

An Appraisal of the Ancillary Reliefs in Dissolution of Marriages Contracted Under the Marriage Act

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Abstract: *Ancillary reliefs in dissolution of marriages contracted under the Act are very salient and of great importance to be put into consideration by the Court in determination of the main relief which is the divorce itself. This articles examines the various types of ancillary reliefs as provided for in The Matrimonial causes Act, 2004, considering the various factors the court will put into consideration in granting these ancillary reliefs. The method of research adopted in this article is the non-doctrinal method. In the examination of the ancillary reliefs and the factors the court put into consideration in granting same, the article aims to give a clearer understanding of the ancillary reliefs, the factors the court usually put into consideration in granting same and persons who are entitled to same and the effects of same. The article made findings that Custody of the children of the marriage which is one of the ancillary reliefs is not granted as compensation to one party or as punishment to the other party even though tender children and female children are most likely to be left with their mothers. In all, the court will at all material time look at the paramount interest of the children of the marriage. Maintenance and settlement of properties can be made in favour of either spouse and in respect of children who have not attained the age of 21 years, there are special circumstances in which the court can still make such orders in favour of the children of the marriage who have attained 21 years and above. This article recommends that the guide line in Sec 25 of the MCA should be revised to give greater emphasis to the provision of adequate financial support for children which should be an over-riding priority and to the importance of each party doing everything possible to become self-sufficient.*

Keywords: ancillary reliefs, custody, maintenance, settlement of properties, dissolution of marriage.

INTRODUCTION

A party to a marriage under the Act can also seek other relief other than the relief for a Decree of Dissolution of the marriage in his or her Notice of Divorce petition before the Court. Such reliefs are

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referred to as Ancillary reliefs. Simply put Ancillary reliefs are orders made by the Court sequence to a Decree of Dissolution. Ancillary reliefs are provided for under Sections 70, 71 and 72 of the Matrimonial Causes Act, 2004. In the cause of this work, detailed explanations will be made as relates to ancillary reliefs in dissolution of marriage. The orders a court will make in hearing and determination of Notice of Divorce Petition filed by either of the parties in a statutory marriage.

Parties seeking decree of dissolution of marriages contracted under the Act are to be properly educated as to their duties, obligations and rights as it relates to the reliefs being sought by parties. This gives a clearer picture of who is entitled to what and defines duties and obligations of parties in the event of the marriage being dissolved. Ancillary reliefs are supplementary orders made alongside the divorce decree to address financial and property issues as well as the custody of the children of the marriage, if any. Simply put, Ancillary reliefs are those additional claims or orders a party can seek or pray the court to grant aside the decree for dissolution itself.

Ancillary Reliefs

Ancillary relief in divorce proceedings refers to the process where the court addresses the financial and property aspects as well as the obligations and rights of the parties and the children of the marriage if any, separate from the main divorce decree. The purpose of the ancillary reliefs is to ensure a fair and equitable distribution of the assets, financial resources, duties, obligation and rights between the parties. Ancillary reliefs are supplementary orders made alongside the divorce decree to address financial and property issues as well as the custody of the children of the marriage, if any. Simply put, Ancillary reliefs are those additional claims or orders a party can seek or pray the court to grant aside the decree for dissolution itself.

In granting ancillary reliefs, the court has discretionary powers. However, such powers must be exercised judicially and judiciously, as the purpose of granting ancillary relief is not to cause undue hardship on any of the parties but rather to ensure the welfare of children and the dependant spouse. The Matrimonial Causes Act makes provisions covering ancillary reliefs in dissolution of marriages proceedings.³

The purpose of granting ancillary reliefs is to express the rights, duties and obligations of party after the marriage has been dissolved. It is also to protect the Rights of the children of the marriage and to ensure that they do not suffer any form of hardship and torture in the likely event that both parties decide to go their separate way by filing a divorce petition. The court also grants ancillary reliefs in deserving cases to make provisions for the dependant party and also the children of the dissolved marriage. In granting ancillary reliefs, the court usually put into consideration certain factors as the granting of same is not automatic. These various factors help the court in exercising its discretion judicially and judiciously.

Maintenance Relief in dissolution of marriage

Maintenance is typically the act of keeping, sustaining or preserving something. It is a state of continuous caring and preserving something so as to be able to maintain its current state in other not to let same deteriorate. Maintenance is one of the ancillary reliefs provided for on the dissolution of marriages and it is provided for under Section 70 of the Matrimonial Causes Act, 2004.

³ Section 70, 71 and 72 of the Matrimonial Causes Act, 2004

The provision of the Matrimonial Causes Act as it relates to maintenance at Section 70 of the MCA provides thus;

Section 70(1) Subject to the provision of this section, the court may, in proceedings with respect to a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2) subject to this section and the rules of court, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all relevant circumstances.

(3) The Court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4) The power of the Court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty – one years unless the court is of the opinion that there are special circumstances that justify the making of such order for the benefit of that child.⁴

From the provisions of the section above, maintenance order can be made pending the hearing of a proceeding for a dissolution of marriage and can also be made after the main relief for dissolution has been concluded. Thus, maintenance order can be made before the Court makes an order in respect of the main relief sought in the proceeding.

In summary, Section 70 of the Matrimonial Causes Act serves to provide financial security to the spouse who may be in a vulnerable financial position following a divorce. The section seeks to balance the needs of the receiving spouse with the financial capability of the paying spouse, ensuring fairness in the aftermath of marital dissolution. The application of this section can help prevent financial hardship after a divorce, particularly for spouses who may not have the means to support themselves immediately after the separation.

Often times the word Maintenance and Alimony are used interchangeably, however there is a difference between alimony and Maintenance. Alimony is typically a financial support paid by one spouse to the other after divorce to provide economic stability, often as a one-time lump sum or a fixed amount aimed at helping the financially weaker spouse maintain a similar standard of living as during the marriage. Maintenance refers to ongoing financial support that can be provided during or after the marriage (including during court proceedings). It is usually a periodic monthly payment and can be adjusted over time based on the financial circumstances of both parties. Maintenance also covers the children of the marriage particularly those yet to attain 21 years of age.⁵ Alimony is generally post-

⁴ ibid

⁵ Law Bhoomi: Alimony vs. Maintenance: What's the Difference? <<https://lawbhoomi.com/alimony-vs-maintenance/>> accessed on 20 March, 2025

divorce support often given as a lump sum, while maintenance is broader, including interim and permanent support, usually paid periodically.⁶

Persons entitled to Maintenance in Dissolution of Marriage

Maintenance orders are usually made by the Court in order to help the financially weak party in sustaining a reasonable standard of life after the marriage has been dissolved. Maintenance order is also made in respect of a child or children of the marriage whom are yet to attain 21 years of age.

Flowing from the above, a party to the marriage and or the children of the marriage is entitled to maintenance relief. By the provisions of section 69 of the Matrimonial causes Act which defines marriage as including a purported marriage that is void. This section did not include a marriage contracted under customary or Muslim rites.

Thus, maintenance order covers spouses of a marriage that is valid or voidable contracted under the marriage Act. It should be noted that under common law, a husband had the duty to maintain his wife and children. If a husband failed to provide for his wife and she had no other means of support, she could become an agent of necessity and pledge his credit to obtain necessary goods and services, such as food and clothing.

However, by the provisions of section 70 of the MCA, either of the spouses can be entitled to maintenance. The factors the court usually looks at are the means, earning capacity and conduct of the parties. Most times, even though either of the spouse to a marriage is entitled to maintenance, it is usually the wife of the marriage that request for maintenance order, this does not in any way vitiate the fact that the husband can also seek for an order of maintenance from the wife, as either of them is entitled to maintenance under the provisions of the Matrimonial causes Act.

The law as to ancillary relief is not only in support of the wife but either of the spouse has a right to seek for maintenance from the other. The court has the discretion to grant the relief and in doing so, the court takes into cognizance certain factors like the means of the parties, earning capacity and conduct of the parties. It is obvious that the reason most husbands do not seek for such reliefs like maintenance is because of the notorious fact that in our society today a man ought to and have to cater for the upkeep and welfare of his wife and children. A man is the head of the family and has to be responsible for taking care of his children and wife, hence it looks strange and most likely embarrassing when in a court proceeding for dissolution of marriage, a man particularly an African man seeks an order for his maintenance from his wife.

The children of the marriage are also the other set of persons entitled to maintenance as provided for under section 70(1) and (2) of the MCA. However, maintenance is usually in respect of the children of the marriage who has not attained the age of twenty – one years. However, the court can decide in special circumstances to grant a maintenance order in respect of children who has already attained 21 years. For instance, if the child who has attained 21 years is still dependent due to special circumstances

⁶ Law office of G. J. Bagga & Associates, Maintenance and Alimony: New guidelines will help women, children <<https://gsbagga.com/blog/maintenance-or-alimony/>> accessed 20 March, 2025

(e.g., disability especially one that requires medical care and attention, the court may order maintenance for the child.⁷

Factors the Court considers in granting Relief for Maintenance

The Court in granting a relief for maintenance puts certain factors into consideration. Such factors includes, the means of the parties, the earning capacities of parties and the conduct of parties.

Means of the Parties

The court in granting an order for maintenance of either of the spouse of the marriage or the children of the marriage, the court will put into consideration the means of the parties. The court will exercise its discretion judiciously and judicially as the purpose of maintenance is not to inflict undue hardship on one party but rather it is to put the dependent party in a state of comfort like he or she was when the marriage was still subsisting.

The means of the parties is usually one of the factors the court will put into consideration when granting an order for maintenance. Section 70 (1) and (2) the MCA provides thus;

Section 70(1) Subject to the provision of this section, the court may, in proceedings with respect to a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2) subject to this section and the rules of court, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all relevant circumstances.

The means of the parties includes assets like buildings and shares in a company with other assets. The Supreme Court has held that in the assessment of maintenance, it must be based on the income of the husband alone where the wife has no source of income, or where she has, then joint income of both parties. Therefore, 'means' has been held to include income, property and financial resources of the party.⁸

Earning Capacity of the Parties

This is the ability to generate income. The earning capacity of a spouse refers to not only what he or she in fact earns but the potential earning capacity if that spouse has suitable employment. Where a spouse is employed, the court will consider whether his income is commensurate with his actual potential earning capacity. As a general rule, a wife is not obligated to work in order to reduce the maintenance her husband should pay. In the case of a young wife who has children and obviously has to work in her own interest, but decides not to work, her earning capacity will be taken into account. Also, if she has worked regularly during the marriage and is expected to work after divorce, her

⁷ Isochukwu, Family Law <<https://isochukwu.com/2017/12/31/family-law-2-2-maintenance-ancillary-relief-2/>> Accessed on 20 March,2025

⁸ O. O. Omolade, Family Law and succession in Nigeria (Princeton & Associates publishing Co. ltd, 2021)298

potential earnings ought to be taken into consideration. Where, on the other hand, the wife has young children to look after she should not be expected to work and her earning capacity will be discountenanced.⁹

The court gathers evidence on these factors and evaluates them comprehensively to determine each party's realistic financial position, aiming for a fair and equitable outcome in maintenance or property settlements.

Conduct of the Parties

This is the conduct of the husband and wife towards each other, their children and the marriage itself. This can also affect the amount of maintenance awarded. In the case of *Wachtel v. Wachtel*, it was observed that it is no longer appropriate to talk about an innocent or guilty spouse. A court in considering the conduct of the parties, is not required to carry out a post mortem or to hear the mutual recriminations of the parties and go into petty squabbles as was the case under the old law. The learned judge also rejected the suggestion that there should be a discount or reduction in what the wife is to receive because of her supposed misconduct.¹⁰

When Maintenance of a Child of the Marriage Abates

Maintenance of a child in divorce in Nigeria generally abates when the child reaches the age of 21 years, which is the age of majority under the Matrimonial Causes Act. However, maintenance may continue beyond 21 years in exceptional circumstances, such as if the child is still in school or unable to support themselves due to special needs or disability. The court always prioritizes the best interests of the child when making or modifying maintenance orders.¹¹

The circumstance under which a child who has already attained the age of 21 years can still be entitled to maintenance order are usually special circumstances where the court deem it fit that for some reasons the child who has attained 21 years of age is still reasonably dependent.

Most of the exceptional cases may include where the child is still schooling and unable to support himself due to circumstances like not having a job to pay for their fees and other educational needs. Also, where the child, due to some health challenges and mental illness, he is dependent and unable to provide for his or herself. In all what amount to special circumstances and what the Court terms as exceptional cases is usually at the discretion of the Court, however such discretion are to be exercised judiciously and judicially.

The Matrimonial Causes Act provides to the effect that a maintenance order shall only be exercised for the benefit of a child who has not attained the age of twenty one years unless the court is of the opinion that there are special circumstances that justify the making of such order for the benefit of that child.¹² Thus this provision gives the court a wide power to decide what amounts to special circumstances.

⁹ *ibid*

¹⁰ [1973]Fam 72 at 90

¹¹ Resolution Law Firm, Family Law Department; Child Custody After Divorce And Child Maintenance <<https://www.resolutionlawng.com/child-custody-after-divorce-in-nigeria/>> Accessed on 30 March 2025

¹² Section 70 (4) MCA

When Maintenance of a Spouse Abates.

Maintenance of a spouse in divorce in Nigeria generally abates (ends) when the spouse granted maintenance remarries, as remarriage presumes the maintenance is no longer required. Additionally, changes in the financial position of either party from what it was at the time the maintenance order was made can also lead to termination or variation of the maintenance order.¹³

Maintenance orders are discretionary and made by the court based on factors such as the age, social standing, conduct, earning capacity of the parties, and existence of children. The court expects a maintained spouse to assume self-support within a reasonable time after divorce.¹⁴

In summary, spousal maintenance typically ends on the remarriage of the recipient spouse or significant change in financial circumstances, with courts having discretion to adjust or terminate orders accordingly.¹⁵

Enforcement of Maintenance

Where a maintenance order is made by the court and the party ordered to pay maintenance defaults, enforcement can proceed through the Family Court or High Court depending on the Court that made the Order. There are various ways the maintenance order can be enforced. Some common enforcement mechanisms include;

- (a) Writ of Attachment/Execution: The court can authorize seizure of the defaulter's property to recover arrears of the maintenance order made.
- (b) Garnishee Proceedings: The court may order the defaulter's bank or employer to release funds or deduct payment from salary.
- (c) Committal Proceedings: Willful refusal to comply may lead to imprisonment for contempt of court.
- (d) Judgment Debt Enforcement: The unpaid maintenance order can be treated like a civil judgment and enforced accordingly.

In summary, maintenance orders in Nigeria are legally enforceable through court registration and various enforcement actions, ensuring compliance with financial support obligations post-dissolution of marriage.¹⁶

¹³Mondaq: S. P. A Ajibade & Co.; Maintenance Orders In Nigeria: Statutory And Judicial Consideration <<https://www.mondaq.com/nigeria/divorce/1410054/maintenance-orders-in-nigeria-statutory-and-judicial-consideration>> Accessed on the 30 March, 2025

¹⁴ Ivie Omoregie: Divorce Settlements in Nigeria and the Concept of ... <<https://www.linkedin.com/pulse/ivie-omoregie-divorce-settlements-nigeria-concept-spousal-omoregie>> Accessed 30 March, 2025

¹⁵MZ. Agams "Alimony and Maintenance During Divorce Under Nigerian Law" <<https://mzagams.wordpress.com/2012/02/04/alimony-and-maintenance-during-divorce-under-nigerian-law/>> Accessed 30 March, 2025

¹⁶ (n.11)

Custody as an Ancillary Relief

Custody simply means the protective care or guardianship of someone or something. Custody of a child or children of marriage contracted under the marriage Act is provide for under Section 71 of the Matrimonial causes Act which states thus;
Section 71 (1)

In proceedings with respect to the custody guardianship, welfare, advancement or education of the children of a marriage, the court shall regard the interest of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.

(2) The Court may adjourn any proceeding within subsection (1) of this section until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and any such report may thereafter be received in evidence.

(3) In proceedings with respect to the custody of children of the marriage, the court may, if so satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or party to the marriage, as the case may be.

Flowing from the provisions of section 71 of the Matrimonial Causes Act which relates to custody of the children of the marriage, it can be seen clearly that the court can grant Custody of the children of the marriage to either of the spouse or even a third party who is not a party to the marriage. The major factor the court will consider at all times material is the paramount interest of the child. A parent might not be deprived of having custody of the child of the marriage simply on the basis that her conduct contributed to the breakdown of the marriage. A bad husband can be a good father same as a bad wife can be a good mother to her children. The conduct of a party must be shown and proven to likely affect or affect the child of the marriage before same can be deprived from having custody of the child. There is no static rule as it relates to custody of the children of the marriage. What the court considers is the paramount interest of the children in all circumstances. The Court will not grant custody to a party or restrain a party from having custody simply because of the sex of that child. What the court is overly concerned about is the welfare, upkeep, education and wellbeing of the child. Thus, a Court can grant custody of a female child to the father where the court feels and knows that it will be in the best interest of the child. In the same vein, the Court may also grant custody of a male child to the mother. In all, what the Court is concerned about and what the Court considers in arriving at a decision as it relates to Custody of the children of the marriage, is the interest of the Child.

Custody is not awarded as a reward or punishment based on matrimonial offences, as even a guilty party may be granted custody if he or she is better suited to care for the child. Welfare officers may be involved to provide reports to assist the court in making custody decisions. In Summary, the Matrimonial Causes Act centers child custody decision on the child's best interest, allowing flexibility for the court to tailor custody arrangements accordingly during and after divorce proceedings.¹⁷

¹⁷ Ibid (n. 9)

Thus, the paramount interest and welfare of the children of the marriage is the hallmark of granting custody of such children of the marriage to either party to the marriage or any other party the court deems fit.

Types of Custody of Child/Children of the Marriage

The court in most cases, usually have the discretion of the type of custody to be granted in respect of the Child/Children of the marriage. The major and most important thing the court puts into consideration is the paramount interest of the children. There are different types of custody that the court can grant in respect of the child or children of the marriage. These types of custody are herein discussed briefly below.

Sole Custody

This is a type of custody wherein one party has both legal and physical custody of the child of the marriage. This usually occurs where the other party is deemed to be unfit maybe due to some mental incapacity which has the ability of affecting the wellbeing and interest of the child/children and ill health which can also affect that party's ability to care for the child. However, the other party can be granted access to see the child and where it is seen that his mental health may affect his or her sense of reasoning and how he acts around the child, he or she may only be allowed access to the child under strict supervision.

Joint Custody

This is a type of custody where both parents share decision making responsibilities and or/and physical care of their children after a divorce. Joint custody can either be joint physical custody in which case the parents have significant periods of physical custody and the child spends time living with each of the parties to the marriage or it can be joint legal custody where both parents share in the decision making authority for important aspects of the child's life, such as education, healthcare and other activities aimed at promoting the welfare and proper upbringing of the child of the marriage. Joint custody usually works better where both parents are committed to co-parenting and prioritizing the child's needs.

Split Custody

This is a child custody arrangement where parents with multiple children each have a sole physical custody of different children. For example, one parent has custody of one or more children, and the other has custody of the remaining children. This arrangement is less common because courts generally prefer siblings to stay together after a separation or a divorce. In all the court will always consider what is in the best interest of the child.¹⁸

Shared Custody

This is usually a kind of custody arrangement where both parents have approximately equal physical custody time with the child, meaning the child spends almost an equal amount of time living with each parent. However, the legal decision making rights may or may not be shared equally. One parent might have sole authority over major decisions like education or healthcare while both share parenting time.

¹⁸ CustodyXchange: Split custody defined: when to use and how to be successful:

<<https://www.custodyxchange.com/topics/.custody/types/split-custody.php> >Accessed on the 15 day of April, 2025

Although shared custody is similar to joint custody, however while joint custody deals more on equal legal decision making, shared custody on the other hand deals more on equal physical Custody.

Bird Nest Custody

This is typically a kind of custody wherein the children are usually in one place or house. Here, it is usually the parents that take turns to visit the children and not the children going to visit them or spend time with them. The bird nest custody is a child custody arrangement where the children remain living full time in the family home (the “nest”), and the parents take turns living there according to set schedule while maintaining separate residences for when they are not in the family home. This arrangement aims to provide stability and continuity for the children by avoiding the disruption of moving between two homes.¹⁹

Factors the Court considers in granting Custody of a Child.

Under the Nigerian Matrimonial Causes Act, custody of children in divorce proceedings is determined primarily by the best interest and welfare of the child, which is the court's paramount consideration.²⁰ Paramount simply means something of the highest importance. Thus paramount interest of the child of the marriage is something of the highest importance which the court must and always consider before granting custody of the child to anyone.

What constitute paramount welfare of the child in custody cases is a composition of many factors such as emotional attachment to a particular parent mother or father, the inadequacy of facility such as educational, religious or other opportunities for proper upbringing. What the Court deals with is lives of human beings and ought not to be regulated by rigid formula. All relevant factors ought to be considered, the paramount consideration being the welfare of the child.²¹

The underlisted are some of the factors a court will consider in granting custody of the Child of the marriage to anybody;

- (a) Parental fitness and health: Mental and physical health of each parent, history of substance abuse, criminal record, or violence affecting care giving ability. Once it is shown that the state of the health of the party seeking for the custody of the child of the marriage, is such that will affect the ability of that party not to give proper care to the child, the court will not grant custody to such parent.
- (b) Parental stability and environment: Stability of each parent's living situation, including housing, employment, and support systems, to provide a secure and consistent home.²²
- (c) Child's well-being and needs: Physical, emotional, and developmental needs of the child, including education, healthcare, and safety.

¹⁹ Tracy Miller: Liverpool family lawyer/What is Bird's Nest custody? <<https://tracymillerfamilylaw.co.uk/blog/what-bird-nest-custody-liverpool-family-lawyer-tracey-miller-explores-post-divorce-parenting-trend>> Accessed 15 April, 2025.

²⁰ Section 71 of the MCA, 2004

²¹ *Damulak v Damulak* (2004) 8NWLR (Pt.874) 151 at 177, paras. C-E

²² Patrick O'Kennedy: What Factors Determine Child Custody Arrangements in Family Court? <<https://okennedylaw.com/what-factors-determine-child-custody-arrangements-in-family-court/>> Accessed 15 April, 2025

- (d) Parental involvement and Caregiving history: Past and ongoing involvement in the child's daily life, education, and activities.
- (e) Child's preference: Courts may consider the wishes of older or mature children, ensuring no coercion or undue influence.²³
- (f) Emotional bonds and relationships: The affection and attachment between child and each parent, as well as relationships with siblings and extended family. Most times court may likely grant custody of male children to the man of the marriage while that of female children to the wife of the marriage on the ground that boys are likely to do better while staying with their father and girls will do better with their mum. Also a child of tender age will be presumed that such a child will be happier with the mother and no order will be made against this presumption unless it is abundantly clear the contrary is the situation, e.g. Immorality of the mother, infectious diseases in the mother, insanity and cruelty to the child. These are matters to be tried.²⁴

In the case of *Oyelowo v. Oyewolo*,²⁵ the Court of Appeal states that although the interest of the children is the paramount consideration when considering who should have custody of the child under section 71 of the MCA, giving consideration to the age and sex of the children cannot be regarded as extraneous.
- (g) Safety concerns: History or risk of domestic violence, abuse, or neglect is critical and can override other factors.
- (h) Other considerations include; Income levels, quality of education, distance between parents, and the presence of third parties in the household may also be evaluated.
- (i) Courts do not ordinarily consider factors such as religion unless where same is seen to be harmful to the wellbeing of the child.²⁶

What Constitutes Paramount Interest of a Child or Children of the Marriage

Paramount interest refers to the overriding obligation to prioritize the child's wellbeing and best interests. This means that the needs, happiness and future of the child are the most important consideration in making any decision as it relates to the Court granting custody of the child. Thus what constitutes paramount interest are all the factors the court will consider for the welfare, proper upbringing, protection, educational needs, upkeep, maintenance and every other thing antecedent for the preservation and building of the life of the child and his future, so that the child does not suffer the aftermath that may occur owing to the separation of both parents. Conclusively the Court has the discretion in granting the custody of the child of the marriage to whom the court deem fit, however in exercising this discretion, the court's primary duty is to consider what is good for that child, that is the court must put the paramount interest of the child as s top priority in granting custody.

²³ Droder & Miller: Divorce & Family Law: 6 key elements that influence a custody decision <<https://www.drodermiller.com/blog/2024/01/6-key-elements-that-influence-a-custody-decision/>> Accessed 15 April, 2025

²⁴ *Alabi v Alabi*[2007] 9 NWLR (pt. 1039) 297

²⁵ [1987] 2NWLR (pt. 56) 239

²⁶ Lunn Law LLC, What Factors Influence Child Custody Decisions During a Divorce ... <<https://www.lunnlaw.com/what-factors-influence-child-custody-decisions-during-a-divorce-involving-children-in-georgia/>> Accessed on 15 April, 2025

By the provision of Section 71(3) of the MCA, a Court can grant custody of the child even to a person who is not a party to the marriage because the interest of the child is the paramount concern of the court in a dispute over custody of the child. So if the interest of the child will be best served by granting custody to another person, the court will so direct. This was the position of the court of Appeal in the case of *Okoli v. Okoli*²⁷

Settlement of Properties on Dissolution of a statutory Marriage

Settlement of properties on dissolution of statutory marriages is provided for under section 72 of the Matrimonial Causes Act, 2004. The section provides thus;

Section 72 Power of Court in proceedings with respect to settlement of property

(1)The Court may, in a proceedings under this Act, by Court in order require 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 as settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as a court considers just and equitable in the circumstances of the case.

(2)The Court may, in proceedings under this Act, make such order as the Court considers 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 property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage or either of them.

(3)The power of the Court to make orders of the kind referred to in this section shall not be made in respect of a child who has attained the age of twenty – one years unless the court is of the opinion that there are special circumstances that justifies the making of such order for the benefit of that child.

The provisions of section 72 of the Matrimonial Causes Act gives the court the power to make orders regarding property settlement in proceedings under the Act. By the provisions of subsection (2) the court recognizes the right of parties to execute pre-nuptial and post-nuptial agreements. However, there is no reported case law on pre-nuptial and post-nuptial agreements because they are not common in Nigeria.

Pre-nuptial agreement is a written document prepared and signed by two persons who are planning to become husband and wife in which both parties pre-determine how their property will be shared and the issue of spousal support is also covered in case they eventually divorce each other. While post-nuptial agreement is a legal document made by spouses after they are married, it outlines the ownership and division of financial assets in case of divorce or separation.²⁸

Prenuptial agreements are not really common or encouraged in Nigeria this is so in order to protect the sanctity of marriages. This opinion is hinged on the fact or belief that where such agreements are encouraged in Nigeria as to agreement on how properties will be shared in the event of parties divorcing, this will affect the sanctity of the African ideology of marriage.

As a party who already knows what he or she will get at the event of dissolution of the marriage, may want to rely on such in making the marriage not workable so that same can be dissolved and they receive the share of the property due to them.

²⁷ [2020] 9NWLR (pt. 1705) 301 p.329

²⁸MetLife Legal Insurance, Post nuptial and prenuptial agreement: How it works – MetLife <<https://www.metlife.com/stories/legal/what-is-a-postnup/>>. Accessed on 15 april, 2025

Who is entitled to Settlement of Properties

The court may, in proceedings under this Act, make such order as the court considers 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 property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of the opinion that there are special circumstances that justify the making of such an order for the benefit of that child. Properties can be settled for the following persons;

- (a) The property to be settled must be owned by one or both spouses.
- (b) There is no restriction on the type of property which may be settled. It can be real or personal but does not seem to include payment of money by one spouse to another (this usually falls under maintenance).
- (c) Properties can be settled for the benefit of one or both spouses; and Children of the marriage who are less than 21 years.²⁹

Powers and Consideration of the Court in making an Order for Settlement.

The Act has set out two parameters for the Court to consider in making an order for settlement. They are Justice and Equity. Thus, the Court may make only such settlement as it considers just and equitable in the circumstances of each case. The scope of discretionary power conferred on the Court by section 72 of the Matrimonial Causes Act is very wide. In exercising this discretion, one of the major factors the courts consider is contribution to the acquisition of the property or joint ownership of the property. 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 to the property as the basis for division. In *Mueller v Mueller*³⁰, the Respondent, as Petitioner at the trial court, prayed for 'equitable equal partition of property between the parties'. The Court of Appeal held that "equity is equality, partitioning of joint matrimonial property must be done on the basis of equity. After all equity favours true equality, both of rights and liabilities, dividing burdens and benefits in equal shares is the principle of equity, the Respondent who was awarded two out of the three houses on the land should not be further awarded the undeveloped portion of the land". The undeveloped portion of the land was therefore, in the principle of equity, awarded to the Appellant by the court.

In *Essien v Essien*,³¹ the Court of Appeal restated the decision of the Supreme Court in *Adaku Amadi v Edward Nwosu*,³² to the effect 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. The court accordingly refused the appellant's case on the basis that she did not prove contribution. In *Oghoyone v Oghoyone*,³³ the court held that the respondent was entitled to joint interest because both parties contributed to the property.

²⁹ Section 72(3) MCA 2004

³⁰ [2006] 6 NWLR (Pt. 977) 629

³¹ [2009] 9 NWLR (Pt. 1146) 306

³² [1992] 5 NWLR (par 24) 273

³³ [2010] LPELR- 4689 (CA)

Where an applicant fails to establish joint ownership or contribution to the property, the court will only be disposed to settle such minimal portion of the property to meet the basic need or demand of the applicant. In settling the properties in some cases, the court may also consider the outstanding indebtedness of the Petitioner and the possibility that he may sell some of his properties to settle the indebtedness. The exercise of discretion by the High Courts are affirmed by the Appellant Courts.

It is important to note that the appellate courts will hardly interfere with the exercise of discretion by the lower court unless the appellant is able to prove that the exercise of discretion by the lower court was not just or equitable.

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