II

A Legal Appraisal of the Economics of Divorce in Nigeria

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Abstract

This essay x-rays the economics of a dissolved marriage on two fronts, namely, maintenance (both temporary and permanent) and settlement of property, regard also, being had for the welfare of the children of the dissolved marriage. With the aid of, among others, comparative references to other similar jurisdictions in the world, a review of the extant body of laws especially the Matrimonial Causes Act was made. Changes were suggested by this writer as desperately needed to bring the Act in conformity with global trend as well as the current socio-economic realities in Nigeria.

Introduction

Divorce has been defined as the legal dissolution of the marriage[1] between a man and his wife by the judgment or decree of a Court.[2] In Nigeria, before a Court can hand down a decree of dissolution of marriage, the Petitioner must *inter alia*, satisfy it that the marriage has broken down irretrievably.[3] Many marriage conventions are agreed that Marriage is a sacred union. Just as there

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[1] Defined by Lord Penzance in *Hyde v. Hyde* (1886) LR IP & D 130 at 133 as the 'voluntary union for life of one man and one woman to the exclusion of all others." See also Section 18 of the Interpretation Act, Cap. 1, LFN 2004. The opposing definitional views in *M.T v. J.T* (1976) 355 2d 204 (cf. C. Arinze Umeobi and Arinze-Dilim Umeobi, *Crises in Family Law*, (Onitsha, Folmerich Printing and Publishing Company, 2009) pg 22 should not concern us here.

[2] Dissolution of marriage is one of the five matrimonial reliefs available in the Matrimonial Causes Act, Cap M7, LFN, 2004. It is listed in section 114(1)(a) as one of the proceeding of the Matrimonial Causes. See generally, sections 15 to 33 of the matrimonial causes Acts, *supra.*

[3] See Sections 15 and 16 of the MCA,*supra*.

are financial and other commitments of parties to a marriage before and during the marriage, it is clear that such commitments, especially on the economic front, subsist even after a valid, legal divorce. It is, then, doubtful whether there is an absolute end to a marriage. In this light, it has been written elsewhere that:

> Once the knot is tied, the duties and obligations of marriage are to be carried out for the rest of the life even if there is mental disparity or physical separation between the husband and wife. The husband is bound to take up the responsibilities for the maintenance of his wife in spite of sharing an estranged relationship.[4]

The above means that the possibility of achieving a clean break by the parties is slim, if not non-existent[5]. This is more so where there are children of the marriage, whose maintenance, depending on their age, may continue for a very long period. The object of this essay is to examine the economics of a post-dissolved marriage on two fronts, viz Maintenance (both temporary and permanent) or Alimony,[6] and Settlement of Property. Attention is also given to the children of the marriage. References may be made here and there to some other jurisdictions comparatively in this examination.

Maintenance

Under the Nigeria Matrimonial Causes Act, a spouse to a marriage and children to a marriage (if any) are entitled to maintenance. Section 70(1) of the Act provides that:

> Subject to this section, the court may in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks

[4] See http://www.indidivorce.com/alimony-in-india.html accessed on 12/01/2011

[5] Compare with divorce *a vinculo matrimonii*. At common law, this kind of divorce released parties to the marriage wholly from their marital obligations, and basterised the children of the marriage. It was granted on grounds that existed before the marriage. See Bryan A. Garner (ed.), *Black's Law Dictionary* (9th Edition, St. Paul, MN, Thomson Reuter, 2009)pg. 550

[6] 'Alimony', which signifies literally nourishment or sustenance, is a "court-ordered allowance that one spouse pays to the other for maintenance and support while they are separated, while they are involved in a matrimonial lawsuit, or "after they have divorced''. See Bryan A. Garner, *op. cit,* pg 85. Under the MCA, the word "maintenance'' is used and applicable too to the children of the marriage. See generally, section 70 of the MCA.

> proper, having regard to the means, earning capacity and conduct of the parties to the marriage, and all other relevant circumstances.

Similarly, section 70(2) made provision for maintenance during the pendency of the suit.[7] From the wordings of section 70 rendered above, the use of the words "a party to marriage" means that either the husband or the wife of the marriage, subject to the consideration of their means, earning capacity, their conduct and all other relevant circumstances, is liable to maintain the other.

However, in India, the relevant law on maintenance is tilted towards favouring the wife of the marriage. For example, with regard to maintenance during the pendency of a matrimonial suit, it is provided that where

> … it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may <u>on the applications of the wife, order the husband to pay her</u> the expenses of the proceedings, and weekly or monthly during the proceeding such sum as having regard to the husband's income it may seem to the Court reasonable.[8] (Emphasis mine)

Similar provision is also made with regard to permanent maintenance[9]. The Nigerian provision which renders both husband and wife liable to maintenance has been sieged and attacked by critics. Dr. S.C Ifemeje, for instance, has written that:

> The continued relevance of this innovation of the Act (MCA) is however, very doubtful as it is not a true reflection of our sociological background. Moreso, since over 38 years of the enactment of this section (section 70), there has been no serious application by the husband, praying the court to order the wife to pay maintenance to him.[10]

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[7] It is also known as alimony *pendente lite*; provisional alimony or temporary alimony.

[8] See Section 36 of the India Special Marriage Act No.43 of 1954. It applies to Hindus. Compare with section 36 of the India Divorce Act No.4 of 1869 as applicable to person who profess the Christian faith.

[9] See section 37 of the India Special Marrige Act, *supra.* Compare also with section 37 0f the Indian Divorce Act *supra.*

[10] S.C. Ifemeje, *Contemporary Issue in Nigerian Family Law,* (Enugu: Nolix Educational Publications (Nigeria),2008)pg.166.

She then cited E.N.U. Uzodike,[11] who opined that the reason why Nigerian men have not taken advantages of section 70 of the MCA is because every Nigerian man prides on his ability to maintain his wife. It will, therefore, not be surprising for the above critics to support an amendment to the Act in the light of the position in India, as mentioned earlier. But the position of these critics cannot go uncriticised. While agreeing with Uzodike that the Nigeria man prides on maintaining his wife, it will not be true of a situation where the relationship is strained. Besides, it is the custom of the Igbo, as well as of many other Southern Nigerian groups, to return the bride price paid by the husband to the wife's family at marriage when the couples no longer live together as husband and wife. Lending his voice to this Thompson, J., in *Akinsemoyin v. Akinsemoyin*[12] observed that:

> The Englishman who receives dowry from his wife's family has got a pecuniary benefit from the marriage; part of which the law permits him to return on the dissolution of the union. The Nigerian man is not so blessed. He pays *donation propter nupties* and in some parts this fee is so exorbitant that it savours of tax. Anthropologies call it Bride-price. Now it will be ridiculous and indeed unreasonable to expect a man who has gone into all that expenses in order to get married to be overburdened with maintenance for the woman unless there are exceptional circumstances warranting it. These exceptional circumstances could be the inability of the woman to fend for herself due to ill-health or mental infirmity or an overpowering barrage of adverse circumstances.[13]

Apart from the above, a situation where only the man is made to pay maintenance contradicts the internationally held convention on the equality of the human persons.[14] Therefore, any amendment to the MCA to favour the wife of the marriage will fall contrary to the Constitution[15] which provides that:

> No Nigerian shall be accorded either expressly by, or in the practical application of any law in force in Nigeria or

[11] E.N.U. Uzodike, 'Maintenance: 16 years After Matrimonial Causes Acts' *Journal of Private Property Law* (1886) p.86. cf. S.C. Ifemeje, *ibid*.
[12] (1971) NMLR 272
[13] *Supra,* at 275
[14] Universal Declaration on Human Rights, 1949
[15] Section 42 (1) (b) of the Constitution of the Federal Republic of Nigeria 1999, Cap. C24, LFN, 2004.

> any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.[16]

In the United States of America, its Supreme Court has held in the celebrated *Orr v. Orr*[17] that any statue that imposes alimony obligations on the husband only is unconstitutional.

The innovation by the Act in making either of the spouses liable in a matrimonial proceeding for maintenance therefore deserves commendation as it takes into cognizance, the current socio-economic transformation that has taken place, especially now that both men and women engage themselves competitively in modern businesses, professions, career and even politics. The Draftsman appreciated the anachronism in some legislations (like that of India) in imposing maintenance liability on the husband alone and thus made a detour therefrom. Our MCA however, makes such liability, subject to, amongst others, the means and earning capacity of the parties.

The means of the parties have been held in *Rogers v. Rogers*[18] to include all financial sources of both spouses. It is immaterial whether it is capital or income and whether actual or contingent. Capital assets like landed property and shares in a Company as well as contingent and prospective assets are also considered the means of the parties.

With regard to earning capacity of the parties, apart from the actual earnings of the parties, the Court also considers their potential earning capacity. For example, in *McEwan v. McEwan*,[19] the Court awarded the wife six pounds per week being the whole sum due to the husband, a pensioner. The court reasoned that at 59, the husband is capable of being engaged in a remunerative employment. For the woman of young age who has got no child, although she is unemployed, her earning capacity would

[16] See also Section 42 (1) (a) of the Constitution, *supra*; Section 1 (3) which provides that 'if any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void." See also *A.G., Bendel State v. A.G., Federation* (1980) 10 SC 1. Any purported amendment shall be void without need for an order of court. See *Mcfoy V. U.A.C* (1961) 3 All ER1169 at 1172.

[17] 440 U.S. 268, 99. S. Ct. 1102 (1979).

[18] (1962) 3 FLR 398.

[19] (1972) 1 WLR 217. Compare *Grifith v. Grifith* (1974) 1 WLR 1350.

be taken into consideration; and her potential earning capacity would also come into consideration when she had worked regularly during her failed marriage and there were no cogent, compelling circumstances, such as physical or mental impairment, that would prevent her from working after the divorce.

While the consideration above is commendable and appears not to have critics, the other consideration of "conduct of the parties'' has always been in the throes of controversy. For example, Dr. Ifemeje has argued that

> The inclusion of the phrase " the conduct of the parties'' as one of the determining factors in the award of maintenance to a party in Nigeria is a clear departure from the no-fault innovation of the Act, and by implication, a re-introduction of the element of fault that the Act desired to do away with.[20]

The learned author then went further to suggest that the phrase be expunged as being "contrary to the no-fault principle of the Act.''

The above reasoning, though sound and meritorious, should be substituted with a call for a rather tactical and careful interpretation by our courts instead of total removal from the Act. In doing this, the court is enjoined to make very broad interpretation. According to the Court in *Harnett v. Harnett* [21]

> Conduct should be taken into account in a very broad way, that is to say, only where there is something in the conduct of one party which will make it quite inequitable to leave that out of account having regard to the conduct of the other party as well in the course of the marriage.[22]

Such instances of conduct of parties include where a wife fired a shot at her husband, where a husband inflicted grievous injuries on his wife or

[20] S.C. Ifemeje, *op .cit* pg 167. This view would appear to be influenced by the dictum of Denning M.R. in *Wachtel v. Wachtel* (1973) 1 All E.R 13 where he pronounced as follows: "Criminal justice often requires the imposition of financial and indeed custodial penalties. But in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down,the imposition of financial penalties ought seldom to find a place. (Emphasis mine)

[21] (1974) 1 WLR 219.

[22] *Supra* at p.244.

committed adultery with his daughter-in-law[23]. Other instances are where the husband is grossly irresponsible or is a notorious drunkard or a vagrant, or a wife who is an unconscionable commercial sex worker.[24]

The above instances, termed by Denning, M.R. in *Wachtel v. Wachtel* [25]as " both obvious and gross", no doubt, very much warrant the conduct of the parties as a determining factor for the award of maintenance. But then it is the suggestion of this writer that the conduct of the parties in the prosecution of the suit, other than the conduct averred in the pleadings for the principal reliefs, be reviewed. Most authors who have argued in favor of the deletion of the phrase " conduct of the parties'' from section 70(1) often fail to bring into consideration the position in the rules.[26] It is provided in the rules that:

> A Court may, in determining proceedings for ancillary relief, being proceedings seeking an order with respect to the maintenance, pending the disposal of proceedings, of a party to a marriage or of child of a marriage, have regard to the conduct of the parties to the marriage <u>other than conduct that is in question in the proceedings for principal relief.</u>[27]

With the foregoing premises, it is safe for us to conclude that the clamor for the removal of the phrase "conduct of the parties'' requires serious revision.

Having attended to the "conduct of the parties'' factor, it remains for us to look at the phrase "all other relevant considerations'. "All other relevant considerations", it seems, going by the *ejusdem generis* rule, covers factors of the same type as the ones specifically mentioned. It will not be out of place to import the particulars listed in the rules.
According to it:

> In proceedings for ancillary relief, being proceedings with respect to maintenance of a party to proceeding or

[23] See *Armstrong v. Armstrong* (1874) 118 53 579; Jones (1976) Fam. 8; *Dixon v. Dixon* (1974) Fam. Law 58 cf E.I.Nwogugu, *Family Law in Nigeria*, (Ibadan:Heinemann Educational Books Nigeria plc, Third Edition, 1990)p.244.
[24] Section 18(3) of the Hindus Adoptions and Maintenance Act, 1956, applicable to Indians of Hindus religion, disqualifies a wife who is "unchaste" from entitlement to maintenance from her husband.
[25] *Supra.*
[26] Matrimonial Causes Rules, 1983.
[27] (Emphasis mine).

of a child of the marriage, the claimant shall state in his application for ancillary relief particulars of-

a. The property, income and financial commitments of the claimants;
b. The capability of the claimant to earn income;
c. The property, income and financial commitments of the spouse of the claimant, so far as they are known to the claimant;
d. The capability of the spouse of the claimant to earn income, so far as that capability is known to the claimant;
e. Any financial arrangements in operation between the claimant and the spouse of the claimant;
f. Any order of Court under which one of the parties to the marriage is liable to make payments to the other; and
g. The ownership of the home in which the claimant is residing, the terms and conditions upon which the claimant is occupying or otherwise residing in that home.[28]

The Court in the celebrated case of *Menakaya v. Menakaya*[29] suggested other particulars viz:

a. The income, earning capacity, property and other financial resources, which each of the parties has, or is likely to have in the foreseeable future;
b. The financial needs, obligations and responsibilities, which each of the parties has or is likely to have in the foreseeable future;
c. The standard of living enjoyed by the family before the breakdown of the marriage;
d. The age of each party to the marriage;
e. Any physical or mental disability of any of the parties to the marriage;
f. The contribution made by each of the parties to the welfare of the family including any contribution made by looking after the house or care for the family; and

[28] *Supra* Order XIV Rule 4.
[29] (1996) 9 NWLR (Pt 422) 250.

> g. In proceedings for divorce or nullity of marriage, the value of their Property or any benefit like pension which by reason of the dissolution or annulment of the marriage, a party will lose the chance of acquiring.[30]

The above are nearly in *pari materia* with the provisions of the U.K. Matrimonial Causes Act, 1973[31] and it would appear that the court in *Menakaya v. Menakaya*[32] borrowed from that law.

In addition, one's responsibility towards members of his minimal and or maximal lineage, as has been customarily entrenched in our society, especially where he is one of the few or lone successful ones, may well be subsumed within "all other relevant considerations." The Court in *Dawodu v. Dawodu*[33] opined that '…social realities would persuade a Nigerian court to take into account the moral obligation one owes one's unemployed parents in the matter.' If the parents have no independent or other means of subsistence then their claim cannot be ignored.

Similarly, liability for maintenance may fall on a father in-law where the daughter or son had derived his income from him or actively participated in his business, and the son in-law or daughter in-law is physically or mental impaired or the wife is in custody of the children of the marriage who are still of tender age.

This is welcome because it is of immense benefit to society at large where poverty strives; and absence of such maintenance may be adequate excuse for children of broken marriages to constitute themselves into social misfits and nuisance. This, however, should not be an avenue to unnecessarily lord over a third party, a responsibility of a deceased person. It should strictly be on the premises this writer has suggested. The case in India where a Hindu wife is entitled to maintenance from her father in-law after the death of her

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[30] In the U.K., the parliament recongnised the need for equitable sharing of pension and as well made some improvements to earmarking with the introduction of the Welfare Reform and Pensions Act, 1999, see particularly sections 19 and 21 thereof.

[31] See Section 25 of the U.K. Matrimonial Causes Act, 1973 (as applicable to England and Wales) which allows the powers of the Court to resolve matrimonial assets and financial matters including the value of retirement benefits of any pension arrangement the parties have between them.

[32] *Supra.*

[33] (1974) 5 CCHCJ 617 at 619. Cf. E I Nwogugu, *op. cit,* at p. 246 .

husband for the reason of her inadequate earnings or property[34] is very much undesirable and, therefore, most unexemplary and would leave room for activists' approach in its interpretation.

Settlement of Property

Settlement of Property with regard to Matrimonial Causes is the readjustment of the ownership of family property consequent upon dissolution of marriage. Settlement of Property of a broken marriage is provided for in Section 72(1) of the Matrimonial Causes Act. According to that section:

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

The wide discretion conferred on Courts by the phrase, "just and equitable in the circumstance of the case" does not go down well with so many learned writers.[35] Dr Ifemeje, learned author, critised the decisions of the Courts in *Akinbuwa v. Akinbuwa*[36], *Nwanya v. Nwanya*[37], *Shodipo v Shodipo*[38] as well as in *Muller v. Muller*[39]where the Court purported to act on the basis of what is fair and just to award settlement to the disadvantage of the wives, which she considered discriminatory. There is a huge merit in this assertion of the learned author especially with regard to Shodipo's case where the wife after 43years of marriage walked away with only N200,000.00 (Two Hundred Thousand Naira) lump sum out of the N10,000,000.00 (Ten Million Naira) worth of marital property. The Court obviously failed to take into consideration the invisible contribution of the wife, the stability and comfort which she provided to enable the man rake in the income.

However, this position may not continue to be the same after more than a decade in view of the rapid socio-economic changes going on; where women

[34] See Section 19 of the Hindus Adoptions and Maintenance Act, 1956.
[35] (1987) 2 NWLR (pt 62) 697.
[36] (1998) 7 NWLR (pt. 559) 661.
[37] (1987) 2 NWLR (pt 62) 697 .
[38] (1990) 5 WRN 98.
[39] (2006) 6 NWLR (pt. 977) 627.

are now careerists, top business executives and public office-holders. When that time comes, and assuming the same judges in *Shopido* and the like cases still remain, it will be unlikely that the decisions in these cases would be followed to the letter. It is hereby suggested that when an amendment to the extant Matrimonial Causes Act is sought, this should be borne in mind so that the men who now have the upper hand do not suffer. Above all, it will promote the principle of equality before the law and fulfill the intendment of placing the spouse on his/her pre-dissolution status.

The Act also empowers a Court to consider ante-nuptial and post–nuptial settlements[40] in the same terms as section 72 (1) already considered. It also has power to vary same for the benefit of both the spouses and the children of the marriage. This now leads us to the consideration of the child in this regard.

The Child[41]

In both the maintenance and settlement of property, the qualification is for the child who is yet to attain the age 21, although the Act gives room for special circumstance where such child above 21 may benefit.[42] This relates to the time at which the order was made.[43] This provision accords with the internationally accepted convention that the child has a right to maintenance. Thus it is provided that 'Every child has the right to maintenance by his parents or guardians in accordance with the extent of their means.'[44]

It is therefore an offence not to maintain a child.[45] It is submitted that a parent can be criminally liable for failure to maintain his child. Good enough

[40] Section 772 (2) of the Matrimonial Causes Act, *supra.*

[41] Children include: (a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other; (b) any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and (c) any child of either the husband or wife (including the illegitimate child of either of them)if, at the relevant time, the child is ordinarily a member of the household of the husband and wife, so however that a child of the husband or wife (including the child born before the marriage, whether legitimate by the marriage or not) who has been adopted by another person or other person shall be deemed not to be a marriage of the marriage…" See Section 69 of the Matrimonial Causes Act *supra*. See also *Asomugha v. Asomugha* (1974)CCHCJ 1419; compare with Egwunwoke Egwunwoke (1966) 2 All NLR I.

[42] See for instance, Sections 70 (4) and 72 (3) of the MCA, *supra.*

[43] B.N. Okpalaobi, "Matrimonial Causes Act: The Issue of Maintenance of Children," *UNIZIK Law Journal*, Vol. 5, No. 1, 2005, pp. 392 – 400.

[44] Section 14 (2) of the Child's Right Act, 2003.

[45] See Sections 300 and 301 of the Criminal Code, Cap C38, LFN,2004.

for the parent liable to pay maintenance, the child provides many useful tax planning opportunities for the family. On this, learned scholar, Professor M.T. Abdulrazzaq has written that:

> A child is a separate taxable individual from the moment of birth and is entitled to all the allowable reliefs commencing from the year of birth. One of the main tax planning objectives is to ensure that the child's allowable reliefs are fully utilized, the effect being to convert income which would otherwise be taxed into tax-free income in the hands of the child[46].

But with the foregoing nifty provisions of our laws, how can the child-support maintenance, whether relating to judicial separation or not, be enforced to the letter in view of the helplessness of the child and the kind of society we have where the child is often relegated to the background? It is suggested by this writer that a special legislation dealing with child maintenance, welfare and custody and an agency responsible for the enforcement of such maintenance, amongst others, be established.

In the U.K, the Child Maintenance and other Payments Act was enacted in 2008 to carter for matters relating to child support. Its provisions include assessment, review and variations of the amount of maintenance to be paid.[47] The Act also creates the Child Maintenance and Enforcement Commission (CEMEC) whose functions include, *inter alia*, appeals against decisions as to payment and other judicial issues. In fact, the main object of the Commission is to maximize the number of those children who live apart from one or both of their parents for whom effective maintenance arrangement are in place.[48] Establishing an agency like CEMEC in Nigeria will reduce the neglect being suffered by children, especially of divorced parents. Often when children lack support, they are likely to live an uncontrolled or un-moderated lifestyle leading to juvenile delinquency and crimes like armed robbery and kidnapping.

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[46] M.T Abdulrazaq," Tax Planning and Settlement of Unmarried Children" *The Gravitas Review of Business and Property Law: Nigerian and International* Vol.2 No. 7, June, 1989, P.11.

[47] David Burrows, "Child Maintenance and other Payments Act, 2008: An Introduction," http://www.familylawweek.co.uk/site.aspx?i=ed24549 accessed on 22/01/2011.

[48] *Ibid.*

Conclusion

In addition to suggestions made in the body of the essay, it is suggested that a review of the Act is desperately needed to bring it into conformity with not just the current global trend, but in line with current socio-economic realities in our country. It is equally suggested that, apart from the High Court, the Magistrate Courts should be conferred with the jurisdiction to hear and determine matters relating to ancillary reliefs as it is done in India[49]. In the alternative, a specialized court named the "Family Court" should be established for strictly matrimonial and allied matters. This will make matters to be dispensed with more expeditiously than it is currently done, as well as decongest our already congested courts.

Again, the concept of mutual divorce[50] should be introduced in our jurisdiction. In this, parties to a marriage can easily file terms of divorce containing maintenance or settlement. This will reduce the hassles of judicial construction of our statutory provisions on what should be the appropriate maintenance payable.

[49] See for instance, Section 4 of the Indian Divorce Act No. 4 of 1869 where the High Court and District Courts are conferred with disparate jurisdictions.

[50] Section 28 of the Indian Special Divorce Act No. 43 of the 1954 confers the District Courts with Jurisdiction to hear and determine motions presented by both parties for divorce on mutual consent.