



AN APPRAISAL OF POSITIVE MEASURES FOR PROTECTION OF THE RIGHTS OF THE CHILD IN THE FACE OF PARENTAL CONFLICT***

Abstract

Marital conflict, especially the level which can lead to divorce is a situation of intense emotions for couples. Couples focus so much on themselves and their problems that they practically forget about their children or at best regard them only as extensions of themselves. Extension that should feel exactly the way the parent feels, extension that should side the parent against the other parent. The period as well as event have the potential to mark and probably mar the child for life. In order to ensure that the hardship of a broken home experience for the child is ameliorated, there is need to sift through legal framework for child protection as well as protection of child rights and ensure that such provisions are brought into public glare as well as implemented. This work reiterates the rights of the child as provided in local and international law which are carelessly violated by parents in such situation. The work also advocates other rights not positively provided but necessary for the proper protection of the child and the child's rights.

Keywords: Divorce; Custody; Child Rights; Child Protection.

1. Introduction

Article 1 of the CRC provides that, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Childhood is a special, protected phase of life during which children have specific rights as recognized in the Convention on the Rights of the Child. It must, therefore, remain recognized and treated as separate from adulthood.¹

The dissolution of marriage brings about intense suffering for the children of such marriage. This suffering is mostly mental, emotional or psychological because the children most probably love both parents and don't want to lose either of them. Depending on the age of the child, the period of parental conflict, divorce as well as the struggle for custody are periods of intense feeling and introspective search for answers.

It is the international legal obligation of States parties under the Convention on the Rights of the Child to ensure that all children, without discrimination, are allowed to be children, to grow, learn, and play in a safe, inclusive, and caring environment, and to thrive with dignity, everywhere and at all times."²

The word right has been defined variously but for the purposes of this study, we'll adopt the definition contained in the Black's Law Dictionary thus:

A right is that which is proper under the law, morality and ethics. Something that is due to a person by just claim, legal guarantee, or moral principle, like the right of liberty... A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong, that is, a breach of duty that infringes one's right.³

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¹ www.ohchr.org >statements >2022/10 >children-have-specific-rights-and -should-be-protected-at-all-times

² *ibid*

³ BA Garner, *Black's Law Dictionary*, (8th edition, U.S, West Publishing Co, 1999) p.1347.



Rights as defined above are protective rights for children which compels the doing of certain actions in order to provide children with conducive environment to thrive. Protective rights are divided into rights against the world and rights of protection from inadequate care. Children's rights against the world assert the general importance of providing them with conditions they need to flourish, although no specific persons are entrusted with this duty. Rights against inadequate care, on the other hand, do assign duties to particular individuals, basically parents or guardians. These rights are unique to children, they hold parents responsible for making sure children's needs are met. Thus, parents are required to feed, clothe, shelter, and educate their offspring. Both kinds of rights assume that children's incapacities warrant special protection. They protect by providing for goods and services normal adults must procure for themselves.⁴ Basically, protective rights of the child levy the parents with corresponding duty and responsibility. Whenever parents deviate from performing these duties, children suffer. In cases of conflict, possible divorce, and the concomitant struggle for custody, the child's suffering may last a long time.

2. Legal Framework for Protection of Child's Right in the face of Conflict

The Convention on the Rights of the Child which is the primary and most comprehensive document that deals with child rights protection states in its preamble that 'recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

The CRC enjoins States Parties to the Covenant to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provisions are to be made for the necessary protection of any children of the marriage. States Parties are also to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.⁵

States Parties are to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.⁶ For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁷

The ICCPR also enjoins States Parties to the Covenant to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provisions are to be made for the necessary protection of any children.⁸ It is obvious that the protection envisaged by this provision is physical, however in situations of parental conflict, what the child needs most is mental and psychological protection. The Child Rights Act provision which states that 'every child is entitled to respect for the dignity of his person, and accordingly, no child shall be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse'⁹ is infringed in situations of conflict, divorce and custody struggle.

⁴ J Elshtain, 'The Family, Democratic Politics, and the Question of Authority' in G Scarre, (ed), *Children, Parents and Politics*, (Cambridge: Cambridge University Press, 1989) pp. 261-262.

⁵ Article 9(3) CRC

⁶ Article 12(1) of the Convention on the Rights of the Child

⁷ Article 12(2) *ibid*

⁸ Article 23(40) of the International Covenant on Cultural, Civil and Political Rights.

⁹ Section 11(a) of the Child Rights Act 2003.



Section 2(1) of the CRA provides thus: A child shall be given such protection and care as is necessary for the well-being of the child, taking into account the rights and duties of the child's parents, legal guardians, or other individuals, institutions, services, agencies, organisations or bodies legally responsible for the child.

The Childs' Rights Act provides that "in every action concerning a child, whether undertaken by an individual, public or private body, institutions of service, court of law, or administrative or legislative authority, the best interest of the child shall be primary consideration"¹⁰

The CRA provides that every child has a right to parental care and protection, and accordingly, no child shall be separated from his parents against the wish of the child except-

- (a) for the purpose of his education and welfare; or
- (b) in the exercise of a judicial determination in accordance with the provisions of this Act, in the best interest of the child.¹¹

3. Parental Conflict

Persons primarily responsible to the child for the provision of the family environment are the parents of the child. Other persons are only expected or obligated to pick up this duty in the absence of the parents.

The relationship between parent and child is the closest bond that children have in their growing up years. Children learn how to relate to others by observing the relationship between their parents.¹² When there is a family conflict, there is more likely to be less warmth, sensitivity, and less parental involvement overall with their children.¹³

It is normal for parents to disagree sometimes however, high levels of conflict and animosity between their parents, place children at a greater risk of developing emotional, social and behavioral problems, as well as having difficulties with concentration and educational achievement. Frequent and intense conflict or fighting between parents also has a negative impact on children's sense of safety and security, which affects their relationships with their parents and with others. Parental conflict that specifically focuses on issues related to children is also linked to adjustment problems, particularly when it causes children to blame themselves for their parents' problems.¹⁴ Witnessing the breakdown of their parents' marriage can be deeply destabilizing for children. Children can carry the effects with them as they grow up, and some of these effects may only become apparent when the children are older.¹⁵

3.1. Divorce

Divorce rates are increasing significantly across most parts of the globe and this trend is expected to continue for years to come barring any unexpected changes in social customs and legislation related to marriage and its termination.¹⁶ Originally, in most jurisdictions, a married couple had to provide an acceptable reason for why they should be allowed to end their marriage and get a divorce. However, the recent introduction of no-fault divorce allows one spouse to file for divorce without

¹⁰ Section I of the Child Rights Act 2003.

¹¹ Section 14(1) *ibid*

¹² Understanding the Effects of Divorce on Children; <https://familyassist.msf.gov.sg/content/impact-of-divorce/impact-of-divorce-on-children>

¹³ Borst, Jacob B., (2015). 'A Systemic Review of the Effects of Family Conflict: Focusing on Divorce, Infidelity, and Attachment Style'. Retrieved from Sophia, the St. Catherine University repository website: https://sophia.skate.edu/msw_papers/426. Accessed on 23/03/23.

¹⁴ Federal Circuit and Family Court of Australia; "Parental Conflict and its Effect on Children".

¹⁵ Understanding the Effects of Divorce on Children; <https://familyassist.msf.gov.sg/content/impact-of-divorce/impact-of-divorce-on-children>

¹⁶ *ibid*



adding a reason. This practice has become relatively widespread and has witnessed a rise in divorce rates globally. According to the American Psychological Association, approximately 40-50% of first marriages end in divorce. The divorce rate for second marriages is even higher, with approximately 60-67% of second marriages ending in divorce.¹⁷ Similarly, divorce rates in Europe and beyond have also seen a significant increase over the past several years. Other countries, such as China, Japan and India—which once had marriage laws that made it difficult or impossible to legally end a marriage—have seen their divorce rates double or triple since previous decades due to changes in legislation and cultural norms.¹⁸

3.1.1. Grounds for Divorce in Nigeria

A party seeking divorce in Nigeria must prove to the court that the marriage has broken down irretrievably and irredeemably and the court granting the couple divorce is the last and ultimate alternative. In accordance with the provisions of the MCA,¹⁹ this is the only ground upon which a court is actually entitled to dissolve a marriage. Nevertheless, subject to the provision of 15 (2) (a)-(h) of the Act, there are actually eight various ingredients that may constitute a breakdown. The eight ingredients are restated as follows:

- a. that the respondent has persistently and willfully refused to consummate the marriage;
- b. that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- c. that since the marriage the respondent has behaved in such a manner that the petitioner can't reasonably be expected to live with the respondent;
- d. that the respondent has deserted the petitioner for a constant period of at least one year immediately preceding the presentation of the petition;
- e. that the parties to the marriage have lived apart for a constant period of a minimum of 2 years immediately preceding the presentation of the respondent as well as the petition doesn't object to a decree being granted;
- f. that the parties to the marriage have lived apart for a constant period of a minimum of 3 years immediately preceding the presentation of the petition;
- g. that the other party to the marriage has, for a period of not less than one year failed to comply with a decree or perhaps restitution of conjugal rights made under that Act;
- h. that the other party to the marriage has been absent from the petitioner for time that is such and in circumstances that are such as to provide good grounds for presuming that he or perhaps she's dead.

Leave of the court is required to petition for dissolution within two years of the marriage unless the petition is predicated on grounds of lack of consummation, adultery, rape, sodomy and bestiality. Leave will not be granted unless the party seeking leave has suffered exceptional hardship or depravity. The court will consider the interest of the children of the marriage and the possibility of settlement in determining the application for leave.

The MCA in S.11 mandates the court not to be quick to grant divorce prayers; they should try to make sure the couples try the option of reconciliation. This is to happen through the active steps of the court, by setting up mediation and appointing conciliators for the reconciliation process of the couples seeking divorce to see if the partners can sort out their differences. The law also

¹⁷ Rate of Divorce in Nigeria

¹⁸ Divorce Rates by Country; <http://wisevoter.com/country-rankings/divorce-rates-by-country/>

¹⁹ Matrimonial Causes Act



mandates the judge to first act as a conciliator to seek for the reconciliation of the couple first. He can only step into his judicial capacity to commence hearing of the divorce petition when the mediation and conciliation for the reconciliation of the partners fails. It is only when s11 of the Act has been fulfilled by the judge and the parties still want divorce that the judge can go ahead to hear the divorce petition.

Therefore, in Nigerian courts, before the prayer for divorce can be granted by the judge, the couple(s) must prove and it must be “manifestly be seen” that the marriage has broken down irretrievably, this means that the partners and even the court have tried everything to make the marriage work but it’s clearly not working and the partners going their separate ways is the best option at the time being.

From the foregoing, it is clear that Nigerian law on divorce is still among the toughest, however sub-sections (g) & (h) seem to have provided a short cut of silent dissolution without the need to prove anything.

It is worthy of note however, that regardless of the toughness of Nigerian law on divorce, the rate of matrimonial causes in Nigeria has become astronomical, a development which constantly leaves the fate of children of such marriages hanging as some fundamental questions concerning the custody and welfare of those children need to be first resolved.²⁰ According to the President of Igando Customary Court in Lagos state, Mr. Koledoye Adeniyi, during the hearing for yet the dissolution of another marriage: “it’s sad these days the rate at which young couples within a short period of their marriages run to court for divorce.”²¹ A rise in the rate of divorce is a rise in the number of children divested of protection and rights. After the ugly incidence of breakdown of a marriage and divorce, the children are further dragged into the struggle for custody. Most of the time, each parent wants custody of the child and most often than not for no other reason than to punish their ex.

Significant numbers of children suffer for many years from psychological and social difficulties associated with continuing and/or new stresses within the post-divorce family and experience heightened anxiety in forming enduring attachments at later developmental stages including young adulthood.²²

3.2. Custody

The Black’s Law Dictionary defines ‘custody of children’ as “the care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding”.

According to section 7(1) of the MCA, in the proceeding with respect to the custody, guardianship, welfare, advancement or education of children of the marriage, the court shall regard the interest of those children as the paramount consideration and subject thereto, the court may make such order in respect to those matters as it thinks proper. What will constitute the interest of the child however will depend on the circumstances of each case. Karibi-White JSC in the case of *Williams v Williams*²³ observed thus: the determination of the welfare of a child is a composite of many factors. Considerations such as the emotional attachment to a particular parent, mother or father, the

²⁰ Adesola Olarewaju-Kadri, S.P.A. Ajibade & Co.

²¹ Fikayo Olowolagba, “Court Laments High Rate of Divorce Among Young Couples” dailypost.ng/2022/03/17/court-laments-high-rate-of-divorce-among-young-people

²² Judith s. Wallerstein, “The Long-Term Effect of Divorce on Children: A Review”. *Journal of the American Academy of Child & Adolescent Psychiatry*, volume 30, Issue 3, May 1991, page 249-360.

²³ (1963), UKHL 6



inadequacy of the facilities, such as educational, religious or opportunities for proper upbringing or matters which may affect determination of who should have custody.

4. Negative Effects of Divorce on the Psyche of the Child

4.1. Higher Propensity for Crime

In 2009, 2,000 people were polled who had experienced divorce as children in the preceding twenty years. The subjects reported witnessing aggression (42 percent), were forced to comfort an upset parent (49 percent), and had to lie for one or the other (24). The outcome was one in ten turned to crime, and eight percent considered suicide.²⁴

4.2. Poor Performance in Academics

Divorce is difficult for all members of the family. For children, trying to understand the changing dynamics of the family may leave them distracted and confused. This interruption in their daily focus can mean one of the effects of divorce on children would be seen in their academic performance. The more distracted children are, the more likely they are to not be able to focus on their school work.²⁵

4.3. Loss of Interest in Social Activities

Research has suggested divorce can affect children socially, as well. Children whose family is going through divorce may have a harder time relating to others, and tend to have less social contacts. Sometimes children feel insecure and wonder if their family is the only family that has gotten divorced.²⁶

4.4. Difficulty Adapting to Change

Through divorce, children can be affected by having to learn to adapt to change more often and more frequently. New family dynamics, new house or living situations, schools, friends, and more, may all have an effect.

4.5. Emotional sensitivity

Divorce can bring several types of emotions to the forefront for a family, and the children involved are no different. Feelings of loss, anger, confusion, anxiety, and many others, all may come from this transition. Divorce can leave children feeling overwhelmed and emotionally sensitive. Children need an outlet for their emotions – someone to talk to, someone who will listen, etc. – children may feel effects of divorce through how they process their emotions.²⁷

4.6. Anger/Irritability

In some cases, where children feel overwhelmed and do not know how to respond to the effects they feel during divorce, they may become angry or irritable. Their anger may be directed at a wide range of perceived causes. Children processing divorce may display anger at their parents, themselves, their friends, and others. While for many children this anger dissipates after several weeks, if it persists, it is important to be aware that this may be a lingering effect of the divorce on children.

²⁴ Lauren Hansen, 9 Negative Effects Divorce Reportedly has on Children; <https://theweek.com/articles/466107/9-negative-effects-divorce-reportedly-has-on-children>. Retrieved 14/03/2023.

²⁵ What are the Effects of Divorce on Children; <https://www.familymeans.org/effects-of-divorce-on-children.html>

²⁶ *ibid*

²⁷ *ibid*



4.7. Feelings of Guilt

Children often wonder why a divorce is happening in their family. They will look for reasons, wondering if their parents no longer love each other, or if they have done something wrong. These feelings of guilt are a very common effect of divorce on children, but also one which can lead to many other issues. Guilt increases pressure, and can lead to depression, stress, and other health problems. Providing context and counseling for a child to understand their role in a divorce can help reduce these feelings of guilt.

4.8. Introduction of Destructive Behaviour

While children go through a divorce, unresolved conflict may lead to future unexpected risks. Research has shown children who have experienced divorce in the previous 20 years were more likely to participate in crimes, rebelling through destructive behaviour which harms a child's health, with more children reporting they have acquired smoking habits, or drug use.

4.9. Increase in Health Problems

The process of divorce and its effects on children can be a stressful. Dealing with these issues can take its toll, including physical problems. Children who have experienced divorce have a higher perceptibility to sickness, which can stem from many factors, including their difficulty going to sleep. Also, signs of depression can appear, exacerbating these feelings of loss of well-being, and deteriorating health signs.

4.10. Loss of Faith in Marriage and Family Unit

Growing up in a divorced family greatly increases the chances of ending one's own marriage, a phenomenon called the divorce cycle or the intergenerational transmission of divorce.²⁸ Despite hoping to have stable relationships themselves when they grow up, research has shown that children who have experienced divorce are more likely to divorce when in their own relationships. Some research indicates this propensity to divorce may be two to three times as high as children who come from non-divorced families. Finally, despite hoping to have stable relationships themselves when they grow up, research has shown that children who have experienced divorce are more likely to divorce when in their own relationships. Some research indicates this propensity to divorce may be two to three times as high as children who come from non-divorced families.²⁹

4.11. Loss of Regard for Religious Faith and Practice

Following a divorce, children are more likely to abandon their faith as adults, those raised in step-families are less likely to be religious than those raised by both biologic parents. Since religious practice has benefits in areas such as sexual restraint, the child of divorce may lose this protection³⁰

5. Rights which Deserve Positive Protection in Divorce Situations

5.1. Right to Live in a Conflict-free Zone

Children should not have to go back and forth between two homes feeling the anger and tension between their parents. The parents should endeavor to keep the conflict out of the

²⁸ "Children of divorce more likely to end their marriages", University of Utah. [Newswise.com/articles](https://www.newswise.com/articles)

²⁹ What are the Effects of Divorce on Children; <https://www.familymeans.org/effects-of-divorce-on-children.html>

³⁰ Jane Anderson; "The Impact of Family Structure on the Health of Children: Effects of Divorce on Children" www.ncbi.nlm.nih.gov/pmc/articles/PMC4240051



lives of the children. When children do not do well after their parent's divorce, this is the number one reason why that is the case.³¹

5.2. Right to Love each of their Parents

Children should be able to feel and express that love without interference from anyone. A parent may have an opinion of his/her ex that he/she feels the child needs to be taught about so they can be better protected. Divorced parents should not subject their children to their beliefs that make it difficult for them to feel love for their other parent. If this precaution is not taken, children will sometimes become self-hating if they perceive that they have traits that are similar to the other parent.³²

5.3. Right to not feel Responsible for their Parent's Divorce

Sometimes children believe their parents are getting divorced because of something they did. They can feel responsible for the fights because of something they asked for that the parents may have disagreed on. They may think their behaviors when told they had done something wrong could contribute to their family changing in this very big way. Children believe their actions have more far-reaching effects than is actually the case. Feelings of guilt and shame often accompany these thoughts and they are not always shared with anyone. It is important to let the children know that there was nothing they did to bring about the divorce.

5.4. Right to not be the Messenger for their Parents

Children should not be the messengers for divorced parents as any reaction to the message may leave the child feeling as though they are the reason a parent is not happy and they are somehow at fault. It is very important that the children do not take part in any exchanges between the parents. They deserve to be protected from the information one parent is sending to the other.³³

Children of divorced parents also deserve such other rights as the right not to have to choose one of the parents over the other, the right not to have to be responsible for the burden of either of the parents' emotional problems, the right to know well in advance about important changes that will affect the child's life; for example, when one of the parents is going to change location or get remarried, the right to reasonable financial support during childhood and through school years, the right to have feelings, to express the feelings, and to have both parents listen to how they feel, the right to have a life that is as close as possible to what it would have been if parents stayed together.³⁴

6. Conclusion

The fact that a child who loses a parent to death is often more psychologically and emotionally secure than a child who loses a parent to divorce is a testament to the expectations of the child from parents and the adverse effects of parental conflict and/or divorce on the psych of the child. It is often said that children are not chattel and should not be treated as possessions; most often than not, children are treated as such in the face of conflict.

It must be noted that for a child, being with one or other of their parents all the time is a minus. For the health of the child and the preservation of his sense of self-worth, the child needs to be with both parents most times.

³¹ Five Rights Your Child Should Have in Your Divorce, <<http://www.goodtherapy.org/blog/rights-children-have-in-divorce>

³² *ibid*

³³ *ibid*

³⁴ The Children's Bill of Rights in Divorce; <https://emeryondivorce.com/childrens-bill-of-rights-in-divorce.php>



7. Recommendations

1. There is need for the enlightenment of young people, a training of the next generation of parents to understand that transitioning from a child to an adult, to a parent comes with responsibilities. They need to understand that all the rights and privileges they enjoyed as children do not last forever. Those privileges are generational and are meant to be transferred to the next generation.
2. Child rights advocates should pick up the challenge and instill in school children a care for the next generation. They should be taught to regard child rights, not only as their own entitlements, but as a duty they owe the next generation. The duty to ensure that their own children's rights are protected.
3. Couples should be enlightened to understand that marriage is more than just a game for two. That getting married at a whim and leaving the marriage at a whim serves great injustice to any child produced during the marriage.
4. The rights of the child to mental, emotional and psychological protection as listed in this work, make corresponding demands of duty on the parents of the child which the law would do well to positively provide and enforce for the realization of the best interest of the child.