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COURSE TITLE: Family Law II

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MODULE ONE

UNIT 1: Judicial Seperation

CONTENTS

1.0 INTRODUCTION

Judicial separation is one of the matrimonial reliefs or remedies provided for under Section 39 – 46 of the Matrimonial Causes Act. This Unit focuses on the meaning of judicial separation and how it operates as a matrimonial relief to parties to a statutory marriage only.

2.0 OBJECTIVES

The objective of this Unit is to learn:

a) The meaning of judicial separation

b) The grounds for judicial separation

c) The effect of the decree of separation on parties to the marriage

3.0 MAIN CONTENTS

3.1 Judicial Separation (Meaning)

Judicial separation means the physical separation between the husband and wife of statutory marriage as ordered by a court of competent jurisdiction. The separation of the parties is legally approved by means of a decree issued by the High Court of a State. For the periods that the decree is in force, the parties are permitted to live apart under separate roofs without being in desertion that would ordinarily be a good reason for the injured party to seek divorce.
The Provisions which regulate the application for, grant and effect of a decree of judicial separation are contained in sections 39-46 of the MCA.
Under S. 2(2) (d) of the MCA, only the High Court in every state in Nigeria has the jurisdiction entertain proceedings and grant decrees of judicial separation. Again, the court can only exercise this jurisdiction in respect of parties that are domiciled in any state in Nigeria. According to S. 2 (3), it is immaterial that the state in which the party is resident is different from the state in which the application is heard and determined.

3.1 Grounds of Judicial Separation

A petition of a decree of judicial separation may be based on one or more of the facts and matters that form the basis for a petition for dissolution of marriage under sections 15 (2) and 16 (1) of the MCA. This means that the facts or grounds on which a petition for judicial separation may be based are the same as those upon which a petition of divorce may be based. Similarly, the supplementary provisions to the said sections 15(2) and 16 (1) in respect of divorce petitions contained in sections 18-24 and sections 26-32 are also applicable to petitions for judicial separation by virtue of S. 40 of the MCA.
Other major similarities between a petition for judicial separation and divorce are:

1) The rule against the institution of proceedings for dissolution of marriage within two years of the date of marriage except with the leave of court also applies to a petition for a decree of judicial separation.

2) The bars and defenses to a petition for dissolution of marriage also apply with equal force to any petition for judicial separation.

Self Assessment Exercise: The Court can refuse the application for judicial separation? Discuss.

3.1 Effect of a Decree of Judicial Separation

The effects of a decree of judicial separation are outlined in sections 41 – 44 of the MCA. They include the following:

i) During the pendency of the decree, the petitioner is exempted from living or cohabiting with the other party to the marriage {S. 41}

ii) Either party may bring proceedings in tort or contract against the other party {S. 42(1)}

iii) If any of the party dies during this period, the surviving party can inherit the property of the deceased as a spouse {S. 42(2)}

iv) If a husband against whom an order to pay maintenance to his wife fails to pay, the maintenance, he is liable to pay for all necessaries supplied to his wife by third parties during this period of judicial separation {S. 42(2)}.

v) During or after this period, any of the parties is free to petition for a decree of divorce based on the same or substantially the same facts as those on which the decree of judicial separation was made {S. 44(1) &(2)}. The Court may then rely on the decree of judicial separation as proof of the facts constituting the ground on which it was made, and grant the decree of divorce; provided that the petitioner provides evidence in court in support of the petition for divorce. {S. 44(3)}

vi) A decree of judicial separation does not prevent the parties to the marriage from jointly exercising any joint powers given to them before the separation {S. 43}

Self Assessment Exercise 2: List the effects of Judicial Separation

3.1 Discharge of the Decree of Judicial Separation

Section 45 of the Matrimonial Causes Acts States " where after the making of a decree of judicial separation the parties voluntarily resume cohabitation, either party may apply for an order discharging the decree and the court shall, if both parties consent to the order, or if the court is otherwise satisfied that the parties have voluntarily resumed cohabitation, make an order discharging the decree accordingly"

4.0 SUMMARY

In this Unit we have learnt about:

a) The meaning of judicial separation

b) The grounds for judicial separation

c) The effect of the decree of separation on parties to the marriage

5.0 CONCLUSION

In this unit we have discussed the issue of judicial separation and the circumstances which the courts have to take into consideration in granting decrees of judicial separation. Note however, that a High Court judge presiding over proceedings for judicial separation or divorce is obliged under section 11 of the MCA not to lose sight of the jurisprudence of keeping a marriage intact if possible. A presiding judge who notices any disposition towards reconciliation exhibited by either the parties or one of them or their lawyers must encourage such reconciliation either personally in his chambers, or through his nomination of trained marriage conciliation experts and the like.

6.0 TUTOR MARKED ASSIGNMENT

7.0 REFERENCES/FURTHER READINGS

1. Aderibige, R. Family Law in Nigeria (Lagos: Codes : Publishers, 2004) Pages

2. Adesanya, S. a. Laws of Martimonial Causes (Ibadan: Ibadan University Press, 1973) Pages

3. Nwogugu, E. I. Family Law in Nigeria (Revised edition) Ibadan: Heinmann Educatinal Books, 1990) Pages 225 – 226

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6. Tijani, N., Matrimonial Causes in Nigeria: Law and Practice (Lagos : Renaissance Law Publishers Ltd, 2007) Pages 111-113

STATUTES

1. Marriage Act, 1914, Cap. M6, Laws of the Federation in Nigeria, 2004 Sections

2. Matrimonial Causes Act Cap. M7 Laws of the Federation of Nigeria, 2004 Sections 39-46

UNIT 2: RESTITUTION OF CONJUGAL RIGHT AND JACTITATION OF MARRIAGE CONTENTS

1.0 INTRODUCTION

Restitution of Conjugal rights and jactitiation of marriage are two separate matrimonial reliefs that parties to a statutory marriage may seek. Both are treated together in this unit because of the size of their contents. They are however not to be confused, as two parts of a matrimonial suit. They both have different rights. While restitution of conjugal rights implies a desire to resume normal marital relationship, jactitation of marriage on the contrary implies a cessation of a phony marriage.

2.0 OBJECTIVE

The objective of this Unit is to learn:

a) The meaning of conjugal rights and restitution of conjugal rights.

b) Mode of presentation of a petition for the restitution of conjugal rights.

c) The Ground of Restitution of Conjugal Rights

d) The Obligations of Petitions after the order of Restitution of conjugal Rights

e) The meaning and explanation of Jactitation of marriage

f) The procedure of Reconciliation in marriage

3.1 Restitution of Conjugal Rights

1) Restitution of Conjugal rights is a matrimonial relief available to a party to a statutory marriage whose spouse has either refused to co-habit with him/her or has refused to render conjugal rights to the petitioner. The relief is provided for under sections 47 -51 of the MCA.

2) Conjugal rights are the totality of rights that a husband and wife enjoy from each other by virtue of marriage. They include such rights as cohabitation, sexual intercourse, home keeping, maintenance, protection, comfort, love and affection etc. These rights must be rendered by both parties to each other unless there is a good reason to withhold the rights.

3) when a party to a marriage without just cause refuses to cohabit with the other or render conjugal rights to the other party, the aggrieved party may file a petition for the restitution of conjugal rights under section 47 of the MCA. This relief, is appropriate where cohabitation has ceased and one party is anxious to resume normal married life. Even where the parties have never cohabited since marriage, a party can still petition for the relief.

4) The order for the restitution of conjugal rights can only be made by the court upon proof that:-
   a. the petitioner sincerely desires mutual conjugal rights between him and the respondent. (S. 49 (a)
   b. The respondent had failed to honour written request from the petitioner before the institution of the proceedings or if no such request was made, that there are special circumstances which justify the making of the decree notwithstanding that such a request was not made. (S. 49(b)). Such a special circumstances would arise where for example instead of writing, the petitioner went physically to plead with the respondent to return to him or sent a delegation of respected persons to plead for him. In the unreported case of *Ayankojo V. Ayankojo* , the court held that if the Petitioner had directed his efforts at reconciliation to the Respondent rather than her father, it would have amounted to the special circumstances envisaged under section 49 (b) of the MCA.

5) it should be noted that the request must have been made in good faith by the petitioner to the respondent with a *bonafide* desire to resume cohabitation, and not as a means to some other ends. The burden of proving that he is sincere in his request lies on the petitioner. In the case of *Ogunmodede v. Ogunmodede* the court found that there was no sincerity in the petitioner's request for resumption of cohabitation and consortium contained in her letter to the respondent, written a day after her earlier petition for divorce was dismissed.

6) Note also that proceedings for decrees of restitution of conjugal rights are rare in Nigeria because of her socio-cultural background. However, the few cases that have been decided in court indicate that in appropriate situations, the decree of restitution of conjugal rights may be granted to deserving petitioners.

Self Assessment Exercise 1:

Sincerity of purpose on the part of the Petitioner must be seen before a court can make an order of restitution of conjugal rights. Discuss with decided cases.

3.2 Ground for Restitution of Conjugal Rights

By section 47 of the MCA petition by a party to a marriage for a decree of restitution of conjugal rights may be based on the ground that the parties to the marriage, whether or not they have at any time after the marriage cohabited, are not at the time of the petition, and that, without just cause or excuse, the party against whom the decree is sought refuses to cohabit with, and render conjugal rights to the petitioner. The petition cannot be granted if it is based on the ground that the parties are cohabiting but are not having sexual intercourse due to the respondent's refusal to do so. This because, upon a petition for restitution of conjugal rights, the court can enforce cohabitation but cannot enforce sexual intercourse. The reason for the relief in the first place is that the aim of the decree is to restore cohabitation, and not to supervise sexual intercourse between the parties.

Self Assessment Exercise II
Discuss the underlying principles for the grant of an order of restitution of conjugal rights.

3.3 Mode of Petition for Restitution of Conjugal Rights

A petition for a decree of restitution of conjugal rights shall be in accordance with form 7 in the first schedule to the Matrimonial Causes Rules 1983 By the Provisions of Order V, rule 25 of the said rules the petition should state the following:

a. The date on which the petitioner and the Respondent last cohabitated and the circumstances in which cohabitation between them ceased or last ceased as the case may be.
b. The date on which, and the manner in which the written request for cohabitation was made to the respondent in accordance with section 49 (b) of the MCA or if no such written request was made, particulars of the special circumstances that are alleged to justify the making of the decree notwithstanding that such a written request was not made.
c. That the respondent still refuses at the date of filling the petition, to cohabit with, and render conjugal rights to the petitioner; and
d. That the petitioner sincerely desires conjugal rights to be rendered by the respondent and is willing to render conjugal rights to the respondent.

3.4 Obligations of Petitioner after a Restitution Order

A petitioner in whose favour a decree restitution of conjugal rights is made has certain obligations to fulfill in order to give effect to a decree. Section 50 of the MCA requires a successful petitioner (if it is the husband)to give notice of a home and the address of such home to which the respondent wife is to return. If a home is not immediately available, the Petitioner must provide one within a reasonable time, and also give an address through which he can be communicated to the wife. On the contrary, a Petitioner wife is only required to give the respondent husband a notice specifying a postal address through which her husband can communicate with her.

By the provision of Section 51 of the MCA a party who refuses to comply with a decree of restitution of conjugal rights may, in the absence of a just cause or excuse, be guilty of desertion, since the decree cannot be enforced by the process of attachment.

3.5 Jactation of Marriage

1. Jactation of marriage is a legal means of correcting false representations of a non-existent marriage between the petitioner and the respondent. It is the means through which the reputation of the Petitioner who is falsely alleged by the respondent to be married to the respondent is protected.

2. Section 52 of the MCA provides as follows:

   A petition under this Act for a decree of jactitation of marriage may be based on the ground that the respondent has falsely boasted and persistently asserted that a marriage has taken place between the respondent and the petitioner; but the making of the decree shall be in the discretion of the court, notwithstanding anything contained in this Act.

3. The object of the above provision is to enable a petitioner to obtain a decree which takes the form of an injunction restraining another person of the opposite sex from claiming or maliciously boasting that he or she is lawfully married to the petitioner, when such a marriage never took place. The decree operates to put the respondent to perpetual silence thereafter. Therefore, where a person falsely boasts and persistently asserts a marriage to another without his or her consent it would constitute a ground for a petition for jactitation of marriage.

   (Jactitationis matrimonii causa). Thus, a party who claims to have been misrepresented can petition for a decree of jactitation of marriage. Such a party must not have encouraged, authorized or acquiesced to such boastings and assertion before he can be entitled to this relief. The was the decision of the English Court of Appeal in the case of *Thompson v Rourke (1893)* Prob 70] where Bowen, L. J. described the important features of jactitation of marriage in the following terms:

> "A suit for jactitation is a rare proceeding and as a stated by Lord Stowell in Lord Hawke v Corris(1), is in the nature of criminal suit. It has something in common with proceedings for defamation. A restraining order in such a suit is not *exdebito justituae*. The court has a judicial discretion, and it imposes on the complainant the condition that he must come with clean hands. It is of great consequences to the public that this condition should be enforced, otherwise parties might play fast and loose with matrimonial reputation. If the petitioner chooses to drop a character in which she has held herself out to the world, she cannot call upon the court to interfere by way of assisting her to do so".

4. The above passage states the fundamental requirement in a suit for jactation of marriage to be that the petitioner must come to court with clean hands. In the Nigerian case of *Ayeni v. Owolabi* (1980) 2Q. L. R. N 241, Agbaje – Williams C.J., explained that what Bowen L. J. meant by the statement about a petitioner not coming to court with clean hands occurs for instance when the petitioner had at a former period, acquiesced in the representation of the respondent that she was his wife.
5.
6. The petition must be accordance with form 64 of the Matrimonial Causes Rules, 1983. According to the provisions of Order XXII, Rules 3(1) & 3(2), the petition must state the following facts:
    1. The dates on which, and the time and places at which the respondent is alleged to have boasted and asserted that a marriage had taken place between the petitioner and the respondent.
    2. The particulars of the alleged boastings and assertions
    3. That the petitioner is not married to the respondent and that the petitioner has not acquiesced in the alleged boasting and assertions. This means that if the petitioner has earlier authorized the representations made by the respondent and later turns around to complain, the court may refuse the relief as he has not come to court (equity) with clean hands.

Self Assessment Exercise 3:
A third party to a marriage cannot sue for a declaration on the validity of a marriage. Discuss in line with Jactation of marriage.

3.6 Reconciliation in Matrimonial Proceedings

Matrimonial reconciliation involves the bringing together again in love, of the parties to a marriage in order to reach a compromise agreement relating to their individual differences. This process is recognized under section 11 (1) of the MCA which provides thus:

> "it shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties of the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the

case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation the Judge may do all or any of the following, that is to say:

a) Adjourn the Proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding Paragraphs;

b) With the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;

c) Nominate a person with experience or training in marriage reconciliation, or in special circumstances some other suitable person, to endeavour with the consent of the parties to effect a reconciliation.

Following from above attitude of courts dealing with matrimonial causes is to try as much as possible to effect reconciliation between spouses. For this reason no admission made by a spouse in a civil case is admissible in evidence if it was made either on an express condition that evidence of it is not to be given or in circumstances from which the court may infer that the parties agreed that the evidence of it should not be given. Moreover, when the court hears a petition for divorce, it usually gives some consideration to whether there are prospects of reconciliation between the parties; the court before which a matrimony proceeding is instituted is obliged to give consideration throughout the course of the suit, to the possibility of reconciling the spouses, unless the case does not admit of such consideration.

Self Assessment Exercise

The duty of the court is to promote reconciliation in matrimonial causes. Discuss with decided cases.

4.0 Summary

In this unit we learnt about

a. The meaning of conjugal rights and restitution of conjugal rights

b. The procedure or mode of presenting the petition for restitution of conjugal rights

c. The ground for a petition restitution of conjugal rights.

d. Obligations of a Petitioner in whose favour an order of restitution of conjugal rights is made.

e. The meaning and explanation of jactitation of marriage

f. The procedure of reconciliation in matrimonial causes

5.0. Conclusion

The basis of granting an order of court in respect of the restitution of conjugal rights is to encourage reconciliation in marriage. In doing this, courts are careful to ensure that such an order is made in

favour of a party who genuinely desires to resume normal married life. On the other hand, the courts are favourably disposed towards making orders for the jactitation of marriage in order to safeguard the reputation of the Petitioner from the malicious boastings and assertions of a respondent regarding a non-existent marriage between them; unless such a petitioner is guilty of complicity in the assertions.

6.0 **Tutor Marked Assignment**

Itemize the ground which a court will consider before granting a decree of judicial separation.

7.0. References/Further Readings

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Adesanya, S. A. Laws of Martimonial Causes (Ibadan: Ibadan University Press, 1973) Pages
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STATUTES

Marriage Act, 1914, Cap. M6, Laws of the Federation in Nigeria, 2004 Sections
Matrimonial Causes Act Cap. M7 Laws of the Federation of Nigeria, 2004 Sections 39-46

UNIT 3: BARS TO GRANTING DECREE OF JUDICIAL SEPERATION AND DIVORCE

CONTENT

A. PETITONER'S ADULTERY

B. PETITIONER'S DESERTION

C. PETITIONER'S CONDUCING CONDUCT

4.0 SUMMARY

5.0 CONCLUSION

6.0 TUTOR MARKED ASSIGNMENT

7.0 REFERENCES/FURTHER READINDS

1.0 Introduction

Parties to a statutory marriage reserve the right at any time to commence proceedings in court to redress the matrimonial causes that flow from the marriage. However, whenever that right is hindered or even lost as a result of the conduct of the complaining party, that right is said to be barred.

Bars operate as estoppel in matrimonial causes to sanction the conduct of a petitioner in relation to the matrimonial misconduct complained on the part of the respondent spouse. In a petition for divorce for example, a petitioner who has proved to the satisfaction of the court that the marriage has broken down irretrievably is entitle to a decree of divorce but such a decree may be refused if an absolute or a discretionary bar applies to the case.
The bars to the granting of either a decree of judicial separation or a decree of divorce are six – three absolute bars and three discretionary bars. An absolute bar is binding on the court, once the facts which constitute the bar are proved. The judge must dismiss the petition. But a discretionary bar leaves room for the court to exercise a discretion whether or not to dismiss the case based on the facts of the alleged mis-conduct on the part of the petitioner.

The absolute bars are condonation, connivance and collusion. The discretionary bars are the petitioner's adultery, desertion and conduct conducing to the commission of the matrimonial offence. These bars are discussed below.

2.0 Objective

The objective of this unit is to help the student to learn the defences that are open to a respondent for either a petition to judicial separation or a petition for divorce.

3.0 Main Content

3.1 The Bars or Defences to Petitions for Divorce or Judicial Separation.

In petitions for judicial separation or divorce, a petitioner who successfully proves any or some of the facts listed under sections 15(2)(a) –(h) and 16(1) of the MCA is ordinarily entitled to the decree sought.

However, the court may refuse to order the decree sought based on the defence that the respondent puts forward, which defence may amount to an absolute or discretionary bar, depending on the facts alleged and proved by the respondent against the petitioner.

3.1.1 Absolute Bars

The absolute bars are as follows:

a). Condonation

Under section 26 of the MCA, no decree of dissolution f marriage can be made where the petitioner had condoned the misconduct of the respondent upon which he relies in his petition.
Condonation is a situation where one spouse, with the full knowledge of the matrimonial misconduct committed by the other souse, reinstates the offending spouse to his or her former marital position, with the intention of forgiving or remitting the misconduct, on the condition that the spouse whose misconduct is so condoned does not thereafter commit any further matrimonial offence. In the English case of *Inglis v Inglis* the court defined condonation in the following terms:

> "Condonation is the reinstatement of a spouse who has committed a matrimonial offence to his or her former matrimonial position in knowledge of all the material facts of the offence with the intention of remitting it, that is, to say with the intention of not enforcing the rights which accrues to the wronged spouse in consequence of the offence".

In the Nigerian case of *Olutayo v Olutayo* the court stated:

> "Condonation of matrimonial offenses means the conditional forgiveness of all such offenses as are known to or believed by the offended spouse so as to rescue as between the spouses the status *quo ante*. As the forgiveness is conditional and not a forgiveness in the true sense of the word, the real import of condonation is a conditional waiver of the right of the spouse to take matrimonial proceedings. Whether or not there has been condonation is a question of fact. Unless it appears to the contrary, the condition subject to which the offending spouse is forgiven is that no further matrimonial offense shall occur".

From the above *dictum* it can be said that condonation is a conditional forgiveness. It is subject to the condition that the spouse responsible for the misconduct constituting the basis of the petition should not commit a further matrimonial misconduct of the same or other kind; otherwise, the subsequent misconduct will revive the condoned offence. In *Harrison – Obafemi v Harrison –Obafemi*, the husband committed adultery with the co-respondent which resulted in the birth of a child. The wife however condoned the adultery and continued to live together with the husband. Subsequently, the husband deserted the matrimonial home and took up residence with the co-respondent. He later filed a petition for divorce, and the wife also cross petitioned for divorce relying on the earlier adultery plus cruelty and desertion. The court held that although the desertion had not lasted the statutory period of 3 years it had revived the earlier condoned adultery.
The rationale for making condonation an absolute bar is that it would generally be inequitable to permit a spouse who has forgiven an offence to go back on the decision. There are three principal ingredients of condonation:

i. Knowledge

ii. Forgiveness by the wronged spouse

iii. Reinstatement of the respondent

i. Knowledge

There cannot be condonation without knowledge of the matrimonial offence or misconduct committed. The wronged spouse must have knowledge of all the material facts of the offence or misconduct, since he or she cannot condone what he or she does not know. Partial knowledge will not suffice. Whether or not a spouse has knowledge of the misconduct is a question of fact to be established by evidence. The knowledge envisaged here may be actual or constructive.

ii. Forgiveness

This is an essential element of condonation. There must be an intention on the part of the wronged spouse to forgive the other spouse(*animus remittendi).* Note that the subsequent resumption of cohabitation between the spouses without an intention to forgive will not be sufficient. However, any spousal cohabitation, coupled with knowledge of the wrong may give rise to an inference of forgiveness and reinstatement. The court held in the case of *Hearn v. Hearn,* that it found it irresistible to infer that condonation had taken place considering that the couple cohabited for ten long years after the alleged misconduct.

iii. Reinstatement

This is the process whereby the spouse guilty of the matrimonial misconduct is reinstated to the position of a spouse. However, reinstatement cannot occur unless reconciliation takes place between the parties. A mere promise to forgive without reinstatement will not amount to condonation. In the case of *Fearn v. Fern*, H who had been abroad on military service received a letter form W stating that she had committed adultery and that she was expecting a baby as a result of it. He replied stating that he had forgiven her and he would always love her and treat the child as his own. W continued to the knowledge of H to draw a pre-natal allowance as well as a separation allowance. H later changed his mind, stopped these allowances and on returning to England, H did not resume cohabitation with W but commenced divorce proceedings. It was held by the Court of Appeal that since H had not reinstated W, there had been no condonation of her adultery.
Whether or not there is reinstatement is a question of fact to be proved. For condonation to be established, there must have been a genuine reconciliation. In discussing reconciliation, Lord Denning in *Mackrel v. Mackrel* stated as follows:

> "Reconciliation does not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married but their relationship must be restored by mutual consent, to a settled rhyme in which past offences, if not forgiven, at least no longer……. embitter their lives".

b. Connivance

This is also provided for under section 26 of the MCA. Where a petitioner has consented, encouraged, or willfully contributed to the commission of the matrimonial misconduct on which a petition for divorce or judicial separation is based, he will be refused the decree on the ground that he connived at the misconduct complained of.

Connivance implies that one party has acquiesced, encouraged or given permission either expressly or impliedly to the commission of the matrimonial misconduct complained of. Connivance also involves anticipatory consent or acquiescence given to the occurrence of the facts relied upon by the petitioner or the continuance of such events if they were already taking place at the time he knew of them. Connivance operates on the principle of *volenti non fit injuria.* To constitute a bar, the petitioner must be shown to have had a corrupt intention in not only creating the right environment for the respondent's misconduct to occur but that he even intended it to occur.
Connivance may be express or passive.

Express Connivance

This is an express authority or consent given by the petitioner to the alleged misconduct. In *Obiagwu v. Obiagwu,* the parties were married in 1942. By 1944, the relationship of the parties began to grow cold because of the childlessness of the petitioner. In 1954 the wife/petitioner consented to the respondent/husband cohabiting with another woman in the matrimonial home for the purpose of bearing children for the respondent. As a result of the respondent's adultery with the woman, four children were born. In 1960, the wife now petitioned for divorce on the ground that the petitioner had committed adultery. The court refused to grant a decree of divorce on the ground that the petitioner connived at the respondent's adultery.

Passive connivance

This occurs where a spouse stands by and permits a matrimonial offence to take place, with the intention that the misconduct will be committed. Thus the willful abstention from taking positive steps to prevent a potentially adulterous relationship could constitute (passive) connivance.
For there to be connivance, consent must have been freely and intentionally given. In the case of *Kings v. Evans*, it was held that there was no connivance where a husband gave consent because he was terrified by the co- respondent and had resented and resisted the adultery as far as he could.

Again, connvinance can be spent if there is withdrawal of consent. In otherwords, if a petitioner initially connived at the respondent's misconduct but later objects to the continuance of the misconduct, and does everything he can to repair the damage caused by his earlier connivance, he cannot be said to have connived at any subsequent or continuing misconduct, the root of which is traceable to the earlier misconduct at which the petitioner connived. This was the position of the English House of Lords in the case of *Godfrey v. Godfrey* where the court held that in order to show that connivance had spent itself the petitioner has to show that there was no connection between the connivance alleged by the respondent and the respondent's misconduct upon which the petitioner's action is based.

c. Collusion

Section 27 of the MCA provides that a decree of dissolution of marriage shall not be made if the petitioner, in the bringing or prosecuting of matrimonial proceedings has been guilty of collusion with intent to cause a perversion of justice.

Collusion implies an agreement, or acting in concert to procure the initiation or prosecution of a suit for divorce with intent to cause a perversion of justice. Collusion has also been defined as "an

agreement or bargain between the spouses or their agents or between the petitioner and the co-respondent as to procuring the initiation or conduct of the divorce proceedings". To constitute collusion therefore, there must be two element – agreement and improper motive or purpose to pervert the course of justice.

There must be agreement between the petitioner and the respondent to commit the misconduct complained of: there cannot be Collusion without agreement. Mere coincidence of action is not sufficient. If one party has the intention and the other does not, there is to agreement. There must be a *consensus ad idem* (meeting of minds).

Collusion will arise if the agreement is between the parties agents, based on the maxim *qui facti per alium faci per se*. (He who does an act through another, does it himself) where for example, a party is paid to initiate divorce proceedings, or a party agrees to commit a matrimonial misconduct, collusion is established. Note however, that a bona fide agreement relating to maintenance costs, damages or custody may not necessarily be collusive. In the case of *Ogunleye v Ogunleye*, the court found nothing collusive in the agreement reached out of court by spouses, whereby the husband would pay a monthly allowance of three pounds to the wife for the maintenance of the only child of the marriage.

A further requirement to establish collusion is that the agreement by the spouses must also have an underlying corrupt intention or motive to cause a perversion of justice. The importance of the element was explained by Scarman J. in the case of *Noble v Noble (No. 2)* thus:

" A collusion bargain is one with a corrupt intention. It is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way for example, the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent, or –closer to this case-a co-respondent induced by a promise of some benefit not to defend a charge of adultery, or stronger still, to provide evidence or to bear witness at the trial against the respondent. If , upon a fair consideration of the circumstances, the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect, conducting the suit, there is, in my opinion, collusion. Unless there is this matching of forensic proceeding against valuable consideration, there is no collusion … I would add that to refrain from raising a defence or drop a charge while continuing with others, though negative acts, are of course as much part of the conduct of suit as positive steps taken to institute or prosecute it, and if done or agreed to be done for valuable consideration would be collusive."

It is immaterial that the collusive agreement benefits someone other than the petitioner. In *Churchward v Churchward*, an agreement where W induced H to commerce divorce proceedings, even though the amount she promised to pay was not for the benefit of H (the petitioner) but for the children of the marriage , was held collusive. Note that once collusion is established, the petition will be dismissed even if the parties never actually acted on the collusive agreement. However, a fresh action could be filed, provided the parties show that the collusive agreement has been spent.

3.1.2 Discretionary Bars

By Section 28 of the MCA, the court may, in its discretion, refuse to make a decree of dissolution of marriage(or judicial separation) if since the marriage-

a) the petitioner has committed adultery that has not been condoned by the respondent or having been so condoned has been revived.
b) the petitioner has wilfully deserted the respondent before the happening of the matters relied upon by the petitioner, or, where those matters involve other matters occurring during, or extending over, a period, before the expiration of that period, or
c) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the matters relied upon by the petitioner.

From the above provision, there are three circumstances under which a discretionary bar may be activated

i) where the petitioner has committed an uncondoned adultery, or where having been condoned, it is revived by another misconduct.
ii) Where the petitioner had wilfully deserted the respondent before the occurrence of the facts relied upon in the petition.
iii) Where the conduct of the petitioner has contributed to the occurrence or existence of the matters relied upon in the petition.

Petitioner's adultery

Where the petitioner has committed an uncondoned adultery or where the adultery having been condoned is revived by another matrimonial misconduct, it will be a discretionary bar to a petition. The petitioner will file a discretionary statement outlining the details of the adultery. This is irrespective of the ground upon which the petition is based. The discretionary statement is a written confessionary statement made to the court by the petitioner as to his or her adultery and asking specially for the court to exercise its discretion in his favour.

Petitioner's desertion.

Where the petitioner had willfully deserted the respondent before the occurrence of the facts relied upon in the petition, the court has a discretion to refuse a decree of divorce or judicial separation in his or her favour. The desertion must be wilful. Therefore, if the petitioner has good reason for deserting the respondent, his or her conduct will not constitute a discretionary bar. Section 28(b) of the Act does not state a specific period of the desertion envisaged to constitute a bar to a petition. Therefore, desertion for a period less than the one year required in Section 15(2) (d) of the Act may constitute a bar.

Conduct conducing:

Section 28(c) of the Matrimonial Causes Act provides that if the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the matters relied upon by the petitioner, the court may, in its discretion, refuse to make a decree of dissolution of marriage. To constitute a bar to the grant of a decree of divorce or judicial separation, the petitioner's neglect or misconduct or habits must have contributed to the matrimonial misconduct of the respondent complained of.

There must be a casual connection between the habit or conduct complained of and the matrimonial misconduct like desertion or adultery, on which the petition is based. For instance, a

woman who deserts her husband without his consent to stay with her parents cannot complain of the husband's adultery since she has exposed him to the risk. In the case of *Negbenegbor*, the husband without just cause forced his wife out of the matrimonial home, and abandoned her for three years without any maintenance. It was held in the husband's petition for divorce based on the wife's adultery, that it was the husband's wilful neglect and misconduct which (conduced) (led) to the wife's adultery. The petition was dismissed.

Exercise of court's discretion

Where a discretionary bar exists, the court has a discretion whether to grant the petition or not. But the Matrimonial Causes Act and the Matrimonial Causes Rules are silent on the factors to be taken into consideration by the court in exercising its discretion. But it is an established principle that such a discretion must be exercised judiciously. In the case of *Enekebe v Enekebe*, the Supreme Court considered and adopted the principles which govern the exercise of the court's discretion as summarized by the House of Lords in *Blunt v Blunt.*

These are:

1. the position and interest of any children of the marriage, who in the long run will probably suffer most from the collapse of the marriage;
2. the interest of the party with whom the petitioner has been guilty of misconduct (e.g adultery) with special regard to prospect of their future marriage;
3. whether the spouses are likely to reconcile;
4. the interest of the petitioner and particularly the interest of the petitioner that he should be able to remarry and live respectably; and
5. the interest of the public at large to be judged by maintaining a balance between the doctrine of sanctity of marriage and the social consideration which renders it foolish to insist on maintaining a marriage which has broken down irretrievably.

The appellate court will not interfere with the exercise of the discretion by the trial court except it was made arbitrarily and erroneously.

6.0 *Tutor Marked Assignment*

Suggested Further Readings / Referees
Books

1. Aderibigbe, R., Family Law in Nigeria
   (Lagos: Codes. Publishers, 2004) pages
2. Adesanya, S. A., Laws of Matrimonial Causes
   (Ibadan: Ibadan University Press, 1973) pages
3. Nwogugu,E. I., Family Law in Nigeria (Revised edition)
   (Ibadan: Heinman Educational Books, 1990) pages 196-204
4. Onokah, M. C., Family Law
   (Ibadan: Spectrum Books Ltd., 2003) pages 223-230
5. Sagay, I. , Nigerian Family Law [Principles, Cases, Statutes & Commentaries]
   (Ikeja: Malthouse Press Ltd. , 1999) pages 388-456

6. Tijani, N., Matrimonial Causes in Nigeria: Law and Practice
(Lagos: Renaissance Law Publishers Ltd, 2007) pages179-190

Statute

1. Matrimonial Causes Act Cap. M7 Laws of the Federation of Nigeria, 2004
Sections 26-28

MODULE TWO

Unit I: Nullity and Rectification of Customary Law Marriage:

1.0 Introduction

Nullity of marriage refers to the official cancellation of a marriage contracted by parties who either did not possess the requisite capacity to marry or who failed to comply with the basic requirements for the celebration of the marriage. It can refer to the annulment or voiding by mere pronouncement of a purported marriage that is invalid by reason of parties not having acquired the status of husband and wife from the very beginning (i.e. void *ab inito*), due to a lack of capacity on their part to do so. It can also refer to a cancellation of a valid marriage by reason of either initial or supervening defects that call for a cancellation of the marriage.

By virtue of the pluralism of the Nigerian legal system, two forms of marriage exist side by side: marriage under the customary law (i.e. both ethnic customary law and Islamic law) on one hand, and marriage celebrated in accordance with the Marriage Act, cap M6 LFN, 2004 on the other. Under both forms of marriage, certain prerequisites are laid down for the celebration of a valid marriage. Where these pre-requisites or requirements are not complied with, the marriage affected may be void or voidable depending on the nature of the defects inherent in the contract of marriage or its celebration.

2.0 Objective

The main objective of the unit is for students to learn about legally-invalid, defective or inchoate marriages and the attitude of Nigerian courts to such marriages; especially in working to rectify the defects therein with a view to either preserve the marriage or to annul it where necessary.

3.0 Main Content

Marriage is globally recognized as a social institution dating back to creation. Matrimony is revered as a sacred and solemn contract between two or more consenting adults of same or different sexes. And in every society, marriages are conducted under a set of rules and standards recognized by such societies as conferring on the parties to it, a special status that attract reciprocal rights and obligations. Thus, under Nigerian customary law for example, the fact of being a married person cannot be implied by mere conduct or representation. There must be some ceremony, indicative of the fact that a marriage has been contracted. In recognition of this fact, *Ward* made the following observation:

> Why does the average native rarely fail to carry out the prevailing ceremony when taking a bride? It would seem that in the eyes of the people there, it constitutes an essential part of the wedding. People speak of a woman acquired without the customary marriage ceremonies as a "lover", a concubine in other words. (Supply the full reference in brackets here).

This observation, which is true of the Yoruba custom, certainly represents the general attitude of various communities in Nigeria. There are several ceremonies that can affect the validity of a marriage under the customary law or under the Marriage Act.

The legal effects of the non-observance of such ceremonies, or the failure on the part of the parties to carry out one or more of the customary requirements for the celebration of a valid customary law marriage is the focus of this unit. As can be seen shortly failure to satisfy the essential or formal requirements of contracting a valid marriage under customary law may render the marriage void or voidable.

3.1 Nullity and Rectification of Customary Law Marriage

Like nullity of marriage under the Act (dealt with in later units), a customary law marriage may be void or voidable. Thus, the marriage may be annulled or invalidated in any of the circumstances discussed in the following sub heads.

3.2 Grounds on which a Customary Law Marriage is Void

The following are the grounds on which a customary law marriage may be declared void.

(i) Lack of Consent

The consent of the parents of the bride is a compulsory requirement in customary law marriage because, without them, the "bride price" which is the major incident of customary law marriage cannot be lawfully paid. Though the bride's mother's consent is strictly not necessary (as was held in the case of ***Obasi v. Obasi [1979]1 SLR 558***) the father of the bride must consent to the marriage; otherwise the marriage is void *ab initio*. Where the biological parents are dead, Pension in Loco parent's such as the uncle or other family members should give no decency consent.

(ii) Blood and Marital Relationship

Under customary law, persons who are related to a certain degree by either blood or marriage cannot marry themselves. Such a marriage is not only void, but also constitutes an abomination in some communities, and necessitates the performance of some sacrifices of expiation.

(iii) Failure to Pay Bride Price

The "Bride Price" which is sometimes used interchangeably with "dowry" is an essential element in customary law marriage. Failure of the groom's family to pay the bride price to the family of the bride renders the marriage purportedly celebrated, void *ab initio*, unless such payment is waived by the bride's family.

(iv) Marriage between Nigerian and Non-Nigerian

Only Nigerians are subject to Nigerian customary law. Therefore, any customary law marriage celebrated between a Nigerian and a non-Nigerian is automatically void. This was the decisions of the court in the cases of ***Fonseca v Passman [1958] WRNLR 41*** and the case of *Savage v Macfoy* ***[1909] Renner's GCR 504***.

(v) Breach of Islamic Customary Law

A purported Marriage celebrated under the Maliki School of Islamic Law will be void in these circumstances:-

(a) Where the pride-price (*saduquat*) is not paid.

(b) Where the parties to the marriage are related either by blood, marriage or customary adoption i.e. fosterage.

(c) Short – term or periodic marriage (*Mutah*)

(d) Marriage on hire basis (*Muwakkat*)

(vi) Incomplete or Inchoate Marriage

A customary law marriage is said to be inchoate where all necessary formal requirements or elements of the marriage are not completely satisfied. For example a marriage may not be complete where the bride is not "led home" to her husband's family after payment of the bride price or after the marriage ceremony. In some Nigerian communities, such a marriage is void but rectifiable by the subsequent "leading home" of the bride. This in essence, means that payment of bride price alone or the performance of a marriage ceremony does not confer on the parties the status of husband and wife in such communities, unless and until the bride has been formally led home to co-habit with her husband.

In the case of ***Re-intended marriage of Beckley and Abiodun (1943) 17 NLR 59***, Beckley, while in Lagos, agreed to marry Miss Alade. Later, he went to Jos and from there he authorized his father to carry out the Yoruba ceremony of I*dana* i.e. payment of bride price for her on his behalf. Miss Alade continued to live in Lagos with her family. Beckley subsequently met Miss Abiodun in Jos and agreed to marry her under the marriage Act. After Beckley had given notice of the intended marriage to the Registrar of Marriage in Jos, his father entered a caveat against the proposed marriage to Miss Abiodun on the ground that his son was already married, arguing that the *idana* ceremony with Miss Alade effected a valid marriage under Yoruba customary law. The court held that the *idana* ceremony without a subsequent formal taking of the girl to the intended husband's home did not amount to a valid marriage under Yoruba customary law. The caveat was then removed by the court and Beckley was allowed to proceed with his Act marriage, to Miss Abiodun.

But in the case of ***Sarah E. O. Green v. Adel Sapara,*** Adel Sapara entered a caveat to forbid an intended marriage between Dr. O. Sapara and Miss Sarah E. O. Green, because of an alleged native (Yoruba) marriage between herself and Dr. Sapara. Adel the caveatrix and Dr. Sapara had lived together as husband and wife for six years even though Dr. Sapara claimed in court that they had not been married, and that the caveatrix was his mistress and not his lawful wife. However, the caveatrix proved that the living together had been preceded by an *idana* ceremony followed by the "taking home" of Adel to Sapara's house by one Miss Johnson, who along with other women, had negotiated the marriage with Dr.

Sapara. The court found against Dr. Sapara because the legal and essential requirements of native marriage under Yoruba custom had been fulfilled.

In summary, take note that it may be possible to rectify a void customary law marriage, depending on the nature of the defect that renders it void. Where parental consent is lacking for example, the subsequent giving of consent and acceptance of, or waiving of payment of bride price by the parents of the bride cures the defect and confers validity on the previously defective marriage. Again, where blood relationship between the parties to a marriage is of a distant nature, the defect of the prohibited degree of consanguinity may be cured by expiatory sacrifices to sever the blood ties and confer validity on the marriage. So also is the subsequent payment of bride price for a bride who had been co-habiting with her "husband" in a void customary law marriage, or the formal "leading home" of the bride where the absence of same was the defect in the purported marriage.

3.3 Grounds on which a Customary Law Marriage is Voidable

The only known ground on which a customary law marriage is voidable is based on the fact that the consent of the wife, who at time of the marriage was a minor, was not obtained. As a general rule, young girls may be married off at very tender ages by their parents without their consent being sought. By the time such young brides attain the age of majority, they may repudiate the marriage contract entered into on their behalf by their parents. In this situation the marriage is voided on the ground of lack of consent of the bride. On the other hand, the bride may formally consent to the marriage and by so doing, rectifies the defect created by her original lack of consent that previously rendered the marriage voidable.

4.0 Conclusion

A marriage contracted under customary law may be annulled for being void or voidable depending on the nature of defects inherent therein. The cancellation or annulment of such a marriage is usually on the ground that one or both parties to the marriage did not possess the required capacity to marry at the time the marriage was celebrated or that some or all of the requirements for contracting a valid customary law marriage were not complied with by the parties. Nevertheless except in situations where the parties are related to a certain degree, by blood or marriage, nearly every other defect that renders that marriage void or voidable can be

rectified in order to confer validity on the otherwise invalid, defective or incomplete (inchoate) marriage.

5.0 Summary

This unit has dealt with nullity and rectification of marriage under native law and custom. Specifically, the unit has exposed students to:

(i) How a customary law marriage can be annulled or cancelled by reason of some defects inherent in the marriage e.g. lack of capacity to marry, or failure to comply with the legal requirements for marriage.

(ii) The grounds upon which a customary law marriage is void.

(iii) The grounds upon which a customary law marriage is voidable.

(iv) The steps that can be taken to correct the defects inherent in a customary law marriage, in order to rectify the errors that render the marriage open to cancellation, thereby conferring validity on such marriage.

6.0 Tutor Marked Assignment

1) List the essentials of a valid customary marriage as decided in Savage v. Macfoy.
2) Explain the term "inchoate marriage"
3) Failure to pay bride price invalidates a marriage. Comment!

7.0 Suggested Further Readings/ References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……
2) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages…….....
3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (……..: Ilusalaiye Press Ltd., 1999) pages……..
4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages 122 – 147.
5) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages 187 – 222.
6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 134 – 387.
7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice**(Lagos: Renaissance Law Publishers Ltd, 2007) pages1-2

Statutes

1) **Matrimonial Causes Act** Cap. M7 LFN, 2004, Sections 2, 15, 16, 17, 21, 30, 69, 82, and 87

Unit 2: Formal Validity and Procedural Defects in Statutory Marriage

1.0 Introduction

The validity of every marriage contracted under the Marriage Act depends on whether or not the laid-down formalities for the celebration of the marriage have been complied with, by the parties. There are certain formalities prescribed by the Marriage Act for the celebration of a valid statutory marriage. These formalities cover some preliminary requirements and the procedures to be adopted in the actual celebration of the marriage. They are provided for under sections 7 -12 and section 21 – 29 of the Marriage Act, Cap M6, Laws of the Federation of Nigeria, 2004. Failure to comply with, or fulfil these requirements may or may not affect the validity of the marriage depending on the nature of defects occasioned by the non compliance with the requirements.

2.0 Objectives

The major objectives of this unit are to help the students to learn the following:-

(i) Meaning of procedural defects in statutory marriage.

(ii) The types and nature of procedural defects that can invalidate a statutory marriage.

(iii) The legal effects of procedural defects on statutory marriage.

(iv) The Way and manner courts interpret procedural defects.

3.0 Main Content

Section 33 (3) of the Marriage Act provides as follows:

> "no marriage shall after celebration, be deemed invalid by reason that any provision of this Act other than the foregoing has not been complied with".

The above provision is a relief offered by the Marriage Act to prevent the invalidation of a statutory marriage on the ground that some formal requirements for the celebration of such marriage have not been complied with. This, in effect, means that failure to comply with **MOST** of the formal requirements for the celebration of a statutory marriage, does not affect the validity of the marriage. Minor breaches like failure to reside within a marriage district for a minimum of 15 days before the grant of a Registrar's certificate cannot invalidate a marriage.

However, the same section 33 (3) of the Marriage Act recognizes the fact that certain types of procedural violations are more serious than others. These violations are considered to have a major effect on the validity of the marriage. They are specifically set out in section 33 (2) and referred to as "the foregoing" in section 33(3). These violations or non-compliance with the identified formalities, are regarded as procedural defects.

3.1 Meaning of Procedural Defects

Procedural defects are the factors that endanger the validity of a statutory marriage depending on the nature of the defects complained of. Section 33 (2) of the Marriage Act provides thus:

> "A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration;
>
> (a) in any place other than the office of a registrar of marriages, or a licensed place of worship (except where authorized by the licence issued under section 13 of this Act; or
> (b) under a false name or names; or
> (c) without a registrar's certificate of notice or licence issued under section 13 of this Act duly issued; or
> (d) by a person not being a recognized Minister of some religious denomination or body or a registrar of marriages".

Apart from the above provisions, there is another requirement under section 12 of the Marriage Act to the effect that a statutory marriage must be celebrated within 3 months from the date that

notice of the marriage is given to the Registrar of marriage; otherwise any marriage celebrated outside that time limit is invalid.

From the foregoing, only major procedural defects contained in sections 12 and 33 (2) are likely to invalidate a statutory marriage, depending on the circumstances of each case and the factors discussed below.

3.2 Types and Nature of Procedural Defects

There are different types of defects associated with failure to comply with the procedural requirements for the celebration of a valid statutory marriage. While the majority of these defects are minor and have no legal effect on the marriage celebrated in violation of them, those contained in Sections 12 and 33(3) of the Marriage Act are considered to be major violations that have the potential of invalidating the marriage. We shall now consider the major procedural defects.

3.2.1 Defect as to Time

Sections 7 and 8 of the Marriage Act provide that one of the parties to a proposed statutory marriage must give a signed notice of the intended marriage in a prescribed form (Form A) to the Registrar of marriages in the marriage district (i.e. the local government area secretariat in which the marriage is to be celebrated). The purpose of the notice is to inform the general public about the proposed marriage, so that any person who has any objection about the proposed marriage can file the objection (caveat) with the Registrar of Marriage. Such notice is displayed outside the registrar's office for 21 days, after which the Registrar can then issue, if there is no objection to the marriage, a certificate of notice in Form C; the certificate being the licence authorizing either the Registrar, or a recognized Minister of a religious place of worship or any other person designated in a special licence to celebrate the marriage.

Section 12 of the Marriage Act provides that if the marriage is not celebrated within three months of filing the notice to marry, the notice and all other proceedings based on it shall be void. This section thus suggests that a marriage celebrated after the expiration of three months after filing the notice is invalid, unless a fresh notice of marriage is issued before the celebration of the marriage.

3.2.2 Defect as to Place of Celebration of Marriage

The Marriage Act provides that parties to a proposed statutory marriage may celebrate the marriage in any of the following places.

(i) A licensed place of worship (Sections 21 – 26)
(ii) Marriage Registrar's office (sections 27 – 28)
(iii) A place designated in a special licence (section 29)

The procedures and modes of celebration to be adopted in each of these places are specifically provided for in the relevant sections of the Act. Any marriage celebrated outside any of these places is void subject to the *mens rea* (mental element of knowledge and wilfulness) of the act of violation of this requirement as discussed below.

3.2.3 Defect as to Names

In filling Form A, that is, the notice of marriage, the real names of the parties must be provided. If any of the parties is found to have celebrated the marriage under a false name, the marriage will be invalidated for violating section 33 (2) (b) of the Marriage Act.

3.2.4 Defect as to Registrar's Certificate of Notice

Section 11(1) of the Marriage Act provides that the Registrar of marriages may issue a certificate of notice in the prescribed Form C after 21 days of the filing of a notice of marriage, but before the expiration of three months from that same day, provided that he is satisfied about the following.

(a) That at least, one party to the proposed marriage has been resident within the marriage district (i.e. local government area) for at least 15 days before the filing of the notice.
(b) That each of the parties (not being widowed already) is at least 21 years old or if less, that he/she has obtained the necessary consent in writing.
(c) That the parties are not related either by blood or marriage.
(d) That neither party to the proposed marriage is already married to another person under customary law.

Note that the Registrar's certificate can only be issued when no objection to the marriage is entered under section 14 of the marriage Act, by any interested person even though the requirements under section 11 (1) have been met by the parties. Where the Registrar's certificate is not issued and the marriage is celebrated without it, the marriage will be invalidated under section 33 (2) (c) of the Marriage Act. The following unreported cases illustrate this point.

In ***Ejikeme v. Ejikeme [1971]***, the marriage between the parties was celebrated in a licensed place of worship but without the parties first obtaining the Registrar's certificate or a special licence in lieu of the certificate of notice. Their excuse was that there was not enough time for them to obtain the certificate from the Registrar of marriage. The court held that the marriage was invalid since the parties knew about the certificate but chose not to obtain it before celebrating the marriage. Similarly, the court held to be invalid the marriage purportedly celebrated without the Registrar's certificate in the case of ***Anyaegbunam v. Anyaegbunam (1973) 4 S. C. 121***.

3.2.5 Defect as to Celebrant of Marriage

The celebrant of a statutory marriage must be either a recognized minister of a religious place of worship or the Registrar of Marriage, as provided for under sections 21, 27 and 29 of the Marriage Act. A recognized Minister of a religion is a person so recognized under the rules and procedures of the particular religion or denomination for holding such an office. Thus, any marriage performed by a person not recognized as a minister of the religious organization in which the marriage is celebrated is void. In the same vein, any marriage purportedly celebrated by any other person than the Registrar of Marriage is void and subject to invalidation.

3.3 Legal Effects of Procedural Defects

As stated earlier, procedural defects may be major or minor. The Marriage Act laid down elaborate procedural rules running through sections 7 – 29 for the celebration of a statutory marriage. These rules cover preliminary issues like giving notice of marriage, and other issues like the procedures to be adopted during and after the celebration of the marriage. For example, the marriage can only be celebrated between the hours of 8.00 am and 6.00 pm, with the doors of the venue open to all, and in the presence of at least two witnesses. Again, when the marriage certificate is signed by all relevant parties in duplicates, the duplicate is required to be filed in the Registrar's office etc. Violations of any of these minor requirements do not result in invalidation of the marriage because of the provisions of section 33 (3) of the Marriage Act.

However, with respect to the major defects dealt with in items 3. 2.1 – 3. 2. 5 above, the same section 33(3) makes it clear that violation of any of these formalities will operate to invalidate the marriage celebrated with the said defects. The dichotomy in the application of minor and major procedural defects to determine the validity of a statutory marriage is based on

the legislature's determination not to invalidate statutory marriages on nothing less than reasons fundamental to the legal foundation of the marriage, and the rights and obligation that flow from such a marriage. The above legislative position is further emphasized by the attitude of the courts in giving effects to this salient legislative intention as seen below.

3.4 Interpretation and Application of Procedural Defects

In interpreting and applying procedural defects to determine the validity or otherwise of a statutory marriage, courts have generally taken the position that failure to comply with most of the formal requirements (i.e. minor) for marriage under the Act, will not affect the validity of that marriage. Even with respect to the major procedural defects occasioned by the violations itemized under section 33 (2) of the Act, the courts have also generally upheld the validity of the marriages celebrated in contravention of the formalities; provided there is proof that one or even both parties to the marriage were ignorant of the non-compliance with the said rules.

Case law on the subject reveals that the courts have somehow adopted the position that procedural defects generally, should not be grounds for invalidating a statutory marriage. This attitude is underlined by the liberal interpretation of the court in the case of ***Russell v. Attorney-General (1949) A.C. 391*** where Bernard, J. said:

> "It is clear from the authorities which have been cited to me that when there is evidence of a ceremony of marriage having been performed, followed by co-habitation of the parties, the validity of the marriage may be presumed in the absence of decisive evidence to the contrary. It would be both tragic and chaotic if such a ceremony would on slender evidence be declared null and void".

Nigerian courts in particular seem to hinge their reasons for upholding the validity of marriage performed with procedural defects – particularly the non-procurement of the Registrar's certificate – on the clause "knowingly and wilfully acquiesce" used in section 33 (2) of the Act. The courts are of the opinion that if the parties to the marriage or even one of them did not knowingly and wilfully agree (acquiesce) to the celebration of the marriage in the face of the offending procedural defects, then the marriage should not be voided or invalidated. The following cases illustrate this opinion.

In ***Akparanta v Akparanta (1972) 2 ECSLR 779***, the petitioner wife sued for the dissolution of the marriage, which she alleged, took place on May 11, 1963. The ceremony was

performed under full Roman Catholic Church rites at Christ the King Catholic Church Uyo. The respondent husband had undertaken to take care of all necessary arrangements preparatory to the marriage. The petitioner wife did not know the details of such preliminary formalities but believed in and trusted that her husband had fulfilled all requirements for the celebration of the marriage. This belief was strengthened by the banns of the marriage that was announced to her hearing and the fact that she saw her husband handing over a document to the officiating priest on the eve of the marriage. The respondent however denied that he married the petition under the Act and that what he intended was a church blessing after the customary law marriage. The court held that the totality of the evidence revealed that a marriage under the Act took place between the parties inspite of some procedural defects evident therein.

In ***Obiekwe v Obiekwe (1963) 7 ENLR 196*** the wife who petitioned for judicial separation averred that she was lawfully married to the respondent in a Catholic Church in Enugu. The respondent on his part alleged that the marriage ceremony did not constitute a valid marriage under the Marriage Act because no Registrar's certificate of notice had been issued. He contended and that since the parties were already husband and wife by customary law, the court had no jurisdiction to entertain the suit. The petitioner replied to this contention that she did not know precisely what formalities were necessary and had left everything to the respondent to handle. Palmer, J. accepted the petitioner's evidence and held that the ceremony of marriage between the parties was valid under the Marriage Act, since both parties were ignorant of the necessity to obtain a registrar's certificate, and the petitioner did not knowingly and wilfully acquiesce in the celebration of the marriage without the registrar's certificate. The court found as a fact that the parties went through the ceremony of marriage believing they had complied with the requirements of the Act (although in fact they had not) and were unaware of any defect. On the legal effect of such a ceremony, the court opined that although section 33(2)(c) of the Marriage Act provides that a marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration without a registrar's certificate of notice or licence, but that section 33 (3) provides that no marriage shall be declared invalid because any provision of the Act, apart from those set out in section 33(2) has not been complied with. Since neither of the parties in this case was aware of any defect, they could not be said to have knowingly and wilfully acquiesced in the celebration of the marriage without a registrar's certificate of notice.

In ***Akwudike v. Akwudike (1963)7 ENLR 5***, Idigbe, J. (as he then was) made a more revolutionary stride. Here the parties were married in a Roman Catholic Church by a priest (who

apparently was not interested in the law of Nigeria, but only in the law of his church) in the presence of two lay witnesses after the publication of banns of the marriage. Notice was not given to the Registrar of marriage; therefore, no registrar's certificate of notice was issued. The petitioner later sought dissolution of the marriage on the ground of cruelty and adultery by the respondent, to which the respondent replied that he and the petitioner were married under native law and custom and only went to church to receive a blessing of the marriage. The respondent further argued that the marriage did not comply with the necessary statutory provisions of the Marriage Act (particularly sections 11 and 13 dealing with Registrar's certificate of notice or special licence), meaning that the marriage was a Roman Catholic marriage which was indissoluble in accordance with the rites of the Roman Catholic Church. The court held that the marriage was valid and he went further to chastise ministers of religion for failing to comply with statutory provisions under the Marriage Act before celebrating marriages. In resolving the issues raised, his lordship relied heavily on the view that where there is evidence of marriage having been performed in accordance with the rites of the church, and the parties have lived as husband and wife, everything necessary to ensure its validity should be presumed in the absence of decisive evidence to the contrary. Consequently, the learned judge took the radical view that a valid statutory marriage subsisted between the parties even though he found as a fact, that the petitioner intended to have a legal marriage under the Marriage Act but that the requirements for same had not been complied with; a fact of which the petitioner was completely ignorant. The learned judge had this to say:

> "If it was the intention of the parties to get married under the Ordinance and they believed that they went through a form of marriage recognized by law…, then if the marriage had been performed by a minister of religion in a place of worship licensed under the ordinance… for the purpose, the marriage in my view would not be void merely by reason of non-compliance with sections 11 and 13 unless it was affirmatively shown that the parties (both parties) wilfully and knowingly failed to comply with the said sections… Now on the evidence before me, I feel quite sure that the petitioner – Justina – had no knowledge of the legal requirements of a valid marriage under the Ordinance and she told me that it was her intention and belief that she was going through a form of marriage recognized by both the church (i.e. R.C.M) and the Ordinance".

In summary, courts are agreed that non-compliance with the rules of formality laid down in the Marriage Act does not strictly-speaking invalidate a marriage unless where the rules violated are those contained in section 33(2) of the Act. Even with respect to those exceptions, marriages

celebrated in breach of those provisions are valid provided there is proof that both parties, or at least one of them did not knowingly and wilfully acquiesce to the celebration of the marriage.

4.0 Conclusion

Procedural defects arise where statutory marriages are purportedly celebrated without compliance with some or all formal rules of procedure, either by the parties or the officiating minister of a religious organization. It would appear from case law on the point that the principal problem of defective statutory marriage ceremonies arises partly from the neglect of the relevant officiating minister to apprise himself of the legal duty imposed on him in the performance of such ceremonies, and partly from the prevailing levity with which such defaulting Ministers of religion are treated.

This situation calls for concern regarding the need for all relevant authorities to take positive steps to correct these ills. This is more so when one considers that the current situation would be intolerably chaotic if several marriages tainted by defective formalities were not shielded by section 33 (3) of the Marriage Act. It can hardly be suggested for one moment that the provisions of the Marriage Act (or in fact of any Act or law for that matter) are enacted for fun. Ministers of religion should be properly instructed on the express requirements of the Marriage Act before being licensed to celebrate marriages in accordance with the peculiar rites of their religion. Attention should particularly be drawn to the consequences of failure to ascertain that the matters required by law for the validity of a marriage have been performed considering that some ministers of religion take the defiant attitude that a marriage is valid only in so far as the parties comply with the peculiar rites of their religious organization.

For example, in ***Akwudike v. Akwudike (supra)*** the priest who celebrated the marriage admitted in evidence that the marriage was not a marriage in accordance with the Marriage Act since it was not an essential prerequisite for a marriage under the rites of the Roman Catholic Church. The observation by Palmer, J. in ***Obiekwe v. Obiekwe [supra]*** becomes germane here. With respect to the untenable distinction hitherto made between marriage under the Act and the so-called “church marriage” he said:

> “A good deal has been said about church marriage or marriage under Roman Catholic Law. So far as the law of Nigeria is concerned, there is only one form of monogamous marriage, and that is marriage under the Ordinance (Act). Legally, a marriage in church of any denomination is either a marriage under the Act or it is nothing. In this case, if the parties had not been validly married under the

> Ordinance, then either they are married under Native Law and Custom or they are not married at all. In either case the ceremony in church would have made not a scrap of difference to their legal status".

The above opinion clearly shows that a "church marriage" only raises a rebuttable presumption that the marriage is a marriage under the Act. Whether it is a valid marriage under the Act then depends on a number of factors that include: the intention of the parties as to the nature of their marriage; whether or not the formal requirements for statutory marriage have been complied with; and whether one or both parties to the marriage were ignorant of those requirements where there has been a non-compliance.

Finally, the issue of defective marriage formalities invariably generates a jurisdictional problem and raises questions on the validity of marriage celebrated with such defects. While one of the parties to a form of monogamous marriage ceremony may wish to insist on the validity of that as a marriage under the Act, the other party may like to deny such a claim on the grounds of material defects, if only to prevail on the court to imply that customary law marriage (which would be more favourable to him) was intended. In resolving this conflict, the combined effect of section 33(3) of the Marriage Act and case law, especially the bold decision in ***Akuwudike v Akuwudike*** effectively frustrates any attempt to take advantage of defective marriage formalities to cancel a marriage intended by at least one party to be a marriage under the Act. Thus:

1. Where the parties intended to marry according to the Marriage Act and failed partially to carry out the formalities under the Act, but performed a religious ceremony in accordance with the rites of that religion, the marriage will be accorded legal recognition - *Obiekwe v. Obikekwe.*

2. Where the parties intended to marry under the Act but failed to comply with the provisions of the Act, and went through a religious ceremony in accordance with the rites of a religion (and thereafter lived together as husband and wife), the marriage is valid, provided that one or both parties to the marriage were ignorant of those requirements. *Akuwudike v. Akuwudike*

3. Where the parties intended to marry according to the Marriage Act, but knowingly and wilfully failed to comply with the provisions of the Act, and only went to the church to

receive a blessing, any claim to a valid statutory marriage will be rejected – *Obiekwe v. Obiekwe.*

4. Where the parties have complied with the provision of the Marriage Act but one of them did not intend that it should be a monogamous marriage, the marriage will be regarded as a marriage under the Act – *Ozobu v. Ozobu [1962]*

5. A duly celebrated marriage under the religious rites of the church of the parties' denomination ought to be regarded as a valid marriage under the Act. This is the effect of the decision in *Akuwudike v. Akuwudike.*

6. The courts have always given liberal interpretation to the provision of section 33 (3) of the Marriage Act to protect marriages celebrated with procedural defects, in order to rectify such marriages. Even with respect to matters contained in section 33 (2) courts have invoked the "knowingly and wilfully acquiesce" rule to confer validity on defective marriages where at least one of the parties was ignorant of the formalities required for statutory marriage.

5.0 Summary

This unit has discussed formal validity of statutory marriage as determined by procedural defects arising from the failure of some, or all relevant parties to comply with the formal requirements for the celebration of a statutory marriage. We have been able to establish the following:

1. The meaning of procedural defects vis a vis statutory marriage, i.e. non-compliance with the rules of formalities laid down in sections 7 – 29 of the Marriage Act.

2. The types and nature of procedural defects – usually classified into minor and major defects – with the major defects being with respect to time: place of celebration, false name(s), Registrar's certificate and the celebrant of marriage, as contained in sections 12 and 33 (2) (a) – (d) of the Marriage Act.

3. The legal effects of procedural defect, i.e. that minor defects do not invalidate a marriage while major defects do, unless there is proof that at least one of the parties to the marriage was ignorant of those requirements.

4. The attitude of the courts in interpreting and applying procedural defects to determine validity of marriage celebrated in contravention of the rules of formality.

6.0 Tutor – Marked Assignment

Discuss the conditions under which failure to comply with the formal requirements for the celebration of a statutory marriage will not invalidate a marriage under the Act.

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (……..: Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages 27 – 36.

5) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages 115 – 131.

6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 50 – 51.

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages8-19,85-110

Statutes

1. **Marriage Act, 1914,** Cap. M6 Act Chapter M7 LFN, 2004, ...

2. **Matrimonial Causes Act** Cap. M7 LFN, 2004, ...

Unit 3: Court Processes

1.0 Introduction

Court litigations are normally conducted by following specific procedures and using prescribed forms, depending on the nature of the litigation and the parties before the court. Usually, these forms and procedures are contained in the various rules of court at both state and federal levels. Under these rules, cases are presented before the courts by means of different documents that form the totality (along with oral arguments) of each party's case. These documents are collectively known as court processes.

Matrimonial proceedings generally, whether it be for dissolution of marriage, nullity of marriage, jactitation of marriage, judicial separation, restitution of conjugal rights etc, also involves the use of court processes. The peculiar nature and circumstances of each case determines the number and types of processes filed in prosecuting or defending the case. A skillful counsel on either side can build his case around carefully-selected court processes so as to present a clear case for easy resolution.

Thus, a counsel in matrimonial proceedings has the responsibility to file the correct processes which must contain the requisite properties or ingredients that would enable the petitioner or the respondent prove his or her case or defend an allegation. For example, a petition for the dissolution of marriage must necessarily contain at least one fact contained in section 15(2) of the MCA, as evidence of the ground upon which the petition is based, and upon which the court would find that the marriage has broken down irretrievably.

In this unit we shall consider one major head of matrimonial petitions and the court processes required for it. Samples of these processes are provided in labelled boxes below.

Meanwhile, there are five (5) major heads of petition that may be filed in court as a matrimonial cause. These are:

1. Petition for dissolution of marriage
2. Petition for judicial separation
3. Petition for Nullity of marriage
4. Petition for Restitution of conjugal rights
5. Petition for jactitation of marriage

Before embarking on certain fundamental aspects of each petition, it is important to state the nature and the frequency with which the various types of matrimonial petitions come into the courts. More than 90% of the court processes that are filed in matrimonial cause matters in the Registries of the High Courts in the various states concentrate more or less on petitions for decrees of dissolution of marriage and other ancillary applications like custody of children. This underscores the importance of this class of proceedings and the need to accord it ample space and in-depth work in this unit. For this reason therefore, a great length of detail is devoted to the petition for decrees of dissolution of marriage and all the ancillary applications and processes required to be filed at various stages of the proceedings by parties in the matter. Again, attention is given to the responses from the court by way of court orders or rulings from the first day of hearing of the case until the final determination of the matter at courts of first instance and appeal courts.

2.0 Objectives

This unit aims to help the students learn the following:

1. Meaning of court processes.
2. The nature of the court processes required for matrimonial proceedings.
3. When and how each court process is filed.
4. The procedure involved in filing court processes.
5. How to prepare court processes.

3.0 Main Contents

As was previously noted, the major emphasis of this unit is the court processes required for a petition for the dissolution of marriage. This is without prejudice however to the incidental

reference to petitions for the decrees of nullity of marriage and judicial separation since the three classes of matrimonial cause petitions use the same format as specified under Order V Rules 11, 18 and 23 of the Matrimonial Causes Rules, 1983 (hereafter MCR), the MCR being the subsidiary legislation to the MCA, 1970. The form of petition required to be used for all three classes of petitions is Form 6 in the First Schedule to the MCR.

We shall now proceed to the court processes required for a petition for the dissolution of marriage and all other attendant processes and procedures.

3.1 Court Processes for Petition for a Decree of Dissolution of Marriage

Petitions for the dissolution of marriage are usually filed by legal practitioners on the instructions of parties, on behalf of the instructing parties. Rarely do petitioners come to court to file their papers themselves except where those petitioners are themselves legal practitioners.

As a first step, the counsel for the petitioner is expected to resolve certain vital preliminary issues affecting the petition. Some of these preliminary points are whether:

- The matter is one that can be filed without the leave of the court or a matter for which leave of the honourable court must be first had and obtained;
- What are those facts that constitute the ground on which the petition is brought?
- What matrimonial offences has the Respondent allegedly committed?
- Do they amount to any of the facts constituting the ground for dissolution of marriage as set out in section 15(1) of the MCA and in Order V Rule 12 (2) of the MCR?

The first question above may be answered in the affirmative or in the negative. If the matter is one in which leave of court is not required, the petition may be filed immediately. On the other hand, if the matter is one in which leave of the court must be obtained, then the first thing to do is to file the appropriate application for leave, argue the said application, obtain the necessary order and then attach same to the petition before filing it.

3.2 Leave of Court

The application for leave of court is a preliminary proceeding, which is different from a main case. It is clearly different from the main petition sought to be presented to the court for a decree of dissolution or nullity of marriage. For this reason, the petition itself is not filed with the motion. It is after the leave of court is granted based on the motion ex-parte that the petitioner

proceeds to file for dissolution of marriage or nullity of marriage as the case may be. The unique nature of this application as a preliminary proceeding is demonstrated by the fact that it is classified as miscellaneous matters in the record of cases in court. Usually, during the filing of the application, it is given a suit number, after which the letter 'M' is added to the number just before the year. That letter 'M' simply represents "Miscellaneous Application". Every miscellaneous application is set out to achieve a purpose as in this case, which is to obtain the permission of the court to enable a petitioner bring his petition for dissolution of marriage within two years of the marriage.

The necessity for leave of court (i.e. permission to file a petition) is because of the requirements of sections 30 (1) and (2) and 40 of the MCA. These sections provide that no petition for the dissolution of marriage or judicial separation may be presented before the expiration of two years from the date of the celebration of the marriage without leave of court, unless the petition is based on the facts of wilful and persistent refusal to consummate, adultery, rape, sodomy or bestiality as contained in sections 15(2)(a) – (b) and 16(1)(a) of the MCA. The rationale for this restriction is to deter people from rushing into ill – advised marriages and to prevent them from rushing out of same once they discover that the marriages are turned against their expectations.

To obtain the said leave of court the applicant must show that a refusal of leave would impose exceptional hardship on him/her or that the case is one involving exceptional depravity on the part of respondent. In ***Akere v. Akere [1962] WNLR 328*** the allegations were that the husband committed adultery with 3 women and he made inordinate sexual demands when the applicant was sick after returning from hospital; physical violence; constant neglect and quarrelling; and transmitted venereal disease to the applicant. These allegations were held to be exceptional hardship and exceptional depravity. It was also held that the burning of the certificates of the applicant, his engineering books, clothes, failure to perform the duties of a wife and refusing him sex amount to exceptional hardship in the case of ***Williams v Williams [1979] 1 ALL ER 556***.

As to what amounts to exceptional hardship or depravity the court said in the case of ***Fay v. Fay [1983] 3 WLR 206*** that it must be shown that the hardship suffered by the applicant or the respondent's depravity is something out of the ordinary. For example an allegation that the husband committed adultery with another woman was held not to amount to exceptional

depravity but merely "extremely adulterous conduct" in the case of ***Blackwell v. Blackwell [1974] 4 Fam. L. 1995***.

There are two types of matrimonial cause petitions where the leave of court is required to be obtained before filing the petitions. These are:

(i) Petitions for a decree of dissolution of marriage as provided for under section 30 of the MCA; and
(ii) Petitions for a decree of judicial separation under section 40 of the MCA.

The requirements for leave for both petitions are exactly the same. Therefore, the application for leave will be treated here as it applies to both classes of petitions. Under Order IV of the MCR, Rule 1 therein provides that an application under section 30 or 40 of the MCA for leave to institute proceedings may be made ex-parte (i.e. without putting the other party on notice). Thus, proceedings for leave of court start with the filing of two court processes:

(i) A Motion ex-parte; and
(ii) An affidavit in support of the motion, in which details of the reason for filing the motion are given.

At this stage, it is important to note that both the MCA and the MCR do not provide any specific sample of ex-parte applications for leave to commence proceedings for a decree of dissolution of marriage or for judicial separation. The Act and the Rules do however provide the basic guide and information for the contents of the affidavit in support of the application. Thus while the format of the application is the same in both cases, the contents of the supporting affidavit may differ slightly in terms of personal details and peculiar circumstances of each case; but each is presented in the same format provided in the guidelines contained in the Rules. For illustration, compare the set of facts or the contents of the affidavits in figures 2 and 4 below. Though the peculiar facts differ, both are aimed at one thing i.e. to convince the court that an order granting leave is necessary in each case.

As already noted above, the motion ex-parte for leave to file a petition is required to be accompanied by a supporting affidavit. The nature and contents of the affidavit in support of the said application for leave is provided for in Order IV Rules 2(a) – (f). Because of the importance of these provisions, they are set out below as follows.

Rule: 2 The affidavit in support of an application under section 30 or 40 of the Act for leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, as the case may be shall:

(a) include particulars of the exceptional hardship that would be imposed on the applicant by the refusal to grant the leave or particulars of the exceptional depravity on the part of the other party to the marriage that is alleged: as the case may be;

(b) state the ground upon which, if leave is granted, the applicant intends to petition for the decree;

(c) state whether or not the applicant has made a previous application for leave, under section 30 or 40 of the Act, to institute proceedings for such a decree, and if he has made a previous application, also state the date and grounds on which and the court to which, the previous application was made and whether that application was granted.

(d) state whether or not a child of the marriage is living and if a child of the marriage is living, also state;

(i) the name of the child;
(ii) the date of birth of the child; and
(iii) the place at which, and persons with whom, the child is residing;

(e) state whether an attempt has been made to effect a reconciliation between the parties to the marriage and if such an attempt has been made, state particulars of the attempt; and

(f) state particulars of any other circumstance that may assist the court in determining whether there is a reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage.

The applicant is also expected to attach the marriage certificate in respect of the marriage in question to the supporting affidavit. Where the original is not available, he may attach a certified true copy and file same with the motion paper. If the couple married in a foreign country and the marriage certificate was made out in a foreign language other than English, that certificate must be filed together with its translation into English. The translation must be verified by the translator who must depose to an affidavit stating his competence to make that translation. However, where it is not possible for the applicant to file his marriage certificate at the time of filing the application for leave, then such applicant must state in his affidavit in support of the application for leave, the circumstances that prevented him from filing the said certificate of marriage.

Four different tables (figures) are given below to illustrate the application for leave and the supporting affidavit. The figures represent the following:

Figure 1: Sample of a regular Application for Leave of Court to file a petition for dissolution of marriage. This sample follows the general form of motions prescribed by the High Court Rules.

Figure 2: General form of Affidavit in Support of motion

Figures 3 & 4: Application for Leave of Court and Supporting Affidavit filed in respect of a real case by a legal practitioner in the High Court Registry of Lagos State. Note that the supporting affidavit deposes to facts that were peculiar to the case. The real names therein have been substituted with fictitious ones.

Figure 1: Sample Motion Ex-parte for Leave to Institute Proceedings

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

Suit No LCD/14^{M}/2006

BETWEEN

MR. AMOS HOT TEMPER -- Petitioner/Applicant

AND

MRS. BOLA HOT TEMPER -- Respondent

MOTION EX-PARTE

BROUGHT PURSUANT TO SECTION 30 OF THE MATRIMONIAL CAUSES ACT CAP. M7 LFN 2004, ORDER IV RULE 1, MATRIMONIAL CAUSES RULES 1983 AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE COURT

TAKE NOTICE that this Honourable Court may be moved on the …..day of …….. 2009 at the hour of 9.00 o'clock in the forenoon or so soon thereafter as counsel on behalf of the petitioner/applicant may be heard praying the Honourable Court for the following:

1. AN ORDER granting leave to the Petitioner/Applicant to commence or institute proceedings for dissolution of marriage with the Respondent herein.

2. AND for such further order or other orders as the Honourable Court may deem fit to make in the circumstances.

Dated this …….. day of …… 2009

_____
T. O. Asunder Esq.,
Counsel to the Petitioner/Applicant
No. 10 Sodom Road, Ikeja Lagos.

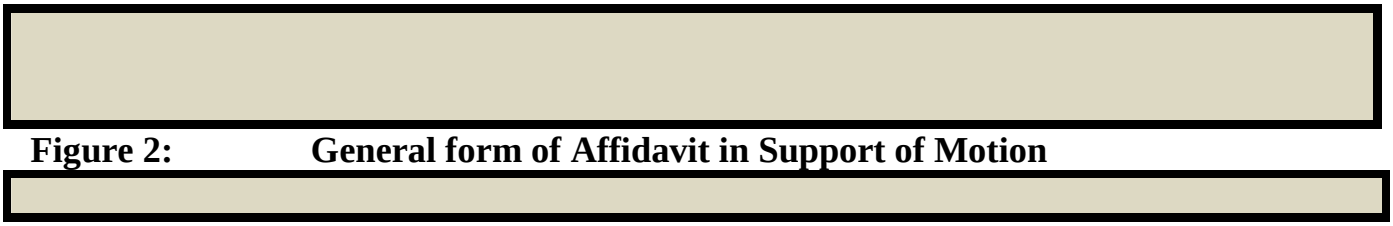

Figure 2: General form of Affidavit in Support of Motion

Figure 3: Profile of Motion Filed in a Real Case

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/304M/ 2009

BETWEEN

MR. JACK BULDOZER -- Petitioner/Applicant

AND

MRS. JILL BULDOZER -- Respondent

MOTION EX- PARTE

BROUGHT PURSUANT TO SECTION 30 (3) OF THE MATRIMONIAL CAUSES ACT 1970, ORDER IV RULES 1 AND 2 OF THE MATRIMONIAL CAUSES RULES 1983 AND UNDER THE INHERENT JURISDICTION OF THE COURT.

TAKE NOTICE that this Honourable Court will be moved on the ..... day of .....2009 in the hour of 9.00 0'clock in the fore noon or so soon thereafter as the Petitioner/Applicant or his counsel may be heard for:

1. An order of this Honourable Court for leave to institute proceedings for the dissolution of the marriage between the Petitioner/Applicant and the Respondent within two years of marriage.

GROUNDS FOR THE APPLICATION

(a) Exceptional hardship being foisted on the Petitioner/Applicant by the Respondent.
(b) Respondent's exceptional depravity.

2. And for such further order or other orders as this Honourable Court may deem it fit to make in the circumstances.

Dated this .....Day of 2009

A. B. Lagbaja Esq.,
Assunder Chambers
100, Demolition Street,
Ogba, Lagos.

Figure 4: Profile of Affidavit in Support of Motion Filed in a Real Case

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/304M/ 2009

BETWEEN

MR. JACK BULDOZER -- Petitioner/Applicant

AND

MRS. JILL BULDOZER -- Respondent

AFFIDAVIT IN SUPPORT OF THE MOTION FOR LEAVE

I, Jack Buldozer male, Christian, Nigerian citizen residing at 50, Sodom Road, Ogba Lagos, Lagos State of Nigeria do hereby depose to the following facts thus:

(1) That I am the above-named person and a businessman by profession.

(2) That I am 41 years old having been born on the 16th day of December 1968 at Goma-Nguru, Nguru Local Government Area of Adamawa State.

(3) That I married the Respondent, Mrs. Jill Buldozer on the 20th day of January 2008 at the Sodom Marriage Registry, Lagos State.

(4) That prior to the date of my marriage I had been residing and working in South Australia.

(5) That I met the Respondent by chance at Ceestarr Niteclub, in Lagos in early October 2007 when I moved to Nigeria.

(6) That I courted the Respondent for a very brief period of 3 months before our wedding day.

(7) That since our marriage in January 2008, the Respondent has caused me exceptional hardship, she being exceptionally depraved.

PARTICULARS OF EXCEPTIONAL HARDSHIP AND DEPRAVITY

That during our short courtship, the said Respondent deceived me and told me a lot of lies about herself and her status namely:

(a) That she was a microbiologist by profession, with a Bachelor of Science degree from Gogo State University, Kukwa Nigeria.

(b) That her name was June Kakasi and a daughter of Chief Omego Kakasi, owner of ABC Airlines Limited, Lagos – a popular airline and aviation company.

(c) That she was then running a course with the Medical Institute in New York, USA and

that she would soon be licensed to practice medicine in USA.

(d) That she hailed from the Kakasi family of Ihiala in Ihiala Local Government Area Imo State.

(e) That she was single and had no subsisting marriage at the time of our courtship.

(f) That she was still a virgin and that I would be the first man to have sex with her and that she would be happy if we tied the nuptial knot.

(g) That she had no child or children anywhere, not having been married before.

(8) That she introduced me to a group of persons in Lagos whom she claimed were her parents and other members of her family and who duly consented and played active roles in our wedding.

(9) That following our wedding on the 20th day of January 2008, I discovered the following facts about her shortly thereafter:

(a) That she is not and had never been a microbiologist anywhere before and that her claimed Bachelor of Science degree from Gogo State University was forged.

(b) That there is no record anywhere of her claimed studentship at any university and she never studied microbiology, or any other course.

(c) That her claimed name June Kakasi was fake, she having several names and aliases and even as I make these depositions, her true identity is not known, since I have not met any of her real parents.

(d) That I have heard her answer to the names Catherine Cole, Kate Chuba and Chika Osuji at different times.

(e) That when I eventually visited the Kakasi family in Ihiala, I was told by the family head that the Respondent is an impostor, she not being a daughter of the revered Chief Kakasi of ABC Airlines Limited fame and in fact not a member of the family at all. The people she introduced me to before the wedding were also not members of the Kakasi family.

(f) That the Respondent is not running any medical course with the Medical Institute in New York and cannot therefore qualify to be a doctor.

(g) That the Respondent had in fact previously cohabited with a man for whom she had had two children before our marriage; a fact which she never disclosed to me.

(h) That the Respondent was far from being a virgin; a fact that I discovered on our wedding night.

(10) That I discovered further that the Respondent is addicted to hard drugs, especially hashish (Indian hemp) and is habitually under the influence of the drugs that make her irrational and irritable.

(11) That on the 24th day of February 2008 the Respondent introduced me to a group of persons she said were business partners of her father's. She persuaded me to invest and I indeed invested the sum of ₦8.4 million into a joint venture import/export business with them. Unknown to me the business was orchestrated to defraud me and I lost all my investments.

(12) That on the 3rd of February 2008, the Respondent brought into our matrimonial home, her two illegitimate children without consulting with me. My objections were met with physical attacks from the Respondent. Since then, the Respondent has constantly nagged at and fought with me at every given opportunity.

(13) Due to the intolerable matrimonial environment at home, I was forced to abandon the matrimonial home, especially when the Respondent threatened to poison.

GROUNDS FOR SEEKING LEAVE FOR THE DISSOLUTION OF THE MARRIAGE

(14) That the conduct of the Respondent since the marriage is not what I can reasonably be expected to bear as provided for under section (2) (c) of the Matrimonial Causes Act 1970.

(15) That I have never made this type of application before in any court in respect of this marriage or any other marriage.

(16) That the names of the two children of the Respondent in question are John Cole and Mary Cole.

(17) That according to the Respondent, John Cole was born on 22nd April, 2003 while Mary Cole was born on the 5th day of June 2005.

(18) That I have no doubt in my mind that my marriage with the Respondent is over as I am convinced that I cannot live with a pathological liar whose roots and identity are not known to me.

(19) That I herein attach the photocopy of the marriage certificate issued to us on the 20th day of January, 2008 at Sodom Marriage Registry in Lagos.

(20) That I depose to this affidavit in good faith believing the contents to be true and correct to the best of my knowledge, information and belief and in accordance with the Oaths Law of Lagos State.

_____
DEPONENT

Sworn to at the High Court Registry, Lagos this
..... day of 2009

BEFORE ME:

_____
COMMISSIONER FOR OATHS

3.3 Filing of Processes and other Procedures

Having prepared the requisite documents, they must be taken to the registry of the court for filing. Since the application is ex-parte, the respondent is neither notified nor served with the motion papers and the supporting affidavit. His/her appearance is also not needed in court during the hearing of the application. On the date fixed for the hearing of the application, the counsel for the applicant argues the case, and tries to persuade the court as to the merits of the case, and as one deserving the leave sought. In doing this, counsel may rely on statutory and judicial authorities, especially existing precedents. Once the court is convinced as to the merits of the case, the order made.

Note however that it is not in every case that an application is brought for leave to file a petition that the leave is granted. The court may refuse an application for leave on reasonable grounds. That is why it is extremely important to comply with the provisions of the MCA and MCR regarding the contents of the affidavit in support of the motion ex-parte. Where an affidavit in support of this type of application fails or neglects to contain the vital information required by law (for example particulars of the exceptional hardship or depravity alleged), the court would simply deny the applicant the order sought. This in effect, means that the applicant cannot file the petition for dissolution, until the expiration of two years from the date of the marriage; or if less, at a future date when he/she shall have satisfied the requirements of the law in this regard.

The granting of the order is the permission to proceed to file the relevant petition. All the petitioner does at this point is to get his or her petition for dissolution of marriage ready, and present them at the Registry for approval, assessment and filing of same. The petition must have a copy of the order granting leave attached to it, and served on the respondent at the same time.

Figure 5 below is a sample of a court order granting leave to file petition for dissolution of marriage.

Figure 5: Sample of court order granting leave to file petition for dissolution of marriage

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT COURT NO. 11. FAMILY & PROBATE

BEFORE THE HON. JUSTICE O.O. LAGBAJA
TODAY MONDAY 30TH DAY OF MARCH 2006.

SUIT NO. L/I/304M/ 2009

BETWEEN

MR. JACK BULDOZER -- Petitioner/Applicant

AND

MRS. JILL BULDOZER -- Respondent

ENROLMENT OF ORDER

HON. JUSTICE O.O. LAGBAJA

UPON THE MOTION EX-PARTE dated 3rd day of March 2009 filed in the court Registry the same date, brought pursuant to section 30 (3) of the Matrimonial Causes Act, 1970 and Order IV Rules 1 and 2 of the Matrimonial Causes Rules, 1983 and under the inherent jurisdiction of the court praying for the following orders:

1. An order of leave of this Honourable Court to institute proceedings for the

dissolution of the marriage between the Petitioner/ Applicant and the Respondent within two years of the marriage:

2. And for such further order or other orders as this Honourable Court may deem it fit to make in the circumstances.

GROUNDS FOR THE APPLICATION

(a) Exceptional hardship being foisted on the Petitioner/Applicant by the Respondent.

(b) Respondent's exceptional depravity.

UPON reading the affidavit of Mr. Jack Buldozer residing at 50 Sodom Road, Ogba Lagos sworn to and filed on the 3rd day of March, 2009

AND AFTER A. B. Lagbaja, Esq., of Counsel to the Applicant's move in support of the application;

IT IS HEREBY ORDERED AS PRAYED

Dated at Ikeja this 20th day of March, 2006.

_____

J. A. AKAWO
Registrar.

4.0 Conclusion

There are series of documents required to be used when matrimonial proceedings are to be instituted in court. These documents, like similar ones used in other kinds of litigation are technically referred to as “court processes”. Both the MCA and the MCR have made provisions for the kind of processes necessary to be used in matrimonial proceedings. With respect to dissolution of marriage and judicial separation, sections 30 and 40 of the MCA have made it clear that a party to a marriage can file for dissolution or judicial separation respectively of a marriage, even less than two years from the date of celebration of that marriage, provided that such a party first obtains the leave of court to file the petition.

Order IV, Rule 1 of the MCR in turn, provides for the nature of court process required for that preliminary leave, i.e. a motion ex-parte and affidavit in support of the motion. The same MCA and MCR give a guide as to what such an affidavit should contain in order to satisfy the court enough to persuade it to grant the order sought. Samples of all these processes have been exhibited above. Also dealt with above, is a step by step analysis of how these processes are filed, and put to use, in order to achieve the desired result; i.e. an order granting leave to an applicant to file a petition for dissolution of marriage or for judicial separation as the case may be.

5.0 Summary

This unit has dealt with the court processes necessary for the prosecution of the matrimonial proceedings of dissolution of marriage and judicial separation. These court processes have been identified to be: motion ex-parte, the affidavit in support of the motion and enrolment of order for leave. It was noted that these particular processes are used only for the preliminary steps towards the filing of a petition for the dissolution of marriage or for judicial separation in respect of a marriage that is less than two years old from the date of the marriage to the date of the application for leave to file a petition. The unit has also dealt with all the steps necessary to be taken to obtain the desired leave of court using the said processes, provided that they satisfy the legal requirements contained in section 30 (3) of the MCA and Order IV, Rule 1 of the MCR.

6.0 Tutor-marked Assignment

1) Itemize the steps needed to file a petition for the dissolution of marriage in the High Court.
2) Name and briefly discuss the three court processes required under Order IV, Rule 1 of the MCR and under the inherent jurisdiction of the court in relation to matters provided for in sections 30 and 40 of the MCA.

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (……..: Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages .....

5) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages .....

6) Sagay, I., ***Nigerian Family Law*** **[*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) .....

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages 192-228

Statutes

1. **Matrimonial Causes Act** Cap. M7 LFN, 2004, Sections 30 and 40

2. **Matrimonial Causes Rules** Cap. M7 LFN, 2004, Order IV, Rule 1 and Order V.

Unit 4: Court Processes II

1.0 Introduction

This unit is a continuation of the immediately- proceeding unit (i.e. unit 3) dealing with court processes and the procedural steps required for the successful prosecution of, or the defence of a petition for the dissolution of marriage, judicial separation or nullity of marriage. The preliminary steps and processes required for obtaining leave of court to file a petition for divorce or judicial separation, were dealt with in that unit. This unit deals with the steps and processes involved in the main petition for divorce/judicial separation or nullity of a marriage irrespective of the duration of the marriage.

As already discussed in the last unit, it is only with respect to divorce and judicial separation in a marriage that is less than two years duration, that the leave of court must be sought before filing the main petition for the dissolution of the marriage, or judicial separation of the parties. The rule is not applicable to other matrimonial causes like nullity of marriage, restitution of conjugal rights and jactitation of marriage.

Having already dealt with the procedure and the court processes involved in the application for leave of court to file a petition for divorce or judicial separation, we shall now proceed to study the procedure and processes involved in the presentation, prosecution or defence of the main petition. However, the focus in this unit is the procedure and processes involved in the petition for the dissolution of marriage only. This is in view of the fact that the over whelming majority of matrimonial causes filed in court are cases of dissolution of marriage.

2.0 Objectives

The main objectives of this unit are to bring the students to learn:

(i) the basic difference between an application for leave of court to file a petition and the filing of the petition itself;

(ii) the court processes required for the prosecution of a petition for the dissolution of marriage; and

(iii) the procedure for filing the processes required for the prosecution of a petition for the dissolution of marriage.

3.0 Main Content

The position has since been made clear, that where a petition is sought to be presented to the court within a period of two (2) years from the date of the marriage, the petitioner must first obtain the leave of the court to do so before presenting the said petition. However, it is not in every case that the petitioner must first obtain leave of the court. For example, if the petitioner seeks to present his petition after a period of more than two years after the marriage, there would be no need for leave of the court to be sought and obtained. The issue of leave of the court is based on the period of time after the marriage that the petitioner intends to approach the court for a matrimonial relief. If the petitioner for whatever reason intends to apply to the court for a petition for dissolution of marriage within two years of his marriage, then the leave of court becomes necessary. But once the two-year mark has been exceeded, then the petitioner may dispense with the leave of court. He could go to court straight away without any need to first obtain any form of leave to institute proceedings for divorce.

3.1 The Petition for a Decree of Dissolution of Marriage

This is a very complex and technical document that must be prepared in accordance with the relevant statutory and procedural requirements. The contents of every form of petition are

determined by the rules and the particular facts that give rise to the petition itself. Order V Part 1 of the Matrimonial Cause Rules (MCR) makes a general provision for matrimonial cause petitions. Order V Rule 1 generally provides for particulars relating to the parties and their marriage to be included in such petitions. Due to their importance, sub-rules (1)(a) – (d); (2) and (3)(a) – (j) of Rule 1 are reproduced below as follows:

Petitions Order V –:

Rule: (1) A petition shall state the full names of each party to the proceedings and, in addition:

(a) the address and occupation of the petitioner;

(b) the address and occupation, so far as known to the petitioner, of each other party to the proceedings,

(c) the name of the wife immediately before the marriage, or alleged marriage, as the case may be; and

(d) the address and occupation , so far as known to the petitioner, of any person not being a party to the proceedings, specified in the petition as a person with whom or on whom the respondent is alleged to have committed adultery, rape or sodomy.

(1) Where the address, at the date of the petition, of a party or person referred to in sub-rule 1 of this rule is not known to the petitioner; the petition shall state that the address is not known to the petitioner and also state the last address (if any) of the party or person known to the petitioner.

(2) A petition shall state:

(a) particulars of the marriage or purported marriage to which the petition relates;
(b) particulars relating to the birth of the parties to the marriage or purported marriage;
(c) particulars relating to the domicile or residence of the petitioner in Nigeria;
(d) particulars of the cohabitation of the parties to the marriage;
(e) the particulars relating to the children of the parties to the marriage and the children of either party to the marriage required by rule 8 of this Order;
(f) particulars of previous proceedings between the parties to the marriage;
(g) the facts, but not the evidence by which the facts are to be proved, relied on as constituting the ground or each ground specified in the petition, stating, if more than one ground is so specified, the facts relating to each ground as far as practicable, separately;
(h) in the case of a petition for a decree of dissolution of marriage or judicial separation – the matters required by rule 7 of this Order;
(i) in the case of a petition for a decree of dissolution of marriage or nullity of a voidable marriage – particulars concerning the arrangements referred to in rule 14 or 15 of this Order; and

(j) in the case of a petition instituting proceedings of a kind referred to in paragraph (c) of the definition of "matrimonial cause" – the matters required by Order XI, rule 4 of these Rules.

From the above provisions of the Rules, some identifiable sub-headings appear. And it is along these subheadings that some of the matrimonial petitions like dissolution of marriage, nullity of marriage and judicial separation are concluded. These subheadings may be stated as follows:

1) Introduction/Bio data of all parties to the petition
2) Marriage
3) Birth records of parties to the marriage
4) Domicile or Residence of parties to the marriage
5) Cohabitation record of parties to the marriage
6) Record of children of the marriage or of parties to the marriage
7) Record of previous proceedings between the parties
8) All relevant facts relating to the ground for divorce
9) Petitioner's denial of complicity in the ground for divorce
10) Proposed arrangements for the children of the marriage.

Apart from the above, the MCR has made various provisions for the inclusion of other relevant information in the petition. These include:

(i) Maintenance and settlement of property;
(ii) Exercise of court's discretion;
(iii) Other matters;
(iv) Order sought; and
(v) Date, signature and address for service of court processes.

The contents of matrimonial cause petitions are outlined in Sub Rule 3 of Rule 1 of the MCR. Each of the particulars that are required to be stated in every petition with regard to the above sub-headings have been provided for, beginning with particulars relating to marriage, which are clearly provided for in Sub Rule 4 of Rule 1.

In order to appreciate the various provisions regarding the general contents of a petition, the format of a petition contained in Form 6 of the First Schedule to the MCR, is reproduced below as figure 1. The form itself is not just a praecipe for petitions for the decree of dissolution of marriage only. It also serves as a format for petitions for decrees of nullity of marriage and for petitions for decrees of judicial separation. References will therefore be made to the format during discussions on these other types of matrimonial cause petitions.

Figure 1: Format for Petitions for Decrees of Dissolution of Marriage of Nullity of Marriage or Judicial Separation Pursuant to Order V, Rules 11, 18 & 23 of the MCR.

(Title)

To the above named High Court.

The petitioner, whose address is .....
.....
and whose occupation is.....petitions the court for a decree of
……..... against the respondent, whose address is
.....
and whose occupation is .....on the ground of
…….....

MARRIAGE

1. The petitioner, then a *(conjugal condition)* was lawfully married to (or went through a ceremony of marriage with) the respondent, then a (*conjugal condition*), at .....
on the … ……..... day of …….....…….., 20.....
according to Christian rites.

2. The surname of the ……..... immediately before marriage (or purported marriage) was …….....

3. .....
(Here insert any particulars required by sub-rule (5) or (6) of Order V, rule 1).

BIRTH OF PETITIONER AND RESPONDENT

4. The petitioner was born at ……. .....
on the ……..... day of .....19 .....
and the respondent was born at …….....
on the ……..... day of .....19 .....

5. .....
(Here insert any particulars required by sub-rule (2) of Order V, rule 2).

DOMICILE OR RESIDENCE

6. The petitioner is, within the meaning of the Act, domiciled in Nigeria. The facts on which the court will be asked to find that the petitioner is so domiciled are as follows:-

…….....

COHABITATION

7. Particulars of the places at which and periods during which the petitioner and the respondent have cohabited are as follows:

.....

or

7. The petitioner and respondent have never cohabited.

8. The date on which and circumstances in which cohabitation between the petitioner and respondent ceased (or last ceased) are as follows:

.....

(leave out if the petitioner and respondent have never cohabited)

CHILDREN

9. There are no children to whom Order V, rule 5 applies.

or

9. Particulars relating to the children to whom Order V rule 8 applies are as follows:-

.....

PREVIOUS PROCEEDINGS

10. Since the marriage (or ceremony of marriage) there have not been any previous proceedings in a court between the petitioner and the respondent.

or

10. The following are particulars of previous proceedings between the petitioner and the respondent since the marriage (or ceremony of marriage) –

.....

11. Since the marriage (or ceremony of marriage) there have not been any proceedings, instituted otherwise than between the parties to the marriage, concerning the maintenance, custody, guardianship, welfare, advancement or education of a child of the marriage.

or

11. The following are particulars of proceedings that have been instituted since the marriage (or ceremony of marriage), otherwise than between the parties to the marriage, concerning the maintenance, custody, guardianship, welfare, advancement or education of a child of the marriage–

.....

FACTS

12. The facts relied on by the petitioner as constituting the ground (or each ground) specified above are as follows.

.....

CONDONATION CONNIVANCE AND COLLUSION

(*Leave out in the Case of a Petition for Nullity of Marriage*)

13. The petitioner has not condoned or connived at the ground (or any of the grounds) specified above, and is not guilty of collusion in presenting this petition.

or

13. The petitioner has not connived at the ground (or any of the grounds) specified above, and is not guilty of collusion in presenting this petition: the following facts are furnished in relation to condonation–

.....

PROPOSED ARRANGEMENTS FOR CHILDREN

(leave out if Order V, rule 14 does not apply)

14. .....

(*Here state the matters required by Order V, rule 14*)

MAINTENANCE AND SETTLEMENT OF PROPERTY

(*leave out if no order for maintenance or settlement of property is sought*)

15. .....

(*Here set out the particulars required by Order XIV, rule 4*)

EXERCISE OF COURT'S DISCRETION

(*Leave out if Order V, rule 13A does not apply*)

16. The Court will be asked to make a decree notwithstanding the facts and circumstances set out in the discretion statement filed herewith.

OTHER MATTERS

(*In the succeeding paragraphs set out any additional matters, including any matters required or permitted to be stated by virtue of Order V, rule 15 or 21 or Order XIV, rule 4*).

ORDERS SOUGHT

The petitioner seeks the following orders–

a) A decree of …….....on the ground of

.....

(*In the following sub-paragraphs set out each other order sought*)

b) This petition was settled by ……Legal practitioner for the petitioner.

(name of counsel)

Filed on the ……..... Day of …….....20....

by…… .....on behalf of the petitioner,

whose address for service is ……...

The above format is a general format or praecipe which a petitioner seeking any one of three out of the five matrimonial decrees under the Act must follow. This means that petitioners seeking decrees for dissolution of marriage or decrees for nullity of marriage or decrees for judicial separation must prepare their petitions in line with the above format. Note however, that though this particular format avails a petitioner in the above three circumstances, it does not follow that the contents of the format must be copied verbatim in each case. Every petitioner in the three instances cited above ought to modify the format, depending on the peculiar facts giving rise to the particular petition, in a meaningful manner. Similarly, no two petitions of the same nature can be exactly the same. Modifications must be made to reflect the particular facts of each case. For instance, if petitioner A had three children with his spouse before filing his petition in court and petitioner B has no child from his marriage to his spouse; their reactions to the subheading on children of the marriage will definitely be different.

In terms of the general contents of the format, the heading of the document which is the name and division of the High Court comes first, followed by the suit number and the parties. Just below the names of the parties is the title of the petition, e.g. Petition for the Dissolution of Marriage. The introduction of the parties follows immediately thereafter.

We shall now discuss the contents of the various subheads identifiable in a petition.

3.1.1 Introduction/Bio data of Parties

Sub – rules (1)(a) – (d) and (2) of Order V Rule 1 makes general provisions with regard to the introduction of the parties. As seen above, it requires that every petition shall state the full names addresses and occupations of each party to the proceedings including those of anyone who, though not a party to the proceedings, but someone with whom the respondent is alleged to have committed adultery, sodomy or rape. The information required for the introduction includes the following:

- Names of both parties;
- Addresses of parties;
- Occupations of parties;
- Maiden name or last known name of the wife immediately before the marriage;
- The name of any person or persons with whom the Respondent is alleged to have committed adultery, rape or sodomy.

In the event that the address of a party becomes unknown to the petitioner at the time of filing the petition, then the petitioner must state that the address is unknown to him and he is also required to state the last known address of the party, if any.

3.1.2 Marriage Details

The next set of information required for the petition is the details of the marriage. For this, Order V rule 1(4) makes provisions for particulars relating to the marriage in the following terms:

(a) The date and place of celebration of the marriage or purported marriage;
(b) The nature of the ceremony of marriage performed;
(c) The religious denomination according to the rites of which the marriage ceremony was performed;
(d) The original marital status of the parties before the marriage, e.g. single, divorced or widowed.

Where any of the parties had been previously married, these particulars of marriage must include the following:

- The date of the previous marriage or of each previous marriage as the case may be;
- The means by which the previous marriage or each previous marriage was dissolved; and
- If a previous marriage was dissolved by a court, the name of the court by which and the date on which the previous marriage was dissolved.

Notwithstanding the elaborate provisions above, a petitioner can supply only the information relevant to the facts of his own case.

3.1.3 Birth Records

The information on marriage is followed closely with the birth details of the parties. Order V, Rule 2 provides for the details required for this subhead. They include the dates and places of birth of the parties. According to sub-rule (2) of Order V, Rule 2 where a party to the marriage was not born in Nigeria, particulars of the date on which the party entered Nigeria or, if the party has re-entered Nigeria after having left Nigeria, the date of his/her first entry into Nigeria must be stated in the petition in addition to the date and place of his/her birth.

3.1.4 Domicile or Residence of Petitioner

After birth details of the parties, comes the domicile or residence of the petitioner. The petitioner must be domiciled in Nigeria before the court can validly exercise any form of jurisdiction in

favour of a petitioner who has presented a petition for a matrimonial cause. This is provided for under Order V, Rule 3 of the MCR. The petition must state firstly, that the petitioner is within the meaning of the Act domiciled or resident (as the case may be) in Nigeria; and secondly, provide a brief summary of the facts (but not the evidence by which the facts are to be proved) upon which the court would be asked to find that the petitioner is, within the meaning of the Act, domiciled or resident in Nigeria.

3.1.5 Cohabitation Record of Parties

For the purpose of paragraph (d) of sub-rule 3 of Order V, Rule 1, the particulars of the cohabitation of the parties that are required to be included in a petition are, (subject to sub-rules (2) and (3) of Order V, Rule 4, the particulars of:

(a) the places of residence at which the parties to the marriage have cohabited for substantial periods;
(b) of the periods during which the parties cohabited at those places: and
(c) of the date on which, and the circumstances in which cohabitation between the parties ceased or last ceased, as the case maybe.

Where the parties to the marriage have never cohabited or where they have not cohabited at a place of residence for a substantial period, the petitioner must declare such information in the petition. The petition must also include a statement about the circumstances under which they cohabited during the marriage.

3.1.6 Record of Children

The information required under this sub-head is contained in Order V, Rule 5 as follows:

(a) Any living children of the marriage below 21 years of age;
(b) Any child of the marriage who though has attained the age of twenty-one years, but for whom an order is sought under sections 70, 71 or 72 of the MCA;
(c) Any child of the parties to the marriage who has been adopted by other persons or is proposed to be adopted by other persons; and
(d) Any child of a party to the marriage who –
    (i) has at any time since the marriage, ordinarily been a member of the household of the husband and wife;
    (ii) has been adopted or proposed to be adopted by another person or other persons.

The particulars relating to any child to whom this rule applies that are to be stated in a petition are:

- in the case of a child referred to in paragraph (a) or (b) of sub-rule (1) the full name and date of birth of the child and the name of the persons with whom the child is residing; or

- in the case of a child referred to in paragraph (c) or (d) of that sub-rule:

  (i) the full name (if any) under which the parties, or either of them, registered the birth of the child;
  (ii) the date of birth of the child; and
  (iii) the date on or about which consent to the adoption of the child was given or the child was placed in the care of another person or persons with a view to his adoption.

If there are no children of the marriage within the context of the MCA, the petition must include a statement to that effect. And where the petitioner disputes the parentage of a child born to the wife since the solemnization of the marriage to which the petition relates, the petitioner must state so and the grounds on which the parentage of the child is disputed.

Finally, where a person who is deemed by virtue of section 69 of the MCA to be a child of the marriage to which the petition relates is alive at the date of the petition, the petition must show the circumstances under which the child is so deemed to be a child of the marriage.

3.1.7 Record of Previous Proceedings.

Order V, rule 6 requires that the particulars of any previous proceedings between the parties must be stated in a petition. These particulars must reflect:

(a) All court proceedings between the parties since the beginning of their marriage, whether such proceedings were in Nigeria or not.

(b) All proceedings concerning the maintenance, custody, guardianship, welfare, advancement or education of a child of that marriage that have been instituted, whether in Nigeria or elsewhere, by other parties.

Where no proceedings have been instituted in any of the circumstances stated above, the petition must include a statement to that effect. Where the petition includes particulars of proceedings that have been heard and determined by a court, the petition must state the particulars of the order made in the proceedings; the date on which the order was made; and court by which the order was made. The petition must also state whether or not the parties to the marriage have cohabited since the making of that order.

Where an order of a court, or an agreement making provision for the payment of maintenance in respect of a party to marriage or a child of the marriage is in force, the petition must state the amount of maintenance payable under the order or agreement.

3.1.8 Facts Relating to Ground for Divorce

The petitioner is required under Order V, Rule 12 of the MCR to state the facts relied on by the petitioner as constituting the ground for divorce. There is only one ground for divorce – that the marriage has irretrievably broken down (see 15 (1) MCA) but the grounds that may lead to that conclusion may include: cruelty, desertion for at least one year, adultery or any of the other facts listed in sections 15(2)(a) – (h) and 16(1) of the MCA.

3.1.9 Denial of Complicity in Ground for Divorce.

Under Order V, Rule 7, a petitioner who alleges facts constituting the ground on which his petition for divorce is based must state that he/she has not connived with the respondent in the conduct which makes up those facts. The statement must also contain a denial that he/she has condoned such conduct. If the petitioner has condoned such conduct, he/she must state all facts relevant to the question whether he/she has condoned that conduct constituting the ground; including any facts relevant to the question whether that ground has been revived, or not.

Finally, the petition must contain a statement that in bringing the proceedings, the petitioner – has not been guilty of colluding with the respondent with intent to cause a perversion of justice.

3.1.10 Arrangements for Children

Order V Rule 14 requires a petitioner to state the following with respect to any children of the marriage.

(a) The arrangements proposed by the petitioner concerning the welfare and/or the advancement and education of the children of the marriage, who would be less than 16 at the date of dissolution of the marriage.

(b) The category of children of the marriage provided for under section 71(3) of the MCA, i.e. children in respect of whom the petitioner seeks an order for them to be placed in the custody of a person other than a party to the marriage.

Where the petitioner chooses not to state such proposed arrangements for the children of the marriage, he/she must give the reasons for not stating the proposed arrangements.

3.2 Other Relevant Information

Apart from the information contained in all the sub-heads treated under items 3.1.1 – 3.1.10 above, the MCR further requires that certain other information be included in a petition, depending on the nature of that petition. Some of these matters are as follows:

3.2.1 Application for Ancillary Reliefs

By the provisions of Order V, Rule 8, a petitioner is required to state the reliefs he/she seeks in the petition. This is a settled principle of pleading in all litigations. Failure to state the reliefs sought may deprive the court of the jurisdiction it needs to hear and determine the case filed by the petitioner. The main relief usually sought in cases of divorce, is an order for a decree of dissolution of marriage between the parties. Apart from this principal relief, there may be other reliefs like an order for the custody of the children of the marriage, or an order for the maintenance of the petitioner and/or the children of the marriage.

Note that the reliefs sought by the petitioner depend on the peculiar circumstances of each case, since no two cases are exactly the same. Thus, a petitioner who claims ancillary reliefs under Order XIV, Rule 4 is required to supply the particulars of the orders or reliefs sought, and the facts upon which the court would be asked to make the order. Where the order sought is with respect to maintenance, the particulars required are:

(a) persons for whom maintenance is sought;
(b) the duration of the order sought for each person;
(c) an amount either as a lump sum, weekly, monthly, yearly or other periodic sums sought for each person;
(d) particulars of the property, income and financial commitments of the claimant; and the capability of the claimant to earn income;
(e) the property, income and financial commitment of the other party as are known to the claimant, and the party's capability to earn income;
(f) any existing financial arrangements between the parties;
(g) existing court orders relating to payment of maintenance by one party to the other; and
(h) ownership of the home in which claimant resides and the terms and conditions for such residence.

Where a claimant has no property or income, he/she must state so in the claim. He/she is also required to provide information on his/her means of knowledge of the other party's property or income, or potential income.

Finally, where a petitioner claims damages under section 31 of the MCA, the amount of damages sought must be included in the petition.

3.2.2 Application for Court's Exercise of Discretion

With respect to a petition for dissolution of marriage, Order V, Rule 13 provides that where a petitioner has committed adultery since the marriage but before filing his/her petition, the petitioner must state in the petition that the court shall be asked to make a decree irrespective of the facts and circumstances of the adultery set out in the petitioner's discretionary statement. In other words, the petitioner must specifically state in his/her petition that the court would be requested at some point in the proceedings, to exercise its discretion in making a decree in favour of the petitioner in spite of the petitioner's previous adulterous conduct.

3.2.3 Other Matters

The MCR makes provisions under Order V, Rules 15 & 21 and Order XIV Rule 4 for the supply of relevant information with respect to certain peculiar matters in a petition. These matters include:

(a) petition for dissolution of marriage where parties are already living apart for a minimum period of two years;

(b) petition for a decree of nullity on the ground that the marriage is voidable due to respondent's mental state, venereal disease of either party or the respondent's (wife) pregnancy for another man as contained in sections 5(1) (b) – (d) of MCA; and

(c) application for ancillary reliefs (dealt with above)

Where parties to a marriage are already living apart for more than two years before the filing of a petition for dissolution of marriage, Order V, Rule 15 provides that the petitioner may state the

arrangements made or proposed by the petitioner for the provision of maintenance or other benefits for the respondent.

In respect of a petition for nullity of marriage on any of the grounds specified in sections 5(1) (b) – (d) of the MCA, Order V, Rule 21 provides that the petitioner must state the following in the petition.

(i) The date on which the petitioner discovered the existence of the facts, which constitute the ground of petition.
(ii) The date on which marital intercourse last took place with the consent of the petitioner.
(iii) Any other relevant fact.

3.2.4 Particulars of Orders Sought

Where a petitioner institutes proceedings with respect to the maintenance of the petitioner, settlement of property, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, the petition must contain particulars of the orders sought by him/her and the facts relating to the proceedings, required by Order XIV Rule 4 of the MCR. (see details in the MCR, 1983)

3.2.5 Date and Signature

Under Order V, Rule 9, every petition must be signed and dated by either the petitioner personally (if he is not represented by a legal practitioner) or by his/her legal practitioner if he/she is represented by one. Such a practitioner must write his name on the petition if it is settled by him. The relevant date to be written on the petition is the date on which it is filed. The address of service of all court processes on the petitioner must be included at the end of the petitions.

In summary, it has been sufficiently stated that a petitioner need not supply answers to all the sub-heads contained in form 6 in the first schedule to the MCR. This is so especially where the particulars required under the relevant subhead is neither known to the petitioner nor relevant to him/her at the time of filing the petition. Furthermore, due to the peculiar circumstances of

individual cases, certain conditions may be inapplicable. For instance where there is no child or children of the marriage, the petitioner need not state that the marriage was blessed with a child or children. Thus, there would also be no need to furnish any particulars relating to the upkeep and maintenance of the children of the marriage. Again, where there have never been any previous proceedings in any court between the petitioner and the respondent prior to the filing of the petition, there would be no particulars to supply in that regard. The correct thing to state then, is that there have never been any previous proceedings between the parties.

3.3 Samples of Petitions

Having considered the various particulars required by the MCR to be stated in a petition for dissolution of marriage, a sample of a petition for the dissolution of marriage is set out below as figure 2 to illustrate the complete document after drafting. Complete document as used here means the petition for the dissolution itself and not the supporting documents. Note that every petition must have the necessary supporting documents attached to it before filing. These important supporting documents without which the petition itself is not complete are five in number and they are as follows:-

- Notice of petition for decree of dissolution (Form 8 or 8^{A}).
- Verifying affidavit pursuant to Order V, Rule 10.
- Certificate relating to reconciliation (Form 3 or 3^{A})
- Acknowledgement of service (Form 11)
- Copy of marriage certificate or certified true copy of the certificate.

Figures 3 – 6 below are full samples of the relevant supporting documents stated above except a sample of a marriage certificate.

Figure 2: Sample of Petition for a Decree of Dissolution of Marriage (Form 6, Pursuant to Order V, Rules 1 - 17)

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/15M/ 2010

BETWEEN

MRS. IBIDUN ANIMASHAUN -- Petitioner/Applicant

AND

MR. KUKU ANIMASHAUN -- Respondent

To the above named High Court

The petitioner, whose address is No. 33 Ago Road, Ijeshatedo, Lagos and whose occupation is teaching, petitions the court for a decree of dissolution of marriage against the respondent, whose address is No. 123 Crowder Road, Ijeshatedo, Surelere, Lagos and whose occupation is public service on the grounds of adultery and intolerability, respondent's unbearable conduct and desertion, all of which have led to the irretrievable breakdown of the marriage.

MARRIAGE

1. The petitioner, then a Spinster was lawfully married to the respondent, then a Widower, at Shomolu Marriage Registry on the 15th day of March, 2005 according to Christian rites.

2. The surname of the petitioner immediately before marriage was Adekunle

3. The Respondent had been previously married to one Kikelomo Ojo on the 22nd dayof November 1998 under customary law. The said marriage was dissolved by Kikelomo's untimely death on the 14th day of February 2003.

BIRTH OF PETITIONER AND RESPONDENT

4. The petitioner was born at Ilesha in Osun State on the 9th day of July 1967 and the respondent was born at Oron in Cross Rivers State on the 1st day of July 1956.

DOMICILE OR RESIDENCE

5. The petitioner is, within the meaning of the Act, domiciled in Nigeria. The facts on which the court will be asked to find that the petitioner is so domiciled are as follows:-

a) Since the petitioner's birth, she has lived in different towns and cities in Nigeria but never lived outside Nigeria.

b) Petitioner currently lives in Ijeshatedo in Lagos State and has resided in the address given above for an unbroken period of two years up until the date of filing this petition.

COHABITATION

6. Particulars of the places at which and periods during which the petitioner and the respondent have cohabited are as follows:

a) No. 3, Laloko Street, Ikotun Lagos from March 2005 to July 2005
b) No. 79, Kogbe Street, Bariga, Lagos from July 2005 to August 2006
c) No. 123 Crowder Road, Ijeshatedo, Surelere, Lagos from August 2006 to October 2007.

7. The date on which and circumstances in which cohabitation between the petitioner and respondent ceased is as follows:

Following constant battery and threats to life meted out by the respondent to the petitioner, the petitioner was forced to move out of the matrimonial home at No. 123 Crowder Road, Ijeshatedo, Surelere, Lagos on 17th October 2007.

CHILDREN

8. Particulars relating to the children to whom Order V rule 8 applies are as follows:-

a) Kofoworola Animashaun born 15th December 2005
b) Victor Animashaun born 11th February 2007

PREVIOUS PROCEEDINGS

9. Since the marriage, there have not been any previous proceedings in a court between the petitioner and the respondent.

10. Since the marriage there have not been any proceedings, instituted otherwise than between the parties to the marriage, concerning the maintenance, custody, guardianship, welfare, advancement or education of a child of the marriage.

FACTS

11. The facts relied on by the petitioner as constituting the ground (or each ground) specified above are as follows.

a) That since the marriage, the respondent has engaged in acts of adultery with several women including two of the house helps in the service of the family.
b) That the respondent has consistently beaten up the petitioner whenever she complained about his adulterous associations.
c) That respondent habitually abuses the petitioner psychologically by comparing her with his deceased wife.
d) That respondent is habitually drunk and comes home most evenings in a state of stupor, vomiting all over the living room and screaming lurid songs at the top of his voice in the neighbourhood to the embarrassment of the rest of the family.
e) Due to constant violent beatings, some of which have resulted in bodily injuries, the petitioner had regularly been admitted into hospital to treat the injuries sustained.
f) In the last six months before the petitioner was forced to move out of the matrimonial home, respondent had threatened to kill her, and on two occasions, respondent was physically restrained from attacking petitioner with a sharp cutlass.
g) In the last three years of the marriage, respondent has refused to provide necessaries for the petitioner and the two children of the marriage.
h) Since the respondent deserted the petitioner, he has not bothered to look for his family, and has consistently rebuffed all attempts made by friends and members of both families to reconcile the parties.

CONDONATION CONNIVANCE AND COLLUSION

12. The petitioner has not condoned or connived at the ground (or any of the grounds) specified above, and is not guilty of collusion in presenting this petition.

PROPOSED ARRANGEMENTS FOR CHILDREN

13. The petitioner proposes to ask the court for custody of the two children of the marriage, since the respondent by his conduct, is not a fit and proper person to care for the children. Petitioner proposes to continue to house and clothe the children and provide for their medical and other needs. Petitioner also proposes to keep the children in the private school they presently attend for their educational training. Petitioner also proposes to give the children the best available religious and moral guidance that the children require until they attain majority.

MAINTENANCE AND SETTLEMENT OF PROPERTY

14. The petitioner seeks an order of maintenance for:
    a) Petitioner in the sum of ₦20,000 (twenty thousand Naira) monthly, until the petitioner remarries; and
    b) The two children of the marriage in the sum of ₦15, 000 (fifteen thousand Naira) each every month until the children attain the age of 25 years or after their graduation from the university whichever is earlier.
    c) Payment of school fees in the sum of ₦3,000.000 (three million Naira) for the two children of the marriage to be paid at a yearly instalment of ₦200,000 (two hundred thousand Naira).

15. The petitioner states as follows:

a) That petitioner presently owns no real property and earns ₦30,000 (thirty thousand Naira) monthly as a school teacher; whereas her monthly financial commitments is an average of ₦40,000 (forty thousand Naira).
b) That following periodic promotions, petitioner has the potential to earn ₦60,000 (sixty thousand Naira).
c) That respondent presently owns the matrimonial home in which he resides and two cars; he earns ₦180,000 (one hundred and eighty thousand Naira) monthly as a public servant on salary grade level 14; whereas his monthly financial commitments is an average of ₦80,000 (eighty thousand Naira).
d) That respondent has the potential to earn ₦360,000 (three hundred and eighty thousand Naira) monthly following periodic promotions until his retirement in 2016.
e) There is presently no arrangement in operation between the petitioner and the respondent.
f) That petitioner is presently a tenant in the house she resides in and paying a monthly rent of ₦15, 000 (fifteen thousand Naira) for a two-bedroom flat.

ORDERS SOUGHT

16. The petitioner seeks the following orders–

(i) A decree of dissolution of marriage on the ground of irretrievable breakdown of marriage based of the facts of adultery and intolerability, respondent's unbearable conduct and desertion
(ii) An order of maintenance for the petitioner and the two children of the marriage in the terms claimed in paragraph 14 of this petition.

17. This petition was settled by Ike Uka Uzo Esq., legal practitioner for the petitioner.

Filed on the 18th day of May 2010 by Ike Uka Uzo Esq., on behalf of the petitioner, whose address for service is c/o Ike Uka Uzo Esq., Victory Chambers, 113, Gadom Road, Surulere, Lagos.

Figure 3: Notice of Petition for a Decree of Dissolution of Marriage (Form 8, Pursuant to Order V, Rule 28)

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/15M/ 2010

BETWEEN

MRS. IBIDUN ANIMASHAUN -- Petitioner/Applicant

AND

MR. KUKU ANIMASHAUN -- Respondent

To Mr. Kuku Animashaun of No. 123 Crowder Road, Ijeshatedo, Surelere, Lagos

TAKE NOTICE that a petition has been presented to the above named court by Mrs. Ibidun Animashaun of No. 33 Ago Road, Ijeshatedo, Lagos, instituting proceeding for a decree of dissolution of marriage.

2. A sealed copy of the petition is delivered to you with this notice.

3. If you intend to consult a solicitor in connection with the proceedings, you should take to him all the documents delivered to you.

4. The form of acknowledgement of service delivered to you with this notice should be completed and signed by you and either you or your legal practitioner should immediately return it to the petitioner's legal practitioner. A stamped and addressed envelope is delivered to you for this purpose.

5. If you desire:
   (a) to deny any facts alleged in the petitions;
   (b) to allege any additional facts for the consideration of the court;
   (c) to submit to the court that it should dismiss any of the proceedings instituted by the petitioner; or
   (d) to make any other submissions to the court,

you should file an answer to the petition.

6. If you wish to institute proceeding for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, you may do so in an answer to the petition filed by you. If you institute proceedings for the dissolution of marriage on the ground that the petitioner as committed adultery, you may also by the answer, institute proceedings for damages in respect of the adultery.

7. If you wish to institute proceedings for the purpose of seeking an order with respect to maintenance for yourself, a settlement, the custody or guardianship of infant children of the marriage, or the maintenance, welfare, advancement or education of children of the marriage you should do so by filing an answer to the petition. If you fail to do so, you will have to obtain the leave of the court to institute the proceedings.

8. If you do not wish to file an answer but wish to receive a copy of each document filed in connection with the proceedings, you should file a notice of address for service. However, unless you file an answer, you will not without the leave of the court, be entitled to furnish evidence to the court or address the court, at the trial of the proceedings and the court, may hear and determine the proceedings in your absence.

9. Any answer or notice of address for service filed by you must be filed within 30 days after you receive this notice or within such extended period as the petitioner or the Court allows and service of a copy of the answer or notice must be effected in accordance with the Matrimonial Causes Rules.

Dated this ……. day of ……2010.

……..
Registrar

Note: The difference between form 8 and form 8^{A} is contained in paragraph 4 of the notice. While form 8 is used by a petitioner represented by a legal practitioner, form 8^{A} is used by a petitioner who is not represented by a legal practitioner. Thus, paragraph 4 of form 8^{A} reads as follows:

"If you desire to defend the proceedings or to commence proceedings against the petitioner in relation to your marriage to the petitioner, you must file in the court an answer that states the matters required by the Matrimonial Causes Rules and serve a copy on the petitioner. It may also be necessary for you to file other documents and to give evidence yourself at the hearing and arrange for other persons to give evidence to prove the matters relied on by you. Any answer filed by you must be filed within 30 days after you receive this notice or within such extended period as the petitioner or the Court allows."

Figure 4: Sample of Verifying Affidavit

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/15M/ 2010

BETWEEN

MRS. IBIDUN ANIMASHAUN -- Petitioner/Applicant

AND

MR. KUKU ANIMASHAUN -- Respondent

VERIFYING AFFIDAVIT

I, Mrs. Ibidun Animashaun, Nigeria citizen, female, Christian, Teacher residing No. 33 Ago Road, Ijeshatedo, Lagos State make oath and state as follows:

1. That I am the petitioner in this suit.
2. That I verify the facts stated in my petition by virtue of my personal knowledge of same.
3. That the statements set forth in paragraph 1 to 10 of my petition are true and correct to the best of my knowledge, information and belief.

…….
DECLARANT

Sworn to at the High Court Registry Ikeja this
…… day of ……. 2010

BEFORE ME

COMMISSIONER FOR OATHS.

Figure 5: Sample of Certificate Relating to Reconciliation (Form 3)

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/15M/ 2010

BETWEEN

MRS. IBIDUN ANIMASHAUN -- Petitioner/Applicant

AND

MR. KUKU ANIMASHAUN -- Respondent

CERTIFICATE RELATING TO RECONCILIATION

I, IKE UKA UZO Esq., certify that I am the solicitor representing the petitioner and that I have brought to the attention of the petitioner, the provisions of the Matrimonial Causes Act relating to reconciliation of the parties to a marriage and the approved marriage guidance organizations reasonably available to assist in effecting a reconciliation between the petitioner and the respondent and the possibility of a reconciliation between the petitioner and the respondent being effected either with or without the assistance of such an organization.

Dated this ……. day of …… 2006

……
Ike Uka Uzo Esq.
Solicitor to the Petitioner

Note: A similar sample can be found in form 3^A in the MCR, except that the legal practitioner in Form 3^A merely attests to the fact that some other legal practitioner in the same jurisdiction as the practitioner has advised the petitioner about the rules of reconciliation; the petitioner being outside his own immediate jurisdiction.

Figure 6: Sample of Acknowledgement of Service (Form 11)

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT IKEJA

SUIT NO. L/I/15M/ 2010

BETWEEN

MRS. IBIDUN ANIMASHAUN -- Petitioner/Applicant

AND

MR. KUKU ANIMASHAUN -- Respondent

I, Mr Kuku Animashaun acknowledge that on the ……day of …….....2000 at 12.00 noon, I received –

(a) a sealed copy of the petition in these proceedings; and

(b) a notice of petition addressed to me.

I also acknowledge that I am the person referred to in the sealed copy of the petition as the Respondent and that I am the person to whom the notice of petition is addressed.

Dated this…..... day of …….....2010.

……
Signature

4.0 Conclusion

A party to a marriage who desires to petition the court for a decree of dissolution or nullity of marriage or judicial separation may do so provided that his/her marriage is not less than two years from the date of the celebration of the marriage. Even where the marriage is less than two

years old, he/she may petition the court provided that the leave of court is first had and obtained in respect of decrees of dissolution of marriage or judicial separation only.

There are several court processes required for this procedure. These processes have been described above and samples of same given. Where necessary, attention has been drawn to the peculiar features of the processes and when and each comes into use in the course of prosecuting a divorce petition. Only processes involved in the filing of the petition by a petitioner were dealt with in this unit; whereas the processes involved on the side of the respondent were not discussed at all. References were made to the relevant rules of the MCR and the MCA.

5.0 Summary

In this unit, we learnt the basic difference between an application for leave of court to file a petition and the filing of the petition itself. While an application for leave is required for petitions for decrees of dissolution of marriage or judicial separation in respect of marriages that are less than two years old, in all other cases, the main petition may be filed directly using the relevant court processes.

The major emphasis in this unit has been the procedure and court processes involved in the filing of a petition for the dissolution of marriage. The contents of the processes were discussed in detail and samples of these processes were provided for illustration and better understanding.

6.0 Tutor Marked Assignment

Describe the procedure and court processes involved in the filing of a petition for the dissolution of marriage.

7.0 Suggested Further Readings/ References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (……...: Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages .....

5) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages .....

6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) .....

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages 192-228

Statutes

3. **Matrimonial Causes Act** Cap. M7 LFN, 2004, Sections 30 and 40

4. **Matrimonial Causes Rules** Cap. M7 LFN, 2004, Order V, and Order XIV Rule 4.

MODULE THREE

Unit 1: Validity of Statutory Marriage

1.0 Introduction

It has been noted in previous units that Nigeria practices a plural system of marriage because of her diverse ethno-religious and cultural make-up. Under the various relevant laws in Nigeria, three forms of marriages are recognised, viz; statutory marriage (sometimes referred to as "court" or "registry" marriage) and customary law marriage made up of ethnic or indigenous customary law marriage, and Islamic law marriage. Each of these systems of marriage has its own form, incidents and legal effects. The validity of marriages contracted under any of these systems of marriage naturally then depends on whether or not such marriages have been contracted according to the legal requirements for doing so under the various systems of law and the ceremonial rites for the conferment of the status of marriage on the parties to such marriages.

This unit deals with the form and incidents of statutory marriage in Nigeria. This necessarily includes: the choice of law that governs statutory marriage; the validity of statutory marriage – i.e. formal and essential validity; the preliminaries to marriage; effect of non-compliance with rules of formality; legal effects of statutory marriage etc.

2.0 Objectives

The main objectives of this unit are to help students to learn the following: -

(i) The nature of a statutory marriage
(ii) The capacity of parties to contract a valid statutory marriage

(iii) The formal legal requirements for contracting a valid statutory marriage
(iv) Effects of non-compliance with the rules of formality
(v) The legal effects of a valid statutory marriage

3.0 Main Content

Statutory marriage in Nigeria is essentially a monogamous union arising out of contract between two consenting adults of the opposite gender. And like in other jurisdictions of the world, this statutory marriage contract comes with rights and obligations that are set and regulated by the state. Like in all contracts, the marriage contract must have the mutual consent of competent and eligible parties who must also comply with the elaborate procedural formalities set by the state to validate the contract. In addition, the parties to the marriage must possess the requisite legal capacity to enter into a statutory marriage contract; otherwise such a contract will be void. The foregoing and other relevant issues are discussed below.

3.1 Regulatory Laws for Statutory Marriage

The contract to marry under statute is a contract that it involves three parties – the man, the woman and the State. While there is a mutual exchange of vows between the principal parties, the State prescribes certain rights, duties, privileges, obligations, benefits and restrictions to accompany the transaction. In Nigeria, statutory marriage and all the incidents that flow from it are regulated by the following laws:

(1) Received English Law

This is made up of the Common Law, doctrines of Equity and statutes of general application. The Common Law and Equity in this regard deal with issues relating to the rights and benefits accruing to spouses of a monogamous marriage; e.g. a husband's right to exercise power and control over his wife and the wife's right to pledge her husband's credit for necessaries. Statutes of general application are pre 1st January 1900 English laws that are applicable in Nigeria by virtue of having been a British colony. An example of a Statute of general application that affects statutory marriage, is the Married Women's Property Act, 1882 which significantly altered the Common Law rules that curtailed a married woman's right to own property and to contract independently from her husband.

(2) Nigerian Statutory Laws

Nigerian statutory laws in this context are laws made in Nigeria specifically to address statutory marriage and the benefits and obligations flowing from it. These include: the

(i) Marriage Act, cap M6, LFN 2004 which regulates the mode of contracting a valid marriage under the Act
(ii) The Matrimonial Causes Act and its subsidiary Matrimonial Causes Rules, cap M7 LFN, 2004 which deals with issues of capacity to enter into a valid marriage under the Act, matrimonial causes like judicial separation, restitution of conjugal rights, dissolution of marriage and other ancillary reliefs like maintenance, custody of children etc.
(iii) The Criminal Code Act, cap C38 LFN 2004 and Criminal Procedure Act cap C42 which deal with special privileges that the husband and wife of a statutory marriage enjoy in criminal proceedings.
(iv) Evidence Act, cap E14, LFN 2004, which also confers special privileges on the husband and wife of a statutory marriage in matters of competency and compellability as witnesses in court proceeding
(v) The Constitution of the Federal Republic of Nigeria, 1999 cap C23 LFN 2004 which deals with the fundamental human rights of Nigerian citizens that includes the right to family life.
(vi) Conflict of laws (Rules of International Law) on which the validity in Nigeria of monogamous marriages contracted in foreign countries are determined.

The above are the major laws that regulate issues of statutory marriage in Nigeria, and as can be seen in due course, the role each of them plays in the marriage.

3.2 Formal and Essential Validity of Statutory Marriage

The basic rule of English law from which Nigeria borrowed is that a marriage can be created between any two people who have the necessary legal capacity, and comply with the stipulated formal requirements for the marriage. A statutory marriage is said to be valid when the parties to it possess the requisite capacity to contract the marriage and they comply with all relevant rules of procedure necessary for the acquisition of the legal status of marriage. In other words, a marriage must fulfil both essential and formal requirements before it can be valid. These requirements are treated hereunder.

3.2.1 Essential Validity

The essential validity of statutory marriage refers to the legal capacity of the parties to it to contract the marriage. And capacity is generally governed by the law of the country in which the parties are domiciled (resident) at the time of marriage i.e. the *lex domicilli*. Therefore in Nigeria, the principal laws which govern capacity are the Marriage Act, 1914 and the Matrimonial Causes Act 1970 (hereafter “the MCA”). Thus, a marriage under the Act is void if a party to the marriage

does not meet the standards set by any of the following essential requirements. These requirements make up the capacity a party should possess in order to qualify for marriage.

Section 3(1) of the Matrimonial Causes Act, 1970 provides:

> Subject to the provisions of this section, a marriage that takes place after the commencement of this Act is void in any of the following cases but not otherwise, that is to say, where –
> (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
> (b) the parties are within the prohibited degrees of consanguinity or, subject to section 4 of this Act, of affinity;
> (c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of the place with respect to the form of solemnization of marriages;
> (d) the consent of either of the parties is not a real consent because:-
> (i) it was obtained by duress or fraud; or
> (ii) that party is mistaken as to the identity of the other party, or as to the nature of the marriage contract;
> (iii) either of the parties is not of marriageable age.

From the foregoing, it is clear that parties to a statutory marriage, as at the date of the marriage, must possess the following:-

- They must have a <u>single</u> marital status
- They not be within the prohibited degrees of relationships by blood (consanguinity) or marriage (affinity)
- They must comply with the formal rules of solemnising the marriage
- They must be of marriageable age.

1. Single Status

Single status simply means not being married to anybody. Section 3(1)(a) of the MCA provides that a marriage is void where either of the parties, at the time of the celebration of such marriage, is already married under statutory or customary law to another person. Violation of this rule is a criminal offence that renders the offending party liable to imprisonment for seven or five years under section 370 of the Criminal Code (see the case of ***R v. Princewill*** **[1963] NNLR 54)** or sections 35 and 48 of the Marriage Act respectively.

2. Prohibited Degrees of Consanguinity and Affinity

Consanguinity and affinity refers to relationship by blood and marriage respectively. Under section 3(1)(b) of the MCA, parties to a marriage under the Act must not be related – to a certain degree – either by blood or by marriage; otherwise the marriage is void. In the case of relationship by blood, it is immaterial that the relationship is of the whole blood or half blood, or whether it is traced through, or to any person of illegitimate birth. In other words, the

prohibited degrees of consanguinity extend to half brothers and sisters who naturally share only one parent – the father or mother. By extension, the respective parents and the siblings of parents to the parties, as well as their own nephews and nieces are within the prohibited degrees of consanguinity in the absence of any provision or clarification to the contrary. Again, the marriage laws are silent on the position of adopted children within the prohibited degrees. It is humbly submitted that since adopted children are the legal children of the adoptive parents, they are also within the prohibited degrees of consanguinity. Note however that Nigerian family laws place no restrictions on marriage as between cousins of whatever degree.

The First Schedule of the MCA lists the persons within the prohibited degrees of consanguinity to include:

(i) Ancestress;
(ii) Descendant;
(iii) Sister or brother;
(iv) Father's sister or brother;
(v) Mother's sister or brother;
(vi) Brother's daughter or son;
(vii) Sister's daughter or son.

With respect to marriage between affines i.e. relatives by marriage, the same first schedule to the MCA provides that the categories of persons in the table below fall within the prohibited degrees of affinity. For the man/woman, he/she cannot marry respectively his/her:

S/N	HUSBAND	WIFE	REMARKS
(i)	Wife's mother	Husband's father	i.e. mother or father-in-law
(ii)	Wife's grandmother	Husband's grandfather	i.e. grandmother or father-in-law
(iii)	Wife's daughter	Husband's son	i.e. step-daughter or step-son
(iv)	Wife's son's daughter	Husband's son's son	i.e. granddaughter or grandson
(v)	Wife's daughter's daughter	Husband's daughter's son	i.e. granddaughter or grandson
(vi)	Father's wife	Mother's husband	i.e. step-mother or step-father
(vii)	Grandfather's wife	Grandmother's husband	i.e. spouses of grandparents
(viii)	Son's wife	Daughter's husband	i.e. daughter or son-law
(ix)	Son's son's wife	Son's daughter's husband	i.e. granddaughter or son-law
(x)	Daughter's son's wife	Daughter's daughter's husband	i.e. granddaughter or son-law

There are exceptions to the rule against marriage between affines. Section 4(1) of the MCA provides that where two persons who are within the prohibited degrees of affinity wish to marry each other, they may apply in writing, to a judge of the high court of the relevant state for permission to do so. The judge can only grant permission to marry if he is satisfied that

"the circumstances of the particular case are so exceptional as to justify the granting of the permission sought".

3. Consent to Marry

Section 3(1)(d) of the MCA provides that the parties to a marriage must give their "real consent" to the celebration of that marriage. The consent so given is not real if: it was obtained by fraud; or the consenting party was mistaken either as to the identity of the other party, or as to the nature of the marriage contract; or that the consenting party was mentally incapable of understanding the nature of the marriage contract. In the unreported case of ***Aiyegbusi v. Aiyegbusi***, the court voided the statutory marriage between the parties when it found as a fact that the petitioner entered into the marriage under duress, having been under the threat of a curse from her father.

Apart from the consent of both parties to the marriage, written consent from third parties such as parents or guardians is required where either party to the intended marriage is under the age of twenty one years, unless he or she is a widower or widow respectively. Section 18 of the Marriage Act specifically requires that the fathers (or the mothers, where the father is either of unsound mind, outside the country or dead) or guardians (where no parents are available) of under-aged parties must issue a written consent to the proposed marriage. Failure to obtain the requisite parental consent attracts a penalty of two years imprisonment for anyone complicit in the offence by virtue of section 48 of the Marriage Act.

4. Marriageable Age

Section 3 (1)(e) of the MCA provides that a marriage will be void if either of the parties is not of marriageable age. The phrase "marriageable age" is however not defined in any statute. The closest indicator of marriageable age therefore can be deduced from section 21 of the fairly recent Child Rights Act, 2003 which prohibits the giving out in marriage of anyone below the age of 18 years. This age is mid-way between the age of 21 fixed for marriage without parental consent by the MCA and the ages of 18 for boys and 16 for girls fixed under the English law that was in use in Nigeria until the enactment of the MCA.

3.2.2 Formal Validity

Section 3(1)(c) of the MCA provides that a statutory marriage is not valid, if the parties to it fail to comply with the requirements of the law concerning the form of solemnization of such marriage. Usually, the solemnization formalities which must be observed in order to create a valid

statutory marriage are those of the law of the country where the marriage is celebrated i.e. the *lex loci celebrationis*. Here in Nigeria, the Marriage Act lays down the procedural steps that must be undertaken by intending couples to a statutory marriage. For the sake of convenience, these procedures are divided into two sub-heads – preliminary steps and the marriage ceremony itself.

(A) Preliminary Procedural Requirements for Statutory Marriage

The preliminary procedural steps to the actual celebration of the marriage are stated in sections 7 to 13 of the Marriage Act. They are as follows:

(1) Notice of Marriage

Under section 7 of the marriage Act, notice of the proposed marriage must be given to the general public through the office of the Registrar of Marriages in the local government area in which the marriage is intended to take place. This is done by either of the parties to the marriage who obtains the notice form free of charge. He/she fills, signs and gives it to the Registrar of Marriage. The notice must contain the names, status, occupation/profession, ages and addresses of the parties in that order while the last column is reserved for stating whether consent has been obtained where necessary and by whom same was given. Where the party giving the notice is unable to write or is not sufficiently acquainted with the English language, he may place a mark or cross thereto in the presence of same literate person who must attest same (section 8). The rationale for the notice is to give any affected member of the public to raise an objection to the marriage on legally-acceptable grounds.

On receipt of the notice, the Registrar enters it into the marriage notice book – a public document that may be inspected during office hours at no cost. It is then published by affixing it on the outer door of the Registrar's office for a period of three months or after he grants his certificate (section 10). After 21 days but before the expiration of three months from the date of the notice, the Registrar may, after the payment of the prescribed fees, issue his certificate in the prescribed form (form C), provided no objection to the marriage was filed during the 21 days and he is satisfied by the depositions of the applicant in an affidavit that:

- at least one of the parties has been resident within the LGA for at least 15days preceding the granting of the certificate;
- each party is at least 21 years old or if less, the requisite written consent has been obtained and annexed to the affidavit or in the absence of that the affected, party is a widow or widower;
- there is no impediment to the marriage on the ground of consanguinity, affinity or any other lawful impediment; and

- neither party is married under customary law to any other person other than the other party to the proposed marriage (see section 11 for other details)

Note that in the computation of the three-month interval between the notice and the issuance of the registrar's certificate, the period between the entering and removal of a caveat if any (dealt with below) is excluded under section 16 of the Act.

The Registrar's Certificate (form C) operates as the permit for the celebration of the marriage at any one of three venues, i.e. either the Registrar's office, a licensed place of worship like a church or other special venue named in a special licence. The certificate is an indication that no objection to the proposed marriage has been received. Under the provisions of section 12 of the Marriage Act, the proposed marriage for which the Registrar's Certificate is issued must take place within three months from the date of the notice; otherwise a fresh notice must be obtained by the parties before they can lawfully marry.

(2) Special Licence

Under section 13 of the Marriage Act, a special licence in Form D may be issued in place of a notice of marriage. It is issued by the Minister of Internal Affairs or any public servant at federal or state level, to whom such power has been delegated by the Minister.

For the licence to be granted there must be proof by affidavit evidence that there is no lawful impediment to the proposed marriage, and that the necessary consents, if any, has been obtained. The licence operates as a permit authorizing the celebration of a marriage between the parties named in the licence, by a marriage registrar or a recognized minister of some religious denomination or body, at a venue indicated in the licence, within a specified time frame.

(3) Caveat

A Caveat is an objection raised by any interested or affected person against a proposed statutory marriage. According to section14(1) of the Marriage Act, a person whose consent is required or who knows of any just cause why a proposed marriage should not take place, may enter a caveat against the issuance of the registrar's certificate. This he/she can do by writing the word, "forbidden" opposite to the entry of notice in the marriage notice book, followed by his/her name, address and the grounds of objection. Any caveat entered against a proposal marriage acts as a bar to the issuance of a registrar's certificate by the registrar until such a caveat is removed.

When a caveat is entered in respect of a proposed marriage, the registrar is required under section 15 of the Act to refer the matter to a judge of the High Court of the relevant state, who then summons the parties to the intended marriage and the objector to appear before him in court, in order to listen to the objector's reasons why a registrar's certificate should not be issued. If the Judge is satisfied that a certificate ought to be issued, he shall remove the caveat by cancelling the "Forbidden" in ink and writing directly underneath, the words "Cancelled by order of the High Court" and sign his name (see section 16). He may then award compensation and costs to the injured party if the caveat was entered on insufficient grounds (section 17). Thereafter, the registrar is at liberty to issue his certificate to enable the marriage to proceed as if the caveat had not been entered.

The Marriage Act does not expressly provide for situations where sufficiently valid grounds are offered by the objector against the issuance of a registrar's certificate. On a proper construction of section 16 of the Act, it is implied that where the court is convinced that a certificate ought not to be issued based on the objector's reasons, it shall then confirm the caveat by its own order; thereby effectively debarring the intending couple from marrying until the stated impediments are removed.

There are several grounds which may be sufficient in law to enable the court cancel an intended marriage. Any or a combination of the grounds listed under section 3(1) of the MC, may be relied upon to enter a successful caveat against a proposed marriage. However, the ground most objectors rely on in Nigeria is the fact of an existing customary law marriage involving the objector or a third party and one of the parties to the proposed marriage. In ***Re Grace Spencer (Caveatrix)*** **[1964] 2 All NLR 171**, the caveatrix entered a caveat against the proposed marriage between Samuel Amonia Spencer and X on the ground that there was a subsisting customary law marriage between her and Spencer. She and Spencer had been having sexual intercourse since 1956 and became husband and wife in 1960, when Spencer paid the sum of £20 to her brother on behalf of her family. The sum paid was in consideration of the customary union between her and Spencer. The Respondent admitted the facts as stated but said that he had been tricked into cohabitation with the caveatrix who was 10 years his senior. The court held that the parties were lawfully married under Bini native law and custom, and since both had lived together before the payment of the dowry of £20, that

would only be a symbolic and not physical act of marriage. Therefore, the court held that the caveat would remain until the impediment of the earlier customary law marriage was removed.

But in ***Ogunremi v. Ogunremi & Anor*** [1972] 2 UILR 466, the caveatrix alleged that she was lawfully married to the 1st respondent under Ado-Ekiti native law and custom. She stated that having been introduced to her family in January 1967, 1st respondent subsequently paid her dowry made up of £12: 10d, 25, kolanuts and 12 bottles of beer. There was however no evidence of any formal wedding ceremony, but caveatrix allegedly had two children for the 1st respondent who denied ever being introduced to the caveatrix's family and paying any dowry. The court, in its judgement held that though a party to a subsisting customary law marriage is precluded from marrying another person under the Act, the 1st respondent in this case could do so because the caveatrix failed to establish to the satisfaction of the court, the existence of any customary marriage between her and the 1st respondent.

(B) The Marriage Ceremony

The procedure adopted for the actual celebration of a statutory marriage depends on the venue of the celebration. Under sections 21, 27 and 29 of the Marriage Act, the venue of the celebration of the marriage may be in a licensed place of worship, the Registrar's Office or a special venue named in a Special Licence respectively. We shall now examine each of them.

(i) **Religious Places of Worship as Venue**

Having obtained the Registrar's certificate (Form C), parties to a proposed statutory marriage may lawfully be married in a formal ceremony at any licensed place of worship by a recognized minister of a church, denomination or body to which such place of worship belongs, according to the rites or usages of marriage observed in such place. This is provided for in section 21 of the Marriage Act, which also requires that the marriage be celebrated with open doors between the hours of 8.00 am and 6.00 pm, in the presence of two or more witnesses apart from the officiating minster.

Section 22 of the Act provides that the officiating minister must first collect the Registrar's certificate or special licence from the parties and he must not celebrate the marriage if he knows of any just cause or impediment to such marriage. Section 23 of the Act requires the officiating minister to ensure that he celebrates the marriage in a building duly licensed to do so, or in a place

designated in a special licence. In the unreported case of **Aiyegbusi v. Aiyegbusi**, the parties were married at the Ayeye Hall of Jehovah's Witnesses at Ibadan on August 28, 1971. In a suit for nullity, the petitioner alleged inter alia that the marriage was not celebrated in a licensed place of worship as required by sections 21 and 23 of the Marriage Act. The only Kingdom Hall of Jehovah's Witnesses licensed for the celebration of marriages at that time was the hall at Amunigun, half a mile from Ayeye where the marriage actually took place. The court held that this defect would have been sufficient to nullify the marriage but for the provision of S.33(2) of the Marriage Act which states that such a marriage can be voided on that ground if and only if all the parties concerned "knowingly and wilfully" acquiesced in its celebration. There was no evidence that either the parties or the officiating minister knew that the license for Amunigun Hall did not cover the Ayeye Hall of the Jehovah's witnesses.

Immediately after the solemnization of the marriage, sections 25 -26 of the Act requires the following to be done:-

- The officiating minister must fill up a marriage certificate in Form E (which contains the names and particulars of the parties and names of their witnesses) along with its duplicate.
- The said particulars must be entered in the counter-foil of the certificate
- The officiating minister, the parties and the witnesses must sign the certificate
- The officiating minister alone must sign the counterfoil
- The officiating minister must sever the certificate and its duplicate from the certificates book.
- The original certificate must be given to the parties and the duplicate forwarded to the Registrar of marriages in the relevant LGA for filing in his office, within 7 days from that date.

Note that a statutory marriage celebrated in a religious place of worship is not the same thing as what some persons erroneously refer to as "church marriage". A marriage celebrated in a church in accordance with the rites and usages of the church, but which does not follow the due process required by the Marriage Act is only valid in the eyes of the church and it cannot be said to be a marriage under the Act. At best, it is a marriage under customary law or under the custom of the church. The position of the law on this point was stated by Palmer, J., in the case of ***Obiekwe v. Obiekwe*** **[1963] ENLR 196 at 199** thus:

> "So far as the law of Nigeria is concerned, there is only one form of monogamous marriage, and that is marriage under the Ordinance [Act]. Legally, a marriage in a Church (or any denomination) is either a marriage under the Ordinance or it is nothing. In this case, if the parties had not been validly married under the Ordinance then either they are married under Native Law and Custom or they are not married at all. In either case

the ceremony in church would have made not a scrap of difference to their legal status.

(ii) **The Marriage Registry as Venue**

Every LGA headquarters/secretariat in Nigeria has a Marriage Registry located within it. Each registry has a Registrar of Marriage along with a complement of relevant staff. Each of these registries is a venue for statutory marriage usually performed by the Registrar of Marriage. The procedural steps for marriage in a registrar's office are provided for under sections 27 and 28 of the Marriage Act. After obtaining a registrar's certificate or a special licence, an intending couple may contract a marriage before a registrar in his office in the presence of at least two witnesses, while the doors of the office are open. This can be done between the hours of 10.00 am and 4.00 pm in accordance with the procedure prescribed under section 27 of the Act.

Before the exchange of vows in the Registrar's office, section 27 of the Act requires the Registrar of marriages to do following:

- Confirm from the parties that it is their desire to marry each other.
- Inform the parties that the marriage then being contracted in his office is perfectly legal without resorting to any other civil or religious ceremony
- Inform the parties that the marriage can be dissolved if necessary, only by a court of competent jurisdiction or death of either party.
- That any of the parties who contracts another marriage with a third party during the lifetime of the present spouse would be guilty of the offence of bigamy and liable to be punished accordingly.

The exchange of marriage vows in the presence of the witnesses present follows the above instructions. The Registrar then fills up the Marriage Certificate (Form E), its duplicate and counterfoil and signs both. He invites the parties and the witnesses to sign the certificate and its duplicate before he severs both from the counterfoil in the marriage certificates book. He then hands one certificate over to the married couple and files the other in his office.

(iii) **Marriage in Special Venues and Nigerian Foreign Missions**

Section 29 of the Marriage Act provides that a marriage may be solemnized in a venue other than a licensed place of worship or a registrar's office. If a special license indicates any special venue, the Registrar of Marriage in the LGA in which the marriage is intended to take place is obliged, upon the production of such license, to give the licence holder, a blank marriage certificate in duplicate. The celebrant of the marriage then fills up the certificates after observing all the formalities prescribed in the relevant mode of solemnization of the marriage chosen by the couple i.e. according to religious rites or civil ceremony.

In the same manner as marriage celebrated in a Registrar's office, all Nigerian diplomatic offices in foreign countries are empowered under sections 49 – 53 of the Marriage Act to perform marriages between parties one of whom must be a Nigerian. The marriage can be solemnized by a marriage officer in his office, and such marriage is as valid as the one contracted before a Registrar of Marriage in Nigeria. For the purpose of the Act, every Nigerian diplomatic or consular officer of the rank of secretary or above qualifies as a marriage officer in whatever country he is accredited to and his regular office serves as the marriage office. All such marriages are subject to the same rules except those contained in sections 13 and 15 – 17. However, where a caveat has been entered under section 14 in respect of a marriage for which notice has been given, the caveat operates to nullify the notice and all proceedings based on it. Any fees paid must be refunded to the payer who reserves the right to give a fresh notice. The necessity to obtain the consents required under sections 18 and 20 of the Act may be dispensed with where consent cannot be obtained due to the giver's absence, inaccessibility or disability. However, required consents cannot be dispensed with where the marriage officer is satisfied that the marriage is sought to be celebrated outside Nigeria solely because the necessary consents were refused in Nigeria.

For other modifications to the provisions of the marriage Act in order to validate statutory marriages contracted in Nigerian foreign missions, see section 53(f) – (i).

3.2.3 Legal Effect of Non-Compliance with Rules of Formalities

The provisions of sub-section (3) of section 33 of the Marriage Act make it clear that failure to comply with most of the formal requirements for marriage under the Act, will not affect the validity of that marriage. According to section 33(3) "no marriage shall, after celebration be deemed invalid by reason that any provision of this Act other than the foregoing has not been complied with", the said "foregoing" being the contents of section 33(2) of the Act. Section 33(2) provides thus:

> A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration:
> (a) in any place other than the office of the registrar of marriages or in a licensed place of worship (except where authorised by the licence issued under section 13 of this Act); or
> (b) under a false name or names; or
> (c) without the registrar's certificate of notice or licence issued under section 13 of this Act duly issued; or
> (d) by a person not being a recognised Minister of some religious denomination or body or a registrar of marriages.

The effect of this provision is that non compliance with any formal requirement apart from the rules relating to venue, names, registrar's certificate or license, and marriage officials, does not invalidate or nullify a marriage. Even with respect to section 33(2) itself, a marriage performed in contravention of the rules may not be invalidated if there is proof that one (or even both parties) to the marriage was ignorant of the non-compliance with the rules.

Case law on this very controversial issue reveals that the courts have somehow adopted the position that procedural defects in marriage formalities should not be grounds for voiding an otherwise legal marriage. The attitude of the courts is deducible from the stringent standard of proof they require to declare a marriage void by reason of statutory procedural irregularities. This attitude is underlined by the liberal view taken in the case of ***Russel v. Attorney-General*** **[1949] A.C. 391** where the court held that a valid statutory marriage is subsisting even in the face of the uncertainty raised by the registrar of marriages that the mandatory 21 days notice of marriage had been given. The court said:

> "It is clear from the authorities which have been cited to me that when there is evidence of a ceremony of marriage having been performed, followed by co-habitation of the parties, the validity of the marriage may be presumed, in the absence of decisive evidence to the contrary. It would be both tragic and . . . chaotic if such a ceremony would on slender evidence, be declared null and void".

Nigerian courts seem to hinge their reasons for upholding the validity of marriages performed with procedural defects – particularly the non-procurement of the registrar's certificate – on the clause "knowingly and wilfully acquiesce". In the very interesting case of ***Akparanta v. Akparanta*** **[1972] 2 ECSLR 779**, the wife/petitioner sued for the dissolution of marriage which she alleged took place on May 11, 1963. The ceremony was performed under full Roman Catholic rites at Christ the King Catholic Church, Uyo after the publication of banns of marriage. The Respondent husband had undertaken to take care of all preliminary legal requirements for the celebration of the marriage. The petitioner herself did not know the details of such preliminaries but believed, having heard the published banns and seen the Respondent handing over a document to the officiating Priest on the eve of the marriage that indeed everything official had been taken care of. At the ceremony itself, the parties dressed in normal wedding attire, exchanged vows and wedding rings before the officiating Priest – Rev. Clifford – and thereafter signed the marriage certificate along with two witnesses. Photographs taken at the ceremony and the marriage register of the church were tendered in evidence. However, the respondent denied that he ever arranged to

marry the petitioner under the Act; that what he intended was a church blessing. He accused the petitioner of stage-managing the ceremony so cleverly as to be able to produce photographs and that he himself did not attach any importance to the rings as a symbol of the union. All he intended was a customary-law marriage that would enable him marry other wives – a desire he had made abundantly clear to the petitioner.

In its judgement, the court reviewed extensively, the case law on the effect of procedural defects on the validity of marriage under the Act and held that all the evidence pointed to the fact that the ceremony of marriage solemnized between the parties on May 11, 1963 constituted a valid and subsisting marriage, under the Act despite the fact that certain requirement of the law were either not complied with or were inconclusive. The court said:

> I cannot say in the face of the respondent's assertion or the petitioner's denial or vice-versa that both parties knowingly and wilfully acquiesced in the celebration of the marriage without the Registrar's Certificate. In order to raise section 33(2) (c) as an objection to the validity of the marriage, it must be shown that both husband and wife acquiesced in its celebration without the Registrar's Certificate. It is not enough if the evidence establishes acquiescence by one party and the other party acted in complete ignorance of the requirements . . . The raison d'être of the provision is to protect the unsuspecting party, usually the wife, from the exploitation of her ignorance of the statutory requirement or her confidence in the party, usually the husband, in arranging the marriage.

In the case of ***Akwudike v. Akwudike*** **[1963] 7 ENLR 5** no Registrar's certificate was issued and both the respondent and the officiating priest knew of the non-compliance with the rules. The petitioner was however ignorant of that fact and indeed had no knowledge of the requirement under Section II of the Marriage Act even though she had intended to undergo a monogamous marriage under the Act. Secondly, the marriage ceremony had indeed been performed as required under section 21. Idigbe, J., (as he then was) held that the wife/petitioner cannot be said to have wilfully and knowingly acquiesced in the irregularity and pronounced the marriage valid.

3.3 The Legal Status of "Foreign Marriages" in Nigeria

This sub-topic examines the legal status of monogamous marriages celebrated in other countries in Nigeria. What is envisaged here is not marriage celebrated in any of Nigeria's foreign missions or embassies under the Marriage Act, but marriages celebrated in foreign countries under their various laws. Generally, the formal validity of a statutory marriage depends on whether or not the marriage was celebrated in accordance with the *lex loci celebrationis* i.e. in accordance with the law of the country where the marriage was celebrated.

There is a lacuna in the Marriage Act as to the legal status of marriages celebrated abroad, here in Nigeria. There is nowhere in the Marriage Act where it is expressly or by implication provided that marriages celebrated abroad be recognized. Therefore, conflict of law rules is relied on to deal with all foreign marriages that are monogamous in nature. Thus, a foreign marriage will be accorded the status of a statutory marriage if by the *lex loci celebrationis*, it is so recognized and the parties also possessed the requisite capacity to so marry under the laws of the country of their pre-nuptial domicile i.e. *lex domicilii*. This means that if both parties abroad, lacked capacity to marry under the laws of their country of domicile, Nigerian courts will treat the marriage as void even though the parties may have had capacity under Nigerian law. The case of ***Soltomayor v. De Barros*** **[1874 – 80] All E.R. Rep. 94** illustrates this point. But if either of the parties was domiciled in Nigeria, and the other one domiciled abroad lacked capacity under his *lex domicilii* their marriage, celebrated subsequently abroad (and valid under the *lex loci celebration*) will be treated as valid if both parties at the relevant time, had capacity to marry under Nigerian Law.

In summary, the present position of the law regarding the status of foreign marriages is ambiguous and subject to random interpretations.

3.4 Legal Effects of Statutory Marriage

Marriage creates a special status to which the law ascribes "peculiar rights and duties, capabilities and incapabilities" The rights and duties so created affect the relationships between the spouses and between them and third parties. The law also protects them to some extent in matters concerning crime, property rights, evidence, torts and contracts. Above all, the parties to a marriage owe each other some inalienable duties and obligations. They also acquire a status which they enjoy either until the death of one party or dissolution of such marriage. While the marriage lasts, parties to any one of such forms of marriage enjoy the rights, duties, capacities and incapacities that the law ascribes to it. Thus, statutory marriage confers on parties to it certain peculiar rights and obligations that are dealt with in the following sub-heads.

3.4.1 Legal Unity, Rights and Privileges

The husband and wife of a marriage under the Act are counted as one person under Nigerian law. And to that legal unity, the law attaches some special rights and privileges that parties to other forms of marriage do not enjoy. For example, whenever reference is made in any law to "husband and wife" the definitional section of the law or the relevant section of the law is quick to point out that the terms mean the husband and wife of a "Christian marriage" or "monogamous marriage"

[see, ***section 18 of the Interpretation Act; section 2(1) of the Evidence Act,***; and ***section 1 of the Criminal Code]***. Again, under criminal law, a man cannot be guilty of raping his wife unless the event in question takes place during the subsistence of an order of judicial separation – a relief open to only wives of a statutory marriage ***[see Sections 6, 218, 221 and 357 of the Criminal Code***]. For purposes of convenience, some of these marital rights and privileges are discussed in the sub-heads below.

(1) Contracts and Torts

In Nigeria, except for states of the former Western Region and Lagos, parties to a statutory marriage cannot contract with themselves since they are one legal person. Therefore they cannot sue each other in contracts unless the contracts were made before their marriage. But by section 1 of the Married Women's Property Law, 1958 of the defunct Western Region, the parties can sue each other in contract in respect of contracts made before or after their marriage. As for the couple's contractual capacity and liability in third-party contracts, the liability of one party for the third-party contracts entered into by the other, depends on the nature of the contracts and the nature and extent of authority given by the liable party to the other, to contract.

In torts, liability of the spouses is similar to what obtains in contract in the rest of Nigeria. Even in states of the former Western Region, section 12 of the Married Women's Property Law provides that "no husband or wife shall be entitled to sue for a tort" unless such an action is taken by the wife for the purpose of protecting her private property. But the husband does not have the same right against his wife even if it is for the protection of his private property. With respect to third parties, the spouses can sue and be sued for torts including for wrongful death of a spouse arising from fatal accidents caused by third parties.

For full details of this subhead, see ***E. I. Nwogugu, Family Law in Nigeria (Revised Edition) pgs. 83 – 95.***

(2) Criminal Law & Law of Evidence

In criminal law, neither spouse to a statutory marriage can be guilty of stealing from each other because no man can steal from himself. Section 10 of the Criminal Code protects spouses from prosecution as accessories-after-the fact of crime committed by one who assists the other to escape punishment provided they are "wife and husband of a Christian marriage". Under section 33 of the Criminal Code, the wife is also not criminally liable for a crime her husband compels her to commit in his presence provided that the crime is not punishable by death or of the sort that

causes grievous bodily injury. As between themselves, section 34 provides that the spouses cannot also be liable for the offence of conspiracy unless with a third party.

In the law of evidence, section 157 of the Evidence Act provides that spouses to a marriage are competent to testify in favour of one by the other. But under section 160(4) of the Evidence Act, they are not compellable as witnesses in a criminal trial involving one or both of them against each other without the consent of the other accused spouse; unless such trial is in respect of matters covered in section 160(1) of the Evidence Act.

For full details of this subhead, see ***E. I. Nwogugu, Family Law in Nigeria (Revised Edition) pgs. 99 – 100***.

(3) Property and Succession Rights

Apart from the special privileges conferred under criminal and evidence law dealt with above, the wives of a statutory marriage also enjoy some inheritance and property rights conferred on them by statutes. For example, section 49 of the Administration of Estates Law, applicable in states of the former Western Region, entitle the widow of a deceased intestate married under the Act to inherit a portion of his estate even if he was subject to customary law in his lifetime. Furthermore, by the provisions of section 72 of the MCA, wives of statutory marriage in appropriate cases, are entitled to maintenance and/or settlement of property upon divorce whereas customary law wives have no such rights upon dissolution of their marriages.

3.4.2 The Right of Consortium

Consortium refers to the totality of rights, society or affiliation, services and help that married persons enjoy from each other. It means the love, care, comfort, companionship, affection, and assistance which each spouse in a marriage is entitled to receive from the other. In contemporary times, it is really irrelevant which spouse plays what role in a marriage, provided that such roles are of mutual benefit to the parties and accords with the norms of marital living and togetherness.

Consortium is so important that any third-party interference with that right attracts legally-supported commensurate sanctions. Persons who interfere with the consortium rights of parties to a statutory marriage may be liable in damages for enticement, adultery, and contractual or tortious wrongs. Some of the rights of consortium arise either out of law or custom, are as follows.

(1) Marital Cohabitation

Husband and wife have a legal duty to live together in the same household, even though not necessarily under the same physical roof. The same “household” here means places that the parties

mutually agree on, to live in even if that involves more than one home located in different places or even different countries, and occupied by at least a member of the household at different times. The breach of this duty implies the matrimonial misconduct of either desertion or living apart, on the part of the party in breach. These actions may be relied on by the innocent party to sue for either restitution of conjugal rights, judicial separation or even dissolution of marriage as provided for in sections 15(2)(d) – (g) of the MCA.

(2) Sexual Intercourse

Sexual intercourse is one of the major causes of marital disharmony. This is because it is the foundational basis of marriage and a duty that parties to a marriage owe to each other, irrespective of their personal inclinations or desires. It is not unusual for one party to whom sex is denied to accuse the other party of cruelty or conduct that the other party cannot reasonably be expected to bear. These are valid accusations allowed by the provisions of section 15(2)(c) of the MCA.

Note however that the right to sex must be exercised reasonably and with due regard to the other party's health, comfort and convenience.

(3) Protection

Spouses to a marriage have a duty to protect each other against all sorts of dangers from human, natural or other causes. They have a right to shelter, food, clothing and medications necessary to ensure good health. Under the Common Law, a wife is at liberty to pledge her husband's credit in respect of any of these necessaries where her husband fails to supply her same and the husband is liable to the creditors for such goods supplied to his wife. Section 32(3) of the Criminal Code Act, [Cap C38 LFN 2004] guarantees a full defence to a spouse who uses whatever force that is necessary to defend the other spouse being assaulted or violated in his/her presence.

4.0 Conclusion

The validity or otherwise of a statutory marriage in Nigeria rests squarely on whether or not the parties to the marriage possess the requisite capacity to marry and whether or not they comply with the rules of formality for the celebration of the marriage. As earlier discussed, capacity to marry is generally governed by the law of the country in which the parties are domiciled at the time of marriage, while the solemnization formalities are regulated by the law of the country where the marriage is celebrated i.e. the *lex loci celebrationis*.

In Nigeria, section 3(1) of the MCA determines the capacity of parties to marry while the relevant sections of the Marriage Act govern procedural formalities for contracting the marriage.

Thus, a marriage under the Act is void if a party to the marriage does not meet the standards set by section 3(1) of the MCA. Whereas the validity of a marriage contracted in breach of the rules of formalities may or may not be void depending on the application of the provisions of section 33(3) of the Marriage Act.

The legal effects of a valid marriage are manifold: apart from creating a special status that both parties enjoy, they also enjoy the right of consortium which includes cohabitation, sex and mutual protection. They also enjoy certain privileges and protection in criminal and civil proceedings in court guaranteed by some sections of the Criminal Code and the Evidence Act, as well as other laws which regulate contracts, torts and property rights between the parties and other third parties.

5.0 Summary

This unit has dealt with the validity of statutory marriages in Nigeria and the following is a summary of the issues discussed.

1) That for a statutory marriage to be valid, the parties to it must possess the requisite capacity to contract the marriage, i.e. the parties must:
    - be single;
    - not be within the prohibited degrees of consanguinity and affinity;
    - really consent to the marriage; and
    - be of marriageable age.
2) That the parties must also comply with the procedural formalities required for the celebration of the marriage thus:
    - File notice of marriage and obtain a registrar's certificate or a special licence in lieu of notice
    - Proceed to one of three venues for the celebration of the marriage, i.e. licensed place of worship, Registrar's office (or any of Nigeria's foreign mission office where necessary) or a venue named in a special licence.
    - Ensure that the right officials solemnize the marriage etc.
3) That the legal effect of non-compliance with rules of formalities is that the marriage may be void depending on which rules were violated and whether or not both parties "knowingly and wilfully acquiesced" in the celebration of the marriage in violation of those rules.
4) That the validity in Nigeria of marriages contracted in foreign countries is determined by conflict of law rules
5) That the legal effect of a valid statutory marriage is that it confers a peculiar status, special privileges, rights, benefits, duties and obligations.

6.0 Tutor-Marked Assignment

Discuss the formal and essential validity of a statutory marriage in Nigeria.

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria***
(Lagos: Codes. Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes***
(Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria***
(……..: Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition]
(Ibadan: Heinmann Educational Books, 1990) pages 22 – 101.

5) Onokah, M. C., ***Family Law***
(Ibadan: Spectrum Books Ltd., 2003) pages 115 – 135.

6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]**
(Ikeja: Malthouse Press Ltd., 1999) pages 49 – 103.

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice**
(Lagos: Renaissance Law Publishers Ltd, 2007) pages……

Statutes

1. **Marriage Act, 1914, Cap. M6** Act Cap M7 LFN **2004, Sections 7 – 53.**

2. **Matrimonial Causes Act** Cap M7 LFN**, 2004, Sections 3(1), 4(1), 15(2) and 72**

Unit 2: Void and Voidable Statutory Marriage

1.0 Introduction

Void and voidable marriage fall within the topic usually referred to as annulment or nullity of marriage. Annulment of marriage differs conceptually from divorce in that divorce terminates a legal status, whereas an annulment establishes that a marital status never existed. When a marriage is annulled, it means that it has been cancelled or abrogated or made void by a competent authority, based on fundamental defects. Although the parties may have gone through a ceremony of marriage and cohabited as man and wife, certain defects may exist which render that marriage void *ab initio* or merely voidable.

This unit deals with the nature, characteristics and legal effects of void and voidable marriage. This is with respect to only statutory marriage since nullity of customary law marriage has already been dealt with in Module 2 of this course.

2.0 Objectives

The objectives of this unit are to help the students learn the following:

(i) The meaning of void marriage
(ii) The meaning of voidable marriage
(iii) The difference between void and voidable marriage
(iv) The grounds on which a marriage may be void
(v) The grounds on which a marriage may be voidable
(vi) The bars or defences to a petition to void a marriage
(vii) The legal effects of void and voidable marriage.

3.0 Main Content

While discussing the validity of statutory marriage in the last unit, we noted that the validity or otherwise of a marriage celebrated under the Act depends on whether or not the parties possessed the requisite capacity to marry and whether they complied with the rules of formalities for the celebration of the marriage. Invalidity of a marriage may be occasioned by the marriage being either void or voidable. These two concepts differ in nature and character but they both produce the same result – even though at different stages of the marriage. We shall now examine both concepts, beginning with the distinction between them.

3.1 Distinction between Void and Voidable Marriage

Nigerian law, like its English counterpart, creates a distinction between marriages that are void and those that are voidable even though both classes are affected by irregularities, and are invalid as a result. This distinction was summarized by Lord Green in ***De Reneville v. De Reneville[1948]1 All E.R. 56*** thus:

> "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it. A voidable marriage is one that will be regarded by every court as a valid and subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction".

Flowing from the above, a void marriage is one in which the defect is such that the law regards the marriage as never having taken place – i.e. void *ab initio*; whereas, a voidable marriage is perfectly legal and exists as a valid marriage unless and until a decree of cancellation is granted in respect of it. The legal consequences arising from the distinction between void and voidable marriages are important and they are as follows:

- A decree in respect of a void marriage can be pronounced at any time, even after the death of the parties to the marriage. But a decree of nullity for a voidable marriage can only be granted during the lifetime of both parties to the marriage.
- Only the spouses to a voidable marriage can challenge its validity and they do so during their joint lifetimes. But parties to a void marriage and any interested third party may question the validity of the marriage even after the death of the parties.
- Parties to a void marriage do not need a decree of nullity (except for confirmation of status purposes) to have capacity to contract another marriage with third parties; whereas a decree absolute of nullity of voidable marriage is a condition precedent to obtaining the requisite capacity to marry someone else.
- All children born or conceived during the continuance of a voidable marriage are presumed to be legitimate while those of a void marriage, subject to certain statutory modifications, are presumed to be illegitimate. Note absence of illegitimate children under Nigeria Law – See S. 38(2) M.C.D., S. 42(2) 1999 Constitution.
- Until a voidable marriage is annulled, anything done in pursuance thereof is valid whereas the reverse is the case for a void marriage.
- The doctrine of approbation does not apply to a void marriage. But where a party to a voidable marriage, by his overt act affirms or approbates "the existence and validity of the marriage, as to render it inequitable and contrary to public policy" to be allowed to complain, he is estopped from challenging the validity of the marriage subsequently.

3.2 Void Marriage

Going by Lord Green's dictum in the *De Reneville* case, "a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place". And according to Lord Nourse in the case of ***Re Spence (deceased) [1990] 2 FLR 278*** a void "marriage, both as a matter of language and by definition … is a nullity. It is only an idle ceremony. It achieves no change in the status of the participants. It achieves nothing of substance." Thus, the parties to it may therefore treat the marriage as void without obtaining a formal court order declaring it void. However, a formal decree of nullity may be necessary where a party may use same to confirm his or her unmarried status when contracting a marriage with someone else.

3.3 Grounds which render a Marriage Void

The grounds upon which a marriage may be nullified for being void are listed under section 3(1) of the MCA, which provides:

> Subject to the provisions of this section, a marriage that takes place after the commencement of this Act is void if any of the following cases but not otherwise, that is to say, where –
> (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
> (b) the parties are within the prohibited degrees of consanguinity or, subject to section 4 of this Act, of affinity;
> (c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of the place with respect to the form of solemnization of marriages;
> (d) the consent of either of the parties is not a real consent because:-
> (i) it was obtained by duress or fraud; or
> (ii) that party is mistaken as to the identity of the other party, or as to the nature of the marriage contract;
> (iii) either of the parties is not of marriageable age.

Statutorily, it is clear from the above that there are five legitimate grounds on which a marriage can be declared void *ab initio*. These are as follows:

3.3.1 Subsisting Lawful Marriage

Sections 3(1)(a) of the MCA and 33(1) of the Marriage Act provides that a purported marriage under the Act is void if it is proved that at the time of the ceremony, either party was already lawfully married to a third party either under customary law or under the Act. Violation of these provisions renders the offending party liable to imprisonment for 5 or 7 years respectively. Similarly, a party who is already married under the Act either in Nigeria or under a monogamous system outside Nigeria cannot validly contract another statutory marriage in Nigeria. In ***Nwankpele v. Nwakpele [1972] 2 CCHCJ 101*** the petitioner filed for the annulment of her marriage to the respondent on the ground that the respondent had lawfully been married to another woman on September 25, 1968 at the Lagos Marriage Registry before he purportedly married her on January 4, 1969 at the Wandsworth Marriage Registry in London. The certificates of marriage issued in both cases were tendered in evidence as proof of the facts therein contained. The court, based on the evidence before it declared that the marriage between the parties solemnized in London on January 4, 1969 was void under section 3(1)(a) of the MCA and granted a decree of nullity.

In order to ensure that the monogamous nature of a statutory marriage is preserved, section 35 of the Marriage Act expressly forbids a subsequent customary law marriage between a party to a subsisting Act marriage and a third party. A violation of this rule renders the subsequent marriage null and void and the offender liable to a five-year prison term. In ***Onwudinjoh v. Onwudinjoh [1957] 11 E.R.L.R. 1*** the court held that Jeremiah, a party to a subsisting marriage under the Act with one Agnes, lacked the capacity to marry another woman – Chinelo under native law and custom during the continuance of the Act marriage. It therefore declared as null and void *ab initio* the purported customary law marriage with Chinelo.

3.3.2 Prohibited Degrees of Consanguinity and Affinity

Since 1970, any marriage celebrated between persons within the prohibited degrees of consanguinity is void under section 3(1)(b) of the MCA. The same rule applies to marriages between affines except where such a marriage falls within the exceptions provided under section 4 of the Marriage Act, i.e. where the consent of a High Court Judge has been sought and obtained to perform a marriage between affines on the ground of "exceptional circumstances".

3.3.3 Non-compliance with *Lex Loci Celebrationis*

Section 3(1)(c) of the MCA provides that failure to comply with the rules relating to formalities of the place of celebration of a marriage invalidates that marriage. However, section 33(2) of the Marriage Act modifies the above provision in the sense that it introduced a mental element in the state of mind of the parties, in determining whether or not the marriage celebrated in violation of the *lex loci celebrationis* is void.

As noted in the preceding unit, it is only where both parties knowingly and wilfully acquiesce in celebrating the marriage in total disregard of the marriage formalities that the marriage will be invalidated. Besides, section 33(3) of the Marriage Act, creates a distinction between formal defects which render a marriage void if the parties "knowingly and wilfully" acquiesce in its celebration, and formal defects which never render a marriage void. By this distinction the formal defects which render a marriage void include wrong venue, using false names, failure to obtain form C, i.e. Registrar's certificate and using an unauthorized celebrant. Other formal defects are treated by the law as too inconsequential to invalidate a marriage celebrated without reference to them.

3.3.4 Absence of Real Consent

Section 3(1)(d) of the MCA invalidates a marriage which was contracted either without any consent from one or both parties to the marriage or if consent was given, same was not real consent. This lack of a valid consent may arise either from duress, fraud, mistaken identity or mental incapability on the part of the party concerned. Let us now briefly examine each if these elements of invalid consent.

Duress

Duress was defined in the case of ***Szechter v. Szechter [1970] 3 All ER 905*** where the petitioner, who had been a political prisoner in Poland, had married the respondent solely in order to be allowed to leave the country. It was held that the marriage was invalid because of the duress emanating from the Polish authorities. For duress to vitiate a marriage, the court said, it must be proved that:

> "The will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party himself is not responsible), to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock".

"Danger to limb" has been held in the case of ***Re Meyer [1971] 1 All ER 378*** to mean a serious danger to physical or mental health and "danger" includes danger to at least a party's parent or child. In addition, danger can include penury or social degradation if they form an essential element in danger to life, limb or liberty. In Nigeria, duress has been held in the unreported case of ***Aiyegbusi v. Aiyegbusi*** to include the threat of a paternal curse viewed by many traditional people as likely to have grave consequences for the person cursed.

For duress to be upheld in any case in which it is alleged, it must satisfy the following conditions:

(1) The party threatened must not be responsible for the basis of the threat. In ***Buckland v. Buckland [1967] 2 All ER 300,*** the petitioner, who was falsely alleged to have had unlawful sexual intercourse with a Maltese girl, married her because due to anti-British feeling at the time, he was advised that he was likely to be convicted and sent to prison for two years if he did not do so. It was held that since he did not commit the act alleged and there was a threat to his liberty, he was entitled to a decree of nullity.

(2) The threat must have caused actual fear. In ***Singh v. Singh [1971] 2 All ER 828***, a girl went through an arranged marriage out of a sense of duty and respect for her parents, it was held that it did not amount to duress arising out of fear as to invalidate the marriage. But in the

American case of ***Lee v. Lee [1928] 3 SW 2d 672***, which involved a "shotgun" marriage, the court declared the marriage contracted under fear of being shot void because " if there had not been a wedding, there would have been a funeral".

(3) In all circumstances, the threat must be to life, limb or liberty and the threatened party must have believed the threat sufficiently enough to force him or her to consent. In ***Scott v. Selbright [1886] 57 L.T. 421***, the petitioner who was under the fear of bankruptcy proceedings against her as well as the fear of public assumption of the fact that she was a woman of easy virtue, married the respondent who had made the threats. The court granted her petition for nullity on the ground that her consent had been obtained under duress, particularly when the respondent had also threatened to kill her.

Fraud

A marriage will be invalidated if the consent of a party was obtained through fraudulent misrepresentation of material facts. In ***Martins v. Adenugba [1946] 18 NLR 63***, the plaintiff sued the defendant for damages for either a breach of promise to marry under the Act, or in the alternative, fraudulent misrepresentation or deceit. The defendant had informed plaintiff's parents that he had completed all preliminary arrangements for their marriage. He then took her and her relatives to the Marriage Registry. On getting there, he went in alone and later came out to inform them that the marriage was completed. All parties concerned then moved to the church – St. Peters Church, Lagos – for a blessing of the union. Thereafter, the plaintiff was induced to believe that she was really married to the defendant based on his utterances and actions and lived with him for 3 years. Plaintiff later discovered that no valid marriage under the Act ever took place. The court held that she had indeed been deceived and granted her the reliefs sought.

Mistake

By the wording of section 3(1)(d)(ii) of the MCA, it seems that for mistake to be pleaded as a ground to void a marriage, the mistake must be either as to the identity of the other party or the nature of the ceremony performed.

With respect to mistaken identity, the mistake will only vitiate consent if it is with respect to the person married and not his qualities. For example, if A marries Z under the belief that he married B, the error is enough to invalidate the marriage. But if A marries Z thinking that she is a rich and famous actress, he cannot rely on mistake to invalidate the marriage. The kind of mistake that

could invalidate a marriage is: if for example an engagement had been conducted by correspondence and a third party successfully impersonated the other spouse at the wedding.

The second limb of the provision is mistake as to the nature of the ceremony performed. Mistaken belief that the petitioner was appearing in a police court, or that the ceremony performed was a betrothal or of a religious conversion have been held sufficient to invalidate the marriage. In ***Valier v. Valier [1925] 133 LT 830,*** the petitioner was an Italian with little understanding of the English language. He had gone through a marriage ceremony arranged by the respondent – an English girl – in a register office in the belief that it was an engagement ceremony. The court held that the petitioner was mistaken as to the nature of the ceremony, and the mistake vitiated his consent.

But where the mistake is not as to the nature of the ceremony but as to the legal effect or consequences of marriage, it cannot vitiate consent as to invalidate the marriage. In ***Messina v. Smith [1971] 3WLR 118,*** the petitioner knowingly married the respondent to enable her obtain British citizenship, and facilitate her trade as a prostitute without running the risk of deportation. Her petition for nullity of the marriage failed because, in the opinion of the court, the parties intended to acquire the status of married persons, and it was immaterial that one or both of them may have been mistaken about some of the incidents of that status.

Mental Incapacity

According to Sir James Hannen P. in ***Durham v. Durham [1885] 10 PD 80***, marriage does not require a high degree of intelligence to understand. But it is a different matter entirely where it is proved that due to mental illness or deficiency, a party to a marriage was "mentally incapable of understanding the nature of the marriage contract."

Mental incapability comes in degrees between outright insanity and mild mental illness, such as senile detention i.e. loss of memory normally associated with old people. In cases of insanity, there is no difficulty in determining that the insane party is obviously incapable of understanding the nature of the marriage contract. On the other hand, mental illness or deficiency will only invalidate the consent of a party who was, at the time of the ceremony incapable of understanding the nature of the marriage and the duties and responsibilities it creates. This in effect means that the peculiar circumstances of each case will determine what degree of mental incapability renders a marriage void on the ground of lack of real consent.

3.3.5 Marriageable Age

Neither the Marriage Act nor the MCA prescribes a minimum age for marriage in Nigeria. The Marriage Act, under section 3(1)(e) merely provides that a marriage will be void if either of the parties is not of marriageable age. The closest reference to the age of marriage in the Act is section 18, which provides that any person below 21 years, he/she not being widowed, must obtain consent from any of the persons mentioned under Sections 18 – 20 of the Act before contracting a valid statutory marriage. In 2003 however, the Child Rights Act (hereafter CRA) was enacted for the Federal Capital Territory, Abuja, wherein section 21 of the CRA expressly prohibits marriage for anyone below 18 years. The CRA is in the process of being domesticated at state levels in order for it to have uniform application in Nigeria. When this process is complete, it would fix marriageable age in Nigeria at 18 years.

3.4 Voidable Marriage

A voidable marriage is one that will be regarded by every court as a valid and subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction. This means that the marriage is valid for all intents and purposes until the discovery of some defects that ultimately make the continuance of the marriage impossible; thereby requiring a decree of annulment.

3.5 Grounds which Render a Marriage Voidable

A marriage is voidable if it offends against any of the grounds set out under section 5 of the MCA – such grounds being incapacity to consummate the marriage, mental ill-health or epilepsy, transmittable venereal disease and pregnancy *per alium* i.e. pregnancy for another man. We shall now examine each of these grounds.

3.5.1 Incapacity to Consummate

Consummation of marriage means the first sexual intercourse between the parties to a marriage after the celebration of the marriage and not before, as was the case in ***Dredge v. Dredge [1947] 1 All ER 29***. The post-marital intercourse must be ordinary and complete i.e. there must be a penetration of the female vagina by the male penis for a reasonable length of time with or without orgasm. It is immaterial that the parties use contraceptives.

Section 5(1)(a) of the MCA provides that a statutory marriage is voidable "where at the time of marriage, either party to the marriage is incapable of consummating the marriage". In other words, a marriage may be voided if a party to it, though willing, is unable to consummate the

marriage. Incapacity to consummate a marriage may be due to either the impotence of the man, or the impenetrability of the woman arising out of some physical malformation. Although, most cases of incapacity are based on physical abnormalities, many are also traceable to psychological factors. For instance, a man may suffer impotence only with respect to the wife and not with other women.

The incapacity complained of must be permanent and incurable. And this rule of incurability covers cases where any remedial operation is dangerous and where a party refuses to undergo an operation or submit to proper treatment that would otherwise cure the defect complained of. In the unreported case of ***Akpan v. Akpan***, the husband tried unsuccessfully at several times to have intercourse with his wife throughout their co-habitation. He refused to submit himself to medical examination despite expert opinion that he could be cured of his impotence. The court held that his refusal to submit himself to medical examination amounted to incapacity to consummate the marriage on the part of the husband, and nullified the marriage accordingly.

Interestingly, either party to the marriage, including the incapacitated party can rely on the incapacity of the sufferer to file for nullity. This position is supported by section 36(2) of the MCA which provides that a petitioner who relies on the incapacity of either party should not be granted a decree by the court it he or she either:

(i) knew of the incapacity at the time of marriage; or

(ii) had conducted him or herself in such a manner as to render the granting of the decree harsh or oppressive to the respondent.

Where the incapacitated party files for nullity, he must prove that he was ignorant of the incapacity at the time of the marriage. In the case of ***Harthan v. Harthan [1948] 2 All ER 639***, the husband who had been unable to consummate the marriage due to his own impotence, successfully brought a petition to nullify the marriage.

Note that the lapse of time between the marriage and the filing of the petition debars the grant of a decree. This is perhaps why a decree of nullity was refused in the case of ***Pettit v. Pettit [1962] 3nAll ER 37*** where the petitioner sought to rely on his impotence after twenty years of marriage. The court refused the decree and held that granting the decree sought would have been against public policy and harsh on the respondent who had had to cope with the petitioner's impotence for such a long time, and had had a child *fecundatio ab extra* i.e. by artificial insemination.

Finally, the court will only grant a petition for nullity if the incapacity complained of existed both at the time of contracting the marriage and at the time of hearing the petition.

3.5.2 Mental Ill-health and Epilepsy

Mental ill-health is a general title which covers different categories of mental diseases and disorders. Epilepsy on the other hand is a disease of the nervous system which renders the sufferer unconscious and subject to violent physical convulsions. The MCA has provided in section 5(1)(b) that a marriage is voidable where either of the parties is:

(i) of unsound mind; or
(ii) a mental defective; or
(iii)subject to recurrent attacks of insanity or epilepsy.

We shall now examine each of these sub-requirements.

Unsoundness of Mind

Unsoundness of mind connotes a mental disorder which may be continuous or intermittent in nature. Unsoundness of mind, when contrasted with outright insanity, means that the sufferer possesses a degree of understanding which is however insufficient to guarantee his ability to cope with the demands of marriage, including having children. Thus, a person with an unsound mind e.g. an imbecile, may possess enough understanding to give valid consent to a marriage and appreciate the ceremony performed but would be unable to function as a normal spouse and parent due to his/her mental disorder.

Mental Deficiency

A mental defective is defined under section 5(2) of the MCA as:

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

Flowing from the above definition, a mental defective is a person, who, as a result of the limited functioning of his mind is unable to care for himself or others; he is therefore unfit for marriage and marital responsibilities. In ***Bennett v. Bennett [1969] 1 All ER 539***, the parties were married in 1965 but were together for only short periods of time, the husband being on active military service abroad and the wife remaining in England. Prior to their marriage, the wife had been admitted into a mental hospital on two occasions – facts of which the husband was ignorant when they married. After the marriage, the wife was readmitted at her own request, for a short time in the same mental hospital while the husband was abroad. On his return, the doctor informed him

that his wife had been having treatment in a mental hospital. The husband then filed a petition for a decree of nullity and the court held that although the wife had been temporarily insane and of unsound mind (this being within the definition of mental disorder) for a short period of time, there was no evidence to show that she was suffering from a mental disorder of such kind or to such extent as to be unfitted for marriage and the procreation of children as envisaged by the MCA. The husband's petition was accordingly dismissed.

Insanity and Epilepsy

Section 5(1)(b)(iii) of the MCA provides that a marriage is voidable on the ground that either party to the marriage, is subject to recurrent attacks of insanity or epilepsy. Insanity which renders a marriage void must be distinguished from insanity which renders a marriage voidable. The tests laid down in the cases of ***Wysall v. Wysall [1959] 3 All* ER 396** and ***In the Estate of Park, Park v. Park [1953] 2 All ER 1411 at 1430*** seem to suggest that mental incapacity – to which both insanity and unsoundness of mind, amongst others belong – manifests in different degrees. And the degree of mental incapacity determines whether or not a sufferer is able to understand and appreciate the nature of the contract of marriage and the responsibilities normally attaching to that status. Therefore, for a marriage to be void, the degree of mental incapacity envisaged must be the "unsoundness or incapacity of mind properly called insanity". This in effect means that the party is not only incapable of understanding the nature of marriage and its consequences (as to render his consent invalid in law) but also the fact that he is incapable of "managing himself and his affairs".

In contrast, the sort of mental incapacity envisaged to make a marriage voidable is a degree of unsoundness or incapacity of mind which is such as to make it impossible for the sufferer to live a normal married life; particularly when there is no prospect of any improvement in his mental health to guarantee a future cohabitation with the spouse. Therefore, all that is necessary, in order to fall within the purview of section 5(1)(b)(iii) is to show that a party suffers intermittently from unsoundness of mind of such a kind or degree as to be "unfitted" for marriage. And this recurring mental disorder must be a condition that exists at the date of marriage. This perhaps explains why the court in the ***Bennett case (supra)*** held that there was no evidence that the wife had suffered from recurrent attacks of insanity (interpreted to mean unsoundness of mind) as at 1965 when the marriage took place; the only case of insanity recorded against her being in 1954 for a period of one month only. But in ***Hunponu-Wusu v. Hunponu-Wusu [1969] 1 All NLR 62***, the wife who suffered two fits of unsoundness of mind each, both before and after the marriage was held to be

subject to recurring attacks of insanity at the date of the marriage even though she was quite sane and normal when the marriage was celebrated.

Intermittent epileptic attacks are also classified in the same category as recurring insanity. Therefore, any party to a marriage who suffers from epilepsy stands the risk of having his/her marriage nullified on that ground, provided there is proof that the condition existed at the date of the marriage. At all material times, the burden of proving that a party suffers from recurrent insanity or epilepsy lies with the person alleging it.

3.5.3 Respondent's Venereal Disease

Section 5(1)(c) of the MCA provides that a marriage is voidable if at the date of the celebration of the marriage, one of parties to it is suffering from a venereal disease in a communicable form. This means that once the disease can be communicated to the petitioner or a third party, it is sufficient to ground a relief. In the unreported case of ***Lawrence v. Lawrence***, the wife was pregnant and was suffering from syphilis – a venereal disease that is transmittable not only to the husband but also to the unborn baby. The Judge, while granting a decree of nullity to the husband, defined "communicable" to mean "communicable to any person" and not necessarily to the other spouse as canvassed in arguments by counsel to the respondent.

To get a relief, the injured party must prove that the disease was contacted from the respondent spouse and nobody else. But where the respondent is able to prove by medical evidence that he/she is not suffering from the disease, the petition for nullity will fail. Finally, a petition for nullity cannot be granted to a petitioner who relies on the disability created by his own venereal disease.

3.5.4 Pregnancy by Another Man

A marriage is voidable where, at the time of the celebration of the marriage the wife is already pregnant by another person other than the husband. The marriage may then be annulled at the instance of the husband only upon proof that he is and could not have been responsible for the wife's pregnancy. The wife cannot petition on the ground of her own pregnancy *per alium*.

3.6 Statutory Bars/Defences to a Petition for Nullity of Voidable Marriage

The Matrimonial Causes Act, 1970 makes provisions for the courts to refuse to grant petitions for nullity on certain grounds. These provisions which act as bars are however in respect of voidable marriages only and they are set out under sections 35 – 37 of the MCA discussed below.

3.6.1 Limitation of Time

The MCA expressly provides under section 37(b) that no decree of nullity shall be granted in respect of any of the matters contained in sections 5(1)(b), (c) or (d) of the Act unless the court is satisfied that such a petition was filed not later than twelve months after the date of the marriage. This provision is an absolute bar which does not admit of any extension of time under any circumstance.

With respect to section 5(1)(a) of the MCA, a decree of nullity shall not be granted on the ground that the marriage is voidable by reason of a party's incapacity to consummate, where the court is of the opinion that considering the lapse of time between the celebration of the marriage and the institution of the petition, it would be harsh and oppressive to the respondent or contrary to public interest to make a decree under the particular circumstances of the case, as was held in ***Pettit v. Pettit (supra)***.

3.6.2 knowledge of the Petitioner

A petitioner who seeks relief on the grounds stated under sections 5(1)(b)(c) or (d) is debarred from getting a decree of nullity unless he can prove that at the time of the marriage, he was ignorant of the facts constituting the ground. It has been held in the case of ***Stocker v. Stocker [1966] 2 All* ER 147** that the objective standard of proof should be used in determining whether or not a petitioner was aware of the facts complained of. Again, with respect to the ground constituted under section 5(1)(a) of the MCA, the court will refuse a petition for nullity under sections 36(2)(a)(i) and 35(a) of the MCA, if it is of the opinion that the petitioner had knowledge of the respondent's incapacity to consummate or was aware of his own incapacity to consummate at the time of the marriage.

3.6.3 Petitioner's Approbative Conduct

Under section 36(2)(a)(ii) of the MCA, a petitioner who is aware that he may avoid the marriage based on the respondent's disability but went on, from the onset of the marriage, to conduct himself in relation to the respondent as to create the impression that he was waiving his rights, is deemed to have approbated the respondent's disability of whatever nature. In the case of ***D v. D [1979] 3 WLR 185***, the couple failed to consummate their marriage owing to the wife's wilful refusal to consummate but went on to adopt their two foster children. The husband knew that he had a remedy in nullity proceedings but failed to take advantage of it before the adoption of the children and thus represented, going by the adoption application that they were husband and wife. He later sought to have the marriage annulled when he left respondent for another woman

on the ground of the wife's refusal to consummate. The wife successfully defended the suit on the ground that his approbative conduct since the marriage debarred him from complaining about her wilful refusal to consummate and obtaining a decree of nullity based on same.

Conduct which may amount to a bar against a petition for nullity can include:

(i) an express affirmation of the marriage by the petitioner; or

(ii) acquiescence to the discovered condition of the respondent by continuing the marriage inspite of same.

The contented acceptance of the discovered state of affairs regarding the respondent, and the rendering of mutual conjugal rights to each other without protests or complaints, amounts to approbative conduct on the part of the petitioner. Thus, where children were adopted with the knowledge, support and consent of both parties as husband and wife, the acts were held to constitute a bar to the actions of the petitioner in ***W v. W [1952] 1 All ER 858***.

Again, a petitioner who consents to, and engages in marital intercourse with the respondent after discovering the facts constituting any of the grounds listed under section 5(1)(b)(c) or (d) of the MCA cannot obtain a decree of nullity based on those facts. The test for determining what constitutes knowledge on the part of the petitioner concerning the facts discovered is an objective one. Thus, in ***Smith v. Smith [1947] 2 All ER 858***, the court held that the question in all cases is not whether the petitioner, during or after post-discovery intercourse believed that the respondent was guilty of the facts discovered; but whether a reasonable man in his shoes and in the light of the facts available to him, would draw that conclusion of guilt on the part of the respondent.

3.6.4 Disabled or Guilty Petitioner

Section 35(a) of the MCA provides that a party who is unable to consummate a marriage cannot rely on his own incapacity or impotence to obtain a decree of nullity unless he can prove that he was not aware of the existence of the incapacity at the time of the marriage. Again, a petitioner who seeks to rely on his own disability occasioned by mental defect or venereal disease as a ground for obtaining a decree of nullity is estopped from doing so under section 35(b) of the MCA. In the same vein, section 35(c) of the MCA provides that a wife who is pregnant by another man cannot rely on her own guilty condition as a ground to obtain a decree of nullity of her marriage. These situations would clearly be against public policy and public morals.

3.7 Effect of Decrees of Nullity in respect of Void and Voidable Marriage

Except for purposes of proving the single status of a party to a proposed marriage, a purported earlier marriage that is void *ab initio* need not be nullified by a formal decree of nullity. This is because such an earlier marriage is deemed by law never to have existed. However, a decree of nullity is necessary to avoid a voidable marriage. Once the decree of nullity is made, the marriage in respect of which it is made is effectively terminated from the date of the order. In other words, all actions taken, or done by the parties as husband and wife before the date of the order are perfectly valid and legitimate, as provided for under section 38(1) of the MCA. All children born, or legitimated during the continuance of the marriage are legitimate [section 38(2)] and are entitled to some ancillary reliefs such as maintenance and settlement of property [see section 69 MCA]. Moreover, it is submitted that any child adopted by the parties to a voidable marriage during the continuance of the marriage is deemed to be a child of the marriage, who is subject to, and entitled to all ancillary reliefs attaching to marriage. This is obvious on a proper construction of the provision of section 69(a) MCA which provides that all reliefs created under Part IV of the MCA are applicable to "children of the marriage", which include any child adopted since the marriage by the parties or one of them, with the consent of the other. It is immaterial that the "marriage" in this case is valid or invalid (i.e. void) for Part IV to apply.

4.0 Conclusion

A statutory marriage is said to be void when the defects inherent in it are such that it would be regarded by the law as never having taken place, even when a marriage ceremony purportedly took place. A decree of nullity is *strictu sensu* not necessary under the circumstance to cancel what never existed. Everything done in pursuance of the void marriage is invalid in law and goes to no issue. Every child born or conceived during the continuance of the purported marriage is illegitimate subject to the constitutional interventions contained in section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999.

A voidable marriage by contrast is one which is valid in law until a decree annulling it is issued by a court of competent jurisdiction. Such a marriage is valid for all intents and purposes until some defects that were inherent in it and which defects were unknown to the parties, come to light; thereby requiring the marriage to be nullified at the instance of either of the parties with the *locus* to do so, depending on the nature of the defect. All children born or conceived during the continuance of the marriage are legitimate, and every other thing done in the course of the marriage is also valid in law.

The defects in either the void or voidable marriage form the grounds on which the petition for nullity may be brought and the marriage subsequently nullified. These grounds are contained in sections 3(1)(a) – (e) of the MCA for void marriage and sections 5(1)(a) – (d) of the MCA for voidable marriage.

5.0 Summary

In this unit, the substance of void and voidable statutory marriage was discussed in great detail. The highlights of the discussion are as follows:

1) The distinction between void and voidable statutory marriage.
2) The meaning of void marriage, i.e. that it is a purported marriage that is invalid in law because of fundamental defects at the onset of the marriage.
3) The grounds on which a statutory marriage may be void – such grounds being:
   (i) subsisting lawful marriage;
   (ii) prohibited degrees of consanguinity and affinity;
   (iii) non-compliance with *lex loci celebrationis*;
   (iv) absence of real consent; and
   (v) marriageable age.
4) The meaning of voidable marriage, i.e. that it is a marriage that is valid in law until the day it is annulled as a result of newly-discovered defects, of which the parties were ignorant at the onset of the marriage.
5) The grounds on which a statutory marriage may be voidable – such grounds being:
   (i) incapacity to consummate;
   (ii) mental ill-health and epilepsy;
   (iii) respondent's venereal disease; and
   (iv) pregnancy by another man.
6) The statutory bars or defences available to a respondent in petition for nullity of a voidable marriage: these being;
   (i) limitation of time
   (ii) knowledge of the petitioner
   (iii) petitioner's approbative conduct
   (iv) disabled or guilty petitioner
7) the legal effect of decrees of nullity in respect of void and voidable marriage

6.0 Tutor-Marked Assignment

1. Discuss the differences between void and voidable statutory marriage.
2. What are the grounds on which a statutory marriage may be void?

3. List the grounds on which a statutory marriage may be voidable
4. What is the effect of a decree of nullity in respect of:
    (i) Void marriage?
    (ii) Voidable marriage?

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria***
(Lagos: Codes. Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes***
(Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria***
(……..: Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition]
(Ibadan: Heinmann Educational Books, 1990) pages 122 – 147.

5) Onokah, M. C., ***Family Law***
(Ibadan: Spectrum Books Ltd., 2003) pages 133 – 135.

6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]**
(Ikeja: Malthouse Press Ltd., 1999) pages 105 – 120.

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice**
(Lagos: Renaissance Law Publishers Ltd, 2007) pages85-110

Statutes

3. **Marriage Act, 1914, Cap. M6** Act Chapter M7 LFN**, 2004, Sections** 33(1) – (3)**.**

4. **Matrimonial Causes Act** Cap. M7 LFN**, 2004, Sections 3(1), 5(1) –** (2) **,** 36(2), 35 – 37, and 69(a)

Unit 3: Dissolution of Statutory Marriage or Divorce

1.0 Introduction

"Dissolution of marriage" and "divorce" mean one and the same thing – i.e. the formal termination of the status of marriage between the parties to a marriage. The nature of divorce is such that the legally enforceable rights and duties arising out of the status created by marriage are terminated formally. This in effect, means that the legal relationship created by marriage is terminated, even though divorce does not necessarily bring the parties' personal relationships to an end, particularly where children are involved.

Unlike in nullity of statutory marriage (dealt with in the previous unit), divorce as a matrimonial cause, does not involve cancellation of marriage because of legal defects inherent therein. Rather, it involves the termination of the marriage as a result of the irreparable breakdown of the marriage arising from matrimonial misconduct on the part of one or both parties to the marriage.

In this unit we shall examine the nature of divorce, the history of divorce law, the grounds on which a petition for divorce may be filed, the effect of a decree of divorce and other related matters. These are in respect of statutory marriage only.

2.0 Objectives

The objectives of this unit are to help the students learn the following:

(i) The history and theories of divorce law in Nigeria
(ii) The rules relating to the presentation of divorce petitions in Nigeria, including the two-year rule and the application for leave to petition for divorce
(iii) The grounds necessary for the presentation of a petition for divorce

3.0 Main Content

Divorce involves a judicial declaration (decree) dissolving a marriage in whole or in part, and releases the parties from all matrimonial obligations.

3.1 History of Divorce Law

Historically, a decree of divorce was known as a decree of divorce *a mensa et thoro*, meaning the separation **of a married woman** from the bed and board of her husband. It could be granted on the grounds of adultery, cruelty or commission of an unnatural offence by either party. Its effect however was to end cohabitation but did not in actual terms sever the marriage ties between the parties. But by 1857, when the court for divorce and matrimonial causes was created in England, it was empowered to dissolve marriages if the petitioner –who must be free from any matrimonial guilt – is able to prove adultery against the other spouse with whom he neither connived nor colluded in perpetrating the offence.

Over the decades, several reforms have been made to move divorce law from fault-finding on the part of a spouse as a basis for divorce, to the point where the courts are only now interested in the fact that a marriage has broken down irretrievably, rather than enquiring into who is responsible for the breakdown. Thus, the Matrimonial Causes Act, (MCA) creates only one ground for the dissolution of a statutory marriage as discussed below.

3.2 Theories in Divorce Law

There are two major theories in the law relating to divorce. These are the matrimonial offence or fault theory and the breakdown theory. We shall now briefly examine both theories.

3.2.1 Matrimonial Offence or Fault Theory

The matrimonial offence theory dates back to the old ecclesiastical (i.e. church) courts in England which had exclusive jurisdiction over divorce matters, until the introduction of secular divorce courts in 1857. Under the matrimonial offence theory, a marriage could be dissolved only in the circumstance that one of the parties had committed a matrimonial offence like adultery or incestuous adultery, cruelty, desertion or the commission of an unnatural offence like sodomy or bestiality. Even then, the canon laws that these courts applied in divorce matters only permitted divorce *a mensa et thoro* (separation from bed and board) which had the effect of a modern judicial separation. The decree *a mensa et thoro* ended cohabitation but did not in actual terms sever the marriage ties between the parties. None of the parties could remarry anyone else during the life-time of the other spouse. To sever the marital ties completely, a petitioner had to apply to the English Parliament for a divorce a *vinculo matrimonii* – based on the ground of either adultery or incestuous adultery on the part of the wife or husband respectively.

The matrimonial offence theory eventually gave way to the breakdown theory of divorce through a series of reforms in the English law of divorce that culminated in the Divorce Reform Act, 1969 of England. Until March 17, 1970, when the Matrimonial Causes Act came into effect, Nigeria had adopted and used in its entirety, the English Law on divorce and other matrimonial causes. Thus, Nigeria also adopted and incorporated into its own MCA the breakdown theory which enunciated the principle that the breakdown of a marriage should be the sole ground for divorce in Nigeria.

3.2.2 Breakdown Theory

The breakdown theory of divorce focuses on the fact that a marriage has broken down irretrievably; meaning that the marriage has died and cannot be revived, irrespective of whose fault it is that the marriage died. Following the incorporation of this theory into section 15(1) of the MCA in Nigeria, the courts are now not concerned with whose fault it is that the marriage is dead, but whether in the light of the facts and circumstances surrounding the breakdown of the marriage, the parties can reasonably be expected to live together again to try to make a success of the marriage. Once the court is able to establish the ground of irretrievable breakdown through proof of any of the “facts” listed under sections 15(2) and 16(1) of the MCA, it has little option but to dissolve the marriage.

It is interesting to note that the contents of the said sections 15(2) and 16(1) of the MCA used to be the grounds upon which divorce petitions were based under the matrimonial offence theory. Presently, under the breakdown theory, their relevance is only for evidence or proof purposes in respect of the fact that a marriage has broken down irretrievably.

3.3 Presentation of Divorce Petition

The High Court in all the states in Nigeria have been conferred with jurisdiction to entertain matrimonial causes including petitions for dissolution of marriages under section 2 of the MCA. Thus, a petition for dissolution of marriage may be presented in any of the High courts subject to certain preliminary rules discussed briefly below.

3.3.1 The Two-Year Rule

Under sections 30 (1) and (2) of the MCA, no petition for the dissolution of marriage may be presented before the expiration of two years from the date of the celebration of the marriage without leave of court, unless the petition is based on the facts of wilful and persistent refusal to consummate, adultery, rape, sodomy or bestiality contained in sections 15(2)(a) – (b) and 16(1)(a) of the MCA. The intention of the legislature in enacting this rule is to dissuade persons from taking the marriage institution lightly and to persuade married couples to try to overcome initial and normal marital difficulties. While interpreting a similar provision in the English MCA which did not permit petitions within the first three years of marriage, the court said in the case of ***Fisher v. Fisher [1948] 64 TLR 245*** that the rule is, "not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of marriage as soon as they discovered that their marriage was not what they expected."

The required leave may be granted to a party to present a petition before the expiration of the two-year period on the ground of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent. In ***Fay v. Fay [1982] 3 WLR 206,*** the House of Lord said that the world exceptional implied aggravated conduct which is "something out of the ordinary". Thus in ***C v. C [1980] 1 All ER 556***, husband's concealed homosexuality was held to amount to exceptional hardship. A more detailed explanation of the issues involved in the two-year rule is contained in ***E. I. Nwogugu, Family Law in Nigeria (Revised Edition) pgs. 151 – 155.***

Note that though the two-year rule prevents the starting of divorce proceedings within two years of marriage, it does not affect the fact or facts upon which a divorce may eventually be obtained. This means in effect that a future petitioner may be able to rely upon the conduct of his or her spouse now being claimed to cause exceptional hardship or depravity as the fact for a later divorce petition based on the sole ground stated in section 15(1)MCA.

3.3.2 The Application for Leave to Petition

In assessing the evidence and determining whether or not to grant leave to an applicant to petition for divorce, the court is guided by certain rules and other considerations. Section 30(4) of the MCA requires the court to consider firstly, the interest of any children of the marriage – children of the marriage being any child born by the couple together, adopted or legitimated or treated by them ordinarily as a member of their household as defined under section 69 of the MCA; and secondly, the question of whether there is any reasonable probability of reconciliation between the parties before the expiration of the period of two years after the date of the marriage.

The contents of the application for leave to file a petition for divorce as well as the processes involved in its filing and granting have been dealt with under Court Processes in Unit 1 of this module. However, the following need to be noted.

- Any leave of court obtained by means of deliberate misrepresentation or concealment of marital facts, may lead to the dismissal of the petition that is founded on it as provided for under section 30(5) of the MCA.

- Any cross-petition that is instituted pursuant to the petition for which leave was fraudulently obtained must also be dismissed. Where however, the court thinks it proper to hear and determine the cross-petition, it must also hear and determine the petition. [see section 30(6) of the MCA]

- The dismissal of any such petition or cross-petition is not a bar to any subsequent proceedings based on the same or substantially the same facts as those constituting the ground on which the dismissed petition or cross-petition was brought. [see section 30(7) of the MCA]

Finally, section 30(9) of the MCA provides that leave of court referred to under the Act at all material times, includes leave granted by a court on appeal, even if leave was refused by the lower court. Again, Order IV, Rule 4 of the Matrimonial Causes Rules (MCR) provides that at all material times, a copy of the order of the court granting leave to the applicant must be served together with the petition for the dissolution of marriage.

3.4 The Ground for Petition for Divorce

As earlier noted, there is now only one ground on which the court has power to dissolve a marriage in Nigeria. That sole ground is that the marriage has broken down irretrievably. According to Oputa, J. (as he then was) in the unreported case of ***Okafor v. Okafor (1971)*** the general theme of the MCA "is definitely to facilitate the dissolution of a marriage that exists only in name; ... a marriage that has broken down irretrievably." Section 15(1) of the MCA provides as follows:

> "A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented by either party to the marriage upon the ground that the marriage has broken down irretrievably".

The above statement is misleading when construed literally. This is because the court cannot dissolve a marriage, no matter how clear it may be that the marriage has broken down, without recourse to certain facts or circumstances which would justify such conclusion. Since the court is not empowered to conduct an investigation into the state of the marriage, it can only reach a conclusion that the marriage has broken down irretrievably upon the proof of certain facts before it. And the facts required to be proved to establish that breakdown are contained in sections 15(2) (a) – (h) and 16(1) of the MCA. A close look at the facts so required to be proved reveals that almost all of them fall within the class of matrimonial offences formerly relied on to obtain a divorce under the matrimonial offence theory, which the breakdown theory replaced.

The implication of this therefore is that unless a party is able to establish at least one of the facts enumerated under the said sections 15(2) (a) – (h) and 16(1) of the MCA – the facts being symptoms of a breakdown of the marriage – then such a party will not be entitled to a decree. It follows that in the absence of proof of any of the facts listed, the court cannot *suo motu* grant a decree on the ground that the marriage has broken down irretrievably. Thus, in ***Richards v. Richard [1972] 1 WLR 1073*** and much later ***Buffery v. Buffery [1988] 2 FLR 365*** decrees of dissolution of marriage in both cases, were refused because the petitioner wives in both cases had failed to establish the "behaviour" or conduct fact that would have enabled the courts to grant the decrees sought. In both cases, the courts held that the marriages had broken down irretrievably but could do nothing about it in the absence of any facts in proof thereof.

Nigerian courts are unanimous in their opinion that though irretrievable breakdown is the sole ground of divorce in Nigeria, the court cannot make a finding of irretrievable breakdown of marriage in the absence of proof of any of the facts specified under sections 15(2) (a) – (h) and 16(1) of the MCA. In the unreported case of ***Ochei v. Ochei & Anor [1971]***, the court held that a petitioner must state the specific fact or facts relied on under sections 15(2) (a) – (h) and 16(1) of the MCA which point to a breakdown. This position of the courts is well summarized in the case of ***Harriman v. Harriman [1989] 5 NWLR (Pt 119) 6*** where the Benin division of the Federal Court of Appeal held that the sub-paragraphs section 15(2) are only "a species of the breakdown" provided for under section 15(1) of the MCA as the sole ground for divorce.

We shall now proceed to examine the facts contained in sections 15(2) (a) – (h) and 16(1) of the MCA. The facts contained in 15(2) (a) – (h) of the MCA are as follows:

(a) wilful and persistent refusal to consummate;
(b) adultery and the resultant unpleasant cohabitation;
(c) behaviour which discourages cohabitation;
(d) respondent's desertion for one year;
(e) separation of the parties for two years;
(f) three years separation of the parties;
(g) failure of respondent to comply with a of restitution of conjugal rights made under the Act and
(h) that the other party is presumably dead.

Other facts dealt with under section 16(1) of the MCA and which are meant to be particulars of the conduct complained of under section 15(2) (c) are as follows:

(a) respondent's rape, sodomy and bestiality; or
(b) the respondent's habitual or drug-induced intoxication for at least two years since the marriage; or
(c) respondent's frequent criminal convictions amounting on the aggregate to three years imprisonment within the first five years of marriage, thereby habitually leaving the petitioner without reasonable means of support; or
(d) respondent's continuing imprisonment for three years for a felony or capital offence since the marriage, up till the date of the petition; or
(e) respondent's conviction for either attempting to kill or murder or intentionally inflicting grievous harm or even intending to inflict grievous harm or hurt on the petitioner since the marriage, but within one year before the petition; or
(f) the respondent's wilful and habitual failure to pay maintenance to the petitioner throughout the period of two years immediately preceding the date of the petition; or
(g) respondent's unsoundness of mind for a period of six years and an aggregate five years of which he must have been confined in a mental institution or institutions since the marriage, and immediately preceding the date of the petition.

The principles of law relating to the above factual grounds are treated either in isolation or in groups hereunder.

3.4.1 Wilful and Persistent Refusal to Consummate [section 15(2)(a) MCA]

Consummation of marriage is the first act of normal and complete sexual intercourse between the parties to a marriage. Where this duty is not performed owing to the refusal of one of the parties to succumb to the other party's request to so consummate, section 15(2)(a) provides that the marriage will be held to have broken down irretrievably. For this subsection to apply, the refusal to consummate must be "wilful" and "persistent".

The respondent's refusal is said to be wilful if it is a "settled and definite decision" on his part, consciously arrived at "without just excuse" as was held in the case of ***Horton v. Horton [1947] 2 All ER 871 at 874***. Therefore, mere neglect to consummate on the part of the respondent does not amount to a wilful refusal to consummate as was held in the case of ***S v. S [1954] 3 All ER 736***.

Again, inability to consummate is not the same as wilful refusal to consummate. Thus, in ***Potter v. Potter [1975] 5 FLR 16***, the wife did not succeed in her petition for dissolution because the court found that the husband's failure to consummate arose not from his deliberate will, but from a natural "loss of ardour" occasioned by a prolonged history of sexual difficulties.

A respondent who can show a "just excuse" for his refusal to consummate is not guilty of wilfully refusing to consummate. In ***Ford v. Ford [1987] Fam Law 232***, the parties were married while the husband was serving a five-year jail term. According to prison regulations, inmates were not permitted to have sexual intercourse even though it was not unusual for inmates to engage in it. The husband, pursuing a desire to be law-abiding refused to have intercourse with his wife (in contravention of prison rules) despite the fact that during her visits, they were left alone for period of up to two hours. In a petition based on the ground inter alia of wilful refusal to consummate, the court held that the husband's refusal to have intercourse in prison (in breach of prison rules) would not by itself have justified a finding that he had wilfully refused to consummate the marriage, but for other reasons that allowed the court to grant the decree sought.

The case of ***Jodla v. Jodla [1960] 1 All LR 625*** and the Nigerian case of ***Owobiyi v. Owobiyi [1965] 2 All NLR 200*** point to the fact that there cannot be a wilful refusal where there is no request – direct or implied – for sexual intercourse and such request can only be honoured if the opportunity exists for respondent to comply. Thus, it can be said that in the case of ***Ford***

(Supra), the prison environment in which sexual intercourse was officially prohibited, did not afford the respondent husband the opportunity to comply with the wife's requests for intercourse.

Note that pre-marital sex does not amount to consummation. Therefore, if the only act of sexual intercourse took place before the marriage, it cannot count as consummated. Again, the state of non-consummation of the marriage, according to section 21 of the MCA, must continue up till the date of hearing of the petition; otherwise there would be no ground for dissolution. Once the marriage has been consummated, the petitioner no longer has a remedy (except on other grounds) if respondent fails to engage in subsequent marital intercourse.

Finally, the respondent's refusal must not only be wilful but also persistent. And persistent in the context of the Act provision has been interpreted in ***Hardy v. Hardy [1964] 6 FLR 109 at 110*** to mean "repeatedly".

3.4.2 Adultery and Intolerability [section 15(2)(b) MCA]

The MCA introduced the twin requirements of adultery and intolerability as pointers to the fact that a marriage has broken down irretrievably. Section 15(2)(b) of the MCA provides that a court shall hold a marriage to have broken down irretrievably if the petitioner satisfies the court "that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent." Therefore, to succeed in getting a decree of dissolution, a petitioner must establish firstly that the respondent has committed adultery since the marriage and secondly that he or she finds it intolerable to live with the respondent.

However, it need not be the respondent's adultery that is responsible for petitioner finding it intolerable to live with the respondent. What petitioner finds to cause intolerability may be due to some other reasons that the petitioner is expected to state. Thus, the adultery and intolerability may exist quite independently of each other, though both factors need to be proved together to secure a decree of dissolution. In the unreported cases of ***Arinye v. Arinye [1973]*** the court held that the test of intolerability is subjective i.e. what the petitioner finds intolerable and not what a reasonable petitioner finds intolerable. Let us now examine the twin concepts under sub-heads A and B

A. What is Adultery?

Adultery is the voluntary or consensual sexual intercourse between two persons of the opposite sex, at least one of whom must be married to some other person. It involves sex between persons

who are not married to each other. Where the element of voluntariness is missing, a charge of adultery cannot be sustained; for example, in cases of rape, mental incapacity and to some extent, intoxication or drunkenness which negatives consent.

The clandestine and private nature of the act of adultery makes the obtaining of direct evidence almost impossible. Nevertheless, an alleged adultery may be proved either by direct evidence or by reliance on circumstantial evidence from which adultery may be inferred, depending on the peculiar circumstances of each case. Directly or indirectly, adultery may be established in any of the following ways;

(i) Confessions and Admissions

Confessions and admissions are the easiest ways to prove adultery. Section 82 of the MCA, provides that once a court is satisfied that the confession or admission is probably true, it may rely on same to rule that adultery has been committed.

(ii) Cohabitation of Respondents

In the case of ***Evoroja v. Evoroja [1961] WNLR 6*** the court held that a presumption of adultery is raised where a respondent and co-respondent cohabit in the same house hold either as legally-unwed spouses or in a bigamous relationship.

(iii) Criminal Convictions during Marriage

Section 87(1)(a) of the MCA provides that a party to a marriage who is convicted of the criminal offence of rape or any other crime or offence in which sexual intercourse with a person of the opposite sex is an element, is guilty of adultery with his victim.

(iv) Sexually – Transmittable/Venereal Disease

The presence of venereal disease or other sexually-transmittable diseases in a petitioner raises a rebuttable presumption that he/she was infected by the respondent; thereby raising another rebuttable presumption that respondent is guilty of adultery.

(v) Where Paternity of a Child is in Issue

A rebuttable presumption of adultery is raised where the paternity of a child is in issue. Examples include:

(a) where a wife deliberately omits the name of the child's father or uses a name other than that of her husband in the birth certificate as was the case in ***Arinye v. Arinye [supra]***; or

(b) where a child is born by a wife at a time when it is highly improbable that marital intercourse took place at the time of its conception as was the case in ***Preston-Jones v. Preston-Jones [1951] AC 391***; or

(c) where DNA tests establish that another man is the father of a child born to a wife like in ***Holmes v. Holmes [1966] 1 WLR 187***.

(vi) Evidence of Opportunity and Inclination

Since obtaining direct evidence of adultery is difficult and rare, parties seeking to establish adultery against their spouses usually rely on evidence of antecedent conduct, disposition and opportunity to commit adultery on the part of the alleged adulterers. The test for determining the circumstances which would justify an inference of adultery has been laid down in ***Ross v. Ellison [1930] AC 1*** where the court cautioned that:

> "…. the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by …. antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as a result of opportunity for its occurrence".

The learned judge was saying in effect that where the evidence of mutual love or passion and an intimate relationship between two persons is so strong and clear that given the opportunity they are most likely to commit adultery, then an inference of adultery will be made if such an opportunity presents itself. In ***Akinyemi v. Akinyemi [1963] All NLR 340*** the court was able to infer adultery from the conduct of the respondent wife and the co-respondent who spent more than five hours out at night on visits to various hotels and nightclubs only to arrive together in the early hours of the morning hugging and kissing each other to exhibit their mutual fondness for each other.

B. The Nature of Intolerability

It is now settled law that there is no conjunctive link between adultery and the fact of intolerability; both requirements are completely independent of each other. In ***Cleary v. Cleary and Hutton [1974] 1 WLR 73***, the English Court of Appeal, in interpreting a similar provision to Nigeria's section 15(2) (b) MCA, held that the ground of divorce is established if the petitioner genuinely finds it intolerable to live with the respondent, even if the adultery has not played any significant part in the breakdown of the marriage. The current attitude of the courts is to regard adultery as a symptom of the breakdown of a marriage, and which may or may not be responsible for the petitioner finding it intolerable to live with the respondent. Therefore, adultery *per se* will only be regarded as the cause of the breakdown of marriage, if and only if the petitioner can

satisfy the court that the act of adultery is so offensive and deeply wounding to him or her as to make any further cohabitation or married life to the respondent to be unthinkable or intolerable.

The test of intolerability is subjective: it is sufficient if the petitioner does in fact find it intolerable to live with the respondent. It is immaterial that a reasonable person might not find it intolerable to live with the respondent under the same circumstances.

3.4.3 Respondent's Unbearable Conduct [section 15(2)(c) MCA]

A court, sitting in its matrimonial jurisdiction is entitled to infer that a marriage has broken down irretrievably upon proof of the allegation that the respondent has behaved in such a manner that makes it intolerable for the petitioner to continue to live with the respondent. There are two limbs to the provision of section 15(2) (c) of the MCA. The petitioner must prove firstly that the respondent has behaved in a particular manner. Secondly, the court has to consider whether, in the light of the respondent's conduct, it will be reasonable to expect the petitioner to continue to live with the respondent. In other words, this provision embodies both the objective and subjective elements of evaluation. And since the word "reasonably" qualifies "expected" and not the respondent's behaviour complained of, the court is not expected to consider whether or not the respondent's behaviour is morally deficient. Thus, in ***Livingstone-Stallard v. Livingstone-Stallard [1974] 2 All ER 766*** the court, in interpreting a similar provision of the English Matrimonial Causes Act, 1973 formulated the combined objective and subjective tests as follows:

> "Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?".

For a better understanding of the nature and weight of the misbehaviour, and the unreasonableness of the expectation of cohabitation envisaged under section 15(2)(c), each limb of the requirement as well as illustrations of behaviour which amount to unbearable conduct is treated below under separate sub-heads A and B.

A. The "Behaviour" Fact

As already noted, a petitioner who relies on section 15(2) (c) as the fact pointing to the breakdown of his/ her marriage must prove that the other spouse has behaved in a particular way or ways, which behaviour or series of behaviour he/she cannot reasonably be expected to live with. In the

case of ***Katz v. Katz [1972] 3 All ER 219 at 223*** "behaviour" was defined as something more than a mere state of affairs or of mind but some form of acts or omissions which may either be positive or negative in manifestation. While positive conduct may be manifested in things like physical violence, constant nagging, verbal assault bordering on cruelty, alcoholism etc.; negative conduct can manifest in prolonged silences and total inactivity, neglect, unjustified refusal of sexual intercourse, inexcusable laziness and a host of others.

Whatever form it takes, the conduct complained of must have a bearing on the marriage itself. And the court must be mindful of the obligations and standards of behaviour implicit in marriage as seen through the eyes of the parties in order to determine whether the conduct complained of can amount to unbearable behaviour. In ***Archard v. Archard*** **(unreported)** both parties, as at the time of their marriage, were devout Roman Catholics who did not believe in the use of contraceptives during intercourse. Later on, the wife ceased to be a practising Roman Catholic, and due to medical reasons, was advised by her doctor not to get pregnant for two years thereafter. She therefore insisted on the use of contraceptives during intercourse in order to avoid getting pregnant. The husband objected to the use of contraceptives and sought the opinion of his priest who then advised him to abstain completely from sex. The wife then petitioned for dissolution on the ground that her husband's refusal to have intercourse with contraceptives was unreasonable conduct she could not bear. The court refused to grant the decree sought on the ground that going by the antecedents of the parties, none was guilty of unbearable conduct. Rather the irretrievable breakdown of the marriage had been caused by a conflict between two reasonable attitudes.

Examples of "unbearable" behaviour include the following, some of which appear trivial:

(i) The case of ***Livingstone-Stallard v. Livingstone-Stallard (supra)*** where the court had to consider the parties' methods of washing their underwear.

(ii) The case of ***Pheasant v. Pleasant [1971] 1 All ER 587*** where the husband accused the wife of inability to give him the demonstrative and spontaneous affection that his nature craved for. The petition was dismissed because there was nothing in her behaviour which amounted to a breach of her marital obligations.

(iii) In ***Richards v. Richards [1984] FLR 11*** where the wife accused the husband of forgetting important family dates such as birthday and wedding anniversaries. He also committed the "crimes" of refusing to take her to the cinema, kill a troublesome dog, notify her parents of

her giving birth to a child and failed to give her flowers to mark the occasion. These were held not to be grave enough to cause marital breakdown.

(iv) But in contrast, the court viewed seriously cases of physical violence (***Udom v. Udom [1962] LLR 112***) drunkenness and alcoholism (***Ash v. Ash [1972] 1 All ER 582***) sexual deprivation and excessive sexual demands, and the making of cruel and unjustifiable remarks calculated to destroy a spouse's career (***Bateman v. Bateman [1979] Fam 25***) Again, in the unreported Nigerian case of ***Gbolade v. Gbolade***, the wife/petitioner filed for divorce over excessive sexual demands and severe beatings from her husband/respondent. She testified that her husband demanded for sex three weeks after a caesarean operation to deliver their first child and that on one occasion when they had a guest, he returned home drunk, called her outside and demanded for sex. She pleaded that he be patient till the following morning when the guest would have left. He refused and suggested the toilet as an alternative venue for the sex. When she refused, he beat her up thoroughly and inflicted injuries on her in the process. She subsequently left the matrimonial home and never returned. The court did not hesitate to dissolve the marriage.

Statutorily, section 16(1)(a) – (g) of the MCA provides for specific types of behaviour which can be held to justify the granting of a decree of dissolution of marriage in pursuance of section 15(2)(c) of the MCA. If either of the parties to a marriage is guilty of any of the listed types of conduct from the date of the celebration of the marriage, such conduct will be considered sufficiently grave and weighty as to sustain an allegation of intolerability. They include:

(a) rape, sodomy or bestiality; or

(b) habitual drunkenness or intoxication arising out of excessive use of sedatives, narcotics, or stimulants for period of at least two years; or

(c) respondent's frequent convictions for crimes within a period of five years and for which he/she has been sentenced in the aggregate to imprisonment for not less than three years, during which periods the respondent habitually left the petitioner without reasonable means of support; or

(d) where the respondent, having been convicted for a felonious or capital offence punishable by either death, life imprisonment or imprisonment for five years or more, has been in prison since the marriage for a period of not less than three years and is still in prison at the date of the petition; or

(e) where since the marriage and within one year immediately preceding the date of the petition, the petitioner has been the target of either an attempted murder or the victim of

intentional assaults occasioning harm or the target of an intent to inflict grievous harm or hurt, all by or from the respondent; or

(f) where the respondent is guilty of habitual and wilful failure to pay the maintenance allowance (either ordered to be paid by or registered in a court in Nigeria, or mutually agreed to be paid under a separation agreement between the parties), to the petitioner throughout the period of two years immediately preceding the date of the petition; or

(g) where the respondent, at the date of the petition, is of unsound mind and is unlikely to recover and where, since the marriage and within the period of six years immediately preceding the date of the petition, the respondent has been confined either for a period of, or for periods amounting on the aggregate to not less than five years in a mental hospital(s) or institution(s).

The above statutory examples of "misbehaviour" are by no means exhaustive of the conduct envisaged by section 15(2)(c) of the MCA. As earlier noted, the peculiar facts of each case will usually present the picture upon which the court will be able to assess whether or not the conduct complained of is so grave and weighty as to justify a finding that no reasonable person can expect the petitioner to continue to live with the respondent under the circumstances. Thus, other kinds of conduct which are common and typical of Nigerians held to amount to unbearable conduct include: the practice of witchcraft, juju or sorcery (***Oladetohun v. Oladetohun [1972] 2 UILR 289***), insulting the family of a spouse (***Bassey v. Bassey [1978] 10-12 CCCHCJ 242***), physical violence, nagging, denial of sexual intercourse to a spouse and indulging in same with third parties (***Johnson v. Johnson [1972] 11 CCCHCJ 94***) etc.

B. Unreasonable Expectation of Cohabitation

The second limb of the fact to be established as a ground for divorce under section 15 (2) (c) of the MCA is that as a result of the respondent's conduct – whether passive or active, positive or negative, intentional or unintentional, acts or omissions – the petitioner cannot reasonably be expected to live with the respondent. Note that it is not the alleged behaviour that must be unreasonable; it is the expectation of cohabitation of the parties despite the intolerable conduct of the respondent as was held in ***Bannister v. Bannister (supra)***.

The test of the reasonableness or otherwise of the expectation of cohabitation is objective, even though it is judged through the eyes of the parties. To this end, the court must consider the particular parties before it and not just "ordinary reasonable spouses". The question of whether a particular petitioner can live with a particular respondent in the face of the stated unbearable conduct is a matter to be decided by the court, which must consider the totality of the character

and personality of the parties and the interaction between them. Thus, in the case of ***Ash v. Ash*** the court opined that a petitioner who is violent, flirtatious or addicted to drink or drugs may reasonably be expected to live with a respondent who is equally violent, flirtations or addicted to drink or drugs. According to the court, "if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other."

In summary, what determines whether or not a particular petitioner can reasonably be expected to live with a particular respondent is the nature and degree of the respondent's misconduct and its effects on the petitioner. And the reasonableness or otherwise of the expectation must be premised on the standard of a reasonable spouse and not just an idiosyncratic spouse with a peculiar nature as the petitioner in ***Pheasant v. Pheasant (supra)*** whose major allegation against his wife was that she could not give him the demonstrative and spontaneous affection that his nature craved. The court must also take into account the characters, personalities, social, religious and educational backgrounds and societal status of the particular parties before it, and decide whether or not the respondent's behaviour is such that no right-thinking person would reasonably expect the petitioner to continue to live with him or her.

3.4.4 Desertion [section 15(2)(d) MCA]

Another "fact" that points to the irretrievable breakdown of marriage is desertion of one spouse by the other. According to section 15(1)(d) of the MCA, a court is entitled to hold that a marriage has broken down irretrievably if a petitioner satisfies the court that the respondent "has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition."

There is no statutory definition of desertion. However, desertion was defined in the case of ***Oghenevbede v. Oghenevbede [1973] UILR 104*** to be:

> "The separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse"

Thus, desertion occurs where there is a separation of both spouses to a marriage, which separation is against the will of one spouse, with an intention by the guilty spouse to bring the marriage permanently to an end without just cause or excuse. To ground a decree of divorce, section 17(1)

of the MCA provides that the desertion complained of must have lasted for a minimum continuous period of one year before the presentation of the petition for divorce.

Desertion may be simple or constructive; simple or actual desertion occurs where the deserting or guilty spouse intentionally ends cohabitation with the other spouse without just cause or excuse. This he or she may do either by moving out of the matrimonial home or living a completely separate life from the other spouse while still living in the same matrimonial home. But where the "innocent" or deserted spouse is forced to leave the matrimonial home either by forceful physical ejection or in response to the deserter's intolerable conduct, then the spouse who remains in the matrimonial home is in constructive desertion.

To make out the "fact" of desertion - be it simple or constructive – the petitioner must prove that the respondent has deserted him or her and secondly that the respondent has been in desertion for a continuous period of at least one year immediately preceding the presentation of the petition. And in order to succeed in a petition based on this fact, the petitioner must establish to the satisfaction of the court, the following four essential elements of desertion:

a) Actual separation of the spouses
b) The intention to end cohabitation permanently i.e. *animus deserendi*
c) Lack of consent from the deserted spouse
d) Absence of just or reasonable cause for the desertion

A. The Fact of Separation

The actual physical separation of the spouses to a marriage is a necessary pre-requisite for the fact of desertion. The physical separation can take the form of either the physical withdrawal of one of the parties from the matrimonial home or the maintenance of separate and independent lives by both parties while living within the same matrimonial home. This latter situation is possible because, in the words of Lord Merrivale in ***Pulford v. Pulford [1922] All ER Rep. 121,*** "desertion is not the withdrawal from a place, but from a state of things." What is needed therefore is not a separation of homes but a separation of households.

De facto separation necessarily implies a complete cessation of all marital duties and obligations flowing usually from cohabitation. In cases where there is actual physical departure of one spouse from the matrimonial home as in ***Rosanwo v. Rosanwo*** [1961] WNLR 297 desertion is easier to establish. But where both spouses are still living in the same matrimonial home, desertion can only be established upon proof that the parties have ceased to have a common life, and can no longer be said to be living as husband and wife in the real

sense of the word. Thus, the level of interaction between the spouses and the extent of shared marital duties and obligations will determine whether or not there is actual separation of spouses living under the same roof.

B. The Intention to Desert (*Animus Deserendi*)

For the fact of desertion to be established, there must be proof that the deserting party actually had the intention to desert by bringing cohabitation permanently to an end. Such an intention can be inferred from the words or conduct of the party in desertion. For example, where a party deliberately moves out of the matrimonial home without the consent of the other spouse (see ***Adebiyi v. Adebiyi [1979] HCLR 154***), a rebuttable presumption of desertion is raised; rebuttable only by evidence of just cause or excuse.

The intention to desert may be an initial or a supervening occurrence. Where a party initially separates from the other party with that party's consent, but later takes a unilateral decision to bring cohabitation permanently to an end, section 19 of the MCA provides that, that party exhibits a supervening *animus deserendi* as was the case in ***Sowande v. Sowande [1969] 1 All NLR 482***.

Finally, a party who lacks the mental capacity to form an intention due to mental illness cannot be guilty of desertion

C. Lack of Consent from the Deserted Spouse

For desertion to occur, the deserting spouse must have withdrawn from cohabitation without the consent of the other spouse. Thus where there is an agreement to live apart, there can be no desertion on the part of either spouse. This was the decision of the court in ***Ikpi v. Ikpi [1957] WNLR 59***.

D. Absence of Just or Reasonable Cause for Desertion

A respondent may have good reasons for deserting a petitioner in two instances – where necessity calls for it or where the petitioner's behaviour calls for it. Such a respondent accused of desertion is said to have just or reasonable excuse for his actions. Cases of necessity could be job-related as was the case in ***Ekanem v. Ekanem [1975] 1 NMLR 235***; health reasons or imprisonment etc (see **Keeley v. Keeley *[1952] 2 TLR 756***); while conduct on the part of the petitioner which makes continuing matrimonial cohabitation impossible will be just excuse for the respondent to desert.

3.4.5 Living Apart for Two or Three Years [sections 15(2) (e) & (f) MCA]

The provisions of sub-sections (e) & (f) of section 15(2) of the MCA shall be treated together here since they are similar in nature except for the length of the period of living apart, and the fact that in section 15(2)(e), the petitioner is required to supply proof that the respondent does not object to a decree of divorce being granted.

For a court to infer that a marriage has broken down irretrievably, the parties to a marriage must have lived apart continuously for a minimum of either 2 or 3 years immediately preceding the presentation of the petition. In effect, these two situations translate to divorce by consent as in the case of section 15(2)(e) and divorce by repudiation in the case of section 15(2)(f). Both scenarios till date, present the best evidence of the irretrievable breakdown of statutory marriage. According to the court in ***Pheasant v. Pheasant [1972] Fam. 202***, separation or living apart "is undoubtedly the best evidence of breakdown and the passing of time, the most reliable indication that it is irretrievable".

Living apart implies physical separation from the same "household" even when the parties are living in the same house. According to section 15(3) of the MCA, "the parties to a marriage will be treated as living apart unless they are living with each other in the same household". The test of what amounts to living apart is whether there is any kind of communal living between the parties. Where the answer is positive, then there is no living apart as envisaged under the Act and exemplified in the case of **Mouncer v. Mouncer** ***[1972] 1 WLR 321***. Where the answer is negative, then there is a living apart as envisaged under the Act and exemplified in the case of **Fuller v. Fuller** ***[1973] 1 WLR 730***.

Living apart begins to count from the date that one party recognises and begins to treat the marriage and cohabitation as ended (held ***Santos v. Santos [1972] Fam. 247***) without necessarily informing the other party as was held in ***Sullivan v. Sullivan [1958 NZLR 912***. And in computing the relevant periods of living apart, section 17(2) of the MCA provides that any periods amounting in the aggregate to not more than 6 months within which the parties lived together (probably to try to reconcile) shall be disregarded in determining whether the period is continuous or not. Again, the court decided in the case of ***Majekodunmi v. Majekodunmi [1974] 6 CCHCJ 809*** that the occasional sexual intercourse between the parties during this period does not imply a resumption of cohabitation and the consequent ending of living apart.

With respect to section 15(2)(e) of the MCA, the Act requires that the respondent must not object to the granting of a decree of divorce. The non-objection may be manifested positively through writing of letters or through answers filed in response to petitions, or negatively through non-participation in the divorce proceedings.

3.4.6 Failure to obey a Decree of Restitution of Conjugal Rights [sections 15(2)(g) MCA]

Section 15(2)(g) of the MCA provides that where a respondent fails to comply with a decree of restitution of conjugal rights for a period of not less than one year from the date of the decree, a decree of divorce may be granted in favour of the petitioner. This means that the respondent has defied a court order instructing him/her to resume cohabitation with the petitioner, and this disobedience has lasted for a continuous period of at least one year immediately preceding the presentation of the petition.

3.4.7 Presumption of Respondent's Death

Section 15(2)(h) of the MCA provides that a marriage can be dissolved where one party has been absent from the petitioner for so long a period and in such circumstances as to provide reasonable grounds for presuming that he/she is dead. In proof of this presumption, section 16(2)(a) of the MCA requires the petitioner to produce evidence that for a period of seven years immediately preceding the petition, the other party has been continuously absent (missing); therefore the petitioner has no reason to believe that he/she is still alive at any time within the seven years. Such petitioner must show evidence of the unsuccessful efforts made to locate the respondent.

4.0 Conclusion

Divorce law in Nigeria today rests squarely on the breakdown theory of marriage, having progressed from the erstwhile matrimonial offence or fault theory that prevailed before the 1970 MCA. The courts are now concerned with the fact that a marriage has broken down irretrievably rather than whose fault it is that a marriage is ending in divorce. Thus, there is now only one ground of divorce provided for under section 15(1) of the MCA i.e. that the marriage has broken down irretrievably.

To establish that the marriage has broken down, a party seeking a decree of divorce is required to satisfy the court of that fact, by pointing to one or a number of the reasons or "facts"

listed under sections 15(2)(a)-(h) and 16 (1) of the MCA , all of which have been discussed above. Finally, parties seeking a divorce must ensure that the marriage is at least two years old before filing a petition for dissolution of marriage. If the marriage is less than two years, a petitioner is required under sections 30 (1) and (2) of the MCA to seek leave of court to file the petition, which leave can only be granted where the court is satisfied that the refusal to grant leave, would occasion exceptional hardship for the petitioner arising from the respondent's depravity.

5.0 Summary

This unit dealt with dissolution of marriage and how a petition for divorce may be filed by a party to the marriage on any of the legal grounds contained in sections 15(2)(a)-(h) and 16 (1) of the MCA. The highlights of this unit are as follows.

1) The History of divorce law from the time of the Ecclesiastical Courts in England, through various reforms up till the MCA 1970.
2) The theories of divorce law – the fault theory (whereby divorce was granted on the ground that a party had committed a matrimonial offence) and the breakdown theory (whereby divorce was granted on the basis that the marriage had broken down irretrievably).
3) Presentation of divorce petition, including the two-year rule and the form of seeking leave of court.
4) The ground for divorce and the facts necessary to be proved to establish the ground of irretrievable breakdown of marriage. The facts in question are:

   (i) wilful and persistent refusal to consummate;
   (ii) adultery and intolerability;
   (iii) respondent's unbearable conduct;
   (iv) desertion;
   (v) living apart for two or three years;
   (vi) failure to obey a decree of restitution of conjugal rights; and
   (vii) presumption of respondent's death.

6.0 Tutor-Marked Assignments

1. Discuss the major characteristics of the fault and breakdown theories of divorce
2. How true is the assertion that there is only one ground for filing for divorce in Nigeria?
3. Briefly discuss the nature and character of the facts leading to a conclusion that a marriage has broken down irretrievably as contained in sections 15(2)(a)-(h) of the MCA.

7.0 Suggested Further Readings/References

8) Aderibigbe, R., ***Family Law in Nigeria***
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Statutes

5. **Marriage Act, 1914, Cap. M6** Act Chapter M7 LFN**, 2004, ...**

Matrimonial Causes Act Cap. M7 LFN**, 2004,** Sections 2, 15, 16, 17, 21, 30, 69, 82, and 87

Unit 4: Bars to Granting Divorce Petitions

1.0 Introduction

A bar is a restriction on a petitioner's right to a decree in matrimonial proceedings against a respondent he or she alleges is guilty of a matrimonial misconduct. It acts as a form of estoppel to prevent a petitioner from being granted the reliefs sought in matrimonial proceedings, on the ground that he/she had condoned, connived at or colluded with the respondent in committing the alleged offence. In other words, where a petitioner has conducted him or herself in a manner that makes it unfair and unjust for the court to grant him/her the reliefs sought in his/her petition, the court may refuse to grant such reliefs depending on whether or not the court has a discretion to exercise in the matter. Thus, bars function along the same lines as the equitable maxim that says that "he who comes to equity must come with clean hands".

Ordinarily, a petitioner who has proved to the satisfaction of the court that his/her marriage has broken down irretrievably as provided under sections 15(1) and (2)(a) – (h) of the MCA is entitled to a decree of divorce. However, such a decree may be refused if a bar applies to the case. This unit discusses the nature of bars to a petition for divorce, the purpose of the bars and the circumstances under which they operate to defeat the claims of a petitioner in a petition for divorce.

2.0 Objectives

The objectives of this unit are to help the students learn the following:

(i) The nature of bars to a petition for divorce;
(ii) The function of the bars;
(iii) The circumstances under which the bars can be invoked;
(iv) The effect of the bars.

3.0 Main Content

A bar to a petition for divorce is a form of sanction against a petitioner who has behaved in a manner similar to the respondent's conduct on the basis of which the petitioner filed for divorce. Even where the petitioner's behaviour is dissimilar to the respondent's conduct complained of, the petitioner must have behaved in an equally blameworthy manner as the respondent's conduct that he/she now complains is responsible for the irretrievable breakdown of the marriage. Therefore, the respondent is at liberty to raise a bar as a defence against the petition and may be able to succeed depending on whether the nature of the bar prevents the court from exercising a discretion as to whether or not to grant the reliefs sought by the petitioner.

Sections 26 – 28 of the MCA provide for two categories of bars that may be invoked as defences against a petition for divorce. These are absolute and discretionary bars. Where absolute bars are proved by a respondent, the court must dismiss the petition; whereas discretionary bars confer on the court, the discretion whether or not to dissolve the marriage even when proof of the existence of same is established. We shall now examine the nature of absolute and discretionary bars.

3.1 Absolute Bars

As mentioned earlier, an absolute bar prevents a court from granting a decree of divorce to a petitioner who has been proved to have committed a matrimonial misconduct. Once the nature of an alleged misconduct on the part of a petitioner is such that it constitutes an absolute bar, the court has no other choice than to dismiss the petition once the allegation has been proved. Three types of bars fall within this category – condonation, connivance and collusion – discussed below.

3.1.1 Condonation

Section 26 of the MCA provides thus:

> "Except where section 16(1)(g) of this Act applies, a decree of dissolution of marriage shall not be made if the petitioner has condoned or connived at the conduct constituting the facts on which the petition is based".

A petitioner is said to have condoned a matrimonial misconduct committed by a respondent if he/she had forgiven and reinstated the respondent to the position of a spouse after the discovery of the said misconduct. If the petitioner failed to complain and take steps to redress the wrong committed by the respondent at the time of discovery, he/she cannot be heard at a later date to complain about the misconduct for which he/she had forgiven and reinstated the respondent; provided that the respondent, whose wrong has been so condoned did not thereafter commit any further matrimonial offence.

Condonation has been defined in the case of ***Inglis v. Inglis [1967] 2 All ER 71*** thus:

> "Condonation is the reinstatement of a spouse who has committed a matrimonial offence to his or her former matrimonial position in knowledge of all the material facts of the offence with the intention of remitting it, that is to say with the intention of not enforcing the rights which accrues to the wronged spouse in consequence of that offence".

In the unreported Nigerian case of ***Olutayo v. Olutayo*** the court stated that:

> Condonation of matrimonial offences means the conditional forgiveness of all such offenses as are known to or believed by the offended spouse so as to rescue as between the spouses the *status quo ante*. As the forgiveness is conditional and not forgiveness in the true sense of the word, the real import of condonation is a conditional waiver of the right of the spouse to take matrimonial proceedings ... Unless it appears to the contrary, the condition subject to which the offending spouse is forgiven, is that no further matrimonial offense shall occur.

From the above dictum it can be said that condonation is a conditional forgiveness. It is subject to the condition that the spouse responsible for the misconduct constituting the basis of the petition must not commit a further matrimonial misconduct of the same nature or of a different type; otherwise, the subsequent misconduct will revive the condoned offence. In ***Harrison-Obafemi v. Harrison-Obafemi [1965] NMLR 446***, the husband committed adultery with the co-respondent which resulted in the birth of a child. The wife condoned the adultery and the spouses nevertheless continued to live together. Subsequently however, the husband deserted the matrimonial home and took up residence with the co-respondent. He later on presented a petition for divorce. The wife also cross petitioned relying on the earlier adultery and desertion. The Court held that the desertion had revived the earlier condoned adultery.

There are three constituent elements in the bar of condonation. These are:

i) knowledge of the misconduct by the petitioner;
ii) forgiveness of the respondent (the offending spouse) by the petitioner, being the wronged spouse; and
iii) reinstatement of the respondent by the petitioner

i) Knowledge

A condoning spouse cannot forgive what he/she does not know. There cannot be condonation without knowledge of the matrimonial misconduct committed by the respondent. The wronged spouse, i.e. the petitioner must have knowledge of all the material facts of the offence or misconduct. Whether or not a petitioner spouse can be said to have knowledge of the respondent's misconduct is a question of fact to be established by evidence. The knowledge in question may be actual or constructive.

ii) Forgiveness

Forgiveness is an essential element of condonation. There must be an intention on the part of the wronged spouse to forgive the offending spouse (i.e. an *animus remittendi*). Forgiveness is usually apparent where there is a resumption of cohabitation based on an intended forgiveness. So that where there is a resumption of cohabitation without an accompanying forgiveness, there is no condonation. Long cohabitation, as in the case of ***Hearn v Hearn [1969] 3 All ER 417*** (where the cohabitation lasted 10 years) coupled with knowledge of the wrong, may give rise to an inference of forgiveness and reinstatement.

Note that forgiveness is conditional upon the respondent not committing another matrimonial misconduct.

iii) Reinstatement

This involves the restoration of a spouse who is guilty of a matrimonial misconduct to the position of a spouse after a reconciliation of both parties. Reinstatement also completes the process of forgiveness; so that a mere promise to forgive without the actual reinstatement of a guilty spouse will not amount to condonation. In the case of ***Fearn v. Fearn [1948] 1 All ER 459***, H who had been abroad on military service received a letter from W stating that she had committed adultery and that she was expecting a baby as a result of it. He replied stating that he had forgiven her and he would always love her and would treat the child as his own. W continued to draw pre-natal and separation allowances to the knowledge of H. Later, H changed his mind and stopped the allowances. When H returned to England, he refused to resume cohabitation with W but commenced divorce proceedings. The Court of Appeal held that since H had not reinstated W, there had been no condonation of her adultery.

Note that the issue of whether or not there is reinstatement is a question of fact to be determined by the court. Again, for condonation to be established there must have been a genuine

reconciliation between the parties. In furtherance of this Lord Denning had this to say in the case of ***Mackrell v. Mackrell [1948] 2 All ER 858*** as follows:

> "Reconciliation does not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married but their relationship must be restored by mutual consent, to a settled rhythm in which past offences, if not forgiven, at least no longer...embitter their lives".

Finally, the rationale for making condonation an absolute bar is that it would generally be inequitable to permit a spouse who has forgiven an offence to go back on the decision.

3.1.2 Connivance

The same section 26 of the MCA which prohibits the grant of a decree of divorce where petitioner is guilty of condonation also applies to situations where the petitioner is guilty of connivance. Connivance implies the active or passive involvement of a petitioner in the matrimonial misconduct that he/she alleges the respondent has committed, and on the basis of which the petition for divorce is filed. Where a Petitioner has consented, encouraged, or wilfully contributed to the commission of the matrimonial misconduct on which a petition for divorce is based, he/she would be refused a decree of divorce on the ground that he connived at the misconduct.

Connivance implies that one party has acquiesced, encouraged or given permission either expressly or impliedly to the commission of the misconduct. Connivance also involves anticipatory consent or acquiescence given to the occurrence of the facts relied upon by the petitioner or the continuance of such facts, if they were already taking place at the time he/she knows of them. Connivance operates on the principle of *volenti non fit injuria*.

Connivance may be express or passive; it is express where the alleged misconduct is directly authorised or consented to by the petitioner. In the unreported case of ***Obiagwu v. Obiagwu***, the parties were married in 1942. Due to the childlessness of the wife/petitioner, she consented to the respondent cohabiting with another woman in the matrimonial home for the purpose of bearing children for the respondent. As a result of the respondent's adultery with the woman, four children were born. In 1960, the wife now petitioned for divorce on the ground that the petitioner had committed adultery. The court refused to grant a decree of divorce on the ground that the petitioner connived at the respondent's adultery.

Note that the consent that implies connivance must have been freely and intentionally given. Thus, in the case of ***Kings v. Evans***, it was held that there was no connivance where the husband had to give consent because he was terrified of the co-respondent and had resented and resisted the adultery as far as he could. Again, connivance ends when there is a withdrawal of consent. So that where there is no causal connection between the initial connivance and the latter act complained of after the withdrawal of consent, connivance cannot be established. Absence of such a nexus automatically removes the inference of such connivance. Therefore, in order to show that connivance had spent itself, the petitioner has to show that it was not the effective cause of the subsequent misconduct and that it played no part therein.

Connivance is said to be passive where a spouse stands by in quiet acquiescence and permits the act of misconduct to take place. Such passive response must however be with the intention that the misconduct in issue would be committed. Thus, the wilful abstention from taking positive steps to prevent a potentially adulterous relationship could constitute connivance.

3.1.3 Collusion

Section 27 of the MCA provides that a decree of dissolution of marriage shall not be made if the petitioner, in bringing or prosecuting a petition for divorce, has been guilty of collusion with the intent of causing a perversion of justice. Collusion has been defined as "an agreement or bargain between the spouses or their agents or between the petitioner and the co-respondent as to procuring the initiation or conduct of the divorce proceedings". It implies an agreement or conspiracy between the petitioner and the respondent, to either initiate or prosecute a petition for divorce with the intention of deceiving the court into granting the decree sought.

To constitute collusion, there must be two elements: -

(i) An agreement between the petitioner and the respondent or co-respondent; and

(ii) An improper motive or purpose between the colluders to pervert the course of justice.

The Agreement

This implies that there must be a conscious agreement between the parties or their agents on their behalf. The mere coincidence of action between the said parties is not enough to imply collusion between them. Where one party has the requisite intention and the other does not, there is no agreement. But there would be collusion where there is an agreement between the parties' agents, based on the maxim *qui facit per alium facit per se* (he who does an act through another, does it himself).

Where a party is paid to initiate divorce proceedings, or a party agrees to commit a matrimonial misconduct in order to facilitate the divorce, collusion arises. Note however, that an agreement made in good faith concerning maintenance costs, damages or custody of children, is not necessarily collusive. In the unreported case of ***Ogunleye v. Ogunleye***, the court saw nothing collusive in the extra-judicial agreement between the spouses whereby the husband would pay a monthly allowance of three pounds to the wife for the maintenance of the only child of the marriage.

Improper Motive or Purpose

A further requirement in collusion is that the agreement between the spouses must also have an underlying corrupt intention or motive to cause a perversion of justice. The importance of this element was explained by Scarman J. in the case of ***Noble v. Noble (No.2)[1964] P.250 at 257*** thus:

> "A collusive bargain is one with a corrupt intention. It is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way for example, the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent, or – closer to this case – a co-respondent induced by a promise of some benefit not to defend a charge of adultery, or stronger still, to provide evidence or to bear witness at the trial against the respondent. If upon fair consideration of the circumstances, the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect, conducting the suit, there is, in my opinion, collusion. Unless there is this matching of forensic proceeding against valuable consideration, there is no collusion . . . I would add that to refrain from raising a defence or drop a charge while continuing with others, through negative acts, are of course as much part of the conduct of a suit as positive steps taken to institute or prosecute it, and if done or agreed to be done for valuable consideration would be collusive".

Collusive agreements may benefit either one or both parties or a third party completely. In ***Churchward v Churchward [1895] P. 7***, an agreement where W induced H to commerce divorce proceedings even though the amount of money she promised to pay was not for the benefit of H (the petitioner) but for the benefit of the children of the marriage, was held to be collusive.

Once collusion is established, the petition must be dismissed even if the parties never actually acted on the collusive agreement. This is however without prejudice to a fresh action being filed, provided the parties show that the collusive agreement that necessitated the dismissal of the earlier petition has been spent.

3.2 Discretionary Bars

Like absolute bars, discretionary bars operate as a defence on the part of a respondent to assist the court to dismiss a petition for dissolution of marriage. Section 28 of the MCA provides as follows:

> "The court may, in its discretion, refuse to make a decree of dissolution of marriage if since the marriage:
> (a) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived;
> (b) the petitioner has wilfully deserted the respondent before the happening of the matters relied upon by the petitioner, or where those matters involve other matters occurring during, or extending over, a period, before the expiration of that period; or
> (c) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the matter relied upon by the petitioner".

The import of the above provisions is that they create what are known as discretionary bars regarding the grant or otherwise of a petition for divorce. The nature of discretionary bars is such that a court adjudicating in a petition for the dissolution of marriage retains the discretion to grant or refuse the petition sought, depending on the conduct of the petitioner as it relates to the matters relied on by him/her in filing the petition.

Note that both the MCA and the MCR are silent on the factors to be taken into consideration by the court in exercising this discretion. Nevertheless, it is an established principle that such discretion must be exercised judicially and judiciously. In the Nigerian case of ***Enekebe v. Enekebe [1964] 1 All NLR 102***, the Supreme Court considered and adopted the principles which govern the exercise of the court's discretion as summarized by the House of Lords in ***Blunt v. Blunt [1943] 1 A. C. 517 at 525*** as follows:-

1. The position and interest of any children of the marriage, who may suffer from the collapse of the marriage, as well as the interest of any children born out of an adulterous relationship involving the petitioner.

2. The interest of the party with whom the petitioner has been guilty of misconduct (e.g. adultery) with special regard to the prospects of future marriage.

3. Whether the parties are likely to reconcile.

4. The interest of the petitioner especially with regard to his ability to remarry and live respectably.

5. The interest of the public at large determinable by maintaining a balance between the doctrine of sanctity of marriage and the other social considerations which make it unwise to put a dead marriage on “life support”.

The discretionary bars in question include:-

(i) Petitioner's adultery;
(ii) Petitioner’s desertion; and
(iii) Petitioner’s conduct conducing to the commission of the matrimonial misconduct by the respondent.

3.2.1 Petitioner's Adultery

By the provision of paragraph (a) of section 28 of the MCA, a petitioner who has committed adultery since the marriage, which adultery the respondent did not condone, may have his petition dismissed by the court. Even where the adultery was condoned, it may still act as a bar if there is evidence that the said condoned adultery had been revived by either another act of adultery, or some other matrimonial offence. The facts upon which the petitioner relies in filing the petition become immaterial where he/she is guilty of adultery.

A petitioner that is guilty of adultery is required to file a discretionary statement as provided for in Order XI Rule 28 of the MCR. The discretionary statement is a written confessional statement made to the court by the petitioner as to his/her adultery, and asking specifically for the court’s exercise of discretion in his favour, inspite of the adultery committed. The discretionary statement must contain details of every act of adultery that has not been condoned by the respondent.

3.2.2 Petitioner's desertion

This is provided for under paragraph (b) of section 28 of the MCA. Where a petitioner had wilfully deserted the respondent before the occurrence of the facts relied upon in the petition, the court has discretion to refuse a decree of divorce in his favour. The desertion in question must be wilful; therefore, if the petitioner had good reason for deserting the respondent, his or her conduct will not constitute a discretionary bar.

3.2.3 Petitioner's Conducive Conduct

Paragraph (c) of section 28 of the MCA provides that if the conduct or habits of the petitioner have conduced or contributed to the existence of the matters relied upon by the petitioner, the court may in its discretion refuse to make a decree of dissolution of marriage. In this case, the

petitioner's neglect or misconduct or habits must have contributed to the matrimonial misconduct of the respondent complained of. There must be a causal connection between the petitioner's habits or conduct complained of and the matrimonial misconduct committed by the respondent upon which the petition is based. For instance, a woman who leaves her husband without his consent to stay with her parents cannot complain of the husband's adultery since she has exposed him to the risk. In the unreported case of ***Negbenebor v. Negbenebor [1971]***, the husband, without any just cause, forced his wife out of the matrimonial home and abandoned her for three years without any maintenance. It was held in the husband's petition for divorce based on the wife's adultery, that it was the husband's wilful neglect and misconduct which led (conduced) to the wife's adultery. The petition was consequently dismissed.

4.0 Conclusion

Sections 15(1) of the MCA provides a ground to a petitioner who desires to divorce his spouse to do so without let or hindrance; provided that he/she is not guilty of any of the facts contained in 15(2) and 16(1) of the MCA on which he/she relies as being the respondent's misconduct that has occasioned the petition. This is because sections 26 – 28 of the MCA imposes some limitations on a petitioner's right to sue for divorce based on facts he/she alleges that the respondent is guilty of, if he/she has either condoned, connived at or colluded with the respondent in commission of the misconduct arising from those facts. Even where this is not the case, but he/she does not come to court as an innocent petitioner, the court may still refuse to grant the petition sought, on the ground that petitioner is also guilty of same or similar misconduct. In the case of the former scenario, the petitioner's condonation of, connivance at or collusion with the respondent in the alleged misconduct operate as an absolute bar against the petitioner and a full defence for the respondent, over which the court has no discretion to grant the petition. In the case of the latter scenario, the court may exercise its discretion to grant the petition sought even though the petitioner is guilty of adultery, desertion or contribution to the misconduct of the respondent complained of.

5.0 Summary

This unit has dealt with the restrictions and bars to the presentation of divorce petitions. Specifically, it has brought to the fore the following:-

(i) The nature and types of bars to a petition for divorce – these being absolute bars made up of condonation, connivance and collusion; and discretionary bars made up of petitioner's adultery, petitioner's desertion and petitioner's conducive conduct.

(ii) The function of the bars; i.e. that absolute bars operate to dismiss the petition while the discretionary bars confer a discretion on the court to either grant or refuse the petition sought based on the facts relating to the petitioner's conduct vis a vis the respondent's misconduct.

(iii) The circumstances under which the bars can be invoked i.e. as a defence for the respondent.

(iv) The effect of the bars which is either a basis to dismiss or grant the petition depending on whether they are absolute or discretionary bars respectively.

6.0 Tutor Marked Assignments

a) Discuss the nature and types of bars to a petition for divorce.
b) What are the options open to a court faced with a defence based on:
   i) Condonation, collusion or connivance.
   ii) Petitioner's adultery, desertion or conducing conduct.

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria***
(Lagos: Codes. Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes***
(Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria***
(……..: Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition]
(Ibadan: Heinmann Educational Books, 1990) pages 122 – 147.

5) Onokah, M. C., ***Family Law***
(Ibadan: Spectrum Books Ltd., 2003) pages 187 – 222.

6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]**
(Ikeja: Malthouse Press Ltd., 1999) pages 134 – 387.

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice**
(Lagos: Renaissance Law Publishers Ltd, 2007) pages179-191

Statutes

6. **Marriage Act, 1914, Cap. M6** Act Chapter M7 LFN**, 2004, ...**

Matrimonial Causes Act Cap. M7 LFN**, 2004,** Sections 2, 15, 16, 17, 21, 30, 69, 82, and 87

MODULE 4

UNIT 1: Ancillary Reliefs to Matrimonial Suits [Maintenance]

1.0 Introduction

There are a number of issues that flow directly from matrimonial causes like annulment, restitution of conjugal rights, judicial separation, divorce etc., which courts in Nigeria are empowered to address and make orders in respect of same, whenever parties to a marriage or any other interested third party requests the courts to do so. These issues are collectively known as ancillary reliefs and are provided for under Part IV of the MCA, 1970. These reliefs are orders for maintenance, custody and settlements of property. Sections 70 – 73 of the MCA empower the High Courts to make orders for ancillary reliefs in favour of either party to a marriage and/or the children of the marriage.

This module as a whole is an exposition on the types, nature of and circumstances under which ancillary reliefs may be made and the categories of persons in whose favour such reliefs may be made. Considering that there are three such reliefs provided for under the MCA, this unit is devoted to a general discussion of the types and nature of ancillary reliefs, with a detailed discussion of one of the reliefs, i.e. the relief of maintenance both under the Act and under Customary Law. The other two reliefs are dealt with in the next two units within this module.

2.0 Objectives

The objectives of this unit are to help the student learn and understand the following:-

1) The types and nature of ancillary reliefs available under the MCA.
2) The categories of persons in whose favour orders for ancillary reliefs may be made.
3) The Relief of maintenance both under the Act and under Customary Law.
4) The types and circumstances under which the relief of maintenance may be granted
5) The factors that courts take into consideration in making an order for maintenance.

3.0 Main Content

The word "ancillary" is an adjective and it is synonymous with words like "secondary", "subsidiary", "supplementary", "additional" or "extra". It basically means essential support to a central object. This in effect means that ancillary reliefs within the context of matrimonial causes are those reliefs that are subsidiary to the reliefs granted in a main cause or matter; i.e. orders made in a matrimonial suit like judicial separation or divorce. For example, when a marriage has broken down irretrievably and a court has made a decree of divorce, there usually are other issues that are dependent on or "ancillary to" the major issue of divorce. Questions like who is to maintain who, or how to share the property jointly owned by the parties, or who gets custody of the children of the marriage necessarily needs to be addressed by the court where proceedings for same are before the court. Any orders made in furtherance of these questions are classified as ancillary orders which are essentially supplementary or subsidiary to the main orders in a matrimonial suit.

3.1 Types and Nature of Ancillary Reliefs

There are three types of ancillary reliefs provided for under the MCA. 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.

3.2 Persons Qualified for Grant of Ancillary Reliefs

According to section 69 of the MCA, 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 also provide 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. [Section 69(a) MCA].
- Any child of the parties born before the marriage, whether legitimated by the marriage or not. [Section 69(b) MCA].
- 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. [Section 69(c) MCA].

While interpreting the phrase "member of the household" as used in section 69(c) of the MCA, the court held in the case of ***Asomugha v. Asomugha (1974) CCHCJ 14***, 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".

We shall proceed to examine the relief of maintenance in detail.

3.3 The Relief of Maintenance

Maintenance in matrimonial proceedings implies the duty to provide for the needs of members of the family, which duty is enforceable by an order of court where necessary. 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 necessaries like food, clothing, medication, housing etc. on credit, could sue the husband to pay for such necessaries.

Since the intervention of statute, the concept of maintenance has been brought within statutory regulation and expanded to accommodate husbands as beneficiaries of orders for maintenance. The Supreme Court acknowledged this fact in the case of ***Olu-Ibukun v. Olu-Ibukun [1974]***. 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.

Where there is no existing private agreement for maintenance between the parties to a marriage, Section 70 of the MCA clearly spells out the rules guiding the grant of the relief of maintenance in respect of marriages contracted under the Act. The provisions of this section clearly indicate that the relief of maintenance may be granted to either:

(i) 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 ;

(ii) any child of the marriage who is below 21 years

(iii) 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 favour.

Section 70(1) of the MCA specifically provides as follows:

> "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".

Thus, this section makes provisions for two categories of maintenance – maintenance pending proceedings and maintenance per se. We shall now examine these two types of maintenance under the Act.

3.3.1 Maintenance Pending Disposal of Proceedings

Maintenance pending disposal of proceedings is an interlocutory proceeding for the grant of an order of maintenance in favour of a party to the marriage and/or children of the marriage during the period that both parties are before the court for the determination of their rights in respect of a matrimonial suit. Usually, relations between parties to the marriage collapse during this period and unless there is an agreement between the parties in respect of maintenance, an order for maintenance pending disposal of proceedings is a vehicle through which one party may be compelled to maintain the other party and/or the children of the marriage on a temporary basis.

Section 70(2) of the MCA empowers the court to make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage, in proceedings for an order of maintenance pending the disposal of matrimonial proceedings. 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. 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.

The procedure to be adopted in applying for an order of maintenance pending disposal of proceedings is provided for under Order XIV, Rules 2 – 14 of the Matrimonial Causes Rules, 1983. The highlights of this procedure are as follows:

- Leave of court is not required to institute the proceedings. [Rules 2 & 3]
- Where the Respondent fails to file a reply to the application within the specified time, the applicant may request the court to make an assessment of the quantum of maintenance to be paid based on sufficient details of Respondent's income etc. supplied by the Claimant. The court can also make an order with respect to the regularity of such payments; the commencement date of the payments; and the mode of payments. [Rules 7 & 8]

- A copy of the court's assessment must be served on the respondent for his response; whereby any objection on his/her part may be referred to the court for hearing. [Rules 6(2), 15 & 9 – 11]

- Without prejudice to the right to apply to court for an order of maintenance, parties to the marriage may mutually agree on the maintenance to be paid. [Rule 14]

- The court has discretion on the quantum of maintenance to award in favour of a claimant bearing in mind the means, earning capacity and conduct of the parties to the marriage as well as all other relevant considerations.

3.3.2 Maintenance Per Se

This is provided for in section 70(1) of the MCA. Maintenance per se is a relief of a more permanent nature than an order for maintenance pending the disposal of proceedings. It is an order of maintenance made after the disposal of the main matrimonial suit instituted by either of the parties to the marriage. Indeed, the court may even refuse to order the relief sought by the petitioner in the main petition (e.g. petition for divorce) until it is satisfied that the petitioner has made adequate arrangements to provide maintenance or other benefits in favour of the respondent when the decree of divorce becomes absolute.

An order of maintenance may be made with respect to a party to a marriage or children of the marriage. And in considering whether or not to make an order of maintenance, the court does not concern itself with the question of who, as between the parties, was responsible for the breakdown of the marriage, even if that responsibility may influence the quantum of maintenance payable to that spouse. What the court concerns itself with, is the question of which of the spouses is better positioned in terms of the means, earning capacity and conduct of the parties to provide maintenance for the other. The factors which help the courts to arrive at an answer to this question are treated below.

3.3.3 General Considerations in the Grant of Maintenance

As previously discussed, the High Court is empowered under sections 70 and 73 of the MCA to grant the ancillary relief of maintenance either temporarily during the pendency of matrimonial proceedings or permanently after the disposal of such proceedings. Whether as a temporary or permanent relief, the court is conferred with discretion under sections 70(1) & (2) to make orders for maintenance, provided that it has due "regard to the means, earning capacity and conduct of the parties, to the marriage and all other relevant circumstances." This translates in effect to four guiding rules for the court's exercise of its discretion thus:

- Means of the parties
- Earning capacity of the parties
- Conduct of the parties

- Other relevant considerations

Means of the Parties to the Marriage

Before a court can order a party to a marriage to pay maintenance in respect of the other party or the children of the marriage, the court must ensure that such a party has the resources to obey the order. Therefore, the court considers the means available to such a party through actual income in liquid cash or income from a regular source like salaries, investments, rentals, businesses, and income from assets capable of being converted to cash at anytime; such assets being cars, buildings, trademarks, company shares and equity etc. Means also include prospective assets like gifts under a will or trust instrument, share of family land etc.

Note that the court cannot assess the means of a party and consequently cannot order an arbitrary amount as maintenance, unless there is sufficient evidence before it in that regard. In the unreported case of ***Akinola v. Akinola [1987]***, the court refused to make an order of maintenance in the absence of any evidence regarding the means of both the respondent and the petitioner, because it considered that making such an order would be arbitrary.

Earning Capacity of the Parties

In contrast to the means of parties to a marriage, the earning capacity of parties actually refers to the potentials of the parties to earn income from a suitable or gainful employment in the public or private sector. Therefore, if a party is underemployed and his income is not commensurate with his qualifications, the court would consider his capacity to earn more income from getting the right job for which he is qualified. Even in cases where a party is unemployed, the courts do not hesitate to award maintenance against such a party for as long as the party can be gainfully employed if he tries to work.

In the English case of **McEwan v. McEwan** [1972] 1 WLR 1217, the husband was a retired constable on a monthly pension of £6 (six pounds) at age 59. He was unemployed at the time proceedings for maintenance was filed against him by the wife. The court awarded the entire £6 of his pension to the wife on the ground that had he tried, he could have obtained suitable work to earn a living; thereby taking advantage of the husband's earning capacity to make the order for maintenance.

Conduct of the Parties to the Marriage

The conduct of parties that the court considers in making an order of maintenance is of a broad and general nature and not necessarily the conduct of the parties that allegedly led to the breakdown of the marriage. Even though Nigerian courts are yet to define the characteristics of the conduct envisaged, the English courts have interpreted similar provisions in the English Matrimonial Proceedings and Property Act, 1970 to mean conduct that is "both obvious and gross" so much so that "... to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice..." By this interpretation, conduct that can dissuade the court from awarding maintenance must be conduct that is of a grievous nature. In ***Harnett v. Harnett [1974] 1 WLR 219 at 224***, the court opined that the issue of conduct becomes relevant in proceedings for maintenance only where something in the conduct of the relevant party makes it "inequitable to leave that out of account having regard to the conduct of the other party as well in the course of the marriage."

Thus, grievous conduct by one spouse which is injurious to the life, limb or psyche of the other party have been held to justify the court's refusal to award maintenance in favour of such a party against the other party – the victim of such gross conduct. Examples of such gross or grievous conduct include:

- A wife who fired a shotgun at her husband when he locked her out of the matrimonial home in the case of ***Armstrong v. Armstrong [1874]***.
- A man who inflicted a serious and permanent injury on his wife in the case of ***Jones v. Jones [1976]***.
- A husband who committed adultery with his daughter-in-law in the matrimonial home in the case of ***Dixon v. Dixon [1974]***.

Other Relevant Considerations

This last requirement confers on the court a wide discretion to consider other factors in awarding maintenance. The courts are at liberty to look at the totality of the evidence before it in terms of the income, assets and properties, financial needs, commitments and responsibilities of parties, their ages and potential productivity levels, age of the marriage, standards of living of both parties etc. In ***Dawodu v. Dawodu [1974] 5 CCCHCJ 617***, the court held that extended family responsibilities fall under this head in determining a claim for maintenance. Thus, in the unreported case of ***Ikpi v. Ikpi [1984]***, wherein the petitioner husband averred that he made monthly allowance for his aged aunt in addition to the education and upkeep of four of his uncle's children plus other monthly disbursements, the court held that it would give consideration to established family obligations in the light of

contemporary culture and societal values; however, such considerations would be subject to the court's discretion and overriding duty of awarding due maintenance to spouses in fitting cases.

SELF-ASSESSMENT EXERCISE

Discuss the provisions of section 70(1) of the MCA 1970 as it relates to children.

3.3.4 The Concept of Maintenance Under Customary Law

A marriage contracted under the native law and custom has its own limitations in several respects, including ancillary reliefs. One of such limitations is the concept of maintenance under customary law, which is restricted to the period of the subsistence of the marriage and not after the dissolution of the marriage. This means in effect that the concept of maintenance under the MCA (which replaces the old alimony provisions) is alien to customary law. In the unreported case of ***Adeleke v. Yinka [1976]*** decided by the Customary Court in Mapo, Ibadan, the court refused to make an order for maintenance in favour of the wife on the ground that "payment of such an allowance to a divorced woman is contrary to native law and custom."

While married, every husband of a customary law marriage is under a duty to maintain his wife in terms of providing her with necessaries like food, shelter, medication, clothing etc. But unlike the wife married under the Act, who may, on desertion by her husband or upon dissolution of the marriage, apply to the court for an order for maintenance against the husband, the customary law wife has no right of maintenance during any period of desertion by her husband. The fact that she was not directly or constructively responsible for the desertion by her husband is irrelevant to the issue of maintenance.

Note however that while a customary law husband does not have a duty to maintain his wife during their separation or after their divorce, in certain circumstances his legal duty to maintain her during the pendency of the marriage continues to apply. Two of such circumstances are where the wife was already pregnant and where she was nursing a baby before the desertion or divorce. Failure by the deserting husband to maintain the wife under these circumstances makes him liable to pay maintenance costs in arrears before he can claim custody of the child in question. This duty is usually enforced by the wife's family by their retention of the child until all outstanding maintenance costs are paid off. This right to retain the child has been upheld by the court in the unreported case of ***Adugba v. Anuku [1968]*** in a judgement delivered by the Customary Court in Oturkpo, Benue State.

SELF-ASSESSMENT EXERCISE

With the aid of decided cases, discuss the right, if any, of a divorced customary law wife to maintenance under customary law.

4.0 Conclusion

Ancillary reliefs are supplementary orders given by a court dealing with matrimonial proceedings involving parties to a marriage. These reliefs are maintenance, custody of children and settlement of property. When courts deal with proceedings for these reliefs in respect of marriages celebrated under the Act, they easily have recourse to the provisions of the MCA contained in sections 69 – 75 for guidance in arriving at just decisions. This cannot be said in respect of customary law marriages since some of these reliefs are alien to customary law.

With respect to maintenance dealt with in this unit, it has been established that the relief of maintenance is available to spouses married under the Act in appropriate circumstances; whereas the concept of maintenance is not recognised under customary law. It has also been established that the relief of maintenance is available to any of the parties to the statutory marriage either temporarily pending the disposal of proceedings as provided for under section 70(2) of the MCA, or on a more permanent basis, after the disposal of a principal suit like divorce or judicial separation as provided for under section 70(1) of the MCA. In granting the relief, courts are enjoined to have due regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

5.0 Summary

This unit has focused on a general introduction on the nature and types of ancillary reliefs and specifically on the relief of maintenance provided for under section 70 of the MCA. It was established that there are three types of ancillary reliefs provided for in Part IV (sections 69 – 75) of the MCA, i.e. maintenance, custody of children and settlement of property; out of which the relief of maintenance was treated in detail. The summary of the relief of maintenance as dealt with in this unit is as follows:-

(i) That the relief is available only in respect of marriages contracted under the Act.

(ii) That the relief may be ordered in favour of either of the parties to the marriage and/or children of the marriage.

(iii) That the relief can be granted either temporarily pending the disposal of a main proceedings or as a permanent relief after the disposal of the main proceedings.

(iv) That the factors that courts take into consideration in making an order for maintenance include the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(v) That it is immaterial that the relief granted in the main proceedings is not in favour of the claimant of a relief for maintenance.

6.0 Tutor-Marked Assignments

1. Examine in detail, the factors that courts take into consideration in granting the relief of maintenance.
2. Determine the categories of children in favour of whom the relief of maintenance can be ordered.

7.0 Suggested Further Readings/References

15) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……

16) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages……

17) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (…….. Ilusalaiye Press Ltd., 1999) pages……..

18) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages 122 – 147.

19) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages 187 – 222.

20) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 134 – 387.

21) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages142-60

Statutes

7. **Marriage Act, 1914, Cap. M6** Act Chapter M7 LFN**, 2004,** sections

8. **Matrimonial Causes Act** Cap. M7 LFN**, 2004,** Sections 2, 15, 16, 17, 21, 30, 69, 82, and 87

UNIT 2: Ancillary Reliefs to Matrimonial Suits [Custody of Children]

1.0 Introduction

In unit one of this module, custody of children was mentioned as one of the ancillary reliefs provided for in Part IV of the MCA. The reason for including custody as a relief is not far-fetched. When a marriage has broken down irretrievably, the welfare of the children of the marriage may be put in jeopardy especially where their parents are unable to agree on which of them should keep and care for the children. Several issues arise in respect of the children, which more often than not are the source of fresh hostilities between the parties to the marriage who are either judicially separated or divorced or are engaged in some other matrimonial dispute.

This unit focuses on the rules relating to the discretionary power of the court to make custody orders in respect of children of a marriage contracted under the Act.

2.0 Objective

The objective of this unit is to help the students learn the following:-

(i) The meaning of custody.

(ii) Categories of children in respect of whom an order of custody may be made.

(iii) Persons in whose favour orders of custody may be made.

(iv) The guiding principles for the grant of the relief of custody.

(v) The means of enforcement of custody orders.

3.0 Main content

The word "custody" is synonymous with the words: “guardianship”, “wardship”, “charge”, “care”, “safe-keeping”, “protection”, “supervision” or “superintendence”, “control” etc. Thus, custody of children implies the care, control and maintenance of children which may be awarded by a court of competent jurisdiction to a party to a statutory marriage either as an ancillary relief consequent to matrimonial proceedings or to a third party entirely as an independent suit, if the best interest of the children would be better served by it. In the case of ***Otti v. Otti (1992) 7 NWLR (Pt 252) 187 at 210***, the Court of Appeal defined custody as essentially concerning the care, control and preparation of a child physically, mentally and morally; it also includes responsibility for a child with regard to his needs like food, clothing, instruction and the like.

Section 71(1) of the MCA provides as follows:

> “In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a 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 of those matters as it thinks proper”.

In matters of custody of children, this section of the MCA confers on the court a discretion concerning the proper order to make, bearing in mind the interest of the children as it relates to their physical, mental and moral welfare. We shall now consider the nature and character of the discretion conferred on the court and what constitutes the interest of children.

3.1 Children Subject to Custody Orders

As discussed in earlier units, the children in respect of whom custody orders may be made are those envisaged under section 69 of the MCA; i.e. children of a statutory marriage. This implies

that children of a customary law marriage or those born out of wedlock are not included within the categories of children in respect of whom orders of custody may be made.

Nevertheless, note that under Common Law rules, the mother of a child born out of wedlock has the first right to custody, unless the biological father of the child can prove to the satisfaction of the court that the mother is unfit to look after the child. In the case of ***Okoli v. Okoli (2003) 8 NWLR (Pt. 23) 565 at 580***, the Court of Appeal discussed the custody of children born outside wedlock and held that the custody of a child born outside wedlock belongs to the mother in the absence of any person claiming custody of the child on the basis of being the natural father.

3.2 The Discretion of the Court

The provisions of section 71(1) of the MCA confers on the court an absolute discretion to determine what is in the best interest of children and make the appropriate orders that best support those interests. Under sub-sections (3) and (4) of section 71, these orders may include: orders to place children in the custody of persons who are not parties to the relevant marriage (if that option is in the best interest of the children) and grant access to the child by one or both parties to the marriage; or orders to grant access to children in the custody of one party by the other party.

The discretionary power of the court also covers the situation where it can receive in evidence, reports from welfare officers on matters that are relevant to the custody proceedings before the court as provided for in section 71(2) of the MCA. The court has the power to adjourn proceedings to allow for time to prepare the report where necessary. The report of the welfare officers is expected to cover all aspects of the life and welfare of the child in question.

A welfare officer is defined in section 114(1) of the MCA as "a person authorized by the Attorney-General of the Federation by an instrument in writing to perform duties as a welfare officer ..." Such persons include:

- a person who is permanently or temporarily employed in the public service of the federation; or
- a person who is permanently or temporarily employed in the public service of a state and whose services has been made available for the purpose of the Act in pursuance of an arrangement between the federation and the state; or
- a person nominated by an organization undertaking child welfare activities.

In the unreported case of ***Oladetoun V Oladetoun Suit No. Ho/111/7076/7/71***, it was held that owing to the intricacy of the question of custody in the case, it was desirable that the court should he assisted by a welfare officer. According to Adefarasin J:

> "The matter of custody in the facts of this case is such an intricate one that I consider it should not be ruled on; I think it is desirable that the court should be assisted by the investigation and advice of a welfare officer as provided for under section 71(2) of the Matrimonial Causes Decree of 1970".

In all circumstances, the court is expected to exercise the discretion conferred under section 71 judicially and judiciously. This means that the court must exercise impartiality and sound judgement in determining the proper order to make in respect of custody of children.

3.3 The Interest of Children

There is no precise definition of the phrase "interest of child" either in the MCA or anywhere else. This fact was emphasized in the case of ***Odogwu v. Odogwu (1992) 2 NWLR (Pt. 225) 539*** where Belgore, JSC opined that the phrase is not limited to material provisions, but include those things that will assist the psychological, physical and moral development of the child; things that would promote the happiness and security which a child of tender years requires. In his words:

> "Welfare of a child is not the material provision in the house, good clothes, food, air-conditioners, television and gadgets normally associated with the middle class; it is more of the happiness of the child and his psychological development. While it is good a child is brought up by complementary care of the two parents living happily together, it is psychologically detrimental to his welfare and ultimate happiness and psychological development if material care available is denied him".

The interest of children as envisaged under section 71 of the MCA embodies several factors which depend on the peculiar circumstances of each case. These factors include but are not restricted to the physical, psychological, moral and overall developmental wellbeing of the children; as well as factors like the ages of the children, the arrangements made for their accommodation, education, welfare, general upbringing, and the conduct of the claimant. Karibi-Whyte, JSC summed up these factors in the case of ***Williams v. Williams (1987) 2 NWRL (Pt 54) 66 at 89*** thus:

> "The determination of the welfare of a child is a composite of many factors. Consideration such as the emotional attachment to a particular parent, mother or father; the inadequacy of the facilities, such as educational, religious or opportunities for proper upbringing are matters which may affect determination of who should have custody".

The learned Justice also interpreted the phrase "paramount consideration" to mean "pre-eminent and superior consideration" in the same case. On his part, Oputa J [as he then was] in the unreported case of ***Okafor v. Okafor (1972)*** considered "paramount consideration" as attaching to the welfare of a child and which is a condition precedent in the determination of custody questions.

In considering what is in the best interest of children, the court does not concern itself with extraneous matters like who, as between the parties is responsible for the breakdown of the marriage which has necessitated the proceedings for custody. Thus, while exercising its discretion, the court does not award custody to one party as a favour to that party or as punishment for the other party, who in the opinion of the court had conducted himself or herself badly. In the ***Okafor case*** cited above, the learned judge opined that the award of custody of children is based on other factors that are outside the guilt, innocence or blameworthiness of the relevant parent or parents. Before awarding custody of the only child of the marriage to the respondent who was in fact responsible for the breakdown of the marriage, having been in constructive desertion, the judge noted that "custody is never awarded as a reward for good conduct nor is it ever denied as punishment for the guilty party's matrimonial offences." The court based its decision on the fact that the child in question was used to the respondent who had also taken good care of him during the period of desertion. Since the child could no longer recognise the petitioner, it was in the best interest of the child to remain with the respondent despite his guilt in the divorce proceedings.

Self Assessment Exercise 1

Explain the term "custody" and illustrate with decided cases.

3.4 Other Factors/Considerations in the Award of Custody

Apart from the interests of children being of paramount consideration in determining questions of custody, the court also takes some other factors into consideration in order to arrive at the best possible decisions that would support the interests of the children. Some of these factors or considerations were identified in the case of ***Williams v. Williams (supra)*** and the unreported case of ***Ihonde v. Ihonde [1972]*** to include: the age and sex of children; the personal wishes or preferences of the children; the children's social and religious backgrounds; their moral welfare; the financial status of the parties to the marriage and the arrangements made by each party for the education, general welfare and upbringing of the children; the conduct of the parties; the promotion of filial companionship among the children by keeping them together etc. Some of these factors are dealt with hereunder as follows.

3.4.1 Ages and Sex of the Children

Neither statutory nor case law lays down any specific principles which courts are bound to observe on the factors of age and sex in the determination of who should get custody of children of a particular age or sex. Nevertheless, it is generally believed that female children are better left in the care of their mothers, and males with their fathers; especially considering that the Nigerian society is largely patrilineal in nature and boys usually belong to the father's family and should be socialised within the paternal family. This was the majority view of the Court of Appeal in the case of ***Oyelowo v. Oyelowo [1987] 2 NWLR (Pt 56) 239 at 246***, where the court opined that for male children, "their rightful and natural place is their father's home" In the same spirit, the court in the case of **Odulate v. Odulate** [1975] 1 CCHCJ 101, awarded custody of the female child of the marriage to the mother on the ground that a girl "has the right to develop her personality under the mother" who, in ideal cases, is a role model for the child.

Again, there is also a general belief that a mother is better suited to care for, and attend to the physical and emotional needs of children of very tender ages. However, the fact that a child is of a tender age does not necessarily mean that its custody will always be granted to the mother if it would not be in the best interest of the child to do so. In the unreported case of ***Oladetohun* v *Oladetohun [1971]***, the court found the mother of the only child of the marriage to be an unsatisfactory wife and a bad mother who practised juju; nevertheless, it granted her custody of the child who was three years old, on the ground that doing so even if temporarily, was in the best interest of the child.

3.4.2 The Personal Wishes or Preferences of Children

The personal wishes and desires of children sometimes count in custody proceedings, especially when the affected children are old enough to make their preferences known to the judge or a Welfare Officer that has been mandated to interview the children concerning their preferences as between the applicants for their custody. In some cases, the judge in the custody proceedings, may interview the children privately in order to determine their wishes which he may or may not give effect to. In ***Odogwu V Odogwu (1992) 2 NWLR (Pt 225) 539***, the Supreme Court held that the court could consult the child's wishes in considering what order to make.

3.4.3 The Social, Religious, Moral and Educational Welfare of Children

The courts usually give consideration to the advantages and disadvantages of any arrangements for the social, religious, moral and formal education the child. Since these factors affect the overall socialisation and education of the child, the courts are usually anxious to ensure that whatever decision is reached in these respects reflects the best for the child. In matters of formal education for example, the court would look at several factors besides the geographical location of schools being proposed for the education of the child. The court would consider other factors like the impact the social, moral and religious environment of the societies wherein the schools are located would have on the overall development of the child. In ***Williams v. Williams (supra)***, Obaseki JSC was of the view that education is in the best interest of the child if it is in a proper environment. Oputa, JSC opined in the same case that education that alienates a child from his roots no matter how intellectually sound, is to be viewed with a suspicious eye by the Court in custody cases, because educating Nigerian children of tender ages in foreign lands would not give them the kind of training required for them to live and survive in Nigeria. According to the learned Justice, a boarding school in England was not a fitting substitute to a mother's care and attention. He continued thus:

> "A Nigerian should be trained to live in Nigeria and not become an expatriate in his own country ... There are periods in a girl's life when she is undergoing the slow advance to maturity when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological."

3.4.4 Equality of Parents/Conduct of the Parties to the Marriage

In his very exhaustive definition and implications of custody in the ***Williams case***, Obaseki, JSC made the points firstly, that in matters of custody of children, both parents have the same equal rights before

the law that they both can exercise. Neither of the two parties can exercise a claim that is superior to the other party's claim to custody. Even where one of the parents is not a Nigerian citizen, the courts do not discriminate against such a party in the award of custody. The primary consideration is the welfare of the children concerned. In ***Oloyede v. Oloyede (1975) 1 NMLR 18***, the court found the Nigerian father unfit to have custody as against the unimpeachable Irish mother. The court held that the fact of the mother being a non-Nigerian does not justify denying her custody.

Secondly, the court should focus on the welfare of the child rather than the conduct of the parents in the marriage, unless such conduct is of a nature that would have negative implications for the child. The learned Justice opined that "an order of custody is not a penal order on either parent and should not be construed as such." Though the conduct of the parents to a child is a matter to be taken into account in determining what is in the best interest of the child, a parent should nevertheless be deprived of custody merely because of his/her conduct which might have contributed to the breakdown of the marriage. Even in cases where adultery is alleged, the learned Justice held that the adultery of a party should not necessarily be the reason for depriving that party of custody unless the circumstances of the adultery make it desirable.

Note however, that the court may not entirely disregard the conduct of the parties in relation to the breakdown of the marriage while considering the best interest of children. According to the court in the case of ***Afonja v. Afonja [1971] 1 UILR 105***, the "welfare of the infant although the first and paramount consideration, is not the sole consideration and the conduct of the guilty party is a matter to be taken into account." For example, serious and continuing misconduct, or moral depravity on the part of one party may occasion a declaration that he or she is not a proper person to be entrusted with the care of children. In ***Lafun v. Lafun [1967] NMLR 101,*** the court awarded custody of the child of the marriage to the petitioner-father and refused to grant access to the child to the respondent-mother until the child attained the age of 14 years, subject to petitioner's consent. This was because the evidence before the court pointed to moral depravity on the part of the respondent and it was not in the best interest of the child for the respondent to have access to him in his formative years, since he could easily be negatively influenced by the respondent's immoral conduct.

Again there are cases where the previous conduct of a party in relation to children cannot be ignored by the court in determining whether or not to grant custody of a child to that party. In the unreported case of ***Kolawole v Kolawole (1982)***, a mother was denied custody because she had previously attempted to kill the child in question. Similarly, the court refused to grant custody of

the only child of the marriage to the mother who had completely abandoned the child for nearly six years in the case of *Okafor V Okafor* (supra).

3.4.5 Financial Status of Parties and Arrangements for General Care of Children

The financial strength and stability of parties in custody proceedings is relevant to the determination of what is in the best interest of children. This financial base must be supported by adequate arrangements for the general welfare of the children, these being: suitable accommodation, education/training, medicare, upbringing etc. Where a party's case is dependent solely on material wealth without adequate arrangements for the welfare of children, the court may not be disposed to awarding custody to that party. This was the decision of the court in the English case of ***Re McGrath (1893) 1 Ch. 143***.

3.4.6 Miscellaneous Factors

Depending on the peculiar facts of each case, custody of children may also be determined by some other factors that courts have taken into consideration in the past. These factors include:

(i) The promotion of filial companionship among the children of the same parents/household by keeping them together in the same place, unless it is not in the best interest of the children to do so.

(ii) The prevention of any psychological damage to children by keeping them in the custody of a party they are either not used to or comfortable with or even a complete stranger. In the ***Okafor*** case for example, the court was particularly mindful of the fact that the child was too close to the father to be separated from him inspite of his young age. In ***H v. H and C (1969) All E.R 262***, the court awarded custody to the father with visiting access to the mother since in all the circumstances it would be very upsetting to remove the child suddenly from a house he was used to.

Self Assessment Exercise 2

Discuss the factors that courts usually consider in making orders for custody of children.

3.5 The Order for Custody

It was stated at the beginning of this discourse that custody of children implies the care, control and maintenance of children as an ancillary relief to a matrimonial order. When a court has weighed all the evidence before it and considered all factors relevant to a particular case, it exercises a discretion as to whether or not to grant custody, in whose favour to grant the custody and the nature or form the custody order should take; provided that the best interests of the children is served by its decisions. Although the MCA does not make provisions for the kinds or nature of orders a court can make with respect to custody of children, courts have in the past, followed the practice in England where necessary. The following are examples of custody orders a court can make.

3.5.1 Physical Custody

Physical custody involves an order of court which grants the right to organize and administer the day to day residential care of a child to either one or both parents of the child. Where one of the parents is awarded sole physical custody, it means that that parent has the sole right to live with a child or children of the marriage on a permanent basis. The other parent may be given visitation rights on designated days or periods, depending on what the court considers to be in the best interest of the children. In such a situation, the parent with visitation rights may be ordered to pay maintenance to the physical custodian for the education and general upkeep of the children.

But where the court awards joint physical custody to both parents, it means that the child or children would spend significant amounts of time with both parents during periods either mutually agreed on by parents or on a regular schedule imposed by the court where the parents are unable to agree on a schedule. Joint physical custody works best if parents live relatively near to each other, as it lessens the stress on children and allows them to maintain a somewhat normal routine.

3.5.2 Legal Custody

Legal custody of a child implies the right to make, or participate in the major decisions affecting a child's education, religion, health and general welfare. Legal custody may be awarded to one or both parents, depending on the circumstances of each case. Where joint legal custody is awarded to both parents, it means that they would necessarily consult with each other before any decision can be taken in matters affecting the children by either of them.

In most cases, courts prefer to award joint legal custody unless there are circumstances that make it impossible to share joint legal custody such as where one parent refuses to communicate with the other about important matters or where one parent is found to be unfit to be entrusted with that responsibility.

3.5.3 Sole Custody

A sole custody order is an order for the care, control, and maintenance of a child which is awarded by a court to one of the parents of a child or children, to the exclusion of the other, following proceedings for divorce or separation, whether judicial or extra-judicial. Courts generally don't hesitate to award sole custody to one parent if the other parent is deemed unfit, e.g. where such a parent is a violent alcoholic or drug addict, a habitual criminal or a proven child molester.

One parent can have either sole legal custody or sole physical custody or both sole physical and legal custody of a child or children. However where courts do award sole physical custody, the parties, more often than not still share joint legal custody, with the noncustodial parent having rights of visitation. In that situation, one parent becomes the primary physical caretaker, while both parents take joint decisions about the child's upbringing. In the case of ***Abayomi v. Abayomi [1974] 12 CCCHCJ 1877***, the court awarded legal custody of and visitation rights to the child to the father and physical custody to the mother.

3.5.4 Joint or Shared Custody

A court may order joint/shared custody of children where the parents do not live together. This implies that both parents would share the decision-making responsibilities for the children, and/or take turns to have physical control and custody of the children. The order may be made in cases of divorce, judicial separation, or in cases where the parties are living apart before matrimonial proceedings for divorce or judicial separation are filed.

A joint custody order usually implies that the parents must work out some sort of time table or schedule that best suits everybody in terms of their own job requirements, housing arrangements, the children’s school and other needs. Where the parents are unable to agree on a schedule, the court will impose the one that is in the best interest of the children on the parties. Some typical schedules involve spending some weeks at a time in each parent's house, or alternating months, years, or six-month

periods, or spending weekends and holidays with one parent, while spending weekdays with the other parent, where that arrangement best suit the children's schooling needs. In Western countries, there is a joint custody arrangement called "bird's nest custody" whereby the children remain in the original family home and the parents take turns moving in and out, spending their out time in their own private accommodation.

A joint custody order has some advantages and disadvantages. Continuing contact and involvement of the children with both parents is one major advantage even though on the minus side, the children are constantly shuttled around. Where the parents lack cooperation or are constantly quarrelling, the ill-will thereby generated between them has negative effects on children.

Joint custody orders may take the form of:

(a) joint legal custody; or
(b) joint physical custody whereby the children spend some appreciable time with each parent; or
(c) a combination of both joint legal and physical custody.

Note that it is common for couples who share physical custody of children to also share legal custody, but not necessarily the other way around. This means that both parents who share legal custody do not necessarily share physical custody, i.e. the care and control of the child. In the case of ***Williams v. Williams (supra)***, the court awarded joint legal custody to the parents of the child but granted the mother the physical custody of the child.

3.5.5 Split Custody

Split custody involves awarding legal custody to one parent while the other parent gets physical custody. This implies that the parent with legal custody has the right to make the major decisions affecting a child's education, religion, health and general welfare while the parent who has physical custody controls the daily management and training of the child. In the unreported case of ***Abayomi v. Abayomi [1974] 12 CCHCJ 465***, the court made a split custody order granting legal custody of the four-year old child to the father, and care and control of the child to the mother.

3.5.6 Temporary Parental Custody

Order XIV Rules 21 – 23 of the MCR provide for the grant of temporary physical custody of children to either party to the marriage, pending the disposal of the main matrimonial

proceedings. The order may be made *ex-parte* or on notice depending on the urgency of the situation. Under Rule 23 of Order XIV, the order for maintenance may be made *ex-parte* following an oral application provided that the leave of court is first sought and obtained to make the application, and the claimant undertakes to file the necessary court processes in respect of the application as soon as practicable. Any order made in this circumstance must indicate the duration of the order and directions regarding the services of relevant court processes on the other party as well as further hearing of the proceedings for ancillary relief.

3.5.7 Third-Party Custody

Section 71(3) of the MCA empowers the court to grant custody of a child or children to a person who is not a party to the marriage, provided that it is satisfied that it is desirable to do so. Orders in favour of third parties are usually made when the court considers both parents of the child not to be fit and proper persons to care for the child; or that it would not be in the best interest of the child to leave him in the care of either parent. The custody order so granted may be on a temporary or permanent basis depending on the circumstances of the case. In the unreported case of **Nwuba v. Nwuba [1971]**, the court granted custody of the three children of the marriage to their maternal grandmother on a temporary basis pending the determination of the petition for divorce then pending in the court. Considering that the children were forcefully separated and isolated from each other (thereby resulting in emotional trauma for them), as a result of the hostilities between their parents, the court decided that it would be in the best interest of the children to keep them together in one place outside the control of either parent. The court said:

> "I am firmly convinced that the interim order which I made on the 9th August for these three children to remain with their grandmother is in their best interest and that order is to remain in force until the determination of the petition as in the order for access and that of removing the children out of the jurisdiction of this court. Custody is therefore granted to Mrs. Rosemary Inyama pending the determination of the petition".

SELF ASSESSMENT EXERCISE

Discuss the different types of custody orders that a court can make in pursuit of the paramount interest of children.

3.6 Enforcement of Custody Orders

Like all court orders, custody orders are enforceable in one of different ways. Section 88(1) & (2) of the MCA provides that an order for custody or access to children may be enforced by attachment of the

person in violation of the order until he complies with the order, following which he can be released from detention. Under section 93 of the MCA, a custody order can also be enforced by committing the person against whom it is made to prison for contempt of court or by the issuance of a writ of sequestration.

A writ of sequestration is a form of contempt proceedings, except that the action is directed against the property of the contemptor and not his person. A writ of sequestration is one of the ways of executing a court order against a person in contempt of court by his disobedience of the order. It is usually issued after the court has satisfied itself beyond doubt that a contempt of court has been committed.

4.0 Conclusion

This unit has dealt with the custody of children and it was established at the onset that the custody of children is one of the ancillary reliefs provided for under section 71 of the MCA. In considering an application for the award of custody, courts have discretion to make orders that are in the best interest of those children. In doing this, the courts rely on a number of factors like the age and sex of the children; the wishes of the children; the social, religious, moral and educational welfare of children; equality of the parents; conduct of the parties to the marriage; the financial status of parties; and the arrangements for the general care of the children.

Having taken these factors into consideration, courts can then decide whether or not and/or to whom custody of children may be given. The courts may rely on the evidence before them to grant custody, the nature of which may be physical custody, legal custody, sole custody and joint or shared custody. The custody may be awarded to either or both parents of children or in appropriate cases to a third party completely.

5.0 Summary

This unit has dealt with a number of issues relating to custody of children as an ancillary relief to matrimonial proceedings. As discussed at the onset, custody of children implies the award of the care, control and maintenance of children to parties to a marriage in crisis or a third party completely where it is in the best interest of children to do so. The categories of children in respect of whom such custody orders may be made are those within the purview of section 69 of the MCA.

The courts have absolute discretion to grant custody orders based on a number of factors like: ages and sex of the children; the personal wishes or preferences of children; the social,

religious, moral and educational welfare of children; equality of parents/conduct of the parties to the marriage; financial status of parties and arrangements for general care of children; the promotion of filial companionship among children and the prevention of any psychological damage to children through forced separation or cohabitation etc. In exercising its discretion based on these factors, the court must make its order based on what is in the best interest of the child(ren).

An order for custody can take any or a combination of the following forms: physical custody; legal custody; sole custody; joint or shared custody; split custody; temporary parental custody; and third-party custody. Such orders may be enforced either by attachment, committal to prison for contempt or by writ of sequestration.

6.0 Tutor Marked Assignment

1) To what extent, if any, do the following factors affect the grant of an application for custody of children?
   (i) The Nationality of a party to a marriage
   (ii) Conduct of one or both parties to a marriage
   (iii) Arrangements for the education and welfare of the children.
   (iv) Cultural background of children
2) Joint custody implies equal access to and sharing of time and responsibilities for children by their parents, discuss!
3) Describe how an order for custody of children may be enforced.

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……
2) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages……
3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (…….. Ilusalaiye Press Ltd., 1999) pages……..
4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages 250 – 259.
5) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages 231 – 235.

6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 546 – 629.

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages123-141

Statutes

1. **Matrimonial Causes Act** Cap. M7 LFN**, 2004,** Sections 69 and 71
2. **Matrimonial Causes Rules** Cap. M7 LFN**, 2004,** Order XIV, Rules

Unit 4: Settlement of Property

1.0 Introduction

Upon the dissolution of marriage, settlement of property of the parties to the marriage is one of the issues that naturally arise for resolution either by the parties themselves or by an order of court. Section 72 of the MCA empowers the court to look into the issue of settlement of property as one of the reliefs ancillary to separation or divorce. Subsection (1) of the said section 72 states thus:

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

The focus of this unit therefore is to examine the rules applicable to the settlement of property and how the courts apply the rules when called upon to do so.

2.0 Objectives

This unit has the objective to teach students the following:

- The meaning and aim of settlement of property in relation to statutory marriage
- Parties to settlement of property
- The nature of property to be settled
- The different modes of settlement of property
- The rules guiding settlement of property
- How settlement orders are enforced

3.0 Main Content

Property, within the context of statutory marriage means almost anything of value; and this usually includes land, furniture, money, vehicles, household goods, insurance policies, intellectual property; debts due to the spouses, equities in respect of potential compensation claims, long service leave entitlements, partnership interests, entitlements as beneficiaries of a trust or a will, etc. Matrimonial property that is subject to settlement thus includes anything of value owned by either spouse at the date of their separation, but does not include property acquired after separation.

We shall now proceed to examine the concept of settlement of property, the parties to settlement, the nature of property to be settled, the types of settlements, and the rules relating to settlement of matrimonial property upon divorce.

3.1 Meaning and Aim of Settlement of Property

Settlement of property under Nigerian law involves the division of matrimonial property between parties to a statutory marriage or among them and their children who are below 21 years or above 21 years in special circumstances. The aim of the court in making property settlement orders is to bring to an end once and for all, the economic relationship between the parties to the marriage, by dividing the family property in such manner as it considers just. A property settlement thus covers all the property of the marriage and the whole economic situation of each spouse.

Settlement of property sometimes functions as an alternative to orders for maintenance in the right circumstances, especially where orders for lump sum payments for maintenance have been made. Both the reliefs of maintenance and settlement of property function to provide economic security for the parties to the marriage and/or their children. So that where it would be more reasonable for example, to settle a house from which regular commercial rents may be collected,

in favour of a party or the children (for their maintenance) than to award a one-time lump sum the value of which may be subject to depreciation as maintenance, the court can order settlement of that property in lieu of lump-sum maintenance order.

3.2 Parties to Settlement of Property

Section 72 of the MCA clearly provides for the categories of persons that are entitled to settled property. Firstly, only parties to a statutory marriage may apply to court for the settlement of their property; and this is usually done by a claim either in the petition for divorce or in the answer to the petition, going by the decision of the court in ***Ayangbayi v. Ayangbayi [1979] HCLLR***.

Secondly, the children of the marriage may also be beneficiaries of settled property provided that such children are those within the purview of section 69 of the MCA and they are less than 21 years old. Nevertheless, section 72(3) MCA provides that child who is over 21 years old may have property settled on him if "... the court is of the opinion that there are special circumstances that justify the making of such an order for the benefit of that child."

3.3 Nature of Property to be Settled

The property to be settled must be owned by the parties either jointly or separately and must be property that the couple obtained either before marriage or during the course of their marriage. According to section 72(1) MCA, such property must be one "to which the parties are, or either of them is, entitled (whether in possession or reversion)..." This means that there are two types of property that must be distributed in the settlement, i.e. common or marital (joint) property and separate property.

Common/marital or joint property consists of property that is purchased by either or both of the spouses while married. Property bought during this period is presumed to be marital or joint property irrespective of how it was actually purchased, unless there is clear and convincing evidence that the parties intended the property to belong to just one spouse. Separate property on the otherhand, is property that is bought by either of the parties before the marriage, or property received in exchange for other separate property, any interest on separate property, or anything that does not fall into the category of marital/joint property.

3.4 Types of Settlements

Property settlements can arise through agreement of the parties, subject to approval by the court, or by court order made independently of any agreement by the parties. Section 72(2) of the MCA provides that in matters of settlement of property, the court may make such orders as it:

> "... considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of the marriage, of the whole or part

of property dealt with by ante-nuptial or post-nuptial settlement on the parties to the marriage or either of them".

This provision means that apart from the powers conferred under section 72(1) to make just and equitable orders with respect to the settlement of property for the benefit of relevant parties, the court can also extend the powers to the enforcement of settlement of property (wholly or partially) agreed upon by the parties to the marriage through ante-nuptial or post-nuptial agreements. Thus, with or without agreement, the court has broad powers to alter the existing rights to property in any way it sees fit so as to do justice between the parties. It can overturn transactions designed to defeat claims for property settlement or spousal maintenance, such as where a spouse has disposed of assets for less than their true value. It can set aside any orders obtained by fraud or duress etc. The court can also apportion liability for any debts and other liabilities of the marriage, such as overdrafts, personal loans and the like.

Thus, there are two types of settlement provided for under sections 72(1) & (2) MCA.

3.4.1 Ante-nuptial or Post-nuptial Settlements

Ante-nuptial and post-nuptial settlements are agreements entered into by parties to a statutory marriage that provide for the division of their assets between them upon divorce. Though, an uncommon practice in Nigeria, parties to a marriage can reach their own legally-binding agreements about their property arrangements in case of separation or divorce. This usually saves the expenses, delays, worry and wrangling associated with lengthy property claims in court that may take two or three years to settle. Once executed, the settlement functions like a contract for enforcement or modification purposes.

As much as possible, ante-nuptial or post-nuptial property settlements must be fair both in the process of reaching the settlement, and in the division of the property – making an equal separation of the total marital assets. If the settlements are fair between the parties, the courts are likely to enforce them. But the courts would usually refuse to uphold such settlements where they are found to be invalid as a result of the following:

(a) Unconscionability

A court will rule that a property settlement is invalid if it is unconscionable, which means that the agreement is so unfair to one party that it must be modified. Lack of fairness in this regard may be due to non-disclosure of existing asset or assets by one of the parties during the settlement discussions leading to the division of the assets, the terms of which were then

reduced into the contentious written settlement documents. To avoid further injustice to the aggrieved party, the court may modify the settlement. Note that the peculiar facts of each case determine whether an agreement is unconscionable or not. Lack of fairness may also be due to lack of access to independent professional legal advice by one party during the settlement, especially where there is a large disparity between the parties' wealth. If only one party chose the counsel used, the court could consider such counsel to be non-independent.

(b) Mistake, Fraud or Undue Influence

A property settlement can also be declared invalid and unenforceable due to mistake, fraud or undue influence. Where the parties make a genuine mistake about the terms of the settlement, the court can modify the settlement to correct the mistake and reflect the original intentions of the parties. Where one party fraudulently withholds information about property or assets during the process of negotiating the settlement, it would be a ground for the court to intervene. Undue influence on the other hand means that one party used pressure or misrepresentations to force the other to sign or agree to the terms in the property settlement. When a court finds either fraud or undue influence, it can invoke section 72(2) MCA to modify the property settlement to correct the unfairness.

3.4.2 Court Settlements

Section 72(1) of the MCA empowers the courts handling matrimonial proceedings relating to divorce to, at the same time, make orders requiring one or both parties to the marriage to make for the benefit of all or any of the parties to, and the children of the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

Settlement orders in this circumstance are not dependent on any existing ante-nuptial or post nuptial agreement, but on claims by one of the parties to the marriage in his or her petition or answer to petition as the case may be. According to the court, while interpreting a similar provision in the Matrimonial Causes Act, 1965 of England in the case of ***Smee v. Smee [1965] 7 FLR 321 at 326***, the essence of the said section 72(1) MCA is to facilitate the resolution of all issues or matters arising out of the marriage relationship at the same time, in one proceeding. It gives room for the adjustment of proprietary relationships at the same time as personal status and consequential questions of maintenance and custody.

In making property settlement orders, the courts ascertain the quantum of existing propriety interests and order settlements for the benefit of one or both parties or their children. New interests may also be ordered to be created for the benefit of either or both spouses or of the children of the marriage who have not attained the age of 21 years. The circumstances of every case would determine the nature of settlement orders to be made. Sometimes, the assets of the

party or parties are weighed alongside their liabilities or other family responsibilities in order to arrive at what the courts consider to be just and equitable.

3.5 Rules of Settlement of Property

Several rules apply in the settlement of property irrespective of the nature of the settlement, i.e. whether the settlement is by the parties or by the courts. Issues like the valuation of the property to be settled, mode of division of the property, status of property acquired before or during marriage etc. have rules guiding their determination as discussed below.

3.5.1 Status of Pre-Nuptial and Post-Nuptial Property in Settlements

It is now trite law that parties to a marriage continue to exclusively retain property such as: bank accounts, vehicles and other household goods which they acquired separately before marriage, after marriage. There is no law that requires that such property be transferred into their joint names or that such property should become common or marital property. Even the fact of cohabitation before marriage does not alter this fact unless there had been a comingling or mixing-up of the property; in that case, the court would necessarily take into account the financial and other arrangements between the parties respecting the relevant property during the period of cohabitation, in deciding on the division of the property.

For property acquired after marriage, the rules that apply are as follows:

(i) Property acquired after marriage *prima facie*, belongs to the party who either paid for it or in whose name it was bought. The same rule applies to debts incurred by each party or in the name of one party. It is only on the breakdown of a marriage that the court looks behind the legal title, to make orders about ownership, notwithstanding in whose name the property is.

(ii) Where property is acquired in the joint names of the parties to the marriage, such as in the building or purchase of matrimonial homes, parcels of land, stocks, shares, bank accounts etc. such property is regarded as common or marital property. Neither party can dispose of the property or mortgage it without the consent of the other, even if only one of them paid for it.

3.5.2 Valuation of Property

Property that is subject to settlement orders are usually valued in order to determine how it can best be shared fairly and equitably. The relevant date for such valuation is the date of trial of the

claim for settlement or claim for variation of existing settlement agreement. Thus, it is in the interest of both parties to maintain the value of matrimonial property after separation but pending trial, so as to maximise the value available for distribution between them. No party must wilfully damage or neglect matrimonial property, since the courts may take such negative conduct into account in the division of property.

3.5.3 Mode of Division/Settlement of Property

There is no provision under MCA regarding the mode of settlement of property to be adopted by the courts. All that the courts are required to do under section 72 MCA is to consider what is just and equitable in the circumstances of each case, especially having regard to the means, earning capacity and conduct of the parties to the marriage, as well as the age and position of the children, if any. Nevertheless, courts may have recourse to borrowing from what obtains in other Common Law jurisdictions while exercising their discretion in the settlement of property.

In the United States of America for example, many states have adopted one form or the other of two sets of guidelines formulated under the Uniform Marriage and Divorce Act (UMDA) for their courts to use when dividing property during divorce. The first mode of settlement provided by the UMDA is that the property should be divided fairly between the parties without regard to "marital misconduct" and with the following considerations in view:

- duration of the marriage;
- previous marriage of either party;
- ante-nuptial agreement of the parties;
- the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- custodial provisions;
- contribution of the spouses to the family
- whether the settlement is in lieu of or in addition to maintenance; and
- the opportunity of each party for future acquisition of capital assets and income. y is also a consideration. The specific facts of each case must be examined to reach a fair and just division of property.

The second mode of settlement under the UMDA outlines a slightly different scheme of how property should be divided. This mode retains the distinction between property bought before the marriage (separate property) and property bought during the marriage (marital property). Here, each party's separate property is given to him or her while the common or marital property is divided without any regard to "marital misconduct." The court also considers the following factors

- contribution of each spouse to the acquisition of the marital property, including home-making contributions;
- value of the property set aside to each spouse;
- duration of the marriage; and
- economic circumstances of each spouse when the division of property takes effect.

It is submitted that Nigerian courts can have recourse to any of the above modes of property settlements especially when adapted to suit local circumstances.

SELF ASSESSMENT EXERCISE
Discuss the categories of persons in favour of whom orders of court for the settlement of property may be made.

3.6 Enforcement of Orders

Under the general powers conferred on the courts by section 75 of the MCA, courts can enforce orders for settlement of property through orders of attachment, sequestration of property or proceedings for contempt of court. The discretionary powers granted under section 75 MCA are wide and varied and includes: the nature of orders to be made; variation of orders; power to require security for financial payments; length or duration of orders etc.

Where a party fails or refuses to carry out orders of the court in relation to property, the court can also take steps to carry out the orders itself, by signing necessary instruments of title, and can punish the party concerned.

4.0 Conclusion

Settlement of property is one of the ancillary reliefs provided for under section 72 of the MCA. It is one of the issues that usually follow divorce and the relief is available to parties to a statutory marriage only. The process involves the apportioning of matrimonial property to one or both parties and/or their children who are below 21 years of age, or above 21 years in special circumstances. This process can be achieved either by the parties themselves or by the court upon claims by either of the parties. When settlement is founded on the agreement by parties, the courts would usually not interfere with it unless the terms of the agreement are unfair to one party, thereby necessitating a modification or variation by the courts under the powers conferred

by section 72(2) of the MCA. Whenever the courts settle property or vary the terms of a settlement agreement, the utmost consideration in the minds of the court is to be just and equitable in all the circumstances of each case. The courts are usually guided by different considerations in arriving at just settlements.

The aim of settlement orders is to permanently sever all economic ties between the parties to the marriage, while providing for the economic security of the parties and the children where applicable. And like all other court orders, settlements of property orders are also enforceable by the courts.

5.0 Summary

This unit has dealt with the settlement of property upon divorce and the highlights of the subject-matter include the following:

(i) Settlement of property is an ancillary relief provided for under section 72 of the MCA whereby property can be ordered to be shared or settled for the benefit of one or both parties to a statutory marriage or for the benefit of children of the marriage, as an alternative to lump-sum payments for their maintenance.

(ii) Section 72(3) of the MCA clearly provides that it is only children below 21 years that are entitled to the benefit of settled property; however children above 21 can benefit if special circumstances impel the courts to make orders for their benefit.

(iii) There are two types of settlement of property – ante-nuptial or post-nuptial settlements concluded by the parties themselves and settlement of property by the courts.

(iv) The courts have power under section 72(2) MCA to vary the terms of ante-nuptial or post-nuptial settlements concluded by the parties, if found to be invalid by the courts by reason of either unconscionability, mistake, fraud or undue influence.

(v) Property that is subject to settlement must be matrimonial property that is owned by the parties to the marriage and includes: anything of value like land, furniture, money, vehicles, household goods, insurance policies, intellectual property; debts due to the spouses, equities in respect of potential compensation claims, long service leave entitlements, partnership interests, entitlements as beneficiaries of a trust or a will, etc.

(vi) Different rules apply to property acquired before and after marriage. Parties to the marriage retain their pre-nuptial property solely and exclusively unless such property has become mixed up with matrimonial property, while joint property is shared between the parties.

(vii) There is no provision under MCA regarding the mode of settlement of property to be adopted by the courts. All that the courts are required to do under section 72 MCA is to

consider what is just and equitable in the circumstances of each case, especially having regard to the means, earning capacity and conduct of the parties to the marriage, as well as the age and position of the children, if any.

(viii) Under the general powers conferred on the courts by section 75 of the MCA, courts can enforce orders for settlement of property through orders of attachment, sequestration of property or proceedings for contempt of court.

6.0 Tutor-marked Assignments

1. Discuss the nature of property that can be subject to property settlement orders
2. Different rules apply to the settlement of ante-nuptial and post-nuptial property, discuss!
3. What is the aim and purpose of settlement of property in marriage breakdown?

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……

2) Adesanya, S. A., ***Laws of Matrimonial Causes*** (Ibadan: Ibadan University Press, 1973) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (…….. Ilusalaiye Press Ltd., 1999) pages……..

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6) Sagay, I., ***Nigerian Family Law* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 502 – 506.

7) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages161-177

Statutes

3. **Matrimonial Causes Act** Cap. M7 LFN**, 2004,** Sections 72 and 75

4. **Matrimonial Causes Rules** Cap. M7 LFN**, 2004,** Order XIV

MODULE 5: SUCCESSION

Unit 1: Testate Succession

1.0 Introduction

Succession, within the context of the discussions in this module, is the law and procedures under which beneficiaries become entitled to the property of a deceased (dead) person after death. It is the process by which one person succeeds another in the occupation of an estate; that is, the process of a person becoming beneficially entitled to a property or interest in property of a deceased person.

Succession is one of the core issues in family law because of its strategic importance in family harmony, and consequently order in society. When a man (used here in a generic sense) dies, leaving behind property, the question naturally arises about who would legally succeed to that estate and what qualifies that person or persons to so succeed. Right from creation, succession has been and remains a very thorny issue that has occasioned legal activism in

different societies at different levels, wherein regulatory laws have been enacted to deal with the issues arising therefrom.

In Nigeria, there are three modes by which property passes from a deceased person to other persons that are legally entitled to succeed him. The first mode involves the deceased person, while still alive, exercising a right to determine who succeeds him after his death i.e. **testate** succession. The second mode applies to **intestate** succession and it involves the intervention of statutory courts in succession matters, through the appointment of certain categories of persons to administer the estate of deceased persons for the benefit of successors that may or may not include the administrators, according to the rules set down in the Administration of Estate Laws applicable in some parts of Nigeria. The third and final mode also falls in the category of intestate succession and involves the use of customary rules of succession under the various Nigerian native laws and customs to determine, after the death of the deceased, who succeeds to his estate.

This module of three component units deals with the three different modes of succession in Nigeria. This unit is devoted to testate succession, i.e. the system whereby a deceased person pre-determines his legal successors through the medium of a will or "testament" as discussed below, while the next two units deal with intestate succession.

2.0 Objectives

The main objective of this unit is to examine the concept of testate succession as distinct from intestate succession and administration of estate dealt with in the next two units. Specifically, this unit will teach students the following:

(i) The meaning of testate succession/wills
(ii) Sources of wills law in Nigeria
(iii) The nature and character of a will
(iv) Types of and capacity for making wills
(v) Who can make a will
(vi) Statutory Requirements of a will
(vii) Revocation and cancellation of wills
(viii) Statutory modifications to wills-making.

3.0 Main Content

Testate succession involves the making of a will, wherein the maker, known as a "testator" leaves instructions in a written document (the will) regarding who succeeds to his estate or inherits his property. A will on its part, is a legal declaration of a person's wishes regarding the disposal of his property or estate after death; it is a written legally-executed instrument or document by which a person disposes off his estate, to take effect after his death.

In testate succession, there are laid down rules and regulations for making valid and legally-enforceable wills. These rules and regulations are discussed in the component parts of this unit.

3.1 Sources of Wills Law in Nigeria

There are different laws that regulate the making of wills in Nigeria, which are traceable to different sources. Some of them are foreign, while some are local – enacted at regional or state levels. The sources of law on wills are as follows:

(i) The Wills Act, 1837 and the Wills (Amendment) Act, 1852

These are statutes of general application in Nigeria being part of the received English Law in operation in England as at 1st January 1900. These statutes are applicable in Nigeria except in the states of the former Western Region – Oyo, Ogun, Ekiti, Ondo, Osun, Lagos, Edo and Delta States as well as Anambra State in the former Eastern Region of Nigeria.

(ii) The Wills (Soldiers and Sailors) Act, 1918

This is an English law that deals with the formal validity of wills especially as they relate to privileged wills. Though it is not a statute of general application that would automatically make it applicable in Nigeria, it is nevertheless applicable by virtue of the provisions of the High Court laws of the various states in Nigeria, which provide for the application of English statutes that regulate "probate clauses and proceedings".

(iii) The Wills Law, 1958 (Western Region)

The Wills Law, 1958, Cap. 133, Laws of Western Region of Nigeria, 1959 was enacted in 1958 as the local replacement for the combined English versions i.e., the Wills Act, 1837, the Wills (Amendment) Act, 1852 and the Wills (Soldiers and Sailors) Act, 1918. The law

is applicable in the states of the former Western Region of Nigeria except Lagos and Oyo States.

The provisions of the 1958 Act are substantially a reproduction of the English statutes except for the introduction of the local content dealing with dispositions under customary law, as dealt with later in this unit.

(iv) Wills Law, 1990 (Lagos)

This is applicable to only Lagos State, having been enacted by the state to regulate wills-making within the context of its local circumstances. The peculiar features of this law are discussed below.

(v) Wills Edict, 1990 (Oyo)

The Wills Edict No. 12 of Oyo State, 1990 was decreed by the then military Governor of the state to modify the provisions of the existing Wills Law 1958, to specifically introduce "reasonable financial provisions" for family and dependants of the testator left out in his will and some other issues discussed below.

(vi) Succession Law Edict, 1987 (Anambra)

This law is peculiar to Anambra State it incorporates rules contained in the Wills Act, 1837, the Wills (Amendment) Act, 1852, the Wills (Soldiers and Sailors) Act, 1918 and the Wills Law, 1958.

3.2 The Nature and Character of a Will

As stated earlier, a will is an instrument through which a person, while alive, provides for the disposition of his properties to designated persons, which will come into operation after the death of the testator. By nature, a will is **ambulatory**, i.e. it does not operate or have effect until after the death of the maker or testator. This means in effect that a will cannot confer any benefits on the designated beneficiaries during the lifetime of the testator, and the testator retains the right to deal with his property in any way he likes until his death. This means in essence that a will is also **revocable** up till the death of the testator

For a document to operate as a will, two characteristics must be present:

(1) the testator must have an *animus testandi* i.e. the intention that the will would take effect after his death; and

(2) the testator must have executed the will, i.e. he must have signed the will in the presence of witnesses and in accordance with the rules for making wills under the relevant laws, e.g., the Wills Act, 1837 or the Wills Law, 1959.

Abayomi summarises the nature and character of a will thus:

> A Will is a testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes manifested in the Will.

3.3 Types of and Capacity for Making wills

There are different types of wills, depending on the legal jurisdictions in which they operate. In most jurisdictions, including Nigeria, any person can make a will (subject to any statutory or customary limitations) provided that they have the necessary capacity to so make a will. The following are some of the more common types of wills.

3.3.1 Regular Will

A regular will is one which is made in accordance with the provisions of the regulatory laws for wills-making in any jurisdiction. For it to be valid, the testator must possess the requisite capacity for making a will. For example, under the Wills Act, 1837 which is common to most Common Law jurisdictions including parts of Nigeria, a testator is said to possess requisite capacity if he possesses the following:-

1) He must be an adult, i.e. a person (male or female) who is not less than 18 years old unless such a person who is less than 18 is in actual military service in any branch of the armed forces.

2) He must possess a sound mind and memory at the time of making the will. According to the court in the case of ***Banks v. Goodfellow [1870] L.R. 5 Q.B. 549 at 565***, to be said to possess a sound mind and memory:

> "It is essential ... that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that

> no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made".

The above test requires that a testator must be able to understand the effect of his wishes as expressed in the will; the extent of the property he is giving out; and whether or not he is giving it to the right persons in view of different claims on him by different persons with whom he has one relationship or the other. The testator must also not suffer from any mental disease that may impair his understanding or suffer from any delusions whatsoever.

3) He must make the will of his own free will, i.e. not subject to any undue influence, coercion or excessive pressure from other persons in making the will. According to Lord Penzance in the English case of **Hall v. Hall** [1868] L.R. 1 P & D. 481 at 482,

> "... pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgement, is a species of restraint under which no valid will can be made ... In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's".

The testator must also not be subject to the fraudulent and deceptive manipulations of other persons in the making of the will

4) He must know and approve of the contents of the will he makes, i.e. he must not be mistaken as to the contents of the will and must not be misled or fraudulently influenced to execute a will, the contents of which he is ignorant of. In the English case of ***In the Goods of Hunt [1875] LR 3 P & D 250*** for example, a woman mistakenly executed the will prepared for her sister with whom she resided and whose will was prepared at the same time as hers. The court held that the woman did not know and approve of the contents of the will she executed.

Cases of fraud are commonly found in the will of a blind or illiterate person. Though the blind and illiterate possess capacity to make a will, the will can be declared invalid on the ground of lack of knowledge and, approval of the contents of the will, where

there is proof that the contents of the will were not read to the illiterate or blind testator and that he understood same before executing the will.

3.3.2 Privileged Will

A privilege will is defined as a right, advantage, or immunity granted to or enjoyed by a person or a class of people, beyond the usual rights or advantages of others. A will is said to be privileged because it is not subject to the usual rules for making wills due to some special circumstance. Such a will is valid even though it does not comply with the formal requirements of the Wills Act 1837 in terms of form, such as the requirements of writing, attestation and execution, or even the possession of the requisite capacity in terms of being a minor.

The right to make a privileged will is conferred by section 11 of the Wills Act, 1837 and extended by the Wills (Soldiers and Sailors) Act 1918 on any soldier in actual military service and any mariner i.e. sailor or seaman at sea and airmen on actual military service. This privilege allows these servicemen and sailors to make wills without necessarily complying with the normal rules of making wills. It is immaterial whether the soldiers or sailors are male or female since, on normal principles of statutory interpretation, any generic reference to males, also includes females.

In England, a wide interpretation has been given to the phrase, “actual military service”. The phrase is not confined to service as a combatant in times of war, but extends to service in any other capacity such as an auxiliary or a trainee and to service when war is merely imminent. Other forms of within the definition include:

- service with an occupying force after a war
- service with peace-keeping force during hostilities
- service in support of the civil power against terrorists (e.g.in Northern Ireland)

The phrase, “at sea” has also received a similarly wide interpretation. A member of the naval forces for example is treated as being at sea if he is in an equivalent position to a soldier or an airman on actual military service (e.g. if he is on shore leave during wartime).

In Nigeria, section 9 of the Wills Law, 1958 (applicable to states of the former Western Region except Lagos and Oyo States) and section 73 of the Succession Law Edict of Anambra State are *in pari materia* with the provisions of both the Wills (Soldiers and Sailors) Act 1918 and section 11 of the Wills Act, 1837. Under both laws, the right to make privileged wills is conferred on any member of the armed forces (Army, Navy and Airforce). However, under the

Succession Law Edict of Anambra State, the provisions are restricted to mariners or seamen at sea and the members of the armed forces that are on "active military service". None of these provisions have been subjected to any interpretation in Nigerian courts.

3.3.3 Conditional Will

A conditional will is a will wherein the testator states that he intends the will to take effect only when some specified condition has been satisfied, e.g. where the condition upon which a testator's will taking effect is dependent on whether or not he survives some other person. In the case of ***In the Estate of Thomas [1939] 2 All E.R. 567***, the testator stated in his will, "If I survive my wife and inherit under her will..." and the will was held to be conditional on his surviving the wife. Unless and until the specified condition occurs, the will cannot take effect.

Whether or not a will is conditional depends on the court's interpretation of the words used.

3.3.4 Nuncupative Will

A nuncupative will is an oral statement directing how property is to be distributed after the death of the maker. Except in cases of privileged wills and *donatio mortis causa* (donation of gifts made orally in contemplation of death) being exceptions to the rule, such statements have no effect in law. Nevertheless, a nuncupative will is perfectly valid under customary law, provided that it is made before credible witnesses.

3.4 Who Can Make a Will?

Section 1 of the Wills Act, 1837 provides that "it shall be lawful for every person to devise, bequeath, all property or dispose of, by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death ..." This provision is re-echoed in virtually all other laws on wills in Nigeria. However, different sections of the various Wills law provide that no will made by any person under the age of 18 years shall be valid.

From the foregoing, it is clear that every adult – male or female, blind or illiterate – who is above 18 years, is qualified to make a will, subject to the exceptions created under the provisions of the Wills (Soldiers and Sailors) Act 1918 which permits persons below 18 years to make wills provided they are sailors or are in military service in any branch of the armed forces.

3.5 Statutory Requirements of a will

A valid will is required by law to be in a particular form. The equivalent sections of the different laws on wills in Nigeria substantially reproduce section 9 of the Wills Act, 1837 (as amended by the Wills Act [Amendment] Act, 1852) which provides thus:

> "No Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledge by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary".

The above provision indicates that for a will to be valid, the following features must be present.

(i) The will must be in writing.

(ii) It must be signed by the testator or by someone else on his behalf, in his presence and by his direction or instruction, at the end or "foot" of the document. Wherever the testator affixes his signature, it must be clear that that the testator intended to give effect to the will by that signature.

(iii) The signing of the will or the acknowledgement of his signature by the testator must be done in the presence of at least two witnesses who are present at the same time to see the testator sign the will or acknowledge his signature.

(iv) Each witness must then attest and sign the will after the signature of the testator in the presence of the testator.

3.6 Revocation and Cancellation of Wills

The nature of a will is such that it is revocable by the testator through different actions until he dies. This means that the will can be revoked at any stage until the moment of the testator's death. Apart from section 18 of the Wills Act, 1837 which provides that a will may be revoked by a subsequent marriage, section 20 of the Wills Act, 1837 (see also section 17, Wills Law & section 81, Succession Law Edict) provides that:

> "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a Will is hereinbefore required to be executed or by the burning, tearing, or otherwise destroying the same by the testator, or

> by some person in his presence and by his direction, with the intention of revoking the same".

Thus, there are four major ways through which a testator can revoke his will i.e. by subsequent marriage, a superseding will, intentional declaration of revocation, or by destruction. We shall now briefly examine each of one these.

3.6.1 Subsequent Marriage

Section 18 of the Wills Act, 1837 (see also section 15, Wills Law 1958 and section 79(1) Succession Law Edict) provides as follows:

> "Every will, made by a man or woman, shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or next-of kin, under the Statue of Distribution".

The above means that a valid statutory marriage contracted by a testator after the making of a will, automatically revokes the will whether or not the testator intended the marriage to revoke the will. The only exception to the rule as applied in Nigeria, is a situation where the will was made in furtherance of a power of appointment to appoint property, which if not exercised would, by default of appointment pass the property to the testator's heir, executor or other successors-in-title.

Revocation by marriage was applied in the case of ***Jadesimi v. Okotie-Eboh (1996) 2 NWLR 128***. The parties were married first under customary law and under the Marriage Act a few years later. In between both marriages, the husband made a will under the Wills Act, 1837. Upon the death of the husband, the issue arose whether the statutory marriage had revoked the will he made prior to the statutory marriage but after the customary law marriage to the same person. The High Court held that the will was not revoked by the subsequent marriage under the Act to the same wife he had already married under customary law, the marriage being a marriage recognised in law in Nigeria. On appeal to the Court of Appeal, the decision was set aside on the ground that the will was revoked by the operation of section 18 of the Wills Act 1837. On further appeal, the Supreme Court restored the judgement of the trial court, and held that the marriage contemplated under section 18 of the Wills Act 1837 could not conceivably include a subsequent statutory marriage between a man and a woman who prior to the statutory marriage, were already

validity married and living together as husband and wife under customary law when the will was made. The Court further held that the marriage which can revoke or invalidate an existing will as contemplated under section 18 of the Wills Act 1837 is one within the English concept, which connotes a marriage between a man and a woman who were of single status at the time of the marriage and therefore possessed the legal capacity to contract a marriage under the Marriage Act.

3.6.2 Later (Superseding) Wills

By the provisions of section 20 of the Wills Act, 1837 under reference, an existing will would be revoked by a will made later in time by the same testator, provided that the later will is executed in the same manner as the earlier one. It is not mandatory that the testator should expressly state that the later will revokes the former; the fact of the making of another will which is not a codicil (addition) to the existing one, is enough to imply a revocation, particularly where the terms of both wills differ or are inconsistent.

3.6.3 Intentional Revocation (*Animus Revocandi*)

Section 20 of the Wills Act, 1837 also provides that a testator may intentionally revoke an existing will "...by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed..." This implies that a testator can expressly state in writing that he has revoked his will and then execute or sign the document in the same manner as a will, in the presence of two witnesses that must also sign as witnesses.

3.6.4 Destruction

Section 20 of the Wills Act, 1837 also provides that a testator may revoke an existing will "...by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Thus, may revoke a valid will by burning it, tearing or otherwise destroying it either by himself or by some other person in his presence under his instructions and direction with the intention of revoking the will. Note that if the destruction is achieved without the requisite intention to destroy, the destruction is invalid and the will remains in spirit in the face of the destruction of the letter.

3.7 Statutory Modifications to Wills-Making

The various laws regulating the making of wills in Nigeria make provisions regarding the capacity of different categories of persons to make wills. For example, section 3 of the Wills Act, 1837 provides as follows:

> "It shall be lawful for every person to devise, bequeath, all property or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or dispose of, would devolve … upon his executor or administrator; and that power hereby given shall extend … to all contingent, executory or other future interests in any real or personal estate, whether the testator may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or Will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will".

The above provision (replicated in modified forms in section 3, Wills Law [Western Region]; section) gives an unrestricted freedom to a testator to devise his property in whatever manner he chooses. However, there have been statutory restrictions imposed on this freedom by the different local statutes on wills dealt with above.

The first legislation to whittle down the freedom of a testator as codified in section 3 of the Wills Act, 1837 is the Wills Law, 1958. Section 3(1) of the Wills Law provides as follows:

> "Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to either at law or in equity, at the time of his death which, if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator".

The above provision imposed customary practices and traditions relating to succession on the freedom of a testator to dispose of his estate as he pleases. The legal effect and consequence is that a provision in a will which neglects or intentionally disregards customary practices relating to property reserved exclusively to certain persons or other inalienable property, would be set

aside. The provision of this section was interpreted and applied in the following celebrated cases: ***Oke v. Oke [1974] 9 NSCC 148***, where the Supreme Court held that the deceased testator did not have the right to dispose by will un-partitioned family land belonging to his wife's family as this was contrary to customary land tenure.

In ***Idehen v. Idehen [1991] 6 NWLR (Pt 198) 382***, where the Supreme Court held that under Bini customary law of inheritance, only the first surviving son of a Bini man who performs the final burial rites of his deceased father is entitled to the dwelling house (*Igiogbe*) of his father; and thus the Igiogbe could not be disposed by will to any other person but the first son in compliance with section 3(1) of the Wills Law. A similar decision was reached in the case of ***Lawal-Osula v. Lawal-Osula [1995] 9 NWLR (Pt. 419) 259***, except that the court even extended the application of section 3(1) of the Wills Law to other properties outside the *Igiogbe*, with the effect of "robbing" a Bini man who is a hereditary office holder of testamentary power to dispose of his property.

In Oyo State, the Wills Edict (now Law) 1990 also imposes a twofold restriction on testamentary freedom. While section 3(1)(a) re-enacted the provisions of section 3(1) of the Wills Law 1958, section 3(1)(b) introduced a religious dimension to testamentary freedom. It provides that the provisions of the law do not apply to the will of a person who, immediately before his death, was subject to Islamic Law. According to Professor **Itse Sagay** in his book, *Nigerian Law of Succession* (pg. 130), the import of section 3(1)(b) of the Wills Law 1990 of Oyo State is that:

> "… all restrictions imposed by Islamic Law on the right of a Muslim to freely dispose of his estate by Will, now apply to Muslims domiciled in Oyo State. In practice it means that such a testator has very little freedom of testamentary power, since Islamic Law has comprehensive and fixed provisions for the disposal of a deceased's estate. In short there is no point in such a person making a Will. One other thing this provision in the Oyo State Wills Law (1990) has done is to effectively override the Supreme Court's decision in *Yinusa v. Adesubokan* …"

Section 4 of the Oyo Wills Law took into account contemporary developments of Wills Law in England wherein provisions have been made for family and dependants. By the said section 4 of the Oyo Wills Law, the following classes of family and dependants of a deceased testator may apply to court for an order for "reasonable financial provision" from the deceased's estate in the event of non-provision or inadequate provisions for them in the Will. They include:

- the husband or wife of the deceased;

- child or children of the deceased;
- parents, brothers and sisters of the deceased who were maintained wholly or partly before the death of the testator.

In Lagos State, the Wills Law, 1990 also took into account some of the developments in England. Section 1 of the law is similar to section 3(1) of the Wills Law, 1959. But section 2 of the Lagos Wills Law is similar to the provisions of section 4 of the Oyo Wills Law by providing for "reasonable financial provision" for the family and dependants of the deceased testator. Though the provisions of section 2 are not as expansive those of England, it gives the family and dependants of the deceased, who are inadequately provided for, or totally left out in the will to apply to the court within six months of the grant of probate for redress.

Reasonable financial provisions are also a feature of the Anambra State Succession Law Edict, 1987 as reflected in section 58(1) of the Edict.

4.0 Conclusion

Testate succession involves the right of a testator to make a will disposing of his property, which disposition takes effect after his death. The nature of a will is such that it does not take effect until after the death of the maker and it is revocable before then. There are several laws guiding the making of a will, with the earliest of them being the Wills Act, 1837 as amended; a statute of general application in Nigeria. While the provisions of the various wills are common in several respects, the local variants of the Wills Act, 1837 i.e. the Wills Law, 1958; the Oyo state Wills Edict, 1990; the Lagos State Wills Law, 1990 and the Anambra State Succession Law Edict have all made some modifications to the Wills Act, 1837 to reflect the socio-cultural circumstances that are peculiar to the people of the states under their jurisdictions.

The various laws also contain provisions on the classes of persons qualified to make a will – adults above 18 years or minors below 18 who can make privileged wills. Finally, a will is revocable by any one or a combination of factors ranging from subsequent statutory marriage of the maker, to the outright destruction of the will.

5.0 Summary

While the introductory part of this unit dealt with the concept of succession generally, the main content of the unit has concentrated on testate succession (wills) only. The unit established that a will is a written legally-executed instrument or document by which a person disposes off his estate, to take effect after his death. It also established the following:

1. That the law on wills in Nigeria are traceable to different sources, including the Wills Act, 1837; Wills (Amendment) Act, 1852; Wills (Soldiers and Sailors) Act, 1918; Wills Law, 1958 (Western Region); Wills Law, 1990 (Lagos); Wills Edict, 1990 (Oyo); and Succession Law Edict, 1987 (Anambra).
2. That the nature and character of a will is such that it is ambulatory and revocable.
3. That there are four different types of wills i.e., Regular Will; Privileged Will; Conditional Will; and Nuncupative Will.
4. That all persons above 18 years can make wills while those below 18 can make privileged wills provided that they are serving in the armed forces or they are mariners, i.e. Sailors.
5. That a will must be in writing, signed by the testator in the presence of at least two witnesses present at the same time; and that the witnesses must attest and sign the will.
6. That a will can be revoked or cancelled by a subsequent statutory marriage; a later or superseding will; an intentional revocation; and destruction of the will either by burning or tearing or the like.
7. That there have been statutory modifications to wills-making by limiting testamentary powers of testators either by subjecting the application of the Wills Law to Customary Law where relevant, or by making mandatory "reasonable financial provisions" available to family and dependants of a deceased testator who did not see fit to make those provisions in his will.

6.0 Tutor-marked Assignment

1. Examine the nature of a will and the categories of persons that can make a will.
2. Discuss the requirements of a valid will and the types of wills that can be made by different persons.
3. Is a will revocable? Explain in detail!

7.0 Suggested Further Readings/References

1) Abayomi, K., **Wills: Law and Practice** (Lagos: Mgbeyi & Associates [Nig.] Ltd, 2004) Chapters 3, 4 – 6, 9, 13 & 14

2) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……

3) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (…….. Ilusalaiye Press Ltd., 1999) pages……..

4) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages 372 – 381.

5) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages 293 – 298.

6) Sagay, I., ***Nigerian Law of Succession* [*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 124 – 256.

Unit 2: Intestate Succession (Administration of Estates)

1.0. Introduction

Intestacy is the condition or fact of dying without having made a will disposing the estate of the dead man. Such a person who dies without a will is known as a "deceased intestate". For his property or estate to devolve on his legal successors, the rules of intestate succession applicable to him would be applied. In Nigeria, succession on intestacy is dealt with in either of two ways – statutorily through the received English laws and local statutes, or under Customary Law, whichever is applicable to the deceased.

This unit deals with intestate succession under the laws dealing with the administration of estates in the different component states of Nigeria.

2.0. Objectives

The objectives of this section are to bring to the knowledge of the students the operational value of the statutory laws on intestate succession in contra-distinction to rules of intestacy under the different customary laws in Nigeria. Specifically, this unit will address the following:-

(i) The meaning of intestacy
(ii) Statutes-based Administration of Estates upon intestacy

3.0. Main Content

The death of a person who did not make a will often brings confusion and quarrels among his successors. While customary law remains the major channel through which issues of succession are resolved, statutory options have also been introduced in some states of Nigeria, whereby the estates of some persons who die intestate can be administered or distributed. The available statutory options are discussed below.

3.1 The Meaning of Intestacy

Intestacy means the state in which a person dies without having made a will disposing of all his property. Intestacy is said to be total when the deceased leaves no will at all and it is said to be partial when the deceased intestate leaves a will that only appoints executors but does not dispose of any property; or when his will deals with only part of the testator's estate. When this occurs, it becomes necessary to appoint personal representatives to manage the deceased's estate and distribute same among the beneficiaries and creditors, if any, according to the principles laid down in the various statutory laws; or to distribute the estate of the deceased according to the applicable customary laws of succession.

3.2 Statutes-based Administration of Estates

There are different laws governing administration of estates in Nigeria, depending on the areas of jurisdiction of the laws. We shall examine these laws in the following sub-sections.

3.2.1 Administration of Estates Law, 1959

In all the current states carved out from the former Western Region of Nigeria and the former colony of Lagos, the law regulating administration of estates is the Administration of Estates Law, 1959, Cap. 1, Laws of Western Nigeria 1959. The states of Oyo, Ogun, Ekiti, Ondo, Osun, Lagos, Edo and Delta were within the operational jurisdiction of the law which the various states reproduced almost verbatim as part of the laws of the states upon creation at different dates.

The Administration of Estates Law does not automatically apply to all cases of intestacy in any of the above states. Section 49(5) of the law provides thus:

> Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law leaving a widow or husband or

any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this Law, any customary law to the contrary notwithstanding:

provided that:

(a) Where by virtue of paragraph (f) of sub-section (1) of this section the residuary estate would belong to the state as *bona vacantia* such residuary estate shall be distributed in accordance with customary law and shall not belong to the state; and
(b) Any real property the succession to which cannot by customary law be effected by testamentary disposition shall descend in accordance with customary law anything herein to the contrary notwithstanding.

The above provisions indicate that the Administration of Estates Law, 1959 applies in cases of death intestate only where the estate of the deceased is neither subject to the authority of a Customary Court, nor to the rules of distribution under Customary Law. For the law to apply to the administration and distribution of the estate of an intestate, the following conditions must be present.

1) The deceased intestate must be a person who was ordinarily subject to customary law, but deliberately chose to remove himself from the jurisdiction of customary law by contracting a marriage under the Marriage Act, 1914, i.e. a different system of law completely.

2) The deceased must have died intestate i.e. without making a will, and been survived by a widow(er) or child(ren) of the marriage contracted under the Act. The provisions of the law do not apply to products of customary law marriage.

3) The deceased must have died after the commencement of the Act, being April 1959. Therefore, the law does not apply to the estates of those who died before April, 1959.

Where the above conditions are present, the provisions of the Administration of Estates Law will govern the distribution of the estate of a deceased intestate, provided that:

(i) the nature of the property to be distributed is such that the deceased could have disposed of it by will if he had chosen to do so, irrespective of a customary law rule to the contrary;

(ii) If there is any part of the estate to which the “ownerless” rule would apply and which the State would ordinarily have a right of claim (*bona vacantia*), that part of the estate will not be claimed by the State. Rather, that part of the estate will be distributed according to the rules of customary law.

(iii) Any real property which cannot be disposed by will due to customary law requirements must be distributed in accordance with the rule of customary law. This provision re-echoes the provisions of section 3(1) of the Wills Law, 1959 already discussed above. Examples of this type of property include unpartitioned family land in which the deceased had an interest in possession only, and property which belongs to first-born sons as a birthright.

Note that the Administration of Estates Law does not apply to persons who married under customary law or under statutory law outside the shores of Nigeria. It does not also apply to non-Nigerians unless he is domiciled in the relevant state or the property owned by the deceased intestate non-Nigerian is landed property situate in the state where the law applies because of the *lex situs* rule.

In distributing the estate to which the Administration of Estates Law applies, the following rules, which are modelled after English rules and contained in section 49(1), are applied as follows:

(a) Where the only survivor of the deceased is a spouse, he or she is entitled to the deceased's residuary estate (remaining estate) which in effect comprises the entire property of the deceased since no other distribution is made.

(b) Where the survivors of the deceased include the spouse and child(ren), the children are entitled to $^{2}/_{3}$ (two thirds) of the residuary estate to be held on trusts for them, while the spouse is entitled to:
    (i) all the personal chattels of the deceased
    (ii) a net sum of money equivalent to the value of $^{1}/_{3}$ (one third) of the residuary estate free of death duties and costs. This sum of money automatically attracts 2 ½ percent interest rate from the date of the deceased's death until the sum is paid or appropriated.
    (iii) a life interest in $^{1}/_{3}$ (one third) of the residuary estate less the personal chattels; and thereafter to be held on statutory trusts for the benefit of the children of the intestate.

    In the above distribution, it is immaterial that the deceased is also survived by parent(s) and/or siblings of full blood.

(c) Where the survivors of the deceased include the spouse and parent(s) and/or siblings of full blood, but without a child, the mode of distribution is as follows:

    (i) the spouse is entitled to all the personal chattels of the deceased;
    (ii) the spouse is also entitled to a net sum of money equivalent to the value of $^{1}/_{3}$ (one third) of the residuary estate free of death duties and costs. This sum of money

automatically attracts 2 ½ percent interest rate from the date of the deceased's death until the sum is paid or appropriated;

(iii) the spouse is also entitled to an absolute interest in ½ (half) of the residuary estate less the personal chattels;

(iv) The parent(s) of the deceased are entitled to the other ½ (half) of the residuary estate less the personal chattels. If no parent survives the intestate, the siblings are entitled to the half on statutory trusts for them..

(d) Where the survivor(s) of the deceased are child(ren), such children are entitled to the deceased's residuary estate to be held on statutory trusts for them.

(e) Where there are no survivors at all, the estate of the deceased goes to the State as *bona vacantia* in which case, the estate would devolve under the rules of customary law to those entitled, as provided under section 49(5)(a) of the Administration of Estates Law.

Finally, section 50(1)(iii) of the Administration of Estates Law, 1959 makes provision for the distribution of an intestate's estate to his children in equal portions on the equitable principle that "equality is equity". That way, family peace and harmony is achievable.

3.2.2 Succession Law Edict, 1987 of Anambra State

The Succession Law Edict, 1987 of Anambra State governs intestate succession in Anambra and Enugu States, thereby removing both states from the rest of Eastern and Northern Nigeria where the rule in ***Cole v. Cole [1898] 1 NLR 15*** (dealt with below) applies. Under the law, succession to the real and personal estate of a deceased intestate is provided for in Part 4 of the law. Copious rules of distribution are reflected in section 51 of the laws, the summary of which are as follows.

(a) Where the deceased is survived by a spouse but no children, parents or siblings of full blood, different rules apply depending on the sex of the surviving spouse. While a surviving husband is entitled to the deceased wife's residuary estate absolutely, the wife may or may not be so entitled depending on whether the deceased husband is survived by siblings of half blood. Where there are half brothers and sisters, the wife can only take either a life interest or an interest pending re-marriage (whichever comes first) in the husband's residuary estate, after which the half brothers and sisters (or their children if they are dead) become entitled to the residue of her interest in equal shares.

(b) Where the survivors of the deceased include the spouse and child(ren), whether or not there are other relatives, the following mode of distribution is adopted:

(i) One third ($^1/_3$) of the residuary estate is held on trust for the surviving spouse. In the case of a surviving husband, he takes an absolute beneficial interest; but a surviving wife takes a life interest or an interest pending re-marriage (whichever comes first) in the husband's residuary estate, after which the children or grandchildren become entitled to the residue of her interest in equal shares absolutely.

(ii) The remaining $^2/_3$ (two thirds) of the residuary estate and the residue of the wife's interest where applicable, are held on trusts for the children of the deceased or their own children, if they have died, in equal shares absolutely.

(c) Where the survivors of the deceased include the spouse and parent(s) and/or siblings of full blood, nephews and nieces of the whole blood but without leaving a child, the mode of distribution is as follows:

(i) two thirds ($^2/_3$) of the residuary estate are held on trusts for the surviving spouse; in the case of a surviving husband, absolutely but in the case of a surviving wife, a life interest or an interest pending re-marriage (whichever comes first).

(ii) the remaining $^1/_3$ (one third) and the residue of the wife's interest after cessation, are held on trusts for siblings of the whole blood or their children in equal shares absolutely.

(iii) Where there are no siblings or children of siblings of the deceased, the said $^1/_3$ (one third) and the residue of the wife's interest after cessation, devolve on the parents absolutely.

(d) If no spouse survives the deceased and the deceased is survived by children or grandchildren of deceased children, two thirds ($^2/_3$) of the residuary estate are held on trusts for the children or grandchildren in equal shares. Of the remaining $^1/_3$ (one third), one half is held on trust for the parents of the intestate and the other half for his siblings.

(e) Where the deceased is not survived by any spouse, children or grandchildren but is survived by both parents and/or brothers:

(i) two thirds ($^2/_3$) of the residuary estate of the deceased are held on trusts for the parents in equal shares absolutely while the remaining $^1/_3$ (one third) is held on trusts for the siblings in equal shares absolutely.

(ii) If there are no surviving siblings, the entire residuary estate devolves on the parents absolutely in equal shares.

(f) Where the deceased is not survived by any spouse or children, but is survived by one parent:

(i) $^{2}/_{3}$ (two thirds) of the residuary estate of the deceased are held on trusts for the surviving parent absolutely while the remaining $^{1}/_{3}$ (one third) is held on trusts for the siblings in equal shares absolutely.

(ii) If there are no surviving siblings, the entire residuary estate devolves on the surviving parent absolutely.

(g) Where the intestate is not survived by a spouse, children or parents, but is survived by siblings of full and half blood as well as other relatives, the estate of the deceased intestate devolves on trusts for these successors in a descending line of succession as follows:

(i) the siblings of full blood take the deceased's estate absolutely in equal shares;

(ii) if no such siblings of full blood exists, the siblings of half blood become entitled;

(iii) in the absence of siblings of half blood, the grandparents of the deceased, if any, become entitled in equal shares;

(iv) the uncles and aunts of the intestate are next in the line of succession where no grandparents survive the deceased;

(v) In the absence of any of the above persons, the head of the deceased intestate's family succeeds to the estate of the deceased. He is then expected to provide for the dependants and other legitimate claimants of the deceased from the estate.

3.2.3 The Rule in Cole v. Cole (Application of English Law)

The rule in ***Cole v. Cole [1898] 1 NLR 15*** governs intestate succession in cases where the deceased contracted a valid statutory or "Christian marriage" outside Nigeria and by implication, outside the ambit of the now-repealed section 36 the Marriage Act of 1914, which governed the distribution of the estate of a deceased intestate married under the Act. Nevertheless, the rule established that the very act of contracting a statutory marriage outside Nigeria removes the parties to that marriage from within the ambit of customary law in succession matters.

The facts of the case are that both parties contracted a Christian marriage in Sierra Leone, even though the deceased intestate was domiciled in Nigeria. Upon his death, the brother claimed that he was entitled to the deceased's estate under customary law as against the surviving widow and child. On the question of whether the widow could rely on the now-repealed section 36 of the Marriage Act, 1914 then governing intestate succession in Nigeria, the court held that the marriage having been contracted outside the jurisdiction of the Marriage Act, the said Act could not apply in the distribution of the deceased's estate. Rather, the estate would be distributed

under customary law. On appeal, the court held that the said marriage, though not governed by the Marriage Act, is an act that is "foreign to native life, habit and custom" which enables the court to refuse to observe native law and custom. The court relied on section 19 of the Supreme Court Ordinance No. 4 of 1876 which provides that in cases where no express rule is applicable to any controversial matter, the court should be guided by the principles of justice, equity and good conscience, to hold that the existing English law of succession applied to the case, to enable the widow and son of the deceased to succeed to the estate as against the brother of the deceased.

The principle laid down in **Cole v. Cole** has been severely criticised over the years. Nevertheless, it appears to be the law that governs intestate succession in Northern and parts of Eastern Nigeria where there are currently no statutory laws on intestate succession on the same pedestal as the Administration of Estates Law, 1959 of the former Western Region and the Succession Law Edict 1987 of Anambra State. Thus, deceased intestates domiciled in the Northern or parts of the Eastern Nigeria, who contract statutory marriages, whether under the Act or outside Nigeria, may have their estates distributed on the principle of **Cole v. Cole**; meaning that pre-1900 English laws on succession would apply, these laws being the Statute of Distributions, 1670 and 1685 and the Intestates' Estates Act, 1890.

Under the said statutes, the following mode of distribution is adopted for the estate of a deceased intestate who contracted a monogamous marriage.

(a) Where the intestate is survived by a widow and issue:

  (i) The widow takes $^1/_3$ (one third) of the personal estate; and

  (ii) The issues share the remaining $^2/_3$ (two thirds) of the personal estate in equal shares.

  (iii) The eldest male child takes the real estate to the exclusion of all other children. Where there is no male, the females take the real estate in equal shares

(b) Where there is a surviving widow but no issue:

  (i) The widow takes absolutely, the whole real and personal estate of the deceased husband provided that it does not exceed £500 in net value at the date of his demise. If the net value exceeds £500, the widow takes half of the personal estate in addition to the £500.

  (ii) The remaining half of the personal estate goes to the father of the deceased.

(c) Where the intestate is survived by issues and no widow, the children are entitled to the personal estate in equal shares.

(d) Where a woman dies, leaving a husband, the surviving husband takes absolutely, all her personal and real estate whether or not she has issues.

(e) Where a woman dies, leaving issues but no husband, the children share the estate equally.

4.0. Conclusion

Succession to the estate of a person who died without leaving a will can be achieved through statutes-based methods jointly classified as administration of estates. In states of the former Western Region, the Administration of Estates Law, 1959 governs succession to the estate of a deceased intestate provided that he falls within the class of persons recognised under the Act. In the states of the former Anambra, the Succession Law Edict, 1987 does a similar task while the rule in *Cole v. Cole* may be the last resort in the remaining parts of the country, depending on the peculiar circumstances of each case.

5.0. Summary

This unit has focused on statutes-based modes of succession to the estate of a deceased intestate. Specifically, intestacy was defined as the state in which a person dies without having made a will disposing of all his property, and the fact that three major statutes and rules are operational in Nigeria for the regulation of intestate succession. The unit identified and discussed the following statutes and rules.

(i) The Administration of Estates Law, 1959 applicable in states of the former western Region.
(ii) The Succession Law Edict, Anambra State applicable in Anambra and Enugu States.
(iii)The rule in *Cole v. Cole* applicable in the rest of Nigeria.

6.0. Tutor-marked Assignment

1. Discuss the jurisdiction of and the conditions under which the Administration of Estates Law, 1959 applies.

2. Highlight the major differences between the modes of distribution adopted in the Administration of Estates Law, 1959 and the Succession Law Edict, 1987

3. State the rule and application of the rule in *Cole v. Cole*

7.0. Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……

2) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (…….. Ilusalaiye Press Ltd., 1999) pages……..

3) Nwogugu, E. I., **Family Law in Nigeria** [Revised edition] (Ibadan: Heinmann Educational Books, 1990) pages 381–398.

4) Onokah, M. C., ***Family Law*** (Ibadan: Spectrum Books Ltd., 2003) pages 317 – 360.

5) Sagay, I., ***Nigerian Law of Succession*** **[*Principles, Cases, Statutes & Commentaries*]** (Ikeja: Malthouse Press Ltd., 1999) pages 73 – 89.

6) Tijani, N., **Matrimonial Causes in Nigeria: Law and Practice** (Lagos: Renaissance Law Publishers Ltd, 2007) pages 232.

Unit 1: Intestate Succession (Customary Law)

1.0 Introduction

The last mode of intestate succession as applied in Nigeria is that found under applicable customary law comprising indigenous law and Moslem religious law. Before the introduction of the received English law in Nigeria, and the enactment of statutory laws, the various ethnic groups in Nigeria had their different native laws and customs regulating all spheres of life including matters of succession, even though these laws are unwritten and un-codified.

In some parts of Nigeria, the customary laws of inheritance are so important that even the right to make wills in the English form have been subjected to the certain overriding rules of custom. For example, section 3(1) of the Wills Law, 1958, section 3(1)(a) of the Wills Edict, 1990 of Oyo State and section 1 Wills Law, 1990 of Lagos State clearly removes the right of a testator to dispose of certain classes of property in a will, in a manner that is inconsistent with the rules of disposition of same under customary law. Oyo State went one step further in section 3(1)(b) of its law to stipulate that the provisions of the law do not apply to the will of a person who, immediately before his death, was subject to Islamic Law; meaning in effect that the right of a Muslim in Oyo State to make a will in the English form is subject to all restrictions imposed by Islamic law on the disposition of property upon death.

Thus, in view of the importance of customary law in matters of succession, this unit focuses on intestate succession under customary law. However, since there is no uniform customary law of succession in all the localities, only selected customary laws from the three major tribes in Nigeria are dealt with here.

2.0 Objectives

The objective of this unit is to teach the students intestate succession under customary law and the customary law that is applicable to a deceased intestate. The unit would address customary rules of succession upon intestacy in the following parts of Nigeria:

(i) Yoruba tribal rules

(ii) The Ibo tribal rules

(iii) Moslem law applicable in Northern Nigeria.

3.0 Main Content

Intestate succession is the prevailing system of customary law succession, even though there is room for what *Sagay* refers to as "vague forms of testate succession". Most people whose lives are governed by customary law have their estates distributed under the rules of the particular customary law to which they were subject while alive, upon their death intestate.

As a general rule, customary rules of succession in Nigeria are predominantly patrilineal even though the Yoruba system in particular is non-discriminatory and favours a certain degree of equality between the sexes. There are communities like the Binis of Edo State where the practice of primogeniture (inheritance by first-born son) is predominant, and a few communities in the North where the practice of ultimogeniture (inheritance by youngest son) is common.

We shall now consider intestate succession within the groups identified above.

3.1 Intestate Succession among the Yorubas

As mentioned above, intestate succession among the Yorubas of Western Nigeria are based on customary rules that are non-discriminatory. This means that all the children of a deceased intestate are entitled to succeed to the estate of the deceased irrespective of their sex. With respect to real or landed property, the concept of family property is the prevailing mode of intestate succession. According to the court in the case of ***Lewis v. Bankole [1909] 1 NLR 82***, all the children of a deceased intestate in Yoruba jointly succeed to and have rights in the estate of the deceased, the property being family property managed by the eldest surviving son of the deceased. The children contemplated here include both legitimate and legitimated children and they all share equally irrespective of age or sex as was decided in the case of ***Salami v. Salami [1957] WNLR 10***.

The method of distribution are based on two systems – *per capita* (*Ori Ojori*) and *per stirpes* (*Idi Igi*) systems. Under the *Ori Ojori* system, the property of the deceased is shared among the children per child while property is distributed on the basis of the number of wives of the deceased irrespective of the number of children each wife has in the Idi Igi system. The children of each wife are then entitled to their mother's share. The *Idi Igi* method of distribution is the prevalent method of the two systems while the *Ori Ojori* is the more contemporary system adopted on the basis of equity considerations.

Other rules of succession include the following:

a) The surviving spouse of a deceased intestate does not succeed to the estate of the deceased spouse as was decided in the case of ***Suberu v. Sunmonu [1957] 2 FSC 33***.

b) Where the children of an intestate woman predecease their mother, their own surviving children are entitled to succeed to the estate of their deceased grandmother upon intestacy and the property is divided amongst them *per stirpes* i.e. according to the number of the original children of the deceased.

c) The siblings of full blood of a child who dies intestate succeed to the estate of their deceased brother or sister; and if there is none, the estate devolves on his parents.

d) Illegitimate children that are not acknowledged by their biological fathers in their lifetimes have no succession rights under Yoruba customary law.

3.2 Intestate Succession among the Igbos

Primogeniture is the predominant system of intestate succession under the customary laws of the Igbos of Eastern Nigeria. The eldest male child of an Igbo family known as the *Okpala* is the major channel of succession. When a man dies, his own eldest son succeeds to his estate with respect to his personal and disposable family. The eldest son also takes the place of his deceased father on the succession line with respect to the extended family property. Unlike the Yorubas in the west, females cannot head families in Igboland no matter their positions in the line of birth. But like the west, the Igbos also practice two systems of distribution – *per stirpes* and *per capita*.

The following rules apply to the distribution of the estate of a deceased intestate of Igbo extraction.

a) The eldest surviving son succeeds exclusively to his father's clothing and furniture, the dwelling house i.e. the Obi and a separate piece of land exclusively as the right of the first born son.

b) All monies are property for all the sons of the deceased jointly and the sons also inherit their father's farming implement, tools and livestock. They also succeed jointly to the remaining lands and houses left by their father.

c) Where there are no sons, the right of succession fall to the eldest brother of full blood of the deceased.

d) Females, who are either widows or daughters, have no right of inheritance with respect to real or landed property. They however have the right to be cared for by successors of their father until they marry or remarry as the case may be. They also have access to land for farming purposes during that period.

3.3 Intestate Succession in Northern Nigeria

Succession in Northern Nigeria is predominantly based on Moslem religious law set out in the Koran. The estate of a deceased Muslim intestate is usually shared among those entitled to succeed him under the law. According to the decision of the court in the case of ***Yinusa v. Adesubokan [1970]*** in the distribution of the estate of a deceased Muslim, the sons must get equal shares while the females have half a share each.

Under Moslem law, distribution of the estate of a deceased intestate is based exclusively on *per capita* system of distribution. The general rules of distribution are as follows.

a) Widows are entitled to one quarter of the estate, where there are no children or grandchildren; and one-eight if there are. This ratio for widows is fixed even where there are multiple widows.

b) Surviving husbands inherit half the estate of deceased wives if there are no children and one quarter if there are children.

c) One daughter inherits half of the estate and more than one daughter get two thirds jointly in equal shares.

d) An only son gets the whole estate after settling existing liabilities.

e) Where there are other children they jointly inherit the entire estate.

4.0 Conclusion

Intestate succession under customary law in Nigeria is dependent on the locality of the deceased. The systems of succession differ from place to place and different categories of

persons have different rights of succession under each system. Each system as found amongst the Yorubas, Igbos and Muslims have their own peculiar features and incidents.

5.0 Summary

This unit has dealt with intestate succession under customary law as distinct from administration of estates. In this unit, the customary laws of succession in the following ethnic and religious groups were briefly discussed:

(i) the Yorubas

(ii) The igbos

(iii)Muslim northerners.

6.0 Tutor-marked Assignment

1. Discuss in detail the system of intestate succession in Yoruba land

2. Females are at a disadvantage in matters of succession in Igboland in cases of intestacy. How true is this assertion?

7.0 Suggested Further Readings/References

1) Aderibigbe, R., ***Family Law in Nigeria*** (Lagos: Codes. Publishers, 2004) pages……

2) Falade, A., ***Marriages, Divorces and Inheritance in Nigeria*** (…….. Ilusalaiye Press Ltd., 1999) pages……..

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