

**REVAMPING THE LAW ON MAINTENANCE OF CHILDREN IN NIGERIA:
NIGERIA, AUSTRALIA AND SOUTH AFRICA IN PERSPECTIVE**

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Abstract

Maintenance of children is one of the ancillary reliefs provided for by the Matrimonial Causes Act.² Besides the settlement of property and Custody of children. These reliefs are designed to protect spouses and children in the event of a dissolution of marriage. Maintenance of children of a marriage, although provided for in Section 70 of the Matrimonial Causes Act, has some pitfalls, such as setting the age of children subject to maintenance at twenty-one, lacking a provision for personal legal representation for the children, and issues related to enforcement. This work aims to review the law of child maintenance in Nigeria, Australia, and South Africa, with a view to determining the propriety or otherwise of the provision vesting rights of maintenance on children under statute in Nigeria. This research was limited to the rights of children to Maintenance upon the dissolution of their parents' marriage under statute in Nigeria, South Africa, and Australia. The doctrinal and comparative methodologies were adopted in this research work. This research revealed that the age limit of twenty-one years prescribed as maximum age limit for the award of maintenance is not very practicable considering the prevalent socio-economic situation in Nigeria. It became obvious that the law on maintenance as it is in Nigeria cannot adequately safeguard the rights of children upon divorce of their parents. It was recommended that these provisions need to be revamped to meet the exigencies of contemporary Nigerian society.

Keywords: Maintenance, Divorce, Ancillary relief, children

Introduction

Maintenance is one of the ancillary reliefs available to parties who seek dissolution of marriage in Nigeria. The word maintenance has several connotations. It could be said to be the act of providing maintenance or receiving maintenance in terms of care giving or providing upkeep or filing a legal suit³

However, maintenance has a different connotation in the realm of matrimonial causes and that is the perspective that is the calling of this work. The meaning

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² Laws of the Federation of Nigeria, 2004, Cap M7

³ Merriam- Webster's offline dictionary

of maintenance under the Matrimonial Causes Act refers to a monetary allowance given to either a party to a marriage or (and) children of the marriage

Maintenance under Statute

The matrimonial Causes Act provides for dissolution of marriage, providing that only one ground exists for the breakdown of marriage under statute which is the irretrievable breakdown of the marriage⁴ and provides for eight facts to prove this irretrievable break down of marriage⁵. It should be noted that before a party can establish a right to maintenance of children under this section⁶, it must be shown that it is an ancillary relief from the main relief for a dissolution of marriage. The Matrimonial Causes Act⁷ provides that a court has the discretion to grant maintenance to the husband or the wife or and the children when there is a petition for dissolution of marriage before it. The section goes further to provide that the court also has inherent powers to make orders of maintenance for the benefit of the children of the marriage being dissolved. In granting an order for dissolution of marriage the court would consider; the party's means of the parties, the earning capacity of the parties, the conduct or behaviour of the parties with regards to the marriage and any other relevant consideration the court deems fit⁸. It should be noted that these criteria do not apply to maintenance pending the disposal of proceedings.

2.1 Children entitled to Maintenance

A significant aspect of the right to maintenance in favour of children⁹ is the fact that it entitles children to maintenance. It provides that the court has discretionary powers to make orders with respect to maintenance of children in proceedings for dissolution of marriage. With the above provision it is clear that although children are not parties to a marriage or parties in divorce proceedings they are entitled to maintenance as provided in the said subsection¹⁰. Therefore, the criteria as provided for assessing Maintenance as contained in S.70 will not be applicable to children even though they are beneficiaries or entitled to maintenance. All such considerations as earning capacity, income, conduct of parties or other relevant considerations will not be applicable to children

Therefore, in assessing maintenance, it would be of no consideration to see if the child has trust funds.¹¹ Also, it would be irrelevant for the court to investigate into the child or children's conduct awarding maintenance. It just

⁴ S.15 (1) MCA

⁵ S.15(2) MCA

⁶ S.70 MCA

⁷ S.70, LFN CAP M7

⁸ S.70 (2) MCA

⁹ S.70(1) MCA

¹⁰ That is, means, earning capacity and conduct of the parties to the marriage and all other relevant considerations

¹¹ In some cases children have money held in trust for them by their parents or third parties

means a bad child is as entitled to maintenance as a good child. The only restriction with respect to maintenance when the subject matter are children is that such a power shall not be exercised in favour of a child who has attained the age of twenty-one years¹². This automatically excludes any child who is twenty-one and above from being awarded maintenance; however, the same section qualifies it by making a rider that children who are twenty-one and above may be entitled to maintenance where it can be proved that special circumstances exist that justify the making of such an order for the benefit of that child. E.I. Nwogugu¹³ has pointed out that S.70(4) MCA does not specify whether a child who benefits from a maintenance order which benefits naturally extends to when the said child is more than twenty-one years, can legally continue to enjoy the benefits of such maintenance after he or she turns twenty-one. He submitted that in such cases it will not matter that the child would continue to benefit from such order the court can still go ahead to make the order and the child will be entitled to the benefit from such maintenance order even after he or she has attained twenty-one years of age. He cited the cases of *Osborne v Osborne*¹⁴ where an Australian court took the position that the restriction in the provision which is similar to section 70(4) MCA applies to children who have reached the age of twenty-one at the date the order was made. It will not apply to a child who would continue to benefit from the order after he or she has reached twenty-one years.¹⁵ Therefore, if maintenance is granted for the payment of a child's school fees till he graduates from the university, then it would not matter that at the time the child would be graduating he or she is more than twenty-one years old. In the Australian case of *Osborne v Osborne*,¹⁶ the court held that the child was entitled even though he will continue to benefit after the child turned twenty-one years. This interpretation of the subsection is a very good one and would safeguard the rights of children better upon divorce of their parents. It should be noted however that the case of *Osborne v Osborne*¹⁷ is not a Nigerian Judicial authority therefore it can only be persuasive authority to Nigerian courts. It should be noted that the law in Nigeria¹⁸.

The proviso to S.70 (4) MCA makes an important exception to the position of maintenance of a child. It provides that under exceptional circumstances a child who is above twenty-one years of age may be maintained but there must exist "special circumstances that justify the making of such order for the benefit of that child". The Act does not further define what amounts to exceptional circumstances. However, E.I. Nwogugu¹⁹, takes the view that exceptional circumstance may be seen in cases where the child although above twenty-one years is in such a physical or mental state that he is unable to support himself; or that he requires special medical care and attention; or in cases where the

¹² 70(4) MCA

¹³ *Family law in Nigeria*, revised edition (Ibadan: HEBN Publishers Plc, 2011) pp. 246,247

¹⁴ (1972) 19 FLR 315 (as cited in E.I Nwogugu op cit p.247)

¹⁵ E.I Nwogugu op.cit. 247,

¹⁶ supra

¹⁷ supra

¹⁸ S.70(4)

¹⁹ Op. cit. p.247

child is exceptionally intelligent and should be entitled to be supported financially through tertiary education or to carry out research. It is submitted that these circumstances as espoused by the learned scholar are good grounds for which maintenance may be awarded to a child who is more than the statutory twenty-one years of age in Nigeria. However, beyond these circumstances there is a myriad of circumstances that should warrant a child who is above twenty-one years to benefit from a maintenance order²⁰. If a child is healthy and not physically or mentally challenged or is exceptionally intelligent, but for reasons which are not his making is unable to become financially independent when he is twenty-one years of age, should that child be left unmaintained? It is submitted that putting the age at twenty-one is not a good position and would not adequately protect the rights of child. It is a notorious fact that in Nigeria today unemployment is on the increase. What if the child has graduated from school and is employable but unable to get a job? Putting the age at twenty-one and not defining exceptional circumstance thereby leaving so much discretion to the court will not adequately protect or safeguard the rights of the child. It is submitted further that circumstances do not need to be exceptional before a child can get maintenance upon the divorce of his parents in the same way circumstances do not need to be exceptional before a party to a marriage benefit from a maintenance order.

2.2 Maintenance pending disposal of Proceedings

S.70 (2) MCA provides that the High court in Nigeria is vested with jurisdiction to make an Order for maintenance pending the end or disposal of proceedings for parties to a marriage as well as the child or children of the marriage putting the parties means, their conduct, earning capacity and other relevant considerations, like other financial responsibilities of the parties, into consideration.

This provision makes maintenance available to parties to a marriage and children of a marriage during the pendency of a suit, before the final determination of the suits. This is definitely a laudable provision considering the length of time a case may take from commencement to when judgment is delivered. This empowers the court to make interim orders of maintenance so that parties and children are not left unprotected during the pendency of a case. It therefore follows that maintenance pending the disposal of proceedings may in appropriate cases flow from the wife to the husband and may flow from either or both parties to the children, the law does not envisage a reverse situation where maintenance may flow from the children to the parents or either of them. Further, such maintenance application can only be made where there is a pending proceeding for a principal relief.²¹ It is therefore evident that a party to a marriage cannot seek maintenance without firstly having a pending suit/proceeding before the court under S.70 (2) MCA. Also, the court cannot make an order under S.70 (2) MCA when the petition for the principal relief has

²⁰ S.70(4)MCA

²¹ See the case of *Babatola v Babatola* (1974) NMLRS 55, *Ajai v Ajai and Ors*(1970-1971) E.C.S.N.L.R 14, cited in M.C. Onokah op. cit. p.239

been dismissed.²² This does not mean that the court is barred from making an order after hearing the case on its merit for the principal relief and maintenance. In that case, where a court is faced with making a decision on the principal relief and the ancillary relief of maintenance, the court can simultaneously make both orders; one dismissing the principal relief and the other granting the ancillary relief of maintenance.²³ Therefore, it is only in cases where before the issue of maintenance pending the disposal of proceedings is heard, the case is already dismissed that a party cannot claim under S.70 (2) MCA.

In granting maintenance pending the disposal of proceedings the court is not entitled to determine the issue or grounds for the dissolution of the marriage but a party has a duty to disclose to court if he or she has indulged in any of the forms of misconduct provided for in S.15 MCA. This will enable the court make a judicial and judicious determination of the application.²⁴ In *Akparanta v Akparanta*,²⁵ the court discharged a maintenance order for non-disclosure by the wife/applicant of her pregnancy for another man.

Judicial attitudes seem to tilt in the direction that where the application is one of maintenance pending the disposal of proceedings the court will not give too much credence to matters that are extraneous to the application for maintenance like the other financial commitments of the parties, as 'a husband must be fair before being generous'²⁶

It is submitted that the provision of S.70 (1) MCA and s.70 (2) MCA are in parimateria with regards to conditions for the granting of maintenance. Therefore, this pre-supposes that it is the same conditions a court should consider in making a maintenance order whether it is in cases of maintenance pending the disposal of proceedings or it is in cases of maintenance per se.

It should be noted that parties to proceedings for maintenance pending the disposal of proceedings may lawfully enter an agreement and agree mutually on the maintenance to be paid pending the disposal of proceedings. Such agreement when filed in court may be adopted by the court and the necessary order made by the court without a necessity of hearing.²⁷

It should be noted also that it is not only the parties that are entitled to maintenance pending the disposal of proceedings; the children of the marriage are also entitled. It is submitted that this is a very progressive provision as it safeguards the rights children without the lapses that would have been occasioned if the parties had to wait for the final determination of the proceedings. However, an order for maintenance pending the disposal of

²² S.75(1) MCA

²³ S.75(2) MCA

²⁴ M.C Onokahop.cit. p.240

²⁵(1970-71) E.C.S.N.L.R.S. P.104. cited in M.C Onokah Ibid

²⁶*Ikpi v. Ikpi* Suit no HD/88/83 of 13/4/84 (unreported) High court of Lagos cited in M.C Onokah Ibid

²⁷ Order xiv rules 9-1

proceedings is not to enrich the parties or the children of the marriage, it is meant to ensure that the parties and children are adequately provided for relative to the usual standard of living of the parties before commencement of the proceedings. It is important to understand the factors the courts will consider in the award of a maintenance order to a party to the marriage. This is important because whoever is obligated to maintain the other based on the factors discussed below may also be the party the court would put under more obligation to maintain the child or children of the marriage.

2.3 Factors the Court Shall Consider in the Award of Maintenance

2.3.1 Means of the Parties

In the case of *Okoro v Okoro*²⁸ the court gave judicial interpretation to “means of the parties” as capital assets of the parties, including contingent and prospective assets.

The means of a party is viewed from a broad perspective as assets which includes buildings a party has and other real property; it extends to equity and shares the party may also have. Even in cases where the income is not stable or contingent, it is also taken into account in the computation or determination of maintenance to the children of a statutory marriage. For instance, if by a trust fund a party is going to be entitled to one million naira by the following year the court will calculate that as part of his/her means. Also, for the purpose of maintenance, it covers all pecuniary resources of the parties, whether capital or income.²⁹ Therefore, the court will not only access the cash at hand at the time it is going to make the order for maintenance but would take cognizance of the means of a party in determining the right or obligation of a party to receive maintenance or to “maintain” the other party and the children of the marriage.

2.3.2 Earning Capacity of the Parties

What is referred to as the earning capacity of a spouse in this context is not only what the spouses earn in actual fact but also what they are capable of earning if they obtained suitable employment based on their capacity and potential.³⁰ This seems to be a situation that is not clear cut. It means even if a man or woman is not in any gainful employment, but from their qualifications, experience and capacity had they been in gainful employment they would have earned a certain amount of money, such amount of money they could have earned had they been in gainful employment will be taken into consideration. Therefore, if a man is a lawyer and it has been said that a lawyer is not a man of straw, then it follows that it does not matter if the lawyer is jobless or not, he will be deemed to be a person of means for the purpose of ascertaining or determining his earning capacity in awarding maintenance. This is a progressive criterion especially

²⁸ [2014] ALL FWLR (pt.572) p.1748 at 1757, see also *Damulack v. Damulak* (2004) 8NWLR (pt874) 151

²⁹ E.I Nwoguguop.cit p.242, *Rogers v Rogers*(1962) 3FLR398

³⁰ E.I. Nwogugu, op.cit p.242

where a party deliberately refuses to work to avoid the responsibility of maintenance of his children. However, it is a notorious fact that there are economic inequalities between men and women in Nigeria, although better now than before, it is still visible. This is due to the apparent unfavourable economic competition in the areas of job and other economic empowerment where women receive the shorter end of the stick.³¹

The court would usually not speculate on the means and earning capacity of the parties, the court would as much as possibly look at it objectively and not award maintenance arbitrarily³². The certificate of means which is a document that shows the actual earning of a party may be filed by parties and it is a veritable tool in making an objective assessment of a party's earnings and income. Where a certificate of means is filed it is easier for the court to objectively award maintenance in favour of the children of the marriage after confirming the authenticity of the information by the parties.

2.3.3 Conduct of the parties to the Marriage

The conduct of the parties is a relevant consideration in determining maintenance. It is however ironical that the conduct of parties should be an issue to be considered considering the fact that in Nigeria it is the no-fault theory of dissolution of marriage that holds sway in matrimonial proceedings. This phrase is nowhere defined in the Matrimonial Causes Act in Nigeria but it would seem that for conduct to be reckoned with it must be both obvious and gross and repugnant to anyone's sense of justice³³. This criterion cannot be said to be objective as the meaning of both obvious and gross may not mean the same thing to everyone. It is my view that this is not a very safe position for parties especially for children because the weaker party may foist with the responsibility of maintenance of the children because of his or her moral failings. This may have a reverberating negative effect on the children who would not get the best maintenance award from the said party with a reprehensible conduct and less financial capacity. It is submitted that just like S.16MCA provides for behaviour which a petitioner is not expected to bear as envisaged by S.15 (2) (c) MCA, even though they are not deemed to be exhaustive, the Matrimonial Causes Act should be amended so that all situations that qualify as "conduct" which the court may take cognizance of in awarding maintenance are properly spelt out

2.3.4 "All other relevant considerations"

This is one of the criteria envisaged by S.70MCA and S.70 (2) MCA it is obviously an omnibus clause that is amorphous and undefined. It is argued that it enables the courts, in their assessment of maintenance awards to take into account factors that are extraneous to the parties' nuclear family.³⁴ This is particularly

³¹ Salman, R.K and Abdulraheem Nimah Modupe, ' Non-Realization of women's Rights in Nigeria: The way forward' unib Law Journal vol.2, No 1, May 2012,232

³²*Igwemoh v Igwemoh* [2015] ALL FWLR(pt 801)p.1554 at 1557-8

³³*Wachtel v Wachtel* [1973] fam. 72,

³⁴ M.C Onokahop.cit. p.244

true bearing in mind that in the Nigerian setting there mostly exist strong ties between nuclear families and their extended family and this relationship cannot be over looked³⁵.

2.4 Quantum of Maintenance

Section 70(1) MCA only prescribes what the courts need to take into consideration in awarding maintenance. It does not go a step further by determining the quantum of maintenance to be awarded in deserving cases.³⁶ In *Adesokan v Adesokan*,³⁷ the court held referring to s.71 MCA that the section does not lay down any objective criteria to establish any particular quantum or fraction of resources of the party that the awardee of the maintenance order is entitled to. The only thing it does is to set out criteria and factors the courts needs to consider before it can exercise its discretion to grant an award of maintenance to a party to a marriage and the children of the marriage. It is suggested that the one-third rule be adopted³⁸ as propounded in *Wachtel's case*.³⁹ The one-third rule⁴⁰ is to the effect that both parties' income will be added together and divided by three and the wife will get a third of the calculated joint income minus her own income. Therefore, if a husband earns ₦50,000.00 (fifty thousand naira) and his wife earns ₦10,000.00 (ten thousand naira). Then by the one- third rule the wife would be entitled to ₦20,000.00 (twenty- thousand naira) as maintenance beside her ₦10,000.00 (ten thousand naira) income. This is not a bad position, unfortunately it is not provided for under Nigerian law. However, it should be noted that the one-third rule is maintenance to the wife not for both the wife and children; otherwise in some cases it would be grossly inadequate and inequitable. It is suggested that in deserving cases where the justice and equity of the case so demand, the one-third rule should be applied by the courts then the court can exercise discretion in awarding maintenance in favour of the child or children of the marriage. This will foster the protection of the rights of a divorced wife and her children.

2.5 Enforcement of Maintenance awards

Enforcement of a maintenance award is very vital in safeguarding the rights of a child or children to maintenance. This is because no matter how equitable an award is in favour of a child, it is useless if it is not enforced especially where the person obligated to pay maintenance does not religiously comply. The Matrimonial Causes Act has made laudable provisions for the enforcement of a maintenance award. S.88 MCA provides that a court may enforce a maintenance award by attachment or other process by an order made by it under the Act for payment of maintenance or cost. S.88 (3) MCA further provides that where attachment of property is unsatisfied for a period that is not less than six weeks,

³⁵*Dawodu v Dawodu* C.C.H.C.J/5/74,617 cited in M.C Onokah Ibid

³⁶ E.I Nwoguguop.cit. p.27

³⁷ [1976] 2 FNR 24,33

³⁸ E.I. Nwogugu Ibid

³⁹ (supra) at 101

⁴⁰Kathleen Hennessy, 'Broken Homes' The guardian, Tuesday 13 may, 2003 retrieved from <https://www.google.com.ng/amp/s/amp> accessed 5th April, 2017

then the person who has the property that was attached would be regarded in law as an insolvent person and the court can order the person be remanded under the attachment for a time or period not more than six months after the end of the time or period of six weeks as earlier mentioned, except the court decides to make a different order. Further S.91 (1) MCA give powers to a court of summary jurisdiction like the magistrate courts to enforce the payment of an order for maintenance.

Further by S.92 MCA maintenance may be enforced by attachment of earnings. S.93 MCA gives wide latitude to the court to use any other means other than those specified under the Act to satisfy a maintenance order. It is obvious that the Matrimonial Causes Act has to an appreciable extent made good provisions for the enforcement of the rights to maintenance of children. The real issue therefore is whether judicial attitudes have been in the interest of making maintenance awards and enforcing same in favour of children. This is because as long as judicial attitudes are negative towards the award and enforcement of maintenance orders the provisions are impotent.

2.6 Inflationary trends

In the assessment of an award of maintenance the court is also enjoined to take cognizance of inflationary trends. In *Anyaso v Anyaso*⁴¹ the court held that it is imperative for the courts to take into consideration the prevailing market cost or prices of commodities. This was also the reasoning of the court in case of *Akinboni v Akinboni*⁴²

2.7 Maintenance by Agreement

There is nothing Under Nigerian law that forbids maintenance by agreement. If parents decide on maintenance for a child or children of their marriage when there is a divorce, the court is at liberty to adopt it if it is in the best interest of the child or children or refuse it, and make its own Orders in the best interest of the child or children⁴³. Parties may also determine how periodical payments for a child's maintenance would be made; whether weekly, monthly, quarterly or any way that is favourable and advances the child's welfare⁴⁴.

3.1 Maintenance of children under the Nigerian Child's Rights Act (2003) in juxtaposition with the Provisions of the Matrimonial Causes Act in Nigeria

The Child Rights Act (CRA)⁴⁵ made provisions for the maintenance of children. It would appear that the CRA provisions is a more progressive and embracing provision. It provides in s.14(2) that a child is entitled to maintenance from his

⁴¹ [1989] NWLR (pt 559), 661

⁴² [2002] NWLR (pt 761)564

⁴³ Sections 1 and 2 of the Child's Rights Act of Nigeria, 2003, S. 71 Matrimonial Causes Act, Cap 7 LFN, 2004

⁴⁴ *Hayes v Hayes* (200) 3 NWLR (PT 648) P276

⁴⁵ Child's Rights Act(2003) (herein after referred to as CRA)

parents or guardian and may enforce the right to maintenance through the Welfare Department of any state. This provision for personal enforcement by the child is unmistakable absent under the Matrimonial Causes Act(MCA). Also the MCA only envisages children born from a statutory marriage but the CRA's provisions cover not only children born under statutory marriage but children born out of wedlock. To this end a child can get independent legal representation to foster his or her right to maintenance. In addition to the foregoing s.204 and s. 205 of the criminal code of Lagos state makes it a criminal offence for a child to be left without maintenance by the parents or Guardians.

4.1 Maintenance of Children under Australian Law and South African Law in Juxtaposition with Nigerian Law.

The making of Maintenance orders is within the jurisdiction of the Family court in Australia. S.72 of the Family Law Act, 1975 makes general provisions for maintenance. It makes provisions for situations where there is no formal marriage between the but the parties have just been in de facto partnerships (relations) and provides that the right to maintenance is still available to children born under these circumstances under Australian law.

The Australian law⁴⁶ shares some similarities with Nigerian law. In both States children born out of wedlock are entitled to maintenance and such children may enforce such maintenance where it is due.

The department of Human services is the department vested with jurisdiction when it comes to determination of maintenance for children under Australian law. Maintenance is referred to as child support under Australian law⁴⁷. The responsibility of paying child support does not change where the parents of the child divorce or separate, neither is it determined by who has custody of the child or who spends more time with the child or whether both or either of the parents have remarried⁴⁸ It is the right of the child at all material times. Provision of financial support for children is usually determined in Australia by the child support Agency. This agency has the responsibility to determine and assess child support for children. The agency also administers the child support for children and administers the child support scheme. The child support Agency derives their power under the Child Support (Assessment) Act 1989.

From 1 July, 2008, a new formula was introduced into the Child Support (Assessment) Act which takes certain factors into consideration in computing child support⁴⁹. They include;

⁴⁶ That is, the family law act, 1975

⁴⁷Family court of Australia, 'child support' retrieved from www.family.court.gov.au/wps/wcm/connect/fcoaweb/family-law-matterproperty-and-finance/childsupport accessed 17/04/2017

⁴⁸ *ibid*

⁴⁹ Max Meyer, "Family law in Australia: overview',(ND) retrieved from <https://lluk.practicallaw.thomsonreuters.com/8-579.5585> accessed 17/04/17

Sharing the maintenance based on incomes of the parties to support the child or children Both parents having same self-support amount The percentage of care each parent provides Recognition of the cost of contact as a contribution to the costs of the maintenance of the children. This is because in certain circumstances it may require extra cost for the party without custody to reach the party having physical custody. This will also be taken into consideration.

It would also appear that in the assessment of maintenance for children a more detailed provision is made under the Australian law. Also, by virtue of the Family Law Act, 1978, S.68, the court can appoint an independent children's lawyer to represent the child's best interest and make sure the appropriate focus on the child is had by the court especially with regards to parenting arrangements. This can happen during divorce proceedings unlike the Nigerian situation that this is only envisaged under the Child Rights Act⁵⁰. One major difference between the Australian law and Nigerian Law is the fact that Maintenance is available to a child till he or she turns twenty-one years old but under the Australian law the age is put at eighteen. The Nigerian age at twenty-one is more at tune with the Nigerian socioeconomic realities so it's a better position. Unlike the Japanese and Nigerian positions, the child or children of the marriage can apply for an independent legal representation for him/herself in all circumstances where his or her right is trampled upon. Further, an organization concerned with the welfare of children or any other person may apply to court to foster the best interest of the child in proceedings affecting the interest of the child⁵¹. Generally, a child under Australian law is entitled to maintenance till the child turns eighteen years of age but a child may continue to enjoy child support after this age under special circumstances such as where the child is in school or where the child is impaired by reason of health or other reasons⁵². Also, the provision of independent legal representation under Australian law at all times gives children the edge they do not have under Nigerian law and this will better protect and safe guard the rights of the children

The Divorce Act of South Africa⁵³, S.6 provides for maintenance for dependent children of the marriage, the age bar for which maintenance may be granted or refused is not stated. This is a far better provision than the Nigeria situation where age bars are provided for. What is provided for under the Divorce Act is 'dependent children'. It follows that as long as the child is still dependent on his parents he or she would be entitled to maintenance. It is submitted that this will better safeguard the rights of the children of the marriage than the Nigerian position. Further, by virtue of S.6 (2) of the Divorce Act of South Africa⁵⁴ the

⁵⁰ 2003

⁵¹ Family Law Court, "independence children's lawyer" retrieved from www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/independence-children accessed 17/04/17

⁵² Legal aid, "child support and child maintenance" www.legalaid.wa.gov.au/informationaboutthelaw/familyrelationshipchildren/childsupport/pages/childsupportandchildmaintenance.aspx accessed 17/04/17

⁵³ 1979

⁵⁴ Op cit.

court has the powers to make orders to investigate into the welfare of the child or children of the marriage with the intent of reaching an equitable decision on their maintenance. What is however most progressive in the South African provision is that by virtue of S. 6 (4) of the Divorce Act⁵⁵ the court may order the appointment of a legal practitioner to protect or safeguard the rights of the child or children of the marriage during divorce proceedings and the fees of such legal practitioner is payable by either one of the parties or both parties to the divorce suit. It is submitted that this is a very laudable provision and Nigeria should imbibe this provision in her Matrimonial Causes Act, as this would definitely foster and safeguard the rights of the child or children of the marriage.

5.1 Findings, Summary and Recommendations

It is an aphorism that the law on maintenance of children in Nigeria still leaves a lot to be desired. Provisions of the MCA which was the only major statute on maintenance of children prior to 2003 was very parochial with many lacunae specially making its provisions unavailable without a divorce proceeding as it was an ancillary relief obtainable from a divorce Petition. The Child Rights Act was a watershed development in this area as it widened the ambits of its operations to even children born out of wedlock. The Child Rights Act is indeed a better legislative document on the subject, although putting the age of a child at eighteen does not cohere with the socioeconomic climate of Nigeria.

Recommendations

- i. It is recommended that in all proceeding involving the rights of a child even in divorce proceedings as is the case under South African Divorce Act, the child or children of the marriage should have their own legal representation whose fees should be paid by the government or the Government can have a department under the ministry of Justice to be directly responsible for that.
- ii. It is recommended that the definition of child for the purpose of maintenance should be revisited. The position under the South African law where dependants are used reflects a better position so that even if a child is more than twenty-one but it can be established that it is through no fault of the child, he is still a dependent then the child should still be entitled to maintenance. For instance, if a child who is twenty-five is incapacitated by ill health or other reasons it would be unfair to refuse him or her maintenance.
- iii. It is also recommended that beyond the provisions for enforcement the law should make provisions where there would be a lien on the account of the obligor of maintenance for the child so that debits for maintenance is automatic from his/her account or pay cheque from his/her work place.

⁵⁵ Op. cit

It is submitted that if these recommendations are implemented the rights of children to maintenance would be better protected in Nigeria.

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