

## Spousal Maintenance and Alimony under the Matrimonial Causes Act (MCA)

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### ABSTRACT

In African society, marriage is regarded as the union between two families even though the parties concerned in the marriage are the husband and the wife who are matured to enter into a legal relationship. But under the common law principles of *Hyde V Hyde*, it is a union between one individual (man and woman) to the exclusion of all others. Despite this, marriage celebration or ceremony varies from one community to another with the payment of dowry or bride prices as may be demanded by the family of the spouse to be. In modern society the maintenance of spouse in matrimonial causes has become a subject of litigation in most jurisdictions on who is awarded reliefs sought in divorce proceedings. The article will explore and examine the matrimonial cause act in Nigeria in spousal matters. It argues that the proceedings and reliefs outline in the dissolution of marriage and divorce is broken down irretrievably which one of the conditions must be met. Thus, the issue of maintenance is left for the court to decide on who gets what. It recommends the children's welfare and maintenance should be paramount in the dissolution of marriage when maintenance of spouse is in adjudication.

**Keywords:** Spouse maintenance, Matrimonial Causes, Divorce and Dissolution of Marriage, Children and Nigeria.

### INTRODUCTION

Marriage is a universal institution which has been in existence from time immemorial. It can be traced as far back as the very creation of man and is considered to have spiritual, moral and social significance in the society. It is therefore revered as sacred and thus heavily guarded by various religions, traditions, social norms and laws alike. In Nigeria, the sanctity of marriage cuts across all regions of the country regardless of culture and religion. Marriage is defined by Lord Penzance in *Hyde v Hyde*<sup>1</sup> as:

*'the voluntary union for life between one man and one woman to the exclusion of others'*

Marriage is a social contract that confers a state of attachment and union status. This is a peculiarity that distinguishes marriage from other forms of contract. There are sets of rules, expectations and boundaries that define the relationship or union. Every social contract specifies rights and responsibilities of parties to it. In Nigeria, the

marriage institution is conceived as a primary and sacred institution through which a man and a woman enter into some form of contract for reciprocal obligations as husband and wife. Other forms of marriage also exist, for example, polygamy in which a person takes more than one spouse, is common in many societies.

Although the main object of a marriage is bliss and happiness similar to fairy tale endings, marriage is soon found by most to be a far cry from that. In fact for most parties, the protection of marriage by culture and religion puts couples in the eternal trap of marriage. In some cultures, such as in the Northern parts of Nigeria, women have little or no say in their marital lives as a result of the age-old culture of forced/child marriages and betrothal from birth.

The concept of marriage and divorce affects Nigerian women more than it affects men due to the deep-rooted culture that all women should be married leaving women with little or no choice as to what direction or dimension their lives should take. Hence, more women are trapped in a hellish or short life as a result of

<sup>1</sup>*Hyde v Hyde* (1860) LR.I PD, 130

being stuck in abusive marriages. Divorce or dissolution of marriage on the other hand is considered to be an abomination because it is perceived to whittle away the sanctity of marriage.

It is fictional to expect a marriage to be free from problems. However, the general rule as contained in the Matrimonial Causes Act<sup>2</sup> is that divorce proceedings cannot be instituted within two years of the solemnization of a marriage without the leave of the court<sup>3</sup>. The only exception to this rule is on the ground that the marriage has broken down irretrievably<sup>4</sup>. The principle of the irretrievable breakdown of marriage as a ground for divorce is based on the idea that:

*'a good divorce law should be to buttress, rather than undermine the stability of marriage, and when unavoidably a marriage has broken down irretrievably, the empty legal shell of the marriage should not only be buried, but buried with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future'<sup>5</sup>.*

Thus, this provision recognizes the sanctity of marriage. It is a tactic of making divorce proceedings cumbersome and less attractive in our society, except only in instances where divorce is urgently the only way out of a total chaos and breakdown of marital unions.

The blunt fact is Nigerian courts do not encourage divorce, and judges have the authority to mandate that couples explore different forms of reconciliation before granting the application. The implication of this is that it can take years from the date of filing of the initial application to the final decree absolute: it is not unheard of for proceedings to take in excess of eight (8) years.

Divorce has not found definition in the Matrimonial Causes Act but in simple parlance, it is the legal termination of a marriage and the obligations created by it. It is the legal separation of man and wife, effected, for cause, by the judgment of a court and either totally dissolving the marriage relation, or suspending its effects so far as concerning the cohabitation of the

parties<sup>6</sup>. A marriage must have legally been in existence before a divorce and consequential issues can arise.

### DIVORCE AND DISSOLUTION OF MARRIAGE

Divorce is an act by which a valid marriage is dissolved, usually freeing the parties to remarry<sup>7</sup>. It is the termination of a marriage or marital union, the cancelling or reorganizing of the legal duties and responsibilities of marriage, thus dissolving the bonds of matrimony between a married couple under the rule of law of that particularly country or state<sup>8</sup>. Simply put, it is the legal and formal dissolution of a marriage.

It is the legal separation of man and wife, effected by the judgement of a court, and either totally dissolving the marriage relation, or suspending its effects so far as it concerns the cohabitation of the parties<sup>9</sup>. It imports the dissolution of a marriage relation between husband and wife, that is, a complete severance of the ties by which parties was united<sup>10</sup>. It is pertinent to note here that there is no statutory definition of divorce. The Matrimonial Causes Act only elaborates on the irretrievable breakdown of marriage as the sole ground for divorce and on the facts that constitutes such ground.

The term dissolution is used interchangeably with divorce and it is also synonymous to divorce. However, dissolution of marriage refers to the process by which a couple can end their marriage permanently. Usually, it is the quicker and less expensive process for terminating a marriage, when neither spouse contests the decision of the court. Divorce on the other hand can be said to be the end result of the process of ending a marriage. Thus, dissolution of marriage ends in a divorce.

In a dissolution, the husband or wife file a joint petition where both parties request the court to terminate the marriage and approve separation agreement that they have prepared and agreed upon prior to filing their petition. However, in divorce, one spouse files a petition against the other spouse and both spouses have not been able to work out a separation agreement.

<sup>2</sup>Matrimonial Causes Act, Cap M7 Laws of the Federation of Nigeria, 2004.

<sup>3</sup>Section 30(1) Matrimonial Causes Act, Cap M7 Laws of the Federation of Nigeria, 2004.

<sup>4</sup>Section 15(1) Matrimonial Causes Act 2004.

<sup>5</sup>*Shokunbi v. Shokunbi* (CHCJ/7/76), page 1913 S.C.

<sup>6</sup>Black's Law Dictionary, Free Online Legal Dictionary 2<sup>nd</sup> Edition.

<sup>7</sup>The Encyclopedia Britannica, 2017

<sup>8</sup>The Covenant Divorce Recovery Leaders' Handbook, Page 166, Wade Power, 2008

<sup>9</sup>Black's Law Dictionary, 2<sup>nd</sup> Edition.

<sup>10</sup>Black's Law Dictionary, 2004.

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Up to 1970, Nigerian law on divorce was based on the matrimonial offence theory which required that a marriage may only be dissolved when a spouse has committed a matrimonial offence like adultery, cruelty or desertion. This was the consequence of the application of English divorce laws in Nigeria<sup>11</sup>. The provision of section 15(1) of the Matrimonial Causes Act, 1970 is considered to be one of the main objectives of the Act which was to make irretrievable breakdown the sole ground for divorce in Nigeria. However, the Nigerian Courts have always interpreted section 15 of the MCA as establishing irretrievable breakdown of marriage as the sole ground of divorce.

There is only one ground for dissolution of marriage under the Nigerian law. A petition for a decree of dissolution of marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably<sup>12</sup>. In the case of *Harriman v Harriman*<sup>13</sup>, the court held thus;

*'by virtue of the provision of item 60 in the exclusive legislative list of the 1979 constitution, the whole of Nigeria is subject to one system of law when it comes to marriage and dissolution of marriage, and which is the provisions of the Matrimonial Causes Act, 1970'.*

The court further held in Paragraphs F-H of the same case that;

*'under the Matrimonial Causes Act, 1970, there is only one ground for the dissolution of all marriages, and that is that the marriage has broken down irretrievably which is provided for under section 15(1) of the Act. The provisions of section 15(2)(a-h) of the Act do not constitute grounds or separate causes of action on the basis of which dissolution of marriage can be granted. They are only various species of the breakdown. In other words, a petitioner who satisfies the court on any one or more of those facts would be entitled to a finding that the marriage has irretrievably broken down, and consequently to a decree dissolving it'.*

Therefore, the court hearing a petition or dissolution of marriage shall hold the marriage to have broken down irretrievably if, but only if,

<sup>11</sup> The reason for this was that the Law on Matrimonial Causes in force in England from time was also made applicable to Nigeria.

<sup>12</sup> Section 15(1)

<sup>13</sup> *Harriman v Harriman* (1909).

the petitioner satisfies the court of one or more of the following<sup>14</sup>;

- That the respondent has wilfully and persistently refused to consummate the marriage.
- That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.
- That since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.
- That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.
- That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition for divorce and the respondent does not object to a decree being granted.
- That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.
- That the other party to a marriage has for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under the Matrimonial Causes Act.
- That the other party to the marriage has been absent from the petitioner for such a time and in such circumstance as to provide reasonable grounds for presuming that he or she is dead.

Spousal maintenance and alimony is an offshoot of divorce and divorce proceedings. In law, a “settlement” can be defined as a resolution between disputing parties about a matter of legal interest and significance, reached either before or after the court action begins<sup>15</sup>. The term “ancillary” is also defined as subordinate; aiding. A legal proceeding that is not the primary dispute but which aids the judgment rendered in or the outcome of the main action. It is a descriptive term that denotes a legal claim, the existence of which is dependent upon or reasonably linked to a main claim<sup>16</sup>. A “relief” is the means by which

<sup>14</sup>Section 15(2), Matrimonial Causes Act.

<sup>15</sup><<https://booksandjournals.brillonline.com>> accessed 25 September 2018.

<sup>16</sup><<https://legal-dictionary.thefreedictionary.com/ancillary>> accessed 25 September 2018.

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a court of law, usually in the exercise of civil law jurisdiction, enforces a right, imposes a penalty, or makes another court order to impose its will<sup>17</sup>.

Divorce settlement is an arrangement, adjustment, or other understanding reached, as in financial or business proceedings between two adults who have chosen to divorce. It serves as the final legal agreements between these adults for documenting the terms of their divorce. A divorce settlement in Nigeria entails which spouse gets what property and what responsibilities once the marriage is over, especially jointly owned properties. It deals with child custody and visitation, child support, alimony, health and life insurance, real estate, cars, household items, bank accounts, debts, investments, retirement plans and pensions, college tuition for children and other items of value<sup>18</sup>.

Ancillary relief is therefore a judgment for payment in a divorce which is beyond the request for divorce. Ancillary relief can include maintenance payments for a spouse, debt payments, child support and payments. Either spouse can request the order for ancillary relief for themselves or for a child. Ancillary relief is the relief sought as part of a divorce claim, but apart from the divorce itself<sup>19</sup>.

There are several reasons for the high rate of divorce in recent times. One of the causes of divorce is the high rate of infidelity and extra marital affairs. This creates trust issues in a marriage and most marriages do not recover from this. Even the provision of the Matrimonial Causes Act recognizes adultery as a ground for divorce<sup>20</sup>. Another reason for the high rate of divorce is infertility. Our core traditional belief is that a person gets married for the purpose of procreation. Once this aim is not achieved, the marriage is regarded as fruitless, divorce becomes imminent for the impatient ones. Poor character, bad habits and addictions are other reasons for the high rate of divorce in Nigeria. Lack of respect for the other spouse's feeling and opinion is also a reason for divorce. Undue pressure and

influence from third parties. If not properly managed is an open door for divorce.

Divorce is no doubt a deviation from the usual family life cycle. It alters the structure of the family. It creates tense conflicts and divided loyalties. There is equally the psychological and emotional trauma for the couple and also the children. The sense of failure and loss that accompanies the marital breakdown frequently leads to the feeling of hatred, bitterness, depression, loneliness and pain. There is also the societal stigmatization of divorced women especially, in the society. Children from broken homes are more prone to social vices and a life of crime. The seemingly increasing rate of divorce needs to be controlled in order to prevent these adverse effects.

Under the Nigerian matrimonial law, settlement of family properties takes place upon the dissolution of a marriage, provided there are any joint assets to be settled. A petitioner (spouse filing for divorce) is expected to ask for the proposed settlement in his or her divorce petition. And where the respondent (a spouse being sued) is the one seeking for the settlement of properties, such prayer must also be included in his or her answer (response to the divorce petition).

With regards to the aforementioned, some of the reliefs that can be claimed by the party seeking the dissolution of marriage in Nigeria are maintenance (spousal support/alimony), child support, settlement of property and payment of lump sum, child custody etc. which would be further discussed in this study.

According to Black's Law Dictionary 'alimony' is an allowance paid by one spouse to another by order of a court for the maintenance of the other spouse while they are separated, during divorce proceedings or after they are divorced.

Alimony comes from the Latin word 'alimonia' which means sustenance and derives from the common law right of a wife to material support by her husband. In other words, it was essentially payable only to a wife. The courts have tried to draw a distinction between maintenance and alimony but this distinction would only apply in jurisdictions where both terms are retained.

Part IV of the Matrimonial Causes Act provides for the making of orders for maintenance, custody and settlements in favour of a husband, wife, children or adopted children of a marriage upon divorce. The High Court is empowered under this part to make various orders in respect

<sup>17</sup>Ibid.

<sup>18</sup><<https://googleweblight.com/i?u=https://resolutionlawng.com/divorce-settlement-in-nigeria/&-hl=en-NG>> accessed 25 September 2018.

<sup>19</sup><<https://www.myattorneyhome.com/Glossary/ancillary-relief>> accessed 25 September 2018.

<sup>20</sup>Section 15(2) (b) Matrimonial Causes Act, Cap M7 Laws of the Federation of Nigeria, 2004.

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of the husband, wife and children of the marriage. In respect of maintenance, the Matrimonial Causes Act<sup>21</sup> makes provision for the maintenance of a spouse or children of a marriage. The court in making such orders would take into consideration the means, earning capacity, conduct of the parties to the marriage and all other relevant circumstances.

The Matrimonial Causes Act also makes provision for guardianship, welfare, advancement or education of children of a marriage. In deciding on these issues, the court shall have regard to the interest of the children as paramount consideration. These interests must of necessity relate to physical, mental, and moral welfare of the children. The wishes of a child, education and religious considerations, conduct of the parents, age and sex of the children, adequacy of arrangement for the child, the wishes of the natural parents, medical and psychological factors, nationality of the mother, need to put brothers and sisters together, and equality of the parents, are all factors to be considered in custody matter<sup>22</sup>.

*Under the Act, settlement of property is based on what the court considers to be 'just and equitable in the circumstances of the case' for the benefit of any or all of the parties involved, whether the spouses and/or children of the marriage (biological or adopted). The court may require the parties to the marriage or one of them to make settlement of property owned in reversion, as the court considers just and equitable in the circumstances.*

### ANCILLARY RELIEFS

There are three types of ancillary reliefs provided for under the Matrimonial Causes Act. These are: maintenance, custody of children and settlement of property. Each of these reliefs is distinct in nature and is granted in respect of specific persons under different considerations. The relief of custody for example, can only be made in respect of children of the marriage in favour of either one or both parties to the marriage or in favour of a third party completely. An order for maintenance or settlement of property on the other hand may be made in favour of one of the parties to the marriage or in respect of the Children of the marriage. In granting any of these reliefs, the courts take different factors

into consideration, each depending on the peculiar circumstances of each case.

According to section 69<sup>23</sup>, ancillary reliefs may be made in respect of any marriage contracted or purportedly contracted under the Act. This means in effect that the orders for ancillary reliefs may be made in respect of parties to either valid marriages or void marriages. The same section 69<sup>24</sup> also provides that ancillary reliefs may be made in respect of the children of these two categories of marriage, provided that the said children fall within the following classes:

- Any child adopted since the marriage by the parties or either one of them with the consent of the other.
- Any child of the parties born before the marriage, whether legitimated by the marriage or not.
- Any child of either the husband or the wife (including an illegitimate child or adopted child) if at the 'relevant time', the child was ordinarily a 'member of the household' of the parties.

While interpreting the phrase 'member of the household' as used in section 69(c)<sup>25</sup>, the court held in the case of *Asomugha v Asomugha*<sup>26</sup>, that the two daughters the wife had for another man before she married her husband were children of the marriage in favour of whom maintenance order could properly be made. The girls had lived with the parties since the marriage and the husband had treated them as his children even though he knew who their father was. He had even submitted their names to his employer as his children for the purpose of his official records.

Again, 'relevant time' as used in the same section 69(c) means that the child in question must have been a member of the household of the parties either as at the time the parties finally ceased to live with each other or as at the time matrimonial proceedings between the parties were instituted. Note however that any child born before the marriage by the parties between them or independently of each other, who has been adopted by another person or other persons is not within the definition of the 'children of the marriage'.

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<sup>23</sup>Matrimonial Causes Act.

<sup>24</sup>*Ibid*

<sup>25</sup>Matrimonial Causes Act.

<sup>26</sup>*Asomugha v Asomugha* (1974) CCHCJ 14

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<sup>21</sup>Section 70 of the Matrimonial Causes Act

<sup>22</sup>Section 71, Matrimonial Causes Act.

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Under the ancillary reliefs, attention will be concentrated on maintenance and settlement of property under the Matrimonial Causes Act.

### MAINTENANCE

Maintenance proceeding for matrimonial cause has created and established some entitlement for spouses and children during and after divorce. These entitlements and allowances can be provided by the husband or wife to a marriage. However, this was not the position under the common law.

The concept of maintenance is traceable to Common Law wherein a husband was obliged to maintain his wife as part of his matrimonial duties. During that dispensation, a wife was at liberty to pledge her husband's credit in procuring the needs of the family whenever the husband deserted her without providing maintenance, especially where she had no adequate means of supporting herself. For all intents and purposes such a deserted wife became her husband's agent of necessity; meaning that any tradesman from whom she purchased necessities like food, clothing, medication, housing etc. on credit, could sue the husband to pay for such necessities.

The enactment of the Matrimonial Causes Act 1970 quashed and obliterated this strict position of the common law. The enactment of this law has drastically reduced the harshness of the common law. The Matrimonial Causes Act 1970 has unprejudiced controversies brought by the common law. The concept of maintenance has been brought within statutory regulation and expanded to accommodate husbands as beneficiaries of orders for maintenance without the exclusion of the children. This means that either party to a statutory marriage may apply to court for an order of maintenance where the parties are unable to reach an agreement on the issue. Ordinarily, parties to a marriage can make an agreement for maintenance as between themselves on the terms they deem fit. So that where the parties to a statutory marriage have privately agreed between themselves on the issue of maintenance, they may request the court to simply sanction the agreement as made.

### MAINTENANCE UNDER THE MATRIMONIAL CAUSES ACT 1970

In the absence of an existing private agreement for maintenance between the parties to a marriage, section 70 of the Matrimonial Causes Act spells out the powers of the court to make maintenance orders. 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 orders as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances'.*

Thus, the subsection clearly prescribes four factors which will guide the court in the exercise of its discretion in this respect. It is necessary to examine these factors in details.

### Means of the Parties

The means of the parties include capital assets like buildings and equity and share in a company together with contingent and prospective assets. It also covers all pecuniary resources of the parties whether capital or income, and whether actual or contingent<sup>27</sup>. The means of a party is relevant in determining his right or obligation to maintenance.

In the case of *Negbenebor v Negbenebor*<sup>28</sup>, the Supreme Court considered the meaning of the terms, 'income', 'earning capacity' and 'asset'. In that case, the lower court had added the value of a house, owned by the husband, and money he had in a bank to the regular earning of the husband to constitute his income. He then added the wife's earning to this total sum, divided it by three, and held that the wife was entitled to one third of the total sum as her maintenance. It was held by the Supreme Court that arrears of maintenance payable may be made retrospective from the date when the originating summons (or petition as the case may be) in the case was issued.

However, in the case of *Olu-ibukun v Olu-ibukun*<sup>29</sup>, the Supreme Court held that a man's house and money in his bank account are not income and should not be considered in awarding maintenance.

It is submitted that this narrow view of 'means' can work injustice to a deserving spouse. Although assets such as houses, cars etc. are not income, for instance the rent on properties, interest generated from a fixed deposit account, dividends from shares, money from transport business etc. This ought to be taken into consideration in determining the 'means' of the spouses.

<sup>27</sup>*Rogers v Rogers* (1962) 3 FLR 398

<sup>28</sup>*Negbenebor v Negbenebor* (1971) 1 ALL NLR 210.

<sup>29</sup>*Olu-ibukun v Olu-ibukun* (1982) FCA/E5/82.

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In the case of *Oluwa v Oluwa*<sup>30</sup>, the court pointed out that the husband/petitioner was financially stable and referred to such assets as his three cars and properties both in England and Nigeria. On the basis of this evidence of means and other factors, the wife/respondent was awarded maintenance.

Also in the Australian case of *Rogers v Rogers*<sup>31</sup>, the Supreme Court of New South Wales held that ‘means of the parties’ refers to the respective capital assets of the parties including contingent and prospective assets and the court added that a wife is not to be undesirable to interfere with capital assets relating to certain types of business.

### Earning Capacity of the Parties

This refers not only to what he or she in fact earns but the potential earning capacity if that spouse obtained suitable employment<sup>32</sup>. The meaning of “earning capacity” was considered by the Supreme Court in *Negbenebor v Negbenebor*<sup>33</sup>, wherein the lower court from whose judgment the husband appealed in this case, had added the value of a house, owned by the husband, and money he had in a bank to the regular earning of the husband to constitute his income. He then added the wife’s earning to this total sum, divided it by three, and held that the wife was entitled to one-third of the total sum as her maintenance. The Supreme Court held that the judge was in error. The latter had confused the basis of assessment, which should have been the respondent’s income, as distinct from his assets.

Thus, where a spouse is employed, the court will consider whether his income is commensurate with his actual potential earning capacity. In *Mc Ewan v Mc Ewan*<sup>34</sup>, the husband, a retired constable aged 59 was unemployed. Although his only cash income was a police pension of six pound weekly, the court held that an order that he should pay his wife the whole of that sum was unreasonable. It was proper, the court stated, to take into account his potential earning capacity as he could have obtained a suitable work had he tried. Again in *Griffith v Griffith*<sup>35</sup>,

the fifty-one year old husband had been in remunerative employment as a consulting engineer. But for three years up to the hearing, he had been unemployed. On the basis of the evidence adduced in respect of his earnings while in employment, the court held that it was reasonable to attribute to him a potential earning capacity of five thousand pounds per annum.

With respect to a wife, the question whether her earning capacity will be taken into account in the award of maintenance is regulated by some basic principles. As a general rule, a wife is not obliged to work in order to reduce the maintenance her husband should pay. In the case of a young wife who has no children and obviously has to work in her own interest, but does not, her earning capacity will be taken into account. Similarly, if she had worked regularly during the married life and is expected to work after divorce, her potential earnings ought to be taken into consideration. Where on the other hand, the wife has young children to look after, she should not be expected to work and her earning capacity should be discountenanced<sup>36</sup>.

### Conduct of the Parties to the Marriage

The conduct of the parties to the marriage is one of the factors to be considered in determining whether to award maintenance or not. However, our courts have not determined whether our new law which is based on breakdown of marriage rather than matrimonial offence has effected any change in the interpretation of the conduct of the parties to the marriage.

In England, courts have interpreted section 5(i) of the Matrimonial Proceedings and Property Act, 1970 which requires the court in dealing with applications for maintenance to have regard to the conduct of the parties. In *Watchel v Watchel*<sup>37</sup> Denning, M. R., observed that it is no longer appropriate to talk about an innocent or guilty spouse. The learned judge also rejected the suggestion that there should be a discount or reduction in what the wife is to receive because of her supposed misconduct.

The decision was re-affirmed as correct by another Court of Appeal in *Harnett v Harnett*<sup>38</sup>, where the court refused an invention to depart from the earlier case. Cairns, L. J. who delivered the opinion of the court in Harnett’s case observed that:

<sup>30</sup>*Oluwa v Oluwa* (1976) 3 FLR 398.

<sup>31</sup>*Rogers v Rogers* (1967)3 FLR 398.

<sup>32</sup>E.I. Nwogugu Op. Cit Page 242.

<sup>33</sup>*Negbenebor v Negbenebor* (1971) 1 ALL NLR 2010 Supreme Court of Nigeria.

<sup>34</sup>*McEwan v McEwan* (1972) WLR 1217.

<sup>35</sup>*Griffith v Griffith* (1974) 1 WLR 1350.

<sup>36</sup>*Rose v Rose* (1957)

<sup>37</sup>*Watchel v Watchel* [1973] Fam 72.

<sup>38</sup>*Harnett v Harnett* (1974) 1 WLR 219.

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*'I would reach the view that it is the intention of the Act of 1970 that conduct should be taken into account only 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'.*

Some of the grievous conducts which English Courts have taken into account in dealing with applications for maintenance include the wife who fired a shot-gun at her husband after she was shut out of the house<sup>39</sup>; the husband who inflicted serious and lasting injury on his wife<sup>40</sup>, and the husband who committed adultery in the matrimonial home with his daughter in law<sup>41</sup>. On the whole, there is good justification in adopting Lord Denning's interpretation as applicable to our law. Thus, it seems safe to conclude that conduct would only be relevant in determining financial provision if 'gross and obvious' or if 'common justice' requires that a party should get less than what normally should be due to that party.

### All other Relevant Considerations

Section 70(1) of the Matrimonial Causes Act, 1970 gives the court wide latitude in dealing with applications for maintenance. Matters such as the standard of living of the parties, and the financial requirements of the applicant spouse would be included in the phrase<sup>42</sup>. Other factors which may come within the meaning of the provision may be viewed from the particulars which are required to be included in an application for maintenance. These are:

- The property, income and financial commitments of the claimant;
- The capability of the claimant to earn income;
- The property, income and financial commitments of the spouse of the claimant, so far as they are known to the claimant;
- The capability of the spouse of the claimant to earn income, so far as that capability is known to the claimant;
- Any financial arrangement in operation between the claimant and the spouse of the claimant;

- Any order of a court under which one of the parties to the marriage is liable to make payments to the other; and
- The ownership of the home in which the claimant is residing and the terms and conditions upon which the claimant is occupying or otherwise residing in that home<sup>43</sup>.

In Nigeria, the extended family responsibilities may constitute one of the other relevant considerations. This was expressed in *Dawodu v Dawodu*<sup>44</sup>, where it was stated that:

*'in Nigeria, one owes one's parents some moral but not legal obligation to assist with their maintenance. One's parents' claim can of course not rank than one's wife and children. ...If the parents have no independent or other means of subsistence then, their claim cannot be ignored'.*

The mere fact that a decree was granted against a party in the proceedings to which the application for maintenance is related does not disqualify that party from being entitled to the grant of a maintenance order<sup>45</sup>. Each case is to be treated on its merits and the court retains a large measure of discretion in this respect.

The provisions of this section 70 clearly indicate that the relief of maintenance may be granted to either:

- A party to the marriage, whether or not a decree had been made against that party in the main proceedings in relation to which the proceedings for maintenance were instituted;
- Any child of the marriage who is above 21 years, if in the opinion of the court, there are special circumstances that justify the making of an order of maintenance in his/her favor.

The parties in respect of whom maintenance orders may be granted will be examined.

### A Party to the Marriage

A party to the marriage is invariably the husband or wife. It therefore, means that either of them can apply for maintenance. The result of the provisions of Section 70 of the Act is that the common law rule where only the wife is entitled to maintenance was removed.

<sup>39</sup>*Armstrong v Armstrong* [1874] 1185J 579.

<sup>40</sup>*Jones v Jones* [1976] Fam 8.

<sup>41</sup>*Dixon v Dixon* [1974] Fam. Law 58.

<sup>42</sup>*Tomkins v Tomkins* (1948)

<sup>43</sup>Rule XIV, Order 4, Matrimonial Causes Rules

<sup>44</sup>*Dawodu v Dawodu* (1974) 5 CCHCJ 617.

<sup>45</sup>Section 70(3) of the Matrimonial Causes Act. *Trestain v Trestain* (1950).



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Either party may apply for maintenance<sup>46</sup> irrespective of whether the marriage was void, voidable or valid. This is the effect of Section 69 of the Act which defines marriage to include, “a purported marriage that is void but does not include one entered into according to Muslim rites or whether customary law.” Thus, the parties to a proposed marriage which is void by virtue of Section 3 of the Act comes within the ambit of Section 69. The exclusion of marriages contracted under Muslim law or other customary law is in line with the general tenor of the Matrimonial Causes Act which only applies to monogamous (statutory) marriages

### *Maintenance of Children of the Marriage*

The power to give maintenance for the children of the marriage cannot 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 circumstances which justify the making of such order. Under Section 277 of the Child’s Rights Act, 2003 a child is a person under the age of eighteen years and by virtue of Section 55(15) of the same Act, orders relating to maintenance of a child shall cease to have effect when the child attains the age of eighteen except otherwise directed.

Section 70(4) of the Matrimonial Causes Act provides that the court has a general power to make maintenance order with respect to the children of the marriage. However, such power cannot 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 circumstances which justify the making of such an order.

In the case of *Cunningham v Cunningham*<sup>47</sup>, the parties were married in April, 1963. The wife had two children by her previous marriage and these children were accepted initially as members of the household by the respondent. From September, 1963 the spouses became estranged and although occupying separate sleeping rooms, they continued to occupy the same dwelling, took their meals together and shared in social occasions together until they finally separated in November, 1965. More than a year before their separation, the responsibility for the upkeep and upbringing of the wife or children (by her previous marriage) respectively had been substantially relinquished by the respondent.

These responsibilities had been assumed by the wife’s parents for over a year before the separation. On the facts, it was held that, although the parties ceased to live together only from November, 1965, the children were no more members of the household, since the respondent had relinquished responsibilities for them more than a year earlier. Whether a child was a member of the household of the spouse is a question of fact and not one of law. If a child is regarded and treated by both spouses as member of the household, that will be adequate proof of the membership of the household.

Also, in *Asomugha v Asomugha*<sup>48</sup>, the wife had two daughters before she married her husband. The daughters lived with the spouse and the husband treated them as his children even though he knew who their father was. He submitted their names to his employer as his children for purposes of his official records. It was held on this point, that the girls were children of the marriage in favor of whom maintenance order can be properly made. But does it cover the case of a child who is not yet twenty-one years on that date but who because of the terms of the order would necessarily benefit from it after attaining twenty-one years? A good illustration is the case of a child of the marriage who on the date the order was made was nineteen years of age but being an undergraduate in a university will benefit from the order even after attaining the age of twenty-one years. In *Osborne v Osborne*<sup>49</sup>, an Australian court took the position that the restriction in the provision which is similar to section 70(4) applies only to children who had attained the age of twenty-one at the date the order was made. It does not extend to a child who at the time of the exercise of the court’s power has not yet attained that age but who would benefit after attaining that age.

There is also need to construe the phrase ‘special circumstances’ under the sub-section. It seems that there must be some good reason to equate a child who is over twenty-one years of age to one who is twenty-one years of age. For instance, there must be evidence that the child who has already attained twenty-one years of age is in such a physical or mental state that he is unable to support himself or that he requires special medical care and attention. Alternatively, it may be shown that the child is specially endowed

<sup>46</sup>*Olu-ibukun v Olu-ibukun* (1974) 1 All NLR (Pt. 1) 513.

<sup>47</sup>*Cunningham v Cunningham* (1968) 11 FLR 399.

<sup>48</sup>*Supra*

<sup>49</sup>*Osborne v Osborne* (1972) 19 FLR 315.

with academic brilliance that she should be entitled to undertake tertiary education or supported to carry out some research. Certainly, the enumeration in the illustration is not exhaustive as there are many other situations which may come within the subsection.<sup>50</sup>

In statutory marriage, application for maintenance of a child will normally arise in proceedings for a matrimonial cause which, inter alia, includes divorce and judicial separation. The Matrimonial Causes Act 1970 provides that both the mother and the father have equal responsibility to maintain the children of their marriage. Where however a parent or both parents fail to maintain the children, such children cannot enforce their right to maintenance in the absence of a proceeding for a matrimonial cause. Where a parent omits to provide the necessaries of life for his or her child under the age of 14 years thus resulting in injury to the child's life and health, proceedings may be brought by the relevant authorities to punish and deprive the parent of his or her custodial rights.

Section 14(2) of the Child Rights Act 2003 has further extended the child's right by providing that the child's right to maintenance by his parent or guardian can be enforced by the child in the family court whether or not there is proceeding for a matrimonial cause. Thus, if a child is of the view that the parents are not fulfilling their obligation to take care of him, the child can initiate an action in court for maintenance by the parents.

### Maintenance Pending the Disposal of Proceedings

Section 70(2) of the Matrimonial Causes Act 1970 provides that:

*'subject to this section and to rules of court, the court may, in proceeding for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances'.*

Proceedings for maintenance pending suit may be instituted by application without leave of court as the case may be<sup>51</sup>. Such application constitutes a request to the court to order the maintenance of a spouse while the proceedings

are pending. The factors which section 70(2) requires that courts to take into consideration in making orders for maintenance pending suit are the same as in the case of permanent maintenance.

The parties to a proceeding for maintenance pending suit may agree mutually on the maintenance to be paid. Such agreement should be submitted to the court which may make the necessary order without a hearing<sup>52</sup>. An order for maintenance pending suit is strictly of a provisional nature. Its purpose is to ensure that the applicant spouse is not left a destitute, but remains well provided for during the course of the proceedings<sup>53</sup>. The order for maintenance pending disposal of proceedings is made to ensure that a party to a marriage under the Act is able to live approximately in the position to which he or she is accustomed until the substantive suit is heard and disposed of<sup>54</sup>. Unlike the customary law wife who has no legal right to be maintained during a matrimonial dispute, parties to a statutory marriage may apply to the court for an order for maintenance against each other during matrimonial proceedings pending the disposal of the main suit.

Maintenance pending suit being a provisional order, lasts only during the period the proceedings are pending. Consequently, an order becomes effective from the service of petition until the granting of a decree absolute, in the case of dissolution of marriage, or a decree of judicial separation, or until the failure to comply with an order of restitution of conjugal rights.

Maintenance may also be granted for the period of an appeal to a higher court as the *lisis* in that case pending. But the death of one of the spouses while the proceeding is still pending brings the order for maintenance pending suit to an end<sup>55</sup>.

The old rule by which a wife is granted so much as maintenance as would bring her income up to one third of that of the husband<sup>56</sup> has been discredited and does not form part of the law. This was pointed out in *Adesokan v Adesokan*<sup>57</sup>:

*'It [section 70 of the Matrimonial Causes Act 1970] does not lay down any particular*

<sup>50</sup>*Whittle v Whittle* (1963) 4FLR 489, 492.

<sup>51</sup>Order XIV, Rules 2 and 3

<sup>52</sup>Order XIV Rule 14

<sup>53</sup>*Coombs v Coombs* (1866) LRI 218.

<sup>54</sup>*Willis v Wills* (1961) 2 FLR 136.

<sup>55</sup>*Scott v Scott* (1952) 2 All ER 890.

<sup>56</sup>*Negbenebor v Negbenebor supra*

<sup>57</sup>*Adesokan v Adesokan* (1976) 2 FNR 24, 33.

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*fractional part of the combined resources of the parties as the entitlement of the 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’.*

However, it has been suggested that in the absence of any other rule, the one-third rule should form a starting point for the calculation of maintenance bearing in mind that it is neither a rule nor necessarily the final proportion to be awarded by a court<sup>58</sup>.

### Effect of a Decree of an Order of Maintenance

By Section 70(3) of Matrimonial Causes Act 1970, the mere fact that a decree was granted against a party in the proceedings to which the application for maintenance is related does not disqualify that party entitled to grant of a maintenance order. Each case is to be treated on its own merit.

In the case of *Trestain v Trestain*<sup>59</sup>, the court held that the fact that a husband obtains a decree for the dissolution of his marriage is in no way a bar to his wife’s claiming and obtaining maintenance, since the fact does not necessarily give a true picture of the conduct of the spouses.

Due to the shift from consideration of the effect of the commission of a matrimonial offence to irretrievably breakdown of marriage, the grant of an order of maintenance has also shifted spotlight from ‘who is responsible for the breakdown of the marriage to who of the spouses by virtue of the fact of the dissolution of the marriage is entitled to be maintained by the other spouse’. However, this was the view of the learned judge in *Wachtel v Wachtel*<sup>60</sup>, Denning M.R. observed that:

*‘it is no longer appropriate to talk about an innocent or guilty spouse. A court in considering the conduct of the parties is not required to carry out a post-mortem or to hear the mutual recriminations of the parties and go into their petty squabbles for the days on end as was the case under the old law’.*

To this end, the order for maintenance under the Matrimonial Causes Act 1970 does not make a distinction between a man and a woman; either of them can depend on the circumstances of the case, be ordered to pay maintenance to the other spouse or any children of the marriage who is so entitled as the case may be.

### CONCLUSION

In conclusion, the maintenance of spouse in a divorce proceedings or petition may depend on the reliefs sought at the court. In situations where both parties are independent or are in employment were, they earn income. The maintenance of the children where there are offspring’s or children of the marriage parties will share the cost of maintenance of the children subject to the earned income of the spouse husband or spouse wife. This is nonetheless on whose custody the children are given to. Traditionally, if the children are still minors, the spouse wife sometime the petitioner gets the custody of children while the spouse husband (respondent) has access to the children during holidays. Maintenance of spouse should be given to children’s welfare due to the fact that the are still minors or their educational training, care and welfare in terms medicals as well as other ancillary equally needs support. While asking reliefs for maintenance for the spouse the court should be mindful of the children and offspring of the marriage and awarding maintenance. We equally suggest that a trustee to be appointed or made among the guardians’ or close family relatives who will look after the children upon the dissolution of marriage. Finally, the payment of maintenance fees or award to the spouse is given in order to care of the spouse and children of the marriage.

### REFERENCES

- [1] Statutes
- [2] Child’s Rights Act, 2003
- [3] Matrimonial Causes Act 1970
- [4] Matrimonial Causes Act, Cap M7 Laws of the Federation of Nigeria, 2004.

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<sup>58</sup>Denning MR in *Wachtel v Watchel supra*

<sup>59</sup>*Trestain v Trestain* (1950) probate 198.

<sup>60</sup>*Wachtel v Watchel* (1973) Fam 72.