



NO FAULT DIVORCE AND ITS APPLICABILITY IN NIGERIA AND AUSTRALIA: A COMPARATIVE APPROACH

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ABSTRACT

Marriage is a sacred institution in which the basic unit of society (family) is rooted. Towards preserving the sanctity of marriage and maintaining order in society, States provide guidelines for the celebration and dissolution of marriages. Like the Nigerian Matrimonial Causes Act, (MCA) 1970, the Family Law Act (FLA) of Australia, 1975 provides for a sole ground on which a marriage may be dissolved; which is that the marriage has broken down irretrievably. However, both statutes differ on facts that can be led in proof of this ground. Adopting the doctrinal research method, this paper examines the FLA, 1975 and relevant subsidiary legislation in Australia with the aim of highlighting the procedure for no-fault divorce in Australia, and identifying lessons for Nigeria, if any. The paper finds, among other things, that under the FLA 1975, the provision on living apart as a fact in proof of irretrievable breakdown of marriage recognises that spouses may be living apart while still sharing an accommodation. Unlike the FLA, 1975, the MCA, 1970 tries to strike a balance in its application of the fault and no-fault principles. However, there is room for strengthening its provisions. The paper therefore recommends, among other things, that the MCA, 1970 amended to reflect a definition of 'living apart' that accommodates spouses who are living apart under one roof in Nigeria.

KEYWORDS: Divorce, No-Fault Divorce, Matrimonial Causes, Marriage

INTRODUCTION

Marriage may be defined as 'the state or relationship of being husband and wife.'¹ Lord Penzance's definition of marriage in *HydeHyde*,² as 'The voluntary union for life of one man and one woman to the exclusion of all others.' no longer reflects present realities. The definition has

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¹Chambers 21st Century Dictionary (Chambers Harrap Publishers Limited 1999) 841.

² [1861-1873] All ER 175.



been criticised, among other things,³ on the ground that marriage does not always last for life although society may prefer that marriage should be for life.⁴ States try to protect their interest in preserving families and the interest of society in seeing that people are not held bound in marriages that have broken down irretrievably.⁵ Thus, laws in several jurisdictions, including Australia and Nigeria, allow for the termination of a marriage during the lifetime of its parties. Some of these laws make dissolution of marriage difficult, arguably in a bid to preserve the sanctity of marriage.

Divorce is ‘The legal dissolution of a marriage by a court.’⁶ It has been referred to as the ‘legal death of the marriage’⁷ The Australian Family Law Act,⁸ s4 defines divorce as ‘the termination of a marriage otherwise than by the death of a party to the marriage.’ A divorce is therefore, the formal termination of a valid marriage during the lifetime of its parties. A divorce enables previously married couples to move on and marry other persons if they choose to do so. It frees parties from ‘toxic, unhealthy, and dangerous marriages.’⁹ It helps parties heal from

³ The definition does not capture polygamous marriages under Nigerian native laws and customs. In addition, it does not capture same-sex marriages which are now recognised in at least 36 countries; ‘Marriage Equality around the World’ <www.hrc.org> accessed 25 April, 2024.

⁴ Originally, the Catholic church regarded marriage as ‘monogamous and insoluble.’ In some cultures, divorce was forbidden. Titiklya Barkataki, ‘Sanctity of Marriage-Liberal v Conservative View’ 1, 6 <www.researchgate.net> accessed 22 April, 2022; Rheinstein, Max, *Marriage, Stability, Divorce, and the Law*, 1972 cited in Rishi A Kumar, ‘An Economic Critique of No-Fault Divorce Laws’ *ssrn electronic Journal* March 2022, 3.

⁵ *Blunt v Blunt* (1943) AC 517 cited in *Ononuju v Ononuju* (1991) 5NWL (Pt 192) 493.

⁶ Bryan A Garner, *Black’s Law Dictionary* (9th edition West Thomas Reuters 2009)549.

⁷ H Jonathan, *Law Express Family Law* (5th edition, Pearson, 2015) 47 cited in G.O Akolokwu, ‘Towards the Stability of the Family System in Nigeria: An Examination of the Fault and No Fault Divorce Principles Under the Matrimonial Causes Act 1970’ [2018] (8)(1) *The Journal of Property Law and Contemporary Issues* 329; see also Benedict Chidi Uguanyi and Zbigniew Formella, ‘Psychological Effects of Divorce on Nigerian Women’ [2023] (5)(4) *Sapientia Foundation Journal of Education, Sciences and Gender Studies*, 111.

⁸ No. 53, 1975.

⁹ Uguanyi and Formella (n7).



psychological pains caused by their marriage. Divorce can rightly be said to promote peace in society by reducing violent marriages.¹⁰

The principal statute governing divorce in Australia is the Family Law Act, (FLA) 1975. Relevant subsidiary legislation on divorce in Australia are the Federal Circuit and Family Court of Australia (Family Law) Rule, 2021 and the Family Law Practice Direction: Divorce Proceedings and the Central Practice Direction-Family Law Case Management. The Federal Circuit and Family Court of Australia is vested with jurisdiction to deal with divorce under the FLA, 1975, Part VI.¹¹

The predecessor to the FLA, 1975 was the Matrimonial Causes Act (MCA), 1959. Under the 1959 law, couples had to prove fault to obtain divorce.¹² The MCA, 1959 focused on protecting the institution of marriage;¹³ it contained no express provision for mutual consent divorce and provided only one no-fault ground, to wit: Separation for more than 5years. The MCA 1959 provided very stringent rules on divorce. For instance, the court could refuse to grant an application for divorce on the ground of separation if it considered that, in the particular circumstances of the case, granting the divorce would be harsh and oppressive to the respondent, or contrary to public interest.¹⁴ With time, this predominantly no-fault approach to divorce under

¹⁰ 'Parallel Paths of Divorce: Integrating Fault and No-Fault Theory' 5-6 <<https://www.researchgate.net>>, accessed 17 April, 2024.

¹¹ Federal Circuit and Family Court of Australia Family Law Practice Direction, para 2.1; 'Divorce' *Federal Circuit and Family Court of Australia* <www.fcfoa.gov.au> accessed 29 April, 2024.

¹² 'How Australia Introduced "no-fault divorce" –and why our family law system is under review again' <www.abc.net.au> accessed 22 April, 2024.

¹³ Provisions such as MCA, 1959, s43 provided that except with the leave of court, a spouse could not petition for divorce unless parties had been married for at least 3 years.

¹⁴ See Australian MCA, s37(1), (2) and (3); M Donaldson, 'A Question of Fault: A Short History of Australian Divorce Law Since 1959' [2004] Research Note 3002-4 No. 58 *Parliamentary Library, Department of Parliamentary Services*, 1, <<https://apo.org.au>> accessed 25 April, 2024.



the MCA 1959 became too cumbersome, expensive¹⁵ and unreflective of the disposition of a vast majority of the Australian populace who began to see marriage as not very necessary.¹⁶

This paper discusses the principles of divorce; highlighting their advantages and disadvantages. With particular emphasis on the no-fault divorce provision in the Family Law Act of Australia, the paper examines and highlights the divorce process in Australia with the aim of identifying lessons, if any, for Nigeria.

PRINCIPLES OF DIVORCE

The principles of divorce, also referred to as theories of divorce, are classified into 2 by some writers, to wit: fault-based principle, which is also known as the matrimonial offence principle, and no-fault principle which is also known as the breakdown principle.¹⁷ The principles have also been classified into 3, to wit: fault theory, mutual consent theory and irretrievable breakdown theory.¹⁸ Kumar writes that ‘divorce by mutual consent also comes under no-fault theory and irretrievable breakdown is the ground for seeking divorce when consent is missing.’¹⁹

Divorce by mutual consent is a divorce where parties agree that the marriage has broken down and should therefore be dissolved. It is generally an amicable divorce. With the aid of lawyers, the parties may draw up the terms of the dissolution of their marriage covering issues such as custody and maintenance and file these terms in court. A scrutiny of mutual consent divorce

¹⁵ Donaldson, *Ibid*, 2.

¹⁶How Australia (n12).

¹⁷ See generally, Akolokwu, (n7); Raj Kumar, ‘Irretrievable Breakdown of Marriage as a Ground of Divorce: A Socio-Legal Study’ [2011] (II) *AIR Journal*, 161.

¹⁸Parallel Paths (n10) 3-4.

¹⁹ Kumar, (n17) 161; ‘Understanding the No-Fault Divorce System in South Australia’ *Mahony’s Lawyers Adelaide* <<https://mahonys.net.au>> accessed 4 May, 2024.



laws²⁰ show that they do not require proof of fault. In other words, the no-fault divorce theory accommodates divorce by mutual consent.²¹ Thus, Akolokwu describes no-fault divorce as an uncontested dissolution; a consensual divorce.²² It can correctly be said that there are 2 major principles of divorce. These are the no-fault principle and the fault principle.

Fault Principle of Divorce

Fault divorce emerged from a moral obligation to uphold the sanctity of marriage. Under the fault principle of divorce, the petitioner is required to establish some wrongful act done by the defendant based on which the marriage should be dissolved.²³ Unlike no-fault laws,²⁴ under a fault-based divorce regime, establishing that the other spouse is at fault is critical not only to establish that the marriage has broken down irretrievably, but also because the conduct of parties is one of the factors considered by courts in the award of maintenance.²⁵ Similarly, to determine the best interest of the child which is of paramount consideration in the award of custody, the court may consider the character of the spouses, among other things.²⁶ Thus, fault-based divorces may not favour the party whose immoral character is revealed in the divorce proceeding. For

²⁰ Such as the MCA, s 15(2)(e).

²¹Parallel Paths (n10) 7; Leon Vincent Chan and Andrea Ang S. Min, 'No-Fault Divorce: The Right Direction towards Therapeutic Justice', 6, <www.researchgate.net> accessed 18 April, 2024.

²² Akolokwu, (n7) 331; Chan and Min, *Ibid*, 4.

²³ Akolokwu, (n7) 330; (n10) 2, 6-7.

²⁴ Kumar, (n4) 1.

²⁵ I.P Enemo, *Basic Principles Family Law Nigeria* (Spectrum Books Limited 2008) 252, 256; Akolokwu (n7) 330, 332; MCA, s70(1); *Hayes v Hayes* (200) 3NWLR (Pt 648) 2776 at 293-294.

²⁶ MCA 1970, s71(1); *Nkiru Joy Oduche v Obiefuna Ndubuisi Oduche* (2006) 5NWLR (Pt 972)102.



instance, in **AnyasovAnyaso**²⁷ the character of the appellant was considered in refusing him custody, even though he was the more affluent spouse.

Often, fault-based divorce laws outline the acts, proof of which will sustain a petition for divorce.²⁸ The list in fault-based divorce laws connotes that certain conducts are so morally reprehensible that they could lead to the breakdown of a marriage.²⁹ This raises the question of whether it is possible to draw up comprehensive lists outlining all the wrongs capable of causing irretrievable breakdown of a marriage. It has been argued that ‘in an era of individualism and choice in marital relations’, laws itemising the faults that could only be relied on to ground a divorce are restrictive and undesirable.³⁰ Finley reasons that, considering the complexity of human relations, it is impossible to list every factor that should validly bring a marriage to an end.³¹

Several factors outside the lists such as that contained in the Nigerian Matrimonial Causes Act, 1970 and the repealed Australian Matrimonial Causes Act³² may indeed cause a marriage to break down irretrievably. These include, infertility, lack of trust, stubbornness, religious differences, excessive jealousy,³³ extended family relationship, work, money, past life, present lifestyle, professional rivalry, health issues, et cetera.³⁴ In **OmosebivOmosebi**³⁵ the fundamental

²⁷ (1998) 9NWLR (Pt 564) 150 at 184.

²⁸ See Nigerian MCA, 1970, ss 15 and 16; repealed Australian MCA, 1959, s28.

²⁹ Michael Attah, ‘Prescriptive and Evidential Challenges in Nigeria’s Fault Divorce Regime’ 530, <www.heineonline.com>; <www.researchgate.net> accessed 17 April, 2024.

³⁰ *Ibid* 514.

³¹ H.A Finley, ‘Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce’ [1978] (94) *The Law Quarterly Review* 120 at 122-124 cited in Attah (n29) 518.

³² The Matrimonial Causes Act (MCA), 1959 preceded the Family Law Act, 1975. The MCA, 1959, s28 provided 14 grounds for the grant of divorce. These included adultery, desertion, cruelty, habitual drunkenness, imprisonment and insanity.

³³ *Goodluck v Goodluck* (1979) 7-9 CCHCJ 145.

³⁴ *Bibilari v Bibilari* (2011) 13 NWLR (Pt 1264) 226; Attah (n29) 519-522; Uguanyi and Formella, (n7) 112-114.



issue leading to the breakdown of the marriage was religious differences. In *OkevOke*,³⁶ the fundamental issue appeared to be the inability of the petitioner to bear children for the respondent.³⁷ The incomprehensiveness of the MCA has caused Attah to recommend that parties should be given room to ‘delineate their own fault regime.’³⁸

Fault-based divorce provides a platform for parties to put out some of the most obscene evidence in open court. In their quest to establish fault, decency and the interest of children of the marriage are sometimes jettisoned by parties as they ‘air dirty linens’ in open court.³⁹ Fault-based divorces tend towards acrimony and are known to be messy. In a bid to obtain divorce, parties in fault-based proceedings may abuse the court process by fabricating stories that portray the other party as being at fault.⁴⁰

The difficulty in dissolving a marriage under Fault-based divorce laws is both an advantage and a disadvantage. It is an advantage in the sense that it affords couples time to reconsider their decision to dissolve their marriages and reconcile. Making divorce too easy will indeed reduce the value attached to marriage.⁴¹

No-Fault Principle of Divorce

³⁵ (1985) HCNLR 666

³⁶ [1979] CCHCJ 327.

³⁷ Attah (n29) 520-521.

³⁸ *Ibid* 535.

³⁹ Kumar, (n17) 161; Akolokwu, (n7) 331.

⁴⁰ Akolokwu (n7) 330, 332; ‘(n12).

⁴¹ Akolokwu (n7)330,332, 335; Chan and Min, (n21) 4; M.O Izunwa, ‘Right to Marry and the Revisionist Advocacy: A Fundamental Jurisprudential Re-Reading’ [2012] *NAUJILJ*, 125.



No-fault divorce gives priority to individual autonomy. It de-emphasises fault,⁴² focusing on the breakdown of the marital relationship as a ground for dissolution.⁴³ In no-fault divorces, the court does not delve into specifics but only focuses on the general question of whether the marriage has broken down irretrievably.⁴⁴ Parties can establish that the marriage has broken down irretrievably by leading evidence to show that they have lived apart for the period required by law.⁴⁵

In *RamKalivGopalDas*⁴⁶ it was opined that ‘it would be unreasonable and inhumane, to compel the parties to keep up the façade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife.’ Forcing people to remain together in a bad marriage may lead to an increase in sexual immorality, negative thoughts, suicidal and homicidal tendencies.⁴⁷ Furthermore, it has been argued that ‘it is better for children to live in happy, sole-parent households than in fractured two parent households.’⁴⁸ On this, Akolokwu writes that ‘The rationale for applying this principle appears to be the fact that a couple should not be trapped in an unhappy marriage which is not working out nor should couples who acknowledge that their marriages were doomed to fail be forced to go through the trauma (physical, social, financial and psychological) of proving fault in a divorce court.’⁴⁹ This rationale is supported by the report that the application of the no-fault principle of divorce ‘has

⁴² Kumar, (n4) 2.

⁴³ (n10) 2, 6; (n12).

⁴⁴ (n10) 3, 9.

⁴⁵ Akolokwu, (n7) 331.

⁴⁶ (1971) I.L.R 1 Delhi 10 (F.B).

⁴⁷ Kumar (n17)165.

⁴⁸ Justin and Rohan Wolfers, ‘Divorce is hell, but so is a bad marriage’ *The Sydney Morning Herald* 10 Dec, 2003, 17 cited in (n14) 1.

⁴⁹ Akolokwu (n7) 331.



led to a decline in the rate of domestic violence and female suicide borne out of frustration of being trapped in a loveless marriage.’⁵⁰

The no-fault principle sanitises the divorce process, making it more honest.⁵¹ It creates greater room for civility in the divorce process. Thus, parties are not constrained to ‘air their dirty linens’ in public.⁵² If they proceed to divulge embarrassing information in open court, it would not be because the law has constrained them to do so.

The ease with which divorce is obtained under no-fault divorce laws has been criticised for contributing to juvenile delinquency, neglect, single parenthood and general instability in homes.⁵³ The contention that no-fault divorce laws erode the sanctity of marriage and lead to an increase in divorces throws up the question of whether there is sanctity in an acrimonious, abusive and unhappy marriage. It has therefore been argued that no-fault divorce does not erode the sanctity of marriage, rather it focuses on the way forward in the interest of all parties, especially where there are children of the marriage.⁵⁴ No-fault divorce does not prolong the pain and suffering of parties trapped in marriages that have broken down irretrievably.⁵⁵ Emphasising the merits of no-fault divorce laws, it has been said, and aptly so, that, although married couples no longer need a reason for the breakdown of a marriage, residual fault elements can still be important, particularly when it comes to parenting arrangements. If there is a history of mental illness, substance abuse or domestic violence, this will be taken into consideration by the court when determining parenting arrangements.

⁵⁰*Ibid* 332.

⁵¹*Ibid* 331.

⁵² Attah (n29) 522.

⁵³ (n14), 1; Akolokwu, (n7) 334, 335.

⁵⁴ Chan and Min, (n21) 3,5, 14.

⁵⁵*Ibid*, 11.



The no-fault clause was designed to reduce the hostile nature of divorce, and to encourage alternative dispute resolution and mediation as opposed to confrontation, heated courtrooms and unnecessary character assassinations. It is also aimed at easing the stress of divorce and making it easier for former spouses to maintain civil relations. In turn, this can make it easier for children to deal and come to terms with the divorce of their parents.⁵⁶

It has been said that one disadvantage of no-fault divorce law is that it significantly reduces the bargaining power of women in relation to property maintenance and property.⁵⁷ There has been evidence of increased divorce rates on the introduction of no-fault divorce laws.⁵⁸ Evidence has shown that in Australia, on the initial introduction of no-fault divorce laws, there was a spike in applications for divorce,⁵⁹ but this spike evened out with time.⁶⁰ Over the years, in several countries, there has been a move away from the fault theory of divorce to the no-fault theory of divorce.⁶¹ The Australian Parliament jettisoned their fault-based divorce provisions in 1975.⁶²

NO-FAULT DIVORCE UNDER THE FAMILY LAW ACT OF AUSTRALIA, 1975

Explaining the rationale for the reform of Australian Family Law, the Attorney-General, Lionel Murphy, in 1973, stated that the proposed law was ‘...to enable marriages that have irretrievably

⁵⁶ Watts McCray, ‘Understanding no-fault divorce in Australia’ <www.wattsmccray.com.au> accessed 23 April, 2024.

⁵⁷ Kumar, (n4)7; Maley has advocated for a review of the Australian No-Fault divorce law arguing that if establishing marital fault affects sharing of marital property, people would behave with more care in marriages and would not be hasty in petitioning for divorce. (n14) 1; (n12).

⁵⁸ Akolokwu, (n7) 331.

⁵⁹ Michael P. Kudd, ‘The Impact of Legislation on Divorce: A Hazard Function Approach’ 125, <www.researchgate.net> accessed 23 April, 2024.

⁶⁰ (n12).

⁶¹ Kumar, (n17) 161; Kumar, (n4) 1, 5-6; Akolokwu, (n7) 331, 332.

⁶² H.A Finley, ‘The Grounds for Divorce: The Australian Experience’ [1986] (6)(3) *Oxford Journal of Legal Studies* 368, 371 cited in Attah (n29) 518.



broken down to be dissolved by simple, dignified, inexpensive proceedings held in private’⁶³ The Family Law Act, 1975 of Australia was enacted under the government of Prime Minister Gough Whitlam to govern the entire country.⁶⁴ This Act introduced a federal court to handle family issues and provide counselling services. The Family Law Act, s.48 of the Act provides that:

- (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.
- (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.’
- (3) A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

Elucidating on what living separately and apart means within the context of the Act, the Family Law Act, s.49 provides that:

- (1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.

⁶³ Cabinet submission No.777, Nov 1973, at <http://naa12.naa.gov.au> cited in (n14) 2.

⁶⁴ Kumar (n17) 163.



- (2) The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

The provision above recognises separation under one roof. It recognises that couples may be living apart but remain together in one accommodation. Thus, Couples may live together in the same household but still be construed to be living apart if they are able to furnish evidence via affidavit that they, for instance, sleep in separate bedrooms, cook and clean separately, do not have a sexual relationship with each other, announced their separation to friends and relatives, and basically live separate lives; live independently of each other. The applicant(s) in this affidavit, should also furnish reasons why he/she/they continue(s) to share a home with the other spouse and if plans are ongoing to change the accommodation situation. This affidavit evidence must be corroborated by another affidavit filed by an independent third party. This independent third party should be someone who was able to directly observe the living conditions. The said party may be a friend, relative or neighbour.⁶⁵

Qualification for Divorce

Only couples in a valid marriage can apply for a divorce. The Australian No-Fault divorce provision simply requires couples who intend to divorce to have lived apart for a minimum of 12

⁶⁵ FCFOA Rules 2021, Rule 50; 'How to apply for a divorce' *Federal Circuit and Family Court of Australia* <<https://www.fcfoa.gov.au>> accessed 4 May, 2024; 'Separation under one roof' *The Family Court of Western Australia* <www.familycourt.wa.gov.au> accessed 25 April, 2024; 'Separation Laws in Australia: Understanding the Legal Process of Separation Before Divorce' *Matthies Lawyers* <www.matthieslawyers.com.au> accessed 15 April, 2024; 'How do I prove I am separated under one roof?' *damiengreer lawyers* <www.damiengreer.com.au> accessed 25 April, 2024.



months immediately preceding the date of filing⁶⁶ the application for divorce. In other words, under the Australian Family Law Act, 1975 the fact that a married couple have lived apart for, at least, 12 months is conclusive proof that the marriage has broken down irretrievably. The consent of the other spouse is not required. To apply for divorce in Australia, either of the parties must:

- a. regard Australia as their home and intend to live in Australia indefinitely; or
- b. be an Australian citizen by birth, decree or by grant of Australian citizenship, or
- c. live in Australia and have done so for 12 months immediately before filing for divorce.⁶⁷

Application

A divorce proceeding in Australia is instituted via an Application for divorce.⁶⁸ This application is accompanied by an affidavit setting out relevant facts to ground the divorce.⁶⁹ Applications for divorce are to be supported by a copy of the marriage certificate; if the marriage certificate is not in English, a translation of the Marriage Certificate accompanied by an affidavit deposed to by the person who made the translation verifying the translation and setting out his qualifications as a translator; and concerning an application for divorce which is being filed within 2 years from the date of the marriage, the FLA provides that:

An application for a divorce order in relation to a marriage shall not, without the leave of court granted under subsection 1C, be

⁶⁶ The relevant time in the calculation of 12 months is the date of the filing of the application for divorce not the date of the hearing of the application for divorce. ‘Separation under one roof’ (n65).

⁶⁷ Applicants that fall under this category are required to produce evidence such as a passport or valid visa; ‘Divorce’ *Federal Circuit and Family Court of Australia* <www.fcfcga.gov.au> accessed 29 April, 2024.

⁶⁸ Family Court (FC) Rules, 2021, Rule 26, item 8; Applications for divorce can be done electronically via the Federal Circuit and Family Law Court of Australia’s online system. ‘How long does divorce take in Australia’ *Daykin Family Law* <<https://daykinfamilylaw.com.au>> accessed 29 April, 2024.

⁶⁹ FC Rules, 2021, Rule 27, item 6; Family Law Practice Direction,(n11) paras 2.11 and 2.12 .



filed within the period of 2 years after the date of the marriage unless there is with the application a certificate:

- (a) stating that the parties to the marriage have considered a reconciliation with the assistance of a specified person; who is:
 - (i) a family counsellor; or
 - (ii) if the court is the Family Court, the Federal Magistrates Court or the Family Court of a State-an individual or an organisation nominated for the parties by a family consultant; or
 - (iii) if the court is not the Family Court, the Federal Magistrates Court or the Family Court of a State- an individual nominated for the parties by an appropriately qualified officer of the court; and
- (b) signed by that person or on behalf of that organisation, as the case may be.⁷⁰

The provision above ensures that parties, who seek to dissolve their marriages without leave of court within 2 years of contracting the marriage, interact with persons who are equipped to offer them counselling services. These persons are required to give the parties a certificate to prove compliance with the provision above.

In Australia, an application for divorce may be a sole or joint application.⁷¹ In sole applications, one party files the divorce application without the other. The other spouse is therefore referred to as the Respondent. A sole applicant will need to serve the divorce papers on the Respondent.⁷² In a joint application, both spouses file for divorce together. One spouse completes the application

⁷⁰ FLA, 1975, s44(1B); Family Law Practice Direction(n11)para 2.6(c).

⁷¹ Family Law Practice Direction *Ibid*, para 2.5.

⁷² Family Law Practice Direction, *Ibid*, paras 2.16 and 2.17; ‘How long does divorce take in Australia’ (n68).



and gives a copy to the other spouse to review and append his signature. The application thus does not require service on the spouses.⁷³

Service and Response to Application

In the case of a sole applicant, once the divorce has been filed and served, the other party has 28 days (if they are in Australia) or 42 days (if they are outside Australia) to respond to the application for divorce.⁷⁴ A respondent may oppose the divorce⁷⁵ or contest the jurisdiction of the court by filing a response to the application for divorce.⁷⁶

After filing, the response must be served on the applicant as soon as practicable.⁷⁷ A respondent who does not oppose the divorce but who disagrees with some of the facts set out in the divorce application ‘may, at least 7 days before the date fixed for the hearing of the application file and serve an affidavit setting out the facts in dispute.’⁷⁸ If disagreements arise over issues such as the date of separation or custody, mediation may be suggested.⁷⁹

Hearing

The Registry Manager fixes dates for the hearing of applications.⁸⁰ In a sole application, if there are children of the marriage under the age of 18, the sole applicant will need to appear in court for hearing of the divorce.⁸¹ In addition ‘if the respondent files a response to an application for divorce, the hearing must proceed in open court and each party must attend the hearing or be

⁷³ Family Law Practice Directions *Ibid*, para 2.15.

⁷⁴ FC Rules, 2021, Rule 39(a) and (b); Family Law Practice Direction *Ibid*, para 3.3.

⁷⁵ A party who wants to oppose an application for a no-fault divorce may, for instance, do so on the ground that the parties have not been separated for the minimum period stipulated by law.

⁷⁶ FC Rules, 2021, Rules 39 and 40; Family Law Practice Direction (n11) para 3.1.

⁷⁷ Family Law Practice Direction (n11) para 3.4.

⁷⁸ FC Rules, 2021, Rule 42.

⁷⁹ ‘How long does divorce take in Australia’ (n68).

⁸⁰ FC Rules, 2021, Rule 36(1).

⁸¹ ‘How long does divorce take in Australia’ (n68).



represented at the hearing by a lawyer.⁸² The hearing date must be fixed at least 42 days after the application is filed, if the respondent is in Australia. If the respondent is outside Australia, the hearing date must be fixed at least 56 days after the filing of the application.⁸³ A party may apply to attend the divorce hearing via electronic means.⁸⁴

In a joint application, the hearing date must be fixed at least, 28 days after the filing of the application.⁸⁵ If there are no children of the marriage under the age of 18 at the time of filing the application, the parties will not be required to attend the divorce hearing.⁸⁶ The Court may determine an Application for Divorce in the absence of the parties where;

(a) In a sole application:

- (i) A Response for Divorce has not been filed;
- (ii) At the time of the divorce hearing, there are no children of the marriage within the meaning of subsection 98A(3) of the Family Law Act;
- (iii) Either the applicant or the parties have jointly requested that the proceeding be heard in the absence of the parties; or
- (iv) The respondent has not objected to the proceeding being heard in the absence of the parties; or

(b) In a joint application:

- (i) The parties have jointly requested the proceeding be heard in their absence; or
- (ii) One party has requested the proceeding be heard in the absence of the parties and the order has not been objected.⁸⁷

⁸² FC Rules, 2021, Rule 39(2).

⁸³ FC Rules, 2021, Rule 36(2)(b); Family Law Practice Direction (n11) para 2.21.

⁸⁴ *Ibid*, Rules 43 and 81.

⁸⁵ FC Rules, 2021, Rule 36(2)(a); Family Law Practice Direction (n11) para 2.20.

⁸⁶ *Ibid*, Rule 45; Unless otherwise advised, all divorce hearings are heard via electronic means. Family Law Practice Direction (n11) para 4.1; 'How to apply for a divorce' (n65).

⁸⁷ Family Law Practice Direction (n 11) para 4.2; see also *Ibid* para 4.4.



If none of the above applies or the court directs otherwise, the applicant must attend court or be represented by a lawyer.⁸⁸

Divorce order

The judicial officer⁸⁹ will review the documents filed to ensure that all the requirements for divorce have been met. If all the requirements are complied with and the court is convinced that adequate provisions have been made for children of the marriage (if any), then a Divorce Order will be issued.

Generally, the Divorce Order becomes absolute at the expiration of one month after the Divorce Order was issued by the Court.⁹⁰ Before the Order nisi becomes absolute, a party may file an application asking that the Order be rescinded. Applications may also be made for the extension or reduction of the waiting period between the grant of the Divorce Order Nisi and when the Divorce Order Nisi becomes absolute.⁹¹ Where there are children of the marriage, a Divorce Order Nisi will not become absolute until the court by order, declares that it is satisfied:

- (a) That there are no children of the marriage who have not attained 18 years of age; or
- (b) That the only children of the marriage who have not attained 18 years of age are the children specified in that order and that:

⁸⁸*Ibid* para 4.3.

⁸⁹ Family Law Practice Direction (n11) para 2.22.

⁹⁰ FLA, 1975, s55(1)(a); Family Law Practice Direction, (n11) para 4.7; after the divorce order nisi becomes absolute, the divorce order can be downloaded from the commonwealth courts portal. 'How to apply for a divorce' (n 65).

⁹¹ FCFOA Rules 2021, Rule 47; Family Law Practice Direction, (n11) para 2.8.



- (i) Proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or
- (ii) There are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.⁹²

Issues pertaining to parenting arrangements, custody, maintenance, et cetera, can be resolved via dispute resolution. Parties may reach an agreement and file it in court. Where spouses are unable to reach an agreement on these issues without the aid of the court, applications for custody and settlement of property⁹³ can be made before the divorce order is issued. However, when the Divorce Order becomes final, a party has 12 months within which to apply to court for property settlement and/or spousal maintenance. After the expiration of this time frame, parties would require leave of court to file for property settlement.⁹⁴

NO-FAULT DIVORCE IN NIGERIA

The Matrimonial Causes Act, 1970 was patterned largely after the Australian Matrimonial Causes Act, 1959⁹⁵ and the Divorce Reform Act 1969 of England⁹⁶ both of which reflected the matrimonial offence theory of divorce.⁹⁷

⁹² FLA, 1975, ss55(1)(b) and 55A.

⁹³ 'A divorce property settlement refers to the process through which assets, debts and finances are divided between both parties after separation.'; 'How long does divorce take in Australia' (n68).

⁹⁴ Carolyn Mckenna, 'How long does it take to get a divorce in Australia' *Damiengreer Lawyers* <<https://damiengreer.com>> accessed 29 April, 2024.

⁹⁵ The Australian 1959 was similar to the Divorce and Matrimonial Causes Act of New Zealand. S.A Adesanya, 'Separation, Non-Objection and Fault under the Matrimonial Causes Decree, 1970 of Nigeria: A Comparative Study with English and Australian Laws' 17, <<https://sollib.ug.edu.gh>> accessed 25 April, 2024.



In Nigeria, the institution of marriage is celebrated and highly regarded. Divorce, on the other hand, is stigmatised.⁹⁸The regime for divorce in Nigeria is reflective of a society that still cherishes the institution of marriage. The MCA, 1970, ss15 and 16 contain provisions for dissolution of marriages in Nigeria. The MCA, s15(1) makes irretrievable breakdown of marriage the sole ground on which a marriage may be dissolved in Nigeria.⁹⁹ In **Ekrebe v Ekrebe**¹⁰⁰ court stated that: As far as the law is concerned, for any divorce petition to succeed, the petitioner must plead and prove one of the grounds contained in section 15(2)(a)-(h) of the Matrimonial Causes Act 1970. If the petitioner, therefore, for any reason fails to plead and prove any of the grounds stated in the law, the petition must be dismissed even if the dissolution of the marriage is desired by both parties.

Thus in Nigeria, the burden is on the petitioner to lead evidence in line with one of the facts listed in the relevant sections of the MCA, before the court can hold that indeed the marriage has broken down irretrievably and consequently worthy of dissolution.¹⁰¹

Captured in the facts listed in the MCA, ss15 and 16 are the Fault and No-Fault principles of divorce. While the MCA, ss15(2)(e) and (f) reflect the no-fault principle,¹⁰² the other facts are

⁹⁶ Cap 55 1959.

⁹⁷ Akolokwu, (n7) 329.

⁹⁸ Uguanyi and Formella, (n7) 111, 116.

⁹⁹ Ibijoke Pat Byron, 'Matrimonial Causes' in Omolade O Olomola (ed), *Family Law and Succession in Nigeria* (Princeton Associates Publishing Co Limited 2021) 253-259.

¹⁰⁰ [1999] 3 NWLR (Pt 596) 514 at 523.

¹⁰¹ See *Ibrahim v Ibrahim* [2007] 1 NWLR (Pt 1015) 383 at 402; Attah, (n29) 532-534.

¹⁰² *Antoniette Beatrice Akioye v Olufemi Olutayo Akioye and Adewumi Jeboda*, Suit No CAW/90/71 (unreported); Itse Sagay, *Nigerian Family Law: Principles, Cases, Statutes and Commentaries* (Malthouse Press Limited 1999) 346; Margaret C Onokah, *Family Law* (Spectrum Books Limited 2003) 221; Olomola (n99) 254-255.



reflective of the fault principle.¹⁰³ One of the provisions¹⁰⁴ on no-fault principle reflects the mutual consent theory. To utilise the no-fault divorce provisions in Nigeria, a petitioner would have to lead evidence to show ‘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.’¹⁰⁵ The petitioner may also utilise this principle in Nigeria by leading evidence to show ‘that the parties of the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;’¹⁰⁶

The MCA, s15(3) provides that ‘For the purposes of subsection 2(e) and (f) above the parties to a marriage shall be treated as living apart unless they are living with each other in the same household.’ Unlike the Australian provision on ‘living apart’, the MCA does not provide for living apart under one roof. This has led to uncertainty concerning whether parties can validly be said to be living apart while still sharing an accommodation. Byron¹⁰⁷ writes that living apart ‘involves physical separation accompanied by termination of consortium.’ Relying on English cases, Sagay disagrees with this position.¹⁰⁸ Enemo explains that ‘living apart will only exist if the husband and wife are no longer living as one household.’¹⁰⁹ There is therefore need for the MCA to expressly provide for living apart under one roof.

¹⁰³ *Bibilari v Bibilari* (2011) 13 NWLR (Pt 1264) 226.

¹⁰⁴ The MCA, s15(2)(e); Akolokwu, (n7) 329, 336.

¹⁰⁵ MCA, 15(2)(e).

¹⁰⁶ MCA, 15(2)(f).

¹⁰⁷ (n99) 253.

¹⁰⁸ *Hollens v Hollens* 115 Sol Jo. 327; *Fuller v Fuller* (1973) 2 All ER 650; Sagay, (n102) 376; see also Adesanya, (n95) 27.

¹⁰⁹ Enemo (n25); see also *Sabastian Ezirim and Theresa Nwagwu v Theresa Ezirim* Suit No. FCA/L/56/78 (unreported) 1981; Sagay (n102) 372-376.



The no-fault principle under the MCA provides enough room for the parties to consider reconciliation. It allows for inflamed passions to cool; in recognition of the fact that rash decisions may be made when passions are inflamed. A marriage where parties have lived apart for 2 years, can safely be said to have broken down irretrievably.

Generally, in Nigeria a successful divorce petition ends with a decree nisi which becomes absolute after 3 months.¹¹⁰ However, the waiting period may be extended or reduced.¹¹¹ Where there are children of the marriage who are under the age of 16, a decree nisi would not become absolute unless the court by order¹¹² has declared

- (a) That it is satisfied that proper arrangements in all circumstances have been made for the welfare and, where appropriate, the advancement and education of those children; or
- (b) That there are such special circumstances that the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.¹¹³

In compliance with the above provision, the court, in *AnyasovAnyaso*¹¹⁴ held that ‘A decree nisi should not be made absolute until the court is satisfied as to the arrangements made for the upbringing of the child of the marriage, and a decree absolute made on an inadvertent non-compliance with the custody and maintenance of the child should be declared void.’

¹¹⁰ MCA 1970, ss 56 and 58.

¹¹¹ MCA, 1970, s 58(2) and (3).

¹¹² MCA, 1970, s58(1)(a).

¹¹³ MCA, 1970, s57(1).

¹¹⁴ (1998) 9NWLR (Pt 564) 150; see also *Oyewole v Oyewole* (1987) 2 NWLR (Pt 56) 239.



Furthermore, a decree nisi may be rescinded by the court on the application of the parties, on the ground that the parties have reconciled.¹¹⁵ The decree nisi may also be rescinded by the court, on the application of a party, if the court is satisfied that ‘there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence’ et cetera.¹¹⁶

The MCA, 1970 contains provisions on reconciliation¹¹⁷ but they do not focus on counselling before the petition is filed. The Matrimonial Causes Rules, 1983, Order II, Rule 2 attempts to fill this void by requiring a solicitor who is representing a party in divorce proceedings being instituted based on facts other than that specified in MCA, s15(2)(h), to file alongside the divorce processes, a certificate stating, among other things, that he has brought the provisions of the MCA on reconciliation to the attention of his client and informed his client of facilities available to assist reconciliation of the spouses. The provisions of the MCA¹¹⁸ and Matrimonial Causes Rules¹¹⁹ on counselling are inadequate because, concerning counselling before filing a petition for divorce, all that is required is that before commencing the divorce process lawyers should file a certificate stating that they have advised their clients on the provisions for counselling. There is the tendency for lawyers to simply file this certificate as a matter of course.

CONCLUSION

Just as personalities differ and conflicts are part of human existence, divorces are bound to happen. The Family Law Act, 1975 of Australia provides for the dignifying dissolution of

¹¹⁵ MCA, 1970, s60.

¹¹⁶ MCA, 1970, s61; see also MCA, 1970, s66.

¹¹⁷ MCA, 1970, ss11 to 14, and 17.

¹¹⁸ MCA, 1970, ss 12-14, 17.

¹¹⁹ Matrimonial Causes Rules, 1983, Order II, Rule 2.



marriages via no-fault divorces. Its Nigerian counterpart, the MCA, 1970, while protecting the institution of marriage by requiring proof of fault from parties who have not been separated for at least 2 years, also provides for no-fault divorce.

The process used in initiating divorce in Australia is referred to as an application whereas in Nigeria it is referred to as a petition. Thus, a person who files for divorce is referred to as an Applicant in Australia and a Petitioner in Nigeria. Furthermore in Australia, the pronouncement of court dissolving a marriage is referred to as a Divorce Order Nisi, whereas in Nigeria it is referred to as a Decree Nisi. In both jurisdictions the pronouncement becomes absolute after a waiting period.

Currently, divorce in Australia could be obtained administratively. It can be done without lawyers.¹²⁰ It is therefore not surprising that Australia experienced a surge in divorces within the first year of the implementation of the Act. Describing the first day of the Family Court's opening in Australia, Swain writes that 'the courts were completely overwhelmed. ...There's these huge queues of people because there's this great pent-up demand of people who actually were no longer living together who wanted to get a divorce but had not been able to do it under the previous situation.'¹²¹ However, after a few years the number of divorces in Australia dwindled. The introduction of no-fault divorce laws did not do away with acrimony in all divorce proceedings as some parties still managed to be acrimonious in their no-fault divorce proceedings.¹²² Noteworthy, is the fact that the FLA, 1975 provides that where spouses desire to dissolve their marriage without leave of court within 2 years of its celebration, the application for

¹²⁰ (n14) 2.

¹²¹ (n12); Kumar, (n4) 26.

¹²² (n12).



divorce should be accompanied by ‘a certificate from a marriage counsellor or other specified person or organisation certifying that the parties have attended counselling and/or considered reconciliation.’¹²³

Divorce has multiple impacts on children, spouses and the society.¹²⁴ Divorcing parents preoccupied with establishing fault, may neglect the children of the marriage.¹²⁵ Sometimes, divorced spouses and their children are stigmatised.¹²⁶ It is therefore important that divorce laws provide the option of No-Fault divorces because No-Fault divorces de-emphasise fault thereby reducing the opportunities of parties reliving the ills of their marriage in open court. Parties who wish to utilise the No-Fault divorce laws should be prepared to first separate from their spouse for the period stipulated by law.

The Australian Family Law Act, 1975 makes divorce quite easy by allowing parties to apply for dissolution of their marriage too early during separation; that is, after 12 months of separation without establishing fault. The Nigerian MCA, 1970 does a good job of striking a balance between the preserving the sanctity of marriage and the need for couples not to be tied to dead and dysfunctional marriages;¹²⁷ parties have to be separated for a longer period under the Nigerian MCA, 1970 before utilising No-Fault divorce. This way the MCA gives parties more time to reconcile.

RECOMMENDATIONS

¹²³ FLA, 1975, s44(1B); Family Law Practice Direction, (n11)para 2.6

¹²⁴ Akolokwu (n7) 334; Chan and Min, (n21) 25.

¹²⁵ Chan and Min, (n21) 3, 14-15.

¹²⁶ Akolokwu, (n7) 334; (n14) 2.

¹²⁷ Adesanya, (n95) 38.



To strengthen the legal framework for divorce in Nigeria it is recommended that, like the Australian Family Law Act, 1975, clear provisions on ‘living apart under one roof’ should be inserted in the Nigerian MCA, 1970 to put an end to the uncertainty in this area of the law.

Furthermore, the MCA, 1970 should be amended to reflect a provision on counselling similar to that contained in the FLA, s44(1B). This provision makes couples seeking dissolution of their marriages within 2 years of its celebration engage in some level of interaction with counsellors before the commencement of the suit, except the court grants them leave to do otherwise. Alternatively, the provisions in the Nigerian Law relating to reconciliation should be strictly observed by the parties and the court should ensure that there is empirical evidence that there were reconciliation efforts or meeting(s) before a known person who can be invited by the court to confirm it.