

Nigerian Institute of Advanced Legal Studies

CHAIRMAN, GOVERNING COUNCIL
Hon. Dr. Umaru Ibrahim Tahir Muhammad, C.M. CFR
FCIM, FIDA, FIDA, FIDA

DIRECTOR - GENERAL
Professor Muhammad Tawfiq Ladan, PhD



ABUJA OFFICE
Supreme Court Complex,
Three Arms Zone,
Abuja, Nigeria.

LAGOS OFFICE
University of Lagos Campus Akoka,
P.M.B. 12620,
Yaba, Lagos - Nigeria.
E-mail: info@nials.edu.ng
www.nials.edu.ng

Our Ref:

Your Ref:

Date: 27th May 2020.

Barakat Adebisi Raji
Department of Jurisprudence and International Law
University of Ilorin
Kwara State,
Nigeria

Dear Mr. Raji,

LETTER OF ACCEPTANCE

We are please to inform you that your paper titled: "Ensuring Better Justice in Settlement of Property Upon Divorce under Nigerian Law: Lessons from other Jurisdictions" and forwarded to us for publication in our NIALS Journal of Public Law Volume 2 has been received from our assessors and is adjudged publishable.

Therefore, it is accepted for publication in our journal.

Thank you for choosing to publish your paper with us.

Accept our assurances.

Yours faithfully,

Ibe Okegbé Irekandu (Ph.D.)
Editor

Ensuring Better Justice in Settlement of Property Upon Divorce Under Nigerian Law:

Lessons from Other Jurisdictions

Grace Ogonda Akolokwu and Barakat Adebisi Raji¹

ABSTRACT

Divorce all over the world gives birth to some issues which if not properly addressed will negatively impact on the couple and the products of the marriage for life. One of the greatest challenges usually faced by couples after divorce is lack of adequate provisions on the custody of all children or a particular child; maintenance of parties and of course settlement of property acquired by the couple during the subsistence of such marriage under the Nigerian law. The question of which party should have what is still a subject and yet to be settled by our courts. In view of the importance of this issue therefore the paper examines the provision of the Nigerian Matrimonial Causes Act (MCA) 1970 with respect to settlement of property after divorce. The paper found that settlement of property after divorce under the above Act is inequitable and discriminatory against the woman. The paper concludes by advancing the way forward especially in the context of the provision of S. 72(2) of the MCA 1970 and recommends that the Act should be amended to inter alia recognize prenuptial agreements of a couple on division of the property of the marriage or equitable distribution of the property where prenuptial agreement by the couple does not exist.

KEYWORDS: Justice; Settlement of Property; Divorce; Nigerian law

1. Introduction

Divorce in Nigeria often leaves the woman with the wrong end of the stick prompting Imam² to state that "the consequences of divorce are more severe for women than men. Women are more economically worse off after marriages are dissolved." The issue of settlement of property between couples upon the dissolution of marriage is topical and germane especially amidst the treatment of women in Nigeria as second class to men in matrimonial matters. In the case of *Akinnubi v Akinnubi*,³ the Supreme Court affirmed that the custom in most Nigerian communities is that a widow is regarded as a mere chattel, a part of her deceased husband's property and is inheritable by her deceased husband's male relatives. It is also true that most men supported by custom and tradition regard their wives as

¹ Grace Ogonda Akolokwu, Department of Private and Property Law, Faculty of Law, Rivers State University, Port-Harcourt, Nigeria; Tel. no: 08033088836; E-mail: grakons@yahoo.com or grace.akolokwu@rsust.edu.com and Barakat Adebisi Raji, Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin, Nigeria; Tel. no. 08069708591; E-mail: babbaraj2007@gmail.com or raji.ba@unilorin.edu.ng

² Ayesha Imam cited in "Nigeria: Divorce Law and Practices among Christians including Grounds, Procedures, Length of Process, Property Dispositions, Child Custody and Consequences for the Woman and her Family" [2012] cited in < <http://www.ecoi.net/local/link/231461/1330960> > accessed 14th October, 2015; Philip Bukola, Oyewole, 'A Critical Analysis of Marital Instability among Yoruba Christian Couples in the North West of England' (PhD diss., University of Liverpool, 2016), 18-21.

Ayesha Imam cited in Nigeria: 'Divorce Law and Practices among Christians including Grounds, Procedures, Length of Process, Property Dispositions, Child Custody and Consequences for the Woman and her Family' <<http://www.ecoi.net/local/link/231461/1330960>> accessed 14th October, 2015.

³ *Akinnubi v Akinnubi* (1997) 4 NWLR, Part 486, p. 144.

their property⁴ especially after the payment of the bride price or what many consider to be the purchase price of the woman.⁵

This demeaning position is oftentimes carried forward into the marriage where a husband would insist that his wife leaves her job and career to become a full time housewife and mother to the children only to conveniently forget this sacrifice at the point of divorce. The woman's economic role in the family which becomes reversed by the husband's dictates and supported by custom is not usually considered, it is in fact completely ignored by the law in dividing marital property between the divorcing couple. Oftentimes the courts would only consider financial contributions towards the purchase of the property which would of course have been purchased by the working husband and in his name. The fact that it was the husband who stopped the wife from working and stifled her career development is not usually averted to by the courts. It is indeed a complex situation as advanced by Ifemeje who stated that "the allocation and re-allocation of property on divorce is a large and complex area of family law."⁶ Addressing questions of balancing non financial contributions of a spouse to the easily quantifiable financial contributions of another are germane and may arise in ensuring an equitable settlement of property between divorced persons. Do our laws not discriminate against women in the sharing of marital property despite the fact that many women help their husbands achieve emotional stability which help them performing well in their various offices, but when they separate or divorce, the man keeps everything while both the woman and her child (ren) leave with nothing.

2. Divorce Under Nigerian Law

Divorce is generally described as a total breakdown of marriage and the suspension of conjugal rights of persons joined in marriage by the law. It is defined as "the legal death of the marriage."⁷ It is the legal dissolution of a valid marriage by a court or a competent body so authorized by law.⁸ A divorce is thus a court order establishing the state of non-existence

⁴M. O. Izzi, 'The Plight of the Girl-Child under Esan Customary Law' [2000] (3) *Journal of Commercial, Private and Property Law*, 93.

⁵M. Ndulo, 'Comparative Perspectives' [2015] (29) (1) *International Journal of Law, Policy and the Family*, 121-131; S. C Ifemeje, 'Contemporary Issues in Nigerian Family Law' (Nolix Publications: Nigeria, 2008): 161.

⁷H. Jonathan, 'Law Express Family Law' (5th edition, Pearson, 2015), 47; D. O. Ayogu, 'Personal Factors as Correlates of Adjustment Patterns of Divorcees in Enugu State' [2009], (Doctoral Dissertation, University of Nigeria, Nsukka).

⁸M. E. Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' [2015] (15) (2), *African Studies Quarterly*, 85.

of a marriage that is, the dissolution of the marriage by judicial decree or order. The effect of a decree of divorce is to break the marriage contract between the spouses.

Under the Nigerian law, the authority to end a marriage through a divorce resides with the High court of a State. By the provisions of Matrimonial Causes Act⁹ (hereafter referred to as the MCA 1970) the dissolution of marriage entered into under the Act shall be through "a petition under this Act by a party to a marriage for a decree of dissolution of the marriage presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably." To determine when a marriage has broken down irretrievably, section 15(2) (a) – (h); provides eight instances of such. Where a petitioner satisfies the court of that one or more of the enumerated facts in section 15(2) exist between the couple, it suffices the court to hold that the marriage has broken down irretrievably. One of the celebrated cases in this regard is the case of *Hardy v Hardy* where the respondent had wilfully and persistently refused to consummate the marriage. Court will not only pronounce the breakdown of the marriage but the refusal must be with the conscious and free act of the spouse. The above ground for divorce in Nigeria are facts listed¹⁰ which must be proved to establish the ground of irretrievable breakdown of the marriage. These facts are the wilful and persistent refusal to consummate the marriage; the respondent's adultery which the petitioner finds intolerable; spouse's unreasonable behaviour; desertion for at least one year; non compliance with the decree of restitution of conjugal rights and presumption of death. The leave of court can only be granted when the petitioner discloses exceptional hardship which he or she will suffer if the petition is disallowed or an exceptional depravity manifested by the respondent which puts the petitioner to a great disadvantage by section 30 (5). These must be proven to the satisfaction of the court and it is for the court to decide on what would constitute such exceptional hardship or depravity.

3. Statutory Provisions on Settlement of Property Upon Divorce in Nigeria

The MCA 1970¹¹ provides for the power of the court in proceedings with respect to settlement of property upon a divorce in Nigeria. According to the provisions in subsection 1, "the court may in proceedings under this Decree by Ordering the parties to the marriage, or either of them to make for the benefit of all or any of the parties to and the children of the marriage, such a settlement of property to which the parties are, or either of them is entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case; while subsection 2 provides that the court may in proceedings under this Act, make such order as the court may consider just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of the marriage of the whole or part of the property dealt with by ante-nuptial or post-nuptial settlements on

⁹S.15 Matrimonial Causes Act 1970, Cap M7-1 Laws of the Federation of Nigeria, 2004; Bright E. Oniha, 'Dissolution of Marriage and Custody of Children under Customary law in Nigeria' [2017]: 1.

¹⁰S. 15(2) (a-h), *ibid*.

¹¹S.72, *ibid*, Owolabi, Adedeji, 'Maintenance Under The Nigerian Statutory Family Law: A Critical Appraisal' [2003] (45) (3/4) *Journal of the Indian Law Institute*, 429-438.

the parties to the marriage or either of them.” The Act¹² strengthened further that property cannot be settled in favour of a child who has attained 21 years except in special circumstances. For instance, before any property can be settled, ownership must be jointly owned both spouses or any of one them and there is no restrictions as to whether the property is matrimonial (marital or non-matrimonial (personal)).

4. Examining The Justice in Settlement Provisions Under The MCA 1970

The Matrimonial Causes Act 1970¹³ gives the courts in Nigeria very wide discretionary powers to make an order as to the settlement of property between divorced parties. What the law demands is that the order should be just and equitable without stating the parameters of determining what is just and equitable to exclude the importation of variables which may be subjective and therefore unjust. However, by subsection 2, the nuptial agreements entered into by the parties before or after the marriage may be disregarded and even excluded by the courts where in the opinion of the courts it is just and equitable to do so. The celebrated case in this respect is that of *Oghoyone v Oghoyone* where the Court of Appeal held that the trial court was right to hold that the respondent had a joint interest in a property belonging to the parties, because it was not referred to in their pre-nuptial agreement.¹⁴ This power given to the courts to exclude the application of ante-nuptial or post-nuptial settlements even where the evidence adduced by the parties was entered into willingly and devoid of duress or coercion. This position is unjust to the parties whose freedom to contract is muzzled by the courts; and as Ifemeje advocates, “where parties expressly prepare an ante- nuptial agreement before marriage, the courts should readily enforce it.”¹⁵

Despite the above however, the injustice inherent in the Nigerian law¹⁶ is displayed by the wide discretion given to the courts when faced with issues of settlement of property

¹²S.72(3) *ibid*; Simisola C. Obatusin, ‘Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Ugandan and South African Courts’ [2017] (56) *Colum. J. Transnat’l L.*, 636; Federico Lenzerini, ‘The African System for the Protection of Human and Peoples’ Rights: Pan-Africanism, Solidarity and Rights’ in *Law, Politics and Rights* [2014], Brill Nijhoff, 11-57.

¹³S. 72(1)(2) *ibid*; Izunwa, Maurice Okechukwu, ‘A critique of certain aspects of the grounds, procedure and reliefs attaching to customary divorce law in Southern Nigeria’ [2015] (7) (6) *Journal of Law and Conflict Resolution*, 31-38.

¹⁴*Oghoyone v Oghoyone* (2010) 3 NWLR (Pt. 1182) 564.

¹⁵Ifemeje, *op.cit* 196.

¹⁶See S. 72(1)(2) MCA 1970; *op.cit* Magashi, Salim Bashir, ‘The Human Right to Development in Nigeria’ (PhD diss., Stellenbosch: Stellenbosch University, 2016). James Adeola, Olanun, Anthony Abayomi Adebayo, and Catherine Ajoke Oluyemo, ‘Gender Imbalance in the Academia in Nigeria’ [2015] (11) (10), *European Scientific Journal, ESJ*, 1; Ngozi, Oluchukwu. Odiaka, ‘The Concept of Gender Justice and Women’s Rights in Nigeria: Addressing the Missing Link’ [2013] (2)(1) *Journal of Sustainable Development Law and Policy (The)*, 190-205.

between parties after divorce and who in some of the cases to be discussed hereafter displayed a skewed sense of justice that was obviously driven by chauvinistic male tendencies. Ifemeje has severely criticized the above section and has warned that it is:

ill-defined as there is no clear cut criteria as to what the judge uses as his reference point in determining who gets what. Everything from all indications depends squarely on the wide discretion. This is unacceptable as such discretions may be adversely influenced by the judge's personal marital experience.

Generally, questions have arisen in different fora in Nigeria and elsewhere on how to treat a woman's non financial contributions to the marriage in cases of settlement of property after divorce by the courts; that is, whether it should be taken into considerations in matters of settlement of marital property? In Nigeria going by the decisions of the Nigerian courts in the cases of *Dairo v Dairo*,¹⁷ *Shodipo v Shodipo*,¹⁸ and *Nwanya v Nwanya*,¹⁹ such non financial contributions of women in the marriage count for nothing in the settlement of marital property between the divorced couple. This fact is most unjust to the woman especially where and when her inability to hold a regular job is by the design of the husband. In fact, all the cases cited above show a clear and more discriminatory attitude towards women in the economics of divorce.

In *Dairo's* case it was the husband who instituted action for the dissolution of the marriage. The respondent wife averred that upon an agreement with her husband early in the marriage she spent her income in maintaining the family and providing their needs while the husband deployed his earnings into building their matrimonial home. Upon the suit for dissolution of the marriage, she prayed the court for a share in the home. It is instructive that although her averment was not contradicted by her husband, the trial court completely ignored her prayer for settlement of the house and to be given a share as her earlier agreement and sacrifice to maintain the home were not recognized. This exercise of discretion in favour of the man who solely provided funds for the building of the house without a consideration of other relevant facts is with due respect a classic display of improper exercise of discretion by the court.

In *Nwanya v Nwanya*, the trial court after granting the decree of divorce proceeded to settle property between the couple especially their country home in Nnewi. The wife claimed

¹⁷*Dairo v Dairo*(Unreported; Suit No ID/9011D/86 of 15/7/88).

¹⁸*Shodipo v Shodipo*, (1987)3 NWLR (Part 62) 239.

¹⁹*Nwanya v Nwanya*(1990) WRN 98; Patrick, Parkinson, "Quantifying the Homemaker Contribution in Family Property Law," *Fed. L. Rev.* 31 (2003): 1.

that she made a contribution of N6, 000.00 to the construction of the country home even though she could not tender any evidence in support of such claim. The trial court accepted her claim but awarded the sum of N5, 000.00 to her as part of her visible and invisible contributions to the construction of the house. This position of the trial court was however frowned upon by the Court of Appeal which insisted that the woman should have tendered evidence of her contributions to the house in form of receipts and witnesses before an award of settlement should be made to her. This position of the Court of Appeal is regrettable because a woman's contributions to the home, financial or otherwise is common knowledge and taken by the society as natural and should not be trifled with by the court in the exercise of the court's discretionary powers.

The case of *Shodipov Shodipo* is even more discriminatory of the woman whose financial contributions to a 43 year old marriage were hardly regarded by the trial judge when he only awarded the sum of N200, 000.00 to the woman after placing the total value of the property at N10m because he refused to consider her age, her non- financial contributions and her reduced productivity due to age in determining her entitlements after settling their marital property. It appears that in exercising the court's discretion in the settlement of marital property, it is only the woman that is usually required to give particulars of her contributions to the matrimonial property for her claim to ownership to be recognized by the court unlike the man. This is very discriminatory and not in tandem with our laws.²⁰ In fact, the same position was adopted by the Supreme Court in *Omwuchekwa v Omwuchekwa*²¹ which denied a wife her claim of co-ownership of matrimonial property on the grounds that she could not furnish evidence of contribution to the purchase of the property in form of receipts. The decision of the Supreme Court in *Adaku Amadi v Edward Nwosu*²² on the demand for proof of joint ownership of property by the woman with due respect is discriminatory where Kutigi, JSC(as he then was) in the lead judgment stated that the woman "when she came to testify in court ought to have explained the quality and quantity of contributions which would have

²⁰S. 42(1)a & b Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides the right of citizens to freedom from discriminations; S 72(1) Matrimonial Causes Act 1970 which enjoins the courts in the exercise of its power in proceedings with respect to settlement of property in matrimonial matters to adopt schemes the court 'considers just and equitable in the circumstances of the case: S. 16(h) Convention on the Elimination of Discrimination Against Women (CEDAW) 1979 provides that State parties should ensure on the basis of equality of men and women the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property...; Reva B. Siegel, 'The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings' [1993] (82) *Geo. LJ* 2127; Reva B. Siegel, 'Critical Legal Histories and Law's (In) Determinacy' [2018] (70) *Stan. L. Rev.*, 1673; C. Cahill, 'On Marriage Equality and Transformation Through Preservation' *Things We Like* [2016], *Jonwell: J.* 153.

²¹*Omwuchekwa v Omwuchekwa* (1997) 10 NWLR, (pt 526) 5.

²²*Adaku Amadi v Edward Nwosu* (1992) 6 SCNJ 59.

enabled the court to decide whether or not she owned the property with PW1 (her husband) who incidentally was not asked to show such proof.

The law of settlement of marital property as provided under the Nigerian law²³ which gives the Nigerian judges a very wide discretion to settle marital property from the cases already discussed show that women have been unfairly treated in the exercise of our judges' discretion despite the demand of the law that they should be just and equitable in the exercise of their discretion.

5. Lessons from Other Jurisdictions on Settlement of Property Upon Divorce

The United States of America:

Settlement of property properly called property division in the United States of America becomes a necessary procedure in the court when the spouses in a divorce cannot come to an agreement as to how property acquired in the course of the marriage be divided. According to Stim,²⁴ the courts in the United States will generally divide property that is jointly owned by using two schemes, namely the Community Property scheme or the Equitable Distribution scheme.²⁵ In the United States the formula for division varies from State to State although most of the States in the western part of the country treat marital property as community property while other States adopt equitable distribution rules peculiar to each State in the treatment of marital property. Ten (10) States in the United States which treat marital property as community property and so equally owned by both spouses while keeping his or her own separate personal property are Arizona, California, Idaho, Nevada, Louisiana, Wisconsin, New Mexico, Texas, Washington and Alaska; although Alaska described as an opt-in Community Property State gives the parties the option to make their property a Community property.

The remaining 40 States practice the equitable distribution of property between spouses. Marital or Community property is generally used to describe "property and earnings

²³See S. 72 MCA 1970; Justin, Efe, Chinedu, 'Rethinking the Property Rights of Spouses on Civil Marriage Breakdown in Nigeria: Inspiration from Other Countries' (PhD diss., University of Pretoria, 2017).

²⁴Daniel I. Tannenbaum, 'The effect of child support on selection into marriage and fertility' [2020] (38 (2) *Journal of Labor Economics*, 611-652; Abraham, Chigavazira, Fisher, Hayley, Tim Robinson, and Ann Zhu, 'The Consequences of Extending Equitable Property Division Divorce Laws to Cohabitants' [2015 (03/19) *Melbourne Institute Working Paper*, 1-30; Snover, Mark A, and James D. Moriarty, "Equal Is Not Necessarily Equitable When Distributing Marital Property." *Mich. B.J.* 89 (2010): 32. Sheldon, John C. "Defining Marital Property." *Maine B.J.* 25 (2010): 48.

²⁵Legal Resources, Hg.org culled from <http://www.hg.org/property-division> accessed on July 4, 2017. Turnbull Christopher J. "Family law property settlements: Principled law reform for separated families." (PhD diss. Queensland University of Technology, 2017).

acquired during the marriage with the exception of individual gifts and inheritances that are kept separate.²⁶ According to Landers²⁷ property acquired during the marriage is considered marital property regardless of which spouse owns the property or how the property is titled that is, whether titled only in the husband or wife's name. In the States that practice Community property, marital property at divorce is divided equally that is, 50/50 between the spouses while the States that adopt the equitable distribution mode, the courts by law are allowed to use their discretion while applying various approved and acceptable contribution to the marriage by each spouse including contributions to the care and education of any of the children and services as a homemaker; the economic circumstances of the parties; duration of the marriage; any interruption of personal careers or educational opportunities of either party; the contribution of one spouse to the personal careers or educational opportunities of either party etcetera.

Some States which are Community Property States like Texas in a decree of divorce allow the courts to determine the rights of both spouses in the disposition of property such as pensions, stocks, savings, insurance policies, etc. The State of Idaho combines the community property and equitable distribution status. The court would apply substantially equal division in value considering the debts between the parties, but where this is not possible, the courts are required to assign the community property in the proportions the court deems just and based on certain factors. In Wisconsin, the State in dividing marital property after divorce makes a distinction between separate or individual property and marital property, that is (all property acquired by both spouses during the marriage using marital funds). The State favours an equal division of marital property and will only deviate from this mode of division after considering the length of the marriage; the property contribution of each spouse to the marriage; spouses' age, physical and emotional health; each spouse's contributions to the marriage (financial and otherwise) and the spouses earning capacity. The court may also award all the equity in the marital home to a spouse that has a low future earning capacity because he or she gave up education or career to support the other spouse's

²⁶*Ibid*; Caroline Bermeo, Newcombe, 'The Origin and Civil Law Foundation of the Community Property System, Why California Adopted it, and Why Community Property Principles Benefit Women' [2011] (11) *U Md. LJ Race, Religion, Gender & Class* 1; Carmen Diana, Deere, Jacqueline Contreras, and Jennifer Twyman, 'Property Rights and Women's Accumulation of Assets Over the Life Cycle: Patrimonial Violence in Ecuador' [2010] (5) *ALASRU, Nueva época: Análisis latinoamericana Del Medio Rural*, 135-176;

²⁷Margaret, Ryznar, 'An Empirical Study of Property Divisions at Divorce' [2016] (37) *Pace L. Rev.*, 589; Hamel, John, Hamel, 'In the Best Interests of Children: What Family Law Attorneys Should know about Domestic Violence' [2015] (28) *J. Am. Acad. Matrimonial Law*, 427.

²⁸Deere, Carmen Diana, Jacqueline Contreras, and Jennifer Twyman, "Property Rights and Women's Accumulation of Assets Over the Life Cycle: Patrimonial Violence in Ecuador." *ALASRU. Nueva época. Análisis latinoamericana del medio rural* 5 (2010): 135-176.

pursuit of career advancement. In this State, pre-nuptial agreements are also considered in the division of marital property.

England:

From the early 1970s the Divorce Reform Act 1969 of England which introduced the no-fault divorce principle gave rise to the need for the courts to properly distribute assets between the spouses following a divorce to ensure that wives were not divorced at Will and without provision of necessities. This fear was adequately captured by Glendon²⁸ who describing the effect of the no-fault principle of divorce stated that it has "sounded the death knell for the old marital property system of separation of assets so far as divorce was concerned."

Prior to the English Matrimonial Causes Act (MCA) 1973 the law on settlement of property was targeted at placing the parties in the financial position they would have been if the marriage had not broken down and each had discharged his or her financial obligations and responsibilities towards each other.²⁹ This position however has been greatly altered by the work of the Law Commission in 1980 which recommended that more emphasis in division of marital property among spouses should be made on giving priority to the needs of the children, and the wife's earning capacity.³⁰ In *Miller v McFarlane*³¹ the court held that in making orders on divorce, "the ultimate objective is to give each party an equal start on the road to independent living;" as there was no specific formula under English law setting out how assets of a couple are to be shared after divorce although all assets are required to be identified including the home preparatory to the division between the couple. Also, the courts were by law required to strive for equality while considering other factors to ensure that the needs of the couple and children are met. The matrimonial home is regarded as a substantial asset to be divided between the couple although a spouse can buy the other partner out. The law provides a list of factors and rules to guide the courts in dividing assets on divorce and they include that:

²⁸M. A. Glendon, *The Transformation of Family Law, State, Law and Family in the United States and Western Europe* [1999] (Chicago, IL: University of Chicago Press), 199.

²⁹S.15 (1) Matrimonial Proceedings and Property Act 1970. MacLean, Mavis, and John Eekelaar, "Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice" [2012] *Child & Fam. LQ.* 223.

³⁰James, Miles, "Charman v Charman (No 4)-Making Sense of Need, Compensation and Equal Sharing After *Miller McFarlane*" [2008] (20) *Child & Fam. LQ.* 378; The Recommendations were made law in the Matrimonial and Family Proceedings Act 1984.

³¹D. N. Hoffman, S.J. Finger, C.J. Meyer, and E.G. Weiner, 2013, *Equitable Distribution Involving Large Marital Estates* [2013] (26) *J. Am. Acad. Matrimonial Law*, 311; Marsha Garrison, "What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence" [2011] (72) *La. L. Rev.*, 57; *Miller v McFarlane* (2006) UKHL 24.

- i. The court should aim at dividing the assets fairly and not necessarily equally so long as there is no discrimination between parties whether as breadwinners or as home makers as both positions are accorded equal importance
- ii. The court will give consideration to the needs of the children.
- iii. The courts can rely on "approximate equality" principle to divide marital property. So the court relying on the principle has ruled that a wife who was a homemaker and did not contribute to the husband's business be awarded a lump sum because in the reasoning of the court she could have benefitted financially from the business if the marriage had continued.³²

The English courts have since moved from this position and gone further with the decision in *Lambert v Lambert*³³ where it held that marital property should be divided equally between parties, that is between the income earner and the homemaker. Marriage in England today is treated as a partnership and the law provides the equal sharing principle which means that when the marriage partnership ends, each spouse is "entitled to an equal share of the assets of the partnership unless there is good reason to the contrary."³⁴ According to Gilmore & Glennon, "the courts in their gender equality principle have thus initiated a shift from a welfare based rationale for financial provision on divorce to an entitlement based model."

The courts equally have a duty to carefully consider the nature of the property of the couple whether it is a matrimonial or non-matrimonial property. In *Rossi v Rossi*, Monstyn QC held that in all cases it is now a "primary function of the court to identify the matrimonial and non-matrimonial property."³⁵ The family home is regarded as "a marital property regardless of origin that is, whether or not owned by one spouse prior to the marriage."³⁶ The court can however depart from the equality principle in division of marital property if there is incontrovertible evidence that "one party has substantial assets which were earned prior to the marriage" or that the property held by the couple at the time of divorce has been largely

³² *Tripas v Tripas* (1973) Fam. 134.

³³ *Lambert v Lambert* (2002) EWCA Civ. 1685.

³⁴ S. Gilmore & L. Glennon; *Hayes & Williams' Family Law* (4th Edition, Oxford University Press, 2014), 154-170; O'Shea, Roisin, O'Shea, 'Judicial separation and divorce in the circuit court' (PhD diss., Waterford Institute of Technology, 2014); Jens M. Scherpe, 'A Comparative Overview of the Treatment of Non-Matrimonial Assets, Indexation and Value Increases' [2013] (25) *Child & Fam. LQ*, 61.

³⁵ *Rossi v Rossi* (2006) EWCA 1482 (FAM).

³⁶ *Miller v McFarlane* (2006) UKHL 24; Simon, Gardner, 'Problems in family property' [2013] (72) (3) *The Cambridge Law Journal*, 301-312; Alison, Diduck, 'Ancillary Relief: Complicating the Search for Principle' [2011] (38) (2) *Journal of Law and Society* 38, 272-300; E. Hitchings, 'The Impact of Recent Ancillary Relief Jurisprudence in the "Everyday" Ancillary Relief Case' [2010] (22) *Child and Family Law Quarterly*, 93.

generated by one person's inheritance.³⁷ In *B v B (Ancillary Relief)* where the husband built the business based on the wife's inheritance, the court in settling property between the spouses departed from equality sharing and applied the principle of meeting the parties needs. Also in *P v P (Inherited Property)* where farming had been in the husband's family for generations and had been brought into the marriage with the expectation that it would remain in specie for future generations.³⁸ The court per Mumby J, held that ordering sale of the farm to apply the principle of equality will be devastating to the husband but that "fairness required an order which would merely address the need of the wife without recourse to the farm assets".³⁹

Concerning the matrimonial home, the Family Act 1996 of England provides that the court has powers to do the following:

- i. Transfer the property into the sole name of one of the spouses;
- ii. Order immediate sale of the property and a distribution of proceeds between the parties;⁴⁰
- iii. Where the parties are joint owners, the court can order that the co-ownership continues but the right of occupation granted to one party. The sale of such a property may also be deferred by a Mersher Order which settles property on the parties on trust for sale in equal shares with the sale postponed until the youngest child has reached the age of 17 years.

Canada:

There is no uniform law on division of marital property under the Canadian Constitution which provides that each province is responsible for laws regarding the division of marital property.⁴¹ Generally however, marriage in Canada is considered an equal partnership and so when it ends the marriage property as is common with partnerships is equally divide whether the spouse is responsible for doing the house chores and running the home while the other is earning family income because the law sees their contributions as equally important except such a division will be unfair to a spouse. Each party is however allowed to keep any

³⁷ *B v B (Ancillary Relief)* 2008 EWCA Civ 284; *K v L* (2010) EWHC 1234(FAM).

³⁸ *P v P* (2004) EWHC 1364 (FAM).

³⁹ *Richardson v Richardson* No 2 (1994) 2 FLR 1051.

⁴⁰ S 24 A, Family Act 1996.

⁴¹ Estin, Ann Laquer, Estin, 'Marriage and Divorce Conflicts in International Perspective' [2016] (27) *Duke J Comp & Int'l L.*, 485; Susanne Lilian, Gossel and Jinske Verhellen, 'Marriages and Other Unions in Private International Law—Separate but Equal?' [2017] (31) (2) *International Journal of Law, Policy and the Family*, 174-190; A. J. Kania, "Temporary Court Orders" in <http://divorce-Canada.ca/Property-divorce-laws>

property he or she brought into the marriage although increases in the value since the marriage is to be shared among the parties. Also if the couple acquired a matrimonial home during the subsistence of the marriage, both spouses at divorce have an equal right to remain and live in the home. In fact, the matrimonial home should be shared equally by the couple even if it was owned by one person before the marriage.

In the province of Ontario, the law in addition to the above allows a person at divorce to keep some properties tagged excluded such as gifts received during marriage from other persons other than from the spouse; property received from an insurance company because someone died; compensation due to an accident or personal injury etcetera. In the province of Alberta, some of the things to be considered in dividing property among couples at divorce and where the parties cannot agree on how property will be split under its Matrimonial Property Act⁴² include spousal contributions to the marriage; contributions to the family; business endeavours; financial resources of the parties; length of marriage; prior agreements made. The court will also consider whether a spouse transferred or sold property and if there are previous court decisions on the issue.

6. Conclusions & Recommendations

The provisions of our law, to wit, the Matrimonial Causes Act (MCA) 1970 concerning the settlement of property on parties after a divorce is obviously lagging behind legal provisions on similar issues in other parts of the world. These provisions have over time generated further questions as to the justice, equity or otherwise of the courts' exercise of its discretion in matters of settling property between parties upon a divorce. From the Nigerian cases of *Nwanya* and *Shodipo*, it is clear that the non-financial contributions of the woman to the marriage under our law are most of the time not accounted for nor recognized by the courts in the exercise of their discretion to equitably settle properties between spouses since customarily the woman is regarded as the property of the man.

The Nigerian law is also not specific on the type of property to be subjected to settlement or otherwise as is applicable in other jurisdictions nor does it set out specific criteria for division of marital property to avoid arbitrariness.⁴³ In other countries like England and America, the

⁴²See S.13 Matrimonial Property Act of the Province of Alberta 1995-1996 which provides specific factors to be considered on division of matrimonial property such as unreasonable impoverishment of either spouses; length of time spouses cohabited; the marriage or separation contract between the spouses; date and manner of acquisition of the assets etc.

⁴³Lt. Justice Chimadu, 'Rethinking the Property Rights of Spouses on Civil Marriage Breakdown in Nigeria: Inspiration from other Countries' [PhD diss., University of Pretoria, 2017].

law is specific on what amounts to matrimonial and non-matrimonial property; and which property should be settled or not; the status of the matrimonial home is given a special treatment to ensure that parties are not rendered homeless as a result of a divorce. Also, under our laws prenuptial agreements are not accorded the importance given to them in the western world in helping to amicably resolve the economics of divorces especially where they have been willingly entered into.

Recommendations

It has been observed that women have not been receiving just and equitable treatment in the exercise of judges' discretion on the settlement of property owned jointly by spouses upon divorce. What is important is that there is a need for radical change in the extant law guiding the apportion of property between couples upon divorce by Courts in Nigeria to give room for universality or better conventional way of distributing family property upon divorce. Hence the following recommendations are made:

1. The section of the Act which empowers judges to exercise discretion in the settlement of property upon divorce should be more explicit on the criteria and guidelines to cover the age of spouse; earning capacity, contribution to the marriage, among other things.
2. A substantive provision on prenuptial agreements with relevant elements for a valid agreement and the effect of such agreements should be inserted in the MCA 1970 to protect parties in the event of a divorce.
3. There is a need for the creation of special family courts with departments or units for post-divorce settlements to cater for the maintenance of parties, custody, and settlement of the marital property.
4. There is a need for inclusion of the right to family or matrimonial homes upon divorce in S.72 MCA 1970 to ensure that nobody is left stranded or abandoned after the divorce especially women and children.
5. It is also recommended that the English, Canadian, and the United States model of equal division of marital property between spouses regardless of who is a financial or care contributor to the home should be adopted to ensure fairness and equity in the Matrimonial Causes Act 1970.

REFERENCE

- Adedoyi O., 'Maintenance Under the Nigerian Statutory Family Law: A Critical Appraisal' [2003] (45) (3/4) *Journal of the Indian Law Institute*, 429-438.
- Avogu D. O., 'Personal Factors as Correlates of Adjustment Patterns of Divorcees in Enugu State' [2009]. (Doctoral Dissertation, University of Nigeria, Nsukka).
- Cahill C., 'On Marriage Equality and Transformation Through Preservation' *Things We Like* [2016], *Jotwell*: J. 153.
- Chinedu J.E., 'Rethinking the Property Rights of Spouses on Civil Marriage Breakdown in Nigeria: Inspiration from Other Countries' (PhD diss., University of Pretoria, 2017).
- Druduck A., 'Ancillary Relief: Complicating the Search for Principle' [2011] (38) (2) *Journal of Law and Society*, 272-300.
- Estin A. L. E., 'Marriage and Divorce Conflicts in International Perspective' [2016] (27) *Duke J. Comp. & Int'l L.*, 485.
- Fisher A., Chigavazira H., Tim R., and Anna Z., 'The Consequences of Extending Equitable Property Division Divorce Laws to Cohabitants' [2019] (03/19) Melbourne Institute Working Paper, 1-30.
- Gilmore S., Glennon L., Hayes & Williams., 'Family Law' (4th Edition, Oxford University Press, 2014), 154-170.
- Glendon M. A., 'The Transformation of Family Law, State, Law and Family in the United States and Western Europe' [1989], (Chicago, IL: University of Chicago Press), 199.
- Gossel S. L., and Jinske V., 'Marriages and Other Unions in Private International Law-- Separate but Equal?' [2017] (31) (2) *International Journal of Law, Policy and the Family*, 174-190.
- Hamel J. H., 'In the Best Interests of Children: What Family Law Attorneys Should know about Domestic Violence' [2015] (28) *J. Am. Acad. Matrimonial Law.*, 427.
- Hitchings E., 'The Impact of Recent Ancillary Relief Jurisprudence in the "Everyday" Ancillary Relief Case' [2010] (22) *Child and Family Law Quarterly*, 93.
- Hofstein D. N., Finger S. J., Meyer C. J., and Weiner E. G., 'Equitable Distribution Involving Large Marital Estates' [2013] (26) *J. Am. Acad. Matrimonial Law.*, 311.
- Ifemeje S. C., 'Contemporary Issues in Nigerian Family Law' (Nolix Publications: Nigeria, 2008): 161.

- Imam A., cited in "Nigeria: Divorce Law and Practices among Christians including Grounds, Procedures, Length of Process, Property Dispositions, Child Custody and Consequences for the Woman and her Family" [2012] cited in < <http://www.ecoi.net/local link 231461/1330960>> accessed 14th October, 2015.
- Izzi M.O., 'The Plight of the Girl-Child under Esan Customary Law' [2000] (3) Journal of Commercial, Private and Property Law, 93.
- Jonathan H., 'Law Express Family Law' (5th edition, Pearson, 2015), 47.
- Kiye M.E., 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' [2015] (15) (2), African Studies Quarterly, 85.
- Lenzerini Federico., 'The African System for the Protection of Human and Peoples' Rights: Pan-Africanism, Solidarity and Rights' in Law, Politics and Rights' [2014], Brill Nijhoff, 11-57.
- Magashi S. B., 'The Human Right to Development in Nigeria' (PhD diss., Stellenbosch: Stellenbosch University, 2016).
- Margaret R., 'An Empirical Study of Property Divisions at Divorce' [2016] (37) Pace L. Rev., 589.
- Marsh G., 'What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence' [2011] (72) La. L. Rev., 57.
- Mavis M., and Eekelaar J., 'Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice' [2012] (24) Child & Fam. LQ, 223.
- Ndulo M., 'Comparative Perspectives' [2015] (29) (1) International Journal of Law, Policy and the Family, 121-131.
- Newcombe C. B., 'The Origin and Civil Law Foundation of the Community Property System, Why California Adopted it, and Why Community Property Principles Benefit Women' [2011] (11) U. Md. LJ Race, Religion, Gender & Class 1.
- O'Shea R. O., 'Judicial separation and divorce in the circuit court' (PhD diss., Waterford Institute of Technology, 2014).
- Obatusin S. C., 'Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Ugandan and South African Courts' [2017] (56) Colum. J. Transnat'l L., 636.
- Okechukwu M. I., 'A Critique of certain Aspects of the Grounds, Procedure and Reliefs Attaching to Customary Divorce Law in Southern Nigeria' [2015] (7) (6) Journal of Law and Conflict Resolution, 31-38.

- Olugbun J. A., Anthony A. A., and Oluyemo C. A., 'Gender Imbalance in the Academia in Nigeria' [2015] (11) (10), European Scientific Journal, ESJ, 15.
- Oluchukwu O. N., 'The Concept of Gender Justice and Women's Rights in Nigeria: Addressing the Missing Link' [2013] (2)(1) Journal of Sustainable Development Law and Policy (The), 190-205.
- Oniha B. E., 'Dissolution of Marriage and Custody of Children under Customary law in Nigeria' [2017]: 1.
- Oyewole P. B., 'A Critical Analysis of Marital Instability among Yoruba Christian Couples in the North West of England' (PhD diss., University of Liverpool, 2016), 18-21.
- Parkinson P., 'Quantifying the Homemaker Contribution in Family Property Law' Fed. L. Rev. 31 (2003): 1.
- Scherpe J. M., 'A Comparative Overview of the Treatment of Non-Matrimonial Assets, Indexation and Value Increases' [2013] (25) Child & Fam. LQ, 61.
- Sheldon J. C., 'Defining Marital Property' [2010] (25) Maine BJ, 48.
- Siegel R. B., 'Critical Legal Histories and Law's (In) Determinacy' [2018] (70) Stan. L. Rev., 1673.
- Siegel R. B., 'The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings' [1993] (82) Geo. LJ 2127.
- Simon G., 'Problems in family property' [2013] (72) (3) The Cambridge Law Journal, 301-312.
- Snover M. A., and Moriarty J.D., 'Equal Is Not Necessarily Equitable When Distributing Marital Property' [2010] (89) Mich. BJ, 32.
- Tannenbaum D. I., 'The effect of child support on selection into marriage and fertility' [2020] (38) (2) Journal of Labor Economics, 611-652.
- Turnbull C. J., 'Family Law Property Settlements: Principled Law Reform for Separated Families' (PhD diss., Queensland University of Technology, 2017).