall be deemed to have willfully deserted that other party without just cause or excuse, notwithstanding that the person may not in fact have intended the conduct to occasion that other party to live separately or apart.

It is my contention that just like Section 18 of the existing MCA, Nigeria, has defined constructive desertion, there is obvious need while reviewing and reforming the Act to equally define simple desertion as already analyzed in this work. By so doing, desertion which by Section 15 (2) (d) of the existing MCA constitutes one of the express species of the ground of dissolution of marriage by the court, would have been defined utterly.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9. 0 Conclusion

This dissertation work has researched on the Nigerian Matrimonial Causes Act (MCA) and made findings on issues that constitute problems since the take-off of the Act in 1970. All the matters-arising from the Act which I called problems and criticisms, reinforced the need and the agitations to review and reform the Act. The findings could be summarized as follows:

The research work first of all made a finding that the Nigerian MCA was a product of the military and that since military regimes constituted a reflection of a failing society, the need for its reforms is undoubtful. Again, the work discovered that western values unfortunately formed the basis of some provisions of the Nigerian MCA. Furthermore, the MCA only effected a partial break with the English Law. The Nigerian Act was based on the MCA of several parts of common wealth countries. The work submitted that reliance on foreign source materials will drastically reduce if the MCA is duly reviewed and reformed. The Nigerian MCA occasioned some gender discriminations in the adjustment of rights in marital property in the event of divorce. Hue and cry on such discriminations followed. The MCA should be reviewed to provide 50/50 formula or a situation near it in the adjustment of marital property rights.

On maintenance, the existing Nigerian MCA empowered the competent courts to make two types of orders, *viz*: Maintenance after dissolution of marriage or maintenance pending the disposal of divorce proceedings. The problem with the present MCA is that

the principles guiding the courts in making maintenance orders were not made mandatory. The work therefore recommended that in view of the vital nature of the financial aspect of divorce, the MCA of Nigeria be reformed to make the guiding principles mandatory thereby making this very important area of our Law no longer be based on the whims and caprices of the presiding judges. The work discussed what it called arbitrary powers given judges by the existing MCA and the resulting hardships, discrimination and marginalization. The work explored how the arbitrary powers were checked in foreign jurisdictions whereby the MCA of such countries provided the needed guidelines that the courts mandatorily follow in making orders and awards. The work therefore stated that there is urgent need to reform the MCA of Nigeria in such a way to bring it up to such international best practices.

The work equally researched on the failure of the Nigerian MCA to define marriage. It discussed the validities of statutory marriage, its legal effects, and propounded what it considered suitable definition of marriage for Nigeria.

There is clamour for a definition of marriage that would accommodate same sex marriage. The work submitted that for countries that have legalized same-sex marriage, two different definitions of marriage be formulated, one for heterosexual marriage and the other for same-sex marriage. The work notes that for Nigeria, same-sex marriage is a taboo and that the country's National Assembly has finally outlawed it and made it a criminal act and that Mr. President has already signed the bill into law.

The work equally made a finding that the present MCA of Nigeria has not introduced an exclusive breakdown theory, as is the case in England, where all fault-based grounds of dissolution of marriage have been expunged from its MCA. The work sampled both old

and recent decided cases in Nigeria making it evidently clear that the Nigerian MCA has not done away with fault principle of dissolving marriages. The work researched on whether, the MCA Nigeria contains only one ground of divorce or many grounds. The work made a finding that the eight paragraphs in section 15 (2) (a) to (h) which the marginal note called grounds should be regarded as facts or species of the breakdown. The work therefore recommended an urgent reform whereby the Marginal Note to Section 15 (1) of the present MCA of Nigeria should read 'Ground' not 'Grounds', for dissolution of marriage and that by so correcting it, the confusion and energy dissipation it has caused the Act would abate. On the criticisms against the MCA of Nigeria on its provision of three years separation in Section 15 (2) (f), the work recommended five years separation for Nigeria in view of the fact that England and Australia from where the Nigerian MCA originated are operating a minimum of five years separation to ground granting petition for divorce without requiring consent or objection from the respondent.

The work noted that the Nigerian MCA still contains both absolute and discretional bars and that they resulted to contradiction and absurdities. For instance, the living apart provisions under Section 15 (2) (e) and (f), it is uncertain what the petitioner must condone, connive at or collude with, to absolutely bar his or her petition. The work therefore submitted that since Nigerian divorce law (MCA) is still running both fault and breakdown principles, the bars should apply only to the sections relating to faults, to avoid cases of contradiction and absurdities. The work examined incapacity to consummate and wilful refusal to consummate marriage and noted that the Nigerian MCA provided that wilful refusal must persist to the commencement of the hearing. The

work therefore recommended that while reviewing and reforming the Act, be it stated that the refusal needs only persist to the date of the petition because Section 21 of the present MCA of Nigeria if not carefully interpreted, may work injustice. Another flaw of the Act is that by making wilful refusal a ground for divorce while incapacity remains a ground for annulment, the Act did create a special problem for counsels to the parties.

The work equally dealt on the jurisdictional problems (flaws) emanating from the Nigerian MCA. One of the findings is that by Section 2 (1) of the Act, a petitioner who resides in any part of Nigeria is allowed to institute divorce petition or any of the matrimonial causes in any part of Nigeria, and that this has been abused many a time by mischievous litigants. The work therefore called for an urgent review and reform of the Nigerian MCA to disallow all sorts of abuse of court process occasioned by the Act.

One other flaw noted in the Nigerian MCA is that it did not define domicile and that it made our courts to fall on received common law and for persuasive authority on the Australian MCA on domicile. However, the work researched and found an interesting and easy-to-understand meaning of domicile to be one's permanent abode or home, and that whether he goes to the North, South, East or West, he returns to the place.

There is also in the Nigerian MCA the problem of going to only High Courts for all matrimonial causes. The work submitted that the present MCA of Nigeria be reviewed and reformed to confer jurisdiction on Magistrate's Courts to handle at least ancillary reliefs such as maintenance or making order for judicial separation in addition to the present powers of enforcing payments of maintenance order by a High Court. In the alternative, let every State and the FCT Abuja create Family Courts as contained in

the Nigeria's Child's Right Act, 2003. The jurisdiction of the family courts should centre only on matrimonial causes to lessen the load of High Courts of States and the FCT Abuja which presently adjudicate exclusively all matrimonial causes. Again, there is this finding that under the present MCA of Nigeria, an independent action for ancillary relief is outside the jurisdiction of the High Courts. This is because of Section 114 (1) (a), (b) and (c) of the MCA which limited matrimonial causes to mean only proceedings for a decree of dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage. The work therefore submitted that the Nigerian MCA needs clear reform that would make it allow filing for independent ancillary reliefs like Maintenance and custody. This is necessary considering the fact that in some situations, a spouse in a troubled marriage may not wish for an outright break of the marriage. Such spouse should be given the option of being allowed by the Divorce Law to file a relief like maintenance as an independent matrimonial suit.

On contemporary issues revolving around the marriage institution, the work examined such issues like same sex marriage, hermaphrodites and pseudo-hermaphropdites, trans-sexualism, single-parenthood, in-vitro fertilization and surrogate motherhood and noted that they constitute part of the reason why the Nigerian MCA needs to be reviewed and strengthened.

The work further made a finding that the Nigerian MCA failed to define simple desertion but only defined constructive desertion. The submission here is that as part of the amendments and reformation which MCA, Nigeria, needs, simple desertion should be expressly defined in the Act. From the analysis in the work, simple desertion may be defined as the unilateral withdrawal from cohabitation by one spouse, without just cause

and with the intention of bringing cohabitation permanently to an end, whereas constructive desertion has already been expressly defined in section 18 of the MCA, Nigeria.

By way of final conclusion, suffice it to say that in view of the fact that the Nigerian MCA has remained static without review for about 44 years now in spite of all the flaws and other problems emanating from it since its promulgation, the points marshaled out in this work should act as catalyst to review and reform the Act.

9.1 More Recommendations/Intervention Strategies

9. 1 .1 Reform No. 1: Express Definition of Marriage Suitable to Nigeria

As earlier stated in this work, the Nigerian Matrimonial Causes Act (MCA) otherwise called CAP M7 LFN 2004 should be reviewed and reformed to come out with an express definition of marriage suitable to Nigeria. I therefore propose such definition of marriage as follows: That

> Marriage is a voluntary union intended for life between a male person and a female person, both being sane and of marriageable age or between a male person and one or more female persons, simultaneously, both being sane and of marriageable age.

The essential elements in the above definition are:

(i) Voluntary union

(ii) Intended for life

(iii) Between a male person and a female person

(iv) Between a male person and one or more female persons simultaneously

(v) Both being sane and of marriageable age.

i) Voluntary Union

This means that for a marriage to be valid, it must be voluntarily entered into by the parties. It must not be by duress, fraud or misrepresentation. This element was well covered by Lord Penzance in his classic definition of marriage while delivering judgment in the case of *Hyde v Hyde*[1]. Lord Penzance stated as follows:

> I conceive that marriage, as understood in Christendom … may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

Though some elements of this definition are faulty, it well provided for the volition of parties to the marriage. It is the volition to marriage that usually leads to a promise to marry and the acceptance of the promise and of course what follows is the marriage *perse*. The promise to marry could be oral, in writing or by conduct such as exchange of engagement ring or fixing a date for marriage. A breach of this will give rise to a common law court case for breach of promise to marry. The aggrieved party here is however entitled only to claim for damages not specific performance. This is because it would amount to breach of public policy to order specific performance. The aggrieved could also claim damages from a third party who in any way induced the breach of the promise to marry. However, before the aggrieved party can succeed, the person must prove to the satisfaction of the court that there was a promise of marriage under the Law, and that the other party failed or refused to honour the promise. The above situation of a breach of promise to marry could happen in many ways. It could be outright refusal to conclude the marriage after entering into the agreement by failure to turn up at the

[1] (1886) L.R.I P & D 130

marriage Registry or the licensed place of worship where the marriage ceremony is to take place. A false or fraudulent misrepresentation to the other spouse that a marriage had been effected when this was not so, can equally constitute a breach of promise to marry.

In *Martins v Adenugba,*[2] the parties had agreed to marry each other. One day, the man took the woman to the marriage Registry in Lagos, and asked her to wait outside the building. He went inside and came out a few minutes later to tell the woman that they were now married. They later went for a church blessing of the union at St. Peter's church Lagos. She believed him and lived with him as the wife for three years before the purported marriage broke down. In fact, the woman's relatives were also of the impression that statutory marriage had taken place between both spouses. Later, owing to bad treatment by the man, the woman consulted a solicitor to institute divorce action. On enquiries, it was discovered that no valid marriage actually took place. The plaintiff brought action against the defendant for damages for breach of promise to marry the plaintiff in accordance with the provisions of the marriage ordinance or in the alternative, damages for fraudulent misrepresentation or a deceit whereby the plaintiff was induced to live with the defendant as husband and wife for a number of years. It was held by the court that the man's action amounted to a breach of promise to marry, and damages was awarded accordingly. Again in *Valier v Valier*[3], an Italian man was tricked by an English woman into marrying her at an English Registry. The man was not informed of actual purpose of their visit to the Registry. The woman lied to him that they were merely going

[2] (1946) 18 NLR 63

[3] (1925) 133 LT 830

to sign engagement papers. He never understood what was said or done because he was not conversant with English language. When he discovered what actually took place between him and the woman at the marriage Registry, he filed petition to nullify the marriage. He was granted the decree of nullity.

The case of *Aiyede v Norman-Williams*[4] illustrates that each case of alleged breach of promise to marry is treated at its own merit by the courts. In Aiyede's case, the plaintiff instituted action against the defendant for damages for breach of a promise of marriage. She stated that the defendant promised to marry her as far back as June 1954 and confirmed the promise by letters written to her between that time and 1956. Defendant contended that the promise to marry her was subject to the consent of his parent, which never came. It was also disclosed that the plaintiff was pregnant for defendant in 1953 and that before she delivered the child, both of them had requested the defendant's parent to grant their consent which they refused to give. It appeared that the plaintiff had written several letters then to the defendant, one of which indicated that the plaintiff considered the relationship to be at its end and she had thus left the defendant in the United Kingdom and returned to Lagos in 1956. Between then and 1959, neither of the parties resumed the relationship and the defendant having gotten married to another woman was sued by the plaintiff for breach. The court while finding as a fact that there was a condition-precedent, held that where promise is happening of a certain contingency, that contingency must happen before the promise becomes actionable. As the condition precedent was not fulfilled, the plaintiff cannot succeed.

[4] (1960) LLR 253

The case of *Ugbomah v Morah*[5] shows that age could be an essential factor for a party to successfully claim that there was a breach of promise to marry.

In Ugbomah's case, the plaintiff, a trader in Onitsha brought an action for breach of promise of marriage against the defendant, a clerk in the Post Office. Both parties exchanged promises of marriage in 1929 when both were still young. The plaintiff was 15 while the defendant was 17. They later quarreled in 1937 and were reconciled in 1938 continuing on the footing of persons contemplating marriage until the defendant broke off the relationship in 1939. The defendant contended that the promise of marriage was not binding, as he was a minor at the time it was made. The Court held that the defendant was underage in 1929 and thus could not make a valid promise to marry. However, the court went further to find that the subsequent promise made in 1938 after their reconciliation was good and binding in law. That the fresh promise to marry made after attaining majority was binding and could sustain an action for breach of a promise to marry.

The ***Interpretation Act***[6] in Nigeria though deficient in some aspects equally covered this element of the definition of marriage well like Lord Penzance did. The Act defined monogamous marriage as follows;

> A marriage which is recognized by the law of the place where it is contracted, as a voluntary union of one man, and one woman to the exclusion of all others during the continuance of the marriage.

[5] (1940) 15 NLR 78
[6] Cap 123 LFN 2004

But in the Marriage Bill proposed by the Nigerian Law Reform commission in 1981, marriage was defined as follows:

> Marriage is a union intended for life between (a) a male person and a female person, to the exclusion of all others, (b) a male person and one or more female persons.

The absence of the word voluntary in the above definition of marriage makes the definition incompletely right. The union must be voluntary and not by force or fraud[7]. Section 3 (1) (d) of the existing Matrimonial Causes Act (MCA) of Nigeria makes it clear that both parties to a marriage must voluntarily consent to the marriage. Where there is absence of consent or if the consent is obtained by fraud, duress, or if either party is mistaken as to identity or the nature of the ceremony or is of unsound mind, the marriage is void. The voluntariness or consent also to a degree extends to the parents of the spouses. For statutory marriage, parental consent is not necessary for validity of the marriage. The only exception is where either party to the statutory marriage is less than twenty-one years old. In that case, he or she must obtain written consent of the father, or if he is dead or of unsound mind or absent from Nigeria, that of the mother. If both parties are dead, or of unsound mind or absent from Nigeria, the guardian of such party can give the consent.[8] In a case where there is no parent or guardian of such party residing in Nigeria and capable of consenting to the marriage, after due inquiry, consent

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[7]S C Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publications, 2008)p. 13

[8]Section 18, Marriage Act Cap M6 LFN, 2004

may be given by a State Governor or the judge of the High Court of a State or the Federal Capital Territory, Abuja or any officer of or above the grade of Assistant Secretary in the Civil Service[9].

Again, where the person required to sign the consent is unable to write or insufficiently acquainted with the English Language or both, he will be required to place his mark or cross thereto in the presence of any of the following persons: any Judge of the High Court of a State or the Federal Capital Territory Abuja, an Administrative Officer, Justice of the Peace, Magistrate, Registrar of Marriages, Medical Officer in the service of the Government; Minister of religion[10]. From the foregoing, it is obvious that consent or volition of the parties to any marriage is indispensable and that by Section 3 of the Nigerian MCA, its absence makes the marriage void *ab-initio*. The following are some of the decided cases on the effect of false consent. In *H v H,*[11] the petitioner was a Hungarian and the respondent husband was a French citizen. This was at the time the communist took over the Government of Hungary. She the petitioner, was in Hungary and became apprehensive of her safety since people of her social class were freely arrested and put in jail. She being one from a wealthy and influential family, decided to leave the country and married the respondent in order to obtain a French passport that would enable her leave the country. With the passport, she traveled to England where

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[9] Ibid

[10] Section 19, Marriage Act Ibid

[11] (1935) 2 All ER 1229

she petitioned for nullity. The Court held that fear for life vitiated her consent purportedly obtained before the marriage and therefore granted her the nullity order sought.

The case of *Buckland v Buckland*[12] illustrates that a threat to one's liberty could make him or her not give his or her real consent. In that case, the petitioner who was falsely alleged to have had sexual intercourse with a Maltese girl married her because due to anti-British feelings at that time, he was advised that he was likely to be convicted and sent to prison for two years if he failed to marry the girl. It was held that since he did not commit the alleged act and there was a great to his liberty, he was entitled to a decree of nullity.

The case of *C v C*[13] was used to illustrate a wrong claim of mistaken identity of a party to marriage. In that case, the respondent before his marriage with the woman represented himself that he was a renowned boxer. The woman was influenced by that and she got married to him.

On discovering that he was not what he claimed to be, the woman brought action for nullity on the ground that she was mistaken as to the man she married. The Court held that her action would fail because she was mistaken as to the man's physical attributes and not as to his identity.

[12](1967) 2 WLR 1506
[13] (1949) NZLR 358

(ii) **Intended for Life**

I settled for this phrase in the definition of marriage after reading and digesting the opinions and arguments of many family law commentators like Professors E.I. Nwogugu, S. Poulter and L.J. Weitzman on the issue.

According to Poulter,[14] to retain the phrase 'for life' in Lord Penzance's definition of marriage is 'totally lacking in realism and purports to hide the perhaps unpalatable fact that our divorce rate, is currently showing an unprecedented increase'[15]. In the alternative, Poulter, suggested introduction of neutral words of 'indeterminable length of time' in place of a complete omission of the word, 'for life', from the definition by Lord Penzance.

Nwogugu[16] in his own comment on 'for life' phrase in Lord Penzance's definition stated as follows:

> This does not imply that the union should be indissoluble. The cardinal requirement here is that at the time of contracting the marriage, the parties intend that it should be for life unless dissolved earlier by a process prescribed by law.
>
> Weitzman, another legal expert in family law in his own comment was of the view that divorce has taken over from death in most countries, as a

[14] S Poulter '*The Definition of Marriage in English Law*" Modern Law' (1979) Vol. 42 Modern Law Review p. 409

[15] Ibid at 410

[16] E I Nwogugu, *Family Law in Nigeria (Ibadan: Heinemann Educational Books., 1974) p.* IXXXI

major terminator of marriages[17]. From internet sources,[18] fifty percent of all marriages in Canada has ended in divorce. Divorce rate is equally high in *US and UK*[19]. Here, in Nigeria, the situation is nearly the same. It is therefore not correct especially these days to say that marriage is for life. It is safer to say that marriage is intended for life as that provides for eventualities that might terminate the marriage before the life of any of the couples terminates. And that is why I preferred and recommended "intended for life" in my express definition of marriage in this work which makes case for review and reformation of the Nigerian's M.C.A.

(iii) **Between A Sane Male Person and A Sane Female Person**

This segment of the definition of marriage drives home the monogamous marriage which Lord Penzance actually contemplated in his definition of marriage in *Hyde v. Hyde*[20]. The two marital Acts in Nigeria namely the Marriage Act and the Matrimonial Causes Act as well as the Interpretation Act squarely took care of this segment of marriage definition, expressly or/and impliedly. Under this segment, the emphases is on one man and one woman who are sane becoming husband and wife. It does not admit of taking more than one wife during the subsistence of the marriage. If it happens, it amounts to the offence of bigamy[21] which attracts seven years imprisonment if convicted.

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[17] L J Weitzman, '*Equity and Equality in Divorce Settlements:* A Comparative Analysis of Property and Maintenance Awards in the United States and England: Resolution of Family Conflict: Comparative Perspective' (1982) Buttersworth Toronto, 450.

[18] Divorce: wwwrealwomenca.com July 2012 at 1 of 5, Accessed 18/8/12

[19] www.rnfc.org/edu 9702 at 01055, Accessed 18/8/12

[20] Supra

[21] Section 370 of Criminal Code, Nigeria

In *Towoeni v Towoeni*[22], *Lawal-Osula v Lawal-Osula*[23] and many other cases, the monogamous nature of Act marriage which this segment of marriage definition demonstrated was manifest. For instance, in Towoeni's case, Salami J.C.A. declared as follows:

> In parenthesis, it transpired during this appeal that the appellant has taken another woman for a wife. I wish to state, without any further assurance, that the purported marriage between the parties still subsisting, is not only bigamous but also invalid, null and void.

Another example of the cases that came up on Monogamous nature of Act marriage few years after the 1970 M.C.A. of Nigeria was *Nwankpele v Nwankpele*[24]. In the Nwankpele's case, the evidence of the petitioner was to the effect that she came across a letter to her husband respondent sometime in April 1971 by a woman who described herself as his wife. The husband admitted this fact, which made her to obtain the marriage certificate of the respondent and the said woman. This certificate bore the respondent's name as Nwankpele and the age stated in this certificate and later one was 28. The petitioner brought this petition praying for the annulment of her marriage to the respondent on the ground that the respondent was lawfully married to one Iyabo Nwankpele on 25th September 1968 and that the marriage was still subsisting and valid at the time he contracted the marriage with her on 4th January 1969. The court held that on the balance of probabilities, it seems that the 1968 wife was alive and not dead on 4th

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[22] [2001] 12 NWLR (pt. 727) 445 at 446-467
[23] [1993] 2 NWLR (pt. 274) 158
[24] (1972) 2 CCHCJ 101

January 1969 when the respondent went through the second marriage. That upon that, the marriage of 4th January is void under Section 3 (1) of the MCA.

The other aspect of this segment of the definition is the need to qualify the male and the female persons who become husband and wife, by expressly stating that such male and female must be sane persons with sound mind for the marriage to be valid[25]. Again, it is submitted that the phrase, 'to the exclusion of all others' be done away with in this segment of the marriage definition.

In other words, this segment of the definition should simply be 'between a sane male person and a sane female'. The reason for the removal of 'to the exclusion of all others' is that it is already implied.[26] It is also this segment of the marriage definition that has actually protected marriage institution from being bastardized by the gays, lesbians collectively called Homosexuals. By this segment, woman to woman marriage (Lesbianism) and man to man marriage (gayism) are ousted as marriage, within the jurisdiction where the definition operates, in this case, Nigeria. In other words, this segment protects the traditional concept of marriage called heterosexual (sexual attraction between people of opposite sex) and sexual behaviour between people of same sex. In *Okonkwo v Okagbue*[27], the Nigerian Supreme Court defined marriage as union of a man and a woman, in accordance with this segment of the definition of marriage. By this segment of the marriage definition, the practice in African native custom like in some Igbo societies where there is a type of woman to woman marriage is equally ousted. The

[25] Section 3 (1) (d) (iii) of the MCA Ibid
[26] Ifemeje, op cit, p.38
[27] (1994) NWLR (pt. 368) p. 301

Supreme Court of Nigeria pronounced on such African woman to woman marriage in the case of *Meribe v Egwu*[28] as follows:

> In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage; and if there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso 14 (3) of the Evidence Act and ought not be upheld by the court.

Nigeria as a sovereign nation has now through its National Assembly outlawed and criminalized any marriage not within this segment of the definition of marriage, though the country's President is yet to sign it into law as at date of this Dissertation work.

(iv) **Between a Sane Male Person and One or More Sane Female Persons Simultaneously**

This segment of the definition of marriage being recommended in this work takes care of the polygamous marriage otherwise known as customary marriage which includes Islamic marriage. It is a popular and very common type of marriage not only in Nigeria but the African continent. By this type of marriage, there is no limit to the number of

[28] 28 (1976) 1 All NLR 266

wives a man takes simultaneously except in Islamic customary law, where the maximum of four wives is the law.

It is important to note that this segment of the recommended marriage definition is totally absent in Lord Penzance definition of marriage or even the definition of marriage contained in the Interpretation Act. A lacuna was therefore created as it is only monogamous marriage that is statutorily recognized under the Marriage Act, Matrimonial Causes Act and the Interpretation Act of 1964. This segment of the marriage definition that would recognize the customary law marriages very popular in both Northern and Southern Nigeria was first formulated by the Nigerian Law Reform Commission which took place in 1961 did not succeed thus leaving the lacuna unfilled. This work has further reformed and improved the suggested re-definition of marriage in Nigeria by the Law Reform Commission. By this work, the word 'sane' has been added to qualify the persons that would qualify to become the husband and the wives. Again the word 'simultaneously' has been included in the marriage re-definition to make it clear that the man is not marrying them one after the other but at the same time.

Finally when the lacuna is filled by way of making statutory these customary law marriages in Nigeria, it would be followed up with the essential and formal validities and requirements.

9.1.2 Reform No 2 – Mandatory Seminars for Marriage

It is my position in this work that it should be expressly provided in the country's MCA that marriage must only be for men and women who are ready to undergo mandatory training by way of seminars on how to engage in an enduring, stable, mature

and respected marriage. When any crises, if at all, comes, it could be managed and solved without allowing it to break down the marriage irretrievably. My case here is that with proper seminars, couples could achieve a stable and respectful marriage which leads to a stable and respectful family. With stable and respectful families, there will be stable and respectful nation.

Ifemeje in her book[29] described marriage as the hall-mark of the society. That means that marriage mars or makes any society. It mars the society where marriage fails whereas successful marriages make the society. The training being advocated here is not totally new. Typical examples are as follows:

(a) **CMS Women Marriage Training**

Though defunct, the Church Missionary Society (CMS) today known as the Anglican Communion used to run mandatory training which any woman in the church aspiring to marry must undergo. It was initiated and run by the early white missionaries who came from England, United Kingdom. One of the centres existed in Awka, Anambra State and the site was the present Bishop Crowther Seminary ground Awka situate along what is today known as Works Road, Awka. The training Centre was nicknamed 'Ama-Nwanyi' meaning Women's Centre. Virtually all married women of Anglican communion whose marriage is not less than 50 years today attended the popular Ama-Nwanyi Training Centre for marriage and the pleasant result was that divorce or marriage instability was totally absent in their matrimonial homes.

It is my submission that this type of training be resuscitated and replicated in all institutions whose duty it is to celebrate marriages for couples. However, in view of the

[29] Ifemeje, op cit, p.2

modern nature of our today's society, it is necessary that the training should no longer be for women alone. The male partners should equally be grounded on how not to allow their marriage to fail or crumble. It is in accordance with the latin maxim- *Nemo dat non quid habit* meaning that one does not give what one has not. The partners will have what it requires to make marriage successful when properly and adequately trained and equipped.

(b) **Mothers' Union, Catholic Women Organization, Fathers Fellowship and Catholic Men Organization**

All the above organizations are not defunct. They are presently in existence in various churches that are licensed to officiate and celebrate marriages. The Mothers Union belongs to the Anglican communion, the Catholic Women Organization belongs to the Roman Catholic church. The Fathers Fellowship belongs to the Anglican communion, while the Catholic Men Organization belongs to the Roman Catholic church. These organizations have noble goals and objectives and before one is admitted into any of the bodies, he or she undergoes some compulsory preparations and trainings. However, they are for persons who are already married. Though the trainings do not last for years before one gets admitted into any of the bodies, the admitted members are from time to time subjected to ad hoc trainings, workshops, conferences and seminars. Their objects include:

(i) Upholding Christ's teaching on the nature of marriage and promoting its wider understanding.

(ii) To encourage parents to bring up their children in the fear of God.

(iii) To promote conditions in society favourable to stable family life and the protection of children.

(iv) To help those whose family life has met with adversity.

Again, the boys and the girls in the churches have similar organizations where they are admitted, for preparations and trainings for married life and other challenges of adulthood.

(c) **Marriage Seminar and Counselling**

This form of training still obtains till date for marriage couples. It is done by the church institutions and other authorities like marriage registrars, charged with celebration of marriages. But the problem is that they are done with laissez-faire attitude and not done with seriousness it deserved. This laissez-faire attitude is on the side of all involved. The parties (marriage partners) and the authorities marrying them officially handle the exercise as mere routine and formality. They take it that the marriage certificate must be issued even when the preparations, lectures and counseling sessions etc, are not completely and properly done.

At present, some of the churches and other authorities use diverse forms and programmes to prepare the marriage partners. But I submit that there are great rooms for improvement to get it right in saving the marriage from failure or what is officially known as irretrievable breakdown of marriages.

The text of a sampled Questionnaires to intending couple by one of the marriage authorities[30] is published as follows:

[30] Venerable C C Mgbemena (2012) Vicar St Paul's Parish Umuokpu – Awka, Anambra State

PROFORMA FOR MARRIAGE COUNSELING

QUESTIONNAIRE FOR SPOUSE

1. Full Name:
2. Date of Birth:
3. Village/Town/LGA:
4. Father's Name:
5. Mother's Name:
6. Occupation:
7. Rank/Position/Designation:
8. Highest educational qualification:
9. Annual Income or Grade level:
10. Hobbies:
11. Favourite Dress;
12. Favourite Food:
13. Favourite Drink:
14. Favourite colour (s):
15. Best Male Friend:
16. Best Female Friend:
17. Personal attributes
18. Personal Faults:
19. Turn on:
20. Turn off:
21. Loved Expression (s):

22. GSM No:

23. Pet Name:

24. Life ambition:

PROFORMA FOR MARRIAGE COUNSELING

PERSONAL QUESTIONNAIRE

1. Full Name:

2. Date of Birth:

3. Village/Town/LGA:

4. Father's Name:

5. Mother's Name:

6. Occupation:

7. Rank/Position/Designation:

8. Highest educational qualification:

9. Annual Income or Grade level:

10. Hobbies:

11. Favourite Dress;

12. Favourite Food:

13. Favourite Drink:

14. Favourite colour(s):

15. Best Male Friend:

16. Best Female Friend:

17. Personal attributes:

18. Personal Faults:

19. Turn on:

20. Turn off:

21. Loved Expression (s):

22. GSM No:

23. Pet Name:

24. Life ambition:

Benefits Derivable from Mandatory Training for Marriage

(a) Stable family

(b) Enduring Family

(c) Respected family

(a) **Stable Family:** This entails durability and growth of the marriage and the resulting family of the married couple. For the fact that the couple prepared themselves for the marriage by undergoing an organized training before entering into the marriage, they eschew and shun all destabilizing factors in their family life. The husband and wife in a stable marriage and family co-operate and live peacefully and enviably and where there is such co-operation, there is growth and progress.

By the training received, they will resist the faults which constitute grounds of divorce. For example, non of the couple will have thirst for adultery or fornication. On the part of the male partner, the practice of cruelty against the wife will be minimal or even absent. In such a situation or similar situations, there is bound to be stability in such a family.

(b) **Enduring Family:** This means that where husband and wife subject themselves to such a pre-marriage training which this work advocates, the marriage will endure, sustain and last. Where that is the case, the result would be enduring marriage, enduring family and indeed an enduring society. Such a family does not hit the rock. There is no separation or desertion be it constructive or ordinary desertion. Indeed, none of the species of the statutory ground of divorce or marriage dissolution will rear head in such an enduring marriage. It is a marriage that last even 'for life' as contemplated by Lord Penzance while defining marriage in the popular case of Hyde v Hyde. It will not be merely "intended for life" but would be truly a life-long union terminable only by natural and normal death (not premature death caused by reckless acts of a spouse).

(c) **Respected Family:** A well-trained couple would constitute and become a respected marriage and would produce a respected family and an aggregate of such respected families leads to achieving a respected society. That a marriage is a respected one means that it is exemplary. There is high level of discipline and respect and therefore such marriage earns people's respect and admiration. Again, a couple's marriage becomes a respected one when it is devoid of ridiculous act and omissions as well as other identical factors that lead to desertion, judicial separation or outright dissolution or divorce order.

It is therefore my submission that preparations and trainings for marriage partners and prospective mothers and fathers be provided for while reviewing and reforming the Nigerian Matrimonial Cause Act. The law should expressly make such training arrangements mandatory for all couples or prospective couples.

By so doing, it will curb divorce and matrimonial problems and reduce them to the barest minimum. The overall result will be happy and successful marriages and families/homes.

9.1.3 Reform No 3: Shift of Emphasis to Alternative Dispute Resolution (ADR) in Marriage Problems

The Alternative Dispute Resolution (ADR)[31] generally refers to the methods and procedure used in resolving disputes either as alternatives to the traditional system of dispute resolution by the courts or in some cases supplementary to such systems.

The origin of ADR is traceable to the African traditional setting rather than the court litigation approach of the western world. In the olden days, in Africa, most disputes were resolved through what we now call ADR methods and this helped to maintain peace and create an enabling environment for cordiality and good neighbourliness.

In Western world, the evolution of ADR is very recent. Originally, the Western countries relied on litigation as means of settling disputes. Undoubtedly, the difficulties that followed litigation as means of settling disputes like undue delay in resolving simple commercial disputes over them gave room for shift of emphases to ADR.

ADR Mechanisms: Alternative Dispute Resolution (ADR) could take the form of reconciliation, conciliation, mediation, negotiation or mini-trial.

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[31] http://www.adr.org (Accessed Tues 24th July 2012)

Reconciliation: For matrimonial causes, the Nigerian Matrimonial Causes Act (MCA) has already provided for reconciliation as an alternative marital dispute resolution strategy by its section 11. The section provides as follows:

> It shall be the duty of the court in which a Matrimonial cause has been instituted to give consideration from time to time, to the possibility of reconciliation of the parties of the marriage, (unless the proceeding are of such a nature that it would not be appropriate to do so), and if at any time, it appears to the judge constituting the court, either from the nature of the case, the evidence on the proceedings or the attitude of those parties, or of either of them, or of counsel, of such a reconciliation, the judge may do all or any of the following, that is to say, he may:
>
> (a) Adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable any thing to be done in accordance with either of the next two succeeding paragraphs;
>
> (b) With the consent of those parties, interview them in chamber, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation.
>
> (c) Nominate a person with experience or training in marriage conciliation or in special circumstances, some other suitable person, to endeavour with the consent of the parties to effect a reconciliation.

Again, order 11 Rule 2 of the Matrimonial Causes Rules (MCR) provided that any document filed for the purposes of instituting action for matrimonial causes, shall not be effective, unless a certificate in accordance with Form 3 or Form 3A (whichever, is appropriate), is duly signed personally by the Solicitor to the party, and filed along with the suit. The effect of the certificate is that the solicitor has brought to the attention of the petitioner, the provisions of the Matrimonial Causes Act, on reconciliation and also notify him of an approved marriage guidance organization available to assist in effecting reconciliation.

The above provisions of the MCR and MCA on reconciliation though laudable have been criticized by learned authors. For instance, Ifemeje in her book[32] stated as follows:

> Much as it is conceded that this provision under consideration is laudable, as it aims at ensuring that ill-thought or hasty institution of matrimonial proceedings, is not allowed to go on, hence, at the early signs of hesitation and remorse, such parties ought to be given enough chance to retrace their steps. However, in real life, one discovers that as a result of our sociological background in Nigeria, before a petitioner sues for divorce, all possible avenues for settlement out of court, must have been explored and exhausted by the extended family members. Consequently by the time the divorce suit is filed, the petitioner has made up his or her mind

[32] Ifemeje op.cit pp. 204-205

> that the marriage has ended. The petition only serves the purpose of formal dissolution of the dead marriage. In view of the foregoing, it implies that section 11 of the Matrimonial Causes Act, in practice rarely achieves much, because the family members must have tried their best.

Conciliation[33]: This aims at bringing about conciliation between the disputing parties by means of compromise suggested by the Conciliator. Conciliation is provided for by the Arbitration and Conciliation Act of Nigeria. Sections 37 to 42 of the Act contained detailed provisions for conciliation.

The Nigerian Matrimonial Causes Act (MCA) did not distinguish conciliation from reconciliation. For example, section 11 (c) of the Act provides as follows:

> Nominate a person with experience or training in marriage conciliation or in special circumstances, some other suitable person, to endeavour with the consent of the parties to effect a reconciliation.

But the difference was clearly explained by Ifemeje *in her book*[34] where she stated as follows:

> While reconciliation is aimed at re-uniting the parties and preventing them from dissolving their marriage, conciliation on the other hand, aims at a different purpose. It comes into operation where the parties have decided to go ahead and dissolve their union

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[33] http://www.marriageconciliationnigeria.org (Accessed 24th July, 2012)
[34] Ifemeje op cit pp. 204-205

The learned author rightly opined that conciliation should come in where reconciliation has failed because according to her 'it facilitates the reaching of a mutually agreeable decision on those matters, which result from the past divorce'

With conciliation post-divorce family devoid of hostilities ushered in by vexed post-divorce issues like Custody and Maintenance are handled amicably with conciliation/mediation.

It is therefore part of my submission in this work that the existing MCA of Nigeria during its review and reform should draw a distinction between these two important terms – Conciliation and Reconciliation. Conciliation as an ADR should be fully incorporated into the MCA.

9.1.4 Reform No. 4: Mandatory Use of Psychologists and Sociologists in Divorce Proceedings

In view of the fact that children of any divorce or separated marriage are indeed the victims of the unfortunate dissolution or separation order of the Court, and considering the fact that marriage itself ideally has much to do with Sociology and Psychology, this work advocates that while reviewing and reforming the existing MCA of Nigeria, let the use of psychologists and sociologists be expressly made mandatory in marriage and divorce matters, particularly in court matrimonial proceedings.

The instant MCA in its Section 11 (1) (c) provides as follows:

The judge may nominate a person with experience or training in marriage conciliation or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation. The above provision, though not fully satisfactory, has recognized and given room for use of professionals which the sub-section calls 'person with experience or training in marriage conciliation' or 'some other suitable person'. By their professional training, the psychologists and sociologists fall into the above categories of persons provided for by the law. However, the wordings of the sub-section should be improved to include reconciliation whereby the professionals make effort to prevent the divorcing/separating parties from going further in the suit while the word conciliation already contained in the sub-section should be retained to enable the professionals counsel the already divorced or bound to divorce parties and by so doing ensure a hitch-free post-divorce arrangements for themselves or/and their children. Again, this work is recommending the use of the word 'shall' in place of 'may' as contained in section 11 (1) of the Act; '---the judge may do all or any of the following, that is to say, he may…'

If the word 'may' noted above is replaced with the word 'shall', it becomes mandatory that the psychologists and sociologists as well as other suitable professionals would be part and parcel of matrimonial proceedings mandatorily.

Again the Matrimonial Causes Rules (MCR) of Nigeria by its Order 11 Rule 2 recognized 'an approved marriage guidance organization' to assist in effecting reconciliation or conciliation where the Matrimonial suit must go on. The Rules provided as follows:

> Where a document to which this order applied is filed on behalf of a party who is represented by a solicitor, the document shall not be effective for the purpose of proceedings under the Act unless a certificate, in accordance with Form 3 or Form 3A (whichever is appropriate) and signed by the solicitor personally, is written on the document.

The certificate referred to in the Rules here ensures that the solicitor has brought to the attention of the petitioner the provisions of the Matrimonial Causes Act on reconciliation and also notify him of an approved marriage guidance organization, available for reconciliation.

The need for mandatory use of psychologists, social workers and assessors in matrimonial causes seem to have been captured by the Anambra State Child's Right Law[35] derived from Nigerian Child's Right Act of 2003. The Section[36] states as follows; with regards to constitution of the Family Courts at the High Court level:

> The members of the Court at the High Court level are to be appointed by the Chief Judge of the State. The Court shall be duly constituted if it consists of:
>
> (a) Judge and
>
> (b) Two assessors, one of who must be trained in area of child psychology.

[35] Section 155 (2), Anambra State Child's Right Law 2004
[36] Ibid

Section 156 (3) of the Law[37] made similar provisions for constitution of the family court at the magisterial level.

Suffice it to say that the Anambra State Government having taken off in the domestication of the child's Right Act, and implementation of the Law, should take further steps particularly in the area of manpower recruitment and training. In the words of Dr. Ifemeje,[38] 'the Government should ensure that enough qualified legal personnel, social workers, assessors, child psychologists are recruited'.

It is therefore my recommendation that Nigeria should emulate foreign countries like Australia which had made the use of expertise of psychologists and similar professionals mandatory in divorce proceedings. The Child's Right Act and the Child's Right Laws in the States and FCT Abuja should provide expressly the use of these professionals. The Federal Government, the State Governments and the FCT Abuja should be made to implement the provisions of the Act/Law through adequate funding.

All these, I recommend should form part of the review and reformation of the country's MCA.

9.1.5 Reform No 5: Independent Representation of Children in Divorce Petitions

Wherever and whenever it is inevitable that marital differences would go to court for adjudication and subsequent orders of the court, particularly where such marriage has produced child or children, this work recommends that there be appointed or secured,

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[37] Anambra State Child's Right Law, Ibid

[38] Ifemeje, 'Establishment, Procedure and Constitution of Family courts in Anambra State' Challenges and Prospects', A paper delivered at State Judiciary Conference on Family Courts in 2012, p. 17.

legal counsel (s) to independently represent the child or children of the marriage, as the case may be. This is to ensure that the best interest of the child or children, as the case may be, is championed and achieved in the divorce proceedings. Such counsels could be appointed by the courts or secured by other relevant persons or bodies. But their appearances independently for the child or children, as the case may be, should be mandatory and be so provided for expressly by the country's MCA.

The present situation in Nigerian is that it is the Lawyers, representing the divorcing or separating parents that also handle the interest of the child/children of the marriage and the situation jeopardizes the interest of the child/children because such Lawyers more or less see the interest of the child or children from the point of view of the parents.

The need for independent representation of child/children in divorce matters could be felt easily from the facts of the case of *Otti v Otti*[39]**.** In Otti's case, the legitimacy of one of the children of the marriage, one Ikechi Otti, was in issue and by the facts of the case, the doctor (an expert evidence) whose evidence the court based to rule that the said child (Ikechi Otti) was illegitimate was not cross-examined and challenged. The court in that case was bound to believe the doctor's evidence against the child because of inadequate representation of the child in the divorce proceedings. It was only the parents counsels that handled the matters. In other words, there was no independent representation of the child and that resulted to poor handling of the child's interest in the proceedings. The facts of Otti's case are as follows:

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[39] [1992]7 NWLR (pt. 252) 187 at 210

Dr. Dennis Anayochukwu Otti was married to Dr. Pauline Otti on 12th March 1968. On 30th October, 1985, Dr. Dennis Otti, the husband, petitioned the High court for the dissolution of his marriage with Dr. Pauline Otti on the ground that the marriage had broken down irretrievably. In support of the petition, he averred that (i) the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent was not objecting to a decree of dissolution; (ii) since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The petitioner also claimed for the custody of the first three children of the marriage. But he averred that he was not the father of the child the respondent gave birth to on 2nd October 1982 named Ikechi Otti. According to him, he had sexual intercourse with the appellant on 3rd November 1981. The respondent filed an answer and cross-petition seeking a dissolution of the marriage on grounds of cruelty, desertion and separation for the last two years. She prayed for custody and maintenance allowance for the children. The respondent did not object to a decree of dissolution of the marriage as sought by the petitioner in his petition. In her answer to the issue of the illegitimacy of the said Ikechi Otti, the respondent simply averred '--- that the petitioner is the biological father of Master Ikechi born in 1982'. At the trial, both parties gave evidence and called one witness each in support of their respective cases. The medical doctor who gave evidence for the petitioner said that by the normal gestation period of human pregnancies, the child could not have been born out of sexual intercourse had on the 3rd November, 1981. The doctor, was not cross-examined. In respect of custody of the children of the marriage, the evidence of the respondent, a senior lecturer in the University of Jos showed that the

nature of her work made it impossible for her to give her personal attention to the children while at work and there was no evidence that she made arrangements for their care and attention during the period. After the address of counsel, the learned trial judge in his judgment found that the behaviour of the respondent was responsible for the breakdown of the marriage and that she had not proved that the petitioner fathered Master Ikechi Otti. The learned trial Judge also found that the petitioner, a medical practitioner, whom on the evidence of the respondent was a man with considerable wealth, was in a better position to look after the children of the marriage. The learned trial Judge granted the petitioner's reliefs as prayed including award of custody of the children. He, in addition, awarded care and control of the children to the respondent, and dismissed in its entirety the appellant's cross-petition. The point being made in this work is that the welfare and other interests of the children of divorcing parents are better represented by separate and independent lawyers different from the lawyers of the divorcing couple. In the Otti's case for instance, one of the children of the marriage, Ikechi Otti, who was being disowned by the father would have been better represented from the take-off of the case if the child (Ikechi) had an independent Lawyer in the matter. The Supreme Court in *Odogwu v Odogwu*[40] held that the court could consult the child's wishes in considering what order to be made. It was also held that custody proceedings could be adjourned to judge's chambers where in informal hearing, the children's view could be assessed along with those of the parents. Similar decision was also reached in the case of *Ojo v Ojo*[41]**.** All these cases point to the fact that there is need for children's interest to be given paramount consideration and protection, and that could be best done if the

[40] [1992] 2 NWLR(pt. 225) 539 at 560
[41] [1969] 1 All NLR 432

Matrimonial Causes Act itself provide for an independent counsel for the child or children of any divorcing parents in the divorce proceedings. Presently, the Anambra State Child's Right Law[42] which was modeled after the Nigerian's Child's Right Act of 2003 provided for the rights of the child to an independent legal representation. The same 2004 Child's Right Law[43] provides for the establishment of Family Courts in Anambra State to hear and determine matters relating to children.

The Anambra State Government particularly the Judicial arm of the Government deserves a big applause for domesticating the country's Child's Right Act and taking practical steps to implement it. But much more is still required to guarantee this independent legal representation of the child or children. What is actually required is to create specialized Family Courts whereby the courts would exclusively hear only family/divorce matters. Meanwhile, Ifemeje[44] has suggested as follows:

> --- it is imperative that the State Government should ensure that children enjoy free independent legal representation as guaranteed by the Child's Rights Law. The need for this can never be over-emphasized, as children lack the financial resources to enforce their rights.
>
> --- Where a child enjoys free legal advice, it is the child's legal representative that would furnish the courts with relevant materials and the antecedents of the parents or guardian of the child. This will assist the court in determining the "best interest" of the child. The child's lawyer

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[42] Section 158, Anambra State Child's Right Law 2004
[43] Section 152
[44] Ibid p. 18

> will appear in court to protect the interest of the child in any proceedings involving the child. Independent legal representation of the child is already well-established and practised in countries like California, Australia and England.[45]

The Nigerian Child's Right Act of 2003 is a good starting point on providing for independent legal representation of the child. There is still the need to make ample express provisions on the subject while reviewing and reforming the country's MCA.

[45]Ifemeje op. cit, p. 18

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APPENDIX

MATRIMONIAL CAUSES ACT

An Act to make provisions for matrimonial causes

(17th March, 1970)

PART 1 – JURISDICTION

1. (1) After the commencement of this Act, a matrimonial cause shall not be instituted otherwise than under this Act.

(2) If a matrimonial cause has been instituted before the commencement of this Act but not completed, it shall be continued and dealt with only in accordance with the provisions of this Act.

(3) Where before or after the commencement of this Act a matrimonial cause has been or is instituted, and whether or not it has been completed, proceedings in relations thereto for any relief or order of a kind that could be sought under this Act shall be instituted after the commencement of this Act only under this Act, so however that, subject to the succeeding provisions of this and the next section-

(a) any jurisdiction of a court of summary jurisdiction of a State or of a court of appeal from such a court, under the law of that State, to make-

(i) orders with respect to the maintenance of wives or children or the custody of or access to children; or

(ii) separation orders or other orders having the effect of relieving a party to a marriage from any obligation to cohabit with the other party, shall not be affected by this Act or any proceedings thereunder; and

(b) proceedings for or in respect of such an order, or for its enforcement, may be continued or instituted as if this Act had not been made.

(4) Where a marriage is dissolved or annulled by a decree of a court of competent jurisdiction under this Act-

(a) any jurisdiction of such a court or of a court on appeal from such a court, to make orders of the kind specified in subsection (3) (a) of this section shall, by virtue of this subsection, cease to be applicable in relation to the parties to the marriage or the children of the marriage; and (b) any order of that kind (unless it is a maintenance order, when subsection (6) of this section will apply) made by such a court in relation to those parties or children shall cease to have effect.

(5) A court in the exercise of its jurisdiction under this Act may at any time by order direct that an order of the kind specified in subsection (3) (a) of this section made by court of summary jurisdiction, or by a court on appeal from such a court, shall cease to have effect; and that order shall cease to have effect accordingly.

(6) Where an order of the kind specified in subsection (3) (a) of this section made with respect to the maintenance of a wife or of children ceases to have effect under subsection (4) or (5) of this section, the order made may, in so far as it relates to any period before it so ceased to have effect, been forced as if this Act had not been made.

2 (1) Subject to this Act, a person may institute a matrimonial cause under this Act in the High Court of any State of the Federation; and for that purpose the High Court of each State of the Federation shall have jurisdiction to hear and determine-

(a) matrimonial causes instituted under this Act; and

(b) matrimonial causes (not being matrimonial causes to which section 101 of this Act applies) continued in accordance with the provisions of Part IX of this Act, so however that jurisdiction under this Act in respect of matrimonial causes within this paragraph shall be restricted to the court in which the matrimonial cause was instituted.

And in any case where maintenance is ordered in proceedings in a High Court, a court of summary jurisdiction in any State shall have jurisdiction to enforce payment in a summary manner.

(2) Proceedings for a decree

(a) of dissolution of marriage; or

(b) of nullity of a voidable marriage; or

(c) of nullity of a void marriage; or

(d) of judicial separation; or

(e) of restitution of conjugal rights; or

(f) of jactitation of marriage, may be instituted under this Act only by a person domiciled in Nigeria.

(3) For the avoidance of doubt it is hereby declared that a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of this Act and may institute proceedings under this Act in the High court of any State whether or not he is domiciled in tht particular State.

3. (1) Subject to the provisions of this section, a marriage that takes place after the commencement of this Act is void in any of the following cases but not otherwise, that is to say, where-

(a) either of the parties is, at the time of the marriage, lawfully married to some other person;

(b) the parties are within the prohibited degrees of consanguinity or, subject to section 4 of this Act, of affinity;

(c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages;

(d) the consent of either of the parities is not a real consent because-

(i) it was obtained by duress or fraud; or

(ii) that party is mistaken as to identity of the other party, or as to the nature of the ceremony

(iii) that party is mentally incapable of understanding the nature of the marriage contract;

(e) either of the parties is not of marriageable age.

(2) The prohibited degrees of consanguinity and affinity respectively on and after the commencement of this Act shall be those set out in the First Schedule to this Act, and none other.

(3) A marriage solemnized before the commencement of this Act shall not be voidable on the grounds of consanguinity or affinity of the parties unless the parties were, at the time of the marriage, within one of the degrees of consanguinity or affinity set out in the First Schedule to this Act but nothing in this subsection shall make voidable a marriage that would not, apart from this provision, be voidable.

4. (1) Where two persons who are within the prohibited degrees of affinity wish to marry each other, they may apply, in writing, to a judge for permission to do so.

(2) If the judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought, he may, by order, permit the applicants to marry one another.

(3) Where persons marry in pursuance of permissions granted under this section, the validity of their marriage shall not be affected by the fact that they are within the prohibited degrees of affinity.

(4) The President may arrange with the Governor of a State for the performance by judges of the High Court of that State of functions under this section.

(5) In this section, "judge" means a judge in respect of whom an arrangement made under subsection (4) of this section is applicable.

(6) Rules made under section 112 of this Act may make provision for the practice and procedure in and in connection with applications under this section, and may include provision for or in relation to the summoning of witnesses, the production of documents, the taking of evidence on oath or affirmation, and the payment of expenses of witnesses.

5. (1) Subject to this Act, a marriage that takes place after the commencement of this Act not being a marriage that is void, shall be voidable in the following cases but not otherwise, that is to say, where at the time of marriage.

(a) either party to the marriage is incapable of consummating the marriage;

(b) either party to the marriage is

(i) of unsound mind, or

(ii) a mental defective , or

(iii) subject to recurrent attacks of insanity or epilepsy;

(c) either party to the marriage is suffering from a venereal disease in a communicable form; or

(d) the wife is pregnant by a person other than the husband.

(2) For the purposes of this section, "mental defective" means a person who, owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight, care or control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage.

6. (1) Save as expressly provided in this Part of this Act, nothing in this Part shall affect the validity or invalidity of a marriage that took place before the commencement of this Act.

(2) A provision of this Act shall not affect the validity or invalidity of a marriage where it would not be in accordance with the rules of private international law to apply that provision in relation to tht marriage.

7. For the purposes of this Act-

(a) a deserted wife who was domiciled in Nigeria either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Nigeria; and

(b) a wife who is resident in Nigeria at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately proceeding tht date shall be deemed to be domiciled in Nigeria at that date.

8. The jurisdiction conferred on a court by this Act shall be exercised in accordance with this Act, and any law in force immediately before the commencement of this Act which confers jurisdiction in divorce or matrimonial causes on the High court of a State or provides for the law and practice to be applied in the exercise of that jurisdiction shall, to the extent that it does so, cease to have effect.

9. (1) Where it appears to a court in which a matrimonial cause has been instituted under this Act that a matrimonial cause between the parties to the marriage or purported

marriage has been instituted in another court having jurisdiction under this Act, the court may in its discretion stay the matrimonial cause for such time as it thinks fit.

(2) Where it appears to a court in which matrimonial cause has been instituted under this Act (including a matrimonial cause in relation to which subsection (1) of this section applies) that it is in the interests of justice that the matrimonial cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the matrimonial cause to the other court.

(3) The court may exercise its power under this section at any time and at any stage either on application by any of the parties, or of its own motion.

(4) Where a matrimonial cause is transferred from a court in pursuance of this section-

(a) all documents filed of record in that court shall be transmitted by the registrar or other proper officer of that court to the registrar or other proper officer of the court to which the cause is transferred; and

(b) the court to which the cause is transferred shall proceed as if the cause had been originally instituted in that court, and as if the same proceedings had been taken in that court as had been taken in the court form which the cause was transferred, but all subsequent proceedings shall be in accordance with the practice and procedure of the court to which the cause is transferred.

10. All courts having jurisdiction under this Act shall severally act in aid of and be auxiliary to one another in all natters under this Act.

PART II- MATRIMONIAL RELIEF

Reconciliation

11. (1) It shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may-

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;

(c) nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under subsection (1) of this section has taken place, either of the parties to the marriage request that the hearing be proceeded with, the judge shall resume the hearing, or the proceedings may be dealt with by another judge, as the case may require, as soon as practicable.

12. Where a judge has acted as conciliator under section 11 (1) (b) of this Act but the attempt to effect a conciliation has failed, the judge shall not, except at the request of the

parties to the proceedings, continue to hear the proceedings, or determine the proceedings; and, in the absence of such a request, the proceedings shall be dealt with by another judge.

13. Evidence of anything said or of any admission made in the course of an endeaovur to effect a reconciliation under this Part of this Act shall not be admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by any enactment, federal or state, or by consent of parties, to hear, receive and examine evidence.

14. a marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribed, before a persons authorised in Nigeria to take affidavits, an oath or affirmation of secrecy in accordance with the forming the Second Schedule to this Act.

Dissolution of marriage

15. (1) A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts-

(a) that the respondent has willfully and persistently refused to consummate the marriage;

(b) that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(c) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

(e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;

(f) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;

(g) that the other party to the marriage has, for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under this Act;

(h) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

(3) For the purpose of subsection (2) (e) and (f) of this section the parties to a marriage shall be treated as living apart unless they are living with each other in the same household.

16. (1) Without prejudice to the generality of section 15 (2) (c) of this Act, the court hearing a petition for a decree of dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in the said section 15 (2) (c) if this Act of the petitioner satisfies the court that-

(a) since the marriage, the respondent has committed rape, sodomy, or bestiality; or

(b) since the marriage, the respondent has, for a period of not less than two years-

(i) been a habitual drunkard, or

(j) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation,

or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or

(c) since the marriage, the respondent has within a period not exceeding five years-

(i) suffered frequent convictions for crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less than three years, and

(ii) habitually left the petitioner without reasonable means of support; or

(d) since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition; or

(e) since the marriage and within a period of one year immediately preceding the date of the petition, the respondent has been convicted of-

(i) having attempted to murder or unlawfully to kill the petitioner, or

(ii) having committed an offence involving the intentional infliction of grievous harm or grievous hurt on the petitioner or the intent to inflict grievous harm or grievous hurt on the petitioner; or

(f) the respondent has habitually and willfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner-

(i) ordered to be paid under an order of, or an order registered in, a court in the Federation, or

(ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation; or

(g) the respondent-

(i) is, at the date of the petition, of unsound mind and unlikely to recover, and

(ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.

(2) Where a petition is based on the facts mentioned in Section 15 (2) (h) of this Acat-

(a) proof that, for a period of seven years immediately preceding the date of the petition, the other party to the marriage was continually absent form the petitioner and that the petitioner has no reason to believe that the other party was alive at any time within that period is sufficient to establish the fact in question, unless it is shown that the other party to the marriage was alive at a time within the period; and

(b) a decree made pursuant to the petition shall be in the form of a decree of dissolution of marriage by reason of presumption of death.

17. (1) Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining for the purposes of section 15 (2) (c) of this Act whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.

(2) In considering for the purposes of section 15(2) of this Act whether the period for which the respondent has deserted the petitioner or the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of anyone period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but not period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be.

(3) References in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.

18. A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have willfully deserted that other party without just cause or

excuse, notwithstanding that person may not in fact have intended the conduct to occasion that other party to live separately or apart.

19. (1) Where husband and wife are parties to an agreement for separation, whether oral, in writing or constituted by conduct, the refusal by one of them, without reasonable justification, to comply with the other's bona fide request to resume cohabitation shall constitute, as from the date of the refusal, willful desertion without just cause or excuse on the part of the party so refusing.

(2) For the purposes of this section, "reasonable justification" means Justification that is reasonable in all the circumstances, including the conduct of the other party to the marriage since the marriage, whether that conduct took place before or after the agreement for separation.

20. Where a party to a marriage has been wilfully deserted by the other party, the desertion shall not be deemed to have been terminated by reason only that the deserting party has become incapable of forming or having an intention to continue the desertion, if it appears to the court that the desertion would probably have continued if the deserting party had not become so incapable.

21. The court shall not find that a respondent has willfully and persistently refused to consummate the marriage unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated.

22. Where-

(a) a person has been sentenced to imprisonment in respect of each of two or more crimes that, in the opinion of the court hearing the petition, arose substantially out of the same acts or omissions; and

(b) the sentences were ordered to be served, in whole or in part, concurrently, then in reckoning for the purposes of section 16 (1) (c) of this Act the period for which that person has been sentenced in the aggregate, any period during which two or more of those sentences were to be served concurrently shall be taken into account once only.

23. A finding in accordance with section 16 (2) (f) of this Act shall not be made unless the court is satisfied that reasonable attempts have been made by the petitioner to enforce the order or agreement under which maintenance was ordered or agreed to be paid.

24. A finding in accordance with section 16(1) (g) of this Act shall not be made unless the court is satisfied that, at the; commencement of the hearing of the petition, the respondent was still confined in an institution referred to in the said section 16 (1) (g) and was unlikely to recover.

25. On the application of the respondent made in the course of proceedings for a decree of dissolution of marriage, the court may, if it considers it just and proper in the circumstances of the case to make provision for the maintenance of the respondent or other provision for the benefit of the respondent, refuse to make a decree unless and until it is satisfied that the petitioner ahs made arrangements satisfactory to the court to provide the maintenance or other benefit as aforesaid upon the decree becoming absolute.

26. Except where section 16 (1) (g) of this Act applies, a decree of dissolution of marriage shall not be made if the petitioner has condoned or connived at the conduct constituting the facts on which the petition is based.

27. A decree of dissolution of marriage shall not be made if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a perversion of justice.

28. The court may, in its discretion, refuse to make a decree of dissolution of marriage if since the marriage-

(a) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived;

(b) the petitioner has willfully deserted the respondent before the happening of the matters relied upon by the petitioner or where those matters involved other matters occurring during, or extending over, a period, before the expiration of that period; or

(c) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the matters relied upon by the petitioner.

29. Where both a petition for a decree of nullity of a marriage and a petition for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the petition for a decree of nullity of the marriage.

30. (1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within two years after the date of the marriage except by leave of the court.

(2) Nothing in this section shall apply to the institution of proceedings based on any of the matters specified in section 15(2) (a) or (b) or 16 (1) (a) of this Act, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant the leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the party of the other party to the marriage.

(4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interest of any children of the marriage, and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of two years after the date of the marriage.

(5) Where, at the hearing of proceedings that have been instituted by leave of the court under this section, the court is satisfied that the leave was obtained by misrepresentation or concealment of material facts, the court may-

(a) adjourn the hearing for such period as the court thinks fit; or

(b) dismiss the petition on the ground that the leave was so obtained.

(6) Where, in a case to which subsection (5) of this section applies, there is a cross-petition, if the court adjourns or dismisses the petition under that subsection, it shall also adjourn for the same period, or dismiss, as the case may be, the cross-petition; but if the court, having regard to the provisions of this section, thinks it proper to hear and determine the cross-petition, it may do so, and in that case it shall also hear and determine the petition.

(7) The dismissal of a petition or a cross-petition under subsection (5) or (6) of this section shall not prejudice any subsequent proceedings on the same, or substantially the dismissed petition or cross-petition was brought.

(8) Nothing in this section shall prevent the institution of proceedings, after the period of two years from the date of the marriage, based upon matters which have occurred within that period.

(9) In this section, a reference to the leave of the court shall be deemed to include a reference to leave granted by a court on appeal.

31. (1) A party to a marriage, whether husband or wife, may, in a petition for a decree of dissolution of the marriage alleging that the other party to the marriage has committed adultery with a person or including that allegation, claim damages from that person on the ground that that person has committed adultery with the other party to the marriage and, subject to this section, the court many award damages accordingly.

(2) The court shall not award damages against a person where the adultery of the respondent with that person has been condoned, whether subsequently revived or not, or if a decree of dissolution of the marriage based on the fact of the adultery of the respondent with that person, or on facts including that fact, is not made.

(3) Damages shall not be awarded under this Act in respect of an act of adultery committed more than three years before the date of the petition.

(4) The court may direct in what manner the damages awarded shall be paid or applied and may, if it thinks fit, direct that they shall be settled for the benefit of the respondent or the children of the marriage.

32. (1) Where, in a petition for a decree of dissolution of marriage or in an answer to such a petition, a party to the marriage is alleged to have committed adultery with a specified person, whether or not a decree of dissolution of marriage is sought on the basis

of that allegation, that person shall, except as provided by rules of court, be made a party to the proceedings.

(2) Where, in a petition for a decree of dissolution of marriage or in an answer to such a petition, a party to the marriage is alleged to have committed rape or sodomy on or with a specified person, whether or not a decree of dissolution of marriage is sought on the basis of that allegation, that person shall, except as provided by rules of court, be served with notice that the allegation has been made and is thereupon entitled to intervene in the proceedings.

(3) Where a person has been made a party to proceedings for a decree of dissolution of marriage in pursuance of subsection (1) above, the court may, on the application of that person, if it is satisfied after the close of the case for the party to the marriage who alleged the adultery that there is not sufficient evidence to establish that person committed adultery with the other party to the marriage, dismiss that person from the proceedings

33. Where a decree of dissolution of marriage under this Act has become absolute, a party to the marriage may marry again as if the marriage had been dissolved by death

Nullity of Marriage

34. Subject to the following provisions of this Part of this Act, a petition under this Act for nullity of marriage may be based on the ground that the marriage is void, or on the ground that the marriage is voidable at the suit of the petitioner.

35. A decree of nullity of marriage shall not be made upon the petition-

(a) of the party suffering from the incapacity to consummate the marriage, on the ground that the marriage is voidable by virtue of section 4 (1) (a) of this Act, unless that party was not aware of the existence of the incapacity at the time of the marriage;

(b) of the party suffering from the disability of the disease, on the ground that the marriage is voidable by virtue of section 5 (1) (b) or (c) of this Act; or

(c) of the wife, on the ground that the marriage is voidable by virtue of section 5 (1) (d) of this Act.

36. (1) A decree of nullity of marriage shall not be made on the ground that the marriage is voidable by virtue of section 5 (1) (a) of this Act unless the court is satisfied that the incapacity to consummate the marriage also existed at the time when the hearing of the petition commenced and that-

(a) the incapacity is not curable;

(b) the respondent refuses to submit to such medical examination as the court consider necessary for the purpose of determining whether the incapacity is curable; or

(c) the respondent refuses to submit to proper treatment for the purpose of curing the incapacity.

(2) A decree of nullity of marriage shall not be made on the ground that the marriage is voidable by virtue of section 5(1) (a) of this Act where the court is of opinion that-

(a) by reasons of-

(i) the petitioner's knowledge of the incapacity at the time of the marriage;

or

(ii) the conduct of the petitioner since the marriage; or

(ii) the lapse of time; or

(b) for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to make a decree.

37. A decree of nullity of marriage shall not be made on the ground that the marriage is voidable by virtue of section 5 (1) (b), (c) or (d) of this Act unless the court is satisfied that-

(a) the petitioner was, at the time of the marriage, ignorant of the facts constituting the ground;

(b) the petition was filed not later than twelve months after the date of the marriage; and

(c) marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the facts constituting the ground.

38. (1) A decree of nullity under this Act of a voidable marriage shall annul the marriage from and including the date on which the decree becomes absolute.

(2) Without prejudice to the operation of subsection (1) of this section in other respects, a decree of nullity under this Act of a voidable marriage shall not render illegitimate a child of the parties born since, or legitimated during, the marriage.

Judicial separation

39. Subject to this Part, a petition under this Act by a party to a marriage for a decree of judicial separation my be based on one or more of the facts and matters specified in sections 15 (2) and 16 (1) of this Act.

40. The provisions of sections 18 to 24 and sections 26 to 32 of this Act shall apply to and in relation to a decree of judicial separation and proceedings for such a decree and, for the purposes of those provisions as so applying, a reference in those provisions to a decree of dissolution of marriage shall be read as a reference to a decree of judicial separation.

41. A decree of judicial separation relieves the petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation, but except as provided by this Part, it shall not otherwise affect the marriage or the status, right and obligations of the parties to the marriage.

42. (1) While a decree of judicial separation is in operation, either party to the marriage may bring proceedings in contract or in tort against the other party.

(2) Where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation, that property shall devolve as if that party had survived the other party to the marriage.

(3) Where upon, or in consequence of, the making of a decree of judicial separation a husband is ordered to pay maintenance to his wife, and the maintenance is not duly paid, the husband shall be liable for necessaries supplied for the wife's use.

43. Nothing in this Part shall prevent a wife, during separation under a decree of judicial separation, from joining in the exercise of any power given to herself and her husband jointly.

44. (1) A decree of judicial separation shall not prevent the institution by either party to the marriage of proceedings for a decree of dissolution of marriage.

(2) Subject to the next succeeding subsection, the court may, in any proceedings for a decree of dissolution of marriage on the same, or substantially the same, facts as those on which a decree of judicial separation has been made, treat the decree of judicial separation as sufficient proof of the facts constituting the ground on which that decree was made.

(3) The court shall not grant a decree of dissolution of marriage without receiving evidence by the petitioner in support of the petition.

45. Where, after the making of a decree of judicial separation the parties voluntarily resume cohabitation, either party may apply for an order discharging the decree, and the court shall, if both parties consent to the order, or if the court is otherwise satisfied that the parties have voluntarily resumed cohabitation, make an order discharging the decree accordingly.

46. The provisions of sections 41 to 45 of this Act shall apply to and in relation to a decree of judicial separation made before the commencement of this Act by a court in Nigeria as well as to such a decree made after the commencement of this Act.

Restitution of conjugal rights

47. A petition under this Act by a party to a marriage for a decree of restitution of conjugal rights may be based on the ground that the parties to the marriage, whether or not they have at any time cohabited, are not cohabiting and that, without just cause or excuse, the party against whom the decree is sought refuses to cohabit with, and render conjugal rights to, the petitioner.

48. An agreement for separation, whether entered into before or after the commencement of this Act, shall not constitute a defense to proceeding under this Act for decree of restitution of conjugal rights.

49. The court shall not make a decree of restitution of conjugal rights unless it is satisfied-

(a) that the petitioner sincerely desires conjugal rights to be rendered by the respondent and is willing to render conjugal rights to the respondent; and

(b) that a written request for cohabitation, expressed in conciliatory language, was made to the respondent before the institution of the proceedings, or that there are special circumstances which justify the making of the decree notwithstanding that such a request was not made.

50. Where the court makes a decree of restitution of conjugal rights on the petition of a husband, the petitioner shall, as soon as practicable after the making of the decree, and at such other times as rules of court so require, give to the respondent notice, in accordance with rules of court, of the provisions made by the petitioner, or which the petitioner is willing to make, with respect to a home, for the purpose of enabling the respondents to comply with the decree.

51. A decree of restitution of conjugal rights shall not be enforceable by attachment.

Jactitation of Marriage

52. A petition under this Act for a decree of jactitation of marriage may be based on the ground that the respondent has falsely boasted and persistently asserted that a marriage

has taken place between the respondent and the petitioner, but the making of the decree shall be in the discretion of the court, notwithstanding anything contained in this Act.

General

53. (1) A decree may be made, or refused, under this Part of this Act by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them, took place before the commencement of this Act or outside Nigeria.

2) For the purposes of this section, the provisions of sections 18, 19 and 20 of this Act shall be deemed to extend to matters which occurred before the commencement of this Act.

54. (1) Subject to the next succeeding subsection, a matrimonial cause of a kind referred to in paragraph (a) or (b) of the definition of "matrimonial cause" in section 114 (1) of this Act shall be instituted by petition.

(2) A respondent may, in the answer to the petition, seek any decree or declaration that the respondent could have sought in a petition.

(3) Proceedings of a kind referred to in paragraph (c) of the definition of "matrimonial cause" in section 114 (1) of this Act that are in relation to proceedings under this Act for a decree or declaration of a kind referred to in paragraph (a) or (b) of that definition-

(a) may be instituted by the same petition as that by which the proceedings for that decree or declaration are instituted; and

(b) except as permitted by the rules or by leave of the court, shall not be instituted in any other manner.

(4) The court shall, so far as is practicable, hear and determine at the same time all proceedings instituted by the one petition.

55. Save where other provisions in that behalf is made by this Act, the court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree.

56. A decree of dissolution of marriage or nullity of a voidable marriage under this Act shall, in the first instance, be a decree *nisi.*

57. (1) Where there are children of the marriage in relation to whom this section applies, the decree *nisi* shall not become absolute unless the court, by order, has declared-

(a) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and , where appropriate, the advancement and education of those children; or

(b) that there are special circumstances that the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

(2) In this section, "children of the marriage in relation to whom this section applies" means-

(a) the children of the marriage who are under the age of sixteen years at the date of the decree *nisi;* and

(b) any children of the marriage in relation to whom the court has, in pursuance of the next succeeding subsection, ordered that this section shall apply.

(3) The court may, in a particular case, if it is of opinion that there are special circumstances which justify its so doing, order that this section shall apply in relation to a

child of the marriage who has attained the age of sixteen years at the date of the decree *nisi*.

58. (1) Subject to this section, where in relation to a decree nisi-

(a) section 57 above applies, the decree nisi shall become absolute by force of this section at the expiration of-

(i) a period of three months from the making of the decree; or

(ii) a period of twenty-eight days from the making of an order under subsection (1) of that section, whichever is the later; and

(b) Section 57 of this Act does not apply, the decree nisi shall become absolute by force of this section upon the expiration of a period of three months from the making of the decree.

(2) Where a decree nisi has been made in any proceedings, the court of first instance (whether or not it made the decree), or a court in which an appeal has been instituted, may, either before or after it has disposed of the proceedings or appeal, and whether or not a previous order has been made under this subsection-

(a) having regard to the possibility of an appeal or further appeal, make an order extending the period at the expiration of which the decree *nisi* will become absolute; or

(b) if it is satisfied that there are special circumstances which justify its so doing, make an order reducing the period at the expiration of which the decree nisi will become absolute.

(3) Where an appeal is instituted (whether or not it is the first appeal) before a decree *nisi* has become absolute, then, notwithstanding any order in force under the last preceding subsection at the time of the institution of the appeal, the decree *nisi*, unless reversed or rescinded, shall become absolute by force of this section-

(a) at the expiration of a period of twenty-eight days from the day of which the appeal is determined or discontinued; or

b) on the day on which, in the particular circumstances, the decree would have become absolute under subsection (1) above if no appeal had been instituted, whichever is the later.

(4) a decree *nisi* shall not become absolute by force of this section where either of the parties to the marriage has died.

(5) In this section, "appeal", in relation to a decree nisi, means-

(a) an appeal, application for leave to appeal or intervention, against or arising out of-

(i) the decree nisi, or

(ii) an order under the last preceding section in relation to the proceedings in which the decree nisi was made; or

(b) an application under section 60 or 61 of this Act for rescission of the decree or an appeal or application for leave to appeal arising out of such an application

59. (1) Where a decree *nisi* becomes absolute, the registrar or other proper officer of the court by which the decree was made shall prepare and file a memorandum of the fact and of the date upon which the decree became absolute.

(2) Where a decree *nisi* has been absolute, any person shall be entitled, on application to the registrar or other proper officer of the court by which the decree was made and on payment of the appropriate fee, to received a certificate signed by the registrar or other proper officer that the decree *nisi* has become absolute, and a certificate given under this subsection shall in all courts and for all purposes be evidence of the matters specified in the certificate.

60. Notwithstanding anything contained in this Part, where a decree nisi has been made in proceedings for a decree of dissolution of marriage, the court may, at any time before the decree becomes absolute, upon the application of either of the parties to the marriage, rescind the decree on the ground that the parties to the marriage have become reconciled.

61. Where a decree nisi has been made but has not become absolute, the court by which the decree was made may, on the application of a party to the proceedings, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the decree and, if it thinks fit, order that the proceedings be reheard.

PARTH III-INTERVENTION

62. In any proceedings under this Act where the court requests him to do so, the Attorney-General of the Federation may intervene in, and contest or argue any question arising in, the proceedings.

63. In proceedings under this Act for a Decree of dissolution or nullity of marriage, judicial separation or restitution of conjugal rights, or in relation to the custody or guardianship of children, where the Attorney-General of the Federation has reason to believe that there are matters relevant to the proceedings that have not been, or may not be, but might to be, made known to the court, he may, at any time before the proceedings are finally disposed of, intervene in the proceedings.

64. (1) The Attorney-General of the Federation may either generally or in relation to a matter or class of matter and either in relation to the whole of the Federation or to a State, by writing under his hand, delegate all or any of his powers and functions under this Part

of this Act (except this power of delegation) to the person occupying from time to time, which the delegation is in force, the office of Attorney-General of a State, and a power or function so delegated may be exercised or performed by the delegate in accordance with the instrument of delegation.

(2) A delegation under this section shall be revocable at will and the fact that any power or function has been delegated shall not prevent the exercise of the power or the performance of the function by Attorney-General of the Federation.

(3) More than one delegation may be in force under this section at the one time in relation to the whole of Nigeria or in relation to the same part of Nigeria; and a delegation in relation to the whole of Nigeria may be in force at the same time as a delegation in relation to parts of Nigeria.

65. (1) In proceedings under this Act for a decree of dissolution or nullity of marriage, judicial separation or restitution of conjugal rights, where a person applied to the court for leave to intervene in the proceedings and the court is satisfied that person may be able to prove facts relevant to the proceedings that have not been, or may not be, but ought to be, made known to the court, the court may, at any time before the proceedings are finally disposed of, make an order entitling that person to intervene in the proceedings.

(2) An order under this section may be made upon such conditions as the court thinks fit, including the giving of security for costs.

66. Where an intervention takes place under this Part of this Act after a decree *nisi* has been made and it is proved that the petitioner has been guilty of collusion with intent to

cause a perversion of justice, or that material facts have not been brought before the court, the court may rescind the decree.

67. Where a decree nisi has been made in any proceedings, for the purpose of this Part of this Act, the proceedings shall not be taken to have been finally disposed of until the decree nisi has become absolute.

68. A person intervening under this Part or Part II of this Act shall be deemed to be a party in the proceedings with all the rights, duties and liabilities of a party.

PART IV – MAINTENANCE, CUSTODY AND SETTLEMENTS

69. In this Part of this Act,-

"marriage" includes a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law, and "children of the marriage" includes-

(a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other;

(b) any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and

(c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either to them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife, so however that a child of the husband and wife (including a child born before the marriage, whether legitimated by the marriage or not) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage; "relevant time" means in relation to proceedings under this Part of this Act either- (a) the time immediately preceding the

time when the husband and wife ceased to live together before the institution of the proceedings; or

(b) if the husband and wife were living together at the time when the proceedings were instituted, the time immediately preceding the institution of the proceedings.

70. (1) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2) Subject to this section and to rules of court, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earnings capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

71. (1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.

(2) The court may adjourn any proceedings within subsection (1) of this section until a report has been obtained from a welfare officer on such mattes relevant to the proceedings as the court considers desirable, and any such report may thereafter be received in evidence.

(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

72. (1) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

(2) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties

to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

(3) The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

73. (1) The court, in exercising its powers under this Part of this Act, may do any or all of the following, that is to say, it may-

(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

(b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;

(c) when a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs; (d) order that any necessary deed or instrument be executed, and that the documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order, (e) appoint or remove trustees;

(f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public officer or other authority for the benefit of a party to the marriage;

(g) order that payment of maintenance in respect of a child be made to such persons or public officer or other authority as the court specifies;

(h) Make a permanent order, an order pending the disposal of proceedings, or an order for a fixed term or for a life or during joint lives, or until further order;

(i) impose terms and conditions;

(j) In relation to an order made in respect of a matter referred to in section 70, 71 or 72 of this Act, whether made by the court or by another court, and whether made before or after the commencement of this Act;

(i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing.

(ii) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event,

(iii) revive wholly or in part an order suspended under sub-paragraph (ii) of this paragraph, or (iv) subject to subsection (2) of this section, vary the order so as to increase or decrease any amount ordered to be paid by the order;

(k) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in section 70, 71 or 72 of this Act, or any right to seek such an order;

(l) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this subsection, and whether or not it is in accordance with the practice under any other enactment or law before the commencement of this Act) which it thinks it is necessary to make to do justice;

(m) include in it decree under another Part of this Act its order under this Part; and (n) subject to this Act, make an order under this Part of this Act at any time before or after the making of a decree under another Part thereof.

(2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless satisfied.

(a) that, since the order was made or last varied, the circumstances of the parties or either of them, or of any child for whose benefit the order was made, have changed to such an extent as to justify its so doing; or

(b) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

(3) The court shall not make an order increasing or decreasing

(a) the security for the payment of a periodic sum ordered to be paid; or

(b) the amount of a lump sum or periodic sum ordered to be secured, unless it is satisfied that material facts were withheld from the court that made the order, or from a court that varied the order, or that material evidence given before such a court was false.

74. (1) Where a person who is directed by an order under this Part of this Act to execute a deed or instrument refuses or neglects to do so, the court may appoint an officer of the court or other person to execute the deed or instrument in his name and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) the execution of the deed or instrument by the person so appointed shall have the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) Where a deed or instrument is executed pursuant to this section, the court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation and execution of the deed or instrument.

75. (1) Save as provided by this section, the court shall not make an order under this Part of this Act where the petition for the principal relief has been dismissed.

(2) Where-

(a) the petition for the principal relief has been dismissed after a hearing on the merits; and

(b) the court is satisfied that-

(i) the proceedings for the principal relief were instituted in good faith to obtain that relief, and

(ii) there is no reasonable likelihood of the parties becoming reconciled

The court may, if it considers that it is desirable to do so, make an order under this Part of this Act, other than an order under section 72 of this Act.

(3) The court shall not make an order by virtue of subsection (2) of this section unless it has heard the proceedings for the order at the same time as, or immediately after, the proceedings for the principal relief.

(4) In this section, 'principal relief" means relief of a kind referred to in paragraph (a) or (b) of the definition of "matrimonial cause" in section 114 (1) of this Act.

PART V-APPEALS

76. (1) Subject to section 77 of this Act, an appeal shall lie as of right from a decision of the High court of a State in the exercise of its jurisdiction under this Act to the Court of appeal and thence to the Supreme court.

(2) In this section, "decision" means any decree, order or other determination.

77. An appeal under this Act

(a) from any order made ex parte;

(b) from any order relating only to costs;

(c) from any order made with the consent of the parties; or

(d) in the case of a party to proceedings for dissolution or nullity of marriage who, having had time and opportunity to appeal from any decree *nisi* in the proceedings, has not so appealed, from any decree absolute founded upon the decree *nisi;* shall lie only with the leave of the court from which, or the court to which, the appeal is sought to be made.

78. Subject to section 77 of this Act, where-

(a) a maintenance order is registered in a court of summary jurisdiction under section 91 (1) of this Act; and

(b) in relation to the maintenance order-

(i) that court makes any order or does any other thing by way of enforcement of the maintenance order; or

(ii) that or another court of summary jurisdiction makes an attachment of earnings order under paragraph 4 of the third Schedule to this Act, then, without prejudice to any right of appeal which may exist against the making of the maintenance order, there shall exist in respect of the order made or other thing done by the court such rights of appeal (if any) as would have existed if the order had been made or the other thing done in the exercise of the court's ordinary civil jurisdiction.

79. The court hearing an appeal under this Part

(a) is hereby invested with the necessary jurisdiction;

(b) may confirm, vary or reverse any decree, judgment, order or other determination appealed from, order a re-hearing or make such other order as it considers proper to determine the real issue of the appeal; and

(c) subject to this Part, shall otherwise have the same powers as it has in its ordinary appellate jurisdiction in civil proceedings.

PART VI-RECOGNITION OF DECREES

80. Where a decree is made under this Act it shall have effect in all States of the Federation.

81. (1) A decree of dissolution or nullity of marriage made before the commencement of this Act by a court in Nigeria or made after the commencement of this Act by such a court in accordance with the transitional provisions of this Act shall be recognized as valid in all States of the Federation.

(2) A dissolution or annulment of a marriage effected in accordance with the law of a foreign country shall be recognized as valid in Nigeria where, at the date of the institution of the proceedings that resulted in the dissolution or annulment, the party at whose instance the dissolution or annulment was effected (or, if it was effected at the instance of both parties, either or those parties)-

(a) in the case of the dissolution of a marriage or the annulment of a voidable marriage, was domiciled in that foreign country; or

(b) in the case of the annulment of a void marriage, was domiciled or resident in tht foreign country

(3) For the purposes of subsection (2) of this section

(a) where a dissolution of a marriage was effected in accordance with the law of a foreign country at the instance of a deserted wife who was domiciled in that foreign country either immediately before her marriage or immediately before the desertion, she shall be

deemed to have been domiciled in that foreign country at the date of the institution of the proceedings that resulted in the dissolution; and

(b) a wife who, at the date of the institution of the proceedings that resulted in a dissolution or annulment of her marriage in accordance with the law of a foreign country, was resident in that foreign country and had been so resident for a period of three years immediately preceding that date shall be deemed to have been domiciled in that foreign country at that date.

(4) A dissolution of annulment of a marriage effected in accordance with the law of a foreign country, not being a dissolution or annulment to which subsection (2) of this section applies, shall be recognized as valid in Nigeria if its validity would have been recognized under the law of the foreign country in which, in the case of a dissolution, the parties were domiciled at the date of the dissolution or in which, in the case of an annulment, either party was domiciled at the date of the annulment.

(5) Any dissolution or annulment of a marriage that would be recognized as valid under the rules of private international law but to which none of the preceding provisions of this section applied shall be recognized as valid in Nigeria, and the operation of this subsection shall not be limited by any implication from those provisions.

(6) For the purposes of this section, a court in Nigeria, in considering the validity of a dissolution or annulment effected under the law of a foreign country, may treat as proved any facts found by a court of the foreign country or otherwise established for the purposes of the law of the foreign country.

(7) A dissolution or annulment of a marriage shall not be recognized as valid by virtue of subsection (2) or (4) of this section where, under the rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice or that the dissolution or annulment had been obtained by fraud.

(8) Subsections (2) to (7) of this section shall apply in relation to dissolutions and annulments effected, whether by decree legislation or otherwise, before or after the commencement of this Act.

(9) In this section, "foreign country" means a country, or part of a country, outside the Federation.

PART VII- EVIDENCE

82. (1) For the purposes of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.

(2) Where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.

83. (1) Subject to this Part of this Act, all parties and the wives and husbands of all parties are competent and compellable witnesses in proceedings under this Act.

(2) Subject to subsection (3) of this section, in proceedings under this Act, a husband is competent, but not compellable, to disclose communications made between him and his wife during the marriage, and a wife is competent, but not compellable, to disclose communications made between her and her husband during the marriage.

(3) Where a husband and wife are both parties to proceedings under this Act each of them is competent and compellable to disclose communications made between them during the marriage.

(4) Subsections (2) and (3) of this section shall apply to communications made before, as well as to communications made on or after the commencement of this Act.

84. Notwithstanding any rule of law, in proceedings under this Act either party to a marriage may give evidence providing or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, but shall not be compellable to give such evidence if it would show or tend to show that a child born to the wife during the marriage was illegitimate.

85. (1) A witness in proceedings under this Act who, being a party, voluntarily given evidence on his own behalf or, whether he is a party or not, is called by a party may be asked, and shall be bound to answer, a question the answer to which may show, or tend to show, adultery by or with the witness, where proof of that adultery would be material to the decision of the case.

2 Except as provided by subsection (1) of this section, a witness in proceedings under this Act (whether a party to the proceedings or not) shall not be liable to be asked, or bound to answer, a question the answer to which may show, or tend to show, that the witness has committed adultery.

86. In proceedings under this Act the court may receive of as evidence of the facts stated in it, a document purporting to be either the original or a certified copy of any certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Nigeria or elsewhere.

87. (1) In any proceedings under this Act-

(a) evidence that a person, being a party to a marriage, was after the marriage convicted, whether in Nigeria or elsewhere, of the crime or offence of rape or any other crime or offence in which sexual intercourse with a person of the opposite sex is an element shall be evidence that the former person committed adultery with the person on whom the rape or other crime or offence was committed; and

(b) evidence that a person, being a party to a marriage, was after the marriage convicted, whether in Nigeria or elsewhere, of the crime or offence of sodomy or bestiality shall be evidence that that person committed sodomy or bestiality.

(2) In proceedings under this Act a certificate of the conviction of a person for a crime or offence, on date specified in the certificate, by a court of a State of the Federation, being a certificate purporting to be signed by the registrar or other appropriate officer of that court, shall be evidence of the fact and date of the conviction and, if the certificate shows that a sentence of imprisonment was imposed, of the fact that that sentence was imposed.

PART VIII – ENFORCEMENT OF DECREES

88. (1) Subject to rules of court, a court having jurisdiction under this Act may enforce by attachment or other process an order made by it under this act for payment of maintenance or costs or in respect of the custody of, or access, to children.

(2) The court shall order the release from custody of a person who has been attached under this section upon being satisfied that person has complied with the order in respect of which he was attached and may, at any time, if the court is satisfied that it is just and

equitable to do so, order the release of such a person notwithstanding that he has not complied with that order.

(3) Where attachment or other process remains unsatisfied for not less than six weeks, the person who has been attached under this section in consequence of his failure to comply with an order for the payment of maintenance or costs shall be deemed to be an insolvent person and may be kept in custody under the attachment for a period not exceeding six months after the expiry of the period of six weeks aforesaid, unless the court otherwise orders.

89. (1) A decree made under this Act by a court having jurisdiction under this Act may, in accordance with rules of court, be registered in another court having jurisdiction under this Act.

(2) A decree registered in a court under this section may, subject to rules of court, be enforced as if it had been made by the court in which it is registered.

(3) A reference in this Part of the Act to the court by which a decree was made shall be construed as including a reference to a court in which the decree is registered under this section.

90. (1) Where a decree made under this Act orders the payment of money to a person, any moneys payable under the decree may be recovered as a judgment debt in a court of competent jurisdiction.

(2) A decree made under this Act may be enforced, by leave of the court by which it was made (or in which it is registered) and on such terms and conditions as the court thinks fit, against the estate of a party after that party's death.

91. (1) Where pursuant to this Act, a court has made an order for payment of maintenance, the order may be registered in accordance with rules of court in a court of summary jurisdiction of a State of the Federation, and an order so registered may, subject to rules of court, be enforced in the same manner as if it were an order for maintenance of a deserted wife made by the court of summary jurisdiction.

(2) The several courts of summary jurisdiction of the States of the Federation are hereby authorized to do all things necessary for the purposes of subsection (1) of this section.

92. An order under this Act for the payment of maintenance may be enforced in accordance with the third Schedule to this Act and the provisions of that Schedule or shall have effect in relation to the enforcement of any such order.

93. Subject to this Act, rules of court may make provision for the enforcement of decrees made under this Act by means other than those specified in the preceding provisions of this Part of this Act.

94. A decree made in a matrimonial cause before the commencement of this Act by a court in Nigeria or by an office of such a court may be enforced

(a) in the manner in which it could be enforced if this Act had not been made; or

(b) Subject to rules of court, in the manner in which a like decree made by that court under this Act may be enforced.

95. Section 112 of this Act shall include power to make rules of court for the purposes of this Part and shall apply in relations to any such rules.

PART IX – TRANSITIONAL PROVISIONS

96. In this Part of this Act-

"pending proceedings" means proceedings instituted in the High court of a State before the date of commencement of this Act but not completed before that date: "the court", in relation to pending proceedings, means the court in which the proceedings were instituted.

97. Pending proceedings constituting a matrimonial cause may be continued and dealt with in accordance with and by virtue of this Part of this Act and not otherwise.

98. (1) Except as provided by this Part of this Act, the law to be applied, and the practice and procedure to be followed, in and in relation to pending proceedings, being proceedings for a decree of dissolution or nullity of marriage or of judicial separation, shall be the same as if this Act had not been made.

(2) Without prejudice to any power that the court has by virtue of subsection (1) of this section to amend or permit the amendment of a petition, the court may in any such proceedings, upon application by the petitioner and on such conditions, if any, as the court thinks fit, permit the petitioner to amend the petition so as to include a ground of

relief provided by this Act and not already included in the petition; and where such a ground is so included, then, in relation to that ground, the provisions of this Act applicable in relation to that ground shall apply as if the proceedings had been instituted under this Act.

(3) Notwithstanding section 114 (4) of this Act, a reference in this Act to the date of the petition or the date of institution of proceedings shall, in relation to a ground of relief included or sought to be included in a petition by virtue of the subsection (2) of this section, be read as a reference to the date on which the application for leave to amend the petition was instituted.

(4) Where, in pending proceedings for a decree of dissolution of marriage, the facts and circumstances that have been established, whether before or after the commencement of this Act, by the petitioner in support of a ground included in the petition are such that they would have established a ground or grounds for the same relief under this Act if this Act had been in force at the date of the petition and the proceedings had been instituted under this Act, the bars to relief applicable in relation to the ground included in the petition shall be those that would be applicable in proceedings on the ground that would have been established under this Act, or if more than one ground would have been established, such one of those grounds as most nearly corresponds to the ground included in the petition, and no other bars.

(5) In the case of pending proceedings, being proceedings for a decree of nullity of marriage on the ground that the marriage is voidable by reason of the parties being within the prohibited degrees of consanguinity or affinity under the law of a State, a decree of

nullity of the marriage shall not be made after the commencement of this Act if the parties were not at the time of the marriage within one of the degrees of consanguinity or affinity set out in the First Schedule to this Act.

(6) A decree of dissolution or nullity of marriage or of judicial separation may be made in pending proceedings either (a) on any basis of jurisdiction that would have been applicable.- to the proceedings if this Act had not been made, or

(b) on any basis of jurisdiction applicable to proceedings under Part II of this Act for the same relief.

(7) A reference in this section to a bar to relief shall be read as a reference to a bar to the granting of the relief sought, whether absolute or in the discretion of the court, other than a bar arising by virtue of section 30 of this Act.

(8) In this section-

"date of the petition", in relation to a petition, means the date on which the petition was filed in, or issued out of, a court; "petition" includes a writ of summons, a cross-petition, a counter-petition, a counter-claim and an answer; "petitioner" induces a plaintiff, a cross-petitioner, a counter-petitioner, a defendant counter-claiming and a respondent seeking relief in an answer.

99. (1) Subject to section 101 of this Act, the provisions of sections 11 to 14, 18 to 20 (including in respect of sections 18 to 20 those sections as applying to proceedings for a decree of judicial separation by virtue of section 40), sections 33, 38, 41 to 45 and 53, section 62 to 95, and section 103 to 112 to this Act apply, so far as they are capable of

application, to and in relation to pending proceedings, being proceedings for a decree of dissolution or nullity of marriage or judicial separation, as if those proceedings had been instituted under this Act and any decree made in the proceedings had been made in proceedings so instituted.

(2) Subject to section 101 of this Act, the provisions of sections 56 to 61 of this Act shall apply to and in relation to pending proceedings, being proceedings for a decree of dissolution of marriage or nullity of a vioidable marriage other than proceedings in which a decree nisi has been pronounced before the commencement of this Act, as if those pending proceedings had been instituted under this Act and any decree made in the proceedings had been made in proceedings so instituted.

100. Subject to section 101 of this Act, pending proceedings constituting a matrimonial cause, not being proceedings for a decree of dissolution or nullity of marriage or of judicial separation, shall be deemed to have been instituted and dealt with under this Act and may be continued and dealt with under this Act.

101 (1) Notwithstanding section 97 of this Act, where in Special any proceedings constituting a matrimonial cause a decree to pending has been made before the commencement of this Act the appeals or following provisions of this subsection shall have effect as if it had not been made, that is to say appeal.

(a) any appeal in respect of that decree may be continued or instituted;

(b) any new trial or rehearing ordered upon the hearing of such an appeal, or upon an appeal heard before the commencement of this Act, may be had and completed; and

(c) any decree may be made or become absolute.

(2) In this section, "appeal" includes-

(a) an application for leave or special leave to appeal; (b) an application for a new trial or a rehearing; and (c) an intervention.

102. (1) Subject to this section, section 15 (2) (g) of this Act shall be decree to apply in relation to the decree of restitution of conjugal rights made by a court in Nigeria before the commencement of this Act in like manner as it applies in relation to decrees made under this Act.

(2) Where there has been, whether before or after the commencement of this Act, a failure to comply with a decree referred to in subsection (1) of this section made before the commencement of this Act and that failure enable, or would, if this Act had not been made, have enabled, the party in whose favour the decree of restitution of conjugal rights was made to institute proceedings for dissolution of marriage forthwith upon that failure, proceedings for dissolution of marriage may be instituted by that party under this Act as if the words "for a period of not less than one year" were omitted from the said section 15 (2) (g) and as if section 30 of this Act had no application to proceedings on the ground specified in that paragraph.

(3) For the purposes of proceedings brought by virtue of this section (other than proceedings under subsection (2) of this section), requirements of a decree of restitution of conjugal rights made before the commencement of this Act shall, notwithstanding that any time limited by law for compliance with those requirements has expired, be deemed to have continued so long as the decree did not, by order of a competent court, cease to have effect.

PART X – MISCELLANEOUS

103. (1) Except to the extent to which rules of court make provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Act shall, subject to the next succeeding subsection, be exercise in open court.

(2) Where in proceedings under this Act the court is satisfied that there are special circumstances that make it desirable in the interest of the proper administration of justice that the proceedings or any part of the proceedings should not be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or the part of the proceedings, as the case may be

104. Proceedings at first instance constituting a matrimonial cause shall be heard and determined by a judge sitting alone as the court.

105. (1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest, of a party, if it is made or proposed to be made to defeat an existing or anticipated order in those proceedings for costs, damages, maintenance or the making or variation of settlement.

(2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs, damages or maintenance as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.

(3) The court shall have regard to the interests, and shall make any order proper for the protection, of a bona fide purchaser or other person interested.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party, or of a bona fide purchaser or other person interested, of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(5) In this section, "disposition" includes a sale and a gift, effected in or outside the Federation in accordance with rules of court, so however that the court, where it thinks it necessary or expedient to do so, may dispense with service of process.

107. A minister of religion shall not be bound to solemnize the marriage of a person whose former marriage has been dissolved, whether in Nigeria or elsewhere, otherwise than by death.

108. (1) Except as provided by this section, a person shall not in relation to any proceedings under this Act print or publish, or cause to be printed or published, any account of evidence in the proceedings, or any other account or particulars of the proceedings, other than-

(a) the names, addresses and occupation of the parties and witnesses, and name or names of the member or members of the court and of the legal advisers of the parties;

(b) a concise statement of the nature and ground of the proceedings and of the charges, defences and counter charges in support of which evidence has been given;

(c) submissions on any points of law arising in the course of the proceedings, and the decision of the court on those points; or

(d) the printing or publishing of a photograph of any persons, not being a photograph forming part of the evidence in proceedings under this Act.

(6) In this section, "court" includes an officer of a court investigating a matter in accordance with rules of court and "judgment of the court" includes a report made to a court by such an officer.

109. A court exercising jurisdiction under this Act may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks just.

110. In proceedings under this Act the court may, subject to rules of court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court thinks just.

111. (1) the court may at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious, dismiss the proceedings.

(2) The court may at any stage of proceedings under this Act, if it is satisfied that the allegations made in respect of a party to the proceedings are frivolous or vexatious, order that the party be dismissed from the proceedings.

112. (1) The Chief Justice of Nigeria after consultation with the Chief Judges of the States and the President of the Courts of Appeal therein may make rules for or in relation to the practice and procedure of the courts (including courts of summary jurisdiction) having, jurisdiction under generality hereof, the rules may-

(a) prescribe matters relating to the costs of proceedings and the assessment or taxation of those costs;

(b) prescribe the court fees to be charged in respect of proceedings under this Act or in relation to declarations, affidavits, instruments, documents, searches or extracts;

(c) authorize a court to refer to an officer of the court for investigation, report and recommendation claims or applications for or relating to the custody of children or maintenance or any other matter before the court;

(d) authorize an officer making an investigation referred to in paragraph (c) of this subsection to take evidence on oath or affirmation and to obtain and receive in evidence a report from a welfare officer, and provide for the summoning of witnesses before an officer making such an investigation for the purpose of giving evidence or producing books and documents;

(e) regulate the procedure of a court upon receiving a report of an officer who has made an investigation referred to in paragraph (c) of this subsection;

(f) authorise an officer of a court to perform and exercise on behalf of the court or otherwise, in relation to proceedings under this Act, functions and powers not involving the exercise of the judicial power of the Federation or of a State and enable the court to review the decisions of that officer in relation to the performance or exercise of any function or power.

(g) provide for proceedings in *forma pauperis* and the remission of court fees in the case of persons authorized to proceed in *forma pauperis*; and

(h) prescribe matters incidental to the matters specified in the preceding paragraphs of this subsection

(2) Subject to subsection (3) of this section, the power of the appropriate authority under the law of a State to make rules of court in relation to the practice and procedure of courts of summary jurisdiction, the High Court of the State shall extend to the making for that

State of rules of court for any matter in respect of which rules may be made under subsection (1) of this section.

(3) Rules made under subsection (2) of this section shall be subject to rules made under subsection (1) of this section; and, if there is any inconsistency between rules made under those subsections, the rules made under subjection (1) of this section shall prevail and the rules made under subsection (2) of this section shall be void to the extent of the inconsistency.

(4) Notwithstanding section 8 or any other provision of this Act, the rules of Court for the time being in force in the High Court of Justice in England providing for the practice and procedure of that Court in respect of divorce and matrimonial causes shall, with necessary modifications, apply in Nigeria until such rules are expressly revoked by rules of court made under subsection (1) of this section, which said subsection shall be deemed to include power to make such a revocation.

113**.** For the avoidance of doubt it is declared-

(a) that decree, judgment, order or sentence of the High court of a State of the Federation given, made or pronounced before the commencement of this Act in the exercise of jurisdiction invested or conferred upon it in respect of matrimonial causes and in force immediately before the commencement of this Act shall, notwithstanding the repeal of any legislation under which the decree, judgment, order or sentence was given, made or pronounced, continue to have effect throughout the Federation; and

(b) that the validity of a decree, judgment, order or sentence given, made or pronounced by a court of competent jurisdiction in the Commonwealth (elsewhere than Nigeria) before the commencement of this Act by virtue of any enactment passed or made in

respect of a marriage entered into during the war of 1939-45 and in force immediately before the commencement of this Act shall, if reciprocal arrangements are made for the recognition of the like decrees, judgments, orders or sentences given, made or pronounced in Nigeria in respect of any such marriages, be accorded in Nigeria the same recognition as if they were decrees, judgments, orders or sentences given, made or pronounced by a court of competent jurisdiction in Nigeria.

114. (1) In this Act unless the contrary intention appears- "adopted", in relation to a child, means adopted under the law of any place (whether in or out of Nigeria) relating to the adoption of children;

"appeal" includes an application for a rehearing;

"court" or "the court" in relation to any proceedings means the court and includes the High Court of the Federal Capital Territory, Abuja exercising jurisdiction in those proceedings by virtue of this Act; "court of summary jurisdiction" means a magistrate's court or district court;

"crime" means an offence punishable by imprisonment;

"cross-petition" includes an answer in which the respondent to a petition seeks a decree or declaration of a kind referred to in paragraph (a) or (b) of the definition of 'matrimonial cause' of this subsection; "decree" (not being a Act, having effect as an enactment made by the Federal Government) includes a decree absolute or decree nisi, a judgment, and any order dismissing a petition or application or refusing to make a decree or order;

"marriage conciliator" means a person authorized to endeavour to effect marital reconciliations or a person nominated by a judge, in pursuance of section 11 of this Act, to endeavour to effect a reconciliation;

"matrimonial cause" means –

(a) proceedings for a decree,

(i) dissolution of marriage;

(ii) nullity of marriage;

(iii) judicial separation;

(iv) restitution of conjugal rights; or

(v) jactitation of marriage;

(b) proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree or otherwise or of a decree of judicial separation, or for a declaration of the continued operation of a decree of judicial separation, or for an order discharging a decree of judicial separation;

(c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a) or (b) of this subsection, including proceedings of such a kind pending at, or completed before, the commencement of this Act;

(d) any other proceedings (including proceedings with respect to the enforcement of a decree, the service of process or costs) in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a), (b) or (c) of this subsection, including

proceedings of such a kind pending at, or completed before, the commencement of this Act; or

(e) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, or proceedings in relation to proceeding seeking such leave

"petition" includes a cross-petition;

"petitioner" includes a cross-petitioner; "proceedings" includes cross-proceedings;

"respondent" includes a petitioner against whom there is a cross-petition;

"State" means a State of the Federation;

"welfare officer" means a person authorized by the Attorney-General of the Federation by instrument in writing to perform duties as a welfare officer for the purposes this Act, being-

(a) a person who is permanently or temporarily employed in the public service of the Federation; or
(b) a person who is permanently or temporarily employed in the public service of a State and whose services have been made available for the purposes of this Act in pursuance of an arrangement between the Federation and the State; or
(c) a person nominated by an organization undertaking child welfare activities

(2) A reference in this Act to a court having jurisdiction under this Act or exercising jurisdiction under this Act shall be deemed not to include a reference to a court

having jurisdiction under this Act or exercising jurisdiction under this Act by virtue only of section 91 or 92 of this Act or the Third Schedule to this Act.

(3) In this Act, "this Division" occurring in a group of sections under an italicized cross-heading means that group of sections.

(4) For the purposes of this Act, the date of a petition shall be taken to be the date on which the petition was filed in a court having jurisdiction under this Act.

(5) For the purposes of this Act, a person shall be deemed to have been convicted of an offence if he has been convicted of that offence otherwise than by a court in its exercise of summary jurisdiction or on appeal from such a court.

(6) Nothing in this Act shall have effect in relation to a marriage which is not a monogamous marriage or which is entered into in accordance with Muslim rites or with any customary law in force in Nigeria.

115. This Act may be cited as the Matrimonial Causes Act.