



Legal and Psycho-Social Issues in Divorce and Child Custody.

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Abstract

Marriage is one of the oldest institutions of human history, it is a social contract and traditionally between a man and a woman, Lord Penzance defined it as "the voluntary union for life of one man and one woman to the exclusion of all others". It will be germane to note that whenever a marriage has broken down irretrievably between the contracting parties, then it becomes a reservoir for sometimes intractable legal and social problems. The man and the woman may be happy to unburden the marriage and get a divorce, but the issues of what law and social parameters can work in order to secure the best interests of the issues of marriage(children) sometimes create unfathomable social problems. The scope of this paper is to critically analyze the issues and problems that usually blaze the trail of a failed marriage and what a lawyer and a psychologist would do in the circumstance to propagate and secure the emotional, social, psychological, physical and moral well being of the children of a failed marriage. This research will employ analytical, critical, historical and empirical methodology, the extant laws of the matrimonial causes Act that regulate divorce and custody will be critically analyzed in order to create a comparative confluence between psychology and law in what the researcher will be termed as "psychology of matrimonial causes".

Key words: Legal; Psycho-social; divorce; child custody

Introduction

Marriage is one of the oldest institutions of mankind. It is the coming together of a man and woman for the purpose of procreation and society. Marriage has been defined in the case of Hyde v Hyde which was heard 20 March 1866 before Lord Penzance, and established the common law definition of marriage as "The voluntary union for life of one man and one woman to the exclusion of all others." Statutorily, the registrar's certificate is a prerequisite to the celebration of a valid marriage. In the case of Amobi v Nzegwu (2014) ALL FWLR pt 730, 1285 marriage under the Act has been defined as "the legal union of a couple as spouses". This paper will also include marriage celebrated under the native law and custom as a subsisting marriage where matrimonial mishap can happen to scuttle. It has been held in the case of Motosh v Motosh (2011) ALL FWLR, Pt 584, 81 that:

The essential ingredients of a valid customary law marriage are payment of dowry ceremony, carrying of the bride to the house of the bride-groom must be proved by calling evidence to establish whether there was a valid marriage under the customary law". Once all these are established, then the customary court seized with the jurisdiction to determine the fallout of customary marriage must be guided by the same principles enunciated for the dissolution of marriage and awarding custody under the matrimonial cause Act.

It will be germane to observe that a failed marriage is a gateway to many social and legal vices. It therefore falls within the ambit of those specifically trained to give psycho-socio counseling and therapy to administer the necessary help needed in minimizing the wrecking effect of a failed marriage. It is a fact that divorce can take toll on economic, mental and social wellbeing of the couple, more so, the problems created by custody and division of property can also open an ugly episode in the matrimonial war. The aim of this paper is to create the need for collaboration between law and psychology in solving sometimes the intractable problems associated with crumbling marriage.

The law does not force unwilling spouses upon each other. Whenever the marriage has broken down irretrievably, it is the duty of the court to determine the marriage and give it a decent burial via decree nisi and decree absolute. It has been held in the case of *Amobi v Nzegwu* (2014) ALL FWLR, pt730, 1285, that:

Decree nisi is a courts decree that will become absolute unless the adversely affected party shows the court within specified time why it should be set aside. Decree Absolute is ripened decree nisi that is a court's decree that has become unconditional because the time specified in the Decree nisi has passed".

It is the law that when marriage has broken down irretrievably, it means no more than the parties thereto is irreconcilable, incompatible, incongruous and implacable. Such a relationship is irrecoverable, irreparable and irredeemable. Such a relationship cannot in anyway benefit from any artificial life support. (See *Okoro v Okoro* (2011) ALL FWLR, pt 572,1755.

Saposnek (2004) is of the opinion that in helping couples to successfully negotiate the ending of their marital relationship, it is vital for the divorce professional to understand the underlying dynamics of the family as a system in the divorce process. The professional must grasp how the divorce crisis influences and is influenced by both family structure and family process.



Family is the major casualty of any faulty marriage, therefore viewing the family as a system allows one to conceptualize events that might seem irrational and disparate within a framework that gives meaning and sense to these events. Indeed, the family going through divorce does not break up as can be used in the everyday common man parlance, but rather is restructured and reorganized. As Ahrons and Rodgers (1987) pointed out:

While marriages may be discontinued, families-especially those in which there are children continue after marital disruption... They do so with the focus on the two ex-spouse parents now locate in separate households. Two nuclei to which, children and parents as well as others, must relate.

Ahrons coined the term "binuclear family" to describe this modal form of post-divorce family structure

MATRIMONIAL LITIGATION

A psychologist is one of the qualified persons to check the emotional, mental and social pulse of a troubled marriage. The letters of the law hardly do justice to either of the spouses, but can at best aggravate the anger, desperation and justifications that are the harbingers of divorce. While a legal divorce is an event, occurring when a judge signs a marital dissolution decree, an emotional divorce is best viewed as a process that occurs minimally over several years, and maximally over the course of a lifetime. Typically, the divorce process begins several years before the actual date of separation, when one of the spouses begins to experience a predictable set of feelings, which may include disillusionment, dissatisfaction, anxiety, and alienation. The divorce literature generally suggests that in 75 to 90 percent of all contemporary divorces, one spouse wants out of the marriage while the other does not (Ahrons, 1981; Kaslow & Schwartz, 1987; Kelly, 1982; Kressel, 1985; Wallerstein & Kelly, 1980), with women more often initiating the divorce (Kelly, 1982).

Whenever a marriage has broken down irretrievably, parties are not to result to self help due to the socio-legal implications and consequences that may come up, the best thing to do is to approach a psychologist or other allied helping professionals who will analyze the situation and advised the couple accordingly of the implications of marital severance. After this phase, parties can approach a divorce attorney, seek relevant advice and approach the court for various matrimonial decrees available to disgruntled parties to a valid marriage. Litigation is the "default" method of resolving disputes, meaning that unless the parties agree otherwise somewhere along the way, the issue will be resolved in litigation.

The Matrimonial Causes Act of 1970 regulates the contract, dissolution and other ancillary reliefs of marriage in Nigeria. Section 15 of the Matrimonial Causes Act provides that:

1. A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.
2. The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts-
 - i. That the respondent has wilfully and persistently refused to consummate the marriage;
 - ii. That since the marriage the Respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
 - iii. That since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
 - iv. That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;
 - v. That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;
 - vi. That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;
 - vii. That the other party to the marriage has, for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under this Act;
 - viii. That the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.



3. For the purpose of subsection (2) (e) and (f) of this section the parties to a marriage shall be treated as living apart unless they are living with each other in the same household.

More so, section 16 of the Matrimonial Causes Act provides that:

1. Without prejudice to the generality of section 15(2)(c) of this Act, the court hearing a petition for a decree to of dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in the said section 15(2)(c) of this Act if the petitioner satisfies the court that-
 - 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-
 - 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;

- f. Or the respondent has habitually and wilfully 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, as 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.
2. Where a petition is based on the fact mentioned in section 15(2)(h) of this Act
- i. Proof that, for a period of seven years immediately preceding the date of the petition, the other party to the marriage was continually absent from the petitioner and that the petitioner has no reason to believe that the other party was alive at any time within that period is sufficient to establish the fact in question, unless it is shown that the other party to the marriage was alive at a time within that period; and
 - ii. A decree made pursuant to the petition shall be in the form of a decree of dissolution of marriage by reason of presumption of death.

The above are the key provisions that oversee the dissolution of marriage and the grounds upon which a petitioner can based his/her cause of action for the dissolution of marriage. It will be instructive to observe that the above sections can only be ventilated through litigation, as there is no court of arbitration or mediation that has the jurisdiction to adjudicate on the matters contain therein on the Act. The problem is that none of the methods of dispute resolution are ideal. Each of them has drawbacks which prevents it from being an efficient and reliable method to resolve disputes.



In contrast to litigation, the mediation format, which involves the hiring of a neutral third party whose function is to educate, empower, and enable the couple to negotiate their differences to a settled agreement, is one which is less likely to have a negative psychological impact on the divorcing couples (Folberg & Milne, 1988; Folberg & Taylor, 1984; Haynes, 1981; Lemmon, 1985; Moore, 1986). Unlike litigation, mediation creates a positive negotiation environment in which anxiety is significantly reduced and is replaced by a healthy concern for the issues which confront both parties and for the decisions which each must make. Therefore the mediation process can be said to be therapeutic. Divorce is a very impassioned process, couples go through it in stages, and their emotional content is what determines the type of dispute resolution process they may settle for. If the parties are not severely hurt but just gradually grown apart, then they may chose a mild dispute resolution approach like mediation or arbitration in order not to hurt their social ties within and outside the marriage. But where the issues facilitating the dissolution of marriage are hostile, then parties may chose litigation in order to get revengeful justice against the offending spouse.

Cost of Litigation

The cost of litigation is overwhelming; it can result to emotional and financial bankruptcy. Litigation is adversarial in nature, and it is true that matrimonial conflict comes as a result of personal problems between the spouses. Marriage is rightly described as a social contract, and issues that scuttle it are always painful, personal and pernicious to the mental, physical and social well being of the contracting spouses. An adversarial method of dispute resolution like litigation will go a long way to foist an unending bitterness that will always infuriate the spouses.

Emotional Cost

Matrimonial emotional cost is always predicated on anger and frustration. It is important to note that anger, as manifested in threats of all kinds, is most often a secondary emotion (Saposnek, 2004). That is, it is a feeling that covers up more primary feelings of hurt, fear, humiliation, loss, abandonment, and powerlessness. Without knowing this fact, it is easy for professionals involved in divorce disputes to view the husband's threats as evidence of his violent tendencies, rather than as understandable reactions to a multitude of primary feelings that he may be experiencing (Holmes & Rahe, 1967). If a rejected spouse cannot re-establish the partner's love, at least he can cause that ex-partner enough pain so as not to be completely ignored or forgotten (Kessler, 1975).

Cruelty is another endpoint of the emotional cost of marriage. The spouses can be the victim or the purveyor of this negative attitude. In determining what amounts to cruelty in the matrimonial causes, the court must bear in mind the fact that

cruelty may arise from a single act or an accumulation of acts. The test is objective". See the case of *Williams v Williams* (1966) ALL NLR, P.1775, Para F. It is the law that, the court should consider the entire evidence before it, the appraisal of cruelty should be objective before it can be adjudicated that the conduct of either of the spouses is such that it is likely to cause or produce reasonable apprehension of danger to life, limb or health of the victim-spouse.

Economic Cost

A vital concern of both parties during the litigation stage is their economic survival and sustainability. For most couples, the expense involved in dividing one household into two is considerable. At first, it may seem unfathomable to the parties that they will be able to survive while maintaining two households. This uncertainty may evoke strong feelings of ambivalence, confusion, self-doubt, resentment, and frustration within both parties.

Then, when attorneys begin making offers back and forth (which typically are positioned strongly for tactical purposes), these feelings escalate to an even greater intensity (Saposnek, 2004). While many couples are able to proceed through these negotiations with relative equanimity, it is not uncommon for couples who have always been rather pleasant to each other to begin to act quite viciously toward each other. Partly, this behavior derives from the exaggerated positions taken by attorneys for bargaining leverage, and partly, it derives from the powerlessness and helplessness felt when negotiations are being conducted out of the control (and frequently out of the comprehension) of the parties(Saposnek, 2004).

Mediation as mode of Alternative Dispute Resolution (ADR) has many advantages over litigious attorney negotiations, one of the advantages is to empower the parties to negotiate directly and constructively and to allow each party to experience a feeling of control over the legal process of the divorce.

Custody of Children: Who the Law Covers

According to Young Persons Act, a child is statutorily defined as a person less than 14 years of age, while a young person is between 14-17 years. United Nations Convention on the Rights of a Child defines a child as a person below the age of 18 years. According to Matrimonial causes Act of 1970, a custody in respect of the application of section 71(1) is any person below the age of 21 years.

It can then be put forward that the meaning of a child must in every case depend on the context in which it appears, any issue of the marriage who is below 21 years must benefit from the 'paramount interest" consideration whenever custody of a child is in issue. Custody of the children of the marriage can be another



chapter in the matrimonial battle. This is governed by section 71(1) of the Matrimonial Causes Act of 1970. In *Alabi V Alabi*, it has been held quoting section 71(1) of MCA 1970 that:

In a proceedings relating to custody, guardianship, welfare and advancement of education of the children, the court is enjoined to make the best interest of the children paramount.

Justice Belgore Rtd held in *Odogwu vs. Odogwu* (1992) 2 NWLR (part 225) that:

Welfare of a child is not the material provisions in the house-good cloths, food, televisions, and all gadgets normally associated with the middle class, it is more of the happiness of the child and his psychological development.

It has been held in *Butanhot v Butanhot* (2011) ALL FWLR, Pt 566,555 that, the welfare of the marriage in terms of their peace of mind, happiness, education and coexistence is the prime consideration in granting custody. It is germane to note that, even children not born in wedlock can come in the question during the consideration of custody issues. It is the law in accordance with the case of *Motoh v Motoh* (2011) ALL FWLR, Pt 584, 81 that children born out of wedlock can also be regarded as legitimate children, if the paternity has been acknowledged by the putative father. The custom of legitimization by acknowledgement of paternity and placing illegitimate children in the same position for inheritance as children conceived in a lawful wedlock can only be allowed by the court in so far as it affected illegitimate children not born during the continuance of a statutory marriage. Custody is a very delicate matrimonial exercise which involves in-depth investigation by a psychologist in order to decipher where the paramount interest of the child lies. This is not an easy task, and it is a self evident truth that judges may not be able to do justice in such scenario without being aided by a professional trained in child development and other ancillary areas. It has been held in *Okoro v Okoro* (2011) pt 572, 1759 that:

The determination of welfare of the child is composite of many factors. Consideration such as the emotional attachment to a particular parent, mother or father, the inadequacy of the facilities such as educational, religious, or opportunities for proper upbringing are matters which may affect the determination of who should have custody. What the court deals with is the lives of human beings and ought not to be regulated by rigid formulae.

Conclusion

The psychology of matrimonial causes is predicated on the fact that apart from the criminal system of administration of justice, matrimonial causes is another

important area where a psychologist should have a credible role to play. The services of a psychologist will be invaluable in the statutorily imposed ADR (Alternative Dispute Resolution) that the law imposes upon parties seeking the dissolution of marriage. The aim of this grievances remedial method is for the spouses to try their hands at amicable resolution of dispute. Litigation has a win/lose disposition, and whenever parties go through it, they do not ever come out the same, and this has the tendency to hurt other post divorce proceedings like custody, maintenance and partitioning of property.

In the final analysis, this paper will reiterate the immortal advice of Abraham Lincoln thus:

Discourage Litigation Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often really a loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity at being a good man. There will still be business enough (Abraham Lincoln, 1850).

Psychology can therefore aid law in so many ways, especially in deciphering the intricacies of matrimonial disputes that sometimes can confound even the mind of brightest lawyers and judges alike.

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Biography

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