AN EXAMINATION OF SPOUSAL RIGHTS AND THEIR RELIEFS UNDER THE MARRIAGE AND MATRIMONIAL CAUSES ACTS

BY

Maryam Talatu ABDU-BIU
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DECLARATION

I hereby declare that this thesis is written by me and it is a record of my research work. It has not been presented in any previous application for higher degree. Al l questions are indicated and sources are fully acknowledged. Any errors in this work are entirely mine.

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Abdu-Biu Maryam Talatu Date

CERTIFICATION

This thesis meets the regulation governing the award of the degree of master of law (LLM) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

_____	_____
Dr. J. A. M. Audi Chairman, Supervisory Committee	Date
_____	_____
Prof. Y. Aboki Member, Supervisory Committee	Date
_____	_____
Dr. A. M. Madaki Head of Private Law	Date
_____	_____
Prof. A. A. Joshua Dean, Postgraduate School	Date

DEDICATION

This research work is dedicated to the memory of my late father Ele-Abdu-Biu and my sister Habiba Abdu-Biu

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ABSTRACT

Spousal right is a duty which both parties to a marriage are to discharge during the subsistence of the marriage. The marriage Act Cap M6 Law of the Federation of Nigeria (2004) appears to be silent on the rights of spouses, while the Matrimonial Cause Act Cap M7, Laws of the Federation of Nigeria (2004) recognizes maintenance as a right in cases of judicial separation and divorce. This work focuses on the non-provision of spousal rights under statutory law and seeks to proffer solutions to this lacuna and to the heavy reliance of the courts in Nigeria on English case law in determining spousal rights.

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LIST OF ABBREVIATIONS

AC	-	Appeal Case
ACHL	-	Appeal Cases House of Lords
ACHL	-	Appeal Cases of House of Lord
All ER	-	All English Report
All, NLR	-	All Nigeria Law Report
CA	-	Court of Appeal
CA. Rep	-	Court of Appeal Report
Cal – Rpt	-	California Report
Cap	-	Chapter
CCHCJ	-	Certified Cases High Court Journal
CEDAW	-	Convention on Elimination of Discrimination Against Women
CH	-	Chancery
Ch	-	Chapter
CHD	-	Chancery Division
CJ	-	Chief Judger
CLR	-	Commercial Law Report
CrApp Rep	-	Cross Appeal Report
EALR	-	East Africa Law Report

EC	-	English cases and English Court
ENLR	-	Eastern Nigeria Law Report
ERLR	-	Easter Region Law Report
FAM	-	Family Appeal Matters
FLR	-	Family Law Report
FNR	-	French National Report
FSC	-	Federal Supreme Court
HL	-	House of Lords
i.e.	-	That is
Ibid	-	Ibiden
Kad	-	Kaduna
KB	-	Kings Bench
Kdh	-	Kaduna division of high court
L.R	-	Law Report
LFN	-	Laws of Federal of Nigeria
LJ	-	Law Journal
LLR	-	Lagos Law Report
LT	-	Law Text
MA	-	Marriage Act

MCA	-	Matrimonial Cause Act
MCA	-	Matrimonial Causes Act
NGO	-	Non-Governmental Organisation
NLR	-	Nigeria Law Report
NMLR	-	Nigeria Monthly Law Report
NNLR	-	Northern Nigeria Law Report
No	-	Number
NSCL	-	Nigeria Supreme Court Laws
NW 2^{d}	-	North West second edition
NWLR	-	Nigeria Weekly Law Report
NYSC	-	Northern Yugoslavia Supreme Court
NZLR	-	New Zealand Law Report
P	-	Page
P.B.U.H.	-	Peace be upon Him
PD	-	Probate Division
PM & A	-	Probate Matter and Administration
Pt	-	Part
QB	-	Queen Bench
QBD	-	Queen Bench Division

Re	-	in the matter of
REM	-	Report Edition Monthly
RT	-	Report on Text
S	-	Section
S.A.W.	-	Sallaulahu Allilium wasallau
SC	-	Supreme Court
TLR	-	Texas Law Report
ULLR	-	University of Ibadan Law Report
US	-	United States
V	-	Versus
Vol	-	Volume
WACA	-	West African Court of Appeal
WALR	-	Western Nigeria Law Report
WLR	-	Wales Law Report
α	-	and

LIST OF STATUTES

(Law Miscellaneous Division) Act Chap. 89 a Statute of General Application 1900.

African Charter on Human and People's Right

Civil Right Act 1964.

Constitution of Federal Republic of Nigeria 1999.

Convention on Elimination of Discrimination Against Women

Criminal Code Act Chapter 421 Laws of Federation of Nigeria 1958.

Debtor Act 1869

Divorce Ordinance No. 2 of 1972 and No. 10 of 1873.

Divorce Reform Act 1985.

Education Amendment Act 1972,.

Equal Credit Opportunity Act 1974.

Equal Pay Act 1964.

Guardianship Act 1973.

High Court Rule.

Holy Quran Chapter 4, 6, 10

Infant Act 1873, 1839.

Labour Act 1974.

Law Reform (Husband and Wife) Act 1962.

Law Reform (Married Women and Tort Feasor) Act 1935.

Law Reform (Miscellaneous Division) Act 1970.

Local Government Law Chapter 79 Laws of Eastern Nigeria 1963.

Maintenance Order Act 1958

Marriage Adaptive by Law order of 1966 of Western Region Law of Nigeria No. 4 of 1957.

Marriage Ordinance No. 10 1863, 1872, 1873, 1884,1886, No of 20 of 1900, No. 22 of 1901, No 1 1907 and No of 1914.

Married Women Property Act 1870 and 1882.

Married Women Property of Kaduna State Edict 1976.

Matrimonial Cases Act Chapter M7 Laws of the Federal of Nigeria 2004 Volume 8.

Matrimonial Causes Act 1857, 1950, 1965 and 1937.

Matrimonial Causes Act Laws of Federation of Nigeria 1970.

Matrimonial Causes Rule 1983.

No. 62 of Declaration of Native and Custom Borgu 1961.

No. 9 of Declaration of Native and Custom of Biu 1964.

Regional Court Federal Jurisdiction Act 1958, Chapter 177 Laws of Federation of Nigeria 1958.

Supreme Court Ordinance 1945.

The Marriage Act chapter 115 Laws of the Federation of Nigeria 1958 and No. 49 chapter 218 of 1971 and Marriage Act 1968.

Theft Act 1968.

TABLE OF CASES

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CHAPTER ONE
GENERAL INTRODUCTION

1.1 Background of Study

Family is the smallest unit in the social structure of every society comprising of a man and wife or wives with children, sometimes the dependants living with them. It is generally accepted that the family is the basis of every human community which includes all persons with common ancestor. The family may be regarded as the nucleus of society whereby the relationship may be traced through males as in patrilineal society, or through females as in matrilineal societies.[1]

Therefore family structure varies from culture to culture i.e. that some are based on monogamous marriages while others are based on polygamous marriages.

The family may be regarded as the basic unit of society constituted by at least two persons whose relationship is that of husband and wife or a man and a woman as partners.

1. Nwogugu, E. I. Family Law In Nigeria, Reprint (Ibadan, Heinemann Educational Books Ltd. Ibadan, reprint 1996) pxxi

Marriage as the basis of family is a universal institution which is recognized and respected all over the world. As a social institution, marriage is founded upon and governed by the social and religious norms of the society. The sanctity of marriage is a well accepted principle in the world and marriage is the root of the family and society. It is only by marriage that a woman obtains the right to be supported by a man. [2]

1.2 The Problem of the Research

In law, the doctrine of unity of spouses has specified the rights of the parties to regulate valid subsisting marriages. The right goes with their correlated duties that serve as obligation on both spouses. The husband in most cases, has right of consortium where he claims the right to exercise power and dominion over his wife, during the cohabitation of

the marriage and it is a duty placed on him to maintain her, when he enjoys consortium as a right from his wife. If the wife fails or refuses to discharge this duty of consortium as a result of either desertion, adultery,

[2.] Bromley, P. and Lowe, N. V. – Family Law 3rd edition (London Butterworth, 1992) p4

cruelty or willful refusal to consummate the marriage, the husband is entitled to remedies such as reconciliation or judicial separation, dissolution of marriage and jactitation of marriage etc. where the marriage has broken down irretrievably.

The wife also has the right which is an obligation on the husband to maintenance, accommodation and shelter etc., but if the husband fails due to certain acts such as desertion, adultery, cruelty, willful refusal to consummate the marriage, intolerability leading the marriage breaking down irretrievably then the wife has remedies such as reconciliation, dissolution, judicial separation etc.

The rights to be discussed in the main research work is faced with problems due to the inadequacies of the Acts to provide for sections covering them because for a marriage to be sustained during cohabitation, the parties must enjoy reciprocal right with their correlated duties. The Marriage Act right from 1914 to date (now M6, Laws of Federation of Nigeria 2004, Vol. 8) (hereinafter cited as Marriage Act) only provides for essential elements of the preparatory and the ceremonial aspect, while the Matrimonial Causes Act of 1970 (now M7, Laws of Federation of Nigeria 2004, Vol. 8) (hereinafter cited as Matrimonial Causes Act) which is indigenous in nature only provides for the relief if the marriage has broken down irretrievably. This is the major problem in the research work. Since this right is mostly a

product of the Superior Court decisions, and Case Law, therefore it became a major problem facing the law since there are no provisions in their respect.

1.3 Aim and Objectives

The aim of this research is to examine the spousal rights and reliefs under the marriage and Matrimonial Causes Acts in Nigeria. This aim will be achieved through the following objectives:

a. To examine the law relating to spousal right with their correlated duties and the various reliefs provided under the Matrimonial Causes Act.

b. To examine the application of the law to these rights and their reliefs, expose the inadequacies of the law and ignorance of spouses about their rights.

c. To examine the various essential elements of marriage celebration under the Marriage Act and their applications while celebrating the marriage

d. To critically analyze the areas of friction in respect of the various rights and their reliefs and bring it to the knowledge of the society in order to prevent the abuse of a spousal rights.

1.4 Research Methodology

The main research methodology for this study is doctrinal i.e. content analysis. In other words domestic statutes, case law, legal literature and other data related to the subject will be analyzed. Therefore this study will largely be a library oriented research.

The sources of data to be consulted will include various books and case laws. References will be made to relevant official papers and reports. Also sources of data for the research include published and unpublished work of scholar relevant to the study. These include books, journal articles, seminar papers, dissertation, newspapers and other periodicals.

1.5 Scope of the Research

The main thrust of the research is on the spousal rights and their reliefs under both the Marriage Act and Matrimonial Causes Act and promoting marriage ties. The scope of the research covers those aspects of other jurisdictions with emphasis on common law jurisdictions that are relevant in promoting the rights and reliefs in Nigeria. Territorially, the research will be centered to the advancement of spousal right and reliefs in Nigeria. However, where circumstances demand, examples of other jurisdictions in respect of the same issues will be included. Also the assistance of other multilateral agencies shall be considered.

1.6 Justification of the Research

The role of marriage in a family is very broad. Indeed marriage has been identified as the cornerstone for any meaningful family development. It has been shown that underdevelopment of any family is closely associated with societies that have refused to

place emphasis on marriage. Marriage enhances the spouses knowing their rights, understanding themselves and serves as an obligation on both parties during the cohabitation of the marriage.

It has been shown that the disintegration of the family is closely associated with societies that have refused to give importance to marriage. Indeed marriage recognizes religious virtues, the social necessity and moral advantage of marriage, making the normal course for an individual to take, since it is the preservation of family and social values.

1.7 Literature Review

Prof. Kasimu,A. B. and Salacuse, J.W.[3] in their book, "Selected Survey of Nigeria Family Law Causes," discussed that various reliefs provided under the Matrimonial Causes Act showing the notion of irretrievability in marriage breakdown. The work did not however discuss the rights of

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3. Selected Survey of Nigeria Family Law Causes (London, Butterworth, 1968 Chapter 7, 8 and 9)

spouses with their correlated duties. Nonetheless, it is a good source of reference for some of the reliefs mentioned in the book.

Another legal luminary in the area of family law in Nigeria is Prof. Nwogugu, E. I.[4] He discussed some of the rights of spouses. This work discussed the reliefs in the light of the new law of irretrievability of marriage breakdown. It is a good source of reference for some of the rights of spouses and reliefs.

Also Adesanya, S. A.[5] in his book titled "Laws of Matrimonial Causes" discussed some of the reliefs as remedies in the light of the new law of irretrievability to marriage breakdown. However, he did not discuss the rights of spouses with their correlated duties. It is a good source of reference for some of the reliefs only.

Cretney, S. N.[6] in his book "Principle of Family Law" discussed some of the rights of spouses and the reliefs. This work did not discuss the reliefs in the light of the new laws on irretrievability of broken marriage. However, the work is a good source of reference for some of the relief and some of the rights.

4(Heinemann Educational Books, reprint 1996) Chapter 2, 3, 5, 6, 8 and 10
5University Press, Ibadan, 1973) Chapter 2, 4, 5, 6 and 7
6(Sweet & Maxwell,London, 1996) Chapter 2, 3, 5, 6, 8 and 10

Bromley, P. and Lowe, N. V.[7] in their book "Family Law" discussed some of the rights of spouses and some reliefs. This work did not discuss the rights of spouses and the relief in the light of the current law of irretrievability of marriage but it is good source of material.

Also, Hoggert, B., Pearl, D., Cooker, E. Bates, P.[8] in their book on Family Law and Society: Cases and Materials, the book discussed some of the rights of spouses, relief, such as divorce

and nullity of marriage. It did not discuss irretrievability of broken down of marriage but it is still good source of reference.

Audi, J. A. M.[9] in her unpublished PhD dissertation titled "The Right of the Spouses in Marriage under the Statute and Islamic Law in Nigeria" discussed some of the rights to both spouses including custody of children and reliefs in context of irritability of broken down of marriage. This work is a good reference material in helping the researcher gear towards the work in one way or of the other.

Danladi Yakubu[10], journal paper titled "A critical evaluation of the protection of the right of woman in Africa" is a good source of material on the right of the spouse.

7(Butterworth London, 1992) Chapter 2, 4, 6, and 7

[8] (Butterworth London Edinburgh, Dublin, 1996) Chapter 2, 3, 5, 6, 8 and 10

[9]Audi, J. A. M. – Kp7172 PhD dissertation

[10]Danladi Yakubu – "Article in Bi-Annual Journal of Public Law" Kogi State University Anyigba, Nigeria P89 – 98

Emily, I. Alenikan[11] in a journal article titled "Family practice and violation of the right of women is a good source of the right of women.

Usman Abubakar Mustaph[12] journal article titled "Protection of right of vulnerable person: case study of women, children, the aged and disabled in Nigeria is a good source of right of women.

1.8 Organizational Layout

The thesis is divided into five chapters. Chapter One is the introduction of the work which covers background of the study, the problem of the research, Aim and Objectives, Scope of the Study, Literature Review, Justification and Methodology.

Chapter Two covers statutory forms of marriage discussing the history of statutory marriage, the requirement of a valid statutory marriage which consists of consent of parent; prohibited degrees and any other lawful hindrance to the marriage, the celebration of the marriage that is marriage at a licensed place of worship; and marriage in a Registrar's office. Offense relating to the marriage, brief introduction of customary marriage, essential element of customary marriage such as parental consent, consent of the intended spouses, minimum age, bride price,

[11]U – Maid L. J ISSN No. 118 – 271 "University of Miaduguri" p.25 – 38

[12]Ibid p.58 – 72

prohibited marriage and ceremonial aspect.

Chapter Three covers rights as an obligation of spouse and such rights are analyzed which serve as a duty on the spouse such as right to consortium covering, incident of consortium, loss of right to consortium, breach of duty to cohabit, remedies for interference with the right to consortium such as in contract, tort, and criminal. Also right to maintenance will be discussed then right to acquire property of own choice, right to education and to work in any place of choice and right of both parties to have custody of children and right to family decision.

Chapter Four covers the various reliefs such as reconciliation, nullity of marriage, dissolution of marriage, judicial separation, restitution of conjugal right, jactitation of marriage and ancillary reliefs.

Finally Chapter Five will cover summary, findings, suggestion, recommendation and conclusion.

CHAPTER TWO

STATUTORY MARRIAGE

2.1 Introduction

The Marriage Act was enacted in 1863 for the settlement of Lagos and Southern Protectorate under Ordinance Number 10 of 1863 as a statute of general application by the British Crown in 1861.[1]

This ordinance regulated the granting of licenses, registration and solemnization of marriages within the settlement of Lagos.

There was also a divorce ordinance No. 2 of 1872 and number 10 of 1873 respectively applicable to the settlement of Lagos colony to regulate issues relating to divorce and this was repealed in 1872[2]. While Lagos became part of the colony of the Gold Coast, the marriage ordinance No. 14 of 1884 was enacted for that colony. The first comprehensive piece of legislation dealing with various matters relating to solemnization of marriage was enacted for Lagos colony. This legislation repealed all the earlier enactments. In 1886, Lagos was separated from Gold Coast colony but with the 1884 enactment as the applicable law. It is important to note

1. Nwogugu, E. I. Family Law in Nigeria 3rd edition (Ibadan, Heinemann Educational Book, Nigeria, 1999), p.22
2. Ibid

that neither the 1884 nor it predecessor applied to the other part of the protectorates in Nigeria. The system of marriage in other parts was either customary law marriage or a Christian marriage in accordance with the rites of the church.

In 1900, the promulgation of Marriage Proclamation No. 20 of 1900 for Southern Protectorate with provision similar with that of 1884 Ordinance to regulate marriage solemnization. This was amended by No. 22 of 1901 and later amended by No. 6 of 1902 and No. 3 of 1903 respectively.

In 1906, the Southern Protectorate was merged with Lagos Colony were the 1884 Ordinance became applicable to the new political and administrative entity.[3]

Meanwhile, marriage in the protectorate of Northern Nigeria is not so regulated until in 1907 when the promulgation of Marriage Proclamation No.1 of 1907. This piece of legislation like its Southern counterpart is similar to the 1884 Ordinance.

The merges of Northern and Southern Nigeria in 1914 streamlined the marriage law in the new political entity of Nigeria by the marriage ordinance of No. 8 of 1914. This applied throughout Nigeria and it repealed the Marriage Ordinance of 1908, the Marriage Proclamation of

3. Ibid

1907 and the Foreign Marriage Ordinance of 1913. The idea of this law is similar to the principle of monogamous English Law Marriage of the 1947 Act. The aim of the Nigerian Marriage Act is to make the celebration of marriages purely civil function; leaving it open to the parties to observe any religious ceremony they deem.[4]

Although today the celebration of monogamous marriage in Nigeria is regulated by the marriage Act of 1958, such marriage is usually referred to as statutory marriage. This was amended in 1971 as Marriage Act No. 49, Cap 218 of 1971 and later the Marriage Act cited as Marriage Validation Act Cap 219 of 1990. And finally now as part of the laws of the Federation of Nigeria of 2004 Cap M6 in Volume 8 as the recent Act for the regulation of statutory marriage in Nigeria.[5]

2.2 Requirement for a Valid Statutory Marriage in Nigeria

2.2.1 Consent of parents

For a marriage to be valid under the statute, it requires the consent of the

parents and where either party to the marriage is under 21 years of age, and is not a widow or a widower, the basic policy of the law is that the

4. Cap 115, Laws of the Federation of Nigeria, 1958
5. Cretney, S. M. Principle of Family Law, 3rd edition. (London, Sweet & Maxwell, 1981), p8.

consent of both parents is required, if both parents are alive as provided under S18 of Marriage Act. The consent as required by law must be a written consent of either parent or both and if either of the parents is dead consent is required from the survivor and any guardian.[6]

The written consent must be signed by the person giving it. But if the parent or guardian cannot write or are illiterates they are to affix their marks to the marriage document in the presence of a High Court Judge or a Magistrate, or a Registrar or a person of similar status as provided under S.19 of Marriage Act. Where no parent or guardian for the party or parties residing in Nigeria to consent to the marriage it may be given by a state governor, a high court judge or any officer above the grade of assistant secretary or any civil service under S.20 of the Act. Also where either party is subject to a custodianship order under the Children Act 1995, the consent of the custodian is so required.

Whether there is parental consent or not, it does not vitiate the celebration of valid statutory marriage as held in the case of Agbo v Udo[7], that notwithstanding the absence of parental consent the marriage was valid under S. 33(3) of the Act 1968 now Cap M6, LFN 2004, but it is an offence punishable with two year imprisonment for any person fully

6. Opcit at p.26
7. (1947) 18 NLR 152

aware of the absence of such consent to marry as provided under S.49 of the Act.

Where the consent required is in respect of an illegitimate person, then the consent of the mother is required unless the mother is deprived by order of court to the custody of the person concerned, then the consent of the custodian is required but if the mother is dead and a guardian is appointed by the mother then the consent of the guardian is required. Where the infant or child is a ward of court, the consent of the court is required. Consent may also be dispensed with under two circumstances:

a) where the consent of a prescribed person cannot be obtained by reason of absence or inaccessibility or by reason of his being under any disability. Consent may be dispensed with by the superintendent registrar or the court may consent to it as provided under S.20(a) & (c) of the Act.

(b) If a person whose consent is required refuses to give it application can be made to the court as provided under S.3(i)(b) of the Act.

In this regard the High Court or the Magistrate Court has jurisdiction to give consent to such cases if it is to the best interest of the parties.[8]

[8] Cretney, S. M. Principle of Family Law, 3rd edition. (London, Sweet & Maxwell, 1981), p10.

The need for requiring parental consent has been examined by the latey committee, the Kilbrandon Committee and the Law Commission. As a result of the Latey Committee's majority recommendation which is same as S.2 Family law Reform Act of 1969 that consent is no longer required if both parties are 18 years age.[9]

The effect of the committee's report resulted in different opinion as to whether the requirement of parental consent should not be abolished and which lead to few reasons in favour of the abolition. Thus:

a) There is no available evidence to show that parents are better judged of the suitability of a match than the child who proposes to marry.

b) It may well be that parental opposition (aimed with a legal sanction) merely strengthens the child's determination.

c) The requirement will be easily evaded and short of making marriage void in the absence of consent where not step is taken effectively in presenting evasion.

Note in situation where children are living with and dependent on the

[9] Family Law Reform Act Intra cited by Cretney, S. M. Principle of Family Law, 3rd edition. (London, Sweet & Maxwell ,1981), p11.

parents, it would be reasonable to refer to the parent judgment and this is

mostly the general practice. Therefore consent requirement whether by law or not or by persuasion without the teeth of the legal sanction may well be more effective than threats.

Today, many children are self-supporting and living on their own within the ages of 16 or 17 years and to allow the absence of parental consent to retain a veto on marriage would be unjustified.

The Latey Committee unanimously recommended that the requirement be retained where either of the party is under the of 18 years because 18 to 21 years are more mature than age 16 to 17 years who might wish to marry simply as part of a rebellion against parental authority in order to gain their freedom.[10]

2.2.2 Prohibited Decrees

The law regards the prohibition of marriage within certain degree either on consanguinity or affinal relationship under section 33(1) of the marriage Act 1958 and also section 3(1)(b) Matrimonial Cause Act to make such marriage void. Therefore both statutes make marriage

10. Ibid p11

prohibited if the woman is or has been the man's ancestress, descendant sister, father sister, mother sister, brother's daughter, sister's daughter in relation to consanguinity relationship. The prohibition on the ground of affinal relationship between a man and his wife are wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, father's wife, grandfather's wife, son's wife, son's son's wife daughter. This prohibition is whether the relationship is of the whole blood or half blood or it is traced through or to any person of illegitimate birth as provided under schedule 1 Matrimonial Causes Act 1970. Also schedule 1, paragraphs 3 and 7 of the Children Act 1975 prohibit a marriage relationship between a child adopted and the adopter as to his relationship with his natural parent and other relatives thereto as if he or she had not been adopted.[11] The prohibition between the adopter and the person who he adopts continues to be so not withstanding that someone else subsequently adopts the adopted person. Marriages within prohibited degree are often said to be void on the ground of incest and no crime is being committed by the party.

It is a criminal offence under S. 10 and 11 Sexual Offense Act 1956 for a man knowingly to have sexual intercourse with his daughter,

11. Ibid p39

granddaughter, mother or sister, but he may without committing crime to have sexual intercourse with aunt or niece and cannot marry them.[12] The prohibition of marriage between certain categories of relatives is universal and it is difficult or even impossible to find a community either advanced or primitive in such sexual conjunction arising and of the prohibited relationship. For example the free and easy Kamang of the Brazilian highland who

recognized monogamous, polyandrous, polygamous, joint marriage and mostly married nieces, step mothers and mother-in-law, either alone or in combination draw a line of marriage with their parent, children, full brother and sister.[13] In spite of the universal existence on some prohibition, there are exception to this. As certain royal dynasties permitted (or ever required) the union of brother and sister. It may be that the exceptional nature of this rule served only to stress the distinctiveness and uniqueness of the rulers who could perform acts unattainable for ordinary people.[14]

Also S. 4 Matrimonial Cause Act 1970 allows two persons as an exception under prohibited degree of affinity who wish to marry each other to apply in writing to a High Court Judge for permission to do so.

12. Ibid – p35
13, Ibid p36
14. Ibid (citing Beatties op cit p126) p36

The judge may by order permit the applicants to marry each other if he is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought as provided under S.4(1) and (2) of the Act. What amounts to "exceptional circumstance" is no define, but it is submitted to be a situation beyond the ordinary and are sufficiently serious as to permit the celebration of a marriage which otherwise would be void. An example is where parties who come from the same village cohabit in a town without knowing the relationship between them and beget a child. If they want to marry and each other this may qualify as an exceptional situation[15] where the parties marry in pursuance of permission granted by the judge, their marriage will be valid notwithstanding that they are within the prohibited degree of affinity, but it may be annulled on any other ground.[16]

Beside the strict legal consideration, the moral propriety of the exception allowed under S4 of Act is important in that it applies only to "exceptional circumstance" but it may be open to abuse and therefore dangerous especially as the "exceptional circumstance" may partly be created by the parties.

[15] Nwogugu, E. I. Family Law in Nigeria 3rd edition (Ibadan, Heinemann Educational Book, Nigeria, 1999), p.25
[16] Section 4(3) Matrimonial Causes Act 1970 now M7 Laws of Federation 2004 vol. 8.

2.2.3 Any other Lawful Hindrance to the Marriage

1) Either party is married: Marriage under the Act is monogamous in nature, being a union of one man and one wife to the exclusion of all others as stated by Herman J. Hyde v Hyde[17]. Consequently a party to a subsisting statutory marriage has no capacity to enter into another statutory marriage with another person because non observance of this rule makes the subsequent marriage void and is an offence punishable by imprisonment for 7 years under S.370 Criminal code Cap 77 (now Cap 38 2004) and also 5 years imprisonment under S. 35 and S. 48 of Marriage Act as the decision in the case of R. v Princewell[18] where the

person is regarded as a married man cannot contract a valid monogamous marriage with another person because if he does so, he will be charged for committing an offence of bigamy and followed in the decision of Nwangwa v Wani[19] later that a party to a subsisting marriage under customary law has no capacity to contract a statutory marriage with a third party as was the decision in the case of Jadesimi v Okotie-Eboh.[19a]

[17.](1963) NNLR 54
[18.](1964) LLR 96
[19.](1886**)** LL&M130, 130 & (1997) 10 NWLR pt 526 pt 559 CA
[19a](1996) 2 NWLR Pt 429 P 125 BC

2) Where consent of either party is obtained under duress or misapprehension: Section 3(1)(d) of Matrimonial Cause Act 1970 states that the consent of either party is not a real consent because (i) it is obtained by duress or fraud or (ii) where the party is mistaken as to identify of the other party or as to the nature of the ceremony performed or (iii) the party is mentally incapable of understanding the nature of the marriage contract where one of the parties is insane and therefore mentally incapable of understanding the nature of the marriage contract, the marriage will be void *ab inito*.

3) Where either of the parties is not of marriage age: In accordance with Section 3(1)(e) Matrimonial Causes Act 1970 such marriage if celebrated where either of the party is not of age, the marriage will be void. Marriage age is difficult to determine because the issue of age has been controversial.

2.3 Celebration of the Marriage

2.3.1 Marriage at a licensed place of worship

Parties to a valid statutory marriage can willfully celebrate their marriage in a licensed place of worship authorized by a Governor within his state. This marriage shall be celebrated by any recognized minister of the church denomination or body where such place of worship the person belongs. The marriage must be celebrated in an open door between 8am and 6pm in the presence of at least two witnesses besides the officiating priest and such celebration must be in accordance with the rites or usage of marriage observed in such church, denomination or body.[20] It is mandatory for the church, denomination or body to write a notification letter to the Marriage Registrar informing the Registrar that the intending couple has certified the necessary formalities of the church, denomination or body and also seeking for marriage certificate as evidencing the marriage solemnization. An example of Marriage Registration and Certificate is the incidence of Adebowale M Taiwo (the groom) and Abimbola D. Ruth (the bride) of Living Faith Foundation Zone I, Ungwan Rimi Kaduna on 7th May 2011 by 10.00am prompt at the church premise. And that of Brother Sunday Sule (groom) and Sister Gloria Peter (bride) of Mount Zion Global Ministries on 26th March 2011 by 10am prompt at the Church premises. The officiating officer is required to be a recognized minister of religion of the church, who shall administer the rules and

procedures of the particular church or denomination as holder of the office of a priest. A marriage performed by a person who is not a recognized minister of the

[20.] S.21 Marriage Act 1958 and the case Chukwuma v Chukwuma (1996) 1 NWLR pt 426 p543CA

religious organization is void.[21] In law, the Registrar certificate is a pre-requisite to the celebration of a valid statutory marriage. Section 33 of the Marriage Act clearly stipulates that marriage celebration between the parties shall be null and void, where both parties knowingly and willfully celebrate marriage without a registrar certificate notice of license. Therefore, the issuance of the Registrar Certificate is of paramount importance as in the case of Anyaegbuman v Anyaegbuman.[22] The Supreme Court held that the validity of the marriage celebration is the evidence of the marriage certificate which to the knowledge of the parties have not been preceded by the issuance of the Registrar Certificate, is in effect null and void, similarly in Obiekwe v Obiekwe[23] where palmer J said:

> A good deal has been said about church marriage or marriage under Roman Catholic Law, so far as the law of Nigeria is concerned there is only one form of monogamous marriage and that is marriage under the Act. Legally a marriage under a church marriage (of any denomination) must be a marriage under the Act or it is nothing. In this case if the parties had not been validly married under the Act, they are either married under native law and custom or they are not married at all.

The celebration of marriage at special license place of worship is

[21] Ibid S.33(2)
[22] (1973) 4.S.C121
[23] (1963) 7 E NLR p196

important for future reference as one of the ground in the case Chukwuma v Chukwuma (supra)[24] amongst other grounds for determination of the estates of the deceased who died intestate as the family of the deceased where claiming that the marriage between the deceased and the plaintiff is not properly celebrated in accordance with the provisions of Marriage Act before the matter reached the court for determination. The court held that the administration of decease estate should temporally be administered by the Administrator General until such a time the parties reach an amicable settlement regarding the distribution of the estate of the deceased or the distribution of same is determined by the Court, whichever is first in time.

Furthermore, the marriage must be celebrated in a licensed place of worship and solemnization of marriage must be before a priest of the church of the parties choice and the Registrar Certificate is prima-facie a valid evidence, and admissible in evidence in the court. Unless the said-marriage celebration is defective for other reason, since no marriage by reason of the provision of Section 33 Marriage Act shall after celebration be deemed invalid by reason that any provision of the Act, other than those stipulated under Section 33(2) Marriage Act thereof, has not been

[24]. Chukwuma v Chukwuma (supra)

complied with. Thus for example, S. 32(2)a of the Act invalidates marriage celebrated by an unrecognized minister of a church or Registrar of marriage. Section 22 makes it mandatory for a minister of religion not to celebrate any marriage if he knows of any just impediment to such a marriage. It is mandatory that he should not solemnize a marriage until it is delivered to him the Registrar's certificate or a special license with all the conditions stated in the certificate as for instance in Kaduna State there is the Kaduna State Registry Certificate with information indicating the name of the Registrar, the parties' names, age and their occupation, consent, place of living, date of notice, date of certification given and clause that the certificate will be void unless the marriage is solemnized on or before three months, as the example of Registrar Certificate of Kaduna North i.e. Magajin Gari signed by INDO JIBO (Registrar) issued on 21/Dec/2009 based on the notice entered on 30 May 2009 between Emmanuel A Adetutu (groom) and Tolulope Abimbola (bride) and the marriage took place in a licensed place of worship and/or other place mentioned.

Section 22 of the Marriage Act 1959 provides this:

"A minister shall not celebrate any marriage if he knows of any just impediment to such a marriage not until the parties deliver to him the registrar certificate or the license issue under section of this Act."

In light of the above, in Kaduna State, marriage celebrated in a licensed place of worship in 2009 from January to December is 205 without just impediment and in 2010 from January to December is 104. Marriage celebrated from January to March 2011 is 49. Section 13 of the said Act provides that:

> The minister upon proof being made to him by affidavit that there is no lawful impediment to the proposed marriage and that the necessary consent, if any to such marriage has been obtained, may, if he thinks fit, dispense with the giving of notice and with the issue of the certificate of the registrar and may grant his license which shall be according to Form D in the First schedule authorizing the celebration of marriage between the parties named in such license by a Registrar or by a recognized minister of some religion, domination or body.

2.3.2 Marriage in a Registrar's office

Parties who have obtained a registrar certificate or special license may as an alternative contract a marriage before a marriage registrar in his office and in the presence of two witnesses. The celebration of the marriage must take place with the open door between 10am and 4pm as provided under S. 27 of the marriage Act 1958 (now M 6) Laws of Federation Vol. 8 2004). After the receipt of the certificate or special license of the parties by the registrar, he addresses the parties either directly or through interpreter in the following terms:

Do I understand that you AB and you CD, come here for the purpose of becoming man and wife? If the parties answer in affirmative, he is required to make certain explanation of the character of the proposed marriage to them and this explanation contains the following silent points:

i) The marriage celebrated in a registrar's office is valid without the need for any other civil or religious rites.

ii) The marriage cannot be dissolved during the life time of the parties except by a decree of a court of competent jurisdiction.

iii) It is an offence of bigamy for a party to the marriage to contract another marriage during the subsistence of the first one.

After the explanation to both parties, the marriage is solemnized by each of parties taking each other as husband and wife in the presence of witness and immediately after solemnization of the marriage, the Registrar completes the marriage certificate in duplicate. The Registrar, the parties and the witness sign the certificate. One copy is given to married couple; the other copy is filed in the registrar office as provided by S. 28 Marriage Act 1958 (M6). Example of certificate signed by Registrar, couple and witness evidence marriage celebrate by the marriage Registrar of Kaduna Magajin Gari Kaduna North, Kaduna State as the marriage ordnance under Section 24 Form F – First schedule with the Federal Government Code of Arm as Federal Legislation between Babatunde O. Ishola and Bidalisu E. Bosode on 20th Feb. 2009 witness by Ebere Ejorwo and Munirat.

2.4 Offences Relating to the Marriage

Various offences such as unlawfully performing marriage ceremony as provided under section 42 of the Act, False Pretence of Impediment to Marriage under Section 41, Marriage with a person previously married section 39, Fictitious Marriage under Section 45, marrying a minor without prescribed consent under section 48. These are offences provided in breach of the provision of the Marriage Act.

a) Unlawfully performing marriage ceremony: It is a general rule that for marriage under the Marriage Act to be recognised, it must be celebrated either by a recognized minister of some religious denomination or body or by a Registrar of Marriage. The non compliance with the requirement makes the marriage void *ab inito* under section 33(2)(d) of the Act, while section 43 of the Act provide that

"whoever performs as a marriage officer the ceremony of marriage, knowing that he is not duly qualified so to … that marriage is void … shall be liable to imprisonment for five years."

The invalidation of the marriage depends on the state of the accused mind which is a material ingredient of the offence as was stated in R v Kemp[25]. Whether a person is a minister of any religious denomination depend on the rules and organization of that body but must be proved that the celebrator of a marriage under the Act is a recognized member of a religious body or denomination. The requirement of the parties celebrating the marriage in full knowledge of the defect is also put into consideration. Except for the defect

considered above, no marriage celebrate under the Act will be void for non compliance with the formalities under Section 33(3) of the Act.

(b) Marriage with a person previously married: These presuppose the possibility of sustaining a charge of bigamy under the provision of the Marriage Act. Bigamy is defined in Section 370 of Criminal Code as:

"When a person having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during a life of such husband or wife."

[25] (1964) A11 ER 649

The crime is defined as felony and it is punishable with imprisonment up to a maximum of seven years under Section 370 of the Criminal Code and Sections 46 and 47 of Marriage Act. For the offence of bigamy to sustain it is necessary to prove the existence of valid first or existing marriage and the first or existing marriage is one under the Act or customary law marriage with the same parties and the second marriage is also a marriage under the Act as per Read J in the case of R v Pincewell (supra)[26]. Where Pincewell was charged with bigamy under Northern Nigerian penal code under section 384 of 1961, which read as follows:

Whoever having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punished with imprisonment for a term which may extend to seven years….

This clearly shows that it is not the intention of the legislation to have two different punishments for the same set of facts relating to the offence of bigamy.

As the writer Okonkwo and Nash submitted that this is not argument against a bigamy charge. To him there is nothing wrong in the principle in respect of the same factual situation involving two criminal charges

[26] R. v Princewell (supra), Jadesimu v Okotie-eboh (1996) 2 NWLR pt 429 p128 SC.

with different punishments. And there is no difference between first customary marriage and first statutory marriage for the offence of bigamy to be sustained. This is a contrary view from decision in R v Sarwan Singh[26a], where on bigamy charge the first marriage must be a monogamous one and even Dr. Morris had remarked that "it looks illogical to treat the polygamous marriage as valid for the purpose of invalidating the second monogamous marriage and yet not to give rise to a charge of bigamy[27] There are instances where the first marriage is statutory and the second marriage is customary or Islamic law marriage, such situation also is suggested to be bigamy and punishable with imprisonment for five year under section 47 of the marriage act. The question is, should this offence be regarded as bigamy? Yes, it is if the early marriage is still subsisting as was the decision in R v Princewell (supra). Therefore in view of the fact that there are two different types of marriages recognized in Nigeria, it is submitted that the scope of the crime of bigamy should properly be defined by the legislature as per the ruling of Magistrate Court where it lacks jurisdiction in the unreported Sarah Bihyong v Fidelis Isah Bihyoung[27a].

[26a](1962)3 ALL ER 612
[27]Cited at p66 in Harvet Law Report 961 at 993
[27a](Unreported case) Case No. KMD/70 DC/2011

(c) Fictitious Marriage: This form of marriage is regulated under section 45 of the Act. It is a situation where the parties proposing for the marriage is under duress, not actually from the other party to the marriage but from a third party as was decision in the case of H v H[28] where the petitioner was a Hungarian and respondent a French citizen. At the time the communists took over the government of Hungary, she became apprehensive for her safety as she came from a wealthy and influential family. To be able to leave her country to avoid imprisonment, she entered into an arrangement with a French national to marry him for sole purpose of obtaining a French a passport. They never intended to be husband and wife and no cohabitation followed. With the French passport, she travelled to England where she petitioned for nullity. It was held that fear for her life which is the prime reason for the marriage, vitiated her consent. And this follows also in the case of Mclaman v Mclaman[29] and Buckland v Buckland.[30] It is immaterial that in fact the party making the threat is incapable of exciting it. All that is necessary is for the party whose consent is in issue to have believed that the threat is real, so as to affect the consent. Though this is an offence, it may be immaterial because the parties committing the offence did it in order to save the other party who is under duress for his or her life.

[28.](1917) 7EALR14
[29.](1935) 2 All ER 1239
[30.](1943) 17NLR59

(d) Marrying minor without prescribed consent: Section 48 of the Marriage Act provides that a marriage without the prescribed consent of other party nullifies the marriage. It is a cardinal of law that the parties to a marriage must have freely consented to the union. Voluntary consent of the parties is a prerequisite for the celebration of a valid statutory marriage.

Therefore, its absence or granting of it under duress or misapprehension vitiates the agreement to marry under Section 3(1)(d)(i) Matrimonial Cause Act 1970 (now M7, L.F.N. 2004). Where a party has not given any consent at all, the marriage is obvious a nullity. The issue of obtaining consent by Fraud or Duress by one party on the other will automatically make the marriage void because it lacked the true consent of the other party. Where consent is obtained by fraud or duress the marriage is a nullity not because of the presence of fraud but because of the absence of consent.

e) False pretence of impediment to marriage: Section 41 Marriage Act 1958 provides:

> whoever endeavours to prevent a marriage by pretence that his consent there to is required by law or that any person whose consent is so required does not consent or that there is any legal impediment to the performing of such marriage, shall if he does so knowing that such pretence is false or without having reason to believe that it is true, be liable to imprisonment for two years.

Where consent is given falsely without any reason of doing so, the parties shall apply to High Court or Magistrate of that jurisdiction for determination of the true consent irrespective of false pretence to cause impediment to the marriage.

If the court discovers that such consent is as a result of false pretence to render impediment to the marriage, the person shall be liable to imprisonment for two years, irrespective of such impediment, and the marriage shall be celebrated. Where it is discovered that the false pretence is in the interest of the parties, the court will not order for the celebration.

2.5 Conclusion

Under this chapter, the introduction of statutory marriage and inception of the Marriage Act was discussed exhibiting the ceremonial aspect, essential validity of the marriage and prohibited degree either on consanguinity or affinity.

CHAPTER THREE

SPOUSAL RIGHTS UNDER THE MARRIAGE ACT

3.1 Introduction

Right is a norm and taken in an abstract sense as justice, ethical correction or consonance with rule of law or principle of morality. Right is generally as power of free action and primarily right pertaining to men and enjoyed in personality and existing antecedently to their recognition by positive law. Right means a just morality, correct consent with ethical principle or rule of positive law.[1] Therefore, spousal rights are rights which the parties enjoyed in their respective obligation during cohabitation of marriage to be discharged as a duty. These rights that the parties enjoyed are not accorded by the Marriage Act but they are being enjoyed as a result of judgement of superior court and other enactment. Right as stated above arise in different forms such as right to consortium, right to maintenance, right to acquire property of choice, right to education and work in any place of choice, right to custody of children and right to family decision and this shall be discussed below.

3.2 Right to Consortium

Consortium means living together as husband and wife, it is full

[1]Black; law Dictionary, 6th edition published by Paul Minn, 1990; p.1323 to 1324

cohabitation during the subsistence of a marriage. Consortium is the bundle of rights enjoyed by spouses. It is the duty which the spouses owe each other in their domestic life. They are not fixed but vary according to the particular circumstances of each marriage.[2]

Under the old common law rule, consortium was the husband's right as the wife is subject to her husband's control; that is he has a right to beat her (but not in a violent or cruel manner), confine her, and also he has legal power to administer corporal punishment as was the decision in the case of Re-Coctrane.[3] This was the practice until the end of nineteenth century when the parliament accorded to the married women a measure of financial independence of her husband by the Married Women's Property Act of 1882. This finally established that a woman has a similar right to her personal liberty as per the decision of the Court of Appeal in R v Jackson[4], "where it was held that from the date of their decision, the shackle of servitude fell from the limb of married women and they were free to come and go at their own will." This decision ended the husband's right to treat his wife as a recalcitrant animal. This principle was reinforced more recently by the Court of Appeal in R v Reid[5] where it was held that a husband who still carries away or secretes his wife against

[2]Bromely, P. M. Family Law 3rd edition, (London, Butterworth, 1997) p.137

[3](1840) 8 DOWL 630

[4](1891) 1 QB671 CA

[5] (1972) 2 All ER 1350

her will is guilty of the common law offence of kidnapping her. While delivering the judgement, Lord Cairn L. J said, "the notion that a husband can, without incurring

punishment, treats his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete."

It should be noted that the Married Women's Property Act 1882 and the two cases above had altered the law relating to the husband's right to his wife's consortium which clearly indicates he cannot enforce consortium by extra judicial means. The parliament in 1923 equated the right of the spouses to petition for divorce. By 1925, both the spouses had equal right with respect to their children and finally in 1967 parliament gave each of them the power to apply for an order regulating their right to occupy the matrimonial home. These changes reflect the modern view that the wife is no longer the weaker partner sub-servient to the stronger but both spouses are joint, co-equal head of the family. It is submitted that the present position as regards consortium is that both spouses have a right to the consortium of the other as by the decision of the court, per Scrutton W in the case of Place v Sear[6]. The decision clearly indicates that these rights must now be regarded as exactly reciprocal. It clearly shows the husband has no right to compel the wife to cohabit with him. This influenced the decision of the court in the Nanda v Nanda[8], where it

[6](1932) 2 KB 497, 500-501
[7](1967) 3 ALL ER 401

was held that a wife whose husband had deserted her, had installed herself against his will in the flat where he was living with another woman and two children and that she had no right to trespass on his property which had never been in the matrimonial home. He was entitled to an injunction to restrain her from doing so again in future. Therefore, in considering the right to consortium, the incidence of consortium, loss of the right to consortium, breach of duty to cohabit and remedies for interference with the right to consortium shall be discussed below.

3.2.1. Incident of consortium

The incidences of consortium are capable of considerable variation and clearly will depend upon such factor as the age, health, social position and financial circumstance of the spouse. It may be worthwhile to examine in more detail these rights which have been directly or indirectly the subject of judicial decisions; they are:

i. The wife's right to use her husband name: On marriage the wife assumes her husband's surname. She is entitled to retain that name even after the termination of the marriage either on death or by divorce because he has no property in his name as to entitle him to seek for injunction restraining his divorcee wife from using the name unless if she does that for the purpose of defrauding him as

   per the decision in case of Refrey[8].

ii. Duty to cohabit: One of the primary incidents of consortium is the duty of the spouse to cohabit or to live together as far as circumstances allow them.[9] Strictly speaking cohabitation does not necessarily imply that the spouses are living together physically under the same roof because certain reasons such as to the nature of employment of any of the spouses may demand that they live apart. This

was in the decision in R v Creamer[10] where it was decided that their living apart was by mutual consent of the parties. Previously, it was determined by the husband as the head of the household but in the modern times, the view has changed like other domestic matters of common concern where the wife has rights just like her husband and based on that, the spouses are bound to settle by agreement. This was clearly voiced by Denning L. J in Dunn v Dunn[11] that such agreement may be entered into before the marriage and will remain in force until a change of circumstance (For example a change in the spousal financial position or health or business interest) that makes it necessary or desirable for them to

[8](1945) CH 348
[9]www.legstateorus/org. 9/9/2009
[10](1919) 1 KB 564 CA

change their arrangement and thus come to a fresh agreement. But whatever arrangement made must be reason not to jeopardize the interest of the spouses[12]. The practical importance of the right to choose the matrimonial home lies in the fact that there is a proper agreement between the spouses to the place of living i.e. either living together or living apart and thus regarded as cohabitation. Withdrawal from cohabitation may constitute matrimonial offence of desertion.

iii. Sexual Relations: Where one of the party is incapacitated either in respect of impotence or willful refusal of the other party to consummate the marriage thereby a ground of nullity of marriage under Section 50 of Matrimonial Cause Act[12a] which states as follows:

> Subject to this act, a marriage that takes effect after commencement of this act not being a marriage that is void shall be voidable in the following case but not otherwise that is today where at the time of the marriage either party to the marriage is incapable of consummating the marriage.

[11](1948) 2 ALL ER 424 or (1941) 2 ALL ER 103
[12]www.berman Simmon.com/article – 4/4/2008
[12a] Matrimonial Causes Act 1970 now Cap M7 LFN 2004

In order to be voidable under Sec. 50, the incapacity to consummate must exist both at the time of the marriage and at the hearing of the petition. If the incapacity was cured before the petition, the marriage will not be voidable. Also, the defect should be such that cannot be cured by medical treatment. The right to sexual intercourse with each other must be exercised reasonably and with due regard to the health and disposition of the other spouse. Consequently there is a duty to have sexual relation, but a spouse is not bound to submit to excessive sexual demand of the other party where it will be detrimental to his or her health.

3.2.2 Loss of the right to consortium

This right that both parties enjoy can be lost in a number of ways:

i. Agreement to live apart: The agreement divests each of the parties to the right of other's consortium. It is normally contained in a formal document known as separation agreement, and when it comes to end, then the right will be revived. Where the husband repudiates his obligation under the agreement the wife is entitled to treat it as to end the agreement and may demand that the husband resume cohabitation[13].

[13]Litigation – essential . leasoeus 2011

ii. Judicial separation: An order of judicial separation or separation order made under matrimonial proceedings relives the party obtaining the order from the duty to cohabit with the other party (as being the most fundamental aspect of consortium) as in the case of Begho v Begho[14]. Therefore, judicial separation puts an end to a state of affairs where a marriage is deprived of its substance, leaving an empty shell, because it will be contrary to public policy maintaining a marriage which has broken down and there is no likelihood that cohabitation would ever resume.

iii Divorce: A marriage is not legally terminated until a decree of divorce is pronounced: This covers situations of nullity of marriage in case of voidable marriage whereby it is made absolute. The duty to cohabit will come to an end once the decree is pronounced. In such situation if the husband forces himself to have intercourse, he will be guilty of raping his wife as was the decision in the English case of R v Brein[15], where it was held that only on this assumption could the husband be legally capable of raping his wife. It should be noted that once decree nisi is pronounced, the marriage is dead and clearly neither party can call on the other to cohabit. The Act

[14]Unreported suit No. W/53/70 and www.Unich/edu/ece/student project/bonified/rape 2/2/2010

[15](1974) 3 ALL ER 663 cante p.114D

allows the pronouncement of the decree nisi under Section 56 Matrimonial Causes Act 1970 which provides that " decree of dissolution of marriage or nullity of a voidable marriage under this decree shall in the instance be a decree nisi."

This decree becomes absolute after the expiration of 3 months which is the prescribed period irrespective of whether or not the court registrar had prepared and filed memorandum verifying the fact as required by Section 59 of the Act as was in the decision in the case of Cooper v Cooper[16]. But the decree nisi is not absolute in accordance with the rule

discussed where either of the parties to the marriage is dead as provided under section 58(4) of the Act which reads: "A decree nisi shall not become absolute by force of this section where either of the parties to the marriage has died." Note also that before a decree nisi becomes absolute, it may be rescinded on either of two grounds:

a. a court may on the application of either party to the marriage rescind the decree nisi on the ground that the parties have become reconciled section 60 of the Act.

b. where rescission can be ordered at the instance of either party

[16](1961) 2 FLR 303

where the court is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance section 61 of the Act.

3.2.3 Breach of the duty to cohabit

Strictly speaking, right to consortium is an obligation between spouses to cohabit whether living together or living apart, provided there is a mutual consent between them. Legally, it is completely unenforceable. The doctrine of unity of personality under Common Law prevents either spouse from suing the other. The only remedy for the deserted spouse is to petition for a decree for restitution of conjugal right. Cohabitation is not specifically enforceable but its breach may lead to other consequence and in event of total breach, the defaulting spouse will be guilty of desertion to enable the other to petition for decree of judicial separation at the end of two years. If the deserting party is the wife, the husband ceases to be under any obligation to maintain her. In the case of Ekrebe v Ekrebe[17], the first respondent married the appellant in 1977 and they had five (5) children. In 1989, the appellant deserted her matrimonial home and refused to go back in spite of repeated persuasions. The parties lived apart for at least two years before the 1st respondent petitioned for divorce at the trial court on the ground that the

[17](1999) 3 NWLR pt 596 p514 CA

marriage has broken down, irretrievably due to adultery, disobedience and denial of conjugal right amongst others and he also sought for custody of their five children. The appellant did not object to the dissolution, but sought for dissolution of the marriage on ground of cruelty, desertion and adultery committed by 1st and 2nd respondent as well as the nullification of an alleged customary marriage between the respondents. It was held that appellant did not specifically plead the essential facts of her case. Her claim was dismissed and the marriage was dissolved in favor of 1st respondent. In determining the appeal section 15(1) and (2) of matrimonial causes act 1970 were considered to and her appeal was unanimously dismissed. The decision of the court disfavoured the appellant because her conduct contributed to the ground for divorce due to some element of misconduct, desertion and adultery, which are wrongful act or omission in support of the demand for divorce.

3.2.4 Remedies for interference with the right to consortium

Initially, under common law, it was only the husband that was entitled to remedies for interference in the form of ravishment or trespass for which could he claim damages against the defendant. By the eighteenth century, both spouses had the right to claim damages for enticement instead of the initial claim for damages for ravishment or

trespass available to the husband only as was the case of Gray v Gray[18] Later, the claim for damages for enticement was replaced by claim for damages for harbouring a spouse and damages for committing adultery. Note that the action for damage for adultery can also sustain the common action for criminal conversation where the husband seeks for compensation for loss of his wife; her comfort and society as the result of the adulterous and wrongful act.

This claim was abolished and replaced by a statutory claim in a petition for divorce in a divorce court. These remedies were not available to the wife because the remedies were made upon quasi propriety interest which the husband has in his wife and her service at common law. The Law Reform (Miscellaneous Provision) Act by 1970, abolished the various actions for enticement, harbouring and action for damages for adultery and provided in Sections 4 and 5(a) and (c) Law Reform Commission No. 25, paragraph 99 – 102[19] that the proper remedies were actions for breach of contract, tort or criminal action for loss of consortium which shall be discussed as follows:

a) Contract: The Law Reform (Married Women and Tort Feasors) Act of 1935 abolished the concept of separate estate and enabled a married

[18](1923) 39 TLR 429

[19]Bromley, P.M. Family Law 3rd edition (London, Butterworth, 1992) p123

woman to hold and dispose of property in all respects as if she were a femesole. Section 1 of the Act provides that a married woman shall be capable of rendering herself and being rendered liable in respect of and shall be subject to the law relating to bankruptcy, enforcement of judgement and court orders as if she were a feme-sole. The Act gave her full power to make contract not only with a stranger but even with her own husband as was the case of Butter v Butter[20]. The law clearly stated that such contracts will be enforceable if they were business arrangements but the courts are not prepared to interfere in the running of the home by giving legal effect to such arrangements where the spouses living together have made such arrangements in order to regularize their domestic affairs. The locus classical case is the case of Balfour v Balfour[21] where the court held that an arrangement where a husband who was about to go to abroad promised to pay his wife £30 monthly in consideration of her not looking to him for further maintenance was unenforceable because there was no intention to enter into legal relations. Note that an agreement made when spouses are living together in amity was held to be legally binding as was in the case of Re-windle[22].

[20](1885) 14 O.B.D. 831

[21](1919) 2 KB 571 CA
[22](1975) ALL ER 987

b) Tort: The general rule is that the fiction of legal unity proceeds two separate rules in torts:

i. Where a tort committed against the wife and tort committed by the wife, her husband is to be joined as a party to the action and failure to do so could be pleaded in abatement. By section 1(c) of the Law Reform (Married Women and Tort Feasor) Act 1935, and the Married Women Property Acts of 1870 and 1882 provided that a married woman can maintain an action in her own name to recover her separate property. In respect of tort committed by the wife the Act makes the wife personally liable for all her tort committed during continuance of the marriage as was the case of Edward v Porte[23], but the Act under S. 3 Law Reform (Married Women and Tort Feasor) Act, the husband may of course still be liable if he authorized the commission of the particular act as his wife acting with his servant in the course of employment.

ii) Action between the spouses: Section 1 of the Law Reform (Married Women and Tort Feasor) Act 1935 provides that a wife could maintain an action in tort against her spouse for protection or security of her own property. This resulted in anomalies and injustice. On the side of

[23](1925) AC HL

the husband, he cannot sue his wife for damage to his property, however maliciously caused, even where the spouses are living at arm's length -Broom v Morgan[24]. The Law Reform (Husband and Wife) Act 1962 provided that each spouses shall have the same right of action against each other in tort as if they were not married and further provided in

Section 3(3) that an action brought after the marriage has been dissolved or annulled in respect of a tort committed during matrimony, the court has a discretion to stay the action in two situations:

a) If it appears that no substantial benefit would accrue to either party from the continuation of the proceedings, the court will prevent the trivial action brought in bitterness due to matrimonial grievance; or

b) The court may stay action if it relates to property and the question in issue could conveniently be disposed of by an application under Section 17 of the Married Women Property Act 1882. When an application is brought under S. 17 of the Act in an action for damages, the court may exercise any power or answer any question be dealt with under S.1(c) Law Reform (Husband and Wife) Act 1962.

[24](1953) 1 ALL ER 849 CA

It should be noted that in practice apart from proceedings available to both spouses on tortuous acts committed, the case of molestation and interference with the right to occupy the matrimonial home are also considered. Note also that the doctrine of unity of spouses further extends to communication between the spouses which is privileged on grounds of public policy but this doctrine does not apply in certain cases so as to enable the defendant to plead the wife's contributory negligence in reduction of damages claimed by the husband for loss of consortium.

c) Criminal cases: The doctrine of unity of spouses has never applied in criminal cases to make the husband vicariously liable for his wife's crime or to prevent either of them from being liable for a crime committed against the other as follows:

i) Marital coercion: Under the common law rule, the mere fact the married woman committed certain offences in the presence of her husband raised a presumption (which is rebuttable) that she committed the crime under his coercion and consequently both shall be liable to a conviction - R v Smitth[25], but under Section 1 of Criminal Code, the wife will not be criminally responsible for an act committed unless it is an offence punishable by death or one in which grievous bodily harm is involved. This rule was finally abolished by Section 49 of Criminal

[25.](1916) 12 CrApp Rep 42

Justice Act 1925 and replaced by the following statutory defence; "in a charge against a wife for any offence other than treason or murder, it shall be a good defense to prove that the offence was committed in the presence of and under the coercion of the husband. Thus the burden of proof is upon the wife to prove coercion and coercion in this context presumably

means something more than a threat of physical violence. It is available to anyone charged with a criminal offence except murder and treason.

ii) Accessory after the Fact: Under the common law, a wife cannot be an accessory after the fact to her husband for a felony or his principal by receiving him or by assisting him to escape punishment, nor is she liable if in her husband's presence and by his authority she assists his confederate to escape punishment. Also a husband does not become an accessory by assisting his wife in a similar fashion[26]. But in R v Holley[26a], it was held that the rule was merely a particular application of the rule of marital coercion and had therefore being abolished by the Criminal Justice Act of 1925 under Section 47, and the court decided that if a wife assisted her husband and another together, she might be an accessory after the act by concealing a felony jointly with her husband. Curiously

[26] Section 10 Criminal Code Act Cap 42 Laws of Federation of Nigeria, 1958 (Now Cap 38, Laws of Federation of Nigeria 2004)
[26a](1963) 1 AH ER 106

enough, the husband was not bound to shelter his wife and might by so doing, become an accessory after the fact to her felony.

iii) Conspiracy: The doctrine of unity of spouses applies in conspiracy

because husband and wife may not be convicted of conspiracy together as in the case of Mawji v R[27]. The protection given to both spouses in respect of conspiracy is provided under Section 34 of the Act[27a] - Keshira v IGP[28]. Note that the protection is lost where it involves a third party since they have abused the privilege given to them by law; they would therefore be convicted. But either of the spouses may be convicted of inciting the other to commit a crime.

iv) Theft: The doctrine of unity of spouses pre-supposes that the husband and wife are deemed to have unity of possession so that neither of them could be guilty of stealing the other's property. A wife of statutory marriage has both criminal and civil rights of action against all persons including her husband, for the protection and security of her separate property as if she were a femme-sole. The defence does not cover a deserting spouse nor where the act is accompanied by an intention to injure or defraud some other persons as provided under

[27](1957) 1 ALL ER 385 A.C.
[27a]S. 34 of Criminal Code Act of 1958
[28](1955) WRNLR 84

Section 36 of the Act. Under the Theft Act of 1968 in England, the spouses are regarded as separate persons and each can be convicted of the theft of the other property obtained by deception. Section 30(1) of the Theft Act of 1968 also provided that either party can be guilty of the theft of property belonging to both of them jointly. Finally Section 30(2), provided that either spouse has the same power to institute criminal proceedings against the other as if they were not married.

3.3 Right to Maintenance

3.3.1 Maintenance

Maintenance means the upkeep or preservation of a thing in a good condition. Maintenance is sustenance, support, assistance or aid, especially where the legal relation of the parties is such that one is bound to support the other such as between father and child (or children) or husband and wife. Primarily the term means provision of food, clothing and shelter, and also includes such items as reasonable and necessary transportation or automobile expenses, medical expenses, utilities and household expenses[29].

3.3.2 Maintenance at common law

The fact of a marriage raised a presumption at common law that the

[29]Black's law dictionary M.A 6th edition published by Paul Minn 1990 at p953 to 954

husband is under a duty to maintain his wife. Her right to maintenance, generally speaking, is co-extensive with her right to her husband's consortium and if her conduct released him from the duty to cohabit with her, he automatically ceased to be under a duty to maintain her as was in the case of Chilton v Chilton[30]. At common law a husband is under a legal obligation to maintain his wife. The obligation arose from the fact of cohabitation and the wife's management of the household. This obligation of the husband to maintain and give financial support to his family is hinged on the principle of unity of spouses. It is a duty placed on him to single-handedly fix the standard of living of the family in a reasonable manner as was in the case of McCurre v McCurre[31]. Hence, if the wife has committed an act of simple desertion she could restore her right to maintenance by taking steps to effect reconciliation as in the case of Price v Price[32]. The rule is as a result of the consequence of the doctrine of unity of legal personality where the wife lacked capacity to enter into a contract, nor own/buy property.

The right of the wife to maintenance and consortium of the husband placed on the husband the duty to provide his wife with necessaries of life. If he provides a home for her, as she has no right to separate

[30](1952) ALL ER 1322
[31](1953) 59 NW 2d 336
[32](1970) 2 ALL ER 497 CA

maintenance in a separate home unless she could justify the living apart from him. If the husband failed to discharge his obligation to maintain her but provides financial support to her, then the only option available to her in the event of default on part of the husband to provide necessaries is to pledge his credit, thereby becoming his agent for the purchase of necessaries. She will not be entitled to maintenance and cannot pledge his credit for necessaries if she commits adultery, as was in the case of Wright v Amuda[33]. The law is to the effect that even if the act committed is a single act it is sufficient to bar her right to

maintenance, but if the husband condones it or connives with her for the alleged adultery by the wife, then she can lay claim to maintenance.

The right to maintenance and to pledge the husband's credit for necessaries will merely be suspended on the commission of desertion, as was the case of Windle v Guardian[34], but this right will be revived immediately on cessation of desertion because it does not cease for all purposes as is the case where she commits adultery. Note that the wife is not duty bound to maintain her husband during or after her marriage.

[33](1930) 2 KB p85
[34](1920) 3KB 381

3.3.3 Maintenance under the statutes

Statutory duty of maintenance can be traced back to the practice of the ecclesiastical court which placed an obligation on a man to maintain a wife after the termination of marriage either through divorce or nullity decree. Maintenance under the statute is either secured maintenance for the life of the wife under Section 16(1) Matrimonial Causes Act 1965 of England or unsecured maintenance for the joint lives of the parties under S.16(1) of the same Act (whereby a former wife gets maintenance order even after the death of the husband so long as certain other condition in the section are met[35]. Formerly, secured maintenance could not be varied, suspended or discharged, but only unsecured maintenance could be varied, suspended or discharged. Later, both types were capable of being varied, suspended or discharged under Section 31(1) of the Act.

Section 16(1) of the Act allows the court to order for payment of lump sum for maintenance. Note that the order for maintenance after divorce may be made in respect of the wife whether she is the petitioner or respondent and even if she has committed adultery or remarried. Section 19(2) Matrimonial Causes Act 1937 provides for the maintenance and other financial relief either during or after the marriage for the husband as claim of alimony pending suit, secured or unsecured

[35]Kasumu, A. B. Nigerian Family Law reprint (London, Butterworth, 1966) p192

maintenance against his wife as a right, where he is divorced by the wife on ground of judicial separation as a result of his insanity and it is also provided in Section 20(1) Matrimonial Cause Act 1965.

Under the Act, the wife can obtain financial relief in a superior court in an independent suit but before the order can be made, the husband must be guilty of willful neglect to maintain the wife or any child and the court must also have jurisdiction to entertain proceedings for judicial separation brought by the wife.

Before the commencement of the decree in Nigeria, it was not certain whether independent proceeding for financial relief could be instituted by virtue of the English statute. The issue arose in the case of Okpaku v Okpaku[36], where the Supreme Court of Nigeria held that it was applicable and therefore granted maintenance to the wife. This decision was reversed by the West African Court of Appeal which held that the Act is not a statute of general application and therefore it is not applicable in Nigeria. This raised a question as to the applicability or otherwise of the Act which was determined by reference to the Supreme Court Ordinance of 1945 that provided for the application in Nigeria of the common law of England, doctrines of equity and statutes of general

[36](1947) 12 WACA 137 (see also the case of Anyaso v Anyaso (1998) 9 NWLR pt 564 p. 150 CA

application in force in England before 1st January 1900; and which provision was later enacted as section 45(1) of the Interpretation Act (Miscellaneous Provision)[36a]

Presently in Nigeria, the current law applicable to maintenance is contained in Part IV of the Matrimonial Causes Act 1970[36b]. Section 70(2) of the Act provides:

> Subject to this section and to the rule of court, the court may in proceeding for an order for 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, earning capacity and conduct of the parties to the marriage and all other relevant circumstance.

Sub-section (3) provides: "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."

While sub-section (4) states that:

> 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 the opinion that there are special circumstance that justify the making of such an order for the benefit of that child.

[36a]Act Cap 89.
[36b] Matrimonial Causes Act Cap M7 LFN 200432

~~Based on the above provisions~~, it is only a party to a marriage that can bring an application for financial support. A party to a marriage has been defined in section 69 of the same act to include "A purported marriage that is void but does not include one entered into in accordance with the Muslim rites or under customary law" as was in the case of Erhahon v Erhahon[37]. The implication of the section 69 of the Act is that it is a party to statutory marriage that can institute an action for maintenance under S. 76 of the Act and not a party to Islamic or customary law marriage. Another fundamental implication of the definition of a party to marriage is that it does not include single mothers on the ground that the law must not encourage illicit and immoral relationships. Note also that the Act provides that the husband and wife in so far have a right and duty to make financial provisions concerning each other but not on an equal footing as was decided in the case of Kah Walter v Tina Walter[38].

3.3.4. Enforcement of maintenance order

Both at common law and statute, various remedies are available in England for enforcing maintenance awarded or any other financial relief

[37](1997) 6 NWLR pt 510 p 667 CA (see www.divorce –law Illinois.com/maintenance.3/5/2011 and www.patorlaw.net/blog.4/6/2011. The unreported case of Innocent Jolly Okoh v Mercy Okoh suit no. kad/kad/854/2010

[38]Unreported suit No. Kdh/Kad/418/1999

given by court. Some of the statutory enactments are the Debtor Act 1869, Maintenance Order Act 1958 of England, and the Debtor Act applied in Nigeria as statute of general application.

Enforcement in respect of arrears of Maintenance, alimony or periodical payments are not legal debt that can be enforced by action, since these payments are left at the discretion of the court - Menakaya v Menakaya[39] and Kubai Zoaka v Faqsher Zoaka[40]. The mode of enforcing payment is either by writ of Fieri Facie or sequestration or garnishee order as provided under Rule 64(11) Matrimonial Causes rule and a summon may be used under Section 5 of the Debtor Act 1869.

Section 6 of Maintenance Order 1958 in England empowered the court to make order attaching the earnings of the husband if he failed to comply with the order of the court. Also section 32 Matrimonial causes Act 1965 of England empowered the court to prevent a husband from disposing of his property with a view to defeating the wife's claim to financial relief. From the above various provisions of the Act, it is clear that courts are empowered to enforce payment of all financial reliefs of a wife out of both the husband's earnings and property if he fails to maintains his wife - Hayes v Hayes[41] and the decision in the unreported

[39](1996) 9 NWLR pt 472 p256 CA

[40]Unreported suit No. Kdh/Kad/468/2009 and see (www.colorado-family-law-com/alimony-,maintenance 6/6/2011

[41](2000) 3 NWLR pt648 p 276CA

case of Elizabeth Babalola v Myles O. Babalola[42]. Note that previously in Nigeria, it was the position that was applicable in England that was law but with the enactment of the Matrimonial Causes Act 1970, the enforcement order basically fall within section 90(1) and 91(1) & (2) Matrimonial Causes Act[42a]

The effect of the above provision is that the payee has the usual means of execution e.g. garnishee and charging order, sequestration, fieri facie, the appointment of receiver and may even invoke the provisions of Debtor Act 1869, especially subsection (2) of S.91 subject to leave of the court and on such conditions and terms as the court thinks fit - Hayes v Hayes (supra) Payment may also be enforced against the estate of the debtor in the event of his death.

3.2.5 Maintenance agreement

Generally, there are two types of agreement. These are as follows:

i) Separation and maintenance agreement: Once it is accepted that separation agreement is not contrary to public policy (agreement to live apart), such separation agreement releases each spouse from

[42a]M7 Laws of Federation of Nigeria 2004, vol.8.

[42]Kdh/Kad/1164/2010

the obligation to cohabit with the other and it becomes possible for a husband to enter into an agreement to pay maintenance for their children. Such rights are governed by the general principles in the of law of contract. Spouses are free to enter into such enforceable contracts to pay maintenance for the other spouse and the children. Such agreements may be oral or written. Either spouse may covenant to provide for maintenance if it will not be contrary to public policy. Once the agreement is entered into, the wife cannot plead his credit unless if he fails to pay the agreed sum, then she may exercise her authority as the husband's agent for necessaries. But where the husband and wife while living apart agreed to resume cohabitation, enforcement financial arrangement in the event of a future separation may be made in the same agreement and this clearly promotes reconciliation between the spouses as was in the case of Anyaso v Anyaso (supra) and the decision in the case of Donald Fada Enyi v Ebiloboere Luky Enyi[43]. Separation and maintenance agreement may be in the following form:

a) Variation of agreement: A valid agreement once made can be varied by consent. It is open to either party to attack enforceability of the agreement on ground of illegality, fraud, mistake, or undue influence

[43]Unreported uit No. Kad/Kad/464/2011 (www.Stepcoupling.com/tag/marriage-maintenance 7/7/2011)

under law of contract as was in the case of Wales v Wadham[44]. The reason why parties make agreement is that the husband in most case wants to settle the wife once and for all. They will also want to know that, comes what may, she is entitled to the stipulated provision agreed. The court uses two grounds to deal with this problem;

i) A covenant by the wife to accept the stipulated payment in lieu of

any other right she has to apply to the court for maintenance as a matter of public policy.

ii) If the husband makes the stipulated payment, a wife could still alleged willful neglect to provide reasonable maintenance. That presumably would be the case in a suit founded on new ground for failure to provide reasonable maintenance as was the case in the unreported case of Veronica Okpara v Festus Okpara[45].

b) Power to vary agreement: Under section 35 Matrimonial Causes Act 1937 of England, that if a maintenance agreement is in writing and titled "Financial Agreement" or if a separation does not itself contain financial arrangement and where there is no other written agreement in existence, either party may apply to the court (i.e

[44](1977) 1 WLR 199.

[45]Suit No. Kdh/Kad/305/2006

Magistrate Court can only vary periodical maintenance payment) for a variation order as in the case of Innocent Jolly Okoh v Mercy Okoh (supra).

c) The function of separation and maintenance agreement: The advantage of separation and maintenance agreement in its traditional form is that it provides maintenance for the wife without the scandal and publicity of divorce and other proceedings[46]. The agreement would terminate desertion and it would often contain a clause whereby the spouses agreed not to petition in respect of any other existing causes of complaint as was in the case in the Femous Rose v Rose clause[47], where the court considered whether the clause will deprive a party of the right to sue for divorce. The Divorce Reform Act 1968 of England in respect of matrimonial offences was relevant because the clause aimed to bury the empty legal shell of a dead marriage as it allowed the parties, by agreement, to oust the jurisdiction of the court. The Act states that any terms in a maintenance agreement purporting to restrict any right to apply to court for an order relating financial agreement shall be void. It also provided that any other financial agreement in the agreement shall thereby be rendered void or unenforceable but.

[46]Encyclopaedia of form and precesedent, 4th edition, vol. 10 pp 906-942
[47](1882) 7 PD225 or (1883) 8 PD 98

be binding on the parties unless for any other reason

ii) Agreement implemented by court order: Previously, separation and maintenance agreement were often made in the past as an alternative to divorce, but now they are made to take effect on divorce. The question is if they do, to what extent is it binding on the parties and the court? Also, if made and implemented by the court order, can it subsequently be varied?

The law is not in all respect entirely clear or satisfactory but the decision of the House of Lord in 1978 in the case of Minton v Minton[48] removed many uncertainties and settled the position as:

i) If the parties make an agreement conditional and approach the court, it is binding on them and is assumed to be valid as a contract unless and until the court refuses to give effect to it.

ii) When such an agreement is presented to the court, the court is not bound to give effect to it, because the court has the ultimate discretion over the financial arrangement to be made on divorce as provided under Section 25(1) Matrimonial Causes Act 1973 of England, which states that the provision of the legislation does not allow the parties to contract to settle out of the court discretion as was in the case of Kah Walter v Tina Walter (supra).

[48](1978FAM 25

iii) Prior to the decision of the House of Lord in Minton v Minton (supra) the only way out for finality be achieved is for the court to dismiss the wife's claim for financial provision and property adjustment on agreed items and it will have no jurisdiction to re-open the matter. But as a result of Minton v Minton (supra) case, it appears no longer necessary for the court formally to dismiss the wife's application but an order simply incorporating the parties' final agreement and will equally give effect to it as was Kah Walter v Tina Walter (supra).

Finally, it is to be noted that legislation clearly in terms and strength forward enable the parties to achieve finality in their agreement but the court has power in divorce proceedings to make orders if the court considers it just to do so, then none of them should thereafter be eligible to apply for reasonable financial arrangement or by inserting in it a financial agreement for the benefit of either of the parties or children of the family as was in the case of Towoeni v Towoeni[49].

3.3 Right to Acquire Property

Under common law married woman was considered to be generally incapable of performing the feudal service of any freehold estate, as it

[49](2001) 12 NWLR pt727 p.445 CA (see www.flick.com/photo/Iwishmewillcom on 3/12/2010 and www.elspartner.com/post-phpan 1/7/2011

will be seized and vested in the husband during covertures and will be under his sole management and care. If the issues of the marriage were born alive, the husband immediately gained an estate in the wife's freehold corresponding to her dower in the land but extending to the whole estate to be known as the husband estate by the courtesy of the Lord. It is because of the issues of the marriage born alive that the husband normally has a life estate in his wife's land and he could have full charge, chattels being more in investment than land and will be owned by the husband under common law. Also, goods including money in his wife's actual possession come under his absolute ownership. During coverture, the husband is entitled to the whole of the wife's income from any source, including her earning or rent from her leasedhold or freehold property. She can only bequeath her personal property with the consent of her husband and such consent might be revoked by him at any time. And if she dies interstate by virtue of this rule, all her personal property including her leasehold and her chose-in- action, will be passed to her husband[50].

Equity, as the name implies gave women nearly all right of a single woman to deal with her property as she wanted i.e. she could give it away, or sell it or give it out by will to whoever she wished or charge it in a contract.

[50]Haward Law Review, vol. 96, pp. 1982-1983, pp.1510-1531

A married woman therefore possesses separate property which the husband has no control over whatsoever and neither him nor his creditors can lay any claim. The court also developed a form of property ownership that enabled wealthy families to establish estates for their daughters[51]. It created a regime of separate property for married women, which was limited to the investment of property of the wealthy and was used in late nineteenth century to deal with the needs of middle and lower middle classes.

Around the middle of the nineteenth century several states adopted Married Women Property Act 1882 that allowed married women to own property, conduct business, enter into contract, sue and be sued and keep any wages they might earn. These continued to the present day, where the wife is responsible for her own tort and crime and she is capable of criminally conspiring with her husband as was in the case of United Sate v Dego[52] where a wife testified in court against her husband. Also, the act did not give the husband

power over the family's wealth but instead it provided that each spouse should own his or her separate property.

It should be noted that, equality of power, which separation of property achieves does not itself lead to equal opportunity to exercise that

[51]Ibid – pp.1531 – 1532
[52](1980) 364 U.S 51

power because married women especially those with young children, will not in practice have the same opportunity as their husbands or an unmarried woman to acquire property. It takes no account of the fact that marriage is a form of partnership to which both spouses contribute, each in a different way and their contribution is important to the family's welfare and to the society at large.

The matrimonial Causes Act of 1857 sought to remedy the existing defect in the law:

i) Where judicial separation is enforced, the wife will be deemed to be a feme-sole with respect to any property she acquires and to have sole power to dispose of a legal property acquired for her separate life;

ii) And if a wife is deserted, she might obtain a protection order which will have effect of protecting her from seizure by her husband and his creditors of any property and earning which she becomes entitled to after the desertion and vesting it in her as if she was a feme-sole under Sections 21 and 25 of the Act. Therefore, the provisions of the law that protects married women remains of historical importance because it gave a statutory extension to the existing equitable concept of separate estates and also broke to the restraint of a married women capacity to hold and dispose of property as a feme-sole.

The law Reform (Married Women and Tort Fearsor) Act 1935 provides that married women's properties owned by them as their separate property should be held and disposed off as a man or feme-sole.

The Act gained recognition by establishing the concept of the separate estates and provides thus under Section 1(a) and 2(1) as follows:

S.1(a)… a married woman shall be capable of acquiring, holding and disposing of any property … in all respects as if she were a feme-sole … S.2(1) All property which:

a) Immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity or

b) Belongs at the time of her marriage to a married woman after the passing of the Act or

c) After the passing of this Act, is acquired by or devolves upon a married woman, shall belong to her in all respect as if she were a feme-sole and may be disposed off accordingly.

It is to be noted that the effect of the provisions of the Act is to extend. cover to the daughter of the poor that the rule of equity (which creates a legal separate property) are to the daughter of the rich. In practice, the most difficult problem is when the marriage has broken down as was the case where the court of Appeal. In the case of William v William[53] the court ordered for the transfer and settlement of property on divorce, nullity and judicial separation. There largely remains the need to make an enquiry into the precise interest that each spouse has in the matrimonial home or other assets.

In some instances, the court may recognize the husband as the sole beneficial owner as was in the case of National Provincial Bank Ltd v Ainsouth[54], the court prevented him from dealing with the property unless and until he provides the wife with suitable alternative accommodation. Also, in the words of Lord Denning in Heseltine v Heseltine[55], that the court may impose a trust whenever it would be inequitable for the estate owner to keep the property for himself alone. This may be the wife's contribution to the family's budget as was the case in Hazell v Hazell[56] that the contribution was not in money's worth which apparently does not suffice, but due to the husband's conduct e.g. where he intends to put the property in their names as soon as the wife becomes of full of age or because the property acquired is by their joint effort for joint use. The court may also look at the circumstances that exists at the time the marriage had broken down and do what seems just including the extending the wife's right to maintenance within its

[53](1976) CH 278 or (1977) 1 ALL ER 28CA
[54](1965) hc 1175 or 1235 or 1236
[55](1971) 1 WLR 342
[56](1972) 1WLR 301

.discretionary power to deal with the situation on the basis of an adjustment of the parties' personal rights. Also in respect of income of either spouse, whether from earnings or from Investments, it will prima facie remain his or her property. And where the spouses pool their income in a common fund, then both acquire a joint interest in the whole fund. but if a spouse withdraws money from a common purse and buys property with it for his or her use, it remains solely for that spouse . Where it is bought for their joint use, then it will be used jointly and the beneficial interest will belong to both the husband and wife.

Apart from their common purse or savings, the husband is duty bound to supply his wife with a housekeeping allowance out of his income and any balance or property bought from it remains the husband's property and not theirs. This is unjust to the wife because it does not consider the fact that any savings from the housekeeping money is due to the

wife's skill and economy as a housewife as to help her husband . as provided under Section 1 of Married Women Property Act 1964 as follows:

> If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purpose or to any property acquired out of such money, the money shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and wife in equal share.

It should be noted that the provision of the Act applies to cases where the allowance is provided by the husband and not to the situation where the wife supports the husband through her economy or where they contribute jointly or to common purse. In Nigeria, if the marriage has broken down irretrievably and both husband and wife contributed to the property in the matrimonial home equally through their earnings or investment, the property shall be shared equally to the parties as provided by Matrimonial Causes Act.[57] Where the court on its own discretion shares property equally among the parties or increases the amount of maintenance of the wife above what she might have demanded, with or without children. In the case of Akinbomi v Akinbomi[58] , the court held on appeal that the issue of sharing of property was not allowed because it was not pleaded but if it were pleaded by the wife, the property would have been shared among them, . Nevertheless she and the children were allowed occupation and enjoyment of rent as was in the case of Towoeni v Towoeni[59].

It is to be noted that most of the complaint of women is that they

[57] S. 70 (1) and (2) and S. 72 (1)(2) & (3) MCA 1970 now Cap M7 Laws of Federation of Nigeria 2004

[58](2002) 5 NWLR pt 761 p568 (see Family.lifegoesstrang.com/reason-divorce on 21/9/2010

[59](2001) 12 NWLR pt 727 p445CA

contribute to the acquisition of matrimonial property (and in some case other property) and the husband disregard their interest at a later date and disposed the property without their consent especially upon dissolution of the marriage if the property is in the husband's name, since he has right of occupancy as was in the case of Innocent Jolly Okoh v Mercy Okoh (supra) where the matter become of property adjustment and the court by the provision of section 70(1) MCA order such settlement as considered to just and equitable, contrary to the decision of Nwanya v Nwanya[60], where his lordship held that a claimant for settlement of property must present her receipt, acknowledging her contribution or the like before the court because the court is not "Father Christmas" and that whoever averts must come prepared to prove his claim. It is submitted that this attribute will work largely against women due to cardinal relationship that exists between the spouses. The above attribute of Nigerian court is unrealistic demanding a party claiming against the other a property as of right where both of them has contributed in common purse a receipt in respect of dispute property either during the continuance of the marriage or when the marriage has broken down irretrievably. Section 7(1) (Married women property of Kaduna State edict 1976) states that:

Subject to the provision of this edict all property which:

60 (1987) 3 NWLR pt 62 p. 697

a) Immediately before the passing of the edict was the separate property of a married woman or held for her separate use in equity.

b) Belong at the time of her marriage to a married woman after the passing of this edict, or

c) Is acquired by or devolve upon a married woman after the passing of this edict, shall belong to her in all respect as if she were a feme-sole and may be disposed of accordingly.

Note that though the law is clear on the issue of acquisition of property by a married woman, yet some culture and traditional practice in some parts of the country abhor married women from acquiring property especially landed property because it is regarded as deviant behavior in some societies, for a woman to have even a farm land separate from her husband. Yet at the demise of her husband she is not entitled to any inheritance from the property she worked for with the husband in his life time. Rather she is often regarded as part of property to be shared[61]. For instance, until recently in Igala land a woman had no right to own a land.

[61]Hogget, B. M. Parent and children, 4th edition London Seet and Maxwell Ltd 1993

This Igalaland comprises of Ankpa, Dekina, idah, Igala-mela, Ibaji, Olu-

Olamaboro, Omala and Bassa Local Government Areas of Kogi State in Nigeria. Other traditional, social and religious practices regard women right to inherit property as unequal to the right of men. In some areas, the women are regarded as property to be inherited after the death of their husband[62].

It is to be noted that the right to acquire and own immovable property anywhere in Nigeria as protected under Section 43 of Chapter IV of the Constitution of Federal Republic of Nigeria 1999 (as amended) as one of the fundamental rights guarantee but this is mostly in practice. It is sometimes frowned at by the society if a woman insists on acquiring separate property from her husband yet on the demise of the husband, she is deprived of the property she jointly acquired with him when he was alive. Article 13, 14 and 15 CEDAW stated that women should have equal right to control, contract and administer property and that all contracts and other private instruments restricting the legal capacity of women are deemed null and void. Therefore the triple system of marriage laws in Nigeria, i.e. Islamic, customary and statutory marriages, resulted in a plurality of legal provisions and precedents regarding property right

[62]Abdullahi, H. – Economic, social and cultural right n Nigeria. A case prepared for the Swedish NGO foundation for human right , May 2000 p. 30-31

and inheritance. It is submitted that the society should recognize, the customs and religious laws that protect the human rights and fundamental human aspirations of women. As a matter of fact, in Nigeria and most parts of the world, customs and religious laws play dominant roles in the determination of the rights of women; certain norms created by these law place women in a position subordinate to men.

3.4 Right to education and work in any place of choice

Before 1873 in Britain, women were not allowed to be educated in all fields of discipline because it was taken that certain professions belong to men only. A woman could not go to work either as single girls or married women. By 1868, Myria Bradwell sought for admission into the Illinois Bar as the first woman to practice law. She was denied the right and she took the matter to court against the state as Bradwell v State[63]. She was refused admission and she challenged the refusal in court up to the Supreme Court of United States. To the Lord Justice the argument was that the enhancement of a woman to the practice of law brought together the subject we now consider separately as employer right, sex discrimination, professional association right and family law. In addition the conceptual laws between a woman's petition to practice law

[63]83 US (16 wall) 130 1873

and her family status involved both empirical and normative claims because the separate sphere for men and women had both factual and normative status. That the role of women as wives, mothers, widows and daughters drew them to economic productivity and self assertion beyond the sphere of the home. Therefore, the effect of this legal change upon the actual subordination of women will be a subject of debate because in the nineteenth century women were treated as equal yet allowed to remain grossly unequal in the twentieth century since actual inequality was recognized and through recognition it became possible to design laws that tended to make people more equal in fact. Married women frequently choose jobs which do not directly challenge the prevailing concept of a woman's proper place as many people view it unseemly and inappropriate for wives to work. Married women are still not expected to express any dissatisfaction with their domestic status so that a return to formal employment frequently has to be legitimized in a socially accepted fashion with hours tailored to suit child care. By the twentieth century and with the formation of professional nursing associations based on women's traditional role in the career, more gender segregation occurred in the health sector as a whole associated with persistent low pay for nurses, in comparison with other sections of the medical profession. Librarians also satisfy the fast growing demand for low paid workers with educated female being recruited. Note that women librarians were frequently employed due to their submissive attitude especially in Tsarist Russia because of their functions in the traditional society. Also, in retail trade, women were employed not because they are cheaper but due to their positive virtue in politeness and soberness. They also function effectively in the world of women by linking women as workers with women who are consumers.

The first step in integrating women into the work place and the market was the stopping of the slave trade consisting of women in large numbers, the adoption of Married Women Properly Act, Community Property Laws, judicial principles and legislations or

statutes countries allowing women into various work place, markets and activities such as practicing law as was the case of Bradwell v State (supra). When deciding the case of SailerInn v Irby[64] the court struck out the state law forbidding women from being bar tenders by holding that an Act guaranteeing all persons freedom in the selection of any occupantion passed in response to the Supreme Court's decision in Bradwell v Illinois State (supra was superior to the state law). The international discrimination against women aimed at protecting them from sexual pressure in the work place and market was raised in the case of Horgen v Alcohol Beverage Control Appeal[65] as a statute prohibiting women from

[64](1971) 95, Cal Rpt 329

[65](1968) 69, cal Rpt 868, 878 - 95

working in bars on the ground they may commit improprieties if engaged in liquor sale was rejected. Also, women were considered intellectual and emotionally incapable of holding many responsibilities in employment since the main concern is to put family responsibilities ahead of their jobs.

Gradually, civilization and modernization reforms were designed to integrate women into the work place or work force freely. Such anti-discrimination laws which allowed women to be assimilated into work force freely replaced laws barring women from certain professions or forbidding their employment under the same conditions applicable to men. Laws forbidding conscious sex discrimination in employment has made e.g. Equal Pay Act of 1964, S. 206(d) of the 1976 U.S. constitution of Civil Right Act of 1964, Education Amendment Act 1972, the Equal Credit Opportunity Act 1974 as well as Housing Act of 1968, laws and regulations prescribing employment procedures also protect women from such discrimination. Other protections were gender-conscious and gender specific in their program design e.g. setting goals, and taking neutral decisions especially in academics. It is a stopgap measure designed to ensure that future employment is free of sex discrimination and to allow each individual a chance to compete equally for the reward of employment. The major benefit of the reform is an attempt to integrate women into employment which tends to provide freedom and equality for women, expand the career options available to them and increase the salaries and advancement possibilities of certain group of women workers. Thus, in Nagle v Fadera[66], where Mrs. Nagle was refused a license by the steward of the jockey club to train race horse in pursuance of their unwritten policy of refusing a license to a woman, she sued for an injunction and a declaration that this practice was against public policy, the court holds on appeal that if however it can be shown that the reason given and other sources of information show that the he candidate has been capacious then the jockey club can and reasonably refuse admission. Therefore, the law will certainly intervene to protect them. Another reason or area of discrimination is the crowding together of a larger number of men and women which could cause problems as women would see men in undignified circumstances that could undermine respect between the sexes. Men will be distracted from their work by the presence of the women. As a result, sexual availability could corrupt the men's morals and lead to misunderstanding. Even to the present day, sexual harassment of working women is used to justify the practice that discriminate against women. Also as ruled by the Supreme Court in case General Electric G v Cribert[67], anti discrimination laws did not require

[66](1966) 2 QBD 633
[67](1926) 125 US 429

states or private employers to include pregnancy benefits in comprehensive medical plans which helps only smaller groups of successful women but failed to change the basic pattern of sexually segregation in employment where most women will remain in dead-end jobs. Note that working women struggle both to maintain their attachment to a domestic role by contributing wages to the family and to resist the implicit disparagement of their work imposed by ideology, idealizing the lady and her domestic virtue through individualism and independence.

In Nigeria, historically women self advancement has been curtailed by the burden of reproduction, as well as associated cultural view placing the woman's role to that of child bearer and home maker with limited time to entertain under aspiration. Challenges in Nigeria bought about gradual changes that make the women like women in other parts of the world especially in developing countries who were faced with discrimination that limit their opportunities to develop in full potential on the basis of equability with men. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) adopted by the General Assembly on the United Nations in 1979 and ratified by Nigeria in 1985[68]. This addresses the right of women to education, training, [68]Article 10, 11, 12, 14 and 15 (CEDAW)

employment, property and inheritance, credit and other resources and opportunities on an equal basis with men.

Notably, Article 11 of CEDAW states that women shall have equal right as men with respect to employment opportunities, choice of profession, promotion and remuneration.

The constitution of the Federal Republic of Nigeria 1999, outlaws

discrimination on the basis of sex and women's employment right and further protected under the labour act 1945, especially section 54 to 58 of the Act regulating the employment of women as pregnant women are entitled to stay away from work for 12 (twelve) months, six months before delivery and six months after delivery. Legislative activities since the second republic in Nigeria to present day have not placed any direct obstacle or barrier on the development of women. Societies have moved and irreversibly beyond the time when women were expected only to listen and "obey" but rather they now foresee, deliberate and decide. In Nigeria today women are at the centre of political legislative, industrial and bureaucratic activities, their rights are assured as those of their male counterparts, these rights are legally and constitutionally assured as part of the nation's general concern for human right[69]. Notable, the Federal

[69]Umezulike, I A – Property right of women and children in divorce, Issue problem and prospects: A proposal for reform university of Lagos press (1996) p174

Government of Nigeria established and initiated a number of institutions and programs to improve the situation of women in nigeria[70].

Through the creation of all the ministries, accordingly, the report

on the implementation of the Beijing platform of Action, submitted to the

United Nations by the Federal Ministry of Women Affairs and Youth Development, women account for only 18percent of the formal sector workforce and only 3 percent of administrative and managerial position in the country.

Even in the federal civil service, which is by far the largest employer in the country, women are heavily under represented, except in junior staff categories, such as clerical officer, secretaries, typist and cleaner. Note that data has also shown in 1995 that the federal government employed 47,908 women accounting for just 24 percent of its total workforce but it was considerably high than 13 percent recorded in 1987.

The gender disparity is even greater in professions like medicine, academic, teaching, engineering, architecture and law which remain overwhelmingly dominated by men, with only a modest improvement

[70](i) The Better Life programme for Rural Women initiated in 1987
(ii) The monastery of Women Affairs and Social Development established in 1993,
(iii) The family support programme established in 1994 amongst others

over the year showing a 15.6 percent up academic staff in Nigerian university and 17.5 percent of medical practitioners as female. Also the greater pattern of employment as well as discrimination in salary practices. There are large disparities in earning between men and women because the occupation where women are mostly engaged such as agriculture, clerical work, petty trading are relatively characterized by low level of productivity and income. The African charter on human and people right calls on all state parties to eliminate every discrimination against women and ensure the protection of the right of women as stipulated in international declaration and convention that:

> Nothing that women right and women essential role in development have been reaffirmed in the United Nations plan of the environmental development in human right 1993, on population and development 1994 and on social development 1995; realing also United Nations security council resolution 1325 (2000) in the role of women in promoting peace and security[71].

The convention was ratified and domesticated in Nigeria as part of our law. And clearly it states in the constitution (CFRN) 1999 that the state is to direct its policy toward ensuring that all citizens are treated equally without discrimination on any ground whatsoever and to have the

[71]Article 18 African character on human and peoples' rights. (see also – www. ar – or.faceook.com/note and marriage.com.about 3/7/2009

opportunity of securing adequate means of livelihood as well as adequate opportunity to secure employment. That state should ensure the condition of work is just and humane. Notwithstanding these provisions, women are still discriminated against in social, political and economic arenas[72]. It is noted that it is a common practice for women not to be

employed in certain field or organization simply because she is a woman. Worst still, women who by marriage left their state of origin to marry a man from another state has been subtly denied employment in their husband's state. On the other hand, a woman who marries outside her state of origin is equally denied employment in her own state; a double jeopardy. Thus in the case of Okunboru v Group Consultant Nigeria and others[73], where she was refused pay for maternity allowance and refused maternity leave which was constituted to be absence from work by her employer in breach of her contract employment, held that her purported termination was a breach of the section 145 and 146 of the Labour Code Act (the predecessor of the labour Act 1974) and therefore wrongful. Therefore, the foregoing shows that, conditions of work are more favorable to men than women. The reason is not farfetched, our society is paternalistic assigns responsibilities for the raring of children to women, whether in

[72]Vision 2010 Report, 1997

[73](Unreported) CCHCS/2/74 at p159

full time employment or business, they still have to shoulder the responsibility for child care. The social and economic changes have necessitated alteration and redefinition of sex role must begin to take cognizance of the multiple role women play as wage earners, mothers and homemakers.

3.5 Right to both Parties to Have Custody of Children

Custody means the sum total of the right a parent should exercise over his child. Especially under common law, the father had the priority right over his children. Father is entitled to the absolute right over his children as was in the case of R v De-Manneville[74], where a writ of habeas corpus was obtained, directed to the defendant to bring up the body of an infant of eight months old. Held that he is the person entitled by law to the custody of his child but if he abuses such right to the detriment of the child, the court will protect the child, but there is no pretense that the child has been injured for want of nurture or in any respect. Then having a legal right to the custody of his child and have not abused the right, he will be entitled to have the right restored to him. Therefore, the father has absolute right over his children until the age of 21 years, upon certain duties paced on him e.g. to maintain and educate

[74](1804 5 East 221

his children, the court would not enforce these duties directly but to some extent indirectly. The father's social role entitled him to control the children. If the mother has to leave him and take the children with her, the court would be expected to force her to return them to him. Court normally does so in order not to interfere with family matters as was in the case of Olmstead v Olmstead[75]. Held granting the father habeas corpus remedy as against the mother and mother - in-laws to obtain the custody of a child on the ground that the paramount legal right of the father to the custody and education of the children will be interfered with by a court of equity only where he has been at fault in bringing about the separation, if not the father has a complete guardianship right over the children and also by the custom he is permitted to attach his surname to the children of the marriage. Under the

Roman law the father has a power of life and death over his children upon the principle of him who gave, had power to take away. Then also the consent of the parent to the marriage of a child under age most be obtained due to the reason of setting a proper life, by preventing the ill consequence of early and precipitated marriage. These powers cease at the age of twenty one (21) years when they are able to use their discretion as in the case of Agarellis

[75](1857)NYSC 27 Barb931

v Lascellas[76]. Held that "the rights of a father are scared right because his duties are sacred duties …" The court interferes with the father's right if he had abandoned the child or if he had no means of maintaining the child, since his right is absolute not only against a stranger but even against the mother. And this right prevailed even after his death if he appoints a guardian for his infant child on his death. And the guardian so appointed is entitled to custody as against the mother. Gradually women sphere started expanding and leading to some external case in relation to family which previously was assigned to men. Around the mid of nineteenth century, with passing of married women property act, mothers and women were said to have equal right to the custody of children as was in the case of Muller v Morrison[77] held that the parents have equal and joint right to custody of the child as an exact equality among the sexes under the law. Because in determining custody the child's best interest is put into consideration. One of the remarkable features in the development of English law in 1973 is that the parliament enacts laws in relation to the legal custody or upbringing of a minor and to his property

or the application of his income there from and also the mother to have the same right and authority as the law had previously allowed the father

[76](1883) 24 CHD 317
[77](1890) 43 kan446 p612

as stated in Section 1(1) of the Guardianship Act 1973. The Act clearly shows that the parental relationship is no longer harmonious and the court intervenes between the father and mother in such a case. Before the Guardianship Act 1973, the legislation that first interfered with the father's right to have the possession of his children and to deny the mother any contact with them was the custody of infant Act 1839, which empowered the court to make order giving custody of any child up to the age of seven years to the mother, giving her access during their infancy. The Act known as Talfourd Act as promulgated by Sergeant Talfour, a lawyer with experience on some remarkable cases and the parliamentary proceeding were protracted and bitter. Then Infant Act 1873 that empowered court to give custody of a child up to the age of 16 years (rather seven years) to their mother. Therefore, various statutes were enacted in England dealing with custody of children. The effect of the act is to assimilate complete right of both parents with regard to the custody of their children or child and gave statutory recognition to the paramount consideration in custody proceedings. In awarding custody, the court has difficult duties to perform because the governing principle in determination is the best interest and welfare of children putting into consideration the qualification and fitness of the respective parties. Seeking custody their

adaptability to the task of caring for the child, their ability to control and direct it, their age, sex and health, temporal spiritual, mental and moral well being as well as the environment and entire surrounding at the proposed home and the influence likely to be exerted upon the child.

In 1989, both the United Nations Convention on the right of child as adopted by the General Assembly in November 1989 and the children Act reached a statute book in England as the most comprehensive and far reaching reform of child law to establish parenthood as the primary legal status in children and return the guardianship Act.

In Nigeria, initially under customary law, custody is absolutely under the control of the father and his relation and under the statutory marriage initially is under the father to the exclusion of the mother as practiced in England. But the effect of various legislations passed in England changed the position where the welfare of the child is considered as paramount consideration in custody proceeding as was in the case of Anyanso v Anyaso (supra).

In custody proceedings the parents have equal right to custody issue, where court considers the child's welfare as was in the case of Akimbuwa v Akimbuwa(supra) Held in granting the order of judicial separation between the parties granted custody of the four children of the marriage and maintenance allowance of ₦ 10,000:00 monthly to the mother and putting their interest of paramount consideration as was in the case of Nzelu v Nzelu[78].

The Matrimonial Cause Act[79] recognizes the full right of each party to the custody of the children as was in the case of Veronica Okpara v Festus Okpara (supra) and the decision on the case of of Omotunde v Omotunde[80]. Finally to the present happening, family regards the best interest of the child as consideration to their upbringing and the mother's right custody especially if the children are young and or where the children choose to stay with their mother until marriage in case of separation. Finally, the authoritative rule of the father having absolute legal right over his legitimate children to the exclusion of the mother's right is no longer the law.

3.6 Right to Family Decision

Generally speaking, under common law and from the historical perspective, the right of both spouses to family decision was not possible then because the husband being the head of the family has every right both on his wife and children to the exclusion of every one. This

[78](1997) 3 NWLR pt 494 p474/CA (www.leg.state.nv.us/nrs/nrs. on 24/01/2011 and www.shoemakerlaw.com/on 2/10/2010

[79]1970 new M7 laws of federation

[80](2001) 9 NWLR pt718 p252 CA

historical development of the legal doctrine governing family right from the vantage point of these legal disabilities applied to married women and children as they are legally merged

into the husband and considered outrageous as an affront to the dignity and autonomy of women.

This old rule that wives and children from legal obligation are subject to the control of the male as the head of the household because women's social role then was subjecting herself to the husband financial, physical and even moral control were women cannot react as passive victims. This conceptual building block of the traditional story juxtapose legally enforced collectively support individualism and female subordination to male authority with female autonomy and independence. The experience of women in colonial and early republic families and late 19th century offer a contrasting complementary piece of evidence that alter the traditional outline about the non domestic roles assumed by women and women's understanding of their role. Thus women assumed independent role to support their families and also asserted power through their subordinate roles.

The early period was the era of male dominating families with their decision as final, subordinating women and enforce collectively rather than individual autonomy. But research into this bite experience of the colonial and revolution of women toward these legal disabilities, marries women participated with men in family decision. In so doing, women challenged the legal and customary restraints on their autonomy and independence and evidence of women experience identified potential combination of the ideas and connection of a standard between patriarchal collectivism and autonomous rights bearing individualism. Perhaps the religious and political rule made women both obliged to be self renouncing and powerful only to be a being. That a family succeeds when it acts lovingly, favour its own and accepts each member with reservation.

The social role of a wife, for example, one carried with its common law disabilities, subjecting the woman to her husband's financial, physical and even moral control. Women in this role, however, did not simply react as passive victim but instead as people able to use the given role for new ends and over time, to transform even the wifely role and other actions beyond the expected wifely terrain in terms with the nurturing and caretaking obligations of the wifely role. Women similarly could exert authority and undertake activities beyond their accusation role by reference to their connection to husband, father and children rather than by reference to a kind of personal and legal autonomy. For example the first right's convention of Seneca Fall in 1848 produced demand for women rights by demanding for autonomy equality, liberty, to push for affiliation, protection and public caretaking[81] and the case of Hewer v Bryant[82,] a decision which exhibits the right and duties of the spouses.

The well documented change in family structure from a hierarchical pattern headed by the husband and father, to a joint and egalitarian pattern whereby husband and wife are equal partners in the decision-making and division of labour within the family such as:

i. Boundaries between the roles of husband and wife are becoming blurred.

ii. There is the shift in emphasis from the character of the family as a unit to the equality of each spouse as an autonomous individual within that unit.

These two factors play in important influence on the legal question that the worldwide trend toward female emancipation. The increased case of planning the number and timing of children has played its roles in enabling woman to choose a particular life style or to alternate between marriage styles to a single life time. The recent change accordingly viewed a significant primarily indicator of ideology of communication

[81]Minow Martha; Forming underneath everything, that grows toward a history of family law Wisconsin law review pp887 - 891

[82](1970) 1 QB 357 - 371

building the law of husband and wife in relationship. In line with this, the French and German Civil codes dealt elaborately with the allocation of power of decision between husband and wife in family matters thus Article 213 of the French civil code reads:

"The husband owns protection to his wife, the wife's obedience to her husband."

In 1967 Article 213 provided that in the case of an inference between husband and wife, the husband would make a decision in conformity with the interest of the household and the children if any.

Finally by 1970 Article 213 read that:

"The spouses together assure that moral and material direction of the family."

The new principle, established that the mother and the father exercise the parental authority in common as a landmark in the development of legal equality of the sex in France and Germany and also the culmination of a steady trend to modify the degree and kind of control to which children are subjected to.

This brought about the argument that the elimination of the head of the family will hasten the dissolution of the family; that the husband should be the head because he is better able to support the family. If not, more and more couples will seek judicial intervention and this will lead to marriage breakdown.

The power of the head of the family can be justified if the family will defend itself as a result of the social and economic structure, the man is stronger in a social sense or acts alone in daily affairs. This is no longer the case as it is not the man alone who earns the living for the family, the wife generally has an education equivalent to that of the husband and she has equal political right, then the notion of head of family will be contrary to good sense and contrary to reality. The issue of right between the spouse in the recent year exhibit that the real family unity under these circumstance does not depend on the authority given to one of

the spouses (such an authoritarian conception can only give rise to conflict), but it depends on the unity of the two spouses.

In United States, there are many cases and statutes eliminating decision based on sex, one amongst many is the husband and wife relationship, where the transformation of marriage will be into a partnership of two individuals of equal rank and dignity as in the case of Doe v Doe[83].

[83](1974) 31 NE 2nd 128 – 132

Finally, the Anglo-American attitude of non-interference with a functioning marriage seen to be the most compatible not only with pluralism in society but also with the principle of equality of husband and wife and the modern view of marriage as a free union of two individuals.

In Nigeria patriarchal society, women suffer marginalization at the family level. They are being excluded from decision making concerning the family, women are often not allowed to take part in decision on how many children to have or when to have them. But with the increase in women roles in the economy, and their retention of income makes some women to have greater financial independence or more scope to make decisions on household expenditure. In the long run, this places important implication for women's status within the family and their wider participation in family decision making. With the rapid expansion of education including higher education, and the emergence of a new generation of more highly educated women both in profession and senior civil service cadre, yet the public life remains to this day overwhelmingly a man's world.

Nigerian women like the other women in the other parts of the world and especially in most parts of the developing world, continue to face various forms of discrimination which limit their opportunities to develop to their full potential on a basis of equality with men. The convention on the elimination of all forms of discrimination against women (CEDAW) adopted by the General Assembly of the United Nations in 1979 and ratified by Nigeria in 1985 includes a series of articles[84] which specifically address the right of women to education, training, employment, property and inheritance, credit and other resources and opportunities on an equal basis with men. Note also Article 18 of the African charter on human and people recognizes rights and calls on all state parties to eliminate every discrimination against women and to ensure the protection of the right of women as stipulated in international declaration and conventions[85].

That women's right and women essential role in development have been reaffirmed in the United Nations plains of on the environment and development in 1992 on human right in 1993, on population and development in 1994 and on social development in 1995; recalling also is the United Nations Security Council's resolution 1325 (2000) on the role of women in promoting peace and security.

In line with the above resolution, women have important role to

[84]Opcit p.81
[85]Article 18 African charter on human and people right

play not only at home but also outside the home. The role women play in respect of decision making in family mostly affect the contribution in the

family, education of children of marriage and other household items, but where there are problems in the marriage and the husband being the trustee of the family property and head of the family claims preference in the property and other contribution toward the family made by women that the property belongs to him alone. And in most cases the court has to intervene as was in the case of Egunjoni v Egunjobi[86] where the judge relied on the statement of Lord Reid in Gissing v Gissing[87] that in such situations a trust is created. The court in deciding on what proportion their interest were to be shared, the court once again depended that if spouses payment are direct, she gets a share proportionate to what she paid.

It should be noted that the disability places on women initially in respect of the right in family decision affecting the property and interest of children and other family matter is no more, because most women are economic dependent that they contribute to the family in equal share with the men giving them the right to decision in the family based on the removal of discrimination in equal level.

[86](1976) 2 FNR 78
[87](1970) 2,WLR 255

Finally, African women more than ever have come to realize that by nature they are entitled to all human rights thereby debunking various myth and folklore embedded in various culture and tradition fixing their traditional place in the kitchen or factory for production of children or as chattels to use and discard by men. But women play important role in procreation, socialization, provision and protection within the family, paradoxically women are not able to exercise their right within the family though they play very important role for the advancement of family and society much less importance is placed on the status and right of women.

3.8 Conclusion

Spousal rights are rights that arise from the decision of the superior court and other enactments because the Marriage Act as a statute in respect of Statutory Marriage provided only for the essential validity and the ceremonial aspect of the marriage. While the Matrimonial Causes Act provided for maintenance where the marriage has broken down irretrievably as financial support to be claimed by the affected spouse. This right that the spouse enjoys as a result of the marriage are in form of the following:

Right to Consortium which places an obligation of cohabitation in the respective domestic life to be discharged as a duty. Consortium co-exists with the right to maintenance and financial support of the family under the unity of spouses. Maintenance mostly is the right of the wife to be enjoyed along side with the consortium of the husband during the marriage and also after divorce or in divorce proceeding depending on the agreement between the spouses from the beginning and it is enforceable under the maintenance order. Also enjoyed in the marriage is the right accorded to the married women to acquired property of their choice which initially was under the sole control of the husband as the head of the family either living together or living apart.

Right to education and work in any place of choice is another right that the married women enjoyed from the late 19th century which initially is solely within the power of the husband or male as head of family. Finally**, right to custody and family decision** which initially is the sole, power of the husband to decide on the children of family and to take decision on the law and when the live, their education, their feeding and custody by various enactment extending to the married women to have a say in family and to custody of the children if at will be in their best interest.

CHAPTER FOUR

RELIEFS AVAILABLE UNDER MATRIMONIAL CAUSES ACT

4.1 Introduction

In a strict sense it is used as a general designation of assistance, redress or benefit which a complainant seeks at the hand of a Court particularly in equity. It may be used as remedies such as specific performance, injunction or reformation and rescission of contract. Therefore, matrimonial reliefs are sought by the parties to the marriage, if either of them finds it intolerable to cohabit with the other.[1] And the reliefs accorded to the parties are in form of reconciliation, dissolution of the marriage, judicial proceeding, nullity of marriage, restriction of conjugal right, jactification of the marriage and ancillary relief under the Matrimonial Causes Act.

4.2 Reconciliation

Reconciliation has always been the attitude of Court dealing with the Matrimonial Causes, as much as possible between the spouses. For this reason, admission made by a spouse in civil case is admissible in evidence. If it is made either on an express condition that evidence of it is

[1]Black Law Dictionary with pronunciation, 5th edition published by St. Paul Minn West Publishing Company 1979

not to be given or in circumstance from which the court may infer that the parties agreed that evidence of it should not be given. Moreover, where the court has petition for divorce, it usually gives some consideration for reconciliation between the parties as was the decision in the case of Blunt v Blunt[1a]. The court in considering whether to exercise its discretion in favour of the petitioner considers among other things that if the marriage is not dissolved, then there will be reconciliation between the spouses. Note that Section 1(2) of the English Matrimonial Causes Act 1965, makes special provision with regard to reconciliation in cases of desertion.

The duty of the Courts to encourage reconciliation under the old law is residuary and of general nature and often dealt with vaguely and resorted to the examination of allegation of the spouses.

The radical change made on the question of reconciliation under Section 11 – 14, Matrimonial Cause Act 1970 is a duty of the Court in Matrimonial proceeding to give consideration throughout the course of the suit to the possibility of reconciling the spouses unless the case does not admit such effort. If at any stage it appears to the judge either from the nature of the case and the evidence in the proceeding or from the attitude of the parties or their coursed that there is a reasonable possibility

[1a](1943) AC 517

of reconciliation he may adjourn the proceeding as provided by Section 11(1) MCA 1970, and such adjournment is in form of the following purposes:

i. To afford the parties an opportunity of being reconciled under such Section (1)(a) of Section 11 MCA 1970. This implies that reconciliation would be effected probably without a third party is intervention.

ii. The judge may, with a view of effecting reconciliation and with the consent of the parties interview them in chambers, the parties may be interviewed with or without counsel as the judge considers appropriate in the particular case under Section 11(1)(b) MCA 1970. If has effort of reconciliation fails, he ceases to be qualified, unless requested by the parties to proceeding, to continue to hear

and determine the suit in the absence of such request, the suit must be heard by another judge as provide under Section 12MCA 1970.

iii. The judge may nominate a person of experience or train in marriage conciliation or in special circumstance, some other suitable person to endeavour, with the consent of the parties, to effect reconciliation under Section 11(1)(c)MCA 1970. A marriage conciliator before embarking under his function must make and subscribe to an oath of secrecy. The oath requires him not to disclose to any person any communication or admission made to him in that capacity except in so far as such disclosure is necessary for the proper discharge of his function. Under Section 14 MCA 1970, the law allows at least fourteen day from the date of the adjournment to enable any effort of reconciliation to yield fruit, because the attempted reconciliation would not destroy the right which has already accrued in the party's favour. Note that if the statutory period has not been completed at the time of the attempted reconciliation, the petitioner will merely have to wait for such a period as it will require that they fulfill the minimum period required from the time the abortive reconciliation took place. Section 17(2) Matrimonial Cause Act 1965 did not expressly state that the parties must have resumed cohabitation during such period or period with a view of effecting reconciliation. This raises the

question whether resumption of cohabitation for reason other than reconciliation (before or after the expiration of the statutory period would terminate desertion or separation. For example, H deserted M in January 1969, they met in June and after a genuine reconciliation, they resumed cohabitation in that month. In November, H withdraws from cohabitation again. Can W still take the period from January to June 1969 into account in completing the period of desertion? Here it is obvious that the parties have already been reconciled and that the resumption of cohabitation is not with a view to effect reconciliation. The strict interpretation of Section 17(2) of the Act can be argued in the absence of any provision in the law which provides that resumption of cohabitation must be for the sole purpose of effecting reconciliation and since the parties have not lived together for more than six months, the desertion has not been terminated and therefore the period between January and June can be taken into account. But on the other hand, it can also be argued that six month period is only meant to encourage reconciliation, therefore if the parties resume cohabitation after reconciliation, the ordinary rule would apply and the desertion which hitherto existed would be terminated. In reconciliation, the consent of the spouses is important in effecting reconciliation because in the absence of such

consent, no basis for reconciliation exists. The judge is also vested with additional responsibility of making personal effort to reconcile the spouses and an experience or trainee in marriage conciliation must be invited in order to ensure the effectiveness of reconciliation. Note also that Order I of the Matrimonial Causes Rules 1983 makes it mandatory for solicitor in some matrimonial suit to draw the attention of their client to facilities or to assist in the reconciliation of the parties. Because such document will not be effective for the purpose of the proceeding under the Act unless a certificate duly signed by the solicitor personally is written as the document. Such certificate must be in form 3A, certifies that the legal practitioner must draw the attention of the petitioner or respondent, as the case may be, to the provision of the Act, relating to the reconciliation of the parties to a marriage and reasonable existence of a marriage guidance organized which may assist in such reconciliation. Note that a judge who has acted as a reconciliatory cannot sit upon the case, where the hearing is to continue, except the parties request that he does so. Evidence of anything said or any admission made in the course of reconciliation is inadmissible in later proceeding. It should be noted that many petitioner do not instruct a solicitor and many solicitors may treat the certificate as a formality unlikely to lead to

any real attempt to resume married life. In many events, no sanction follows if the solicitor states that he has not discussed the possibility of reconciliation. Note that when the Divorce Reform Act came into force. It was judicially stated that if there has been no discussion, the Court might feel bound in some case to exercise its power to adjourn the proceeding to see whether reconciliation

could be effected as was in the case of Goodrich v Goodrich[2]. But now it is abolished in the Matrimonial Causes Procedure Committee in 1985 under paragraph 442 – 443. With this recommendation, there are some evidences that there is a possibility of reconciliation in number of marriages that are currently dissolved and solicitor should be aware that they may have a greater role to play in encouraging parties to seek reconciliation. Note that Section 2(1) and Section 2(6) Matrimonial Cause Act 1973 states the facts that the parties have lived with each other for more than six months will not stop the petitioner from relying on further adultery committed since they separated even though this is a contribution of the same adulterous act as was in Carr v Carr[3]. It is doubtful whether the period is long enough to

effect reconciliation in many cases or the attempt is likely to be successful if the petitioner has to keep their eye open.

Although the argument has some force and its relevance to Nigeria is not doubtful because of few cases to show the incident as in the case of Akwara v Akwara[3a] where the Lagos High Court decided in accordance

[2](1971) 2 All ER 1340 (and the case of Anyaso v Anyaso (1998) 9 NWLR opt564 p150CA)

[3](1978) 3 All ER1193 CA, and unreported case of Elizabeth Babalola v Myles O. Babalola kcd/kad/1164/2010

[3a]Unreported suit No/33/71 of 22/11/1971 and Patience O. Ukaegbu v Emmanuel Okoh Ukaegbu Suit No Kdh/Kad/187/2006

with the principle followed in the Goodrich v Goodrich (supra), the intolerability of life with the respondent did not have to arise from the established respondent adultery. In Akwara v Akwara (supra), the petitioner and the respondent were married in Lagos in 1965 and the only child of the marriage born in 1966 died in 1971, the respondent and the co-respondent worker in Barclay Bank in Benin and they lived together as husband and wife. The petitioner who had been sent to the United Kingdom for a secretariat course, at the expense of the respondent, returned to Nigeria in December 1968. The respondent and co-respondent turned up at a party held by the petitioner's mother in hour of the petitioner to mark her return from the United Kingdom and the respondent, after an attempted reconciliation the respondent offered to take her back on condition that she has to share the home with the co-respondent. But the petitioner rejected this offer. She petitioned alleging that the respondent had committed adultery and that she found it intolerable to live with him. In upholding her allegation the trial judge said:

> The first respondent has by his own act converted a monogamous marriage into a polygamous, or a potentially polygamous marriage. The petitioner could not be expected to accept the arrangement proposed by husband that is to share the matrimonial home with the woman cited. The petitioner is therefore right to say that she finds life with her husband intolerable in the circumstance.

The above English and Nigerian cases are relevant but one will caution in adopting them partly because they are decisions of a Court of First instance, but a law under the recent Act in Section 11(1) Matrimonial Causes Act Cap M7 2004 vol. 8 Laws of Federation of Nigeria that:

It shall be the duty of the Court where a Matrimonial Causes has been instituted to give consideration from time to time for the possibility of a reconciliation of the parties to the marriage (unless the proceedings is 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 of the evidence that there is a reasonable possibility of such a reconciliation the judge may do all or any of the following:

a. Adjourn the proceeding to afford 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 the parties, interview them in chamber, with or without counsel as the judge thinks proper with a view to effecting reconciliation.

c. Nominate a person with experience or training in marriage conciliation or in special circumstance, some other suitable person, to endeavour with the consent of the parties and to effect reconciliation[3b].

It should be noted that the Act places it as a duty on the court to do their best to see that the marriage did not dissolve in order to protect the institution of marriage for the interest of both parties and if there are children, also they should be protected.

4.3 Nullity of Marriage

Nullity of marriage is distinguished from the other Matrimonial Causes of relief such as divorce, judicial separation restitution of conjugal right, which are available in respect of valid and existing marriage. But a suit for nullity is one by which a party seeks to establish owing to some detect that the marriage is invalid. Therefore, the word nullity denotes the process of terminating void and voidable marriage.

Meaning of void and voidable marriage

Void marriage is that which produces no legal consequences. Thus a void marriage is one that will be regarded by every Court in any case the

[3b]Adah Bally v Gedion Bally unreported suit noKdh/Kad/792/2005 and unreported case no Kdh/Kad/464/2011 Donald Fada Enyi v Elizabeth Lucay Enyi

existence of the marriage as has never taken place and can be so treated by both parties to it without the necessity of any decree annulling it. The above statement ignores the fact that an act which does not produce the intended legal consequences may produce other unintended legal consequences. But if it achieves them, it is valid. Note that a void marriage is one that has never been in existence as such void ab-initio, and the parties thereto have never acquired the statue of husband and wife.

Note that any person may assert the invalidity of a void marriage because void marriage is one which does not produce the intended legal consequence and in such marriage the wife does not acquire the domicile of the husband as was in the case of De-Reneville v De-Reneville[4] where a void marriage is regarded as that which has never taken place between the parties.[4a]

Voidable marriage is one that will be regarded by every Court as a valid subsisting marriage until a decree of annulling it is been pronounced by a Court of competent

jurisdiction. Note that after the introduction of divorce by judicial process in 1857, the voidable marriage came to occupy a position midway between the void marriage and the

[4](1948) p 100, III or (1948) 1 All ER 56, 60
[4a] www.Umich edu/ece/student project /bonfied/rape/2/2/2010

valid marriage. The annulment, of a voidable marriage like divorce change the parties status by a judicial decree, and both serve as means of terminating a marriage that has broken down.

A voidable marriage is one that is good while subsisting but may be annulled at the instant of one or both parties owing to some existing defect, as was rightly stated that avoidable marriage is one that will be regarded by every Court as a valid subsisting marriage until it has been pronounced by a Court of competent jurisdiction as was stated in De-Reneville v De-Renerville (supra). Note that in a voidable marriage, the wife automatically acquires the domicile of the husband by reason of marriage since the doctrine of unity of spouse with its corresponding rights and duties applies to spouses of voidable marriage. Before the decree commences a decree of nullity of voidable marriage has never been given retrospective effect as was in the case of Inver Clyde v Inver Clyde[5] where Bateson J. equated the decree of nullity in the case of voidable marriage with a decree of dissolution when he said:

> Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it the marriage being voidable and not void and the decree affecting and involving an alternation of status and being a judgment in rem is being on all the world to call it a suit for nullity does not alter its essential and real character of a suit for dissolution.

[5](1931) p28 of 41 – 42

The above dictum treated a voidable marriage as that which has never existed but in Re-Deuhirst[6] the decree was merely given a partially retrospective effect. In that case it was held that where an annuity was payable to a widow and she remarried and the marriage was subsequently annulled because it was voidable, the widow would revert the status of a widow of her former husband and could therefore claim the annuity payable to her, but only as from the date of the annulment of the second marriage and could not claim any arrears.[6a]

The problem and unjust effect of the retrospectiveness of the

decree of nullity of marriage in bastardizing the issue of the marriage. Therefore the distinction between void and voidable marriage shall be discussed below, thus the following:

i. Ground for Annulment

Essentially a marriage will be void if either party lacks capacity to contract it or if the ceremony is formally defective. Until the nullity of marriage under the Act, it was doubtful whether lack of consent made a

[6](1948) CH 198

[6a] www.bermansimmons.com/article 4/4/2008

marriage void or voidable in the case marriage contracted after 31st July 1971, when the Act specifically provide that this will make them voidable. With the doubtful exception of lack of consent, the only ground on which a marriage could be voidable after 1971 was when the age by the marriage Act rendered a marriage void if either party was under the age of 18 years and that one of the parties was imported. The Act added four new ground:

- The respondent willfully refuses to consummate the marriage
- That either party is mentally disorder.
- That the respondent is suffering from a venereal disease
- That the respondent's wife is pregnant before the marriage.

The new ground plus the issue of impotence and lack of consent constitute the ground on which a marriage will be voidable today. Note that where consent of either party is obtained by duress or fraud the marriage will be void because it lacks the true consent of the other party. Duress or fraud vitiates consent since it implies dishonest misrepresentation by a party to the marriage by which the consent of the other was obtained. By fraud the dishonest party procured the form without the substance of agreement as was in the case of Moss v Moss[7]

[7](1891) p. 263 – 268-9

whiled Duress on the other hand means that compulsion as to affect the mental attitude of the party whose consent is in question. It has to be shown that the duress created a state of fear or apprehension which prevented the party from consenting to the marriage. Thus, in Szechter (orse karsov) v. Szechter[8] and Singh v Singh[9], it held by Sir Jocelyn Simon that:

> In order for the impediment of duress to vitiate an otherwise valid marriage, it must be proved that the will of one of the parties there to has be overborne by genuine and reasonably held fear caused by threat of immediate danger (For which the party is not himself responsible), to life, limp or liberty, so that the constraint destroys the reality of consent to ordinary wedlock.[9a]

It is irrelevant that the party whose consent was so obtained is susceptible to pressure than a person of ordinary courage and also the duress needs not come from the party to the marriage but may originate from a third party. It is immaterial that the party making the threat was incapable of executing it, all that is necessary is for the party whose consent is in issue to have believed that the threat was real, so as to affect the consent as was in the case of Parojic v Parjcic.[10]

[8] (1971) 2 WLR 170, 180
[9] (1971) p.226

[9a] Marriage, about.com/od/advice and selftests/Advice3/4/2011 and case of Ekrebe v Ekrebe (supra)

[10](1959) 1 All ER 1

While in the case of Singh v Singh (supra) the parties were Sikh and practice Sikh custom, the wife's parent arranged her marriage, they told her that her husband was educated and handsome, but when she met him for the first time at the registrar's office for the civil ceremony of the marriage she thought about it and never wished to go through the civil ceremony, but out of obedience to her parents' wishes and in deference to her religious faith she went through the marriage in accordance with Sikh custom, the parties separated after the ceremony and it was arranged that a week later they would go through a religious ceremony at a Sikh temple after which they were expected to consummate the marriage. The wife refused to attend the religious ceremony and did not have anything further to do with her husband. She then petitioned for nullity on the ground of duress induced by parental coercion. The trial judge held that the ground was not established and dismissed her petition. On appeal, the Court of Appeal dismissing the appeal held that to establish duress as vitiating consent to a marriage, the genuine fear induced by threat of immediate danger of life, limb or liberty, since there was no threat of immediate danger of the wife's life, limb or liberty. There was no duress though she acted out of obedience to her parent and defence to her religion.

It should be noted that for the petitioner to succeed in her petition for degree of nullity, it must be established that consent is obtained more susceptible to pressure than a person of ordinary courage.

ii. Necessity for Decree

The vital distinction between a void and a voidable marriage is still that the former, being void ab-initio, while the later remains valid marriage until a decree of nullity is pronounced. Hence if either party dies before a decree is granted, a voidable marriage must be treated as valid for all purpose and for all time as was in the case of Re-roberts.[11] And on the other hand either party to a void marriage may lawfully contract a valid marriage with someone else without having the first marriage annulled.

Note that a decree of nullity is a judgment in rem, so that no one may subsequently allege that the marriage is in fact valid. But the most important reason for bringing proceeding is that the court has power in granting a decree to make ancillary order, and a party may therefore present a petition in order to obtain a property adjustment order or financial provision irrespective of any children of the family as the parties are not married. This is the only way the wife, to avoid the marriage, may obtain any form of maintenance for herself

[11] (1978) 3 All ER 225, CA

.**Ground which Marriage will be Void**

The ground on which a marriage is void is provided in Section 3 of the Matrimonial Cause Act 1970 now Section 3 of the Matrimonial Cause Act M7[12] is similar to those provided by the hitherto applicable, English law except for a few but significant changes. The

Act attempts to provide list of the ground on which a marriage is void, as void ab-initio, therefore Section3 makes it clear that the Act gives five grounds on which a marriage may be void:

i. Existing lawful marriage

By Section 3(1)(a) MCA 1970 now Section 3(1) M7 where either of the parties to a marriage is at the time of its celebration legally married to some other person, such a marriage will be null and void as was in the case of Nwanpele v nwankpele[13]. The first situation is where a customary law marriage precedes a statutory marriage with a different person as was decided in the case of Ojo v Ojo[13a] in High Court Aba presided over by Unuezinwa J in December 1972. This is dealt with in Section 33(1) of the Marriage Act and same as in M6[13b]

[12]Laws of Federation of Nigeria 2004, vol. 8
[13] (1973) 3 UILR 84
[13a] Unreported case suit no A/40/172/1972
[13b]Marriage 1965 now Cap M6 LFN 2004 vol. 8

"No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is held."
Note that this sub-section applies only to statutory marriage celebrated in Nigeria under the Marriage Act, but if the marriage is contracted outside Nigeria, the provision does not apply. In such situation the validity of Foreign Marriage will be determined by the application of the conflict of rules as to the capacity to marry. Note that to invalidate marriage celebrated under the Marriage Act on the ground of a previous marriage under customary law; the previous marriage must be proved with a high degree of certainty as was in the case of Abisogun v Abisogun[14] which was cited in the case of Osamwayin v Osamwayin[15], where the Supreme Court stated the rule as follows:

> With respect, I cannot share the view of the learned trial judge that to prove a marriage in accordance with native law and custom in order to invalidate another marriage, the premise of one of the parties to the alleged marriage backed up the evidence of her brother, whilst other alleged to be aware of the marriage are alive is enough to discharge the ones of proof required to prove such marriage by Native Law and Custom. I would add that in order to invalidate a marriage celebrated

[14] (1963) 1 All NLR 237, 242
[15] (1972) 10 SC1 and the case of Chukwuma v Chukwuma (1966) 1 WWLR pt 426 p543 CA and Jadesimi v Okotie – Okoh (1996) 2 WWLR pt 429 p128 SC

> under marriage ordinance on the ground of a prior marriage by native law and custom, the later marriage must be established by a high of degree of certainty.

Where there is lawful existing marriage under native and custom, no subsequent statutory marriage can invalid the marriage because such subsequent marriage is void ab-initio.

ii. Prohibited degree of affinity or consanguinity

Any statutory marriage celebrated in Nigeria by parties who are within the prohibited degree of consanguinity or affinity will be void as provided under both Section 33(1) and Section 3(1)(b)[15a]

It is important to note that the Act with regard to the prohibited degree of affinity or consanguinity relate only to marriage celebrated after the statute came into force. Consequently, a clear distinction must be made as to the rule applicable to marriage contracted before the 1970 Act and after that date. Thus prior to the promulgation of the 1970 Act, the prohibited degree of marriage was dealt with under Section 33(1) of the Marriage Act and it provides:

> A marriage may be lawfully celebrated under the ordinance between a man and the sister or niece of his deceased wife, but serves as aforesaid. No marriage in Nigeria shall be valid which, if

[15a] Marriage Act 1965 and Matrimonial Causes Act 1970.

> celebrated in England would be null and void on the ground of kindred of affinity…

But note that this Section has been replaced by Section 8 and Section 15(1)(d) of MCA 1970.

It is immaterial whether the relationship is of the whole blood or half or whether it is traced through or to any person of illegitimate birth. But Prior to 1970 Nigerian Courts have applied English Statutes on matrimonial Causes in force from time to time. It has been argued that the phrase for the time being in force may mean the current English law or the law of England when the Marriage Act was passed or the law of England as at 1900.

The Matrimonial Cause Act do provide full list of the prohibited degree of affinity or consanguinity which do apply to marriage celebrated after the coming into operation of the Act in 1970 as provided under Schedule 1 of the Act.

It will be recalled that in certain circumstance, it may be possible for person within the prohibited degree of affinity to marry each other with the consent of the High Court Judge as provided under Section 4 of the 1970 Act.

iii. Formal defect

In certain circumstance, a marriage will be void if the prescribed formalities are not complied with. Under the Act, not all breach of the formalities required by the Act will affect the validity of the marriage. There are some details of formalities which render the marriage void if both parties knowingly and willingly acquiesce in celebrating such marriage.

Where the marriage is celebrated in Nigeria the rules applicable to its formalities are contained in Section 33(2) Marriage Act 1968, which provides that:

"a marriage shall be null and void if both parties knowingly and willfully acquiesce in its celebration" without compliance with some formalities prescribed by the Act."
Note that the operative word in the Act, knowingly and willfully mean the mental state of the parties and is an important factor in determining whether or not a marriage is void because it involves the following:

- In any place other than the office of a registrar of marriage or a licensed place of worship (except where authorized by the license issued) as was in Bello v Bello[16].

[16] Suit No1/44/76 (unreported) High Court Ibadan July 29, 1976 and the case of Menakaya v Menakaya (2001) 16 NWLR pt 758, p. 203 SC

- Under a false name or names.
- Without the registrar certificate of notice or license or duly issued as was in Obiekwe v Obiekwe[17].
- By a person not being a recognized minister of some religious denomination or body or registrar of marriage.

The requirement that both parties should knowingly and willfully acquiesce in the celebration of the marriage presents a problem, if the parties are aware of the relevant facts but ignorant of the legal requirements as was cited in the case of Greaves v Greaves[18]. Therefore invalidity will only operate when the action of the parties is deliberate and taken with full knowledge of any existing defect.

iii **Lack of real consent**: It is a cardinal principle of law that the parties to a marriage must have freely consented to the union. Consent may arise in three ways:

(a) Where a party is incapable of consenting to a marriage: the marriage is void under Section 3(1)(d)(iii) but if it is shown that a party is mentally incapable of understanding the nature of the marriage contract. Mental incapacity may be due to insanity, drunkenness etc. existing at the time when a marriage takes place

[17](1963) 7 ENLR 196

[18] (1872) LR 2 P & D 423, see Chukwuma v Chukwuma (supra)

under the presumption of sanity, the burden of proof is on the party who alleges insanity.

(b) Where a party is capable of consenting but alleges that he did not give his consent (real or apparent) to the marriage in issue. This is also covered by Section 3(1)(d)(ii) which speaks of a party being mistaken as to identity of the other party or as to the nature of the ceremony performed. This is in consonance with the well established rule that only a mistake as to the identity of the other party or as to the nature of the ceremony will render marriage void. Note that as far as a mistake as to identify although very rare as was in the New Zealand case of C v C[19] that the marriage was valid because the mistake was only as a husband quality or attribute.[19a] But for mistake about the nature of the ceremony this would invalidate a marriage, if the mistaken party did not realize that he was going through the ceremony of marriage but thought something else as was in Mehta v Mehta[20] as held that the marriage was void for that mistake.

(b) Where a party is capable of consenting to a marriage and did consent ostensibly but alleges that the consent was not freely and

[19] (1942) NZLR 346
[19a] Ekrebe v Ekrebe (1999) 3 NWLR pt 596 p.514, CA
[20] (1945) 2 All ER 690

voluntarily given – this is covered by Section 3(1)(d)(i) consent not being real if it was obtained by duress or fraud. And it is only a fraud or duress which induces a fundamental nature of the ceremony or as to the identity of the other party will render a marriage void as in the case of Valier v Valier[21].

Note that the issue of duress or fraud is of conflict in respect of judicial opinions as to whether it renders a marriage void or voidable because ordinarily, the voluntary consent of both parties is necessary, for a valid marriage and that the marriage is void if such consent is lacking or it is procured by threat or duress.[21a]

iv. Marriageable age

By virtue of Section 3(1)(e) of the Act, a marriage is null and void if either of the parties is not of marriageable age. Neither the Marriage Act nor the Matrimonial Causes Act prescribes any marriageable age. Mostly recourse is made to the common law age of marriage. The absence of any provision relating to age of marriage does not mean that one validly marries irrespective of one's age. In Nigeria the marriage age is 16 – 18 years and that any marriage celebrated below the age is void irrespective of the knowledge or

[21] (1925) 133 LT 830
[21a] www.diivorce source.com/info/divorce-elawa/Colorado 3/5/2011

willfulness of the parties in acquiescing to the celebration of such marriage.

Ground on which marriage is voidable

The grounds on which a marriage celebrated after the commencement of the Matrimonial Causes Act will be voidable are laid down in Section 5 of the Act. These grounds are exclusive because the Section stipulates that such marriage …' shall be voidable in following cases but not otherwise…"

This means that the ground that makes a marriage voidable under the old law has to apply to all marriages celebrated after 17th March 1970.even though they were applicable to marriage celebrated before the Act. Therefore, the ground shall be considered as follows:

i. Incapacity to consummate marriage

Incapacity to consummate a marriage is a ground for the annulment of the marriage. Incapacity means that a party in question is impotent. But willful refusal to consummate a marriage was initially a ground rendering a marriage voidable but now is a ground for divorce.

To consummate a marriage, there must be ordinary and complete sexual intercourse with each other after the celebration of the marriage. But where sexual relations are partial and imperfect, there will be no consummation as cited by per Dr. Lushington in the case of D – E v A – G[22] where he observed that:

> It does not mean partial and imperfect intercourse, yet I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be a degree difficult to deal with but if so imperfect as scarcely to be natural, I should not hesitate to that legally speaking it is no intercourse at all…

This means that there must be a penetration of the female organ by the male in the ordinary sense. Though initially intercourse with the use of contraceptive method by one of the spouses do not amount to consummation as was the decision in the case of Cowen v Cowen[23] but the House of Lords ruled in the case of Baxter v naxter[24] that marriage is consummated where the spouses use contraceptive or other mechanical form of contraception. Also there is still some uncertainty as to whether the practice of coitus interruptus (i.e. withdrawal before the emission of semen) can amount to consummation as was in the case of White v White[25].

[22] (1845) 1 Reb 279, 163 ER 1039
[23] (1946) P.36
[24] (1948) AC 274
[25] (1948) p.330

In the present law penetration without ejaculation is sufficient to constitute consummation as was in the case of RVR[26]

To make a marriage voidable, the incapacity to consummate must exist both at the time of the marriage and at the hearing of the petition. Therefore if the incapacity existed at the time of the marriage but has been cured before the petition, the marriage will not be voidable as was in the case of S v S[27]. The reason is that the cause of the impotence may be due to a physical, mental or moral disability. It may sometime happen (especially where the

cause is psychological) that the person involved is only incapable of intercourse with a particular individual. The cardinal point in support of nullity is the inability of a spouse to consummate the marriage in question.

Where a marriage is not consummated after a reasonable period and the respondent refused to submit to medical examination, there may be a presumption that the respondent is incapable as was in Akpan v Akpan[28]. In this case the parties were married in London on 28th January

1965. Throughout the period of their cohabitation in England and their journey back to Nigeria they shared the same bad, but there was no

[26] (1952) 1 All ER 1194
[27] (1956) P.1
[28] Suit No. WD/12/67 (unreported) High Court, Lagos 27 July, 1968

sexual intercourse. The respondent attempted several times to have intercourse but was unsuccessful. On each occasion, there was no erection. The medical inspector report and the medical evidence established that the petitioner was able to consummate the marriage. But the husband, the respondent, refused to submit to medical examination. It was held that failure to consummate the marriage is due to the incapacity of the respondent. It should be noted that before a marriage is declared voidable on the ground of incapacity to consummate, the court must be satisfied that the defect is not curable as provided under Section 36(1)(a)[28a], means that the person cannot be cured by medical treatment as was in the case Sy v Sy[29]. The position is the same if the defect can be remedied by an operation attended by danger to life., and the marriage will not be voidable on this ground unless the respondent refuses to submit to such medical examination as the court considered necessary for the purpose of determining whether the incapacity is curable.

An impotent person can petition for nullity on the ground of his

impotency if it is proved that he is not aware of the existence of the incapacity at the time of the marriage as provided under Section 35(a) of

[28a]Matrimonial Cause Act 1970 now Cap M7 LFN 2004 vol. 8
[29] (1963) P.37 (CA) or (1962) 3 WLR B26

the Act as decided in the case of Petit v Petit[30]

It is significant to note that willful refusal to consummate a marriage is not a ground for nullity under the 1970 Act but it is a ground of nullity under the English law i.e. Matrimonial Cause Act 1950 under Section 8(1)(a) and Section 9(a) of 1965 Act, and this followed in the decision of Horton v Horton[31]. The justification for this change is because willful refusal to consummate is the definite decision of a sexually potent spouse, which should not make a marriage voidable but rather it should be a ground for dissolving the marriage as provided under Section 15(2)(a) of the Act that willful and persistent refusal to consummate the marriage is a ground for divorce.

ii. Unsoundness of mind, mental disorder and epilepsy

A marriage is voidable if at the time of its celebration one of the parties was of unsound mind or a mental defect or subject to recurrent attack of insanity or epilepsy as provided under Section 5(1)(b) of the Act. But if any of these mental deficiencies arose only after the marriage, it will not void the marriage. Unsoundness of mind means insanity, and involves the incapacity of a person to manage himself and his affairs as

[30] (1962) 3 WLR 99 (CA)
[31] (1947) 2 All ER 87 (HL)
was in Smith v Smith[32] Whysall v Whysall[32a] and also as provided under Section 5(2) of the Act; thus:

> as person whom owing to an arrested or incomplete development of mind whether arising from inherent causes or induced by disease or injury, requires oversight, care of control, for his own protection or for the protection of others and is by reason of that fact, unfitted for the responsibilities of marriage.

This defect may exist at birth or arose subsequently as a result of disease or injury. A spouse who is of unsounding mind or a mental defective is regarded by the law as being incapable of carrying on a normal married life as was in Whysall v Whysall (supra). In such situation the other party to the marriage is allowed to petition for nullity of the marriage. Finally the burden of proving that a party is inane at the time of the marriage lies on the party asserting it, and a marriage will not be decreed voidable at the petition of the party suffering from the mental deficiency or epilepsy.

iii. Venereal disease

A marriage is voidable if at the time of the ceremony the respondent was suffering from venereal disease in a communicable form as provided under Section 5(1)(c) of the Act. Venereal disease is not defined in the Act, but the important question today is whether it includes

[32] (1940) P.179 and [32a](1960) P. 52, 64 - 65

AIDS since it is sexually transmitted disease, though it can also be transmitted in other ways. It is clearly socially desirable to release a person from marriage to an infected spouse and it would be unreasonable to limit the petitioner who could show that the respondent had acquired it as the result of sexual intercourse. In regard to AIDS as a venereal disease for this purpose would be to suppress the mischief and advance the remedy that legislative has provided in Heydon case[33] which is the principle of construction and it is not certain that courts would adopt this construction.

Finally, under Section 35(b) of the Act, a decree of nullity in respect of a voidable marriage cannot be granted at the suit of the party suffering from venereal disease in a communicable form on the ground that the decree of nullity on the ground of venereal disease in a communicable form is also subject to other rules.

iv Pregnancy of the wife by a person other than the husband

The husband may annul the marriage if he can prove that the wife is pregnant by some person other than himself at the time of the marriage. There is no corresponding right for women to have her marriage annulled on the ground that some other women are pregnant by her husband at the

[33](1584) 3 Ca Rep 7

date of the marriage. Also that a wife so pregnant cannot obtain a decree of nullity on the ground of her pregnancy as provided under Section 35(c) of the Act. The decree of nullity ~~cannot be granted on this ground if the Cou~~rt is of the opinion that by any reason it would in the particular circumstance of the case be hard and oppressive to the respondent or contrary to the public interest to make a decree. For instance, the court will refuse to make the decree if the petitioner had knowledge of the pregnancy at the time of marriage as this would amount to an approbation of those facts. The court will refuse a decree where the petitioner with full knowledge of the fact and without just cause allows his right to lapse. Thus W v W(No. 4)[33a], decision is in line with Section 8(1)(d) of the English Matrimonial Causes Act 1950 and which is same with Section 5(1)(d) of the 1970 Act. In that case, the husband petitioned for nullity on the ground that his wife was pregnant by some other person at the time of their marriage. He sought to prove that the child born soon after the marriage was not his by requesting the Court to order blood test of the spouses and the child. The Court of Appeal held that it had no inherent or statutory power to order such blood test, which in any case would not settle the matter conclusively. But, where parties submit to blood test the

[33](1584) 3 Ca Rep 7
[33a](1963) 2 All ER 841 (CA), (1964) P.47

result most corroborate other evidence to the same end in proof of paternity of the child as was in Liff v Liff[34].

In Nigeria based on the important role played by families of the spouse (even in a statutory marriage) in probing the background of the parties to a marriage will often have

revealed any traces of such and that is why there is no single reported Nigerian case of an action brought to void a statutory marriage based on this ground.

4.4 Dissolution of Marriage

The decree of dissolution of marriage are at times granted to both parties where the consequence of matrimonial offence is that he court had to pronounce one spouse "guilty" and the other spouse "innocent." This might work injustice in many cases because in the majority of cases both spouses are at fault in varying the degree and the fact that in most cases the court usually exercises its discretion in favour of the petitioner and makes the distinction between "guilty" and "innocent" spouse. The matrimonial offense principle meant that the innocent spouse could in theory jeep in existence a marriage which is already an empty shell, if he decided for one reason or another not to petition. In effect, the "innocent" spouse could hold "the other suspended like Mahamet's

[34] (1948) WN 128

coffin, as in the case of Painter v Painter[35]. Therefore the matrimonial offense principle could cause bitterness and distress not only to both spouses but also to their children as was in the case of Innocent Jolly Okoh v Mercy Okoh[35a]. Note also the matrimonial offense principle at times results in the fabrication of evidence where the spouses were determining to obtain a divorce by all means.

Ground for divorce

Prior to 1970, the Nigerian law on divorce was based on the matrimonial Causes Act 1965 which applied in Nigeria until 1970. This arose from the fact that the law on Matrimonial Causes in force in England from time to time was made applicable to Nigeria. Thus, change in English law in this respect became part of Nigerian law (as provided under Section 4 of the Regional Courts.[35b] Therefore marriage may only be dissolved when a spouse has committed a Matrimonial offense like adultery, cruelty or desertion. Nigeria benefitted immensely from the reforms which took place in England and formed the basis of our matrimonial Causes Act 1970.

The most important change effected by the Act was to introduce

[35] (1963) 4 FLR 216 at 219 – 220 and Anidlabi v Anidlabi (2007) NWLR pt 1017 p1

[35a] – Unreported case Suit No. Kdh/Kad/854/2010 and se family.lifegoesstrong.com/reas-divorce xm 21/9/2010

[35b] Federal Jurisdiction Act 195, Cap 177 Laws of the Federation of Nigeria 1958

the breakdown principle into the Nigerian law of divorce while at the same time retaining element of the matrimonial offense principles.

Thus Section 15(1) of our Act provides that either party to a marriage may petition for divorce "upon the ground that the marriage has broken down irretrievably."

This is the primary and fundamental question which court would be called upon to determine and formulate as follows thus:

"Does the evidence before the court reveal such failure in the Matrimonial relationship or such circumstance adverse to that relationship that no reasonable probability remains of the spouse again living together as husband and wife for mutual comfort."

It should be noted that the Section established a single ground for divorce i.e. irretrievable breakdown in please of several which existed under the old law. Therefore, Section 15(1) of the Act has been established as the sole ground of divorce as was the decision in Ezirim v Ezirim[36] where Nnaemaka Agu JC (then) who delivered the unanimous opinion of the Court of Appeal observed that:

[36] Suit No. FCA/L/56/78 (unreported) February 6, 1981, Court of Appeal, Lagos Division and the cae of Joseh Terseer Ogar v Judith Venderan Ogar unreported case No/Kdh/Kad/97/2009

> It is necessary to bear in mind the fact that although the Act (Matrimonial Cause Act) created only one ground of divorce, to wit, that the marriage has irretrievably broken-down (Section 15(1) of Act), yet that the facts which may lead to the marriage breaking down irretrievably are categorized under sub-section (a) to (h) of Section 15(2). Only those facts can suffice to find a petition for divorce ought not to hold that the marriage has irretrievably broken down unless the petitioner or cross-petitioner as the case may be satisfies the Court on one or more of the fact.

The above decision based on Section 15(2) of the Act due to proof enables the court to come to the conclusion that a breakdown of marriage has occurred. The enumeration of the facts is exclusive in the sense that a court cannot conclude that a marriage has broken down and grant a decree of divorce unless one of the facts at least has been established. At least three of these - adultery, cruelty and desertion – each in a modified form, are included in the list. The other include period of separation which exemplifies the breakdown approach.

It is important to refer to the view of the English law commission in respect of the adoption of the breakdown principle because of its relevance to the Nigerian situation. In all, a good divorce law should achieve the following objective:

i. To buttress, rather than to undermine, the stability of marriage and

ii. When regrettably, a marriage has irretrievably broken-down to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness and humiliation[37].

The two points entail that a divorce law is to ensure that divorce is not so easy as to dissolve the parties from making effort to overcome their matrimonial difficulties, but if possible, to dissolve the legal tie once it has become irretrievably broken if the marriage is dead, i.e. the object of the law is to afford it a decent burial. This is an achievement in a way of just concerned, including the children as well as the spouses and avoids the minimum embarrassment and humiliation. Above all, the law seeks to take the heat out of the dispute between husband and wife and certainly

further embitter relationship between them or between them and their children. Lastly, it did not merely bury the marriage but do so with decency and dignity and in a way which will encourage harmless relationship between the parties and their children in the future as was in the decision of Omotunde v Omotunde[37a].

Based on the above, it is the duty of the court to inquire as far as it reasonable into the fact alleged by both parties in practical terms, the

[37] Reform of the Ground of Divorce. The Field of Choice Ground, 3132 paragraph 15 and see divorce support-about.com/ad/us state divorcelaw/a/Illinois divorcedfamily2/10/2010

[37a] (2001) 9 NWLR pt 718 p252 CA

burden is on the petitioner solely to establish one of the facts and it is for the respondent in a defence to show if he wishes that the marriage has not broken down irretrievably.

The petitioner's assertions though clearly highly relevant, cannot be conclusive as was in the case of Ash v Ash[38], but there can still be few cases indeed where there are chance of a reconciliation by the time the case has gone for the hearing because it must be shown that the marriage has irretrievably broken down at the date of the hearing and not at the date of the petition. Any other interpretation of the Act would make nonsense of the provisions empowering the court to adjourn the proceeding to enable the parties to attempt reconciliation as was in the case of Pheasant v Pheasant[39]. Note that if the decree is granted under the special procedure as will usually be the case, the petitioner's statement will in fact be conclusive.

Basis of the present divorce law

The present law of divorce is that a marriage can only be terminated if there has been the commission of a matrimonial offence by one of the parties to the marriage. The commission of such offence does not

[38] (1972) FAM 135, 141 (1972) 1 All ER 582 and the unreported case of Veronica Opkara v Festiu Opkara Suit No.Kdh/Kad/305/2010
[39] (1972) 3 All ER 219 at 233, see Anyaso v Anyaso (supra)

automatically terminate the marriage but only gives the other party (i.e. the petitioner cannot therefore seek a dissolution of the marriage on the ground of his own adultery, desertion etc) to the marriage the option of terminating it by divorce. Therefore this basis shall be considered below.

(a) Willful and persistent refusal to consummate the marriage: Section 15(2)(a) of the Act is to the existence that if there is a proof of the willful and persistent refusal of a spouse to consummate the marriage will enable a court hearing a divorce petition to decide that the marriage has broken down irretrievably. The interpretation of the phrase "willful and persistent refusal" as used in deciding the case of Handy v Handy[40] thus that:

> persistent" in this context is a word which implies continuity and seems to me to be somewhat analogous to the word "repeatedly", "willful" means in the context the doing of something as a matter of conscious will. The end result of the combination of the two words seems to me that in order to make out a case under Section 28(c) (Section 15(2)(a) of the Act) it will be necessary to show that there was a refusal to consummate and that despite a number of requests, the respondent continued to refuse to engage sexual intercourse with the other spouse."

Note that the phrase as a settled and definite decision come to without

[40] (1964) 6 FLR 109, 110 – 111, and the unreported case suit no/Kdh/Kad/468/2009 in respect of Kubai Zoaka v Faqsha Zoaka. See also www.caseskawfirm.com on 1/3/2011

just excuse and in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage as first established in the case of Horton v Horton[41].

What constitutes willful and persistent refusal to consummate will depend on the fact of each case. Mere neglect to comply with a request is not necessarily the same as refusal. A refusal implies a conscious act of volition. Neglect on the other hand may be nothing more than a failure or omission to do what has been suggested. Note that it must be shown that the refusal is a conscious and free act of the respondent as was in handy v Handy (supra). But before there can be refusal, there must be number of request, direct or implied, and an opportunity to comply with such request exists in the case of Horton v Horton (supra). The court in determining whether or not there has been a refusal the whole history of the marriage must be considered. Thus in Jodla v Jodla[42], the parties were married in a Registrar's office[42a]. They were Roman Catholics and fully appreciated their faith but did not countenance matrimonial relation between them until there had been a religious ceremony which the husband promised to arrange for matrimonial home for the fill cohabitation of the marriage. Although repeatedly requested to do so by

[41] (1947) 2 All ER 871
[42] (1960) 1 WLR 236

[42a] Bobai Aya v Patience Imade A. O. (unreported) case suit no Kdh/Kad/882/2010 and Ada Sukprako v Emovrawe S. (unreported) case suit no. Kdh/Kad/924/2010

the wife who was at all times subject to the ceremony taking place, willing to render the husband full matrimonial rights, he failed to live up to his promise. Each of the parties commenced proceeding for a decree of nullity on the ground that the other had willfully and persistently refused to consummate the marriage. It was held that the wife's request to the husband to make the arrangement for a religious ceremony constituted an implied request for sexual intercourse which he had refused without just cause. Consequently, he willfully refused to consummate the marriage.

Therefore, willful persistent or refusal to consummate the marriage is a ground for divorce, the court must ensure that under Section 21 of the Act which requires that the marriage had not been consummated up to the commencement of the hearing of the petition.

(b). Adultery and intolerability

Adultery may be defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other.

One of the important changes made by the Act in the law of divorce is that adultery simplicity is no more a sufficient ground for the dissolution of the marriage.

By Section 15(2)(b) of the Act, in addition to proof that the respondent has since the marriage committed adultery, the petitioner must also show she finds it intolerable to live with the respondent. In fact, the Section effects a major change in the concept of adultery as a fact on which the court may dissolve a marriage. Before 1970, the mere proof of adultery was sufficient to grant a decree of divorce. But under the Act this is no longer the case as was the decision in the case of Egbueje v Egbueje[43].

The petitioner has to prove not merely the commission of adultery by a spouse but also that the petitioner finds it intolerable to live with the respondent. Consequently, in order to satisfy the sub-section two certain elements must be established. Thus:

- The commission of adultery and

- The petitioner finding it intolerable to live with the respondent. The above element must be established after the celebration of the marriage.[43a]. The element of free will is fundamental to the concept of adultery. Consequently, where a spouse has extra marital sexual intercourse against his or her real consent, adultery will not be established

[43] (1972) 2 EC 5 LR 740
[43a] Erhahan v Erhahan (1997) 6 NWLR pt 510 p.667 CA

as was in the case of Clorkson v Clorkson[44]. Note also that where an insane spouse engages in sexual relationship with a third party, the M'Naghten rule will apply in finding of the adultery. In so doing, adultery cannot be established as against the insane party if he does not know that the nature of his act is wrong as was in the case of S v S[45].

Also, if a spouse commits adultery under the influence of alcohol or drugs so that he or she does not understand the nature and consequence of the act, the position would be akin to insanity and adultery will be negative as was in Hanbury v Hanbury[46].

It is of importance to note that where both parties petitioned each other on the ground that the other has committed adultery and that each finds it intolerable to live with the other. The court may exercise its discretion in favour of both parties and therefore dissolve the marriage or it may refuse to exercise its discretion in favour of either of them and dismiss both petitions and lastly it may exercise its discretion in favour of one of them, grant him a decree and dismiss the other party's petition as was in the decision of Bhojwani v Bhojwani[46a].

Finally, unlike the position under customary law of certain areas

[44] (1930) 143 RT 773
[45] (1962) P.133
[46] (1982) p.222
[46a] (1996) 6 NWLR pt 457 and Rutmwa Dangwanan v Major James Yusuf D.(unreported) case suit no. Kdh/Kad/964/2010

where premarital intercourse by the wife is actionable at the instance of the husband, adultery as a matrimonial relief to a statutory marriage must be proved to have been committed after the celebration of the marriage. The mere fact that the marriage has not been consummated is no bar to a petition based on adultery and in such case, the respondent may cross petition for a nullity decree based on impotence or the willful refusal of the petitioner to consummate the marriage.

The proof of adultery

(i) Act must be voluntary: In order to be guilty of adultery, a person must have had sexual intercourse voluntarily as was in the case of Clorkson c Clorkson (supra). This principle also applies if consent is negative by force or fear. That in order to establish adultery, the intercourse needs not be complete as would constitute consummation of marriage. But there must be some penetration of the female organ by the male. But if the parties are indulged in sexual gratification which does not involve some penetration, adultery will not be found as was in the decision of Dennis v Dennis[47].

It is important to note that to establish adultery the act must have been done voluntarily by the spouse involved in the act and it must be such that the other spouse finds it intolerable to live with the spouse

[47] (1955) P.153, 160(CA)

involved in the act as was in the case of Erhahon v Erhahon (supra).

(ii) Standard of proof: The consummation of adultery is a matter of fact which under Section 82 of the Act must be proved to the satisfaction of the Court. To attain the standard of proof, the evidence must be such that satisfies the court as to the truth of the alleged adultery as was in the case of Briginshaw v Briginshaw[48]. Note that once a spouse establishes an act of intercourse between the other spouse and a third party, the burden of proof will shift to the later to show that the intercourse lacked his or her real consent as was in the case of Redpath v Redpath[49]. But if at the close of evidence uncertainty exists, as to whether the case is one of adultery or rape, the court must dismiss the petition. In case involving adultery, it is immaterial that the marriage has not been consummated as was in the case of Ekrebe v Ekrebe[49a].

The proof of adultery is either by direct evidence or by giving circumstance from which the court could infer adultery. Before the court will infer adultery, the evidence must establish more than a mere suspicion and opportunity. It must satisfy the court that an inference of adultery ought to be drawn from the surrounding circumstance.

[48] (1938) 60, CLR 336
[49] (1950) 1 All ER 6000 (CA)
[49a] (1999) 3 NWLR pt 596, p.514 CA

The court is also faced with a confession of adultery by either the petitioner or the respondent as the only evidence on which a divorce petition is based. The court is very cautious in accepting the veracity of such a confession so as to avoid the danger of dissolving

a marriage when no matrimonial offence has actually been committed. Therefore, the standard of proof in adultery is not certain due to the nature of the offence because there is a view that it must be established beyond reasonable doubt as in criminal cases or will the degree of proof be lower as in civil cases i.e. by preponderance of probability.

Nigerian Court like English Court have insisted that he proof must be beyond reasonable doubt as was in case of Akinyemi v Akineymi[50] and Lemis v Lemis[50a]. But in the recent case of Blyth v Blyth[51] where the House of Lords reversing the decision of the Court of Appeal on standard of proof in divorce proceeding and held that:

> The standard of proof came to this so far as the ground for divorce is concerned, the case, like any civil case may be proved by a preponderance or probability but the degree of probability depends on the subject matter. In proportion as the offence is grave, so ought the proof to be clear. So far as the bar to divorce are concerned, like connivance or condonation , the petitioner needs only show

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[50] (Unreported) FSC 303/63 and [50a](1960) LLR 215 and also unreported case suit no Kdh/Kad/97/2009 of Joseh J. Ogar v Juth n. Ogar

[51] (1966) 1 All ER 524 at pp. 536 – 537

> that on balance of probability he did not connive or condone as the case may be.

This is now the position in English court but it is not certain as to whether Nigerian Court follow suit based on the pronouncement of the House of Lords.

(iii) Joinder of co-respondents: In a petition for a decree of divorce, where a spouse is alleged to have committed adultery with a specified person, Section 32(1) of the Act prescribes that the co-respondent must be made a party to the proceeding, unless the rules of court prescribe otherwise. However, under order IX Rule 3(1) of High Court Rules, where the petitioner alleges in a petition for divorce that the respondent has committed adultery with a person whose name is unknown to the petitioner at the time of filing the petition, the suit shall not be set down for trial unless the Court has made an order dispensing with the naming of that person. But if the petitioner subsequently became aware of the name of the person at any time before the making of the decree of divorce, he shall amend the petition accordingly as provided under Order IX Rule 5(1) High Court Rules. And the respondent on the other hand is not bound to make the adulteress or adulterer a party to the suit. But where the co-respondent dies after the institution of the proceeding or the filing of the answer but before the decree is made the petition or answer shall be amended by stating the death of the person and the date on which he died.

Note that Section 32(2) of the Act is clear to the extent that a person who has been made a party to divorce proceeding in accordance with the above rules may apply to the Court to be dismissed from the proceeding. The court may approve such application if it is satisfied that the allegation of adultery has not been proved.

iv Damage for adultery: The right action for damage for adultery which is confined on each spouse is under Section 31 of the Act. Thus in Adeyinka v ohuruogu[52], the Supreme Court discussed the principle governing the award of damage to a petitioning husband.[52a] The co-respondent in the above case appealed against the decision of the high Court which ordered him to pay damages and cost for committing adultery with the respondent wife. He admitted adultery but argued that he was unaware that the woman involved was a wife of a statutory marriage. Onyeama J. S. C. said:

[52] (1965) NM LR 324

[52a] – Dominic Douglas v Helen Tope A (unreported) case suit no. Kdh/Kad/1026/2010

> In Nigeria, a woman may be married without being married under the Marriage Act and a man may have reason to believe she was married without thinking she was married under the Act. We think that in the absence of any finding that the correspondent knew or had reason to believe that the petitioner's wife was married to him under the marriage Act, cost should not have been awarded against him.

It is submitted that lack of knowledge that the women involved is a wife of a statutory marriage should not affect the liability of the co-respondent, since he would in any case have been liable for damage and cost if the woman had been married under customary law and not under the Act.

(c) Cruelty

This is also a ground for divorce under the Act. The Court is empowered to terminate the marriage if the respondent has treated the petitioner with cruelty since the celebration of marriage. The term cruelty is not defined in any status and the courts are left to determine whether any particular conduct is cruel or not. But to constitute cruelty, there must be willful and unjustifiable conduct inflicting pain and nursery, and causing injury to health or the reasonable apprehension of one or the other as was in Horton v. Horton (supra). Note that a conduct which causes injury to health is not by itself sufficient, the conduct must be willful, but in case of insanity a husband does not know the nature and quality of his act, he cannot be cruel as was Astle v. Astle.[53] But an act of violence, if sufficiently grave, may amount to cruelty, and also sulking, if it causes injury to health, can amount to cruelty as was in the case of Lauder v. Lauder[54]. The communication of venera disease by either spouse to the other also amount to cruelty as was in Browning v. Browning[55]. Where unnatural perfected practice of a wife with other women caused injury to the husband's health, such practice were held to amounts to cruelty as was in the case of Gardner v. Gardner[56]. A divorce can be granted on the ground of cruelty already suffered by the petitioner. It is not necessary to show that the cruelty is likely to continue. Where a husband has been guilty of cruelty to his wife, who has caused her to leave him, and she subsequently condensed the cruelty and return to him, a very slight fresh evidence of cruelty is required to entitle the wife to a decree for cruelty as was the decision in Bertram v. Bertram[57]. Note that it is practice of the court to require corroboration for cruelty but it is not a rule of law . Therefore, the judges carefully refrained from attempting a comprehensive definition of cruelty observed by the learned commentator that this restraint by the judges as given rise to numerous and conflicting

[53] (1939) P.415, 109 L. JP.9
[54] (1948) W. N. 477; (1947) 1 A ER 76
[55] (1911) P.161; 80 LJ P.74
[56] 177 LT 148; (1947) 1 A ER 630 and the case Akinbuwa v Akinbuwa (1998) 7 NWLR pt 559 p.661CA
[57](1944) P.59, 113 L.J. P. 52

cases on what legal cruelty, is. But the essential element of cruelty began in the case of Russell v. Russell[58] and end with the case of Crollin v. Crollin[58a], in both decision, the House of Lord, held that to establish legal cruelty sufficient for matrimonial relief, the petitioner must show conduct which is grave and weighty on the part of the respondent conduct which is grave and weighty on the part of respondent conduct which cause danger to life, limb or health (physical or mental) or a reasonable apprehension of it to petitioner. The petitioner must prove intension to injure on the part of the respondent especially where there is no physical violence by the respondent. The House of Lords finally ruled that intension to injure without physical violence is no longer necessary.

Therefore, the nature of respondent conduct to be relied upon to establish cruelty accordingly as Fatayi – William J (as he then was) in the case of Odiase v. Odase[59] relied on the English cases, be weighty and grave, as Denning LJ (of late memory) observed in the case of Mcewan v. Mcewan[60]:

> It must be more than ordinary wear and tear of married, couples still have to put up with all the vexation, the quarrel, and the troubles which are ordinary incidents of married life. They have to take each other for better for worse. They must

[58] (1897) AC 395 and [58a](1963) 3 WLR 176
[59](1965) NMLR 196, see Ekrebe v Ekrebe (supra)
[60] (1964); 198 Sol. Jo. 198 see also Akinbuwa v Akinbuwa (supra)

> put up with the temperament and defect of character of each other. There may come a time when defect of character or temperament may be such as to the conduct complained of, must consist physical violence.

Thus in Beckley v. Bekley[61], (were abstention from intercourse as evidence of cruelty and also citing Odiase v Odiase (supra) in abstention from intercourse coupled with long absence from matrimonial home amount to cruelty) the Court held that the constant negation by the husband together with his persistently accusing the wife publicity of adultery, amount to cruelty. Even though an act considered in isolation might not amount to cruelty, the petitioner may use a series of these acts to established cruelty as in Akinbuwa v Akinbuwa (supra).

From the foregoing, Nigerian Court follow suit of English cases rigidly in deciding whether or not a conduct is so grave and weighty as to amount to cruelty. However, it is suggested that local cultural values and social condition must be taken into consideration in deciding whether a particular conduct is grave and weighty. If this is done the occasional chastisement of a wife might not necessarily amount to cruelty in Nigeria, if such is tolerated. In this respect the decision of Sadipe v Sadipe[62] by Justice Fatayi – William (as he men was) is of interest, where the wife

[61] (1961) WNLR 47 and (1961) WNLR
[62] (Unreported) Akure AK/37/63 and the case of Samuel E S v Esther E. A.(unreported) court no Kdh/Kad/703/2010

alleged that even though she was married to the respondent in a monogamous form, the later had always expressed his preference for a polygamous marriage and behaving as if he was not married by going out without talking the petitioner along and also staying out till the early hours of the morning. The trial judge inferred cruelty from these allegations holding that:

> Having regard to her (petitioner's) background, her obvious sophistication and enlightenment and the fact that she is a Christian, I am of the opinion that she is the sort of person who could be deeply shocked by the respondent's pronouncement. The continued repetition of his disbelief coupled with such concrete manifestation of it as repeatedly staying out until the early hours of the morning were in my view likely to give rise to reasonable apprehensive of danger to the health of the petitioner.

The decision was so rigid on the part of the respondent as cruelty was established by the petitioner being that our

judges follow suit of the English decision in respect of cruelty without
putting into consideration of type of cultural values and social condition of our as was in the decision of Towoeni v Towoeni[62a].

To established cruelty, the petitioner must show injury to her health in proving danger to life, limb or health, bodily or mental or a

[62a] (2001) 12 NWLR pt 727 p.445 CA

reasonable apprehension of it as was laid down in the case of Russel v Russel (supra) by the house of Lord. And also the intention to be cruel in the nature of insult, humiliation and acts of deprivation and the like where intention implies as the natural and probable result of what he does, but this is no longer the case based on the House of lord decision in Crollins v Crollins (supra) showing that the attitude of mind will go only to the gravity and weight of the conduct complained of and not to stand on its own fact as a separate requisite of cruelty as in Akinbuwa v Akinbuwa (supra).

(d) Desertion

Desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse.

Under Section 15(2) of the Act, a marriage will be regarded as having broken down irretrievably where the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.

Desertion is understood to have taken place when there has been a separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life. Desertion is of two kind i.e. simple and constructive desertions.

Simple desertion is where the guilty spouse is the one who abandons the matrimonial consortium while in constructive desertion, the deserting spouse is the one who remains in the matrimonial home, but who by his or her conduct has made it impossible for the other spouse to remain in the matrimonial home. Generally, desertion constitutes the deliberate purpose of abandoning the conjugal right and this is based upon facts and these facts may and do vary with the surrounding circumstance of the parties. This implies the cessation of cohabitation and an intention on the part of the guilty spouse to desert the other as was the decision in Sickert v Sickert[63]. Since desertion consists of the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separately permanently. It therefore follows that four elements must be present before desertion can be proved.

(i) De-Facto separation

This implies the bringing to an end of cohabitation by severing all

[63] (1899) P. 278, 68 L. T. P. 114. See www.divorce-law Illinois.com/maintenance 2011

mental obligations as was the decision of per Evershed M. R. in the case of Perry v Perry[64]. The most obvious form of separation in desertion is where the deserting spouse physically departs from the matrimonial home as in the case of Rosanwo v Rosanwo[65]. However there can be desertion even though the spouse resides in the same home since desertion is not the withdrawal from a place but from a state of things. Note that a spouse who is desirous of leaving the matrimonial home does not always have an alternative place to go to but rather than to leave, he or she may continue to live there but may repudiate all marital obligations. In such a case there will be desertion just as in the case of physical departure, as Lord Mernvale P stated in the case of Pulford v Pulford[66] that "desertion is not the withdrawal from a place, but from a state of things." Therefore, where there has been complete cessation of all the marital obligations and the spouses are no longer said to be living as husband and wife in the real sense of the word, there is separation for the purpose of desertion even though the parties still reside under the same roof[66a]. That is a willful absenting on the part of one spouse and such absence and cessation of cohabitation must be in spite of the other spouse.

[64] (1952) 1 All ER 1076, 108C (CA)

[65] (1961) WNLR 297

[66] (1923) P. 18, 21

[66a] Case of Juliana John V Musa Appolos)unreported suit no UCC/CVAC2/2010

Finally De-Facto Separation implies the situation where both spouses are living in the same roof but there is separation in respect of matrimonial home completely between the parties.

(ii) Animus Deserendi

Normally, animus deserendi will be present when one spouse leaves the other as the desertion commences immediately on separation. Therefore animus deserendi implies the intention to withdraw from cohabitation permanently. When the original separation took place, the parties intended to return to each other and one of them later resolves not to resume cohabitation, desertion begins as soon as the animus is formed as in Pulford v Pulford (supra). Note that animus deserendi is not present where a spouse temporarily absents from the other, for instance on holiday or mutual consent of the spouses. But where a spouse voluntarily abandons the matrimonial home there is a presumption that he intended to desert the other spouse and desertion starts from the moment of the departure as in the decision of G v G[67.]

Where separation is due to mutual consent and one of the parties form the intention to withdraw permanently from the other, desertion

[67] (1964) P.133

starts from the moment the intention is formed. Thus in Agu v Agu[68] the parties, a Nigerian and a German lady, were married in England in July 1952. The husband petitioner returned to Nigeria in August 1958 on the mutual agreement that he would first settle down and later send for his wife and children. In 1960 the petitioner booked passage for the respondent and their children to join him in Nigeria. The respondent cancelled the booking on the ground that she was nervous to make the journey and later made it clear that she would not make the journey. In May 1963, the petitioner made an unsuccessful journey to Germany to persuade her to return but she refused. It was held that the respondent was in desertion from 1960 when the animus deserendi supervened. Similarly, if separation is involuntary, for example owing to imprisonment, it may be turned into desertion by the subsequent animus deserendi of a spouse as was in Beeken v Beeken[69].

Whether an insane person is capable of forming the necessary animus is a question of fact. It is to be proved in each case that the necessary animus exists so as to make the insane party guilty of desertion. Thus in Perry v Perry[70], the wife left her husband because she suffered

[68]Suit No. E/D/1966 (unreported) Enugu High Court 18th July 1966 and also Samuel E. S. v. Esther ES (unreported) (supra).
[69] (1959) WNLR 314
[70] (1963) 3 All ER 766

from the insane delusion (quite unfounded in reason) that he was trying to murder her Loyd-Jone held that her conduct must be judged as though there is no desertion because she believed that she had good cause for leaving her husband. Note that hardship might force a spouse if the other party, already in desertion develops mental illness and desertion will continue if only he retained the animus deserendi and he might also lack the capacity to consent to a divorce after two years' separation. Consequently, the Act provides that the Court may treat the desertion as continuing in such circumstance, but if inanity were supervened, it will not necessarily terminate the desertion. It should be noted that animus deserendi which is the intention to desert the other spouse must be established before the deserting spouse can be said to have formed intention to end the matrimonial relationship between them.

iii Lack of consent

Basically desertion is a matrimonial offence. Consequently, there can be no desertion if the separation is by consent. Therefore, the issue of consent is a question of fact and it may be expressly given as a simple license to go or be embodied in a separation agreement. A spouse who leaves the matrimonial home without the consent of the other spouse may be in desertion. Desertion will supervene once one party withdraws his

consent to that state of affairs. Thus in Ikpi v Ikpi[71] the parties were married in 1944 and lived at Ibadan. In November 1965, the husband was transferred to Zaria. There was an agreement between the spouses that he wife should remain in Ibadan as she was expecting a baby and maternity facilities were not assured at Zaria. The wife was to join him in Zaria in February 1951 if maternity facilities in Zaria were guaranteed. Later the husband wrote assuring the wife of maternity facilities in Zaria. The wife refused to join him on the ground that she would not get teaching appointment in Zaria. It was held that as the husband had but an end to the agreement separation the wife was in desertion when she refused to join him Zaria. Alternatively, consent may be implied by the conduct of the parties as was in the decision of Joseph v Joseph[72].

There must be in fact an agreement to live apart before the party cannot be held to complain of it. And this consent must be genuine and not obtained by duress, fraud or misrepresentation, but consent must be freely given. But if consent to the separation is withdrawn, desertion will automatically begin provided that the other conditions are satisfied.

Consent may be in writing or embodied in a deed, but it must be provided for by the spouses living apart and where the spouses are parties

[71] (1957) WNLR 59 and (unreported) case of Bobai Aya v Patience Imade A. O.(supra)
[72] (1953) 2 All ER 710 (CA)

to separation agreement, the refusal by one of them without reasonable cause to comply with the other's bona fide request to resume cohabitation put that party in desertion. Absence of consent on the part of a spouse is different from the matter of his wishes. Thus if there is no consent there may be desertion even though the petitioner is pleased to see the respondent live.

iv. Lack of just cause

There will be no desertion if one spouse has a reasonable cause or excuse for leaving the other. It is clear that where one spouse is guilty of adultery or other matrimonial misconduct, the other spouse will have a reasonable cause for living apart. In fact if the innocent party fails to withdraw, he may forfeit his or her right to matrimonial relief on the ground that he has condoned or connived to the misconduct as was in the decision of Beigan v Beigan[73].

It has been recognized that a spouse conduct may be such that the other justified in breaking of cohabitation and if he does so he will be in desertion. The test for determination as to whether the conduct has reached the pitch is being formulated in various ways. The best know and most frequently cited test is that of Lord Penzance in the

[73](1956) P. 313 – also unreported case of Kubai Zoaka v Faqsur P. Zoaka (supra)

case of Yeatman v Yeatman[74] where the law Lord said that the conduct must be "grave and weighty." But this was further expanded by Lord Simon P. in the case of Young v Young[75] the conduct amounting to such grave and weighty matter render the continuance of the matrimonial cohabitation virtually impossible because the ordinary wear and tear of conjugal life would not itself suffice and provide a good excuse for a spouse to desert the other as was the decision in Jackson v Jackson[76]. The Nigerian position under the Matrimonial Cause Act is that any conduct which justifies dissolution of a marriage under Section 15(2)(c) of the Act may also provide a just cause for desertion. But sometimes a good cause for desertion which is independent of the petitioner's conduct may exist. For example, a spouse may withdraw from cohabitation on account of ill-health or imprisonment as was in the case of Keeley v Keeley[77]. But mental illness, except where it constitutes to the health of other member of the family, is not bar to be a good cause for withdrawal from the matrimonial home.

A reasonable but mistaken belief by a spouse in the existence of a good cause for separation based on the conduct of the other spouse may be a good defence for desertion. Finally lack of just cause served as a

[74] (1868) LR 1 P & D 489, 494
[75] (1964) P. 152, 158 or (1962) 3 All ER 120, 124
[76] (1952) 146 LT 406 4
[77] (1952) 2 TLR 756

defence based on reasonable belief that the other spouse committed a misconduct that objective one and not subjection.

Generally to constitute a ground for divorce, desertion must have lasted for a continuous period of one year immediately preceding the presentation of the petition. In determining whether desertion has been continuous, one or more period not exceeding six months during which the parties resumed living with other in the same household and there was no break in the continuity of the period and apart from this no period of cohabitation counts as part of the period of desertion as provided under Section 17(2) of the Act. But practically it is doubtful as to whether desertion for a period of one year should be a sufficient cause for the dissolution of the marriage because in many cases the period may be insufficient to enable the deserting spouse to take a final decision on whether or not to return to the matrimonial home.

Desertion, being an offence which must run throughout a stipulated period, may be brought to an end before the expiration of the statutory period, if one of the fair constituent elements of desertion ceases to exist at any given moment during the course of the prescribed period, then desertion will come an end by:

(i) Resumption of cohabitation by the spouses removing the element of de-factor separation thereby putting an end to desertion, that it where the parties resume to residence under the same roof, and consortium is restored. Note that the physical cohabitation must be accomplished by the mutual intention to set up a home as was in the case of Mummery v mummery[78]. Therefore in most case cohabitation terminate desertion

but do sometime prejudices reconciliation, where one of the spouses is in desertion, the parties are willing to resume cohabitation in order to give the marriage the chance, the innocent party may thereby ultimately forfeit his right to matrimonial relief as was in the case of Adah Bally v Gedion[78a].

(ii) Offer to return: animus reverendi: Loss of animus deserendi will terminate desertion but such loss must not be tact, it must be communicated to the other spouse in an offer to return. Thus to terminate desertion, the offer must be reasonable and genuine as was in Pratt v Pratt[79]. But for an offer to be genuine the party making it must have both the intention of resuming cohabitation and the means of implementing it, if it is accepted. Sometimes the deserted spouse may be doubtful of the genuineness of the offer and may attach condition to its acceptance such condition must be reasonable as was in the case of Pearce v Pearce[80].

[78] (1942) P. 107, 110
[78a] Unreported case suit no Kdh/Kad/792/2005
[79] (1939) AC 417
[80] FSC 257/1961, 16 April 1963 and case of Patience Okoh Ukaegbu v Emmanuel Okoh Ukaegbu (unreported case suit no. Kdh/Kad/187/2006

(iii) Supervening consent: The deserted spouse may bring the desertion to an end by subsequently giving his consent to the separation. Such consent may take the form of a separation agreement or a judicial separation or a separation order.

(iv) Insanity: With regard to the initiation of desertion, it is for the petitioner to prove that an insane respondent is capable of forming the necessary intention to desert. On the question of the continuation of the desertion after insanity has supervened, the fact that the deserting spouse has become incapable of forming an intention to continue, the desertion shall not terminate if the court is satisfied that the desertion would probably have continued if the deserting spouse has not become insane.

Conduct which the Petitioner Cannot Reasonably be Expected to Bear

Section 15(2)(c) of the Act enables a court to find that if a marriage has broken down irretrievably where, since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent as was the in the case of Goodrich v Goodrich[81]. Note that the conduct of the respondent which is in question must have occurred since the celebration of the marriage, the petitioner

[81] (1971) 2 All ER 1340, 1342

must first establish that the respondent has behaved in a particular way and on the basis of the facts so proved by the petitioner.

The meaning of the word behaviour forms an important element in the interpretation of Section 15(2)(c) of the Act which was cited by Sir George Beker P in the case of Katz v Katz[82] that:

> Behaviour is something more than a mere state of affairs or a state of mind, such as for example a repugnance to sexual intercourse or a feeling that the wife is not being as demonstrative as he thinks she should be. Behavior in this context is an action/or conduct by the one which affects the other. Such conduct may either take the form of act or omission or may be a course of conduct and in my view, it must have some reference to the marriage.

Therefore in such cases court may refuse to grant the decree because of the fact that respondent's behavior is an inability to give the husband the spontaneous affection which his nature demanded and for which he craned.

Behavior may also be negative or positive under the Act. In practice the fact may be more established in cases of positive behavior like violent language or violent activity. And behavior may be negative in

case of silence, total inactivity and laziness, in such case spouses may

82 (1972) 1 WLR 955

obtain decree of divorce but would be expected, sometime to be more tolerant than where the behaviour is positive. Note also that the problem may arise where the respondent's behavior stems from mental illness, injury or disease of the body which is involuntary. Thus in such case the court appropriates grant decree even though the respondent's condition is not of his or her own making.

It is important to note that conduct in question must also have some reference to the marriage. Consequently the impact of the conduct in question on the marriage will be a relevant consideration if for instance the husband fights regularly at his place of work or defrauds his employer, the court will have to consider what impact if any, such conduct would have on the marital relationship as was in Katz v Katz (supra).

Note that behavior must be sufficiently grave as to justify the petitioner's refusal to live with the respondent. In applying this test the court mostly considers not only the established behavior of the respondent but also to inquire into the character, personality, disposition and behavior of the petitioner, thus a violent petitioner may be reasonably expected to live with a violent respondent.

From the foregoing the following below are behavior enumerated in Section 16(1) of the Act as envisaged in paragraph (c) of Section 15(2) of the Act.

(i) Rape, sodomy and bestiality: These are grounds for divorce and they exist only at the instance of the wife. She has to prove that the husband has since the marriage been guilty of sodomy, bestiality or rape. The conduct of this nature is grave and would enable a Court to conclude that the petitioner cannot reasonably be expected to live with the respondent. Section 87(l)(a) of the Act state clearly if there is evidence that a spouse since after the marriage was convicted of rape; sodomy or bestiality in Nigeria or elsewhere shall be regarded as evidence that the spouse committed the offence in question. In this respect, any certificate of the conviction of a person for a crime on a specified date by any Court in Nigeria duly signed by the registrar or any other appropriate officer of the Court, shall be received as evidence of the conviction, the date and if so state, the sentence of imprisonment imposed as provided under Section 87(2) of the Act as was in the decision in TVT[83] that:

> Sodomy is an act in which two people take part, that prima facie each as guilty as the other of the crime, so that when a wife who has committed sodomy with her husband seek a divorce on the ground of the sodomy, she is pleading an act which

[83] (1963) 3 WLR 261 at P. 267; see also (unreported) Ada Sukprako v Emouranwe (supra)

> is wrong not only on the part of her husband but on her part too, and she ought not to be allowed to take advantage of her wrong

It is said that the consent given by the wife must be "real" and there should be knowledge of the relevant factor concerning the act consented to. But the case of T v T (supra) clearly showed that husband persuaded an innocent wife to yield to act of sodomy on the ground that it was not wrong and was a natural act between husband and wife, therefore the Court held that there was no real consent by the wife.

(ii) Habitual Drunkenness or Intoxication: The petitioner cannot be reasonable be expected to live with the respondent where, since the marriage, the respondent has for a period of at least two year, been a habitual drunkard or habitually been intoxicated by reason of taking or using in excess any sedative or narcotic or stimulating drug or preparation.

Note that a habitual drunkard has been judicially described as one who as a matter of habit conscience take intoxicating liquor to an extent that makes him liable to become incapable of controlling his language and action with due regard to the right and feeling of others, or to his own safety and self management as was in the case of Gilbert v. Gilbert[84].

The vital question for consideration is the condition which his [84](1963) 15 FLR 357

action to drink produces and not necessary the extent to which he consumes alcoholic drink as was used in deciding the case of Sallivan v.Sallivan[85]. The word Habitual implies the frequent exercise of the habit of being a drunkard as was in the case Lehman v. Lehman[86].

The petitioner must prove that the respondent has been subject to numerous and continued habit of drunkenness, but if a period of sobriety for instance, nine month occur, it may not be said that the respondent is a habitual drunkard. And it is immaterial whether the abstemious was voluntary or induced by other factors like ill-health.

Finally, the two year period must occur after the celebration of the marriage before the presentation of the petition. But the sub-section does not require that this period should immediately precede the presentation of the period. The sub-section envisages that the two years must be a complete and continuous period rather than an aggregation of several periods. .

(iii) Insanity: A petition for divorces can be presented by either spouse on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for at least five years immediately preceding the presentation of the petition. The test of whether an unsound

[85] (1955) CLR 595

[86] (1969) 15 FLR 363. See also (unreported) Rutmwa Dangwaren v Major James Yusuf D. (supra)

mind is incurable depend on whether by reason of his mental condition a spouse is capable of managing himself and his affairs, and if not, whether he has hope to be restored to a state in which he will be able to do so, bearing in mind that affairs include problem of work, society and of married life as was in the case of Whysall v. Whysall (supra).

It should be noted that insanity as evidence of the fact contained in Section 15(2)(c) of the Act must be distinguished from unsoundness of mind as a ground for nullity of marriage. Note that there is generally no distinction between insanity and unsoundness of mind as was cited in the case of Smith v. Smith[87], because the test for unsoundness of mind is whether the respondent by reason of his mental condition is capable according to the standard of a reasonable person, of managing himself and his affairs. While "unlikely to recover" means that it is improbable that the respondent mental health will be restored to a state that will enable him to manage his affair. To meet this test the petitioner must satisfy the Court that on the balance of probability the respondent will not recover from the insanity. it make no difference whether the unsoundness of mind is congenital or was cause by a supervening mental illness as was decision in the case of Robinson v. Robinson[88].

[87] (1944) p.179

[88] (1964) 3 All ER 232, (1965) p.192

Note that once the Court decides that the unsoundness of mind exists in a form which the respondent is unlikely to recover, as it. is immaterial that insanity is not violent. A spouse may be a raving lunatic and unlikely to be cured, but such unsoundness of mind is not a. ground, for divorce unless it has resulted in the prescribed confinement. The total of five year's confinement must have occurred since the marriage and within the six year immediately preceding the date of the petition. Moreover the period of confinement may be one continuous period, or several periods that total five years. Finally the marriage will not be dissolved under this provision unless the Court is satisfied that at the commencement of the hearing of the petition the respondent is still confined in such an institution and unlikely to recover.

Defence

On hearing of the petition, the Court must satisfy itself as to the fact alleged, as to whether it has jurisdiction to entertain the suit and whether the parties have been accessory to or connived at or condoned the offence, or whether collusion exists, and must inquire into any counter charge. These are matter which if proved to the satisfaction of the Court are complete answer to the petition and leave the Court with no discretion but to dismiss it.

(i) Connivance

This means permission or acquiescence in the respondent adultery. The essence of it is that it preceded the event as was the decision in Churchman V. Churchman[89]. It does not raise a presumption of guilt, but the Court must be satisfied that it does not exist. A petitioner in this respect includes his agent. A husband may not stand by and tolerate his wife adultery, meeting her, having intercourse with a man and then because of some private view of his own as to what a woman owes to her husband, complain of her violation of that private view and come to seek a remedy of the hand of the Court.

(ii) Condonation:

This means a blotting out of the offence imputed so as 'to restore the offending party to the same position he or she occupied before the offence was committed as was the' decision in the case of Germany v. Germany[90]. To constitute condonation there must be both forgiveness and restoration of sexual intercourse with full knowledge of past adultery constituted condonation of such adultery. There 'cannot be contingent condonation at any rate where the' condonation includes the irrevocable act of sexual intercourse.

[89] (1945) P.44; 114 L. J. 17
[90] (1938) P.202; 107 L. J. P.124

(iii) Collusion:

This is an agreement or bargain between the spouses or the petitioner and the correspondent as to procuring the initiation of a suit for divorce or for providing for its conduct. An agreement to commit adultery or not to claim damage or alimony if the suit is not defended, amount to collusion. But a request for past evidence is not collusion.

There are also discretionary bars or fact which if proved leave the Court with a discretion as to the decree (a) adultery of the petition as was the decision in the case of Whitworth v. Whitworth[91]; (b) unreasonable delay in presenting or prosecuting the petition, the petitioner's own cruelty or desertion and conduct conducing to the adultery companied of.

Alternative Remedies

A decree nise for dissolution may be varied to a decree for judicial separation e.g. to prevent children by any other marriage of the .husband benefiting. under the settlement. .

Effect of decree:

The effect of a decree of dissolution is that the parties are no longer husband and wife re stranger to one another as regard person and

[91] (1893) P.85; 65 L. J. P.71

property, save so far as the statutory jurisdiction of the Court enables it to vary settlement whether anti nuptial or post-nuptial. Note that the separation deed in Worsley v Worsley[92] and whether there are children or not. The Court has power to interfere with the interest, rights and liabilities of persons not parties to the suit as for instance a wife further covenanting to settle a fund. In any way the effect of a decree of dissolution is as if the parties had never married as was in the case of Re Lesingham's Trust[93]. The parties are able to remarry, but if there is a right of appeal against the decree absolute the right of re-marriage is suspended during the time for appealing, and if an appeal is entered until it is dismissed. The decree absolute for dissolution must be made before either of the spouses dies. Thus decree absolute become valid, binding and effective from the moment of it pronouncement by the judge in Court as was in the case of Crosland v. Crosland[94].

4.5 Judicial Separation

Judicial separation is an old divorce known as a mensa et thoro granted by the Ecclesiastical Court in England. This decree is normally obtained on any ground on which a petition for divorce might be presented. This is base on the respondent adultery or cruelty or where the wife is the

[92] LR 1 P and D 649; 38 L. J. PM & A 48
[93] 24 CH D 703; 53 L. J.. CH 333
[94] (1947) P. 53 or (1947) LJR 279

petitioner on the ground that the husband has committed, presumably, attempted to commit rape, sodomy, or bestiality. Note that unlike the modern divorce, judicial separation does not terminate the marriage; it only absolves the spouses from the duty of cohabitation.

4.5.1 Grounds for judicial separation

A decree of judicial separation may be based on one or more of the facts and matters which may ground a petition for dissolution of marriage as specified in Section 15(2) and Section 16(1) of the Act as provide under Section 39 of the Act and also as was in the case of Aja v. Aja[95] where judicial separation was granted based on the petitioner adultery and decision in the case of Bamgbala v. Bamgba[96]. Section 40 of the Act provides that Sections 18 to 24 and Sections 26 to 32 of the Act shall apply to and in relation to a decree of judicial separation and proceeding for such a decree and, for the purpose of those provision as so applying, a reference in those provision to a decree of dissolution of marriage shall be read as a reference to a decree of judicial separation.[96a]

The above provision provided that the fact which would result in

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[95] (1972) 1 EC 5 LR 140
[96] (1976) 5 CC HCJ 1431
[96a] Omotunde v Omotunde (2001)9 NWLR pt 718 p.252 CA

the dissolution of marriage and to be a bars and defence in the proceeding for such a relief shall be applicable in proceeding for judicial separation.

For instance the respondent's failure to comply with a period of at least one, year with a decree for restitution of conjugal right is a fact which could be relied upon in divorce proceedings, the same fact by necessary implication, can be relied upon in proceeding for judicial separation.

Therefore grounds such as: -

Any of the ground upon which a petition for divorce might have been presented are corresponding ground for judicial separation;

- here the respondent has failed to comply with a decree of restitution of conjugal rights;
- Any grounds on which a decree a meansa et thoro might have been granted by the ecclesiastical Court before the passing of the Act.

It follows that the basis for, and the bars applicable in proceedings for judicial separation are corresponding greater than those applicable before. Note that the consequences of this decree are not so wide as these of a dissolution of marriage. The parties are still husband and wife, they are not free to re-marry, and they may come together and live as husband and wife again without going through any ceremony of re-marriage. In this case, the Court has no power of dealing with settlement on a sentence of judicial separation as one for dissolution of marriage; the Court has no power to order the securing of a gross sum of money except in case of dissolution or nullity of marriage as was in the Bhojwani v. Bhojwani[97].

Finally it important to note that before the commencement of the Act, there• was no minimum period after which a petition for judicial separation could be presented. But now the two year restriction on the presentation of a petition for divorce contain under Section 30 of the Act has been made applicable to proceeding for judicial separation by Section 40 of the Act which incorporate the provision Section 18 to 24 and Section 26 to 32 to such proceeding. Notable this provision may work a greater hardship for example if within two years of the marriage one spouse persistently treat the other with gross brutality, the aggrieved party might be force to withdraw from cohabitation without the aid of the Court unless leave to present a petition within two years is granted. It would be a fair approach and would eliminate any hardship in such a case if the Court is very liberal in granting leave. Moreover it would be possible for a spouse, invariably the wife who obtains a decree of judicial

[97] (1996) 6 NWLR pt 457, P.661 S.C.

separation following the brutal treatment by the husband within two years of the marriage as was in the case of Joseph J. egar v Juth A. Venditer egar (supra).

4.5.2 Effect of the decree

The effect of the decree has been clearly stated t Section 41 of the Act which provides: "A decree of judicial separation relieve the petitioner from the, obligation to cohabit with the other party to the marriage while the decree remain in operation."

Since the decree relieve the parties from the duty of cohabitation with each other. Consequently while the decree is in force, neither of the spouses can be in desertion. And a husband who has intercourse with his wife against her will during the same period may be guilty of rape as was in the case R v. Clarke[98]. Note that the decree does not otherwise affect the marriage statute, right and obligation of the parties to the marriage. The parties therefore remain, for all other purpose, as husband and wife. The wife cannot for instance, acquire a separate domicile from her husband during the operation of a decree of judicial separation as was in Ford v. Ford[99]. Note that it is always opens to a spouse who has obtained a decree of judicial separation to petition for a divorce on the same

[98] (1949) 2 All ER 448
[99] (1947) 73 CLR 524

ground as that obtained in judicial separation as was in the case of Kah Walter v Tina Walter[99a].

A decree of judicial separation may be discharged at the instance of the respondent. If he can show either that the decrees was obtained in his absence or the desertion was the ground of the decree and, that there is a reasonable cause for the alleged desertion.

Also while the decree is in force, either party to the marriage may sue the other party in contract or tort as provided under Section 42(1) of the Act, the wife in that case is treated as a feme sole.

Section 42(2) of the Act provided that if a spouse dies intestate in respect of any property during the continuance of a decree of judicial separation, that property shall devolve as if that party had survived the other party to the marriage. The effect therefore is that the other party will not be entitling to the right of a spouse on the intestacy of the deceased spouse.

Note that where a power has been given to husband and wife jointly, one spouse can still join the other in the exercise of that power not withstanding that a decree of judicial separation is in force.

[99a] (Unreported) Case suit No. Kdh/Kad/418/1999

The voluntary resumption of cohabitation by the spouse will bring a decree of judicial separation to an end, and either party may apply for an order discharging the decree. And the Court may make an order discharging the decree if both parties consent to the order, or if it is satisfied that they have voluntarily resume cohabitation accordingly as provided under Section 45 of the Act.

Note that this provision of the Act is useful where for example a fraudulent wife in whose favor a maintenance order (normally such an order is called an alimony order) has been made for the duration of judicial separation and has voluntarily resumed cohabitation with the husband but refuses to consent to a discharge order in order that she may continue to enjoy the payment of the maintenance.

4.6 Restitution of Conjugal Right

The decree of restitution of conjugal right is not new, it was well known to the• ecclesiastical Courts. It is a remedy available to a spouse who satisfies the Court that the other spouse has left him or her without just cause and has refused to render conjugal right. The remedy unlike a decree of divorce or judicial separation was primarily aimed at preserving the marriage. The decree, if given enjoins only a resumption of cohabitation but does not force the parties to have sexual intercourse. Thus Section 47 of the Act provides as:

> A petition.. .for a decree of restitution of conjugal right 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 when the defence is sought refuse to cohabit with and render conjugal right to the petitioner.

The above provision provided that the Court can still make an order even though the parties have never cohabit or they have never had a proper home as it was inconsistent with the decision of the English Court in Fasbender v. Fasbender[100] which was cited in the case of Munro v. Munro[101].

Moreover by necessary implication the fact that the respondent has a just cause or excuse for not cohabiting with the petitioner is a good defence, but by allowing such a defence, the decree has ensured that an order is not obtained, contrary to e merit of the case as was in the case of Adah Bally v Credian Bally (supra).

It should be noted that failure to comply with the decree shall be deemed desertion without reasonable cause, entitling the petitioner to bring a suit for judicial separation. Both in England and Nigerian before the commencement of the decree, it was generally assumed that a valid and effective separation agreement, if expressly pleaded will be a good

[100] (1938) 3 All ER, 396

[101] (1950) 1 All ER 832

defence as was in decision of Palmer v. Palmer[102], but by Section 48 of the Act: "An agreement for separation, whether entered into before or after the commencement of the Act shall not constitute a defence to proceeding... for decree of restitution of conjugal right".

The above provision can be argued that a separation agreement shall not be a defence, as the Section allows a petitioner who is a party to such an agreement to approbate and reprobate and that in such case, the provision may result in fraud on the respondent, if the petitioner never intended from the outset to abide by the separation agreement. And on the other hand Section 48 of the Act is designed to avoid anything which might hinder cohabitation as was in Elizabeth Babalola v Myles O. Babalola (supra).

4.6.1 Ground for restitution of conjugal right:

A petition for the decree may be base on the fact that the party against whom it is sought refuses, without just cause or excuse to cohabit with and render conjugal right to the petitioner. The relief is one which is appropriate where matrimonial cohabitation has ceased and one party is anxious to resume normal' married life. Hence a decree cannot be granted where the respondent cohabit with the petitioner but refuse sexual intercourse as was in the case of Jackson v. Jackson[103]. Note to succeed in

[102] (1923) P.180 at 182
[103] (1924) P.19

getting the decree the petitioner must show his sincerity in seeking a resumption of cohabitation and must also be willing 'to perform the normal duties and right of married life. Restitution of conjugal right will not be ordered if the petitioner is guilty of a matrimonial offence as was in the case of Dyson v. Dyson[104] but note that if this offence has been condoned or connived at, then it will not bar the petitioner right.

4.6.2 Defence to petition for restitution:

The refusal, without just cause or excuse of the respondent to resume cohabitation is the ground for a decree of restitution of conjugal right. If however, the respondent has a good cause for his refusal to cohabit, he cannot be ordered by the Court to resume cohabitation. Good cause included absence on duty or business or the commission of matrimonial misconduct by the petitioner as was in Dyson v. Dyson (supra). Note that resumption of cohabitation may constitute condonation. A separation agreement does not constitute a defence to proceeding for a decree of restitution of conjugal right.

The decree of restitution of conjugal right cannot be enforce by attachment as provided by Section 51 of the Act, but a party who refuses to comply with the decree may be guilty of desertion.

[104] (1954) P.189

4.7 Jactitation of Marriage:

The suit for jactitation of marriage is brought to obtain a declaration that two persons are not married to each other, where one party maliciously boosts that a marriage has ensured. To succeed the petitioner must show that the respondent not only used his name but must also prove the false boasting of the marriage. A jactitation suit has been used as a device to get a declaration from the court as to the validity of a marriage. A petition for a decree of jactitation of marriage must state the date which and the time and place at which the respondent is alleged to have boasted and asserted that a marriage had taken place between the petitioner and the respondent.

The petitioner will in the circumstance seek a decree which will silence the false and malicious allegation and only a party who claims to have been misrepresented can petition for the decree as was in Ex-parte Conpbell[105] Section 52 which speaks about jactitcation of marriage is to the effect that the respondent has falsely boasted and persistently asserted that a marriage has taken place between the respondent and the petitioner, but the decree is within the discretion of the court, notwithstanding

[105](1962) L. J. PN 60

anything contained in the Act.

It should be noted that the object of the provision is to enable the petitioner obtain a decree which takes the form of an injunction restraining another person of the opposite sex from claiming or boasting that he or she is lawfully married to the petitioner.

The provision of Section 52 of the Act also gave the Court absolute discretion whether or not to make a decree, if the petitioner does not come to the Court with clean hand, he may be denied the relief, for instance, if the petitioner acquiesced in the representation.

Finally, it has been stated that the Court must have jurisdiction to make the declaration if the respondent resides in the country where the declaration is sought.

4.8 Ancillary Relief

Ancillary relief is that part of the remedies awarded in a matrimonial cause in form of maintenance, when maintenance or other financial remedy is sought as an ancillary relief in a matrimonial cause. The Nigerian Court by virtue of the various High Court laws apply the current English law on this case. It is immaterial whether the law applied in England is statutory or based on the common law. But when maintenance is sought in an independent action, English statute enacted after 1900 relating to this will not apply in Nigeria. Statute passed before 1900 will apply provided they are statute of general application in England.

Therefore ancillary relief shall be discussed in respect of a party to marriage and children of the marriage.

(I) A Party to a Marriage:

The Act provides for the making of ancillary order in respect of a party to a marriage under Section 69 of the Act, which defines marriage as to include:

"A purported marriage that is void but does not include one entered into according to Muslim rites or other customary law".

Thus, the parties to a purported marriage which is void by virtue of Section 3 of the Act come within the ambit of Section 69.

This also applies to husband and wife of a valid or voidable marriage contracted under the marriage Act as was the decision in Williams v. Williams[106].

(ii) Children of the Marriage:

Ancillary orders may also be made in respect of children of the marriage as provide under Section 69 of the Act as follows:

[106] (1976) 3 CCHCJ 805

- Any child adopted since the marriage by the husband and wife or by either of them with the consent of the other.[106a]

- Any child of the husband and wife born before the marriage, whether legitimated by marriage or not.

- And any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if at the relevant time, the child was ordinarily a member of the household of the husband and wife, however that 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 person shall be deemed not be a child of the marriage.[106b]

This is a relief given where the marriage has broken down and there are children to the marriage as a sort of maintenance to both the spouses and the children of the marriage putting into consideration that the custody of the children[107].

[106a] www.patarlaw.net/log on 4/6/2011 and the case of Anyaso v Anyasao (supra) and
Akinbuwa v Akinbuwa (supra)

[106b] The case of Donald Fada Enyi v Ebikoboere Luky (unreported) case suit no. Kdh/Kad/464/2011

[107] www.leg.state.NV.US/nrs/nrs on 24/9/2010 and www.shoemaker.law.com on 21/10/2010

This comes in forms of alimony pending suit, permanent alimony, maintenance and periodical payment.

4.10 Conclusion

Relief serves as basis for the parties to statutory marriage, where the parties finds it intolerable to cohabit with each other either as the result of desertion, cruelty, adultery or intolerable act causing the marriage to be broken down irretrievably. These reliefs include reconciliation – as one which the court makes effort to afford an opportunity to the parties as a means of settling their differences in order to resume cohabitation. Divorce, on the other part, is where reconciliation has failed, the parties can no longer live as husband and wife, then, the law court will find a means of putting an end to the empty shell of the marriage. And judicial separation as a relief only to relive the parties temporally from cohabitation whereby later they resume cohabitation voluntarily if they so before the expiration of the time given by the court.

While restitution of conjugal right, if granted, the parties enjoy a resumption of cohabitation of the marriage but the parties are not forced to resume sexual intercourse. And jactitation of the marriage is an injunction sought by the husband restraining the wife from parading his name as her husband or vice-versa where the marriage has broken down irretrievably.

CHAPTER FIVE

CONCLUSION

5.1 Summary

The institution of statutory marriage and enactment of the Marriage Act in 1863 in the then colony of Lagos, and the subsequent enactment of the Matrimonial Causes Act in 1970, brought about the dual system of marriage into Nigeria, if not it were initially governed by the various ethnic customary laws.

Therefore, stationary marriage is a union of a man and woman as a husband and a wife to the exclusion of other persons. And it places an important consequence that a man and a woman have domestic rights and obligation to be observed or discharged as a duty between the spouses for the subsistence or success of the marriage.

The parties to the marriage enjoy certain rights during the marriage, but these rights mostly resulted from decision of the superior court or other enactment because, the rights are not provided for in the Marriage Act, which form the basis of the problem of the research and it is aimed at finding solution to the research work,

The Marriage Act provided for the ceremonial aspect and essential validity which is discussed in chapter two of the work, and also reference is made to customary ethnic marriage touching the aspect of validity and the ceremonial aspect.

Spousal Rights, the basis of the work, are rights that the spouse enjoys in subsistence of the marriage which arises mostly from the decision of the superior court and other enactment; cover certain rights such as right to consortium, which place an obligation of cohabitation in their respective domestic life to be discharged as a duty. Consortium co-exists with the right to maintenance and financial support of the family under the unit of spouses. While maintenance is the right of the wife to be enjoyed along side with the consortium of the husband during the marriage and also after divorce or in divorce proceeding depending on the agreement between the spouses from the beginning and it is enforceable under maintenance order. Also enjoyed in the marriage is the right accorded to the married woman to acquire property of their choice which initially was under the sole control of the husband as the head of the family either living together or living apart. Right to education and work in any place of choice is another right that the married women enjoyed from the late 19th century which initially is sole power of the husband to decide on the living of the family and the custody of the children is being extended to the married women as a result of various enactments.

With all these rights enjoyed by the spouses and in the event that the spouse find its intolerable to live as husband and wife as a result of the act either from the desertion, cruelty, adultery, or an intolerable act, the law under the Matrimonial Causes Act provides as a relief for parties to put the enmity shell to rest. These reliefs are in form of reconciliation where the court will find a means of settling the spouses to resume cohabitation, divorce, where reconciliation has fail, the parties can no longer live as husband and wife, then the court will put an end to the empty shell. While judicial separation only relives the parties temporarily from cohabitation but later they may resume cohabitation voluntarily. And restitution of conjugal right once granted the parties enjoy cohabitation of the marriage but they are not force to resume sexual intercourse and finally jactitation of the marriage is an injunction sought by the parties stopping the other from parading the subsistence of a valid statutory marriage.

5.2 Observation

In the course of the research work, the following findings are made as observation. These are as follows:

i. Marriage itself is the living together of the husband and the wife, in full cohabitation during the subsistence of the marriage and carries along certain rights with their correlated duties to be discharged by the parties as an obligation. These rights are not provided for in the Marriage Act or the Matrimonial Causes Act but they are founded upon the decision of the superior courts and other enactments covering different aspect of rights, for example, the Married Women Property Act 1882; Principle of Equity, Anti discrimination laws, treaties binding on member state under the United Nations.

ii. It is observed that the right was only enjoyed by the husband in full capacity to the exclusion of the wife until the case of R v Jackson (supra) that the shackles of servitude fell from the married women and they acquired a considerable freedom of action; and enjoy equal right as their husbands, as right to education and work in any place of choice, right to acquired property of choice and to have right in family decision and issue relating to custody of the children.

iii. Also, it is observed that it is only the aspect of right to maintenance in the course of proceeding or where the marriage is dissolved that the Matrimonial Causes Act under Section 70a(2) and Section 90(1) and Section 91(1)(2) of the Act which provide for maintenance as alimony attaching both earning and property of the husband where he fails to pay maintenance after the dissolution of marriage and no more and there is no such provision in the marriage Act. Thus most rights are as the result of decision of superior court.

iv. It is further observed that there are no much judicial pronouncements found in the Nigeria court as decision because references are made to foreign cases as the parties do settle themselves without notifying the court or failure to continue with the proceeding.

v. It is observed that the Marriage Act only covers the ceremonial and essential aspect of the marriage. And even under the constitution of the Federal Republic of Nigeria, 1999, the fundamental right under chapter four of the constitution covers only the aspect of discrimination and acquiring property and issue of equal education under chapter two, and not all the right and the reliefs.

iv. It is observed that the aspect of dissolution of the marriage carries more weight in the court as a relief than that the relief of judicial separation which is considered as an old remedy. Finally all through the work most cases cited are foreign cases to buttress the work because it is difficult to find Nigerian cases on the various rights and their reliefs because in some of the cases, the parties do reconcile themselves without going back to inform the court.

5.3 Recommendations

The observation of these rights is the bedrock of the substance of marriage between spouses. And in the event where the marriage has broken down irretrievably, there are reliefs as remedies available to both parties. However, there are still persistent reports on violation of spousal right in the matrimonial homes most especially by the dominant power

of the male as being the head of family, which has been confirmed by various reports of studies conducted on the subject matter. It is therefore imperative that the Nigerian law makers take a second look at this branch of law with a view to reform the relevant provision in our law so as to translate the theoretical right into reality.

Thus, the establishment of the Ministry for Women Affairs and Youth Development and National Commission of Human Right in 1993 and 1995 respectively has been seen as a sincere effort to enthrone respect for women alongside with their male counterpart in the matrimonial home.

Accordingly the following recommendations are thereby made:

i. It has been shown that spousal rights are not provided for in the Marriage Act which is the law governing the statutory marriage in Nigeria. It is therefore recommended that the Act be re-amended to provide for provisions or section in respect of spousal right especially the right to consortium, right to maintenance and the right to custody of children. In so doing the stated right would be well recognized.

ii. The Matrimonial Cause act being our first indigenous marriage law did not determine the spousal rights but only dwelt on the aspect of maintenance on the divorce as reliefs which are remedies where the marriage has broken down irretrievably. It is therefore suggested that the entire Section 70(1), Section 90(1) and section 91(i) and (ii) Matrimonial Cause Act be re-enacted to define the issue of maintenance as a right.

iii. There is the need for these rights to be expressly stated in the marriage registry and be brought to the notice of registrar of the marriage and intending couples including their parents and relatives.

iv. There is a need for the Ministry of Women Affairs and Youth Development and National Human Right Commission to organize series of seminars, lectures and workshop on the concept of spousal right and other related issue both at Federal, State and Local levels in order to enhance the continuance of matrimonial home.

v. The provision of the law on right and relief of the spouses should be clearly stated and printed in the major Nigerian languages.

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