

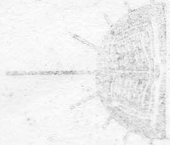


Professor Mojisola Oluyemisi Ogungbe (KJW)

L.LB (Ife), L.LM (Lagos), BL.

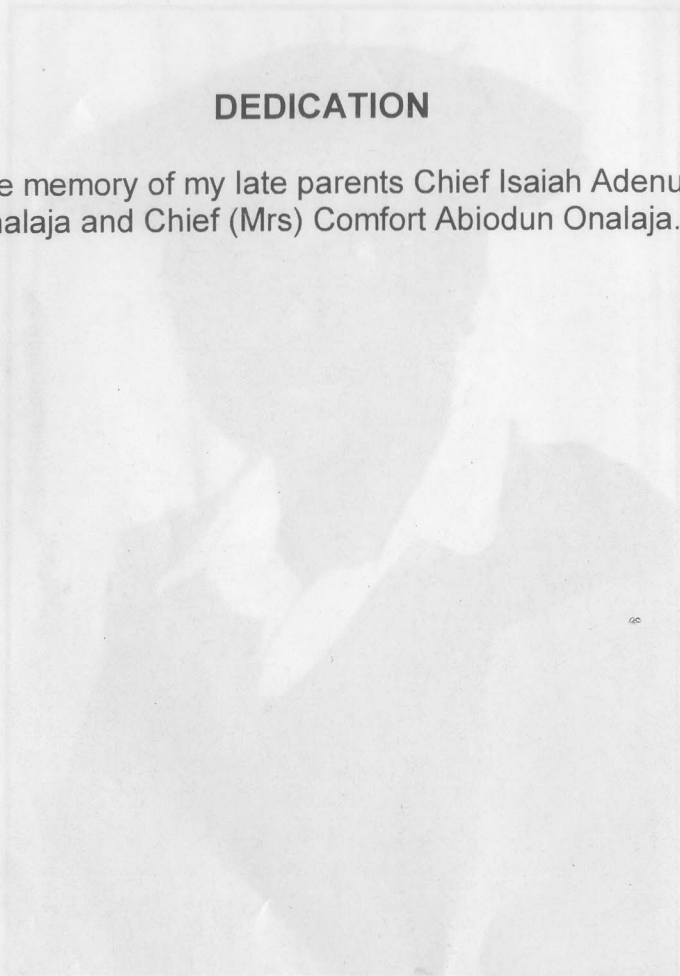
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DEDICATION

To the memory of my late parents Chief Isaiah Adenuga
Onalaja and Chief (Mrs) Comfort Abiodun Onalaja.



FAMILY IN DISARRAY – LAW TO THE RESCUE

Prof (Mrs) MOJISOLA OLUYEMISI OGUNGBE (KJW)

LLB (IFE), LLM (LAGOS) BL.

46TH INAUGURAL LECTURE
OLABISI ONABANJO UNIVERSITY
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FAMILY IN DISARRAY – LAW TO THE RESCUE

PREAMBLE

It is customary in the academia when one is appointed a professor to deliver an inaugural lecture. It is the height of academic development and all academics look forward to a day like this. As customary as giving an inaugural lecture is, it is not every academic that rises to this level and even when one gets to the status of a Professor, it is not all Professors that have the grace to deliver an inaugural lecture.

There are various reasons why giving an inaugural lecture may not be possible. It may be that the Professor is not invited to deliver one soon enough after appointment. The professor may die before he has an opportunity to deliver one and so on and so forth. But to God be the glory that none of the above became my lot. It was the plan of Satan that this day should not be possible but the Lord foiled his plan.

On 6th February, 2005, I was involved in a ghastly motor accident which could have never made today a reality but God saved my life. I am grateful to all the good people that shared with me the pains and made my recovery very fast. I shall acknowledge them at the appropriate time. I am grateful to our former Vice Chancellor, Prof Tola Osilesi for giving me this unique opportunity to deliver this inaugural lecture. I cannot but thank the present Ag. Vice-Chancellor Prof. Olusoga Sofola, who allowed this occasion to take place despite his very short time in this university. I congratulate the newly appointed council members of the University especially Otunba (Dr) Alex. O. Onabanjo, the Pro-chancellor and Chairman of the Council and I wish them God's guidance and wisdom in the enormous task ahead.

THE JOURNEY SO FAR

Mr. Vice Chancellor Sir, my academic career started in October 1985, as a Junior Trainee fellow with the then Ogun State University, (now Olabisi Onabanjo University) Ago-Iwoye. When I was called to the Nigerian Bar as Barrister and Solicitor of the Supreme Court of Nigeria, I joined the Lagos State Ministry of Justice as a State Counsel in 1981, first as a youth Corp Member and later as a full member of the Ministry, I rose to the post of a Senior State Counsel before I decided to join academics when Ogun State University was established and law was included as one of its programmes.

I want to acknowledge the Contribution of Prof. J. Olubi Sodipo of blessed memory who gave me the opportunity to join academics. I also appreciate Chief (Dr) N. O. Sotoyinbo, the first Registrar of this University who signed my letter of appointment to become a member of staff of this great University. Why the 2nd of June was chosen as the day for this Lecture is because my 1st son who is now a building Engineer was born on this day. And my 1st step to academics was taken on this day. I give glory to God Almighty for the double joy and for crowning it all with the delivery of this Inaugural lecture.

FAMILY IN DISARRAY - LAW TO THE RESCUE

1. INTRODUCTION:

The importance of the family institution to the human society cannot be over-emphasized. The choice of this topic was borne out of the fact that the family is a concept that touches every human being in the world. There is no one in this gathering that does not belong to a family. Hence, the decision to talk on a topic that will interest and benefit all.

To say that the concept of family in a society is not important is a misnomer. The families make up the community, culminating in the larger society. Family is very important in making or

marring a society. A good family will translate to a good society which will definitely make a good nation.

The key players in the family form the players in the society, hence the call for an examination of the societal – moral decadence and woes, and proffer solutions.

Each member of my audience today belongs to a family, and as such, everyone is involved in the problem of a family in disarray, and would be more interested in what the law can do to bring solutions to the disarray in families.

As a teacher of law with years of field work and researches related to family law, I think it is just right for me to be attracted by what is happening in our families today which is really affecting our nation. I am sure that my audience at this lecture will agree with me that this situation should be given some focus by bringing to the fore, the causes of failures in our families, and what could be done to salvage the situation.

In this paper, I intend to examine the different definitions of family given in three different jurisdictions, look into the formation of marriage, dissolution of marriage and the attendant consequences of such dissolution. The main thrust of this lecture is to bring out the effect of broken family on the society, the attendant consequences of such break and what the law has done or is doing to salvage the situation and suggest what the law can still do to make our families better.

I shall address my mind to all Laws whether man made or divinely made, affecting the existence of the family today.

Mr. Vice Chancellor Sir, for the purpose of this paper, reference to the family will be directed towards the man, his wife or wives and the children. We shall be concerned with the law relating to the formation of the family, the role the family plays in the society, the attendant effects of a family in disarray and the position of the law regarding the family.

What is family?

"The declaration of 1994 by the United Nation as the international year of the family resulted in a deliberate focus on the welfare of the family, the world over and by member states in their respective countries.¹" According to a learned writer in family law², the term "family" does not lend itself to easy and precise definition. In one sense, the family may be defined to include all persons with common ancestor. Under this wide connotation, the family may embrace the large body of persons related by blood to a common ancestor.

The criteria / qualification for kinship vary from culture to culture. Whereas in some it is based on the father's biological line, in some others it is based on the mother's biological lines; further more in other places it is based on the combination of both the father's and mother's biological line. Kinship is generally about the different levels of uncles, nieces and first cousins. A family is a group of persons sharing common ancestry or lineage, especially distinguished lineage.

In the Children's Health Encyclopedia³, A family is defined as a group of two people or more related by marriage, related by blood, or by adoption and who live together. No other factor influences children as deeply as their families. As a social unit with genetic, emotional and legal dimensions, the family can foster the child's growth, development, health and well being. The family can provide the child with affection, a sense of belonging, and validation⁴.

To Gordon Meal Dieni⁵, the definition of family depends on who answers the question. Social scientists defined family in relation

¹ M.O. Ogungbe – Family Law and Family Sustainance in a complete Society – The Family and the Law Ed. J.A. Sokefun pg 131

² Nwogugu – Family law in Nigeria (1990) Heinemann education books LXXVII.

³ Available on the Internet <http://www.answers.com/family> (22/12/2008.)

⁴ Available on the Internet <http://www.answers.com/family> (22/12/2008.)

⁵ The definition of family in a free society. Culled from Internet, Ibid.

to a culture's biological and marital kinship rules and patterns of reciprocal obligation.

American culture maintains a distinction between brothers, sisters and cousins and used a single word to designate those kin. Institutionalism define family as a "traditional" biological, procreative and children rearing structure and emphasize the biological mother and father and biological offspring to define family. According to the BLACKS LAW DICTIONARY⁶, "The meaning of family necessarily depends on the field of law in which the word is used, purpose intended to be accomplished; its uses and fact of the circumstances of each case". The family is a generic term for a group of kindred and person. It connotes a social arrangement by which related individuals are brought together either on the basis of marriage or blood.

The family provides the institutional framework with which a collective body of persons interacts; such interaction may require them to live in one house, under one head, and management. A family is the smallest unit in the social structure of every society.

It is generally accepted that the family is the basis of every human community, and the family may be regarded as the nucleus of the community. The term family could also mean the extended family concept, which is prevalent in Nigeria and Africa. In *Chinuweze v Masi*⁷, The Supreme Court of Nigeria defined a family as "... the man and his wife (under a monogamous marriage) or wives (if it is marriage under customary law) and the children born to him by such wife or wives"⁸

⁶ Bryan A. Garner, Black's Law Dictionary, 8th edition Thompson West Inc, U.S.A.

⁷ (1998) 1 NWLR (pt..97) SC

⁸ The Family and The Law, ed Justus A. Sokefun, Faculty of Law, Olabisi Onabanjo University, Ago- Iwoye (2001)

In Nigeria the definition of family in most cases is traced through males, as in patrilineal societies or through females, as in matrilineal societies.

Sometimes, the group included in the wide definition of "family" is referred to as the extended family. This concept is prevalent in most other industrialized societies. Green defines the "extended family" as a group of closely related people, known by a common name and consisting usually of a man and his wives and children, his son's wives and children, his brothers and half brothers and their wives and children and probably other near relations⁹. In recent times, the term "family" has been given more restricted connotation. It may refer to a smaller group consisting of a household – the man, his wife or wives, the children and probably the dependant who live with them. This situation is close to the concept of family in English law which is restricted to the man, his wife and children.¹⁰

What is Family Law?

In my view, these are laws affecting the family, guiding the family, controlling the family, whether man made or divinely made. These Laws are meant to establish and maintain a healthy family and society. For example, the 'Ten Commandments' in the bible are made to control the affairs of human being in their relationship with God and to one another.¹¹

It is submitted that from these laws, most of our status took a view cue and derived laws family and the society.

⁹ Green M.M. Law Tenure in an Ibo Village (Lund Hymphries, London 1941) 2-3.

¹⁰ See *Hyde v. Hyde* (1886) LR (R & D 130 at 133)

¹¹ See Exodus Chap 20 vs. 1 – 7.

The law that says "love thy neighbour as thyself"¹² contemplate that when you love your, you will not do him any harm. Many laws usually attach sanctions to it, be it Cannon Law, Customary Law, Statutory Law, Common Law or Social Law. Similarly, family law proposes the law establishing the family and control its operation to achieve a holistic society. This is why we have laws controlling the formation of marriages since the union of a man and a woman brings about the family most of the time.

2. FORMATION OF MARRIAGE

Then God said "It is not good for the man to live alone, I will make a suitable companion to help him... He formed a woman out of the rib of the man and brought her to him, that is why a man lives his father and mother and is united with his wife and they both become one"¹³. The conclusion drawn from the above quotation is that marriage is a creation of God and ordained by Him.

Marriage is a universal institution which is recognized and respected all over the world. As a social institution, marriage is founded on, and governed by the social and religious norm of society. Consequently, the sanctity of marriage is a well accepted principle in the world community. Marriage is the root of the family and society. Under our laws, two forms of marriage are recognized, marriage under the customary/Islamic law and statutory marriage. Customary/Islamic marriage may be polygamous while statutory marriage is monogamous.

A polygamous marriage may be defined as a voluntary union for life of one man with several wives. Its essential characteristics are the capacity for the man to take as many wives as he pleases. The mere fact that at a given moment he

¹² See John Chap 13 vs. 34.

¹³ Gen chap 1 vs. 18 – 24, Good News Bible

has only one wife does not affect the character of the marriage so long as the capacity of taking more wives is retained.¹⁴

In Nigeria, polygamous marriage is a customary law institution and therefore the character and incidents of the system are governed by customary law.

Customary law varies from one community to the other.

The institution possesses three unique features, it is unwritten, it must be a mirror of accepted usage¹⁵ in the area where it is applied and its rules change with times¹⁶.

The question arose whether under customary law, a woman could marry more than one man at the same time. The marriage of one woman to more than one husband at a point in time, legally known as polyandry is socially prohibited and legally unacceptable. This situation was considered in the case of *Kpelanya v. Tsoka and Anor*¹⁷ the court held that by TIV customary law, a woman could not lawfully be married to two men at the same time.

It is an offence for a woman to have more than one husband concurrently¹⁸. Why is a woman limited in the exercise of her fundamental human right of freedom of association, if a man is allowed to marry more than one wife?

The celebration of customary law marriage is preceded by betrothal that is, the agreement to marry. Betrothal consists generally of the consent of the parties and the payment of bride price¹⁹.

¹⁴ Nwogugu op cit, M.O. Ogungbe Family Law and Family Substances in a Complete Society. Family and the Law Ed Justus Sokefun, pg 131.

¹⁵ Under Islamic Law, a man may take not more than four wives (The Holy Quran 4:4, AL-NISA, Islamic International Publications Limited U.K.

¹⁶ Bairamain F.J. in *Owoyin v. Omotosho* (1961) 1 ALL NLR 304.

¹⁷ (1971) N.M.L.R 66. Osborne CJ in *Lewis v. Bankole* (1909) 1 NWLR 66.

¹⁸ Osborne CJ in *Lewis v. Bankole* (1909) 1 NWLR 66.

¹⁹ Sec 6 (2) Native Authority (Declaration of Idoma Native Law and Custom Order) 1956.

The marriage is concluded as soon as the formal handing over of the bride to the family or the groom is performed²⁰

Monogamous marriage in Nigeria is the same as in England. It is a voluntary union for life of one man and one woman to the exclusion of all others.²¹ For this form of marriage to be valid under our law, it must be a voluntary union. That is, there must be free consent of both parties to the union.

While monogamous marriage has some features in common with the ordinary civil or commercial contract, it is *sui-genesi* (in a class of its own) and in various areas different from civil contracts. Like ordinary contracts, a monogamous marriage is consensual in origin. It is the mutual consent of the parties that brings the agreement into being. The contract of marriage creates reciprocal rights and obligations for the parties. But unlike ordinary commercial contract, a contract of marriage requires forms and ceremonies for its solemnization²².

The parties to this form of marriage cannot of their own dissolve the marriage as in the case of commercial contract²³ nor is the marriage contract discharged under the doctrine of frustration.

FRUSTRATION

In a commercial contract, after the parties have made their agreement, unforeseen contingencies may occur which prevent the attainment of the purpose that they had in mind. For example, if some catastrophic event occurs for which neither party is responsible so that the venture to which the parties now find themselves committed is radically different from the

²⁰ Nwogugu Family law in Nigeria, Ibid. pg. 20.

²¹ See *Ikedionu v. Okafor* (1966-67) 10 ENLR 178, In a matter of Marriage Ordinance (Beckley V. Abiodun – 1943, 17, NLR 59, *Osanwonyin v. Osanwonyin* (1972) 105 (CI) *Hyde v. Hyde* (1866) L. R. P & D 130

²² Per Lord Penzance in *Hyde V. Hyde* (supra)

²³ *Mordant v. Mordant* (1870) LR 2 P&D 109.

originally contemplated, then the contract is forthwith discharged.

A contract becomes frustrated and the parties are discharged, if due to circumstances beyond the control of the parties, it is impossible to perform the contract²⁴, for example in *Taylor v. Caldwell*.²⁵ A has agreed to give B the use of a music hall on certain specified days for the purpose of holding concerts. The hall was accidentally destroyed by fire, six days before the contract date and B claimed damages for breach of the agreement. BLACKBURN J held the contract to be discharged.

Except in the case of death of one spouse, a marriage may only be brought to an end by the decree of a court of competent jurisdiction²⁶.

Marriage is not a mere contract, but one that creates status²⁷. The status created by marriage is recognized not only in the country where the parties are domiciled but universally. Sanctity of marriage is a principle recognized and enforced by law. Every society makes law that regulates and promotes the institution of marriage. There is a legal presumption of marriage resulting from cohabitation by the parties. Where a man and woman have lived together as husband and wife for over a long period of time and are generally known as such, the law presumes that the cohabitation resulted from a valid marriage unless the contrary is clearly proved²⁸.

In protecting the institution of marriage, the law frowns at certain types of contract that interferes with the sanctity of marriage.

²⁴ *Moss v. Moss* (1897) Pg 263 at 267.

²⁵ (1863) 32. L.J. Q.B. 164

²⁶ Cheshire and Fifoot's Law of Contract, Ninth Edition. M.P. Furmston Ed. (1976) London Butterworths

²⁷ Matrimonial Causes Act. Cap M7 Laws of the Federation of Nigeria 2004.

²⁸ *Rasbeinder v. AG* (1922) CH 850 at 858.

For example a contract, the object of or effect of which is to prevent a person from marrying or which is against marriage is regarded as being contrary to public policy²⁹. The law strikes down marriage brokerage contracts by which a person procures a marriage between two parties for a reward³⁰. Section 3 of the Matrimonial Causes Act (MCA) provides that "A marriage is void but not otherwise where either of the parties is at the time of the marriage lawfully married to another person".

In *Abisogun v. Abisogun*³¹. The court was of the view that a contract in which a married person is a party is not only against public policy and morals but also void. In *Spiers v. Hunt*³², The court was of the view that such a contract will not only be void for being contrary to public policy but also for illegality. The law also decrees void a promise by a married man to marry a person who knows him to be already married as being contrary to public policy and an encouragement of immorality³³.

A PROHIBITED MARRIAGE

Under section 3(i)b of the MCA, a marriage will not be allowed to take place where there is a prohibited degree of consanguinity and affinity (incestuous marriage). First, the prohibited degree of consanguinity concerns the possible relationship by blood of the parties to a marriage i.e. you can not marry your sister.

Secondly, prohibited degree may also exist by reason of affinity. A man lacks the capacity under customary law and statutory law to marry his wife's mother or the mother of his son's wife. No sexual relationships are tolerated between such parties. These measures are taken so as to maintain the

²⁹ *Re: Shaphard* (1904) 1 ch 456.

³⁰ *Re: Fenter 1* (1950) AC ER 1073.

³¹ *Hermon v. Charlesworth* (1905) 2 Ch 128.

³² (1963) NSCC. 198 (1963) 1 ALL NLR 237.

³³ *Ibid.*

sanctity of marriage and its resultant effect on the family generally.

LEGAL EFFECTS OF MARRIAGE

As soon as marriage is contracted, a family is formed. There are certain legal consequences that flow from this relationship. Statutory marriage confers on the husband and wife rights and obligations that are peculiar to persons who have acquired that status. Some of these obligations include consortium, maintenance, property and other civil matters.

CONSORTIUM

Consortium is the word employed to describe the state of living together as husband and wife with all the incident that flows from such relationship. A wife owes the duty to her husband to reside and consort with him, including the preparation of nice dishes for him, and anyone who without justification, procures antics or persuade her (the wife) to violate the duties, commits a wrong towards the husband for which he (the husband) is entitled to recover damages. Over the years, the courts have identified the following as attributes of consortium:

1. **Change of Name:** The bride may change her name to that of her husband.
2. **Sexual Intercourse:** The couple have unrestricted access to sexual intercourse.
3. **Mutual Defense:** Both husband and wife are entitled to defend one another in the face of attack.
4. **Duty to Cohabit:** Both husband and wife are expected to live in the same abode unless otherwise agreed.
5. **Rights and obligations relating to property and other civil matters:** As a general rule, a man could not enter into an enforceable contract with his wife at common law, this was in view of the fact that the husband and wife were regarded as one legal person by virtue of the doctrine

known as legal unity. The enactment of the Married Women Property Acts (MWPA) 1882 amended in 1893 and the Married Woman Property Law (1958) has conferred the capacity to contract on married women. Note that the MWPA 1882 as amended is applicable throughout the states of the Federation with the exception of Lagos, Ogun, Ondo, Oyo, Ekiti, Osun, Edo and Delta state, where the MWPL (1958) apply.

RIGHTS AND OBLIGATION UNDER CRIMINAL LAW, EVIDENCE AND TORT.

A wife of statutory marriage is not liable to be punished as an accessory after the fact, if she helps or assists her husband to escape punishment and vice versa³⁴. Also a wife of legal marriage cannot be compelled to give evidence against her husband.

2. **Conspiracy:** The husband and wife of a statutory marriage are not criminally liable for conspiracy between themselves alone³⁵.
3. **Rape:** A husband cannot be guilty of an offence of having unlawful carnal knowledge of his wife. However, marital rape is now in place in some jurisdiction e.g. South Africa.

MAINTENANCE

It is generally accepted that the husband is the bread winner, while the wife is primarily responsible for the running of the household. It is therefore expected that the husband should maintain the family. However, the position may be reversed in particular cases especially in recent times when many women have become the breadwinner of the family due to economic depression and loss of job by their husbands.

³⁴ Shaw V. Shaw (1954) 2 QB 429.

³⁵ Sec 34 of the Criminal Code. CAP C38. See Keshinro V. IGP - citation

DUTIES OF PARENTS IN A FAMILY

The parents have various obligations towards their children and wards. These are financial, moral and social. It is the duty of the parent especially the husband who is regarded as the head of the house and also as the bread winner to meet all the material needs of his family. He has to provide shelter, food and clothing for the family and in addition, he is responsible for payment of children's school fees.

The parents also have the moral obligation to ensure that the children are brought up properly. It is the responsibility of the parents, most especially the mother, to ensure that the children imbibe the culture and tradition of the society.

The Bible says "A wise son brings joy to his father, but a foolish son grief to his mother³⁶". The mother is to co-operate with the father to ensure peace and harmony in the home. When these are realized, it will definitely have a great impact on the peace and harmony in the society.

3. FAMILY IN DISARRAY

As we mentioned above, parents in a family have a lot of responsibility to keep the family intact. In case of any lapses on the part of the parents, the resultant effect is that the family will be in disarray. There are situations when the conditions in the family will become so degenerated that peace and happiness would elude the family. Under this situation certain consequences might flow. For example, it may lead to separation of the husband and wife which may eventually lead to an action for dissolution of the marriage. In traditional setting, there is no formality in dissolution of marriage because the

³⁶ Proverb chapt 10 vs. 1, Good News Bible (Bible Society of South Africa, NBD / Pal Print) Cape Town South Africa

ceremonies are not formalized as is done under the statute. The history of divorce originated from the early Roman Empire. Nigeria, taking after the European statute, there is the need to trace the history of divorce from Europe.

3. HISTORY OF DIVORCE

Historically, the grounds for divorce have reflected a mix of theology and expediency. In the early times of Roman Empires, mutual consent or even unilateral repudiation provided sufficient ground to terminate a marriage. A legal precedent from eight century Europe stated that a couple need only have a clerk or notary to authenticate their agreement for divorce. This tradition existed into the tenth century until the Church of Rome declared marriage to be a sacrament. The church alone claimed authority to conduct marriage and would only dissolve a union that was invalid at its inception.

By the end of the sixteenth century, marriage jurisdiction came under the purview of the state and civil divorce emerged. Secular courts were established to authenticate the ground put forth by the parties. The marital offence was the sole just claim for divorce. In 1857, the Divorce and Matrimonial Causes Act, created divorce as a form of punishment for misbehaviour during marriage. A faulty wife could not claim maintenance after divorce and the innocent spouse has a better claim to custody. During the nineteenth century the divorce rate steadily rose, as judicial divorce replaced legislative divorce and many states allowed judges to grant divorce on any grounds they deemed fit. In 1867 the country had 10,000 divorces, and the rate doubled between 1870 and 1900³⁷.

The sensitivity towards wife beating and child abuse also grew during the nineteenth century. This sensitivity also reflected in an actual increase in assaults committed against blood

³⁷ [Http://www.answers.com/family](http://www.answers.com/family). 22/12/2008.

relatives. All these factors turned some families into arenas of tension, conflict and violence.

The history of divorce is in some respect a study of women's systematic inequality in marriage. At common law the doctrine of marriage unity made clear the superiority of husband. The woman lost her separate legal identity and was subsumed within that of her husband's.

DIVORCE IN CANADA

In 1968, the Canadian Parliament introduced the Divorce Act. The Act provided two grounds for a divorce viz: matrimonial fault and marriage breakdown. The enumerated fault included adultery, cruelty, rape, sodomy, bestiality, commission of homosexual act and bigamy.

The indicia of a marriage breakdown sufficient for divorce were imprisonment, addiction, desertion, non-consummation and separation.

In the 1970's, divorce in Canada carried a substantial social stigma. Today, however most Canadians consider divorce to be a right. Adults are free to marry whom they wish and also to end that relationship if it becomes unsatisfactory, unhealthy or unsafe. Although adults are free to secure their own personal happiness, a marriage breakdown can become very complicated, particularly where children are involved.

Research has shown the negative impact divorce can have on children. Most children of divorce experience dramatic decline in economic circumstances. They can be faced with a multitude of changes like the possible abandonment of at least one parent, the diminished capacity of both to attend to their needs (due to parents own stress) as well as changes in otherwise familiar living settings. Some children may experience long term behavioural problems, depression, poor school

performances, low self-esteem and difficulties in future intimate relationship.

The situation in Nigeria is not quite different from what obtains in Canada, except that in Nigeria, there are two forms of marriage i.e. customary law marriage/Islamic law marriage and the marriage under the statute.

The divorce proceedings in each of these forms of marriage will now be discussed.

As earlier mentioned, there are two forms of marriages recognized in Nigeria. That is, the customary marriage and the statutory marriage.

5. DISSOLUTION OF MARRIAGES

CUSTOMARY MARRIAGE

One of the incidents of dissolution of customary marriage is the refund of the bride price by the family of the bride to the former husband.

In *Edet v. Essien*³⁸ the issue of non-refund of bride price to Essien made him lay claim to the child born by the former wife to another man.

Though the claim was rejected by the court for being repugnant to natural justice, equity and good conscience, however, the court was in support of the refund of the bride price. There are no special rules for the dissolution of customary law marriages; custom varies from place to place. The customary law of a woman strongly affects her status, provision for home and means of livelihood for a wife cease with the divorce or separation. She (the wife) leaves without a share in the husband property acquired during the marriage.

Sometimes as stated earlier, customary law compels an estranged wife to refund the bride price paid on her.

³⁸ *Edet v. Essien* (1949) 19 NLR 38.

6. STATUTORY MARRIAGE

Unlike the customary law marriage, dissolution of statutory marriage is guided by the Matrimonial Causes Act³⁹. The law makes provision for what is called the two year rule⁴⁰. That is, no divorce proceedings can be instituted within two years of the marriage except under prescribed circumstances or by leave of the court. The rationale for this rule is "not only to deter people from rushing into ill-advised marriages but also to prevent them from rushing out of marriages as soon as they discovered that their marriage was not what they expected".⁴¹

An application for leave to institute proceeding under section 30 of the MCA may be made *ex parte* with a supporting affidavit.

The affidavit among others should include:

1. Particulars of exceptional hardship and depravity that is alleged.
2. The ground(s) on which if leave is granted, the applicant intends to petition for the decree of dissolution of marriage.
3. Whether or not the applicant has brought previous application for the leave and if so, the date, grounds and the court to which the previous application was made, and whether the application was granted.
4. Whether or not the child of the marriage is living and if so, the name, date of birth and place of residence of the child.
5. Whether an attempt at reconciliation between the parties to the marriage has been made and if so, the particulars of such an attempt.

Apart from the two year rule, the law also provides for a ground for divorce "upon the ground that the marriage has broken down irretrievably".

³⁹ MCA Cap M7LFN 2004

⁴⁰ Sec 15 (2) a of the M.C.A.

⁴¹ Buckley L. J. M *Fisher v. Fisher* (1984) Pg 262 & 264.

Section 15(2) of the Matrimonial Causes Act (MCA) provides that either party to a marriage may petition for divorce upon the ground that the marriage has broken down irretrievably.

A marriage will be considered to have broken down irretrievably if a petitioner is able to rely on any of the conditions stipulated under section 15(2) a-h of the MCA. These are:

1. Willful and persistent refusal to consummate the Marriage.

A successful establishment of this allegation by either of the parties will support the ground that the marriage has broken down irretrievably⁴². In *Hardy v. Hardy*⁴³, the court observed that "there is no hard and fast rule to what constitute willful and persistent refusal to consummate. Much depend on the circumstances of each case. Judges are consequently urged to have recourse to the history of marriage". For a refusal to be held willful and persistent, it must be shown to be a conscious and free act of the respondent.

2. Adultery and Intolerable Conduct/Behaviour:

Marriage is taken to have broken down irretrievably if the applicant could prove adultery or intolerable conduct on the part of the respondent, proof of adultery is not enough, the applicant must prove that he finds it intolerable to live with the respondent⁴⁴. In *Adeyemi v. Adeyemi*⁴⁵, the husband visited his wife at night. The wife's bedroom was in darkness, as a result of his banging on the door, it opened and he found the respondent and co-respondent inside. The wife was sitting with her wrapper carelessly on her body, and co-respondent's shirt was not properly tucked. It was held

⁴² Sec 15 (2) (a) of the M.C.A

⁴³ (1964) 6 FLR Pg 109.

⁴⁴ Sec 15 (2)b of the M.C. A

⁴⁵ (1969) 2 ALL N.L.R. 181

that the circumstances which the parties were found, pointed conclusively to the commission of adultery.

3. Conduct which the petitioner cannot reasonably be expected to bear: Where it is evident that since the celebration of marriage, the conduct of the respondent has been such that the petitioner cannot reasonably bear, the court will hold that the marriage has broken down irretrievably.⁴⁶ Over the years, the courts have recognized the following as conduct envisaged under section 15(2c) of the MCA. These are: physical violence, practice of charm and juju in the matrimonial home, refusal of sexual intercourse with the petitioner, ungovernable temper and intemperate drinking as well as gambling. In *Bassey v. Bassey*⁴⁷ refusal of sexual intercourse with the petitioner was held by the court as an intolerable conduct.

4. Desertion: Marriage will be taken to have broken down irretrievably if the respondent deserts the petitioner for the continuous period of at least 1 year immediately preceding the presentation of the petition⁴⁸. The following are elements of desertion:

- a. De facto separation: This occurs when a spouse departs from a matrimonial home physically, or when he repudiates all marital obligations, but living under same roof with the petitioner.
- b. *Animus Deserendi*: This is an intentional act of the respondent to withdraw permanently from cohabitation.
- c. Lack of just cause: The respondent will be deemed to have deserted the petitioner, if he lacks a just and equitable ground to do so.

⁴⁶ Sec 15 (2) c of the M.C.A.

⁴⁷ (1978) 6 CHCJ. 242.

⁴⁸ Sec 15 (2) d of the M.C.A.

d. Absence of consent: Absence of consent on the part of the petitioner holds the respondent liable for desertion.

5. Living Apart for at least two years: Marriage will be taken to have broken down irretrievably where the parties have lived apart for at least 2 years, immediately preceding the presentation of the petition⁴⁹. It should be noted that living apart is not implied only by physical separation of the parties, it also coupled with termination of consortium.

6. Living Apart for at least 3 years: Marriage will be deemed to have broken down irretrievably. Where it is evident that for a considerable period of 3 years immediately before the presentation of petition, the parties have lived apart⁵⁰. If we take a cursory look at condition 5 and 6, it will be submitted that there is a misnomer or contradiction in the conditions. What is living apart for at least 3 years when we have already had living apart for at least 2 years. Either of the two should have been substituted with the other.

7. Failure to comply with the decree of restitution of conjugal rights: The refusal of respondent for a period not less than a year to resume cohabitation with the petitioner in spite of a court order, is a ground to hold that the marriage has broken down irretrievably⁵¹.

8. Presumption of Respondent's Death: Marriage will be deemed to have broken down irretrievably, when it is shown that the respondent has been absent for the period or such a time as to provide a reasonable ground for presumption that the respondents is dead⁵². In this

⁴⁹ Sec 15 (2) e of the M.C.A.

⁵⁰ Sec 15 (2) f of the M.C.A.

⁵¹ Sec 15 (2) g of the M.C.A.

⁵² Sec 15 (2) h of the M.C.A.

case, the court will issue a *Decree nisi*, before it is made absolute. Once the decree has been made absolute, the marriage is forever dissolved.

Nigeria benefited immensely from the reforms which took place in England and other parts of the Common Wealth between 1920-1966. The provision of the Matrimonial Causes Act 1970 took a cue from the English provisions. The English law commission is of the opinion that a good divorce law should seek to achieve the following objectives:

- To buttress, rather than to undermine the stability of marriage, and
- When regrettably, a marriage has irretrievably broken down to enable empty legal shell to be destroyed with the maximum fairness and the minimum bitterness and humiliation⁵³.

The objective of this law is to ensure that divorce is not made easy as it is to encourage the parties to make efforts to overcome their matrimonial difficulties. But once it is evident that the marriage had broken down irretrievably in fact, if the marriage is dead, the reasonable thing is to give it a decent burial.

This should be achieved in a way that is just to all concerned⁵⁴.

7. CASES IN WHICH THE BOTTLE NECK CREATED BY THE LAW RESCUES THE FAMILY

The law provides certain bars to the granting of a decree of divorce. These bars include:-

1. Absolute Bars
2. Discretionary Bars

The Absolute Bars: There are three absolute bars, these includes:

- a) **Condonation:** Condonation is the conditional forgiveness of a marital misconduct of a spouse and the reinstatement of him or her to the position of spouse. It operates to bar a party (who has condoned the other) from obtaining a decree of divorce on the fact of adultery and intolerable conduct. Thus in *Okala v. Okala*⁵⁵, the wife respondent in a cross-petition proved to the court that the husband petitioner had committed adultery with their house-help. The court found that she had knowledge that the husband and the house-help were committing adultery and she took no active step to remonstrate. The court held that she could not in the circumstances show that she found it intolerable to live with the petitioner.

The court further held that the respondent's condonation of the adulterous acts barred her from obtaining divorce decree. It should be noted that a plea of condonation will fail if the condonation was obtained by fraud or pretence⁵⁶.

- b) **Connivance:** This follows the principle of *volenti non fit injuria*. (no act is actionable at the suit of any person who has expressly or impliedly assented to it). A spouse will be barred from obtaining a decree of dissolution of the marriage, if he or she instructed another to bring about the conduct alleged in the petition. In such a case, he or she will be deemed to have connived in the conduct constituting the fact alleged in the petition.
- c) **Collusion:** this exists where there is an agreement between the spouses with the intention to deceive the court into granting a decree of divorce which it would not otherwise grant. In *Olajumoke v. Olajumoke*⁵⁷ The fact of three years living apart was alleged. Exhibits in court

⁵⁵ (1973) E.C.S.L.R. at pp. 71-72.

⁵⁶ See the case of *Sifo V. Sifo* (C.C.H.C.J. /1/ 72 at P..52.)

⁵⁷ Suit No. HD /83/ 83 of 14/12/84 (unreported) Lagos High Court.

⁵³ Reform of the Ground of Divorce. The field of choice. CMMD 3132, Paragraph 15.

⁵⁴ Ibid Para. 17.

included a document titled "Document of Mutual Understanding" signed by the parties. It was there in stated that each party had children born out of wedlock, and that neither would contest the divorce proceedings. Segun J. concluded that the parties agreement was collusion within the meaning of section 27 of the MCA (1970) a decree of divorce was then granted.

2. **Discretionary Bars:** there are three discretionary bars, these include:
 - a) **Petitioner's uncondoned or Revived Adultery:** where a spouse has committed adultery which has not been condoned by the other spouse or if so, has been revived, the court has discretion whether or not, on the petition of such a spouse, to grant a decree of dissolution of marriage.⁵⁸
 - b) **Petitioner's Desertion before the Fact Alleged:** where one or more facts stipulated in section 15 (2) (grounds for dissolution of statutory marriage) are proved against the respondent, but such fact occurred after the petitioner had deserted the respondent, then the court has discretion to grant or refuse a decree of divorce.
 - c) **Petitioner's Contributory Conduct:** a petitioner may also be barred from obtaining a decree dissolving the marriage, if his or her conduct contributed to the occurrence of the fact or facts relied upon in the petition for divorce.

The most convenient condition for divorce seems to be evidence that the parties have lived apart for a continuous period of three years immediately preceding the presentation of the petition.⁵⁹ This basic rule could be compared with the two year rule. Under the two year rule, the petitioner needs the leave of the court to file the petition or that there is no proof that

⁵⁸ *Ambe v. Ambe* (1975) N.M.L.R. 28

⁵⁹ Section 15 (2) e of the M.C.A.

the respondent does not object to the petition.⁶⁰ On the other hand, the three year continuous separation requires no consent from the other party.

Mr. Vice chancellor sir, the point that attracts the attention of this paper is: what becomes of the parties to the marriage after its dissolution. In most cases the consequence that flows from a broken marriage is evident on the children of the marriage.

The first problem is the issue of custody.

The issue of custody comes up after the marriage has been dissolved. As shown above, it is very easy to obtain a divorce under a customary law marriage. The decree of dissolution of marriage comes in two stages. Decree nisi and decree absolute, as earlier mentioned.

WHAT IS DECREE NISI AND DECREE ABSOLUTE?

Decree nisi is an order from a court of competent jurisdiction that a marriage will end after a fixed period of time unless there is a good reason why it should not.

The Decree Absolute is an order from a court that finally ends a marriage, making the two people divorced. Once a decree is obtained, it means that a vacuum will be created in the family as this means only one parent instead of two will be left to take care of the children. Now that the family is in disarray, what is the way forward?

8. CUSTODY

When the issue of custody (i.e. who takes care of the children of the marriage) arises, after the marriage has been dissolved, the party that has the custody of the children will then settle down to look after the children. The work expected to be done by two persons now devolves on an individual, the family is

⁶⁰Section 15, MCA Cap 220 LFN 2004.

into the mainstream of larger society. Some experts also contend that it is the child's exposure to places of high criminal activity that ultimately lures him from home and ensures his graduation from innocence to criminality.

It should be noted that children are especially perceptive and tend to be aware of the actions of their parents. They usually hold their parents as their role model for fashioning their own behaviours. Thus a drunkard father should expect an alcohol abusing child, a prostitute mother, a sexually promiscuous child, a violent and choleric parent should expect a child of such type etc.

It is important that parent should radiate love and harmony in the home rather than hatred and conflict; they should generate family peace and happiness rather than tension and unhappiness and provide supervision rather than neglect.

In a family where children suffer neglect, there is easy tendency that they will become delinquent.

The Lagos State Robbery and Fire Arms Tribunal on 22nd June 1988 convicted 12 boys aged between 16 and 18 years for armed robbery and sentenced them to death by firing squad.

Though comments from public opinion were against this conviction but the fact remains that this is one of the results of parental neglect. It is submitted that more attention and care should be given to the children in the family.

There are other consequences of parental neglect. The Nigerian society is breeding these delinquents in large numbers. Sexual offences i.e. rape, indecent assault, incest etc. are committed daily. Some children have taken to drugs, some are exposed to violence, immorality and all sorts of vices by the type of video films they watch⁶⁵.

Mr. Vice Chancellor Sir, experience has shown that many of the children who become vagabonds pick pockets, armed robbers

⁶⁵ The African Guardian Magazine of Sept 12, 1988 P. 8 – 11.

and the likes are children who suffer neglect or who are products of broken homes. Children are now learning through parental and other adult examples, that materialism is the only thing that counts. The result of this is now found in the large-scale involvement of youths in illicit drug trafficking and fraud. Children are now found to be involved in examination malpractices despite the criminalization⁶⁶ and they are aided or supported by their parents.

In such circumstances decency and morality have been thrown to the dust bin. It should be noted that whatever the society is at anytime, is merely a reflection of the state of the individual families. It is unfortunate that no amount of capital punishment or long term imprisonment⁶⁷ can change the situation the nation finds itself now, because the remedies provided by the state laws were not allowed to bring out the necessary results. Nigerian adults, particularly parents and other family members should take their sacred responsibility of nurturing their children into responsible and respectable adults in the society so that the menace of moral decadence in our society can be removed.

10. DOMESTIC VIOLENCE

Another important cause of family being in disarray is violence in the family popularly known as domestic violence. Domestic violence occurs when a person is being abused by his/her spouse or former spouse, parent, child or someone in the household. Any abusive, violent, coercive, forceful, or threatening act or word inflicted by one member of a family or household on another can constitute domestic violence. Various individuals have defined domestic violence to include everything from saying unkind and demeaning words, to grabbing a person's arm, to hitting, kicking, chocking, or

⁶⁶ M.O. Ogungbe, *Op Cit*.

⁶⁷ Section 3 (16) of the Special Tribunal Miscellaneous Offences Act, No 20 1984 Cap 410 LFN 1990

murdering. Violence within the family is not a recent phenomenon. In fact it is as old as man itself⁶⁸.

Domestic violence once considered one of the most underreported crimes, became more widely recognized during the 1980s and 1990s. During this period, law enforcement and mental health professionals grappled with the severity, complexity and prevalence of the problems. It is saddening to note that domestic violence is a deliberate act.

The great majority of men who are violent towards their partners are not violent towards others, such as friends, work colleagues and even their slave. The highly publicized 1995 trial of former professional football player and movie actor O.J (Orenthal James) Simpson, for the murder of his former wife Nicole Brown Simpson and her friend Ronald Lyle Goldman, thrust it on to the front pages of newspapers for many months. Simpson was acquitted of the murder charges, but evidence produced at his trial showed that he was arrested in 1989 and that he had threatened to kill his former wife. The disclosure over this case prompted a national discussion on the cause of domestic violence, its prevalence and the effective means of eliminating it.

Domestic violence usually occurs in a cycle with three general stages. First, the abuser uses words or threats, perhaps humiliating or ridiculing.

Next, the abuser explodes at some perceived infractions by the other person and the abuser rage is manifested in physical

⁶⁸ The situation reported in the N.T.A. news of 29th march 2005, where a man killed his father and two of his brother is a very pathetic case of family in disarray. Similarly, the Vanguard of 30th March 2005 reported a case of a man who set his wife ablaze after an argument. These are cases which could be avoided in our families so that, the society can be a place conducive for living.

violence. Finally, the abuser cools off, asks forgiveness, and promises the violence will never occur again. Typically, the abuser's rage begins to build again after the reconciliation, and the violent cycle is repeated.

Lawmakers in some countries gave little or no attention to this global family plague. However, in the United State of America, public outrage over domestic violence led to the inclusion of the Violence Against Women Act as Title IV of the Violent Crime Control and Law Enforcement Act of 1994. The Act increases penalties for domestic violence and rape, and provides for enhanced privacy, protections for victims⁶⁹. There is no doubt that parents and children living in households in which the assaults take place are damaged by this behaviour both physically and emotionally. Resultant effect of this on the family may put the family in disarray.

In extreme cases, husbands have been assaulted and killed by their wives⁷⁰, making them in such isolated cases victims of physical violence in their own homes and putting the family in disarray.

In spite of unambiguous pronouncement by the United Nations to the contrary, domestic violence has been and is still the lot of millions of children around the world.

Notable among such acts of violence is child labour⁷¹, sexual defilement⁷², physical assault, genital mutilation etc.

⁶⁹ M Hayes & C. Williams, Family Law, Principle, Policy and Practice (Butterworths 1995)

⁷⁰ See the Guardian – Thursday June 1 1999 Pg. 10.

⁷¹ See the United Nations Convention on the Right of the Child, adopted by the General Assembly on 20th Nov 1989.

⁷² Article 32 of the convention implores state parties to recognize the right of the child.

LEGAL REMEDY FOR DOMESTIC VIOLENCE IN NIGERIA

Regrettably, in Nigeria, there is no direct legislation on the prevention of domestic violence. At best, what we have are palliative measures here and there from provisions of the Constitution,⁷³ the Law of Torts, Convention on the Right of the Child, African Charter on the Right and welfare of the Child⁷⁴, Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and related instruments.

Couples who are married can turn to the Domestic Violence and Matrimonial Proceedings Act 1976 for reliefs⁷⁵.

According to section 1(1) of the act, a spouse who is a victim of domestic violence may apply for one or more of four types of injunctions viz:-

1. A non-molestation injunction relating to the applicant. Where this injunction is granted, the perpetrator of the violence is restrained from further molesting the victim (i.e. the applicant)⁷⁶.
2. A non-molestation injunction relating to any child living with the applicant. This injunction is meant to prevent the other party to the marriage from molesting a child living with the applicant.
3. An ouster injunction excluding the other party from the matrimonial home or a part of the matrimonial or from a specified area in which the matrimonial is included⁷⁷.

⁷³ The Nigerian constitution in Sec 3 A(1) provides every individual is entitled to respect for the dignity of his person and accordingly, no person shall be subjected to torture or inhuman-degrading treatment.

⁷⁴ Article 34 which make state parties to the convention to undertake to protect the child from all forms of sexual exploitations and abuse.

⁷⁵ See also South African Domestic Violence Act, Sec 116 of 1988.

⁷⁶ For detailed discussion on the provisions of various legislation on the prevention of domestic violence in the United Kingdom – See M. Hayes & C. Williams *Op Cit* Pgs 308 – 375.

⁷⁷ See *Horner v. Horner* (1982) ALL ER. 495, *George V. George* (1986) 2 FLR 334.

4. An injunction requiring the other spouse to permit the applicant to enter and remain in the matrimonial home or part of the matrimonial home.

This Act is often used by spouses who do not want or cannot obtain divorce. It should be noted that to be entitled to any of the orders, the applicant must have legal or equitable right: (i.e. he is either the victim or acting in *loco parentis*) when none exist, the applicant will not be granted such order.

11. CHILD ABUSE

Child abuse is usually manifested in the following forms – cruel punishment, physical violence and battering. Child abuse has been defined by the United Nations Children Educational Fund (UNICEF) to mean: “*The portion of harm to children that results from human action or inaction that is prescribed proximate and preventable*”.

One of the ways in which the law rescues child abuse which may put family in disarray is the Declaration of the Right of the Child, adopted by the General Assembly of the United Nations on 20 November 1959 which provides that the child “By reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth”. The insurgence of juvenile miscreant called “Area boys” in some Nigerian cities is an indication of dislocated family life and the price paid on child abuse.

Recently, the National Assembly accented to the bill on the Right of the Child and the Child Right Act was passed. The Act provides as follows:

1. Right to survival and development⁷⁸
2. Right to name.⁷⁹ every child has a right to name and accordingly, shall be given a name on his birth or on such other

⁷⁸ Sec 4 of the child's Right Act 2003.

⁷⁹ sec 5 of the child Right Act 2003.

date as is dictated by the culture of his parent or guardian. The birth shall be registered in accordance with the provision of the birth, death, etc (compulsory Registration Act 1992)

3. Freedom of thought, conscience and religion.⁸⁰ Parents and Legal guidance shall provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interest of the child.

4. Freedom of association and peaceful assembly⁸¹ This must be done in conformity with the law and in accordance with the necessary guidance and direction of his parent or guardians.

5. Right to private and family life.⁸² This entitles a child to his privacy, family life, home and correspondence, telephone conversation and telegraphic communications etc.

6. Right to freedom of movement.⁸³ This is subject to parental control which is not harmful to the child.

7. Right to freedom from discrimination⁸⁴ a child shall not be subjected to any form of discrimination merely by reason of his belonging to a particular community or ethnic group or by reason of his place or origin, sex religion or political opinions.

8. Right to dignity of the child⁸⁵. Every child is entitled to respect for the dignity of his person and accordingly no child shall be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment...

9. Right to leisure, recreation and cultural activities⁸⁶

10. Right to health and services.⁸⁷

11. Right of parental care, protection and maintenance.⁸⁸

⁸⁰ sec 6 of the child Right Act 2003.

⁸¹ sec 7 of the child Right Act 2003.

⁸² sec 8 of the child right act 2003

⁸³ sec 9 of the child right act 2003

⁸⁴ sec 10 of the child right act 2003

⁸⁵ sec 11 of the child right act 2003

⁸⁶ sec 12 of the Child Right Act 2003

⁸⁷ Sec 13 of the Child Right Act 2003

⁸⁸ Sec 14 of the Child Right Act 2003

12. Right of a child to free, compulsory and universal primary education, e.t.c⁸⁹

13. Right of a child in need of a special protection⁹⁰

14. Right of unborn child for protection against harm⁹¹

15. Contractual Rights of a child⁹²

16. Responsibility of a child and parent.⁹³

17. Right of parent to provide guidance with respect to the child's responsibilities.⁹⁴

A child is the component which not only completes a family, but also guarantees its survival and continuity, as well as that of the society and human race⁹⁵.

The African Charter on the Rights and Welfare of the Child (herein after called the Charter) stipulates, "*family shall be the national unit and basis of society*". It should be protected by the state which shall take care of its physical health and morals⁹⁶.

The Charter further provides that every child shall be entitled to the enjoyments of parental care and shall if possible, have his place of residence determined by his parents. No child shall be separated from his parents against his will (unless) such separation is in the best interest of the child⁹⁷. It is the view of this writer that this provision is one that can help in moulding the child if properly applied.

⁸⁹ Sec 15 of the Child Right Act 2003

⁹⁰ Sec 16 of the Child Right Act 2003

⁹¹ sec 17 of the Child Right Act 2003

⁹² Sec 18 of the Child Right Act 2003

⁹³ Sec 19 of the Child Right Act 2003

⁹⁴ Sec 14 of the Child Right Act 2003

⁹⁵ Adeyemi A.A. – The Child and the Family – Unilag Readings in Law, Ed. E.O. Akanki, 1999.

⁹⁶ Article 18 (1)

⁹⁷ Article 19 (1)

12. HUMAN TRAFFICKING

Human trafficking is another practice that can put a family in disarray. According to the Human Rights Watch, *“trafficking in person is the illegal... recruitment, transport or sale of human beings into all forms of forced labour and servitude, including trafficking into forced marriage. Women are particularly vulnerable to this slavery – like practice, due largely to the persistent inequalities they face in status and opportunity worldwide”*⁹⁸

Trafficking in human being is as old as mankind. It cut across nations, races and continent⁹⁹. George W. Bush also condemned the practice. He likened it to modern day slavery in the following words. *“We must show new energy in fighting an old civil crime. Nearly two centuries after the abolition of the transatlantic slave trade, and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time”*¹⁰⁰

FORMS OF TRAFFICKING IN NIGERIA

There are two forms of trafficking in Nigeria, namely, internal, and international trafficking. Internal trafficking is the movement of persons from one place to another (mostly from rural to urban) within the country. The victims of this form of trafficking are mostly children. The purpose of this form of trafficking include: domestic work/child minding or baby sitting, farm labour, shop work, street hawking, begging, mining and ritual dealings. International trafficking is the trafficking of persons from Nigeria to other countries.

⁹⁸ www. Answer. Org., assessed on 23rd of Sept 2006.

⁹⁹ M.O. Ogungbe, Human Trafficking in the 21st century and the Nigerian Jurisprudence, Current Perspectives in Law, Justice and Development. Ed. Adedotun Onibokun and Ademola O. Popoola (2007). Pg. 362-380.

¹⁰⁰ President Gorge W. Bush, his address to the UN General Assembly, Sept 2003.

The most notorious purpose of this form of trafficking is prostitution. Others include; armed conflict, criminal activities (armed robbery and gangsters).

There have been declarations, conventions, bills of rights, charters and other statutes both at the international and domestic levels against this practice.

LAWS ON TRAFFICKING IN NIGERIA

The latest of the laws in relation to human trafficking is the Trafficking in Person (Prohibition) Law Enforcement and Administration Act, 2003. Prior to the enactment of this law, there were relevant provisions concerning human trafficking scattered in various legislations. In the criminal code, sections 222A, 223, 224, 225A, 227, 365, 366 and 369 all have provisions relating to human trafficking. The penal code in sections 271, 272, 275, 277, 278, 280 and 281 also contain similar provision, section 34, 35 and 41 of the 1999 Constitution contain provisions on human trafficking. The Child Rights Act (2003) criminalizes exploitative child labour and other forms of child abuses. The Labour Act in sections 59-63 has clear provisions prohibiting the procurement of young person for forced labour, recruitment of persons to work abroad etc. The long and short of these laws is to rescue the family from disarray.

13. WIDOWHOOD

Widowhood is generally accepted as the loss of a spouse through death. Widowhood as defined by society, customs and general law presupposes that marriage in one way or the other must have taken place between the deceased and the surviving partner.¹⁰¹

¹⁰¹ M.O. Ogungbe Nigerian Law: Contemporary Issues. (2003) Vox (Nigeria) Limited. Pg. 182

The trouble of a widow begins at the moment her husband breathes his last. The sympathy for her ends at the spur of the moment. Whatever be the personal law of the deceased or the type of marriage contracted, mourning and widowhood rites are regarded as obligatory by most ethnic group in Nigeria.

The concept of widowhood in so far as women are concerned, is further made complex by the levirate system, which is still being practiced in Nigeria and South Africa. By this practice a male relative of the deceased man is identified to take over the conjugal and other functions that are performed by the deceased with respect to his wife.

Widowhood affects men and women differently in that when a woman dies, the status of widowhood for the surviving man is rarely permanent.

A widower will be encouraged and assisted by the family, community and society at large to quickly pass through the state of widowhood and remarry¹⁰², but this is not so with the women.

WIDOWHOOD RITES IN NIGERIA

Under Nigeria customary law, widowhood for women is a protracted period during which they must conform to lengthy and conforming mourning procedures. Widows go through these rituals because of strong beliefs, which are held about the evils that would befall a widow if she does not conform. For instance the Ibo of Eastern Nigeria expects widows to shave their heads, wear black dresses for one year, at times they are expected to drink the water used in bathing the corpse of their husband to absolve them from any complicity in the husband's death¹⁰³.

¹⁰² Ibid.

¹⁰³ M.O. Ogungbe, Women's Right in Nigeria. Nigerian Law Contemporary issues. Ed. Justus A. Sokefun *Op Cit*.

The account of a widow Cecilia Akuego – Onwu from Eastern Nigeria summarizes the plight of widows. According to her: *"I was forced to sit near the corpse of my husband till daybreak", they (his relations) put kolanut on his chest and forced me to eat it. They made it compulsory... without washing my hands or cleaning my teeth for seven market weeks...*

*On every market day, about three O'clock in the morning, they sent an old widow to escort me with a lamp to a nearby river to take a bath. This according to them meant that if I killed my husband, he would come out of the river and avenge his death"*¹⁰⁴.

In September 1993, about 2,000 women from Enugu protested and condemned the practice of taking widows naked to shrine for purification before they are allowed to associate with the public. Women, who refused to take part in the *"wicked culture are harassed, discriminated against and had their family property confiscated.*

To a reasonable man, these wicked practices can destabilize the family and put the family in disarray. To rescue a widow from this wicked practices, there is need to consider the common law principle of testate succession.

14. TESTATE SUCCESSION

Testate succession is a situation where a man dies leaving a will which disposes off his property. Death is inevitable for any one born of a woman. This fact should always be considered as a factor that can put a family into disarray if not properly handled. When a family bread winner fails to prepare for his home after death, it may cause disarray in the family¹⁰⁵.

¹⁰⁴ M.O. Ogungbe *Op Cit*.

¹⁰⁵ M.O. Ogungbe, Making a Will. A paper delivered at the College of Medicine (O.O.U. Sagamu)

UNDER CUSTOMARY LAW

A person married under customary law may dispose off his property by a will made orally during lifetime of the testator. For the will to be valid, it must be made in sound mind, the property in question must be clearly identified and the deceased must have the power to dispose off the property. For example, he has no power to dispose off undivided family property or communal land, the family land etc. Such Will is subjected to alteration by members of the extended family if they feel that adequate provision has not been made for sons¹⁰⁶.

This situation sometimes brings problem in the family and may throw the family into disarray especially where daughter and wives are barred from inheritance while sons are favoured instead.

This situation may be avoided only if the deceased makes a will in English law form.

UNDER STATUTE

Under the English Wills Act 1837 which is a Statute of General Application (in force in England on January 1, 1900) or under the various Wills Laws of the different states, a man can make provision for his wife and children except that he cannot dispose off property that he has no right to dispose off under customary law, for example, family land¹⁰⁷. Any person can make a will under the Wills Act even if married under customary law. For example, a Moslem was held to be able to freely dispose off his estate by will irrespective of limitations imposed by Islamic law¹⁰⁸. However since the case mentioned above many states have enacted laws which prohibit Moslems from disposing of their property by will in contradiction of the Islamic rules of succession. It is also possible for a man to use a will to

¹⁰⁶ See the Customary Law Manual.

¹⁰⁷ See *Johnson v. Macauley* (1961) 1 ALL NLR 743.

¹⁰⁸ See *Yinusa v. Adebosokan* (1971) NMLR 77.

disinherit his wife and ensure that she receives no part of his estate by leaving the property to other people. Many Nigerian men do not make wills but even when they do, it has been noted that they do not often make reasonable provisions for wives¹⁰⁹. To save this unhappy situation, the law provided that ignored dependents may apply for reasonable financial provision from the deceased's estate¹¹⁰.

Ignored dependents include the wife or husband of the deceased, a child of the deceased or a brother or sister of the deceased provided that the later three categories were being maintained by the deceased immediately before his death. It should be noted that ignored dependents, must make an application for reasonable financial provision within six months of the grant of probate.

At this juncture, it is important to note that, succession under the customary law and the English law received by virtue of our local statute may either be testate or intestate. As noted earlier, a man is said to have died testate if he dies leaving a valid will behind. He dies intestate where he dies without making or leaving a will¹¹¹. Having considered the provisions of the law, relating to testate succession and how the law intervened to rescue a family from every problem that may arise from testate succession, it is now necessary to consider the help provided by the law as regards the intestate succession.

¹⁰⁹ See Ajai - "Legal Pluralism & Mishardly of Moslems - Further consideration of *Adebosokan v. Yinusa* and the Internal Conflict Rules" in (1986) Nigerian Current Law Review 127 - 140. The view was expressed that such restriction violates the Constitutional right to freedom of religion.

¹¹⁰ See Stella Omiyi, A Critical Appraisal of the Legal Status of Widows Under the Nigerian Law (Lagos Federal Ministry of Justice 1990) 73.

¹¹¹ See e.g. Sec 2 (1) Wills Edict No. 17 of 1988 (Rivers State) Sec 4 (1) Wills Edict No. 137 of 1990 (Oyo State)

INTESTATE SUCCESSION UNDER CUSTOMARY LAW

The customary law of intestate succession applies only where there is no testamentary disposition. Where a will is made the customary rule of intestate succession does not apply¹¹².

However, it is interesting to note the observations of a commentator who opined that all African societies are unanimous about one tradition which is to the effect that in the customary law of intestate succession, the widow has no place in the sense that she can never inherit from her husband on intestacy. She found it remarkable that such uniformity in the customary law of so many people with different origins, history and custom exists¹¹³.

The patriarchal nature of African societies which developed patterns of property rights designed to perpetuate male dominance can perhaps explain the uniformity. Men were content to allow women the use of land mainly as the means to expand, capsule and reinforce their own control. Women (especially many who were not of the same blood line) were not allowed to control land in their own right¹¹⁴.

Under the customary rule of intestate succession, male primogeniture is a system whereby family property is inherited by the first-born male. Where the first born is dead, the property goes to the first son of the first-born male. Failing any male issue, the property goes to the brother of the first son male, but never to the female children. It applies under the common law and under the customary rule of intestate succession.

¹¹² Mojisola Ogungbe – Family Law Through the Cases. (2004) Vox (Nigeria) Ltd. V.I. Lagos.

¹¹³ See Omiyi *Op Cit* at P 74.

¹¹⁴ See Isabella Okagbue – The Legal Rights of Widow in Nigeria, issues, problems and prospect. Bolaji Owasanoye Ed. P 916.

CONCLUSION/RECOMMENDATION

In Nigeria, as well as South Africa, the type of marriage the deceased enter into determines how his property is to be divided. In Nigeria, if a person who married under the marriage Act dies, the surviving spouse takes one-third of the estate, if there are issues of the marriage. If there are no issues, the surviving spouse takes one-half of the estate. However, where a person who married under the customary law dies, the customary rule of intestate succession shall apply in the absence of a will¹¹⁵. For example in Igbo land, a widow has no right to the property of her deceased husband except that which he gave her as an outright gift in his lifetime and probably that which is left to her by will. Even where the sons inherit their father's estate but are too young to manage it, their mothers have no right to administer it for them. This right belongs to the eldest paternal male relation¹¹⁶. It is submitted that this type of custom is more likely to put the family in disarray than to bring peace and harmony to the family.

The few rights which a widow has is the right to continue living in her matrimonial home after the death of her husband subject to good conduct.

Under the Islamic law, the widow of a man who dies intestate with no children is entitled to one quarter of the estate. Where there are children, the widow's share is reduced to one-eighth. Where there is more than one wife, they will all share the one quarter or one-eighth equally between them. Where the parents of the deceased are still living, they will inherit certain things and the rest of the estate is divided among the children with the male children having equal shares and female children half of the males. Where a wife dies intestate with no children, the

¹¹⁵ M.O. Ogungbe – Nigerian Law Contemporary Issues. *Op Cit*.

¹¹⁶ See generally, The Customary Law Manual, A manual of customary law obtained in the Anambra State and Imo State of Nigeria. (Ministry of Justice, Anambra state, 1977) Pg. 12, 62, 169

widower is entitled to half her estate and if there are surviving children, to one quarter¹¹⁷.

INTESTATE SUCCESSION UNDER STATUTORY LAW

The laws governing matters relating to intestate succession in Nigeria are not uniform. They are in accordance with the legislations of different jurisdiction into which the country for this purpose has been divided. In Lagos, Ogun, Oyo, Osun, Ondo, Ekiti, Edo and Delta states, the applicable law is the Administration of Estate Law¹¹⁸. Section 49(5) of this law states the situation under which the 1959 legislation will apply. It provides:

"Where any person who is subject to customary law contracts 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 testator, might have disposed by will shall be distributed in accordance with the provision of this law, any customary law to the contrary notwithstanding."

However, where the death of the testator occurred before 23rd April 1959 (the date of the commencement of the law) the administration of estate law will not apply just as it will not apply where the distribution of any estate is governed by customary law¹¹⁹. It seems that the provision of these laws tried to rescue the families that are put into disarray by the death or the breakdown of the family.

¹¹⁷ See e.g. Sec 2 (1) Wills Edict No. 17 of 1988 (Rivers State) Sec 4 (1) Wills Edict No. 137 of 1990 (Oyo State)

¹¹⁸ This provision was retained in the Laws of Ogun State – Administration of Estate Laws Vol 1

¹¹⁹ Mojisola Ogungbe, Family Law Through the Cases, Op Cit at P. 241 – 242.

CONCLUSION/RECOMMENDATION

In this lecture, I have examined the family as an entity that forms the society, formation of families through marriages and how families can be in disarray. The consequential effect of divorce on the parties to the marriage, and the resultant effect on the society. The area where the law has come to the rescue of family in disarray was also highlighted. The conclusions that are drawn from this lecture and the recommendations submitted are as follows:

- a. That families form the nucleus of every society and whatever the problems that confront the families will definitely affect the society at large.
- b. It was observed that customary rules of intestate succession in Nigeria are in need of serious reforms. Women suffer significant discrimination under the African customary rules of intestate succession. This situation encourages disarray in the families thereby contributing to an unhealthy society.
- c. The importance of making a will cannot be over-emphasized as this put to rest any discriminatory attitude encouraged by customary rule of intestate succession.
- d. The law will be in a position to remedy the problems in the families if the players of the family roles cooperate with themselves to effect the necessary remedy.
- e. To guide against families in disarray, parent should radiate love and harmony in the home, rather than hatred and conflict. They should generate family peace and happiness and not tension and unhappiness, promote unity rather than discord and provide supervision rather than neglect.
- f. The level of moral decadence in our society can be drastically reduced by reducing the values attached to material wealth to the detriment of moral values. This has done a lot of damage to many families which eventually affect the society at large. There is no amount of legislation that can cure this defect except all Nigerians support the

government to ensure the qualitative survival of the family and the state.

Finally, it is observed that, in totality the law has gone a long way to rescue the families in disarray but more still need to be done to remove many of the problems facing the families, the effect of which may put the families in disarray. To God be the glory, Mr. Vice Chancellor Sir, thank you for giving me this great opportunity. My profound gratitude goes to all my audience for their patience. God bless you all.

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I give glory to God Almighty, the Alpha and Omega, the one that is and shall be, for his protection and guidance over me since birth. To him be majesty, dominion and power now and forever, Amen.

Customarily on occasion like this, one cannot but remember those who in one way or the other have impacted one's life. However, it may not be possible for me to mention the numerous individuals and groups that God used to propel the course of my life up till today. To these people, I say a big thank you and pray that the Almighty God who alone is the keeper of all accurate records will never forget your labour of love. He will reward you abundantly beyond your imagination.

First and foremost, I wish to acknowledge and appreciate the blessings and favour I received from my parents Chief Isaiah Adenuga Onalaja and Chief (Mrs) Comfort Abiodun Onalaja, both of blessed memory. They brought me to this world, nurtured and cared for me and gave me a very sound education upon which I was able to build on to the point of becoming a Professor. I celebrate you dad and mum, continue to rest in the bosom of our lord.

I must appreciate the foundation Vice-Chancellor of this great University, Prof. Olubi Sodipo of blessed memory and his wife Otunba Sodipo and the foundation Registrar Chief (Dr) Nathaniel O. Sotoyinbo and Mrs. Bola Sotoyinbo for their encouragement and the opportunity given me to excel in academics. I appreciate my uncle and "father" Hon. Justice Moronkeji Omotayo Onalaja, former council member of O.O.U, and former Chairman of Council of Legal Education. He was instrumental to my progress in the legal profession. All other

Vice-Chancellors under whom I served are appreciated. They did not fail to promote me as and when due.

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My special thanks goes to my former Vice chancellor, Sir (Prof) Odotola Osilesi (KJW) for his assistance at all times especially for giving me the support to go on sabbatical leave at Igbinnedion University Okada, and assist in building a young Faculty of law. I was fortunate to have him acting for the Vice-chancellor all the time I had to obtain permission to extend my leave of absence. I thank you sir.

I was fortunate to attend one of the best secondary schools in Ogun State which is Anglican Girls Grammar School, Ijebu Ode where presently I am the National Vice-President of the old students association. All the staff that taught me in the school impacted my life in a positive manner. I cannot forget Chief (Mrs) Funmi Arikawe (former Miss Osidipe). She was my "mother" in school. I appreciate every bit of the training she imparted to me which assisted me to this height. You taught me and I taught two of your children. May you and your family continue to enjoy the abundant blessings of God.

The present principal of the school, Mrs. Oduwole and all members of staff & students of my school are appreciated for keeping the touch burning and steering the ship of the school to progress.

My President (Old student association) Mrs. Joy Hassan, and all alumni are appreciated for your contributed assistance to the school. God bless you all.

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After my call to the Nigerian Bar, I was privileged to serve as a Youth Corper at the Lagos state ministry of Justice under the leadership of Honourable Justice Olu Adetosoye (now of Ondo State High Court). He ensured that I was retained after my service year. I served for four years in the Ministry i.e. 1981-1985 and this enabled me to acquire the practical experience as a lawyer. All my colleagues in the ministry were wonderful. I remember today, Honourable Justice. Muri Okunola of blessed memory who was my immediate boss at the time I was leaving the ministry. He was a wonderful boss who cared for the progress of his staff. May God Almighty grant him eternal rest.

Honourable Justice Dolapo Akinsanya shall continue to be my role model. She gave me the leadership needed to succeed in the legal profession, I shall never forget you. God will continue to bless you and all yours. Justice Oluremi Jacobs, the Chief Judge of Ogun State has been wonderful. All my colleagues, many of them now High Court Judges, some are big men and women in the legal profession. I appreciate you all.

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memory. He was my mentor who provided the opportunities for me to publish articles, journals, and books which he edited and showed me the way to rise in academics. (I am grateful for being God's instrument in making me what I am today. The goodness and mercy of God shall not depart from his family.)

My father in the school, Prof (chief) A.A. Adeyemi (who fondly call me Moji), and taught me Comparative Criminal Law, sentencing and treatment of offenders and criminology. Prof. Akintunde Obilade who went out of his way to take me through Ghandi Library, my lecturer in Family Law, Dr. M. Oyebanji, Prof. Taiwo Osipitan (S.A.N), Prof. Yemi Osinbajo (S.A.N) I appreciate you all. Prof. C.K. Agomo, Prof. Oyewo (we served on N.U.C. panel together) I appreciate you.

I must acknowledge the contributions of all members of staff of Olabisi Onabanjo University, both past and present, Academic and non-academic for making the university a place to be proud of. I am very sorry that time will not permit me to mention individuals, but I appreciate you all.

I wish to mention in particular Prof. Yinusa Olatunji Oyeneye under whom I served as Dean of the Faculty of Law 1996-1999. He was God's precious gift to the university & his contributions to the progress of the university will ever be remembered. It was during his tenure that Faculty of Law's quota to the Law School has increased from 70 – 150. Thank you sir. Prof. Otolorin (DVC Acad.) Prof. Kayode Ajayi (DVC Admin) Prof. Alausa (Director Acad. Planning) Thank you for your support.

My colleagues at the faculty of law have been wonderful. They are my first family in the academia.

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to uplift the faculty. I salute you all. Our present Dean Prof Folarin Shyllon deserves my appreciation for making this day possible. I congratulate him for witnessing the 2nd Inaugural Lecture from the faculty of law Olabisi Onabanjo University.

I wish to specially appreciate my "children" in the Faculty, Dr. (Mrs.) Mosun Imasogie, Mr. Jide Ogunsakin, Mr. Seyi Leigh and Mr. Idowu Adegbite who critically went through the manuscript for this lecture and gave useful suggestions, I thank you all.

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Vice-chancellor sir, I must confess that I am a woman of many parts. I am a Community woman, a Church leader, and a Family woman. Please permit me to acknowledge the contributions of each of these groups to my life. I belong to the Royal Family of Pari-pete in Ago-Iwoye. My Royal father, the Ebumawe of Ago-Iwoye is here. I am his chief (the Yeye Mofin of Ago-Iwoye). I salute your Royal Majesty. I appreciate all the Royal fathers present here today. Ade a pe lori, bata a pe lese, irukere a di abere. All the Otunbas and Olorituns I salute you. All the Clubs and Associations from my town Ago-Iwoye, under the umbrella of ACDC, the Chairman, Mr. Sikiru and Secretary Mrs. Nike Tolofari. I say a big thank you.

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Omolade, Olatunde and Feyi Ogungbe, Olawunmi and Adewale Onafuwa and Abidemi & Adenike Ogungbe who are God's gift that are for signs and wonders. I appreciate your support and prayers. My grand children, Olamide, Ogo-Oluwayimika, Ola-Oluwa, Ayo-Oluwa, Fiyinfoluwa, Tolulope Oluwatobi, Inioluwa and Oluwabusayomi made me a fulfilled woman and they shall continue to be my joy. I could not have asked God for a better family. Olatunde, today being your birthday, I wish you many happy returns and God's guidance in your future endeavours.

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Once again, I thank the Ag. Vice-chancellor for this unique opportunity to deliver this lecture.

Finally, I thank you all for being a wonderful audience. I appreciate the love you demonstrated by coming to Ago-Iwoye to honour me today despite your tight schedule and to listen to my inaugural lecture. The lord that brought you safely to Ago-Iwoye shall surely grant you journey mercies back to your destinations.

Mr. Vice-chancellor Sir, this is my inaugural lecture. I thank you for this opportunity. Glory be to God. Once again, I thank the Almighty God for making this day a reality. May I therefore ask my audience to join me in singing this song to express my hearty thanks to the Almighty.

*"What shall I say unto the Lord
All I have to say is thank you Lord
Thank you Lord (2x)
All I have to say is thank you Lord"*