PROCEDURAL AND LEGAL COMPLEXITIES IN MATRIMONIAL PROCEEDINGS BEFORE TRIAL COURTS IN NIGERIA*

Abstract
Marriage is the union between individuals from different backgrounds who agree to come together as one entity. Given the fact of the diversity in life, culture, and background, quarrels or misunderstandings are bound to occur. Where left to fester or unattended to, the artificial bonding of these two-into-one individuals may disintegrate and fall apart. Through the doctrinal method of research, this paper revisits the facts in establishing that a statutory marriage has broken down irretrievably; it further discusses some of the complexities involved in dissolving statutory marriages before trial courts in Nigeria. The aim of the paper which is to draw attention to some of the procedural intricacies of matrimonial disputes found out that when marital relationships riddled with crises eventually breakdown, it is further interwoven with several procedural complexities which complicates the otherwise delicate situation of all parties in the divorce mesh. Recommendations to strengthen the institution of marriage and or reduce the bitterness often associated with matrimonial causes like law reform, mandatory pre-marital counseling, and creation of special family court for determination of matrimonial disputes were offered.

Keywords: Marriage, Divorce, Matrimonial Causes, Law.

1. Introduction

Globally, Nigeria inclusive, the concept of marriage is a universal one. Marriage has variously been described as the fulcrum on which modern society is built. It is acclaimed to be the oldest institution known to man as well as the foundation of the social structure of every society.[1] However, because of the problems associated with permanent cohabitation of two people from different backgrounds with different upbringing the marital voyage is not taken up as a ready option by some people.[2] Irrespective of the position taken or choice between the two divide, it is not in doubt that there are pre essential conditions for forming as well as dissolving the marriage contract.[3] Although, the modes of termination or dissolution of marriage under the monogamous marriage or polygamous marriage system differ, the right of either of the spouses to severe the contract under either type of marriage is not debatable. More importantly, the trial court[4] is usually faced with a number of challenges when confronted with disputes over dissolution of statutory marriages. These challenges that may either be procedural or substantive cover a number of issues. This paper in discussing the facts, proof of which shows irretrievable breakdown of marriage, focuses on the challenges faced by trial courts in Nigeria on dissolution of statutory marriages. The research which is undertaken in the light of the stated problems adopts the doctrinal methodology as well as an in-depth analytical approach in discussing dissolution of statutory marriages in Nigeria and the intricacies involved in the process, it also puts into consideration various trends to resolving matrimonial disputes. It is the argument in this paper that resolving matrimonial disputes with less rancour is preferable to bringing such disputes to an end with several underlining unending raging issues and bitterness. The paper concludes with some suggestions for law reform to keep Nigerian marital laws on the same pedestal with the demands of a changing world.

2. Types of Marriage

In every case concerning marriages in Nigeria, one has to determine the type of marriage involved in other to apply appropriate law or determine the incidence. In Nigeria, we have two distinctive marriage contracts, they are described below:

Marriage under Customary law

Marriage under customary law is the state of being simultaneously married to more than one spouse.[5] It may be defined as a voluntary union for life of one man with more than one wife.[6] Its essential characteristic feature is

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[1] H. P. Faga and E. A. Odike, 'Rethinking the Concept of Dissolution of Marriage under Nigerian and English Statutory Laws: Any Room for Reform?' (2009) (3) (1) *Benue State University Law Journal*; 121.
[2] G. A. Okpara, 'The Youth and Marriage: Some Reflections' (2013) (4) *R/S UJPL*; 156.
[3] Per Lord Westburry in *Shaw v. Gould (1868) LR.3 HL 55 at* 82.
[4] The trial Court here refers to the High Court of any State of the Federation by virtue of section 2 (1) Matrimonial Causes Act 1970.
[5] B.A Garner. (ed), *Black's Law Dictionary* (9thedn, West Publishing Company Minnesota, 2009).
[6] E.I Nwogugu, *Family Law in Nigeria* (HEBN Publishers PLC, 1989) 159.

the capacity or ability of the man to take as many wives as he pleases. The mere fact that at a given moment he has only one wife does not affect the characteristics of the marriage so long as the capacity of taking more wives is retained.[7] Generally, there is no limit to the number of wives a husband could take under customary law in Nigeria and the mere fact that there may be plurality of wives does not affect the basic premise that the polygamous marriage is usually intended to last for life. This type of marriage is commonly referred to as a polygamous marriage because it is a customary law institution.[8] The term 'customary law' therefore covers a multitude of laws which is different from one locality to another. Marriage under customary law creates a relationship not only between a man and a woman but also between the two families involved.[9] Thus, the reality is that the wife is regarded by members of her husband's family as having been married not solely to her husband, but into the family. The dissolution of a customary marriage is not as stringent as that under the Marriage Act. It can be dissolved with or without judicial pronouncement. The proof of the dissolution of customary law marriage requires a high degree of certainty. Living with a man and having children for him alone does not necessarily make a woman a wife of the man under native law and custom. A Customary law marriage may be dissolved either by non-judicial divorce or by the order of an appropriate customary court.[10]

Marriage under customary law or its dissolution will not be discussed in detail because it is not the focus of this paper.

Marriage under the Act

Marriage under the Act according to Lord Penzance in *Hyde v. Hyde*[11] is the '…`voluntary union for life of one man and one woman to the exclusion of all others.' Thus, this type of marriage must be a voluntary union as there must be free consent of both parties to the marriage union and there must be every intention that the union is for life.[12] A statutory marriage is in essence a contact between the parties to it. Thus, a man whose marriage has taken effect under the Act cannot legally contract any marriage under the custom with another woman so long as the marriage subsists.[13] In order to preserve sanctity of marriage or marital harmony, a man and his wife under this marriage contract are regarded as one person. The marital contract brings about duties and responsibilities both legally and socially on the part of both spouses which cannot be varied by agreement.[14] Also there are some privileges accruing to this type of marriage and neither of these privileges is available to customary law spouses. However, where things have fallen apart and the marital harmony between the couple could no longer be conserved, the law gives allowance for dissolution of such matrimony.

3. Dissolution of Statutory Marriage in Nigeria

Divorce is the legal dissolution of a marriage by a court.[15] It is the commonest of all the matrimonial reliefs prescribed under the Matrimonial Causes Act (The Act or MCA).[16] The weakening of marriage as a social institution is not unique to developed countries, as many cases of retreat from marriages, alternatives to marriages and divorce rates are becoming more pronounced.[17] Section 15(1) of the MCA provides that 'either party to a marriage may petition for divorce 'upon the ground that the marriage has broken down irretrievably.' The Court of Appeal in *Anioke v. Anioke*[18] stated that petition for dissolution of marriage may be presented by either of the parties to a marriage upon the sole ground that the marriage has broken down irretrievably. The sole ground for the dissolution of a statutory marriage in Nigeria therefore is that the marriage has broken down

[7] *Ibid.*, Ixxxi.

[8] This system of polygamous marriage is called 'polygyny' which is a sharp contrast of 'polyandry' (the practice of having more than one husband). Human polyandry is extremely rare in Nigeria. see Olomola, O., 'An Appraisal of Polygyny and Reproductive Rights of Women in Nigeria.' (2013) (5) (1) *Journal of Conflict Resolution,* 7.

[9] This explains why death of a customary law spouse may terminate the physical union of parties but the contractual relationship between families is left active. See Nwogugu, *op.cit.*, Ixxxv.

[10] Nwogugu, *ibid*, 219.

[11] (1886) LR 1 P & D 130, 33.

[12] As marriages may be conducted for various reasons, it is doubtful if one can state categorically that the union is necessarily for life. I. Sagay., Nigerian *Family Law: Principles Cases, Statutes, & Commentaries*. (Malthouse Press Limited Lagos. 1999), 31.

[13] 33(1) of the Marriage Act

[14] For example in Nigeria, parties cannot mutually dissolve their marriage without following laid down patterns for doing so.

[15] B .A Garner (ed), *Black's Law Dictionary*, (7th edn, West Publishing Company Minnesota, 1999) 121.

[16] Cap M7,Vol.8 Laws of the Federation of Nigeria 2004.

[17] M.F. Brinig, C.E.Schneider, L.E. Teitelbaum, *Family Law in Action: A Reader* (Anderson Publishing Co, Ohio, 1999) 225.

[18] (2013) All FWLR (Pt 658), p.975.

irretrievably.[19] In defining the term, the court in *Okoro v. Okoro*[20] said, 'marriage has broken down irretrievably me++/
ans no more than the parties thereto are irreconcilable, incompatible, incongruous, and implacable. Such relationship is irrecoverable, irreparable, and irredeemable and cannot in any way benefit from any artificial life support'. The court shall not hold that a marriage has broken down irretrievably unless the petitioner proves one of the facts listed in Section 15(2) of the MCA.[21] The section stipulates eights facts, proof of which will enable the court to come to the conclusion that an irretrievable breakdown of marriage has occurred. Any one or more of the eight specified facts in section 15 (2) of the MCA would be 'guidelines' which will enable the court to determine whether or not that 'ground' for dissolution of marriage exist. The operation of the irretrievable breakdown principle in the light of the 'facts' stipulated in section 15 (2) of the MCA will now be examined:

Willful and Persistent Refusal to Consummate Marriage

Notwithstanding the two-year restriction on petition for the dissolution of marriage, a spouse may petition at any time in reliance on the fact that the other party has willfully and persistently refused to consummate the marriage. In doing this, the petitioner must show that such state of affairs persisted up to the commencement of the hearing of the petition.[22] A petition is likely to be struck out if at some time between its presentation and its hearing, the marriage has been consummated. In that situation, the respondent's 'persistent' refusal will be negated. It seems that the inclusion of the word 'persistent' places on the petitioner the onus of proving not only that the respondent willfully refused consummation, but that the petitioner, as a mark of his or her willingness repeatedly made efforts directed to consummation. In *Felicia Kuti v. Rufus Kuti*,[23] the court held that to rely on this fact for dissolution of marriage, there must have been persistent proposals for sexual intercourse made by the petitioner to the respondent which must have been refused by the respondent. A marriage is consummated where the parties have full sexual intercourse even though the husband is sterile.[24] Also, where an injunction is granted against a husband, any sexual intercourse thereafter will be unlawful and will amount to rape unless the wife consented. Also, a separation order with a provision that the wife will no longer be obliged to co-habit with the husband has the effect of rendering sexual intercourse between spouses unlawful unless the wife consents.[25]

Respondent's Adultery and Petitioner Finding in Intolerable

Adultery has been defined 'as the consensual sexual intercourse between two persons of opposite sexes at least one who is married to a person other than the one with whom the intercourse is had, and since the celebration of the marriage.'[26] The irretrievable breakdown of the marriage may be proved by the fact that 'since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.'[27] By this provision, either party to the statutory marriage may obtain a decree of divorce based on the others adultery. This is different from the situation under customary law as this option is hardly open to a customarily married wife. It is noteworthy that adultery *per se* will not be a sufficient fact in this situation; the petitioner must find it intolerable to live with the respondent because of the act.[28]The nexus between adultery and intolerability must be established by the petitioner. Both the commission of the adultery and intolerability must be proved. where sexual relations persists between the husband and wife after adultery, the court is entitled to hold that the petitioner does not find it intolerable to live with the respondent as the innocent party will be held to have condoned the adultery.[29] In similar manner, the court in *Clarence Harrison-Obafemi v. Comfort Harrison-Obafemi*,[30] the court opined that an act of adultery can be revived by a subsequent adultery or any other matrimonial offence. In addition, the law requires the third party involved in the adultery to be made a party to the petition.[31] Where a petition for dissolution of marriage or an answer to such a petition alleges that a party to the marriage has committed adultery with a specified person, whether or not a decree for dissolution of marriage

[19]This could be described to mean that either or both of the spouses are unable or unwilling to cohabit and there are no prospects of reconciliation. *Caffyn v. Caffyn* 806 N.E. 2d 415 at 419 (Mass. 2004).
[20] (2011) All FWLR (Pt.572) 1749 per Eko JCA at p. 1786.
[21] *Damulak v. Damulak* (2004) 8 NWLR (Pt. 874) 151.
[22] Section 21 MCA.
[23] Suit No 1/53/82, reported in I. Sagay., *Nigeria Family Law Principles Cases, Statute, & commencement*, (Malthouse Press Limited Lagos. 1999), 153.
[24] E I Nwogugu. *Op cit*, 159.
[25] *R v. Clarke* (1949) 2 All E.R 448.
26 *Alabi v. Alabi* (2007) 9 NWLR (Pt.1039) 297.
[27] Section 15(2) (b) of the MCA.
[28] E.M Akpambang, 'Proof of Adultery and Intolerability as a ground for Divorce in Nigeria: A Critical Appraisal' (2005) (2) (1) *Fountain Quarterly Law Journal*, 163.
[29] Section 26 of the M.C.A.
[30] (1965) NMLR, 446.
[31] Section 32(1) of the M.C.A.

is sought on the basis of that allegation, that person except as provided by the rules of court shall be made a party to the proceedings. In *Eigbe v. Eigbe*,[32] the court opined that joinder of co-adulterers is a must-requirement of the law and that where such adulterers are not joined; the petitioner cannot use any legal process for dissolution of the marriage on such ground. Under Order IX rule 3(1) of the Matrimonial Causes Rule, where the petitioner alleges in a petition that the respondent has committed adultery with a person whose name is unknown, to the petitioner at the time of filing the petition, the suit shall not be set down for trial unless the court has made an order dispensing with the naming of that person. An entry in the Register of Births by the mother of a child, which gives a name other than her husband's name, may amount to admission of adultery. Thus, an entry of birth by the wife which omits the name of the child's father or simply gives a name other than the husband's amounts to an admission of adultery. In *Morakinyo Oparison v. Abimbola Oparison*,[33] it was alleged at the trial court that the 1st respondent had adulterous relationship with the 2nd respondent while still married to the petitioner which culminated in him abandoning the matrimonial home. Evidence of familiarity between both respondents and a birth certificate of one Amadaoseyi Oparison showing them as parents of the child was conclusive proof of the establishment of adultery which was affirmed even at the Court of Appeal.

Spouse's Unreasonable Behaviour

Under the Act, cruelty (as it was known under the old law) is no longer a ground for the dissolution of marriage. However, acts of 'unreasonable behavior' form the basis of the court's consideration of an allegation under section 15 (2) (c): 'that since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. Behaviour, in this context may either take the form of acts or omission by one spouse which affects the other spouse and such acts must have some reference to the marriage. The test here is objective and the application of this test is the function of the court and not the petitioner. In applying this test, it is necessary not only to consider the established behaviour of the respondents but also to inquire into the character, personality, behaviour and disposition of the petitioner. For example, a violent petitioner may be reasonably expected to live with a violent respondent. [34] Section 16 (1) lists a number of acts supplementary to section 15. However, the list is by no means exhaustive. Other acts may satisfy section15 (2) (c) and this essentially will depend on the circumstance of a case. But conduct outside Section 16(1) MCA must be of equal gravity as those enumerated in that subsection. For instance, the courts have held that practice of juju or charms,[35] constant nagging, inordinate demands for sex[36] could constitute intolerable behaviour.

Desertion for at least One Year

Under the old law, desertion was a matrimonial offence, proof of which entitled the petitioning spouse to an order for the dissolution of the marriage. The Act still incorporates desertion, not as a matrimonial offence and therefore a ground for divorce but as a fact which if proved will lead to the court's holding that the marriage has broken down irretrievably. Desertion within the meaning of section 15(2) (e) of the Act must be one where any of the spouse abandons and forsakes without any justification, thus renouncing his or her responsibilities and evading its duties.[37] In *Anioke v. Anioke*,[38] desertion is defined as the withdrawal of support and cessation from cohabitation without the consent of the other spouse and with the avowed intention of abandoning allegiance, fidelity or responsibility and remaining separated in perpetuity. Under the old law, the petitioner had to prove desertion for a period of three years. This has now been reduced to one year, thus portraying the objective of the Act to facilitate the dissolution of the marriage which exists only in name. However, in calculating the one year period, the court will not take account any one period (not exceeding six months) or any two or more periods (not exceeding six month in all) during which the parties resumed living with each other, in considering whether or not the one year period has been continuous. The provision is intended to encourage the reconciliation of the parties after the desertion has been started. A spouse who alleges desertion by the other bears the burden of proving it to the satisfaction of the court.

Living apart for at least Two Years

The court will hold that a marriage has broken down irretrievable if the parties to it have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted. Section 15 (2) (e) of the Act provides that the parties are treated as living apart if they are not living with each other in the same household. The court have consistently

[32] (2013) All FWLR, (pt 705), 369.
[33] (2013) All FWLR (pt. 666) 523.
[34] See *Ash v. Ash* (1972) 2 WLR 347.
[35] *Sotomi v. Sotomi* (1976) Suit No HD/37/75 High Court of Lagos State. Reported in Sagay, *op cit*.,281.
[36] *Gbolade v. Gbolade*(1970)Suit No WD/37/70, High Court of Lagos State. Reported in Sagay, *op cit*.,261.
[37] J. O. Ige., *The Law of Divorce and Matrimonial Proceedings (Practice Notes No 4)* (Crown Goldmine Communications Limited 2011) 44.
[38] (2013) All FWLR (pt. 658), 975 per Oredola JCA at page 993.

explained that the word 'household' was synonymous with 'family,' so that so long as marital relations of consortium were not terminated between the spouse, they would be deemed to live in the same household even though they live some miles from each order. Mere physical separation does not constitute 'living apart.' Living apart involves physical separation manifested by an intention to terminate or destroy marital consortium[39] there must also be a clear intention on the part of one or both spouses not to return to the other and the treatment of the marriage as having come to an end. Where therefore, the parties are compelled by the exigencies of external circumstances, such as absence on professional or business pursuits, ill-health, confinement in jail or war outbreak to live apart, the situation will not amount to 'living apart' under the Matrimonial Causes Act.[40]

Living Apart for a Least Three Years

A petitioner who shows that he or she had been living apart from the other spouse for at least three years immediately preceding the petition may be granted a decree of dissolution of the marriage. This is a matter of fact evidencing irretrievable breakdown of the marriage and is provided under section 15 (2) (f). It will be recalled from the discussion earlier that the Act provides under section 15 (3) that a party will be treated as living apart unless they are living in the same household. 'The living apart envisaged by section 15 (2) (e) and (f) should be 'living apart' as distinct from mere 'being apart'. Living apart referred to in paragraph (e) and (f) of section15 (2) of the Act is a state of affairs to establish which it is necessary to prove something more than that the husband and wife are physically separated. It must be shown that the bond of marriage between the couple no longer exists. A conflicting view is that the mental element of living apart must be proved in addition to the factum of living apart, 'It seems settled that living apart within section 15 (2) (e) and (f) means not only physical separation, but also a breakdown in consortium and all that makes marriage life.[41]

Non-compliance with Decree of Restitution of Conjugal Rights

By section 15 (2) (g) of the Act, a spouse may establish the irretrievable breakdown of the marriage by showing that the other party to the marriage has for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under the Act. This is contained in section 47 of the Act. The court would not make an order under section 47 unless it was satisfied that the party seeking the order desired conjugal rights to be rendered, and was willing to render such to the party. In establishing his or her case, the petitioner would have proved to the court that the respondent had ignored previous requests for cohabitation, which had been written in conciliatory languages. In proceeding for dissolution of the marriage, any intervening resumption of cohabitation by the spouse will doubtless negate an allegation under section 15 (2) (g). However, the court will not entertain any plea by the respondent of the parties' agreement to separate. A decree of restitution of conjugal rights is not enforceable by attachment by reason of section 51 of the Act. Hence although the court can order cohabitation by making a decree under section 47, a refusal to comply with it confers on the other spouse a right to petition for divorce.

Presumption of Death

A marriage maybe dissolved on the fact that the respondent has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presumption that the respondent is dead.[42] This fact may be established by proof that the respondent has been absent for a continuous period of seven years immediately preceding the presentation of the petition and that the petitioner had no reason to believe that the other party was alive at any time within that period unless it is shown that the respondent was alive within that period.[43] Section 164(1) of Evidence Act, 2011 also confirms this position. However, if the respondent is found to be alive before the decree nisi is made absolute, the decree will be rescinded.

4. Complexities in Matrimonial Disputes

Proof of adultery: By virtue of Section 15(2) of the Act, one of the facts a petitioner could establish to sustain an action in dissolution of marriage is respondent's adultery and the fact that the petitioner finds it intolerable. It needs to be stated that a mere allegation of adultery by either party to the statutory marriage will not suffice in a petition for divorce to show irretrievable breakdown of the marriage as adultery *simpliciter* no longer entitles a petitioner to a decree of dissolution of the marriage. A petitioner who relies on this fact has a challenge to overcome as he or she will only succeed if it can be shown by evidence that he or she finds it intolerable to live

[39] *Idowu v. Idowu* (2016) All FWLR (Pt. 863) 1688 at 1744.
[40] I. P. Emeno, 'A Re-examination of 'living Apart' as proof of irretrievable breakdown' (1995) (2) (1) *University of Benin Law Journal*; 131.
[41] S. A Adesanya, *Laws of Matrimonial Causes*. (University Press, Ibadan. 1973) 56.
[42] Section 15 (2) (h) of MCA.
[43] Section 16 (2)(a) of MCA.

with the respondent as a result of the adultery. The petitioner's adultery and the respondent's finding it intolerable to live with petitioner must be dependent on one another so that the intolerability must be in consequence of the adultery. Another hurdle a petitioner has to face in proving adultery is contained in Order V Rule 13 of the Matrimonial Causes Rules 1983 to the effect that where the petitioner has committed adultery, the court may not determine the fact(s) stated in the petition which evidence irretrievable breakdown of the marriage, unless the petitioner files a discretion statement. It states inter alia: 'Where a petitioner for a decree of dissolution of marriage on a ground specified in any of paragraph (a) to (g) inclusive, of section15 (2) of the Act has committed adultery since the marriage but before filing of his petition, his petition shall state that the court will be asked to make the decree notwithstanding the facts and circumstances set out in his discretion statement.'

Another challenge faced by the petitioner and the court in proving adultery is the standard of proof of adultery. The standard of proving adultery is on preponderance of probabilities and not proof beyond reasonable doubts. It is rare or almost impossible to obtain direct evidence of the commission of adultery, this is because of its nature (it being a very private act between two consenting adults).[44] This position was reiterated by the Court of Appeal in the case of *Okaome v. Okaome.*[45.] As a result, adultery is usually inferred from the surrounding circumstances.[46] Invariably in divorce suits the practice have grown, not based on any statutory provision, for courts to exercise the utmost care in balancing probabilities and to ensure that the evidence clearly preponderates to entitle the petitioner to a decree. When this happens the court is said, within the meaning of Section 82 of the Decree, to be reasonably satisfied, not merely satisfied. 'Despite the provisions of Section 82, some judges have still maintained that a higher standard of proof is required to establish adultery. In *Anoka v. Anoka*,[47] Oputa J. declared that in matrimonial proceedings, adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence in a criminal case. As stated earlier, adultery is a matrimonial wrong which must be specifically pleaded and clearly proved. The petitioner in *Obajimi v Obajimi*[48] accused the respondent of adultery and transmitting venereal disease to him but his ground of adultery failed because same was not established. The court stated that charges of venereal disease must be specifically pleaded (the type and particulars must be stated) and its proof is usually by medical record.

Corroboration

Corroboration has been defined as a confirmation of a witness' evidence by independent testimony.[49] Its purpose is not to give validity or credence to the evidence which is deficient or suspect, but only to confirm and support that which was as evidence is sufficient and credible.[50] The rule of corroboration also features in matrimonial proceedings despite the fact that it is not specifically stipulated in the Matrimonial Causes Rules. Where corroborative evidence is missing especially in undefended suits, the petition may be dismissed.[51] In *Oghenevbede v. Oghenevbede*,[52] the court opined that the petitioner's evidence was too scanty and insufficient to prove desertion and as such should be corroborated. The Evidence Act[53] does not impose any particular number of witnesses for proof of any fact. What this seems to suggest is that a petitioner can very well prove her case with just one witness that is, herself alone. She does not need to line up array of witnesses to buttress her story. However, this scenario often does not play out in practice as courts insist on corroborative evidence in matrimonial proceedings.

Award of Custody

Custody of children in a matrimonial cause is usually a vexed issue. More often than not, the child is seen as a priced goldmine which the parents jostle so hard to keep. The court in *Otti v. Otti*[54] define the concept to mean the control, preservation and care of a child and to essentially concern the responsibility for a child's physical, material, mental, moral needs. Though the interest and welfare of the child is considered paramount,[55] there are instances where a perceived matrimonial misconduct or moral depravity by either parent could tilt the balance in

[44] A. S Ogwuche, (ed) *Compendium of Laws under the Nigerian Legal System* Volume 1, (Maiyati Chambers, Abuja.)747.
[45] (2017) All FWLR (pt. 900) 456.
[46] *Ambe v Ambe* (1976) 1 MNLR 28; *Ross v Ross* (1930) AC 7.
[47] (1973), E.C.S.L.R(3)(pt.1), 53.
[48] (2012) All FWLR (pt. 649) P.1168.
[49] See *Administrator–General & Public Trustee Delta State v. Ogoro* (2006) ALL FWLR (pt. 293) 256, *Ogunbayo v. State* (2007) ALL FWLR (pt.365) 408; *Nwaube v. State* (1995) 3 SENT 77 at 97.
[50] *Adeoti v. State* (2009) All FWLR (pt 454), 1450.
[51] Sagay, *op cit.*, 638.
[52] Suit No W/7/71
[53] Section 200 Evidence Act, 2011.
[54] (2002) 1 SMC 116.
[55] See Section 71 (1) Matrimonial Causes Act; *Williams v. Williams* (1987) 2 NWLR (pt. 54) 66.

favour of the other party.[56] Although a child's relationship with either parent following a divorce is artificial to the child's adjustment in life, more often than not, children become tools or weapons of fight used by parents to get back at each other especially where custody is not granted because of a matrimonial fault. In the circumstance, the continuing relationship the child has with either of his parents or a non-custodial spouse may not be assured and the child's fate left in the hands of a total stranger as a result of the divorce proceedings, he may become dysfunctional later in life.

The test of unreasonable Behavior

There have been a lot of arguments amongst eminent scholars and jurist as to whether the test for determining spouse's unreasonable behavior as stipulated under section 15 (2) (c) of the Act should be a subjective or objective one. Adesanya opined that: 'The test whether the petitioner can or cannot be expected to live with the respondent is objective. Therefore, it is not sufficient that the petitioner alleges that she cannot live with the respondent because of his behaviors, the behaviors must be such that a reasonable man cannot endure.'[57] Similarly, in *Ayangbayi v Ayangbayi*[58] the court reemphasized the above position when it held:

> ...the court must consider the effect of the respondent's behavior on the petitioner and ask itself whether or not it is established that the petitioner cannot reasonably be expected to live with the respondent...The broader approach which in my view, should be used is to consider whether it is reasonable, having regard to the evidence before me, to expect this petitioner to put up with the behaviour of the respondent having in mind the characters of each of them.

On the other hand, it is the opinion of some judges that the test to be applied in respect of Section 15(2) (c) is subjective. In *Soetan v Soetan*[59] Salvage J. said: 'It is therefore the feelings of the petitioner that matters and if he says I can no longer live with my wife, I find it intolerable to do so, I do not see how the court could find that this was not so.' This opinion was reaffirmed in *Ojo v Ojo*[60] where Oguntade J. said: 'In determining whether or not the respondent has behaved in such a way that the petitioner can't reasonably be expected to live with the respondent within the meaning of Section 15(2) (c) of the Matrimonial Causes Act 1970 the court has to adopt the subjective standard.' In view of the complexities enumerated above, a spouse will not be granted a divorce on the mere allegation that he or she cannot reasonably be expected to live with the other. Instances of the alleged unreasonable behaviors of the other spouse must not only be given but must also be proved to the satisfaction of the court. Mere trivialities or the averment of incompatibility of the spouses will not suffice to obtain the decree of divorce.

5. Conclusion and Recommendations

In the light of the above discussion, it is not in doubt that there is an urgent need to eradicate or reduce to the barest minimum the procedural and substantive complexities in matrimonial disputes so that even where parties decide to pull out of the marital institution, the social structure of the society is not dismantled by a vindictive spouse. While it is true that the Nigerian Matrimonial Causes Act has laudable provisions there is still room for improvement in view of the modern socio-economic realities. To this extent, the following recommendations are made with a view to improving the provisions of the law of divorce in Nigeria.

1. It is recommended that the institution of marriage be strengthened. This can be done by inserting a provision in the Marriage Act for a mandatory pre-marital counseling before the conduct of all marriages, this would give the intending spouses a head start before plunging into the marriage institution. In addition, it is recommended that Centers of Family Guidance charged with the responsibility of encouraging marriage mentoring programs where married couples can share ideas on how to avoid marital crises and an irretrievable breakdown of marriages be established.
2. It is also recommended that a special division of the High Court should be constituted consisting of a panel made up of judges, assisted by relevant experts in other disciplines such as psychologists, social welfare workers, etc, to assist in determination of family or matrimonial disputes. The adversarial method of dispute resolution where parties 'fight' and 'winner takes all' should be downplayed and in its place, negotiated agreements devoid of rancor should be encouraged.
3. Given the fact that most matrimonial causes are painful and trying experiences for those involved,[61] the law should mandate a compulsory resort to Alternative Dispute Resolution (ADR) in matrimonial

[56] *Alabi v. Alabi* (2007) 9 NWLR (pt.1039) 297.
[57] S .A Adesanya, *op cit*.,56.
[58] (1979) HCLR 1,6.
[59] (1972) CCHJ, 4.
[60] (1981) HCLR 237, 250.
[61] L. B. Dan Kada and H. Aliyu, 'Mediation as an Effective Mechanism for Matrimonial Dispute Resolution in Nigeria' (2018) (5)(1) *Unimaid Journal of Public Law*, 134.

causes before litigation;[62] the provision for reconciliation entrenched in the Matrimonial Causes Act should be utilized to reduce the challenges faced by litigants. Quite a number of cases could have been resolved at the initial stage thereby saving litigants the hassles of litigation. Even after formal dissolution, ADR can still be a viable option particularly in matters of maintenance and custody and where practicable, legal aid should be made available for indigent spouses in prosecuting their rights, where the marriage has broken down irretrievably.

4. It is highly recommended that emphasis should be placed on substance and not procedural law. The procedural aspect of matrimonial causes should be amended to:
    a) eliminate forum shopping by requiring that petitioners file their matters in the state where the cause of action or part thereof arose or the state of domicile of the parties during the subsistence of the marriage;
    b) make it discretionary and not compulsory for a petitioner to join an adulterer as co-Respondent; and
    c) require lawyers to verify, on affidavit, compliance with the process of reconciliation, rather than merely requiring filing of certificate relating to reconciliation.

Finally, when the procedural and substantive complexities in matrimonial disputes are reduced and our divorce laws are reformed or amended and the aforementioned recommendations translated into laws, it is hoped that the mutual hatred, bitterness, acrimony and hostilities often associated with the divorce matters will be eradicated or reduced to barest minimum.

[62] Settlement should be taken as the solution and judicial process or litigation as an alternative. See D.E. Abrams, N.R. Cahn, C.J Ross, D.D Meyer. *Contemporary Family Law* (2nd ed. West Publishing Company Minnesota, 2009) 920.