

Modern Civil Procedure Law

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with

CHAPTER 15

MATRIMONIAL CAUSES

Marriage is a union of man and woman. In Nigeria, two systems of marriage are recognized: the monogamous and polygamous system. A monogamous marriage is the voluntary union for life of one man and one woman to the exclusion of all others.¹ A polygamous marriage, on the other hand, may be defined as a voluntary union for life of one man with two or more wives. The essential characteristic is the capacity of the man to take more than one wife.

By its nature, a monogamous marriage in Nigeria is governed by the Marriage Act and the Matrimonial Causes Act. Hence a monogamous marriage may be said to be the statutory marriage. A polygamous marriage is regulated by Customary Law. This varies from one area to another as there is no single system of customary law in Nigeria.

This Chapter will concentrate on the statutory marriage. It shall also discuss the various forms of matrimonial causes and reliefs under the Matrimonial Causes Act.

Definitions

Customary Marriage

A customary marriage is one contracted under the customary law or native law and custom of parties. It is devoid of any formality. It must, however, have the following ingredients:

- i. Capacity.
- ii. Payment of dowry or bride price.

¹ *Hyde v. Hyde* (1886) L.R. 1 P & D 130 at 133; by section 18, Interpretation Act Cap. 192 Laws of the Federation of Nigeria, 1990, (Cap. 123 LFN 2004) a monogamous marriage is "a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage."

iii. Handing over of the bride to the groom's family.

Where any or all of the above mentioned ingredients are absent, then the marriage is invalid.² A customary marriage by its nature is polygamous. It is a valid marriage recognized by law.³ The dissolution of customary marriages is usually at the Customary Courts established under the Customary Courts Law of the various States in Nigeria.⁴ It is less formal and need not allege the grounds of divorce under the Matrimonial Causes Act.⁵

Statutory Marriage

This is a marriage regulated by statute in Nigeria by the Marriage Act and Matrimonial Causes Act. By section 114(1), Matrimonial Causes Act, a matrimonial cause is defined to include proceedings for a decree of: dissolution of marriage; nullity of marriage; judicial separation; restitution of conjugal rights; and jactitation of marriage.

Other proceedings with respect to the maintenance of party to proceedings, settlements, damages in respect of adultery, custody or guardianship of infant children of the marriage, etc. also come within the definition of matrimonial causes.

Jurisdiction

The basis of jurisdiction of a Court to entertain a matrimonial cause is the domicile⁶ of the petitioner. If the domicile is not established, the Court will

2. Nwogugu, E.I.: *Family Law in Nigeria* (Ibadan, Heinemann Educational Books (Nigeria) 2001 at) p.43
3. See: section 35, Marriage Act, Cap. 218, Laws of the Federation of Nigeria, 1990 (Cap. M6 LFN 2004). This provision prohibits any person married under the Act from contracting any other marriage under customary law. *Onwudinjoh v. Onwudinjoh* (1957-58) 11 E.R.L.R. 1
4. See for example section 17, Customary Courts Laws of Ogun State and Ondo State.
5. See: *Nwangwa v Ubani* (1997) 10 N.W.L.R. (Pt. 526) 559; *Lawal-Osula v Lawal-Osula* (1993) 2 N.W.L.R. (Pt. 274) 158
6. Section 2, Matrimonial Causes Act Cap. 220 Laws of the Federation of Nigeria, 1990 (Cap. M7 LFN 2004) Domicile may be of origin, choice or dependency. See Kasunmu: "The Matrimonial Causes Act, 1970: An Analysis," *Nigeria Journal of Contemporary Law* Volume 2 No. 2 (1971) pp. 186 - 208. See: *Bhojwani v. Bhojwani* (1995) 7 N.W.L.R.

lack jurisdiction to pronounce upon the validity or otherwise of the marriage. By section 2(3) of the Matrimonial Causes Act, a person domiciled in any State of the Federation is domiciled in Nigeria and may institute proceedings in the High Court of any State whether or not he is domiciled in that particular State.⁷ The most important consideration is that he is domiciled in Nigeria.

There is a difference between residence and domicile for purposes of conferring jurisdiction on a Court. A person who is resident as distinct from a person who is domiciled in a State or Nigeria has no *animus manendi* to reside permanently in Nigeria. A person may be resident outside Nigeria but be domiciled in the country if he regards Nigeria as the permanent place of abode.⁸ For the Court to have jurisdiction, the petition must state the particulars relating to the domicile or residence of the petitioner in Nigeria and the facts upon which the Court shall be asked to find that the petitioner is so domiciled or resident.⁹

Domicile of a Wife

By operation of law, a wife's domicile is that of her husband. Therefore, a foreigner married to a Nigerian can institute a matrimonial cause in Nigeria.¹⁰ It is the husband's domicile that determines jurisdiction, subject to section 7, Matrimonial Causes Act.

Special Provisions as to the Wife's Domicile

By section 7, Matrimonial Causes Act, a deserted wife will be deemed to be domiciled in Nigeria, if she was domiciled in Nigeria either immediately before

(Pt. 407) 349 C.A.; *Folorunsho v. Folorunsho* (1996) 5 N.W.L.R. (Pt. 450) 612; *Osibamowo v. Osibamowo* (1991) 3 N.W.L.R. (Pt. 177) 65; *Omotunde v. Omotunde* (2001) 9 N.W.L.R. (Pt. 718) 252.

Although only a High Court can entertain proceedings under the Act, a Court of summary jurisdiction, a Magistrate Court, also has jurisdiction to enforce payment in a summary manner.

See: *Bhojwani v. Bhojwani* (*supra*); *Koku v. Koku* (1999) 8 N.W.L.R. (Pt. 616) 672.

⁷ See Order V Rules 1(3) and 3 of the Matrimonial Causes Rules.

¹⁰ See: *Koku v. Koku* (1999) 8 N.W.L.R. (Pt. 616) 672; *Lord Advocate v. Jaffrey* (1921) 1 A.C. 146. This is also known as dependent domicile.

her marriage or immediately before the desertion. Secondly, a wife who is resident in Nigeria at the date of instituting proceedings under the Act and has been so resident for a period of three years immediately preceding that date shall be deemed to be domiciled in Nigeria at that date. By this provision, a wife is deemed domiciled in Nigeria for the limited purpose of matrimonial causes proceedings.

Court, Forum and Power of Transfer

Only the High Court has jurisdiction to entertain matrimonial causes under the Act.¹¹ By section 2(1) and (3) of the Matrimonial Causes Act, a petitioner may institute proceedings in the High Court of any State whether or not he is resident in that particular State. A petitioner resident in Lagos State may decide to institute a matrimonial proceeding in Borno State or Sokoto State. The High Court in the State will have jurisdiction. However, this may be inconvenient to the parties or one of them. Hence the development of the doctrine of "forum convenience."¹² This rule has been given statutory force in section 9, Matrimonial Causes Act which gives the Court a power of transfer of a pending cause. This power of transfer may be exercised at any time and at any stage either on application by any of the parties, or of its own motion. Where a matrimonial cause is transferred from a Court to another, all documents filed in the former Court shall be transmitted by the Registrar or other Officer of the Court to the Court or Registrar of the Court to which the cause is transferred. The matter will proceed as if originally instituted in the other Court.¹³

In *Adegoroye v. Adegoroye*,¹⁴ an application for transfer of a matrimonial cause from Benin to Lagos was made by the respondent on the

¹¹ In Order 1 Rule 4(1), Matrimonial Cause Rules, Court means the High Court of a State or of the Federal Capital Territory Abuja. See also section 114(1) Matrimonial Causes Act

¹² "Forum convenience" means the State or District in which an action may be most appropriately brought considering the best interest of the parties and the public. See *Black's Law Dictionary*, 6th Edition, p. 655

¹³ Section 9(2), (3) and (4), Matrimonial Causes Act.

¹⁴ (1996) 2 N.W.L.R. (Pt. 433) 712; see also *Folorunsho v. Folorunsho* (1996) 5 N.W.L.R. (Pt. 450) 612

ground that the parties were resident in Lagos with their 4 children and the strain, stress, health and financial inconvenience involved in going to Benin particularly with her being at 65 (sixty-five) years of age, it was better that the cause be heard in Lagos.

The High Court refused the application. The Court of Appeal allowed the appeal and held that by virtue of section 2(1)(a) of the Matrimonial Causes Act, the High Court of any State in Nigeria has jurisdiction to hear and determine matrimonial causes instituted under the Act. It follows, therefore, that although there is no specific provision in the Matrimonial Causes Rules for the transfer of a petition for dissolution of marriage from one High Court of a State to another, such power can be inferred since the entire country constitutes one jurisdiction under the Act.¹⁵

Matrimonial Reliefs

A person domiciled in Nigeria can institute proceedings for a decree of –

- (a) Dissolution of marriage; or
- (b) Nullity of a voidable marriage; or
- (c) Nullity of a void marriage; or
- (d) Judicial separation; or
- (e) Restitution of conjugal rights; or
- (f) Jactitation of marriage.¹⁶

Dissolution of Marriage

A party to a marriage can present a petition for dissolution of the marriage upon the ground that the marriage has broken down irretrievably.¹⁷ The circumstances in which the court will hold that a marriage has broken down irretrievably are:

Lack of Consummation

This is where the respondent has willfully and persistently refused to

¹⁵ *Ibid.* at p. 720 D

¹⁶ Section 2(2) Matrimonial Causes Act.

¹⁷ Section 15(1), Matrimonial Causes Act. This is the only ground upon which a divorce petition could be based. The conditions under section 15(2) Matrimonial Causes Act are

consummate the marriage. A party is said to have willfully and persistently refused to consummate a marriage when he or she deliberately refuses to have sexual intercourse with the other party despite a number of requests.¹⁸ However, the petitioner must satisfy the Court that no consummation has taken place before the commencement of the hearing of the petition.¹⁹

2. Adultery

This is where the respondent has committed adultery since after the marriage and the petitioner finds it intolerable to live with the respondent.²⁰ Adultery means the sexual relations between either of the party to the marriage to a third party. Adultery *per se* will not be a ground. The petitioner must find it intolerable to live with the respondent. Both the commission of adultery and intolerability must be proved. These must occur after the marriage. Where sexual relations persist 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. The innocent party would be said to have condoned the adultery.²¹

The standard of proof of adultery is on a preponderance of probability and not proof beyond reasonable doubt.²² It is important to plead and lead evidence on the third party involved in the adultery i.e. the co-respondent.²³ The third party must be made a party to the proceedings.²⁴

only meant to support this sole ground. See: *Anagbado v. Anagbado* (1992) 1 N.W.L.R. (Pt. 216) 207; *Harriman v. Harriman* (1989) 5 N.W.L.R. (Pt. 119) 6; *Megwalu v. Megwalu* (1994) 7 N.W.L.R. (Pt. 359) 718. A Court can only hold that a marriage has broken down irretrievably if at least one of the situations in section 15(2) is established.

18 Section 15(2)(a) Matrimonial Causes Act.

19 See section 21 Matrimonial Causes Act.

20 Section 15(2)(b) Matrimonial Causes Act.

21 See: *Anagbado v. Anagbado* (1992) 1 N.W.L.R. (Pt. 216) 207; section 26, Matrimonial Causes Act.

22 *Erhahon v. Erhahon* (1997) 6 N.W.L.R. (Pt. 510) 667; *Sodipo v. Sodipo* (1990) 5 WBRN 98

23 *Megwalu v. Megwalu* (1994) 7 N.W.L.R. (Pt. 359) 718. A party can ask for further and better particulars.

24 Section 32(1) Matrimonial Causes Act, *Ebe v. Ebe* (2004) 3 NWLR (Pt. 860) 215.

3. Respondent's Irresponsible Behaviour

This occurs if since after the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.²⁵ The facts needed to be established by the petitioner to prove this ground are stated in section 16(1) of the Matrimonial Causes Act as follows:

- (a) Since the marriage, the respondent has committed rape, sodomy, or bestiality; or
- (b) Since the marriage, the respondent has, for a period of not less than two years -
 - (i) been a habitual drunkard, or
 - (ii) habitually been intoxicated by reason of taking or using to excess, any sedative, narcotic or stimulating drug or preparation, or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or
- (c) Since the marriage, the respondent has within a period not exceeding five years -
 - (i) suffered frequent convictions for crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less than three years, and
 - (ii) habitually left the petitioner without reasonable means of support; or
- (d) Since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition; or
- (e) Since the marriage and within a period of one year immediately preceding the date of the petition, the respondent has been convicted of -

²⁵ Section 15(2)(c), Matrimonial Causes Act.

- (i) having attempted to murder or unlawfully to kill the petitioner, or
 - (ii) having committed an offence involving the intentional infliction of grievous harm or grievous hurt on the petitioner or the intent to inflict grievous harm or grievous hurt on the petitioner; or
- (f) The respondent has habitually and willfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner –
- (i) ordered to be paid under an order of, or an order registered in, a Court in the federation, or
 - (ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation; or
- (g) The respondent –
- (i) is, at the date of the petition, of unsound mind and unlikely to recover, and
 - (ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.²⁶

By section 17(1), Matrimonial Causes Act, the mere fact that the parties lived together after the date of the occurrence of the final incident relied on as stated in section 16(1) will not constitute condonation but will be disregarded by the Court if the length of the period of their living together was six months or less.

4. Desertion

This is a situation where the respondent has deserted the petitioner for a

²⁶ The facts to be proved in section 16(1) are disjunctive. Therefore the proof of one of the grounds will satisfy the Court.

continuous period of at least one year immediately preceding the presentation of the petition.²⁷

Desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse.²⁸

There are 4(four) elements which must be present:

- i) The defacto separation of the parties;
- ii) *Animus deserendi*, that is the intention to withdraw from cohabitation permanently;
- iii) Lack of just cause for withdrawal from cohabitation; and
- iv) Absence of the consent of the deserted spouse.

Desertion may be willful or constructive. Where a respondent deliberately separates or lives apart from the petitioner, it will be willful desertion. But where the conduct of the respondent constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, the respondent shall be deemed to have deserted the petitioner without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.²⁹ This is constructive desertion.

In the case of *Towoeni v. Towoeni*,³⁰ the Court held *inter alia* that there could not be desertion within a year where the petitioner was pregnant and had a baby within a year.

For the purpose of calculating the period of desertion or living apart continuously in section 15(2)(d), (e) and (f) of Matrimonial Causes Act, section 17(2) provides that:

²⁷ Section 15(2)(d), Matrimonial Causes Act

²⁸ *Oghenevbede v. Oghenevbede* (1973) 3 U.L.L.R. 104

²⁹ Section 18, Matrimonial Causes Act

³⁰ (2001) 12 N.W.L.R. (Pt. 727) 445

"...no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be."

5. *Living Apart for Two Years*

This occurs where the parties to the marriage 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.³¹ The petitioner must prove the following:

- a) The parties to a marriage shall be treated as living apart unless they are living with each other in the same household.³² It is important for the petitioner to prove that they are living apart.
- b) The living apart must be for a continuous period of at least two years as defined in section 17(2), Matrimonial Causes Act Cap. 220 Laws of the Federation of Nigeria, 1990.
- c) The respondent does not object to a decree being granted. One of the easiest means of proof of absence of objection is where a petition is undefended by the respondent.³³ Also where there was evidence of a letter written by the respondent informing the petitioner that the marriage had broken down and that the respondent would like to file a petition, the Court held in *Oyenuga v. Oyenuga*³⁴ that it showed the respondent did not object to the petition.

³¹ Section 15(2)(e), Matrimonial Causes Act.

³² Section 15(3) and 17(3), Matrimonial Causes Act and *Towoeni v. Towoeni* (*supra*)

³³ Contrast *Ibeawuchi v. Ibeawuchi* (1974) U.I.L.R. 67; (1974) 3 E.C.S.L.R. 56 where the Court held that failure to contest a petition is not conclusive evidence of non-objection.

³⁴ (1977) 2 C.C.H.C.J. 395.

6. *Living Apart for Three Years*

This means that the parties have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.³⁵ Where the parties have lived apart, for a continuous period of three years as defined in section 17(2), Matrimonial Causes Act, the Court is obliged to hold that the marriage has broken down irretrievably. The Court has no discretion and the consent of the respondent is unnecessary.³⁶ The Court is also not concerned with the reason for the living apart by the parties. It is a "non fault" provision.³⁷

Living apart as envisaged by this ground does not connote physical living apart of the parties to the marriage. There must be evidence of definite termination of the consortium between the parties to the marriage before the physical fact of being apart can be said to constitute separation.³⁸ There are 2(two) differences between section 15(2)(e) and (f):

- a) 2(two) years separation in (e) and 3(three) years separation in (f)
- b) The consent or absence of objection is required in (e) and this is not necessary in (f)

7. *Failure to Comply with Decree of Restitution of Conjugial Rights*

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 Matrimonial Causes Act.³⁹

8. *Presumption of Death*

The other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds⁴⁰ for presuming that he or she is dead. By section 16(2)(a) of the Matrimonial

³⁵ Section 15(2)(f), Matrimonial Causes Act.

³⁶ *Omotunde v. Omotunde* (2001) 9 N.W.L.R. (Pt. 718) 252.

³⁷ See *Mc Donald v. Mc Donald* (1964) 6 F.L.R. 58

³⁸ See: *Rayden on Divorce* 12th Edition, p. 287

³⁹ Section 15(2)(g), Matrimonial Causes Act.

⁴⁰ Section 15(2)(h), Matrimonial Causes Act. See also section 144(1), Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 (Cap. E14 LFN 2004) and the case of *Megwalu v. Megwalu* (1994) 7 N.W.L.R. (Pt. 359) 718.

Causes Act, where a petition is based on the ground of presumption of death, the petitioner must prove that for a period of seven years immediately preceding the date of the petition, the respondent was continually absent from the petitioner 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.

On this ground, the petition must state the latest date on which the petitioner had reason to believe that the respondent is alive and the circumstances in which the petitioner has reason so to believe. It must also state the particulars of any enquiries made by the petitioner for the purpose of locating the respondent.

Petition for Dissolution of Marriage within Two Years of Marriage - The Two Year Rule

A petition for a decree of dissolution of marriage shall not be instituted within two years after the date of the marriage except by leave of the Court.⁴¹ The rationale for this rule was stated by Bucknill, L.J. in *Fisher v. Fisher*⁴² as "not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of marriage as soon as they discovered that their marriage was not what they expected."

Procedure for Obtaining Leave

An application for leave to institute proceeding may be made *ex-parte* with an affidavit in support which shall disclose the following:

- a) Particulars of the exceptional hardship that would be imposed on the applicant by the refusal to grant the leave or particulars of the exceptional depravity on the part of the respondent that is alleged as the case may be.
- b) State the grounds upon which, if leave is granted, the applicant intends

⁴¹ Section 30(1), Matrimonial Causes Act Cap. 220 Laws of the Federation of Nigeria, 1990 and Order IV Matrimonial Causes Rules

⁴² (1948) Probate 263, 264 (C.A.)

to petition for the decree.

- c) State whether or not the applicant has made a previous application for leave and if he has made a previous application, also state the date and grounds on which, and the Court which the previous application was made and whether the application was granted.
- d) State whether or not a child of the marriage is living. If the child is living, he should state –
 - (i) the name of the child;
 - (ii) the date of birth of the child;
 - (iii) the place at which, and the persons with whom the child is residing.
- e) State any reconciliation attempt, if any, and the particulars thereof.
- f) Particulars of any other circumstances that may assist the Court in determining whether there is a reasonable probability of a reconciliation between the parties before the expiration of the period of two years after the date of the marriage.
- g) The applicant is expected to file the marriage certificate with the application unless he is unable to do so.⁴³
- h) Where leave has been granted by the Court, the drawn up order shall be served with the petition on the respondent.⁴⁴

*Conditions for Grant of Leave*⁴⁵

Leave of Court shall not be ordinarily granted unless:

- a) to refuse to grant the leave would impose exceptional hardship on the petitioner. The term 'exceptional hardship' is not defined in the Act. However it means that the hardship suffered by the applicant must be shown to be something out of the ordinary. It is for the Judge in the

⁴³ Order IV Rule 3, Matrimonial Causes Rules

⁴⁴ Order IV Rule 4, Matrimonial Causes Rules

⁴⁵ See section 30(3) and (4), Matrimonial Causes Act, *Akere v. Akere* (1962) W.N.L.R. 328; *Majekodunmi v. Majekodunmi* (1966) N.M.L.R. 191

- exercise of his discretion in the circumstances of the case to determine whether the situation is exceptional.⁴⁶
- b) that the case is one involving exceptional depravity on the part of the other party to the marriage. Exceptional depravity is also not defined. But in *Akere v. Akere*⁴⁷ where leave was sought on the grounds of exceptional depravity on the part of the respondent and exceptional hardship suffered by the applicant, it was alleged that the respondent committed adultery during the period in question with three women, one of whom the applicant understood to be the respondent's cousin. Other allegations included inordinate sexual demands when the applicant was in poor health and had just returned from hospital, physical violence, constant neglect and quarrelling; that the respondent infected the applicant with venereal disease and that he turned the applicant out of his home. The Court held that the case was one of exceptional hardship on the applicant and exceptional depravity on the part of the respondent.
 - c) the Court shall have regard to the interest of any children of the marriage; and
 - d) to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of two years after the date of the marriage.

*When Leave of Court is not Necessary Before a Divorce Petition is filed within Two Years of Date of Marriage*⁴⁸

Leave of Court shall not be necessary to commence proceedings for a decree of dissolution of marriage within two years of date of marriage if the petition is based on any of the following grounds:

- 46 *Fay v. Fay* (1982) 3 W.L.R. 206 at 211. In *Williams v. Williams* (1979) 1 All E.R. 556; (1979) 2 W.L.R. 95, it was held that the following facts could constitute exceptional hardship – burning the applicant's certificates, engineering books and wearing apparels; threat to kill him, failure to cook for him, and to perform other wifely duties, starving him of sex and desertion.
- 47 *Ibid.* On what constitutes exceptional or ordinary depravity. See *Majekodunmi v. Majekodunmi* (*Ibid.*)
- 48 Section 30(2), Matrimonial Causes Act.

- a) Where the respondent has willfully and persistently refused to consummate the marriage.⁴⁹
- b) Where since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondents.⁵⁰
- c) Since the marriage, the respondent has committed rape, sodomy or bestiality.⁵¹
- d) Where the institution of the proceedings for a decree of dissolution of marriage is by way of cross-proceedings.

Voidable Marriage

A voidable marriage is one that may be voided at the option of either party. It remains valid until set aside. The grounds on which a marriage will be voidable are stated in the Act⁵² and are as follows:

1. Where at the time of marriage either party is incapable of consummating the marriage

This means the party in question is impotent. An impotent person is one who is incapable of having normal sexual relations. The Court would not grant a decree of nullity of marriage on this ground if:

- a) the petitioner was aware of the existence of the incapacity at the time of the marriage.⁵³
- b) the Court is not satisfied that the incapacity to consummate the marriage also existed at the time when the hearing of the petition commenced and that:

49. Section 15(2)(a), Matrimonial Causes Act.

50. Section 15(2)(b), Matrimonial Causes Act.

51. Section 16(1)(a), Matrimonial Causes Act.

52. Section 5, Matrimonial Causes Act. It seems that the grounds stated in this section are exclusive, that is, no other ground will be accepted. This is because the section provides *inter alia* "...shall be voidable in the following cases but not otherwise...." See Nwogugu, E.I. *op. cit.* p. 140

53. Section 35(a) and 36(2), Matrimonial Causes Act. Under section 26(2)(a), Matrimonial Causes Act, the conduct of the petitioner since the marriage and or lapse of timing are also relevant factors for refusal to make the order.

- (i) the incapacity is not curable;
 - (ii) the respondent refuses to submit to such medical examination as the Court considers necessary for the purpose of determining whether the incapacity is curable; or
 - (iii) the respondent refuses to submit to proper treatment for the purpose of curing the incapacity; or
 - (iv) it would be in the particular circumstances harsh and oppressive to the respondent or contrary to the public interest to make a decree.
2. *Where at the time of marriage either party is of unsound mind or a mental defective or subject to recurrent attacks of insanity or epilepsy.*⁵⁴

Unsoundness of mind means insanity and involves the incapacity of a person to manage himself and his affairs. 'Mental defective' is defined in section 5(2), Matrimonial Causes Act as "a person who, owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight, care or control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage."

However, a decree of dissolution would not be made on this ground if:

- (i) the petitioner is the one suffering the disability of the disease;⁵⁵
- (ii) the petitioner was, at the time of the marriage, ignorant of the facts constituting the grounds;
- (iii) the petition was filed later than twelve months after the date of the marriage;
- (iv) marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the facts

54. Section 5(1)(b), Matrimonial Causes Act; *Hunponu-Wusu v. Hunponu-Wusu* (1969) All N.L.R. (Reprint) 60; *Smith v. Smith* (1940) 2 All E.R. 595

55. Section 35(b), Matrimonial Causes Act.

constituting the ground.⁵⁶ The act of intercourse would constitute condonation.

3. *Where a party to the marriage is suffering from a venereal disease in a communicable form*

The Court will also not make the order under this ground as in the grounds under (2) above. Sections 35(b) and 37, Matrimonial Causes Act, are applicable.

4. *Where the wife is pregnant by a person other than the husband*⁵⁷ *at the time of the marriage*

A wife cannot bring a petition on this ground⁵⁸ and the restrictions in section 37 Matrimonial Causes Act, apply.⁵⁹

Effect of a Decree of Nullity of a Voidable Marriage

A decree of nullity of a voidable marriage shall annul the marriage from and including the date on which the decree become absolute. However, such a decree shall not render illegitimate a child of the parties born since, or legitimated during, the marriage.⁶⁰

Void Marriage

Section 3 of the Matrimonial Causes Act states 5(five) grounds on which a marriage may be void *ab initio*. A marriage is void in any of the following cases:

- 1) Either of the parties is, at the time of the marriage, lawfully married to some other person. This means that a party should not marry another person during the subsistence of the marriage either under the Act or

56. Section 37, Matrimonial Causes Act.

57. Section 5(1)(d), Matrimonial Causes Act.

58. Section 35(e), Matrimonial Causes Act.

59. See explanation in 2 *supra*

60. Section 38, Matrimonial Causes Act

Customary Law.⁶¹ The marriage to another when a marriage in subsisting would constitute bigamy.⁶² An exception is where the subsequent marriage is to the same person.

An allegation that a man got married to a woman under the Marriage Act when his marriage to another woman under native law and custom was still subsisting is an allegation of commission of a criminal offence and has to be proved beyond reasonable doubt. In the case of *Abisogun v. Abisogun*,⁶³ the Supreme Court held that the previous marriage under native law and custom must be established by a high degree of certainty.

- 2) The parties are within the prohibited degrees of consanguinity or affinity.⁶⁴ Whereas the parties who are within the prohibited degree of consanguinity cannot marry, those within prohibited degree of affinity may marry subject to leave of Court.⁶⁵ The prohibited *degree of consanguinity* are stated in the first schedule to the Act as follows:

Ancestress or ancestor;
 Descendant;
 Sister or brother;
 Father's sister or brother;
 Mother's sister or brother;
 Brother's daughter or son;
 Sister's daughter or son.

61 See sections 33(1) and 35, Marriage Act, Cap. 218, Laws of the Federation of Nigeria, 1990 (Cap. M6 LFN 2004). This includes where decree nisi has been granted in a previous marriage which is yet to become absolute. See *Amobi v. Nwagwu* (2006.) All FWLR (Pt. 297) p. 1087.

62 See section 370 Criminal Code which prescribes 7 (seven) years of imprisonment; and *R v. Princewell* (1963) N.N.L.R. 54; *Craig v. Craig* (1964) L.L.R. 96. See also sections 46 and 47, Marriage Act; *Towoeni v. Towoeni* (*supra*) at 466 - 467.

63 (1961) All N.L.R. (Reprint) 235; *Lawal-Osula v. Lawal-Osula* (1993) 2 N.W.L.R. (Pt. 274) 158.

64 Section 3(1)(b), Matrimonial Causes Act.

65 See section 4, Matrimonial Causes Act.

The prohibited degree of affinity are:

Wife's mother or husband's father;
 Wife's grandmother or husband's grandfather;
 Wife's daughter or husband's son;
 Wife's son's daughter or husband's son's son;
 Wife's daughter's daughter or husband's daughter's son;
 Father's wife or mother's husband;
 Grandfather's wife or grandmother's husband;
 Son's wife or daughter's husband;
 Daughter's son's wife or daughter's daughter's husband.

It is provided that for the purpose of the schedule, it is immaterial whether the relationship is of the whole blood or half blood, or whether it is traced through, or to any person of illegitimate birth.

Where two persons who are within the prohibited degrees of affinity wish to marry each other, they may apply, in writing, to a judge for permission to do so.⁶⁶

By section 4(2) of Matrimonial Causes Act, if the judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought, he may by order permit the applicants to marry each other. Although the Act does not define what constitutes exceptional circumstances, it contemplates a situation that is beyond the ordinary and are sufficiently serious to permit the celebration of a marriage which would otherwise be void.⁶⁷

Where persons marry in pursuance of permission granted by Court, the validity of their marriage shall not be affected by the fact that they are within the prohibited degrees of affinity.⁶⁸

- 3) The marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of

66 Section 4(1), Matrimonial Causes Act

67 Nwogugu, E.I. *op. cit.* at p. 25

68 Section 4(3), Matrimonial Causes Act

solemnization of marriages.⁶⁹

The places for solemnization of a marriage under the Act are the marriage registry or a licenced place of worship.

By section 33(2), Marriage Act, a marriage shall be null and void:

- (a) If both parties knowingly or willfully acquiesce in the celebration in any place other than an office of the registrar of marriages or licensed place of worship.⁷⁰

A marriage celebrated in the marriage registry or in the church of the parties choice after the issuance of a registrar's certificate is *prima facie* valid unless the said marriage celebration is defective for other reasons.⁷¹

- (b) Under a false name or names.
- (c) Without a registrar's certificate of notice or licence issued by Minister.
- (d) By a person not being a recognized minister of some religious denominations or body or a registrar of marriages.⁷² The question of whether a person is a recognized minister of a religious denomination depends on the rules and procedure of the particular church or denomination with regard to the holding of that office.
- 4) The consent of either of the parties is not a real consent because-
- (i) it was obtained by duress or fraud; or
- (ii) that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed;
- (iii) that party is mentally incapable of understanding the nature of the marriage contract.⁷³

⁶⁹ Section 3(1)(c), Matrimonial Causes Act

⁷⁰ Section 32(2)(a), Marriage Act. The Minister of Internal Affairs is the one authorized to licence any place of public worship as a place for the celebration of marriages under section 6 of the Act.

⁷¹ *Chukwuma v. Chukwuma* (1996) 1 N.W.L.R. (Pt. 426) 543 at 561

⁷² Section 33(2)(d), Marriage Act; *Chukwuma v. Chukwuma* (*supra*)

⁷³ Section 3(1)(d), Matrimonial Causes Act

- 5) Either of the parties is not of marriageable age.⁷⁴ There is no where in the Matrimonial Causes Act where marriageable age is defined: but under the Marriage Act,⁷⁵ the marriageable age is assumed to be 21 (twenty-one) years. Therefore, if either of the parties is under 21 (twenty-one) years, the consent of the father (or if he is dead, or of unsound mind or absent from Nigeria), of the mother and if both are absent from Nigeria, dead or of unsound mind, the consent of the guardian must be obtained in writing or if an illiterate, such consent should be obtained in the presence of a Judge, Magistrate, Justice of the Peace, Registrar of Marriages, Minister of Religion, etc.

Statutory Marriage and Church Marriage

Celebration of a church marriage merely gives divine blessing to the customary marriage which for all intents and purposes remains a marriage under customary law, if it is not one in accordance with the Marriage Act. In order to convert customary marriage into a statutory marriage, the parties must consciously take the steps and adopt the procedure in the Marriage Act.⁷⁶

Judicial Separation

A petition for a decree of judicial separation may be based on one or more of the facts and matters to ground a petition for dissolution of marriage under sections 15(2) and 16(1) of the Act.⁷⁷ A decree of judicial separation relieves the Petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation but shall not otherwise affect the marriage or the status, rights and obligations of the parties to the marriage.⁷⁸ Therefore, while the decree is in force, neither of the spouses can be in

⁷⁴ Section 3(1)(e), Matrimonial Causes Act.

⁷⁵ Sections 11(b), 18, 19 and 20, Marriage Act. Contrast the position with section 11 of the Australian Marriage Act, 1961, which defines marriageable age as that of a male who has attained the age of 18 (eighteen) years or that of a female who has attained the age of 16 (sixteen) years.

⁷⁶ See *Nwangwa v. Ubani* (1997) 10 N.W.L.R. (Pt. 526) 559

⁷⁷ See sections 39 and 40 Matrimonial Causes Act.

⁷⁸ Section 41, Matrimonial Causes Act.

desertion. Also, a husband who has intercourse with his wife against her will during the same period may be guilty of rape.

Effect of a Decree of Judicial Separation

- a) Where a decree of judicial separation is in operation, either party to the marriage may bring proceedings in contract or in tort against the other party.
- b) Where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation, that property shall devolve as if that party had survived the other party to the marriage.
- c) Where in consequence of making a decree for judicial separation, a husband is ordered to pay maintenance to his wife, and the maintenance is not duly paid, the husband shall be liable for necessaries supplied for the wife's use. The parties remain for this purpose husband and wife.
- d) A decree of judicial separation shall not prevent the institution by either party to the marriage of proceedings for a decree of dissolution of marriage.⁷⁹

Restitution of Conjugal Rights

Where a party to a marriage without just cause refuses to cohabit with the other party and render conjugal rights, the aggrieved party may file a petition for restitution of conjugal rights.⁸⁰ This relief is appropriate where cohabitation has ceased and one party is anxious to resume normal married life. The Court shall not make a decree of restitution of conjugal rights unless it is satisfied:

- (a) that the petitioner sincerely desires conjugal rights to be rendered by the respondent and is willing to render conjugal rights to the respondent; and
- (b) that a written request for cohabitation, expressed in conciliatory

⁷⁹ See sections 42, 43 and 44, Matrimonial Causes Act

⁸⁰ Section 47, Matrimonial Causes Act

language, was made to the respondent before the institution of the proceedings, or that there are special circumstances which justify the making of the decree notwithstanding that such a request was not made.⁸¹

Jactitation of Marriage

Where a person falsely boasts and persistently asserts a marriage to another person, it would constitute jactitation of marriage. A petition under this Act for a decree of jactitation of marriage may be based on the ground that the respondent has falsely boasted and persistently asserted that a marriage has taken place between the respondent and the petitioner. The making of the decree shall be in the discretion of the Court.⁸² Only a party who claims to have been misrepresented can petition for a decree.

The petition must be in accordance with the Matrimonial Causes Rules and should state the following:

- i. the date on which and the time and place at which the respondent is alleged to have boasted and asserted that a marriage had taken place between the petitioner and the respondent.
- ii. particulars of those boastings and assertions
- iii. that the petitioner is not married to the respondent and that the petitioner has not acquiesced in the alleged boastings and assertions.⁸³

Divorce Petition

Parties to a Divorce Petition

Petitioner: This is the party that files the petition. This includes a cross-petitioner.

⁸¹ Section 49, Matrimonial Causes Act

⁸² Section 52 Matrimonial Causes Act

⁸³ Order 22 Rule 3 Matrimonial Causes Rules. Note that if the Petitioner had earlier authorized the representation and later turned around to complain, the Court may refuse the relief as he has not come to Court (equity) with clean hands. See *Thompson v. Rourke* (1893) Probate p. 70; *Ayeni v. Owolabi* (1986) 2 QLRN 241

Respondent: This is the party against whom a petition is brought. It also includes a petitioner against whom there is a cross-petition.

Co-Respondent: If the ground of the petition is that the respondent has committed adultery, section 32(1) provides that the petitioner shall join in the action, the person with whom the respondent committed the adultery. Unless the Rules of Court prescribed otherwise, such a party is called a co-respondent. Under Order IX Rule 3(1) of the Matrimonial Causes Rules, where the petitioner alleges in a petition for dissolution of marriage 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 the person under Order IX Rule 3(7). If the petitioner subsequently becomes aware of the name of the adulterer, Order IX Rule 4 allows the petitioner to amend the petition to reflect the name.

Petition

A petition for decree of dissolution of marriage, nullity of marriage or judicial separation shall be as in Form 6 to the first schedule to the Matrimonial Causes Rules (M.C.R.). A petition for dissolution of marriage shall contain the following:⁸⁴

- a) **Parties:** A petition shall state the full names of each party to the proceedings and, in addition, the address and occupation of the petitioner, the address and occupation, so far as known to the petitioner, of each other party to the proceedings.

The petition shall also state the name of the wife immediately before the marriage or alleged marriage, as the case may be and the address and occupation, so far as known to the petitioner, of any person, not being a party to the proceedings, specified in the petition as a person with whom or whom the respondent is alleged to have committed adultery, rape or sodomy.

⁸⁴ See Order V Matrimonial Causes Rules.

- b) **Marriage:** Particulars of the marriage to which the petition relates. By Order V Rules 4, 5 and 6, Matrimonial Causes Rules, the particulars expected to be stated are: the place at which the marriage was solemnized; the nature of the ceremony – if the ceremony was a religious ceremony, the religious denomination according to the rites of which the marriage or purported marriage was solemnized; the conjugal status of the petitioner and the respondent respectively, immediately before the solemnization of the marriage.

If either the petitioner or the respondent was previously married, the date of that marriage, and the means by which the previous marriage was dissolved. If the dissolution was by order of Court, the name of the Court by which and the date on which, the marriage was dissolved must be stated.

- c) **Birth:** Particulars relating to the birth of the parties to the marriage.⁸⁵ By Order V Rule 2 Matrimonial Causes Rules, the particulars relating to the birth of the parties to the marriage are the date and place of birth of each party to marriage. Where a party to the marriage was not born in Nigeria, particulars of the date on which the party entered Nigeria or, if the party has re-entered Nigeria after having left Nigeria, the date on which the party first entered Nigeria shall also be stated.
- d) **Domicile:**⁸⁶ The petition is required to state that the petitioner is within the meaning of the Act, domiciled in Nigeria; also the facts to support this assertion shall be stated concisely.
- e) **Cohabitation:**⁸⁷ This refers to the particulars as to the parties living together, if any. The petitioner shall state the places of residence at which the parties to the marriage have co-habited for periods

⁸⁵ Order V Rule 1(3)(b), Matrimonial Causes Rules.

⁸⁶ Order V Rule 1(3)(c) and 3, Matrimonial Causes Rules.

⁸⁷ Order V Rule 1(3)(d) and 4, Matrimonial Causes Rules.

that, having regard to all the circumstances, were substantial: the periods during which the parties cohabited at those places; and of the date on which and circumstances in which cohabitation between the parties ceased or last ceased as the case may be. Where, however, the parties never cohabited, the petition shall include a statement to that effect.

- f) *Children:*⁸⁸ Where there is any child of the marriage who has not attained the age of 21 (twenty-one) years, or any child of the marriage who has attained the age of 21 (twenty-one) years in respect of whom an order for maintenance, custody or settlement of property is sought, or who has been adopted or a member of the household, the petition shall state the full name and date of birth of the child and the name of the persons with whom the child is residing. If there are no children to whom the rule applies, the petition shall include a statement to that effect.

By Order V Rule 14 Matrimonial Causes Rules, where at the date of petition for a decree of dissolution of marriage, there are children below 16 (sixteen) years of age, the petition shall state the arrangements proposed by the petitioner concerning the welfare and where appropriate, the advancement and education of the children who are then living.

- g) *Previous Proceedings:*⁸⁹ In this part of the petition, the petitioner is expected to state whether since the marriage any proceedings have been instituted in Nigeria or elsewhere in any Court between the parties to the marriage. Also, any proceedings concerning maintenance, custody, guardianship, welfare, advancement or education of the child shall be stated. If proceedings have been

88 Order V Rule 1(3)(e) and 5, Matrimonial Causes Rules.

89 Order V Rule 1(3)(f) and 6, Matrimonial Causes Rules.

instituted, the petition shall state the order or orders⁹⁰ made in the proceedings and the date on which and the Court by which the order was made. The petition shall also state whether the parties have cohabited since the making of that order.

- h) *Condonation, Connivance and Collusion:*⁹¹ The petition is expected to state that the petitioner has not condoned, connived or colluded in bringing the petition.

- i) *Particulars of Order Sought:*⁹² Under this head, the petitioner shall state the reliefs sought including order for maintenance, damages for adultery, custody or guardianship of infant children of the marriage, costs of the proceedings, etc.

- j) *Date and Signature:*⁹³ The petition shall bear the date of filing. Where it is settled by a Legal Practitioner, the name of the Legal Practitioner shall be written on the petition. It shall also be signed by him.⁹⁴ Where the petition is settled by the petitioner himself, it shall be signed by him.

Cross-Petition

Section 114, Matrimonial Causes Act defines a petition to include a cross-petition. A respondent to a divorce petition may also petition for the dissolution of the marriage on other grounds than those in the original petition. He or she can also seek fresh reliefs. In a matrimonial proceedings, a cross-petition

⁹⁰ If an order of Court relates to maintenance of a child of the marriage, the petitioner is required to state the amount of maintenance payable under the order or agreement. – See Order V Rule 6(5) Matrimonial Causes Rules.

⁹¹ Order V Rule 7, Matrimonial Causes Rules.

⁹² Order V Rule 8, Matrimonial Causes Rules.

⁹³ Order V Rule 9, Matrimonial Causes Rules.

⁹⁴ In the case of *Goodman v. Ebans Ltd.* (1954) 1 Q.B. 550, signature on a rubber stamp was held to be good signature. See also *A.C.B. Plc v. Haston (Nig.) Ltd.* (1997) 8 N.W.L.R. (Pt. 515) 110, where it was held that merely typing the name of counsel would not constitute a signature.

is itself a petition and it is in the same category of counter-claim in an action commenced by writ of summons.⁹⁵

Documents to Accompany a Petition

- a) *Notice of Petition:* The notice of the petition is to give the respondent instructions as to the steps to be taken after service of the petition. It shall be in Form 8, 8A, 9 in the First Schedule to the Matrimonial Causes Act as appropriate. The notice is to be signed and sealed by the Registrar of Court.⁹⁶ If a notice of petition is lost, another copy shall be signed and sealed by the Registrar upon being satisfied of the loss.⁹⁷ The notice of petition shall remain in force for purpose of service for 12(twelve) months from the day on which the petition was filed. The Court, however, has powers to extend time within which a notice may be served notwithstanding that the notice has ceased to be in force. Where an order of extension is made by Court, the Registrar shall indicate that fact on the notice.⁹⁸
- b) *Marriage Certificate:* This is to show that a marriage under the Act was solemnized. This would give the Court jurisdiction.⁹⁹ Where a petitioner is unable to file the marriage certificate with the petition, he must state so in the affidavit verifying the petition and the reason(s) why he is unable to do so.¹⁰⁰

By section 32 of the Marriage Act Cap. 218, Laws of the Federation of Nigeria, 1990:

"Every certificate of marriage which shall have been filed in

95 *Nwanya v. Nwanya* (1987) 3 N.W.L.R. (Pt. 62) 697; *Erhahon v. Erhahon* (1997) 6 N.W.L.R. (Pt. 510) 667.

96 Order V Rule 28, Matrimonial Causes Rules.

97 Order V Rule 31, Matrimonial Causes Rules.

98 Order V Rule 32, Matrimonial Causes Rules.

99 See *Anyaegbunam v. Anyaegbunam* (1973) 4 S.C. 121

100 Order V Rule 27, Matrimonial Causes Rules.

the office of the registrar of any district, or a copy thereof, purporting to be signed and certified as a true copy by the registrar of such district for the time being, and every entry in a marriage register book, or copy thereof certified as aforesaid, shall be admissible as evidence of the marriage to which it relates, in any Court of justice or before any person having by law or consent of parties authority to hear, receive, and examine evidence."

From the foregoing provisions, where the original marriage certificate is lost, a duly certified true copy thereof or entry in a marriage register book and a certified copy of such entry could be tendered in evidence. Also, Order V Rule 27(7) Matrimonial Causes Rules also defines "marriage certificate" to mean - an original certificate or record of the marriage or a copy or photographic representation of an original certificate or record or of an entry of the marriage in an official register of marriages being a duly certified true copy thereof. In the petition for dissolution of marriage, only a photocopy of the certificate is expected to be attached to the petition. It is during the trial of the action that the original or the certified true copy thereof becomes necessary.

What is the effect of failure to tender the marriage certificate in evidence? Will it preclude the Court from making the order of decree nisi? Failure to tender the marriage certificate will not preclude the Court from making the order if there is evidence of a monogamous marriage and the parties have cohabited together as husband and wife. Secondly, oral evidence of the marriage can be led especially where it is not challenged.¹⁰¹

101. *Menekaya v. Menekaya* (1996) 9 N.W.L.R. (Pt. 472) 256 (C.A.); *Chukwuma v. Chukwuma* (1996) 1 N.W.L.R. (Pt. 426) 543; *Anyaegbunam v. Anyaegbunam* (supra)

- c) *Acknowledgement of Service:* By Order VI Rule 3(1) Matrimonial Causes Rules, where a petition is to be served by post, it shall be accompanied by a form in accordance with Form 11 for acknowledging service of the document. The respondent is expected to sign and return it to the petitioner's Solicitor. A stamped addressed envelop is also delivered for this purpose. It would seem that where service is not to be effected by post, there is no need for an acknowledgment of service.¹⁰²

By Order VI Rule 3(1) Matrimonial Causes Rules, service of the document by post shall be deemed not to have been effected unless the person signs and returns to the person on whose behalf the document is being served or to his Legal Practitioner an acknowledgment of service as in Form 11.

- d) *Verifying Affidavit:*¹⁰³ The purpose of the verifying affidavit is to confirm the truthfulness of the facts stated in the petition. It is sworn to by the Petitioner before the petition is filed.
The affidavit will:
- (i) verify the facts stated in his petition of which he has personal knowledge; and
 - (ii) depose as to his belief in the truth of every other fact stated in the petition.
- e) *Certificate Relating to Reconciliation Signed by the Legal Practitioner:* The Solicitor acting for the petitioner is expected to file a certificate as in Form 3 or Form 3A whichever is appropriate to show steps taken before filing of the petition to reconcile the parties to the marriage. By Order 2 Rule 2 of the Matrimonial Causes Rules, the petition shall not be effective unless such a certificate duly signed

¹⁰² See Notice of Petition in Forms 8 and 8A.

¹⁰³ Order V Rule 10 Matrimonial Causes Rules. See also *Anyanso v. Anyanso* (1998) 9 N.W.L.R. (Pt. 564) 150.

by the Solicitor is written on the document.¹⁰⁴

- f) *Discretion Statement:* This statement is required to be filed where a party to the proceedings has committed adultery either before the filing of the petition or answer or after the filing of the petition or answer but before the trial of the proceedings as soon as practicable after committing the adultery.¹⁰⁵

A discretion statement shall be in Form 30 and shall state the particulars of the acts of adultery committed by the petitioner or respondent, as the case may be, since the marriage, the circumstances giving rise to the commission of the act of adultery and the grounds upon which the court shall be asked to make a decree of dissolution of marriage notwithstanding the adultery.¹⁰⁶

Before a discretion statements is filed it must be:

- i. signed by the party who made it;
- ii. the matters set forth in it have been verified by the affidavit of the party written on it;
- iii. enclosed in a sealed envelope having written on it the words: "Discretion Statements," the number of the proceedings and a certificate –
 - if the party is represented by a Legal Practitioner, signed by the Legal Practitioner; or
 - if the party is not so represented, signed by the party, certifying that the statement is duly signed and verified, and that it bears the date on which it was signed.

Under Order XI Rule 32, the Court may if it considers it proper require a discretion statement filed by a party to be tendered in evidence, read in

¹⁰⁴ *Anyanso v. Anyanso (Ibid)*

¹⁰⁵ Order XI Rule 28, Matrimonial Causes Rules.

¹⁰⁶ Order XI Rule 29, Matrimonial Causes Rules.

open Court or produced for inspection by another party to the suit at any stage of the trial. Except in such situation, a discretion statement shall not be open to inspection by any person other than the Attorney-General or a person authorized by him in writing, without leave of Court.

It is important that every party to a matrimonial cause praying that the Court exercise its discretion to grant a decree *nisi* notwithstanding adultery must lodge a discretion statement in the registry. However, the absence of a discretion statement though vitally important may not bar the Court from exercising its discretion one way or the other. Each case depends on its facts.¹⁰⁷

Address for Service

A party may give his address for service for purpose of proceedings by stating such address in a document filed by him as in Form 1 to the Schedule to the Matrimonial Causes Rules.¹⁰⁸ He may also give the address in any other document first filed by him such as a petition, an answer or application.

If a party fails to give an address for service, he shall not be entitled to be heard upon the trial or any other proceedings or application. He cannot complain of not being served a Court process.¹⁰⁹ Where the party is represented by Legal Practitioner, his address for service may be that of the Legal Practitioner.¹¹⁰ A party may change his address for service by filing and serving a form in accordance with Form 2 to the Schedule.

Reconciliation

It is the duty of the Court in which a matrimonial cause has been instituted to give consideration from time to time to the possibility of a reconciliation of the parties to the marriage.¹¹¹ The judge hearing a cause may take the step to reconcile the parties if it appears to him from -

¹⁰⁷ *Ononuju v. Ononuju* (1991) 5 N.W.L.R. (Pt. 192) 479 at 495

¹⁰⁸ Order 1 Rule 12, Matrimonial Causes Rules.

¹⁰⁹ See *Anyanso v. Anyanso* (*supra*)

¹¹⁰ Order 1 Rule 12(4), Matrimonial Causes Rules.

¹¹¹ Section 11, Matrimonial Causes Act.

- i. the nature of the case;
- ii. the evidence in the proceedings;
- iii. attitudes of the parties, either of them or of Counsel.

that there is a reasonable possibility of such a reconciliation.

Where the Court is of the opinion that there is possibility of reconciliation, it may do all or any of the following:

- i. adjourn the proceedings to afford those parties an opportunity of becoming reconciled;
- ii. with the consent of the parties, interview them in Chambers, with or without Counsel, as the Judge thinks proper with a view to effecting a reconciliation;
- iii. nominate a person with experience or training in marriage conciliation or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.¹¹²

Where a marriage conciliator is appointed to effect a reconciliation, he shall before entering upon the performance of his functions make and subscribe to an oath of secrecy in accordance with the form in the Second Schedule to the Matrimonial Causes Act.¹¹³

Duty of Judge after Reconciliation:

- a) Where a matter is adjourned for purpose of reconciliation under section 11(1)(b) of the Act but the attempt to effect a reconciliation fails, the Judge shall NOT except at the request of the parties to the proceedings continue to hear the proceedings.¹¹⁴
- b) Where there is no request for the Judge to continue the hearing, the proceedings shall be dealt with by another Judge.¹¹⁵

¹¹² Section 11(1)(c), Matrimonial Causes Act.

¹¹³ Section 14, Matrimonial Causes Act.

¹¹⁴ Section 12, Matrimonial Causes Act.

¹¹⁵ Section 12, Matrimonial Causes Act.

- c) Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation shall not be admissible in any Court or in proceedings before a person authorized by any enactment, federal or State, or by consent of parties, to hear, receive and examine evidence.¹¹⁶

Setting Down the Suit for Trial

After the petition, answer and reply or rejoinder (pleadings) have been completed, the petitioner's counsel is required to make a request to set the suit down for trial. If the suit is undefended, the request shall be in accordance with Form 31 and shall state the Court Division in which the petitioner desires the suit to be tried and signed by the Solicitor to the petitioner if he is represented by counsel.¹¹⁷ In a case where the suit is defended, the request shall be in accordance with Form 32 and duly signed by the counsel for the petitioner or by the party.¹¹⁸ In both cases, the counsel shall state the number of days he will require for trial. The Registrar is thereafter expected to issue a Notice of Trial as in Form 33.¹¹⁹

Hearing

The hearing of the petition must be in open Court except where the Rules of Court make provision for proceedings or part of proceedings to be heard in Chambers.¹²⁰ In the case of *Menekaya v. Menekaya*,¹²¹ the Supreme Court held that any hearing in Chambers is a nullity. The right to have a matrimonial cause heard in open Court cannot be waived.

However, by section 103(2), Matrimonial Causes Act, where, in a proceedings, the Court is satisfied that there are special circumstances that make it desirable in the interests of the proper administration of justice that the proceeding or part thereof should not be heard in open Court, the Court

¹¹⁶ Section 13, Matrimonial Causes Act.

¹¹⁷ Order XI Rule 39, Matrimonial Causes Rules.

¹¹⁸ Order XI Rule 41, Matrimonial Causes Rules.

¹¹⁹ Order XI Rule 46, Matrimonial Causes Rules.

¹²⁰ Section 103(1), Order XI Rule 39 Matrimonial Causes Act.

¹²¹ (2001) 16 N.W.L.R. (Pt. 738) 203; See also *Oviasu v. Oviasu* (1973) 1 All N.L.R. 74; (1973) 11 S.C. 315

may order that persons who are not parties or legal advisers shall be excluded during the hearing or part of the hearing.

Decree – Decree Nisi and Decree Absolute

After the conclusion of trial and the Court is satisfied of the existence of any ground in respect of which relief is sought, it may grant a *decree nisi* of dissolution of marriage or nullity of a voidable marriage.¹²² Generally a decree *nisi* is for a period of three months after which it may be made absolute.¹²³

Note the following exceptions:

- a) Where there is a valid appeal against a decree *nisi*, it will not become absolute except at the expiration of a period of 28 (twenty-eight) days from the day on which the appeal is determined or discontinued.¹²⁴
- b) Where there are children of the marriage under the age of 16 (sixteen) years at the date of the decree *nisi*, the decree shall not become absolute unless the Court is satisfied that proper arrangements have been made for the welfare and in appropriate cases, the advancement and education of the children. Otherwise, the Court must be satisfied that there are special circumstances that warrant the decree *nisi* being made absolute.¹²⁵
- c) A decree *nisi* shall not become absolute where either of the parties to the marriage has died before the order is made absolute.¹²⁶ Where the decree *nisi* has become absolute by force of law before the death of either of the parties, section 58(4), Matrimonial Causes Act will be inapplicable. In the case of *Dejonwo v. Dejonwo*,¹²⁷ the decree

¹²² Section 56, Matrimonial Causes Act.

¹²³ Section 58(1)(a)(i) and (b), Matrimonial Causes Act.

¹²⁴ Section 58(3)(a), Matrimonial Causes Act.

¹²⁵ Section 57, Matrimonial Causes Act; *Adeyinka v. Adeyinka* (1971) 1 N.M.L.R. 255

¹²⁶ Section 58(4), Matrimonial Causes Act; *Ononuju v. Ononuju* (1991) 5 N.W.L.R. (Pt. 192) 479. By Order XII Rule 6 Matrimonial Causes Rules, if a party or his Legal Practitioner becomes aware of the death of the other party after the decree *nisi*, but before it becomes absolute, that party or his Counsel is required to file an affidavit stating such particulars of the date and place of death as the case is known to him. Thereafter, the Registrar shall file a memorandum to that effect if he is satisfied that the party is dead. (1993) 7 N.W.L.R. (Pt. 306) 483

nisi was made on 16th day of May, 1988 to become absolute in 3(three) months, that is 16th day of August, 1988. On 13th day of November, 1989, the petitioner died. It was held that the subsequent death did not affect the decree *nisi* since it had become absolute by operation of law.

A decree *nisi* may be rescinded by the Court at any time before the decree becomes absolute:

- i. Upon the application of either of the parties to the marriage on the ground that the parties have reconciled.¹²⁸
- ii. On the application of a party to the proceedings, if the Court is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance. The Court may if it thinks fit, order that the proceedings be reheard.¹²⁹

After a decree *nisi* has become absolute, the Registrar of Court, upon application, will issue a certificate as to decree absolute as in Form 40.¹³⁰

Effect of Decree Absolute

By section 33 of the Act, where a decree of dissolution of marriage has become absolute, a party to the marriage may marry again as if the marriage had been dissolved by death.

Decree and Right of Appeal

A party to any proceedings may appeal against the decree *nisi* before it becomes absolute. An appeal against a decree *nisi* must be filed within 3 (three) months.¹³¹ Being a final decision of the High Court, the appeal is as of right by virtue of section 241(1)(a) of the Constitution of the Federal

¹²⁸ Section 60, Matrimonial Causes Act.

¹²⁹ Section 61, Matrimonial Causes Act.

¹³⁰ Order XII Rule 7, Matrimonial Causes Act.

¹³¹ Section 25(2)(a), Court of Appeal Act, Cap. 75, Laws of the Federation of Nigeria, 1990 (Cap C36 LFN 2004)

Republic of Nigeria, 1999.

However, if the party fails to appeal against a decree *nisi* having had time and opportunity of doing so and the decree *nisi* is made absolute, then no right of appeal exists.¹³² The rationale for this constitutional provision is that:

“the parties would have changed their matrimonial position. For instance either of them may have remarried. There might be other circumstances which can hardly be reversed as a result of the dissolution.”¹³³

It should be noted that once an appeal has been duly filed against a decree *nisi*, it acts as a stay to making an order of decree absolute. The Court would be incompetent, to make any order during the pendency of the appeal.¹³⁴

¹³² Section 241(2)(b), Constitution of Federal Republic of Nigeria, 1999.

¹³³ See Nwadior, F, *Civil Procedure in Nigeria*, 2nd Edition, University of Lagos Press 2000 – p. 801; *Nabhan v. Nabhan* (1967) 1 All N.L.R. 47; (1967) N.M.L.R. 130.

¹³⁴ See *Ononuju v. Ononuju; Dejonwo v. Dejonwo* (*Ibid.*)

This book, *Modern Civil Procedure Law*, is an effort to provide a comprehensive and reliable reference material in the study of civil procedure in Nigeria and covers the on-going reforms in the subject in many States, particularly, the adoption in 2004 of new rules of court in Lagos State and the Federal Capital Territory as well as several other States thereafter.

The special advantage of the book lies in the fact that it consists of contributions from specialists in the subject. The contributors are all lecturers at the Nigerian Law School who have taught and practiced civil procedure at one time or the other. Indeed, some of them are either the subject heads or the heads of litigation departments in the various campuses. Their views are therefore based both on their teaching as well as practice experiences. This explains the detailed and comprehensive approach to the topics treated in the 21 chapters of the book.

The book, apart from covering the new rules, deals with other recent developments in the subject. For example, the chapter on 'Election Petitions' is based on the Electoral Act, 2006. Also, the book has given some attention to Alternative Dispute Resolution Mechanisms including the practice and procedure of the court annexed Multi-door Courthouse.

It is written in simple and plain English Language characteristic of teachers and hopefully it will serve as a great companion to both students and practitioners in their research and practice.

