
THE MAINTENANCE OF SPOUSES AFTER DIVORCE: A *SINE QUA NON**
Abstract

This aspect of matrimonial relief is best described to be under the economic aspect of marriage. Maintenance is an ancillary relief. The husband's Common Law duty to maintain his wife ceases on the dissolution of the marriage; however on dissolution of the High court or county court has wide powers to order either of the spouses to make ancillary financial provision and for property adjustment for the other spouse. This means that husband is maintaining his ex-wife or a woman maintaining her ex-husband. The matrimonial causes Act, applicable in Nigeria is encouraging, being the indigenous law fashioned specifically to reflect our social and economic values and suitable for solving our domestic problems. The High Court in Nigeria is empowered under the Act to make various orders in respect of the husband, wife and children of the marriage and dissolution. These orders may be in the nature of cash payment and capital transfer or order for sale of property. The order for cash payment may be in lump sum, secured and unsecured maintenance or periodical payments. These maintenance orders are made to meet the liabilities incurred in maintaining the other spouse of a child of the family after divorce and for many other reasons outlined therein. This work defines the concept of divorce and maintenance, the historical background of maintenance, statutory guidelines, orders which may be made by the court, the need for maintenance of spouses after divorce in Nigeria/other jurisdictions and finally, my conclusion and recommendations.

1.0 Introduction

According to the Blacks' law Dictionary, Divorce means; legal dissolution of a marriage by a court, also termed marital dissolution or dissolution of marriage. When used without qualification the term divorce imports a dissolution of the marriage relation between husband and wife, that is, a complete severance of the tie by which the parties are united. However in its common and wider use, the term includes: the dissolution of a valid marriage, a formal separation of married persons and the annulment of a marriage, void from the beginning.

So while the term divorce has sometimes been broadly defined or applied to include both decree of nullity and decree of dissolution of marriage especially where the marriage was not void but only voidable at the option of the injured party. This has been declared not to be in tune with modern usage and generally the term denotes only dissolution or suspension of a marital relation and does not include annulment of an invalid marriage"¹

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¹ Bryan Garner, Blacks Law Dictionary (West Publishing Co., 2004, 8th Edition) p.515

Divorce is the official recognition of the end of a statutory marital relationship by a court of law.²

1.2 The Concept of Maintenance

Maintenance is the financial support given by one person to another, usually paid as a result of a legal separation or divorce, especially Alimony. Maintenance may end after a specified time or upon the death, cohabitation or re-marriage of the receiving party.³

2.1 Historical Background of Maintenance

The ecclesiastical courts were able to give financial protection to a wife by ordering the husband to pay her Alimony, pending the determination of the suit and permanent alimony after granting a decree of divorce *a mensa et thoro*. After 1857 this power was vested in the divorce court and subsequently in the High Court and Divorce County Courts. The Divorce Court set up in 1857 was also empowered on granting a decree of divorce to order the husband to secure maintenance for the wife. If the husband had no capital which could be secured, hardship was likely to be caused to the wife; this was cured in 1866, when the court was given the power to order the husband to pay unsecured maintenance to the wife. As this would have to come out of his income, however, the maximum term for which it could be ordered was the spouses joint lives. In 1907, these powers were extended to nullity. In 1937 the courts were given the power to order the payment of a lump sum in addition to or instead of maintenance or alimony on divorce, nullity and judicial separation. There was a reform in 1969 when the fear was expressed that many innocent wives divorced against their will would be left out with inadequate provisions. Then the Matrimonial Causes Act 1970 was passed but most of its provisions were repealed in Matrimonial Causes Act 1973 which governs the award of maintenance in the High Court and Divorce County Courts. The old confusing terminology (alimony, maintenance and periodical payments) is abolished and all are now described maintenance. Section 72 of the Matrimonial Causes Act, deals with settlement of property upon divorce.

Section 70 (1) 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 proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

What it means is that Section 70 of the MCA, gives the court the power on appropriate application to make orders. By so doing, the law has succeeded in doing away with the old confusing terminologies of alimony and maintenance by using the word ‘maintenance’, even when the word alimony in the old sense is intended. The Act has equalized- the status of

² S. Ifemeje, Contemporary issues in Nigerian Family Law (Nolix Educational Publications, 2008, Enugu) p.1

³ Bryan Garner, Op cit, p.973.

husband and wife In relation to maintenance, as “a party” under the Act could mean a man or a woman.

Maintenance is no longer the sole responsibility of the husband. It is now a concept which renders the wife equally liable to pay maintenance to the husband. Though in reality, men have not prayed the court to order the wife to pay maintenance to him because every man derives pride in his ability to maintain his wife. Orders which may be made by the court are in the nature of cash payments and Capital. Cash payments include:

- (a) Unsecured Periodical Payments: This provides a spouse with a steady income and in a proper case they may be awarded in addition to a lump sum. It may be paid weekly monthly or yearly as the case may be.
- (b) Secured Periodical Payment: An annual sum paid by the payer to the payee secured on a capital fund provided by the payer e.g stocks and shares deed or title documents and vested in trustees.

Secured maintenance last for the payees life, enforcement is more likely to be successful because it provides specific funds for the enforcement of an order, it may be assigned to another and where the party ordered to make the payment dies before the other spouse, the security funds remain distinct from his other assets available for distribution and may be used for the payment of maintenance.

- (c) Lump Sum Provision: It is usually the case where a spouse has sufficient capital resources available to meet such purpose. The benefits of lump sum order are that it provides the spouse to whom it is awarded capital which may be invested to provide income or to be used for the purchase of a home. It also removes the bitterness associated with periodic payments. In practice lump sum payments are not made subject to conditions.⁴

3.1 The Need for Maintenance of Spouses after Divorce in Nigeria

Before outlining the need for maintenance after divorce, it would be proper to analyse the guiding principles which would assist the courts in awarding maintenance in a divorce petition. The Court of Appeal in the case of *Menakaya v Menakaya*⁵ laid down these principles. They are:

- (a) The income, earning capacity/ property and other financial resources, which each of the parties has or is likely to have in the foreseeable future.
- (b) The financial needs obligations and responsibilities which each of the parties has or 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 either 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.

⁴ *Ibid* page 261

⁵ (1996) 9 NWLR pt 422, 250 at 301 and also *Nama v Nama* (2006) NWLR pt 966 Page 1

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- (g) In proceedings for divorce or nullity of marriage, the value of either party or any benefit like pension which by reason of the dissolution or annulment of the marriage a party will lose the chance of acquiring.

The Court of Appeal further stated that it is its duty to apply the above principles to place the parties so far as is practicable and having regard to their conduct in the financial position, which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligation and responsibility towards the other:

This decision was also followed by the decision of the Court of Appeal in *Hayes v Hayes*⁶

By these principles laid down by the Court of Appeal, the need for maintenance after divorce include amongst others:

- (1) To meet liabilities incurred in maintaining the other spouse or a child of the family.
- (2) The financial needs, obligations and responsibilities which the other party to the marriage is likely to have in the foreseeable future. This covers such matters as additional expenses arising from the further education or training of a spouse, those incidental to earning a living or providing accommodation.
- (3) To maintain the standard of living enjoyed by the family before the breakdown of the marriage. *Kershaw v Kershaw*⁷ (1964) 3 ALL ER 635.
- (4) A divorced woman who is old and has slim chances of remarrying needs to be paid maintenance.
- (5) A party who is physically or mentally disabled in a marriage cannot be left alone to suffer and therefore such a party needs to be paid maintenance.
- (6) A woman who had stayed at home as a house wife to care for the family, had no job and savings should be paid maintenance and given an Interest in the matrimonial property, see the case of *West v West*⁸.
In *Okala v Okala*⁹, on dissolution of a marriage, a wife was awarded a lump sum payment in recognition of her contribution to the marriage.
- (7) Maintenance is also necessary by considering benefits like pension which by reason of the dissolution a party will lose the chance of acquiring.
- (8) A party in custody of the child or children of the marriage needs to be paid maintenance. The manner in which a child was being and in which the parties to the marriage expected him to be educated or trained has to be considered. The child has to be placed in the financial position he would have been if the marriage had not broken down.
- (9) Furthermore, the social and Economic life of the child or children of the divorced marriage does not diminish on the account of the divorce of the parties. The children should not suffer further pain as that would amount to punishing them twice, see *Menakaya v Menakaya*¹⁰

⁶ (2000) NWLR Pt (648), 276 at 293

⁷ (1964) 3 ALL ER 635

⁸ (1977) 2 ALL ER 705

⁹ (1973) 3 ECCLR 67

¹⁰ *Op cit*

- (10) The standard of living which the husband previously maintained before he parted with the wife should be continued because it is a relevant consideration in award of maintenance in matrimonial proceeding, see *Akinbuwa v Akinbuwa*.¹¹
- (11) The present cost of living after the divorce makes it important for maintenance to be paid, see, *Anyaso v Anyaso*¹²

3.2 The Need for Maintenance in Other Jurisdictions

In England, the traditional law of maintenance performs three functions:

- (1) It enforces support for the divorced wife whom the divorce had deprived of the expectation of support inherent in the husband's marital obligations.
- (2) It punishes fault, by reducing the entitlement of the at-fault spouse.
- (3) It serves as compensation to a wife for her contribution to the defunct home.¹³

The Nigerian principles laid down by the court in awarding maintenance in *Menakaya's* case followed the English Women Property Act of 1882, therefore, the courts in England hold the same views.

In Canada, maintenance awards are only made to meet reasonable needs, following divorce e.g custodial arrangement made for the children of the marriage, physical and mental health of the parties and then ability to find employment. A maintained spouse is expected to assume responsibility for himself or herself within a reasonable time following dissolution¹⁴

4.0 Conclusion and Recommendations

4.1 Conclusion

From the foregoing, it is clear that the provision made by the Matrimonial Causes Act for maintenance orders to be made by the court for a divorced party is very necessary. The provisions of our indigenous Matrimonial Causes Act is similar to foreign Statutes regulating matrimonial causes that is why *Menakaya's* case, followed the English Women Property Act of 1882.

But the fact still remains that in Nigeria divorced women are not bold enough to seek for enforcement IN competent courts. Men are not also willing to seek for maintenance assuming they are not the cause of the divorce or are financially disadvantaged.

4.2 Recommendations

- (1) Maintenance here in Nigeria and under the Act In particular refers to only statutory marriage. I recommend that statutory provisions should be made for the maintenance of wives of customary law marriages because Nigeria recognizes three systems of

¹¹ (1998) 2 NWLR (PT 559) 661

¹² (1998) NWLR (pt 564) 100

¹³ S. Ifemeje,

¹⁴ S. Ifemeje,

marriage, Statutory, Islamic and Customary Law marriages, equal status should be accorded the parties under the different systems.

- (2) The Nigeria court should take into account the moral obligation one owes unemployed parents, in the social sense of life because if the parents have no independent or other means of subsistence then their claim should not be Ignored, hence they may have been dependent on any of the parties in the ill-fated or dissolved marriage, see; *Dawodu v Dawodu*.
- (3) The Act does not lay down any particular fractional part of the combined resources of the parties as the entitlement of that party asking for maintenance. It only sets out what has to be considered, before a court exercises its powers in relation to award of maintenance. I recommend that the one-third rule used by the ecclesiastical courts then should form a starting point for the calculation of maintenance.
- (4) I recommend that the Act should provide for a child, whose welfare is in question to bring an application too,
- (5) Men should be educated that they are entitled to bring maintenance application, as a party under the Act can be a man or a woman.