Family law in Nigeria: overview

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JURISDICTION AND CONFLICT OF LAW

Regulatory framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of law

Nigeria is a federation of 36 states and the Federal Capital Territory, Abuja. Under its constitution as amended in 2010, the breakdown of statutory marriage and other matters incidental to it are under the Exclusive Legislative List. This means that the National Assembly (federal law) makes the laws governing matrimonial causes. Therefore, the 36 constituent states and the Federal Capital Territory cannot legislate on dissolution of marriage and the welfare of children consequent upon dissolution.

The Matrimonial Causes Act enacted in 1970 (now Cap. M7 Laws of the Federation 2004) mainly governs marriages, marital breakdown and the welfare of children in Nigeria. In 1983, the Matrimonial Causes Rules were made pursuant to the Matrimonial Causes Act. These Rules set out the procedure for instituting actions for the dissolution of marriage and custody and maintenance matters following the dissolution of marriage.

In 2003, Nigeria enacted the Child’s Rights Act pursuant to the United Nations Convention on the Rights of the Child. This law has been adopted by 24 states including Lagos, Enugu, Plateau, and Rivers states. Most of the states in the northern part of the country are yet to adopt it. The law sets out provisions on the welfare and adoption of children. In 2012, Lagos State enacted the Family Law Rules pursuant to the Child’s Rights Law. The Rules have greatly simplified procedures on adoption, custody, guardianship and welfare of children generally in Lagos State.

Other laws include:

- The Maintenance Orders Act Cap MI, Laws of the Federation of Nigeria 2004, which facilitates the enforcement of maintenance orders made in England, Ireland, and other countries in which it applies.
- The Married Women’s Property Act 1882, a statute of general application in Nigeria.
- The Law against Domestic Violence in Lagos State 2007.

In 2013, the National Assembly enacted the Same Sex Marriage (Prohibition) Act 2013. This criminalises and provides penalties for solemnisation and witnessing of same sex marriages.

In addition, received English law (consisting of common law, doctrine of equity, and statutes of general application which were in force on 1 January 1900) apply in Nigeria. Decisions of courts in England are persuasive authority in Nigeria.

Family law has not fully developed in Nigeria compared with some other jurisdictions. There are no sufficient legal provisions for areas such as surrogacy, pre-nuptial agreements and division of property.

Case law has attempted to fill the gap by ensuring the law serves justice in particular cases.

Court system

Though federal laws through the Matrimonial Causes Act regulate matrimonial causes, jurisdiction is given to the high courts of the states of the federation and the Federal Capital Territory. There are no separate family courts. Disputes are heard by the State High Courts across the country. However, where an order of maintenance is ordered by the High Court, it can be enforced by a court of summary jurisdiction in a summary manner. Section 114(1) of the Matrimonial Causes Act defines a court of summary jurisdiction as a magistrate court or a district court.

However, Lagos State has created a family court to deal with disputes relating to guardianship, custody and adoption not related to matrimonial causes in its Child Rights Law 2007.

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

Divorce

The main requirement for courts to have jurisdiction in relation to divorce proceedings and ancillary relief is domicile in Nigeria (see Question 3). A person who is domiciled in any state of the federation is considered domiciled in Nigeria and can bring a petition for divorce in the high court of any state of the federation, irrespective of whether he is domiciled in that state. However, the rule of forum convenience empowers the court to transfer matrimonial cases or a petition filed in a state high court to any other state high court in the federation, if it is in the interests of justice that the matrimonial case be dealt with in the other state.

Property

Disputes over a matrimonial home and other joint property of the parties are usually incidental to the matrimonial cause. The rules of domicile apply (see Question 3) and the same high court where divorce proceedings are brought has jurisdiction. The high court can exercise its ordinary jurisdiction with respect to joint property or the protection of matrimonial property when divorce proceedings have not been instituted. In cases where settlement of property is in issue, it is advisable to institute matrimonial causes where the property is situated. This will remove the need to register the judgment in the state where the property is situated before enforcement.

Children

With respect to children, the court with jurisdiction over divorce proceedings has jurisdiction over custody and child maintenance. The jurisdiction of the court with respect to the custody, guardianship, maintenance, advancement and education of children is based on the main matrimonial cause.
Actions relating to the general rights of the child (including adoption, custody, guardianship, and maintenance) under the Child's Rights Act are not based on matrimonial causes. Therefore, domicile is not required and mere residence in the state that has adopted the law or in the Federal Capital Territory will suffice.

Domicile and habitual residence

3. How do the concepts of domicile and habitual residence apply in relation to divorce, financial arrangements, and children?

Domicile is the place at which a person is physically present and regards as home, that is, a person's true, fixed, principal, and permanent home to which that person intends to return and remain, even if currently residing elsewhere.

Residence is the place where one actually lives, as distinguished from domicile.

While residence usually refers to bodily presence as an inhabitant in a given place, domicile usually requires bodily presence as well as an intention to make the place that person's home. A person therefore may have more than one residence at a time but only one domicile. Though the term domicile and residence are often used synonymously, they are quite different.

In Nigeria, domicile is the most important factor in determining jurisdiction in divorce proceedings, which include ancillary relief such as financial arrangements, custody and maintenance. The domicile of the husband determines the jurisdiction of the court, subject to section 7 of the Matrimonial Causes Act which has special provisions on the wife's domicile in the following circumstances:

- A deserted wife who was domiciled in Nigeria either before her marriage or immediately before the desertion is deemed to be domiciled in Nigeria.

- A wife who, at the date of bringing proceedings under the Matrimonial Causes Act, has been resident in Nigeria for at least three years immediately preceding the date of bringing the action, is deemed to be domiciled in Nigeria.

A person can be resident in Nigeria without being domiciled in it, no matter how long the residence, if there is a lack of intention to make Nigeria a permanent abode. The court has held that a petitioner, who was born in Singapore but had lived in Nigeria since 1979 and had been doing business in Nigeria, was not domiciled in Nigeria but in Singapore (Bhojwani v. Bhojwani (1995) 7 NWLR (Pt.407) 349 at 364-365). The court decided the point on the basis that the petitioner had sworn an affidavit in the UK stating that his domicile was Singapore.

It has also been held that parties who had acquired US citizenship and married in the US had acquired the US as their domicile of choice. This put their domicile of origin in abeyance, therefore they could not start divorce proceedings in Nigeria (Ugo v. Ugo (2008) 5 NWLR (Pt.1079)).

Conflict of law

4. What procedure applies for a party applying to stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?

**Procedure**

Where a matrimonial cause is pending in a foreign jurisdiction, a party can apply for a stay of proceedings, by an application on notice, on the grounds of the common law principle of forum non conveniens. The application puts the hearing of the petition on hold, until the court determines that it is the more appropriate court to hear the proceedings. Parties frequently base this application on section 9 of the Matrimonial Causes Act but the section only applies to transfer of cases within the country. The primary basis for the application of the principle of non conveniens is the common law.

**Factors**

Nigerian courts have discretion on whether to stay proceedings. The factors considered are:

- The connection of either party with the competing forums.
- Whether the petitioner is merely seeking procedural advantages (forum shopping).
- Possible prejudice to the petitioner, such as being:
  - deprived of security for the claim;
  - unable to enforce any judgment obtained;
  - faced with a time bar not applicable in the other jurisdiction;
  - or
  - unable to get a fair trial for political, racial, religious or other reasons.

The principal consideration is whether the other jurisdiction is a more appropriate forum, looking at the facts and circumstances of the case, such as the:

- Location of the matrimonial home.
- Interests of children to the marriage.
- Permanent residence of the parties and domicile.

The authors successfully opposed a petition for the dissolution of a marriage in Nigeria in favour of the UK, on the grounds that orders relating to the parties, their children and their family home will be made in the UK.

**PRE- AND POST-NUPHTIAL AGREEMENTS**

**Validity of pre- and post-nuptial agreements**

Section 72(2) of the Matrimonial Causes Act recognises the right of parties to execute pre- and post-nuptial agreements. However, the validity or the extent to which the agreement will bind the parties is at the court's discretion. There is no reported Nigerian case law on pre- or post-nuptial agreements because they are not common in Nigeria.

However, the Court of Appeal has impliedly pronounced on the validity of such agreements, when it 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 (Oghoyone v. Oghoyone (2010) 3 NWLR (Pt. 1182) 564).

**DIVORCE, NULLITY AND JUDICIAL SEPARATION**

**Recognition of foreign marriages/divorces**

5. To what extent are pre- and post-nuptial agreements binding?

6. Are foreign marriages/divorces/civil partnerships recognised?

Marriages

Section 49 of the Marriage Act provides for a limited recognition of foreign marriages between parties, one of whom must be a
Nigerian citizen. To be recognised and valid, such a marriage must be contracted before a Nigerian diplomatic or consular officer of the rank of secretary or above, at his office.

However, being a common law country, common law rules on recognition of foreign marriages on the basis of the law of the place where the marriage takes place (lex loci celebrationis) apply. This is impliedly given credence by section 3(1)(c) of the Matrimonial Causes Act. This provides that a marriage will be declared void if it is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnisation of marriages.

**Divorces/annulment**

Nigerian law recognises a dissolution decree or nullity made in accordance with the law of any foreign country under section 81(2-9) of the Matrimonial Causes Act. The basic requirement is domicile in the foreign country or residence, depending on whether it is a dissolution or an annulment of a marriage.

A dissolution or annulment of a marriage effected in accordance with the law of a foreign country will be recognised as valid in Nigeria if its validity would have been recognised under the law of the foreign country in which the dissolution was sought.

In addition, any dissolution or annulment of a marriage that would be recognised as valid under the rules of private international law but to which none of the provisions of section 81 of the Matrimonial Causes Act apply will be recognised as valid in Nigeria.

**Civil partnerships**

Civil partnerships are illegal in Nigeria under the Same Sex Marriage (Prohibition) Act. This Act criminalises and provides penalties for solemnisation and witnessing of same sex marriages. The effect is that it is against Nigerian public policy to recognise foreign civil partnerships in Nigeria.

**Divorce**

Under Nigerian law there is only one ground for divorce, which is that the marriage has broken down irretrievably. To establish this, the petitioner must satisfy the court of certain facts or situations (section 15 and 16, Matrimonial Causes Act). Most of these facts are fault-based, in which case, fault must be alleged and proved by the party seeking dissolution of the marriage. These facts are:

- Lack of consummation of the marriage.
- Adultery and the fact that the petitioner finds it intolerable to live with the respondent.
- The respondent has behaved in such a way that the petitioner cannot be expected to live with him or her. Sodomy, bestiality, habitual drunkenness or drug addition, frequent crime convictions and lack of reasonable means of support/maintenance and unsound mind can be argued in this regard.
- Desertion for a continuous period of at least one year immediately preceding the filing of the petition.
- The other party to the marriage has, for at least one year, failed to comply with a decree of restitution of conjugal rights.
- The other party to the marriage has been absent from the petitioner for such time and in such circumstances to provide reasonable grounds for presuming that he or she is dead.
- Nigeria law also recognises a non-fault based dissolution of marriage. A petitioner will not need to allege fault on the part of the respondent to secure dissolution of marriage where:
  - The parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the filing of the petition, and the respondent does not object to the dissolution of the marriage.
  - The parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the filing of the petition.

Leave of the court is required to petition for dissolution within two years of the marriage unless the petition is predicated on grounds of lack of consummation, adultery, rape, sodomy and bestiality. Leave will not be granted unless the party seeking leave has suffered exceptional hardship or depravity. The court will consider the interest of the children of the marriage and the possibility of settlement in determining the application for leave.

It must be emphasised that a petition for dissolution of marriage will not succeed if the petitioner has condoned any of the above reasons/grounds or facts that must be proved.

**Nullity**

In Nigeria, nullity can be of a voidable marriage or of a void marriage. A marriage is voidable where, at the time of the marriage (section 5 of the Matrimonial Causes Act):

- Either party to the marriage is incapable of consummating the marriage.
- Either party to the marriage is;
  - of unsound mind;
  - mentally defective; or
  - subject to recurrent attacks of insanity or epilepsy.
- At the time of the marriage, either party is suffering from a venereal disease in a communicable form.
- The wife is pregnant by a person other than the husband.

A petition for nullity of voidable marriage cannot be granted at the instance of the party suffering the incapacity stated above unless the party was unaware of the incapacity at the time of the marriage. A decree of nullity will also not be made under the second, third and fourth bullet points above unless the court is satisfied that all of the following applies:

- The petitioner was ignorant of the fact constituting the ground at the time of the marriage.
- The petition was filed no later than 12 months after the date of marriage.
- Marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the fact constituting the ground.

A decree of nullity of a void marriage will be made in any of the following instances:

- Either of the parties is at the time of the marriage lawfully married to another person.
- The parties are within the prohibited degrees of consanguinity and affinity.
- The marriage is not valid under the law of the place where the marriage takes place, due to a failure to comply with the law of that place relating to the form of solemnisation of marriages.
- Lack of consent of either party, because:
  - it was obtained by duress or fraud;
- the party was mistaken as to the identity of the other party, or the nature of the ceremony; or
- the party is mentally incapable of understanding the nature of the marriage contract.

Either party is not of marriage age (under the Child Rights Act, the age of marriage is stated as 18 years, for both sexes).

**Judicial separation**

A decree of judicial separation can be made in any of the circumstances stated with respect to grounds for dissolution of marriage (see above, Divorce and Nullity). A decree of judicial separation only relieves the petitioner from the obligation to cohabit with the respondent while the decree subsists. It does not affect the status, rights and obligations of the parties to the marriage (section 41, Matrimonial Causes Act). This means that under this section, the marriage is still valid and subsisting and neither party can remarry while the decree subsists.

**Finances/capital and property**

8. **What powers do the courts have to allocate financial resources and property on the breakdown of marriage?**

The courts have power to allocate financial resources or settle property at the instance and for the benefit of the parties and the children of the marriage, under section 72 of the Matrimonial Causes Act. The application is usually made by a claim in the petition for divorce or in the answer to the petition. This section provides in effect that the court can make any order it deems just and equitable in the allocation and settlement of the property. Unless there are exceptional circumstances, children above 21 years cannot be beneficiaries of the settlement of property or maintenance.

The power of the court includes the power to mandate the execution of deeds or instrument for the transfer of title, payment of lump sum, grant of life interest in the property, constitution of trust and payment of maintenance to a public officer for the benefit of a child, and so on. The power of the court in this regard can be exercised before the conclusion of the proceedings.

There is no express provision in the law with respect to whether trust, company or other assets can be taken into consideration as a financial resource in the settlement of property. However, the court has wide discretion (section 73 and 74). This discretion can be exercised, depending on the facts and circumstances of particular cases, to do equity where trust or company properties are involved. For example, the court has the power to appoint or remove the trustees of trust property or constitute a trust in favour of either of the parties (section 73(f) (e), (f) and (g)). Furthermore, the discretionary power of the court as granted by law may be exercised with respect to shareholding in the company holding the property or the veil of incorporation may be lifted for the purpose of settlement of property.

9. **What factors are relevant to the exercise of the court's powers?**

There is no provision under Nigerian law regarding factors for the exercise of the court’s power to allocate resources and settlement of property. All that is required of the courts under section 72 of the Matrimonial Causes Act is to consider what is just and equitable in the circumstances of each case. In practice, the court will look at the following:

- The time the property was acquired (it must have been acquired during the subsistence of the marriage or payment for it must have been concluded during the marriage).
- Whether the property was acquired jointly.
- The contribution of the parties to the property.
- The conduct of the parties.
- The age and position of the children.

Though contribution has been a major consideration, this practice has no sound basis in the law. The law expressly provides that the property for settlement can either belong to one or both parties (section 72(f)).

10. **What is the court's current position on the division of assets?**

Nigerian courts more often than not share property in a marriage to the benefit of men, who usually have higher income. This is because the court insists on contribution as the basis for division. The court has decided that direct financial contribution to the purchase price of a matrimonial home or to the repayment of the mortgage must be proved before joint property can be inferred (Essien v. Essien (2009) 9 NWLR (Pt. 1146) 306, 331-332), where the Court of Appeal restated the decision of the Supreme Court in Adaku Amadi v. Edward Nwosu (1992) 6 SCNJ 59. The court accordingly refused the appellant's case on the basis that she did not prove contribution. In Ogbohonye v Ogbohonye (see Question 9), the court held that the respondent was entitled to joint interest because both parties contributed to the property.

Contribution by a party does not necessarily have to be in the nature of a cash outlay for the purchase or development of the property. For example, contribution can be by way of moral and/or financial contribution to the business of the other party where the property is acquired with the profits of the business (Ibeabuchi v. Ibeabuchi (2016) LPELR-41268).

Given the discretionary powers of the court under the law, it is suggested that contribution should not be the major consideration. The attitude of the court will do injustice in many cases against the intention of section 72 of the Matrimonial Causes Act. For example, a party may have been taking care of the children's food or school fees when the property was acquired by the other. This has resulted in a situation where parties who have properties abroad prefer to petition for the division of assets in countries where the courts are more favourable to women.

**Finances/maintenance**

11. **How does ongoing spousal maintenance operate following marital breakdown?**

Section 70 of the Matrimonial Causes Act gives the court power to make orders for maintenance of the spouse and the children of the marriage. Under section 73 of the Matrimonial Causes Act, maintenance can be ordered to be paid weekly, monthly, yearly, or as a lump sum.

12. **Is it common for maintenance to be awarded on marital breakdown?**

It is routine for the court to award maintenance on marital breakdown.
13. What is the court’s current position on maintenance on marital breakdown?

In ordering maintenance, the court is required to consider what is just and equitable in the circumstances of each case, having regard to the means, earning capacity and conduct of the parties to the marriage, and the age and position of the children, if any.

Factors taken into consideration include the following:

- The social status of the parties and their lifestyles.
- Their respective means, income and earning capabilities/Capacities.
- The existence or non-existence of child or children of the marriage.
- The Conduct of parties.
- The length of time the parties were married.

(Odosote v. Odosote (2012) 3 NWLR (pt.1288) 478) and (Eluwa v Eluwa (2013) LPELR-22120 (CA).

14. What financial claims are available to parents on behalf of children within or outside of the marriage?

The power of the court to order maintenance for children under the Matrimonial Causes Act (section 70) is predicated on a matrimonial cause, which is a substantive action for dissolution, separation or nullity of marriage. Parents can therefore claim maintenance for their children during the process or after dissolution or separation. Either parent can apply for maintenance under the Child’s Rights Act in states that have adopted the law and the Federal Capital Territory in the absence of a matrimonial cause, that is, within the marriage.

15. On what basis is child maintenance calculated?

In Nigeria, maintenance is for children less than 21 years old. However, in special circumstances, the court can use its discretion to award maintenance for a child of 21 years or more, under section 70(4) of the Matrimonial Causes Act.

In determining the maintenance, the court will have regard to all circumstances of the case, including the income, earning capacity, property and other financial resources of the party to which the maintenance order applies, as well as his financial needs, obligations and responsibilities. In addition, all of the following must be considered in calculating child maintenance:

- The financial needs of the child.
- The income, earning capacity and property of the parties.
- Physical or mental disability of the child.
- The manner in which the child is being or is expected to be trained.
- (Section 4 of the first schedule to section 55(14) of the Child’s Rights Act, in conjunction with section 70 of the Matrimonial Causes Act).
- Maintenance order can take the form of any of the following:
- Periodical payment to the child or to the Applicant for the benefit of the child.
- Payment of a lump sum to the child or to the Applicant for the benefit of the child.
- Enforcement of a Maintenance Agreement and Financials Agreement.
- Grant of an interim Order to make periodical payments to the child pending the substantive application.
- There is no fixed formula for calculating child maintenance; it is on a case-by-case basis. The guide is the above listed considerations and the overriding interest of the child.

16. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

Under the Matrimonial Causes Law, a maintenance order is in favour of a child under the age of 21. Special circumstances are required for children that are 21 years old and above. Special circumstances can include disability or other factors that make it difficult for the child to support his/herself. This means that maintenance may be in place until the child finishes university education. However, this depends on the facts and circumstances of the case.

Maintenance orders or child support predicated on the Child’s Rights Act terminate when the child reaches 18 years old. This is because a child under the law is a person under the age of 18.

17. Can a child make a claim direct against their parents?

Under the Child’s Right Act (section 14(2), a child has a right to maintenance from the parents and can maintain an independent action for it against the parents. This is not so under the Matrimonial Causes Act because there must be a matrimonial cause before ancillary reliefs for maintenance can be claimed by the parents on behalf of the children (Ugbah vs. Ugbah (2009) 3 NWLR (pt. 1127) 108).

Reciprocal enforcement of financial orders

18. What is the legal position on the reciprocal enforcement of financial orders?

The following deal with the reciprocal enforcement of financial orders in Nigeria:

- The Reciprocal Enforcement of Judgments Act (REJA) (Cap. 175 of 1958). This applies to the UK, Ghana, Sierra Leone, Gambia, Newfoundland, New South Wales, the State of Victoria, Barbados, Bermuda, British Guiana, Gibraltar, Grenada, Jamaica, the Leeward Islands, St. Lucia, St. Vincent, and Trinidad and Tobago.

- The Foreign Judgment (Reciprocal Enforcement) Act (FJA) (Cap. 152 of 1990). This applies to all commonwealth countries and other countries it has been extended to by the Minister of Justice. However, its status is uncertain in the light of decisions of the Supreme Court that the REJA still applies until activation of the relevant provisions of the FJA.

A judgment creditor wanting to enforce a foreign monetary judgment in Nigeria must submit an application supported by an affidavit stating prescribed facts and matters within 12 months of the date of the judgment under the REJA. If a country does not have a reciprocal arrangement with Nigeria or where the REJA does not apply to the country, a judgment of a court of that country must be enforced through an action commenced in Nigeria, with the judgment as the cause of action.
Financial relief after foreign divorce proceedings

19. What powers are available to the court to make orders following a foreign divorce?

Once the monetary aspect of the judgment in the foreign country is registered in Nigeria or a judgment is obtained in Nigeria on the basis of the foreign judgment (see Question 18), the Nigerian court has control over the execution of the registered judgment, as if the judgment had been obtained in Nigeria. Therefore, the Nigerian court will have power to compel the payment of maintenance or other sum stated in the judgment. Also, under the Maintenance Orders Act, maintenance orders obtained in England, Ireland, Gambia, Ghana, Sierra Leone, New South Wales, St. Vincent, Grenada, British Guiana, Victoria, Australia, Zambia, South Africa, New Zealand and Jersey are directly enforceable by Nigerian courts upon registration.

CHILDREN
Custody/parental responsibility

20. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage?

Under the Matrimonial Causes Rules, a party who seeks the dissolution of marriage or other relief must state the number and age of the children and the arrangement for their maintenance, education and most importantly, custody. The issue of custody must therefore feature from day one. The court can raise the issue on its own where the parties refuse to and cannot grant a decree absolute until arrangements for children are determined.

The court may order joint custody or award custody to one of the parties with visitation rights for the other party. The primary consideration in awarding custody under the Matrimonial Causes Act and Child’s Rights Act is the welfare and interest of the child. The factors considered by the courts are not exhaustive. The following factors among others are key in determining who should have custody:

- Emotional attachment to a particular parent.
- Degree of familiarity and wishes of the child.
- Adequacy of facilities (educational, social, emotional, and so on).
- Respective incomes of the parties.
- If one of the parties lives with a third party.
- The age of the child.
- The sex of the child. (Custody of a female child is usually given to the mother and male children to their father. However, this is subject to the overriding interest of the child).
- Opportunities for a proper upbringing.
- Conduct of the parties.

Custody is not awarded as a punitive measure on a party guilty of matrimonial offences, nor as reward for the other party. In Odusote v. Odusote (see Question 8), the court held that where a mother does not suffer from moral misconduct, infectious diseases, insanity, lack of reasonable means, or is not cruel to the children, custody of children of tender age and female children should be given to the mother.

Custody for married couples may be sought under the Matrimonial Causes Act or the Child’s Right Act. For unmarried couples, only the Child’s Rights Act applies. In states where the law has not been adopted, customary or Islamic laws will apply. The considerations for grant of custody for unmarried couples are largely the same because the interest of the child is the most important factor.

21. What is the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage?

The court has discretion under the Matrimonial Causes Act and Child’s Rights Act to include in a custody order visitation or access rights of the other party or parties to the marriage, where custody is given to the other party or a third party in the interest of the child. The paramount consideration is the interest and welfare of the child. The court can order supervised access rights, depending on the facts and circumstances.

The duration of child arrangement orders including visitation rights is until the child reaches the age of 21 or 18 depending on whether the order was made pursuant to Matrimonial Causes Act or the Child’s Right Law.

There is no separate representation for children in matrimonial cause proceedings relating to maintenance or custody. However, there may be a separate representation for a child under the Child’s Rights Act where the child institutes an action independently against the parents.

International abduction

22. What is the legal position on international abduction?

Nigeria is not a signatory to the HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention). However, abduction is a criminal offence. Section 27 of the Child’s Rights Act criminalises abduction and removal of a child from lawful custody with:

- 15 years’ imprisonment, if there is an intention to return the child.
- 20 years’ imprisonment, if there is no intention to return the child.

Child abduction is also a criminal offence under section 371 of the Criminal Code. The section provides that a person who kidnaps a child is guilty of a felony and liable to be a sentence of 14 years’ imprisonment.

- International abduction is dealt with mainly by pressing criminal charges. The other option is the use of diplomatic channels between Nigeria and the other country involved. The authors are of the view that the return of the child to the parent with legal custody abroad can be secured by the court under the Child’s Right Act once it is established to be in the interest of the child. This is because the overriding consideration for the welfare and custody of a child is the best interest of the child.

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23. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

If a parent wishes to take a child out of the jurisdiction, the permission of the other parent is required because custody is based on certain established facts. Relocation will always change the dynamics of the facts, including:

- Accommodation and education for the child.
- Earning capacity of the custodial parent.
- Visitation rights for the other parent.

The other parent can therefore challenge removal without permission.

There is no express provision on applications to remove a child from the jurisdiction. However, a custodial parent can apply to remove a child from the jurisdiction if it is in the interest of the child under the Child’s Rights Act. The court will take into consideration similar factors for the grant of custody and the visitation rights of the other party (if any).

**SURROGACY AND ADOPTION**

**Surrogacy agreements**

24. What is the legal position on surrogacy agreements?

There is no law on surrogacy in Nigeria. Agreements on surrogacy are not enforceable in Nigeria on grounds of public policy. In the absence of legislation on surrogacy, a child cannot be obtained based on surrogate agreements, unless by proper adoption measures.

**Adoption**

25. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?

Under section 129 of the Child’s Rights Act, the following persons can apply to court, in a prescribed form, to adopt children in Nigeria:

- A married couple, where both of them have attained the age of 25 years and there is an order authorising them to adopt a child.
- A married person, if he has obtained the consent of his spouse, as required under section 132 of the Act.
- A single person, if he has attained the age of 35 years, provided that the child to be adopted is of the same sex as the person adopting.

In all the above cases, the adopter or adopters must be persons found to be suitable to adopt the child by the appropriate investigating officers.

In some states such as Lagos, Delta and Edo states, the applicant and the child must be resident in the state where the adoption is sought. If there is a parent or guardian available for the child, their consent is required.

Same sex relationships are considered criminal acts and as such, same sex couples are not able to adopt.

**Cohabitation**

26. What legislation (if any) governs division of property for unmarried couples on the breakdown of the relationship?

There is no legislation, which governs the division of property for unmarried couples in Nigeria.

**FAMILY DISPUTE RESOLUTION**

**Mediation, collaborative law and arbitration**

27. What non-court-based processes exist to resolve disputes? What is the current status of agreements reached through mediation, collaborative law and arbitration?

The resolution of family disputes through mediation and conciliation before resorting to court is a natural part of family life in Nigeria. Religious heads, heads of families, and respected elders in the community are often invited to help resolve marital disputes before any recourse to the courts. Arbitration is not common in resolution of family disputes.

The terms of settlement reached after negotiation on issues like custody and division and settlement of property will form part of an enforceable contract. However, since it is a post nuptial agreement, its enforcement is at the court’s discretion.

In states like Lagos, the courts are empowered to refer cases to the Multi Door Courthouse, which is an alternative dispute resolution court. Parties can also approach the court directly. The court can use any alternative dispute resolution mechanism to resolve the dispute.

28. What is the statutory basis (if any), for mediation, collaborative law and arbitration?

The statutory basis for alternative dispute resolution processes in matrimonial causes is the Matrimonial Causes Act. It mandates a petitioner to file a certificate of reconciliation along with his petition. The petitioner’s legal practitioner signs the certificate stating that the provisions relating to reconciliation have been brought to the attention of the petitioner. During the proceedings, parties must attend a compulsory conference at which the court attempts to reconcile the parties. The court has wide scope to encourage the parties to settle issues like custody and division of property. In *Nwosu v Nwosu* (see Question 10), the court held that a marriage should not be dissolved if it is capable of being settled.

The Child’s Rights Act also grants the Family Court established by it the power to encourage amicable settlement. States like Lagos have designated Family Courts with express powers to explore alternative dispute resolution mechanisms.

**CIVIL PARTNERSHIP/SAME-SEX MARRIAGE**

29. What is the status of civil partnership/same-sex marriage? What legislation governs civil partnership/same-sex marriage?

In Nigeria, all forms of same sex associations and marriage are criminal offences, with a term of imprisonment of up to 14 years. The major legislation on same sex is the Same Sex Marriage (Prohibition) Act 2013. Other legislation like the Penal and Criminal Codes also criminalise same sex practices. The definition of marriage under the Matrimonial Causes Act cannot accommodate same sex marriages.
MEDIA ACCESS AND TRANSPARENCY

30. What is the position regarding media access to and press reporting of family law cases?

All court proceedings including matrimonial causes and proceedings of Family Courts must be public. This is a constitutional prerequisite for a fair hearing. Matrimonial causes or other family proceedings determined in chambers will be legally void (section 103(2) of the Matrimonial Causes Act and Order 1 Rule 9(1) of the Matrimonial Causes Rules; Menakaya v Menakaya (2001) 16 NWLR (Pt. 738) p.203.

The media and other members of the public have access to family court proceedings and are permitted to report on family law cases. However, the court can exclude the media and other members of the public from the proceedings in exceptional circumstances such as on the grounds of security, unruly behaviour, interest of the child, and so on.

CONTROVERSIAL AREAS AND REFORM

31. What areas of the law (if any) are currently undergoing major change? Which areas of law are considered to be particularly controversial?

The most controversial aspect of Nigerian family law is the Same Sex Marriage (Prohibition) Act 2013. The law has drawn criticism from within and outside Nigeria. The basis for this criticism is that it is a breach of the fundamental human rights of a minority, as enshrined in international conventions to which Nigeria is a party. Reference is also made to the Nigerian constitution which precludes discrimination on the basis of sex. However, the law has public acceptance because it is in line with moral and religious beliefs of the Nigerian people. It is therefore difficult to maintain the argument that same sex was contemplated in the constitutional provisions on non-discrimination.

Some aspects of Nigerian family law like surrogacy and international abduction require legislation and domestication of international conventions to avoid problems in the near future. Reforms are needed in areas like cohabitation, settlement of property and the criteria for maintenance. The discretion that the courts have in these areas is too wide, creates uncertainty and does not always capture the essence of the requirement of what is fair and equitable.

ONLINE RESOURCES

Nigerian National Assembly
W www.nassnig.org

Description. The official website of the Nigerian National Assembly, which is the legislative body of the government. The site contains Nigerian statutory legislation.
Practical Law Contributor profiles

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• Nigerian Bar Association.
• International Bar Association.
• International Federation of Women Lawyers (FIDA).
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• Nigerian Bar Association.
• Institute of Chartered Secretaries and Administrators of Nigeria.
• Chartered Institute of Arbitrators (UK).
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