Towards the Institutionalization of Divorce Mediation in Nigeria: A Case Study of Enugu State

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ABSTRACT

Nigerian divorce laws and the divorce litigation process pose severe psychological, social-cultural, economic, and legal problems for families going through divorce in Nigeria. This thesis argues that divorce mediation may be able to ameliorate the harsh effects of these laws and process.

This thesis seeks to achieve the following objectives: (1) To determine if the divorce mediation process can achieve the goals of a good divorce process, (2) To determine if the divorce mediation process can provide solutions to the myriad of unique problems which face families going through divorce in Nigeria, and (3) To determine the possibility of incorporating divorce mediation into the family dispute resolution system in Nigeria through an institutionalized divorce mediation program at the government-funded citizens' mediation centres.

These objectives are achieved through an in-depth review of the customary and statutory laws regulating marriage and divorce in Nigeria as well as a review of the divorce litigation process in Nigeria. This thesis employs both desk and empirical research methods. It examines legislation, policy documents and academic treatises on divorce and divorce mediation. It also utilizes semi-structured interviews to examine the Citizens' Rights and Mediation Centre, Enugu State, to determine its viability as a vehicle for the institutionalization of divorce mediation in Nigeria. The thesis finds that indeed divorce mediation achieves the aims of good divorce law. It further finds that while the divorce mediation process is not a panacea, its features lend themselves easily to the resolution of the myriad of problems which face families going through divorce in Nigeria. It also finds that divorce mediation can be incorporated into the Nigerian family dispute resolution system through an institutionalized divorce mediation program at the state-funded citizens' mediation centres present in several states in the country.

It concludes that incorporating divorce mediation into the family dispute resolution system in Nigeria will ameliorate some of the harsh effects of the current divorce system. It offers short and long term proposals for the institutionalization of divorce mediation in Nigeria.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

Nigeria and the rest of the world have recorded increased divorce rates in the past few decades.[1] In Nigeria, urbanization and industrialization can be traced as some of the root causes of high divorce rates and these have been exacerbated by increased societal tolerance of divorce, more liberal divorce laws, and social and economic emancipation of women.[2] Reduced religious objection to divorce has also led to high divorce rates.[3]

With increased tolerance of divorce and increased divorce rates arose a need for setting parameters for ensuring an effective divorce process for the divorcing family, the family dispute resolution system and the state. To this end, several commissions were held all over the world,[4] particularly in the United Kingdom, the results of which were distilled into a comprehensive list of the goals of a good divorce law and detailed in the first section of the failed[5] English Family Law Act 1996. Some of these goals include reducing the acrimony associated with the divorce process, ensuring good post-divorce relationships between spouses and their children, protecting vulnerable members of the family going through divorce, saving salvageable marriages and minimizing the cost of divorce for the divorcing couple and the state.[6]

Litigation was previously the only accepted form of dispute resolution available to divorcing couples. It was therefore charged with achieving the goals of a good divorce particularly the goal

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[1] TG Adegoke 'Socio-cultural factors as determinants of divorce rates among women of reproductive age in Ibadan metropolis, Nigeria' (2010) 8 *Stud Tribes Tribals* 107; Ntoimo Lorretta Favour Chizomam & Uche Isiugo-Abanihe 'Determinants of singlehood: A retrospective account by older single women in Lagos, Nigeria' (2014) 27 *African Population Studies* 392; Robert E Emery, David Sbarra & Tara Grover 'Divorce mediation: Research and reflections' (2005) 43 *Family Court Review* 23; Jonathan Herring *Family Law* 5 ed (2011) 7, 102-3.

[2] Adegoke 107, 109; Herring 7.

[3] John Lande 'Revolution in family law dispute resolution' (2012) 24 *Journal of The American Academy of Matrimonial Lawyers* 414.

[4] United States: The Governor's Commission on the Family of 1966; United Kingdom: The Royal Commission on Marriage and Divorce (the Morton Commission) of 1951.

[5] c. 27, s 1. This Act was passed in 1996. It provided for no-fault divorce as well as divorce mediation. Pilot studies were carried out to ascertain the most effective means of carrying out the the new provisions of the Act especially information meetings and mediation, the results of the studies were unsatisfactory and the Act was abandoned.

[6] Herring 105-8.

of successfully burying dead marriages with minimal damage to the family.[7] However, with the passage of time, courts all over the world have found litigation incapable of achieving these goals for several reasons. In many parts of the world, including a number of common law jurisdictions, litigation is essentially an adversarial process[8] where each party attempts to fight a war against the other party and *win*. This creates hostility and bitterness, particularly in disputes within the family,[9] and therefore makes it impossible for litigation to achieve the conflict reduction goal of a good divorce. Litigation also fails to address and take care of the emotional needs of divorcing couples and their children,[10] and leads to protracted proceedings,[11] and exorbitant costs[12] — for the parties and the state.[13]

Dissatisfaction with the divorce litigation process led to a demand for a less acrimonious, less time consuming, cheaper process, to take into consideration the legal as well as emotional needs of the divorcing couple and their children. This gave rise to the application of alternative dispute resolution processes — such as arbitration, mediation, and early neutral evaluation — to family disputes. Among these tested alternatives to traditional divorce litigation, divorce mediation has proved to be the most popular.[14]

Litigation, however, is still the most widely used dispute resolution method available to spouses going through the dissolution of the statutory marriage in Nigeria. The result is financial and psychological damage suffered by divorcing couples and their families,[15] increased court dockets,

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[7] 'Putting Asunder: A Divorce Law for Contemporary Society' Society for the Promotion of Christian Knowledge, (S.P.C.K) London 1966. (Putting Asunder Report); 'Reform of the Grounds of Divorce: The Field of Choice' (1966) Law. Com. No. 6; CMND. 3123 H.M.S.O. (Field of Choice Report).

[8] Bill Ezzell 'Inside the minds of America's family law courts: The psychology of mediation versus litigation in domestic disputes' (2001) 25 *Law & Psychol. Rev.* 119; Connie JA Beck, Bruce D Sales, & Robert E Emery 'Research on the impact of family mediation' in Jay Folberg, Ann L Milne & Peter Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 447.

[9] Hakeem Ijaiya 'Alternatives to adjudication in settlement of matrimonial disputes' (2004) 1 *UDUSLJ* 74; Robert E Emery & Melissa M Wyer 'Divorce mediation' (1987) 42 *American Psychologist* 473.

[10] Christy L Hendricks 'The trend toward mandatory mediation in custody and visitation disputes of minor children: An overview' (1993) 32 *U. Louisville J. Fam. L.* 495; Thomas Carbonneau 'A consideration of alternatives to divorce litigation' (1986) *U. ILL. L. REV*. 1130.

[11] Lori Anne Shaw 'Divorce mediation outcome research' (2010) 27 *Conflict Resolution Quarterly* 451.

[12] Shaw 451; Nancy Ver Steergh 'Yes, no, and maybe: Informed decision-making about divorce in the presence of domestic violence' (2003) 9 *William & Mary Journal of Women and the Law* 162.

[13] It also causes inordinate increase in court dockets. Ayinla Lukman A 'Enhancing sustainable development by entrenching mediation culture in Nigeria' (2014) 21 *Journal of Law, Policy and Globalization* 19.

[14] Shaw 447.

[15] Ifemeje Sylvia Chika *Contemporary Issues in Nigerian Family Law* (2008) 205-6.

and disregard for the sanctity of the marriage institution.[16] In addition to the failure of litigation to achieve the goals of the good divorce in Nigeria, it is also unable to provide solutions to the peculiar problems faced by spouses going through divorce in Nigeria.[17] This amongst some of the reasons listed above have led to the dissatisfaction with the current divorce process.[18]

Nigerian scholars have come to realize the need for divorce mediation and have recommended its introduction to the Nigerian legal system to ameliorate the harsh effects of the current system of divorce.[19] This research provides an extensive argument for the need for divorce mediation in Nigeria and further proposes the integration of divorce mediation into the Nigerian family dispute resolution system through an institutionalized divorce mediation program, that is, a well-established and widely used mediation program.[20] The most successful mediation institution of this nature in Nigeria is found in the government-funded citizens mediation centres attached to the Ministries of Justice in several states across the country.[21] One of such centres, the Citizens' Rights and Mediation Centre, attached to the Ministry of Justice, Enugu State has been selected as a case study to determine its suitability for the establishment of a divorce mediation program.

1.2 CONTEXTUAL FRAMEWORK

In the past three decades, the mediation movement has taken the world by the storm, permeating almost every major legal system in the world. It has been applied to all classes of disputes:

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[16] Divorce proceedings in Nigeria are held in open court, therefore the public is welcome to watch parties wash their dirty linen in public. Section 103 of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2011.

[17] These problems are delineated in Chapter Four below.

[18] Ifemeje *Contemporary Issues* 205-6.

[19] Ibid 199-210; 'Communique issued at the end of the national conference on the rights of women and children in divorce' in Olawale Ajai & Toyin Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 250; Maurice O Izunwa & Sylvia Ifemeje 'Non-inclusion of mediation process in Nigerian divorce law: An urgent call for review' (2011) 8 *Journal of Law and Diplomacy* 36. Yetunde A Adesanya 'Divorce litigation in Nigeria: Proposal towards an alternative dispute resolution procedure' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 222-235.

[20] As defined by Bobbie McAdoo & Nancy A Welsh 'Look before you leap and keep on looking: Lessons from the institutionalization of court-connected mediation' (2004) 5 *Nev. L.J.* 407. See Chapter 6 below for a detailed discussion on institutionalized divorce mediation programs.

[21] Note that while they are renowned for providing mediation services, they do not mediate divorce cases. Some of these states include, Enugu, Jigawa, Edo, Ogun and Plateau States. See Barry Walsh 'In search of success: Case studies in justice sector development in Sub-Saharan Africa' (2010) 58 available at: *http://documents.worldbank.org/curated/en/291991468009961030/pdf/574450ESW0P1121n0Africa010June02010.pdf,* accessed on 16 September 2019.

commercial, environmental, criminal, tortious, family; and administered by all kinds of organizations: courts, community centres, government institutions, and private institutions.[22]

Mediation has been defined as:

> … the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute.[23]

The form of mediation applied to disputes within the family arising as a result of divorce or separation is referred to as divorce mediation or family mediation.[24] To facilitate a simpler understanding of the context of this study, consideration must be given to the form and character of the process of divorce mediation.

1.2.1 Defining Divorce Mediation

Simply put, divorce mediation implies the use of mediation for the resolution of disputes relating to the dissolution of marriage as well as matters arising as a result of such dissolution such as child custody, settlement of property, and spousal and child maintenance.[25]

Divorce mediation has been defined as:

> … a process in which an impartial third person, the mediator assists couples considering separation or divorce to meet together to deal with the arrangements which need to be made for the future.[26]

It has also been defined by the Model Standards of Practice for Family and Divorce Mediation[27] as:

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[22] Robert A Hahn & David M Kleist 'Divorce mediation: Research and implications for family and couples counseling' (2000) 8 *The Family Journal* 165.

[23] Christopher Moore *The Mediation Process – Practical Strategies for Resolving Conflict* 3 ed (2003) 15.

[24] Family mediation is also a term for mediation, which deals with the settlement of issues in separation and divorce.

[25] Lisa Parkinson *Family Mediation* (1997) 5; Ilene Wolcott 'Mediating divorce: An alternative to litigation' (1991) 28 *Family Matters* 47.

[26] Lord Chancellor's Department 'Looking to the Future Report: Mediation and the Ground for Divorce' (White Paper, CM 27990 of 27 April 1995) (Looking to the Future Report) para 5.4, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272042/2799.pdf,* accessed on 11 October 2016.

[27] Available at *https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/Model_Standards_of_Practice_.pdf,* accessed on 18 October 2019. These standards were developed by a joint effort of the Academy of Family Mediators (AFM), the Association of Family Courts and Community Professionals (AFCC), the American Bar Association (ABA) Family Section and other organizations. Andrew Schepard 'Model standards of practice for family and divorce mediation: The symposium on standards of practice' (2001) 39 *Family Court Review* 121.

> … a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the parties' voluntary agreement.[28]

Other definitions include:

> … a process in which a couple or any other family members whether or not they are legally represented and at any time, whether or not in legal proceedings agree to appoint a neutral third party (mediator) who is impartial and has no authority to make decisions with regard to their issues – which may relate to separation, divorce, children issues, property and financial questions or any other issues- but who helps them make their own informed decisions by negotiation without adjudication.[29]

> … a form of alternative dispute resolution (ADR) in which a neutral, expert third party helps parents to negotiate custody and perhaps financial arrangements as cooperatively as possible.[30]

Parkinson provides a comprehensive definition of divorce mediation:

> … a form of mediation in which the mediator helps couples at any stage of separation or divorce to consider the options available to them and to communicate better with each other in reaching joint decisions on present and future arrangements. These may include arrangements for children, finance and property matters and the separation or divorce itself.[31]

In summary, divorce mediation involves the use of a neutral third party to facilitate communication between spouses in divorce and divorce-related disputes to enable the creation of a satisfactory settlement agreement which serves the needs of all the members of the family.

1.2.2 Goals of Divorce Mediation

Several goals — also perceived as benefits — have been attributed to divorce mediation.

> The aim of divorce mediation is to assist parties to reach a mutually satisfying agreement which recognizes the needs and rights of all family members.[32]

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[28] Andrew Schepard 'The Model standards of practice for family and divorce mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 521, 533.
[29] 'Essentials of Family Mediation' available at *https://www.russell-cooke.co.uk/media/1811/essentials-of-family-mediation.pdf,* accessed on 20 April 2013.
[30] Robert Emery *Renegotiating Family Relationships: Divorce, Child Custody and Mediation* 2 ed (2012) 2.
[31] Lisa Parkinson 5.
[32] M De Jong 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 *THRHR* 97; M De Jong 'Mediation and other appropriate forms of dispute resolution upon divorce' in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa*

According to Emery, the goal of divorce mediation:

> … is to negotiate a settlement that forms the basis of a binding, legal agreement. Psychologically and emotionally, the goal is to help partners to preserve their parental relationship even as their marriage is coming apart.[33]

Other goals include:

> … to help separating and divorcing couples reach their own agreed joint decisions about future arrangements; to improve communications between them; and to help couples work together on the practical consequences of divorce with particular emphasis on their joint responsibilities to co-operate as parents in bringing up their children.[34]
>
> … to assist parties to reach a mutually satisfying agreement which recognizes the needs and rights of all family members.[35]

According to Beck and Sales:

> While mediation's goals of decreasing litigation and increasing compliance are particularly appealing to legal professionals, mediation is also hypothesized to increase communication between parents, decrease bitterness and tension, and clarify the best interests of the children.[36]

Satisfaction of the couple with the divorce mediation process and the outcome, and compliance with the subsequent settlement agreement as a result of this satisfaction;[37] reduced acrimony between the parties;[38] and creating an avenue for parties to air their concerns,[39] have all been viewed as goals plus benefits of divorce mediation. Another goal is the reduction of the cost of dispute resolution for both the parties and the state.[40]

The divorce mediator therefore seeks to encourage communication and understanding between the spouses going through divorce,[41] in a bid to ascertain and focus on their needs and interests rather

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[33] Emery *Renegotiating Family Relationships* 3.
[34] Looking to the Future Report para 5.6.
[35] De Jong 'Judicial stamp' 97.
[36] Connie J A Beck & Bruce D Sales *Facts Myths and Future Prospects* (2001) 17-18.
[37] Joan Kelly 'A decade of divorce mediation research: Some answers and questions' (1996) 34 *Family Court Review* 373; Emery, Sbarra & Grover 'Divorce mediation' 27; De Jong 'Judicial stamp' 4; Viney Joshua Williams *The Modern Divorce* (unpublished Master of Jurisprudence thesis, Durham University, 2011) 107.
[38] Joan B Kelly 'Family mediation research: Is there empirical support for the field?' (2004) 22 *Conflict Resolution Quarterly* 18; Beck & Sales 16-18.
[39] Beck & Sales 16; Nina R Meierding 'Managing the communication process in mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 234.
[40] Beck, Sales & Emery 449.
[41] Viney 97; De Jong 'Judicial stamp' 97.

than rights and positions, to enable them reach a mutually satisfactory and binding legal agreement, and to encourage a cordial post-divorce parental relationship.[42]

In summary, divorce mediation, like other alternative dispute resolution processes, has the primary goal of ameliorating the harsh effects of litigation either through amicable dispute resolution, that is, helping parties resolve their dispute in a conciliatory environment to ensure mutual satisfaction and sometimes improved post-dispute relationships; or through effectiveness in the administration of justice, that is, time and cost savings for the courts and the spouses going through divorce.[43]

Over the years, divorce mediation has time and again achieved its goal of ameliorating most of the harsh effects of divorce litigation, leading to a widespread usage that seems to be rising at an exponential rate.[44] Divorce mediation is viewed as more cost-effective than divorce litigation,[45] as it is less expensive[46] and less time-consuming.[47] Divorce mediation is flexible where divorce litigation is rigid;[48] private and confidential where divorce litigation is often open to the public;[49] takes into consideration both the legal and psychological aspects of divorce where divorce litigation concentrates essentially on the legal aspects;[50] and vests in the parties the power to take charge of and resolve their own dispute, (the principle of self-determination);[51] where divorce litigation vests such power in a third party, the judge.[52] Divorce mediation has therefore been hyped by many as the most suitable dispute resolution method for family disputes,[53] hence its growing

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[42] Emery, Sbarra & Grover 'Divorce mediation' 22; Lisa Parkinson 331; Herring 141; John Haynes & Stephanie Charlesworth, *The Fundamentals of Family Mediation* (1996) 1.
[43] Kelly 'Family mediation research' 3.
[44] Emery, Sbarra & Grover 'Divorce mediation' 22-3.
[45] Renata Mienkowska-Norkiene 'Inequality in divorce mediation - Reasons, manifestations and ways to avoid it. Lessons for Lithuania' (2012) 11 *Social Work* 119, 121; Shaw 451; Carbonneau 1119.
[46] Paula James *The Divorce Mediation Handbook: Everything you need to know* (2001) 15.
[47] Kelly 'Family mediation research' 3.
[48] Ann L Milne, Jay Folberg & Peter Salem 'The evolution of divorce and family mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 8; James 15.
[49] Milne, Folberg & Salem 8.
[50] Haynes & Charlesworth 29.
[51] Schepard 533-4; Shaw 465.
[52] Nancy A Welsh 'Reconciling self-determination, coercion and settlement in court connected mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 420.
[53] Gary Friedman & Margaret Anderson 'Divorce mediation's strengths' (1983) 3 *California Law* 36; Nor Fadzlina Nawi & Nora Abd Hak 'Towards the development of a mandatory family mediation program in the Malaysian civil legal system' (2013) at 3-4, available at *https://www.researchgate.net/publication/277325482_Towards_the_Development_of_a_Mandatory_Family_Mediation_Program_in_the_Malaysian_Civil_Legal_System,* accessed on 26 June 2014; Emery, Sbarra & Grover 'Divorce mediation' 22.

popularity[54] in countries like the United States,[55] the United Kingdom,[56] Chile,[57] Canada,[58] Malaysia,[59] and Australia.[60]

1.2.3 History of Divorce Mediation

The divorce mediation process has been in existence and has been practiced for thousands of years all over the world,[61] albeit informally. Hundreds of years ago, in pre-colonial Nigeria, family members, elders and leaders of the communities were charged with the responsibility of ensuring effective dispute resolution within the family using the mediation process.[62] Other countries like China[63] and South Africa[64] have also practiced some form of traditional family dispute resolution including divorce mediation in the very distant past.

In 1939, the movement for the establishment of family mediation was initiated in the United States, through the introduction of conciliation services at the Conciliation Court in California.[65] However, divorce mediation came into practice professionally decades later, in the 1970s.[66] Several lawyers in the United States, in a bid to save divorcing couples from the harsh effects of divorce litigation started providing divorce mediation services to interested clients.[67] At the time, mediation and

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[54] Emery *Renegotiating Family Relationships* 135.
[55] Yelena Ayrapetova 'Mandatory divorce mediation program passed in Utah' (2005) 7 *Journal of Law and Family Studies* 417.
[56] Marian Roberts 'Divorce mediation: The development of the regulatory framework in the United Kingdom' (2005) 22 *Conflict Resolution Quarterly* 509.
[57] Andrew Bainham *The International Survey of Family Law* (2005) 171.
[58] Julien D Payne 'Family conflict management and family dispute resolution on marriage breakdown and divorce: Diverse options' (1999-2000) 30 *Revue générale de droit* 663; Bethany Knox *A Consideration of a Mandatory Family Mediation model under Section 9 of the British Columbia Family Law Act* (unpublished Masters of Arts thesis, University of Victoria, 2014) 12.
[59] Nor Fadzlina Nawi 'Mandating mediation in family law conflict in Malaysia: Exploring judges and lawyers' perspectives' available at *http://ssrn.com/abstract=1872860,* accessed on 12 April 2013.
[60] Hilary Astor 'Making a 'genuine effort' in divorce mediation: What does it mean?' available at *http://ssrn.com/abstract=1294019,* accessed on 12 April 2013; Lawrie Moloney, Lixia Qu, Kelly Hand, John De Maio, Rae Kaspiew, Ruth Weston & Matthew Gray 'Mandatory dispute resolution and the 2006 family law reforms: Use, outcomes, links to other pathways and the impact of family violence' (2010) 16 *Journal of Family Studies* 192-6.
[61] Daniel G Brown 'Divorce and family mediation: History, review, future directions' (1982) 20 *Conciliation Courts Review* 1.
[62] Andreas Rahmatian 'Termination of marriage in Nigerian family laws: The need for reform and the relevance of the Tanzanian experience' (1996) 10 *Int'l J.L. Pol'y & Fam.* 285.
[63] Brown 1.
[64] Amanda Boniface 'African-style mediation and western-style divorce and family mediation: Reflections for the South African context' (2012) *PER* 56.
[65] Milne, Folberg & Salem 5; Knox 33.
[66] Lande 'Revolution in family law dispute resolution' 423; Milne, Folberg & Salem 5.
[67] Milne, Folberg & Salem 4.

other forms of alternative dispute resolution were new to the American legal system and as these methods were yet to prove themselves, the public and other lawyers were wary of divorce mediation and its supposed benefits.[68] However, a new wave of research in the field, spanning over a decade showed divorce mediation to be a laudable dispute resolution method.[69] Notable scholars like Jessica Pearson and Nancy Thoennes,[70] Robert Emery[71] and Joan Kelly[72] encouraged divorce mediation after carrying out divorce mediation outcome research. The move away from fault to no-fault divorce further encouraged the use of divorce mediation in the resolution of divorce and divorce-related disputes. Divorcing couples, no longer relied on the courts for the terms of the dissolution of their marriage; they used the divorce mediation process to negotiate all aspects of their divorce; custody arrangements, assets distribution and spousal and child maintenance.

A few years later, mandatory family mediation was introduced in California, in 1980.[73] It was required for all custody-related cases brought before the Family court. With time, other countries followed the American example. Australia in the 1990s, and Hong Kong in 2000,[74] the United Kingdom in 2011 through the introduction of the Pre-Application Protocol for Mediation Information and Assessment to supplement its Family Procedure Rules 2010[75] and Alberta, Canada in 2014.[76] These countries have not only incorporated divorce mediation into their family dispute resolution systems, they have also taken further steps to include divorce mediation instruction in the legal education curriculum[77] thereby ensuring further growth and development of the practice of mediation.

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[68] Ibid 4-5.
[69] Nancy A Thoennes & Jessica Pearson 'Predicting outcomes in divorce mediation: The influence of people and process' (1985) 41 *Journal of Social Issues* 115.
[70] Ibid; Jessica Pearson & Nancy Thoennes 'Mediation and divorce: The benefits outweigh the costs' (1982) 4 *FAM. ADvoc*. 26; Jessica Pearson & Nancy Thoennes 'Divorce mediation: Reflections on a decade of research' in Kenneth Kressel, Dean G Pruitt & Associates (eds) *Mediation Research: The Process and Effectiveness of Third Party Intervention* (1989) 9.
[71] Emery & Wyer 472-9.
[72] Joan B Kelly & Lynn L Gigy 'Divorce mediation: Characteristics of clients and outcomes' in Kenneth Kressel, Dean G Pruitt & Associates (eds) *Mediation Research: The Process and Effectiveness of Third Party Intervention* 263; Joan B Kelly 'Parent interaction after divorce: Comparison of mediated and adversarial divorce processes' (1991) 9 *Behavioral Sciences and the Law* 387; Kelly 'A decade of divorce mediation research' 373.
[73] Milne, Folberg & Salem 5; Knox 33.
[74] Knox 27-8.
[75] UK Practice Direction 3A, 2011; See also Viney 40.
[76] Knox 26.
[77] The United States: Almost 90% of the law schools in the United States have at least one ADR offering (180 out of 202 law schools). See: *http://adr.uoregon.edu/aba/search/?abamode=allschools; http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html;* with at least 231

1.3 RESEARCH QUESTIONS

This thesis therefore seeks to answer three broad questions:

i. Whether divorce mediation achieves the goals of a good divorce process?
ii. Whether divorce mediation can solve the unique problems associated with divorce in Nigeria?
iii. Whether divorce mediation can be incorporated into the present divorce litigation system through the Citizens' Rights and Mediation Centre?

To answer the questions above, three preliminary questions will be explored, one for each broad question.

i. What are the goals of a good divorce law?
ii. What are the unique problems associated with divorce in Nigeria?
iii. Why is the government-sponsored Citizens' Rights and Mediation Centre a viable platform for the incorporation of divorce mediation in the Nigerian divorce process?

1.4 RESEARCH OBJECTIVES

This topic was chosen primarily to emphasize the need for the application of divorce mediation to the process of dissolution of marriage in Nigeria. This work will therefore contain an exposé of the divorce litigation process in Nigeria, highlighting the inability of divorce litigation to achieve the goals of a good divorce process. It further argues that while the goals of good divorce law and process may be universal, each society has conditions which may be peculiar to them and which their divorce law and process must be able to deal with to ensure that they effectively protect all the citizens of the society. Simply put, good divorce law and process should be able to satisfy the universal goals of good divorce laws and processes as well as be adapted to provide solutions to the peculiar problems of the society in which they will be implemented. It will also argue that the adoption of divorce mediation in Nigeria is justified because divorce mediation better achieves the goals of a good divorce, eliminates the severe effects of divorce litigation, and also provides a solution to the unique problems associated with divorce in Nigeria. It recommends the integration

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different mediation offerings *http://adr.uoregon.edu/aba/search/?abamode=allclasses* (some law schools have multiple offerings) including at least 36 active mediation clinics specializing only in mediation: See generally *http://adr.uoregon.edu/aba/search/*. Australia: Kathy Douglas 'The teaching of ADR in Australian law schools: Promoting non-adversarial practice of law' (2011) 22 *ADRJ* 49.

of divorce mediation into the Nigeria family dispute resolution system through an institutionalized divorce mediation program because the goals of institutionalized divorce mediation programs are in line with those of the good divorce and therefore these programs are immediately able to provide a more efficient divorce process in Nigeria. It further proposes the establishment of an institutionalized divorce mediation program at the government-funded citizens' mediation centres. It proposes these centres primarily because they are successful institutionalized mediation service providers although they do not currently provide divorce mediation services.

This thesis will conduct a study of one of these centres, the Citizens' Rights and Mediation Centre of the Ministry of Justice, Enugu State, to determine its suitability for the establishment of an institutionalized divorce mediation program. It will determine possible prospects and challenges to the adoption of this program in Nigeria and means of overcoming them with the ultimate aim of providing a draft template for the establishment of an effective divorce mediation program.

The empirical examination of the Citizens' Rights and Mediation Centre, probably the first research of its kind into the activities of the Centre, will create an information database for subsequent research. It is also hoped that this research project will give rise to a substantial increase in scholarly interest in the field of mediation and encourage the inclusion of mediation and divorce mediation instruction in the legal education curriculum.

1.5 RATIONALE FOR THE RESEARCH

More and more couples get divorced in Nigeria every year.[78] The families and courts therefore suffer great losses each year. This research proposes the use of divorce mediation, in particular, an institutionalized divorce mediation program, as a solution to the myriad of problems facing divorcing couples and the family law system in Nigeria.

The application of mediation to the resolution of matrimonial disputes is an untapped area of family law in Nigeria; divorce mediation is relatively unknown in these parts. It is imperative that divorce mediation is introduced in Nigeria because of the many advantages of mediation over litigation such as lower costs, greater party control or self-determination, privacy, speed and the amicable nature of mediation versus the adversarial nature of litigation. One of the most important reasons for the inclusion of divorce mediation programs in Nigeria lies in the nature of divorce

[78] Tolulope M Ola, Richard B Oni & Foluso F Akanle 'Divorced women in Nigeria: Empowered or disempowered?' (2015) 1 *Social Inquiry into Well-Being* 61; Adegoke 107; Izunwa & Ifemeje 36.

mediation as a dispute process which is less damaging for the couple and children of the marriage.[79] The divorce mediation process takes into consideration both the emotional and legal aspects of family disputes in a way that litigation cannot;[80] it caters to the emotional needs of the separating families while also seeking to protect their legal rights.[81]

Furthermore, the world is turning towards divorce mediation[82] and the Nigerian legal system needs to be improved to reflect the changing times. Recognizing the need to manage family disputes better, legal systems all over the world have established divorce mediation programs[83] and some have gone a step further to make these programs mandatory.[84] The establishment of institutionalized divorce mediation programs will ensure that Nigeria is on par with its Western counterparts.

1.6 SCOPE AND LIMITATION OF THE STUDY

The focus of this thesis is the determination of the appropriateness of divorce mediation as a dispute resolution process for the Nigerian family dispute resolution system. Nigeria operates a mixed legal system recognizing both customary law, (this includes Islamic Law)[85] and statutory law.[86] Legal marriages can be contracted under these separate and distinct systems and thus, two forms of marriage are recognized in Nigeria: customary law marriages (these include Muslim marriages) and statutory marriages.[87] The customary marriage is a union between one man and one

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[79] Emery, Sbarra & Grover 'Divorce mediation' 30; Emery *Renegotiating Family Relationships* 3.
[80] Friedman & Anderson 38.
[81] Emery *Renegotiating Family Relationships* 3.
[82] As early as the 1990s, there were over 200 court-based mediation programs in the United States and by 2004, over 90% of family court service agencies offered mediation. See generally Peter Salem 'The emergence of triage in family court services: The beginning of the end for mandatory mediation?' (2009) 47 *Family Court Review* 371.
[83] The US, Canada, United Kingdom, Malaysia, Hong Kong.
[84] The United States: Ayrapetova 417; Australia: Mieke Brandon & Tom Stodulka 'A comparative analysis of the practice of mediation and conciliation in family dispute resolution' (2008) 8 *QUTLJJ* 196.
[85] Note that some scholars categorize Islamic Law as a system on its own, that is, not subsumed under customary law. Imam-Tamim Muhammad Kamaldeen 'A doctrinal review of literature on multi-tiered marriage in Nigerian family law' (2015) at 1, available at: *https://www.researchgate.net/profile/Muhammad_Kamaldeen_IMAM-TAMIM/publication/281664989_A_doctrinal_review_of_literature_on_multi-tiered_marriage_in_Nigerian_family_law/links/55f3937a08ae6a34f6607298/A-doctrinal-review-of-literature-on-multi-tiered-marriage-in-Nigerian-family-law,* accessed on 22 June 2018; European Asylum Support Office 'Country of Origin Information Report: Nigeria, Actors of Protection' (2018) at 15, available at *https://www.easo.europa.eu/sites/default/files/publications/2018-EASO-COI-Nigeria-ActorsofProtection.pdf,* accessed on 04 January 2020 (European Asylum Support Office Report).
[86] Rahmatian 281; European Asylum Support Office Report 16.
[87] Elvis-Imo I Gina & Okonkwo Theodore, 'Revisiting the question of double-deck marriage in Nigeria' (2016) 6 *African Journal of Law and Criminology* 132-3; Chima Umezuruike 'The concept of double-decker marriages in Nigeria' at 1, available at *http://www.umezchambers.com/articles-publications/10-the-concept-of-double-decker-*

or more wives which is regulated by the customs of the parties.[88] It is primarily viewed as a union between the families of the spouses.[89] The statutory marriage, on the other hand, following the decision in *Hyde v Hyde*[90] is the union of one man and one wife which is regulated by provisions of statutory law. Section 18 of the Nigerian Interpretation Act[91] defines a monogamous marriage as:

> "Monogamous marriage" means a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage;[92]

Section 7 of the Nigerian Same Sex Marriage Prohibition Act, 2013 further defines marriage as:

> … a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law.

The focus of this research are the statutory and customary marriages which are governed by statutory and customary laws in Nigeria. Muslim marriages, being subject to Islam and Sharia laws, do not come within the purview of this study.

The primary target location for this research is the South-East region of Nigeria.[93] Nigeria, with a population of about 193 million people[94] is divided in six geopolitical zones;[95] the South-East is one of those zones. This region is made up of five states — Abia, Anambra, Ebonyi, Enugu and Imo[96] — with a population of about twenty million people.[97]

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marriages-in-nigeria, accessed on 24 June 2018*;* Harinder Boparai 'The customary and statutory law of marriage in Nigeria' (1982) 3 *Journal of Comparative and International Private Law* 533; E I Nwogugu *Family law in Nigeria* 3 ed (2014) 4.

[88] Nwogugu 9.

[89] Ibid 63.

[90] (2002) EWCA Civ. 1826.

[91] Cap 123 Laws of the Federation of Nigeria, 2011.

[92] It further provides in section 3 that only a marriage between a man and a woman shall be recognized in Nigeria.

[93] See Appendix A.

[94] European Asylum Support Office Report 14.

[95] Southeast, Southsouth, Southwest, Northcentral, Northeast and Northwest. See the European Asylum Support Office Report 13.

[96] European Asylum Support Office Report 20.

[97] Diala Anthony '*Judicial Recognition of Living Customary Law in the Context of Women's Matrimonial Property Rights in South-East Nigeria* (unpublished PhD thesis, University of Cape Town, 2014) 47.

This region of Nigeria was selected primarily because its indigenes are predominantly of the Igbo tribe[98] and the Christian religion[99] and therefore contract mostly customary — not Islamic — and or statutory marriages[100] and simultaneously too.[101] The relationship between these two systems of marriage create different outcomes from statutory marriages contracted in other parts of the country. Finally, the researcher is also familiar with the culture and tradition of the people having lived in this region for over thirty years.

This thesis therefore focuses on determining the appropriateness and the need for the institutionalization of divorce mediation as the preferred dispute resolution method for terminating marriages contracted under statutory and or customary legal systems, in the South-East region of Nigeria. The Citizens' Rights and Mediation Centre, Enugu State, the focus of the empirical portion of this thesis, was selected as a case study because it is the biggest institutionalized mediation institution in the South East region.[102]

The thesis also draws legal material from South Africa, and Australia and the Unites States because they are African and world leaders, respectively, in the use of divorce mediation for family dispute resolution.

1.7 LITERATURE REVIEW

As previously mentioned, courts the world over, to lessen damage to children and parties of failed marriages, decongest overflowing dockets, and to keep up with changing times, have turned to mediation and other forms of dispute settlement for speedy and amicable family dispute resolution.

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[98] Ibid; Lorretta Favour C Ntoimo & Monica Ewomazino Akokuwebe 'Prevalence and patterns of marital dissolution in Nigeria' 12 *The Nigerian Journal of Sociology and Anthropology* 8; Victor Chikezie Uchendu *The Igbos of Southeast Nigeria* (1965) 1-3.

[99] Diala 'Judicial Recognition' 47.

[100] Umezuruike 1.

[101] Before the advent of the British, indigenes of this region contracted marriages solely according to their local laws and customs. With colonialism came statutory and Christian marriages. Today, to keep up with the times and protect their legal rights under statutes, as well as honor their traditional roots, South easterners contract both customary and statutory marriages. Elvis-Imo & Okonkwo 138; *Jadesimi v Okotie-Eboh* 1996 (2) NWLR 128, 147-8 per Uwais CJN; Olokooba S M 'Analysis of legal issues involved in the termination of "double-decker'' marriage under Nigeria law' (2007 – 2010) *Nigerian Current Law Review* 198; Rahmatian 289.

[102] Felicia Ukwu 'Citizens' rights and mediation centres at local government level' (2013) 6 *Citizens' Rights and Mediation Centre Quarterly Journal* 4.

This global change however is yet to spread to the African continent. Divorce mediation in Africa is almost non-existent.[103] South Africa[104] leads, with several organizations providing divorce mediation services and recent court judgments encouraging and mandating divorce mediation.[105] However, there still remains a general lack of commitment to the process by the people.

In Nigeria, the most common form of mediation practiced is commercial mediation.[106] Disputes resolved using the mediation process are usually disputes arising out of simple contracts, debt recovery matters, tenancy matters and land matters.[107] Even though mediation is sometimes applied towards the resolution of disputes involving the family, divorce related disputes are specifically reserved for the courts as the primary form of family dispute resolution available to the divorcing couple in Nigeria is litigation. Section 2 of the Matrimonial Causes Act, expressly vests the State High Courts with the power to resolve family disputes relating to divorce and separation and matters ancillary thereto such as maintenance, child custody, and settlement of property.[108]

The result is that the divorce process in Nigeria is therefore subject to all the procedural disadvantages associated with the resolution of disputes through litigation. In addition, other problems associated particularly with the divorce process in Nigeria such as the double marriage phenomenon — where the same couple contracts two marriages under two different legal systems, notably a statutory and customary marriage, giving rise to two different set of rights and responsibilities and two different marriages that must be dissolved separately — are worsened by the litigation process. Nigeria is a deeply religious and cultural society where divorce still attracts stigma for the divorcing couple, the children of the marriage and sometimes, their extended family.[109] Litigation contributes to this as divorce proceedings are open to the public[110] and as such, members of the public are acquainted with the sordid details of a couple's marriage during the divorce process. Despite the evidence to show that the resolution of matrimonial disputes through

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[103] De Jong 'Judicial stamp' 95.
[104] Hoffman W (ed) *Family Mediation in South Africa: Present Practices and Future Vision* (1991) papers from the Third National Conference of the South Africa Association of Mediators in Family Matters (Johannesburg 1992).
[105] *MB v NB* 2010 (3) SA 220 (GSJ); *Van den Berg v Le Roux* 2003 (3) All SA 599 (NC); *Townsend-Turner and another v Morrow* 2004 (1) All SA 235 (C).
[106] Onyema Emilia 'The Multi-Door Court House (MDC) scheme in Nigeria: A case study of the Lagos MDC' (2013) 2 *Apogee Journal of Business, Property & Constitutional Law* 98.
[107] Ibid.
[108] Section 114 of the Matrimonial Causes Act, 2004.
[109] Epiphany Azinge 'Settlement of disputes: An appraisal of alternatives to adjudication in matrimonial, chieftaincy and land disputes' (1993) 4 *A Journal of Contemporary Legal Problem* 58-9.
[110] Section 103 of the Matrimonial Causes Act, 2004.

litigation causes untold hardship for the couple as well as the children of the marriage, litigation is still the most widely used form of formal family dispute resolution in Nigerian courts. There is therefore, no legal framework for divorce mediation practice in Nigeria.

However, as previously stated, the world over, mediation is the cornerstone of the family dispute resolution system. Many comparative studies have been conducted in the areas of divorce mediation and divorce litigation to determine the most effective process for the amicable dissolution of marriage with minimal damage to the family and the benefits of mediation have outweighed those of litigation.[111] The indices for comparison range from cost in term of finances[112] and time for the divorcing couple and the courts, to client satisfaction,[113] improved post-separation relationship between the couple and their children, [114] settlement rates, compliance with mediated agreement, adequate provision for the psychological and legal needs of the couple and the children.

Kaspiew,[115] in the same vein as Moloney,[116] conducted an extensive evaluation of the new family law reforms in Australia, which mandate family mediation for the resolution of family disputes in the country, to ascertain the effectiveness of the family mediation program in Australia. They reported that the potential benefits of family mediation far outweighed the potential negative effects.[117] They also reported improved client satisfaction,[118] and reduced applications to the family law courts for litigation.[119]

Other proponents[120] have posited different reasons for the application of divorce mediation to family disputes. In summary, this school of thought posits that divorce mediation produces higher

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[111] Kelly J B 'Mediated and adversarial divorce: Respondents' perceptions of their processes and outcomes' (1989) 24 *Mediation Quarterly* 71.
[112] Payne 12; Pearson & Thoennes 'Divorce mediation' 9.
[113] Even where parties failed to reach resolution. In a study by Pearson and Thoennes, they recorded higher rates of client satisfaction with divorce mediation (77%) when compared with litigation (40%) and reported higher compliance rates with mediated agreements by parties. This study also recorded lower re-litigation rates for mediation participants than participants of the litigation process. See Salem 376.
[114] Emery, Sbarra & Grover 'Divorce mediation' 22.
[115] Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand & Lixia Qu '*Evaluation of the 2006 Family Law Reforms*' (2009).
[116] Moloney et al 192-6.
[117] Kaspiew et al 52.
[118] Ibid 50.
[119] Ibid 50.
[120] Milne, Folberg, & Salem 3, 8; M De Jong 'A pragmatic look at mediation as an alternative to divorce litigation' (2010) 3 *Journal of South African Law* 515; Susan K Boardman, John Fiske, Laurie Israel & Ken Newmann 'Marital mediation: An emerging practice' available at *http://www.mediate.com/articles/maritalmediation1.cfm,* accessed on 25 April 2013; Wolcott 47; Stephen T Knuppel 'Promise and problems in divorce mediation' (1991) 1991 *J. Disp. Resol.* 127-9.

quality outcomes than litigation in terms of agreement, time spent, cost, post separation family relationship.[121]

The focus of the study however is not on the generic benefits of the divorce mediation process; extensive studies have been carried out to this effect. This study rather seeks to determine the ability of divorce mediation to achieve the aims of a good divorce process and to provide solutions to the myriad of problems facing couples going through divorce in Nigeria.

Nigerian scholars have called for the institution of divorce mediation in the Nigerian legal system. Ifemeje[122] states that divorce mediation may be the solution to the problems which spouses and the state must contend with during the process of dissolution of marriage in Nigeria and should therefore be incorporated into the Nigerian legal system. Adesanya while in agreement with Ifemeje concludes that this may be difficult to achieve.[123]

This work while agreeing with the scholars above that divorce mediation may be the solution to the problems of divorce in Nigeria seeks to further expound on their hypothesis by providing a thoroughly examined foundation for their recommendations. It compares the effects of divorce mediation and divorce litigation in the Nigerian context. It goes a step further to recommend a concrete way of integrating this divorce mediation program into the current family law system. It proposes the use of institutionalized divorce mediation at government-funded mediation centres to ensure that the divorce mediation service is available to Nigerians from all walks of life.

The Citizens Rights and Mediation Centre is such a centre. It was established in August 2005 by the Enugu State Government with the support of the Department for International Development (DFID) of the United Kingdom under the Enugu State Citizens' Rights and Mediation Centre Law, 2004.[124] It is a government-funded mediation centre whose primary mandate is the provision of alternative dispute resolution services[125] — mediation — to the less privileged particularly women and children.[126] It is situate in the capital city of Enugu, Enugu State, and is the biggest centre of its kind in the South Eastern region of Nigeria.

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[121] Kelly 'Family mediation research' 3.
[122] Ifemeje *Contemporary Issues* 199-206, 237; Izunwa & Ifemeje 36.
[123] Yetunde A Adesanya 'Divorce litigation in Nigeria: Proposal towards an alternative dispute resolution procedure' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 222-235.
[124] Cap 45 Vol III of the Laws of Enugu State 2004.
[125] Section 3 of the Law.
[126] Section 14 of the Law.

1.8 RESEARCH METHODOLOGY

The research will be partly desk-based, examining policy and legal research in the area of divorce in Nigeria and divorce and divorce mediation in the rest of the world.[127] It will be achieved through the examination of primary and secondary sources such as legislation, court rules, policy documents, working papers, and relevant research papers. The research will also be partly empirical to determine the operations of the Citizens' Rights and Mediation Centre, Enugu State and the possibility of the establishment of a divorce mediation program at this Centre.

The research methodology chosen for the empirical section of this research project is the qualitative inquiry, in particular, the qualitative case study. This type of qualitative inquiry involves an in-depth description and analysis of a bounded system.[128] It is the study of a particular phenomenon such as a person or entity, to illuminate the researcher and aide the acquisition of better understanding of the phenomenon. The unit of analysis is the bounded system. The researcher seeks to acquire information on the institutional and operational structure of the Citizens' Rights and Mediation Centre. This informed the choice of the qualitative case study research methodology. This Centre, a bounded system, is therefore the unit of analysis for this research.

Two data collection methods were adopted: interviews and documentary analysis. The interviews provided practical insights into the framework of mediation at the Centre as well as the machineries of the Centre.[129] They were audio-recorded, in-person, semi-structured interviews of all the participants, conducted in English language. The primary research participants were key stakeholders of the Citizens' Rights and Mediation Centre; the administrators, the mediators and the users of the Centre.

Triangulation was adopted to ensure viability of the information received. This was ensured through interviewing three categories of participants: administrators, mediators and the users of the Centre.

These three categories of participants were selected to ensure a range of perspectives from each group. The categories are the administrators of the Centre, the mediators at the Centre and the

[127] Noe that there is a dearth of scholarship on divorce mediation in Nigeria.
[128] Sharan B Merriam *Qualitative Research: A Guide to Design and Implementation (*2009) 40.
[129] See Appendix D for Interview Questions.

users of the Centre. A total of 29 participants were interviewed: 1 administrative head, 13 mediators and 15 users.

The primary sampling method was the non-probability sampling, in particular, purposive sampling. It was adopted because it enabled the researcher to gain maximum insight into the research subject by selecting a sample which will best provide the necessary information. This purposive sampling was employed for the first level of sample selection (to determine the unit of analysis) and part of the second level involving the first group, the administrators of the Centre. Stratified random sampling was employed for selecting the research participants in the second and third categories, that is, the mediators and the users of the Centre.

Category 1: Administrator

The Director of the Centre is the primary administrator at the Centre. He supervises the daily operations of the Centre and is the link between the Centre and the Ministry of Justice.

Category 2: Mediators

The relevant differences in the population are gender and number of years of experience at the Centre. Other differences such as level of qualification and socio-economic status are not significant enough to be considered because all the mediators are all staff employees of the Mediation Centre and therefore with similar qualifications and income and minus one exception, within a narrow age bracket (30-40). 13 mediators out of 22 were selected, representing approximately 60% (59.9%) of the total number of mediators at the Centre. They were assigned pseudonyms for privacy and ease of reference. They are referred to in this work as Mediators 1 to 13.

a. Gender

While both genders are reflected at the Centre, the mediators are mostly women, with a ratio of approximately 2:1. There are a total of 22 mediators, 15 women and 7 men. The selected sample consisted of 9 female mediators and 4 male mediators representing a ratio of approximately 2:1.

b. Number of years of experience at the Centre

With a few exceptions, the mediators are rotated within the Ministry every 4 years. The mediators with the most experience at the Centre are therefore those who have been at the Centre for more

than 3 years. Those with the least experience would have been at the Centre for 1 month to 2 years. The selected sample reflects a balance between the relevant groups. 4 mediators were the youngest mediators at the Centre having spent 1 to 2 years at the Centre. 4 mediators were the oldest mediators having spent 4 to 10 years at the Centre and the middle group of 5 consisted of mediators who had 3 years' experience working at the Centre.

Category 3: Users

The relevant differences in my population are Gender and Age. Other differences such as, socio-economic status and level of education could not be determined because this data is not collected by and is therefore not available at the Centre. The selected sample consists of 15 users representing about 60% of the total number of new clients received by the Centre every month. The Centre receives approximately 25 new cases every month. [130] The users were assigned pseudonyms for privacy and ease of reference. They are referred to in this work as Users 1 to 15.

a. Gender

Complaints at the centre are lodged by both men and women. The selected sample consists of a total of 15 users, 9 men and 6 women.

b. Age

The sample will be grouped into two age groups (18 - 45) and (46 – 70). The selected sample reflects a fair representation of participants from each age group.

All the interviews were conducted using an audio recorder, at the Centre during work hours from December 2019 to February 2020.

The most obvious limitation of this empirical study was the unwillingness of users of the Centre to participate in the interviews. Many declined to give interviews, some expressed a desire to be paid before granting the interview and subsequently declined when they realized the exercise would attract no financial benefits. Most of the users who participated in the interview were in a hurry to leave the Centre, having just concluded a mediation session. The most relaxed participants were users who had come to the Centre for purposes other than a mediation session.

The information gathered from the interviews was supplemented by information gathered using the secondary data collection method, a documentary analysis of the documents available at the Centre such as the Centre's journal and other documents.

[130] See Table in Appendix B.

This research required approval from the Research Ethics Committee of the Faculty of Law because it involved the collection of data from human participants. This approval was granted on 17 December 2019 for a period of twelve months.[131]

1.9 OUTLINE OF THE STUDY

The thesis begins with this introductory chapter — Chapter One — which provides a basic overview of the research that was carried out within the thesis. It contains a brief background of the research work, the research questions, rationale for and objectives of the research as well as the research methodology to be adopted. It ends with a structural representation of the contents of the thesis and a brief summary.

Chapter Two discusses the theoretical framework of this thesis. It expands on the concept of divorce, and presents a brief history of divorce in several countries around the globe. It ends with an exposé on the goals of a good divorce law and process.

Chapter Three examines the process of divorce in Nigeria with respect to customary and statutory marriages. It further examines the legal framework for the dissolution of these marriages — customary and statutory — to determine if these processes and legislation achieve the goals of a good divorce. The chapter proves that the divorce litigation process and legislation in Nigeria fail to achieve the goals of a good divorce.

Chapter Four explicitly details the peculiar problems associated with dissolution of marriage in Nigeria, showing how socio-cultural conditions in Nigeria prevent the good divorce. It further exposes the inability of divorce litigation to solve these problems thereby laying the foundation for the argument in favour of the need for the institutionalization of divorce mediation in Nigeria.

Chapter Five focuses on the concept of divorce mediation. It considers the features of divorce mediation in relation to its ability to achieve the goals of divorce law and to provide a solution to the peculiar problems of the divorce process in Nigeria. In essence, this chapter reinforces the need for improving the divorce process in Nigeria through the institutionalization of divorce mediation programs in the Nigeria family dispute resolution system.

Chapter Six discusses the institutionalized divorce mediation program. It provides a concise summary of its goals and benefits and provides an examination of the key features of these

[131] See Appendix C.

programs drawing lessons from models in Australia, the United States, South Africa and other countries.

Chapter Seven provides a comprehensive examination of the Citizens' Rights and Mediation Centre, Ministry of Justice, Enugu State, Nigeria. It considers the appropriateness of this Centre as a viable vehicle for the establishment of a divorce mediation program in Nigeria using findings from the empirical study as well as the key features of institutionalized divorce mediation programs identified in the previous chapter. It further details the benefits and challenges of instituting a divorce mediation program at the Citizens' Rights and Mediation Centre as well as means of overcoming these barriers. Finally, it determines the necessary changes which need to be made to the Centre for the successful implementation of a divorce mediation program.

Chapter Eight concludes the thesis with an overview of discussions in the preceding chapters. It provides research findings, recommendations for a new divorce mediation system and policy implications for these recommendations.

1.10 SUMMARY

This chapter provides a brief background to the thesis, showing a review of relevant literature, the research objectives and the organizational structure of the work. It further provides the contextual background for the thesis highlighting the research questions, limitations and scope, and methodology. In the following chapter, we consider the contextual framework for this thesis, beginning with a study of the concept of divorce.

CHAPTER TWO

DIVORCE

2.1 INTRODUCTION

This chapter introduces the subject of divorce with a brief look at definitions and the historical background of divorce in the first and second sections. These sections lay the foundation for the discourse in the final section which is centered on the goals of a good divorce law and process.

2.2 DEFINING DIVORCE

The concept of divorce has been defined by a number of scholars and statutes. The Black's Law Dictionary defines it as:

> … legal dissolution of a marriage by a competent court and when used without qualification, the term divorce imports a dissolution of the marriage relation between husband and wife, a complete severance of the tie by which they were united.[132]

It has also been defined as, 'A court's termination of a marriage for specified grounds,'[133] as well as 'An *ex nunc* dissolution of a valid marriage during the lives of the spouses by a decision of a competent authority for reasons laid down by statute or by a procedure prescribed by law.'[134]

Section 4 of the Australian Family Law Act[135] defines it as, '… the termination of a marriage other than by the death of a party to the marriage.'

Finally, in the case of *Atherton v Atherton*,[136] divorce was defined as:

> The legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties.

From the above, divorce can be defined as the dissolution of a valid marriage between two living spouses by a court of competent jurisdiction, which dissolution denotes a complete termination of

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[132] Bryan A. Garner (ed.) *Black's Law Dictionary* (2004) 515.
[133] William Statsky *Family Law: The Essentials* (2014) 128.
[134] Katharina Boele-Woelki *Principles of European Family Law Regarding Divorce and Maintenance* (2004) 13.
[135] No 53 1975.
[136] 181 U. S.155, 21 Sup. Ct. 544, 45 L. Ed. 791.

all ties, rights and duties accruing to the parties as a result of such marriage.

These definitions above however, apply only to the statutory divorce and do not reflect an adequate definition of the divorce process under customary law.

There exists a lacuna in relevant literature on the definition of the customary divorce in Nigeria. For the purpose of this work, the customary divorce in Nigeria may simply be defined as the termination of the customary marriage between spouses or the termination of the customary union between a man and his wife and their respective families.[137]

2.3 HISTORY OF DIVORCE

A discussion of the history of the divorce process in Nigeria is incomplete without a history of the divorce process in the United Kingdom because Nigeria was colonized by the British and therefore stayed under British occupation and laws for a protracted period of time. Before the 16th century, the Christian world perceived the institution of marriage to be sacrosanct and therefore, marriages were considered indissoluble.[138] In common law jurisdictions, dissolution of marriage was possible only in extreme circumstances usually cases of the commission of adultery by a wife or aggravated adultery by a husband.[139] This meant that spouses seeking divorce had to prove the presence of the matrimonial offence. The spouse seeking the divorce was perceived as the 'innocent' party and the other spouse, the 'guilty' party. This gave rise to what became known as the matrimonial offence principle.[140] Nevertheless, obtaining the divorce was extremely difficult as the dissolution of marriage was within the purview of the church through the ecclesiastical court[141] and at such high expense[142] that parties could ill afford to apply for it.

The English Matrimonial Causes Act 1857, heralded the beginning of secular divorces in England.[143] However, the Act was based on the matrimonial offence theory which meant that

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[137] *Eze v Omeke* (1977) I ANSLR 136.
[138] Ann Summer Holmes 'The double standard in the English divorce laws, 1857-1923' (1995) 20 *Law & Social Inquiry* 604.
[139] The husband must have committed the adultery under incestuous or other equally wrong circumstances or it may be aggravated by cruelty or desertion by the husband. Griselda Rowntree & Norman H. Carrier 'The resort to divorce in England and Wales 1858 – 1957' (1958) 11 *Population Studies* 191.
[140] Ibid.
[141] Ibid; Holmes 604.
[142] Ibid.
[143] Holmes 601.

divorces were only granted upon proof of the commission of a matrimonial fault, usually adultery, committed by the wife or adultery coupled with aggravated circumstances such as rape and incest, committed by the husband.[144] Review of this law led to the creation of the Matrimonial Causes Act 1923 which allowed wives to petition for divorce on the ground of adultery simpliciter, that is, without having to prove additional aggravating circumstances.[145] Meanwhile, in 1920, New Zealand became the first country to make a provision for a divorce which was not based on a matrimonial offence. Section 4 of the New Zealand Divorce and Matrimonial Causes Act[146] provided for the grant of a decree for dissolution where a couple had been separated for at least three years and without apportioning blame to either of them.

> It shall be lawful for the Court, in its discretion, on the petition of either of the parties to a decree of judicial separation, or to a separation order made by a Stipendiary Magistrate or by a Resident Magistrate, or to a deed or agreement of separation, or separation by mutual consent, when such decree, order, deed, or agreement is in full force and has so continued for not less than three years, to pronounce a decree of dissolution of marriage between the parties, and in making such decree, and in all proceedings incidental thereto, the Court shall have the same powers as it has in making a decree of dissolution in the first instance.

In 1937, perhaps borrowing a leaf from the New Zealand Act, the English Matrimonial Causes Act was amended to include insanity (amongst other grounds: desertion and cruelty) as a ground for divorce.[147] For the first time, it recognized a ground for divorce which did not apportion blame to either of the parties to the marriage. Thus began the era of a dual system of dissolution of marriage recognizing both fault based and non-fault based grounds. In 1959, Australia's Matrimonial Causes Act followed suit by providing for divorce based on the grounds of separation for a continuous period of not less than five years before the institution of the petition.[148]

In the early 1950s, following the Second World War, due to societal dissatisfaction with the provisions of its divorce law of 1937, The English government sought to review it. Several commissions were established to review the law, especially the provisions for divorce. The Royal Commission on Marriage and Divorce (the Morton Commission) of 1951 was one of many. In

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[144] Frances Burton *Family Law* (2003) 59.
[145] Ifeoma Enemo *Principles of Nigerian Family Law* (2007) 153.
[146] The New Zealand Divorce and Matrimonial Causes Amendment Act No 70 11 GEO v of 1920.
[147] Enemo 153.
[148] Section 28(m) Australia's Matrimonial Causes Act 1959.

1956, after five years of deliberation it published a report, Morton Commission Report,[149] advocating for the retention of the matrimonial offence system[150] because, the Commission believed that this would best achieve the objective of preserving the institution of marriage.[151] The goal of the Morton Commission therefore was the preservation of the institution of marriage and the stability of the family.[152] This report met with much dissatisfaction.[153]

Subsequently, the Archbishop of Canterbury set up a group to review the same laws.[154] In 1966, ten years after the Morton Commission Report, the Archbishop's group published their conclusions and recommendations in its report, 'Putting Asunder: a Divorce Law for Contemporary Society' (Putting Asunder Report). The group advocated for the amendment of the divorce based on a combination of fault and non-fault based (insanity) grounds, and specifically advocated the removal of the matrimonial offence system and the establishment of the irretrievable breakdown theory.[155] The irretrievable breakdown theory, they stated, would not require proof of a matrimonial offence to show that a marriage had come to an end. Instead, the parties only needed to prove that the marriage had broken down irretrievably. To ascertain the irretrievable breakdown, there would be a thorough judicial inquest into the marriage, after which the court would decide whether or not to dissolve the marriage.[156] In terms of the Report, the preferred goal was reconciliation. The judicial inquest was geared towards ascertaining the possibility of marital reconciliation.[157] Even though on the face of it, the Archbishop's group proposed the irretrievable breakdown theory as the sole ground for divorce and not matrimonial offence, it sought — through the judicial inquest — to make the divorce process even more difficult than it had been under the matrimonial offence theory.[158]

Again, the report was adjudged unsatisfactory[159] and that same year — 1966 — the Law Commission began its own research into the same subject. Its findings were documented in a report

[149] Morton Royal Commission on Marriage and Divorce 1951-1955 (Report Cmnd. 9678, 1956).
[150] James Herbie DiFonzo 'Customized marriage' (2000) 75 *Ind. L.J.* 889.
[151] Morton Commission Report 13-15.
[152] DiFonzo 875, 893
[153] Enemo 154.
[154] Ibid.
[155] DiFonzo 893.
[156] Ibid 894.
[157] Ibid.
[158] Ibid 895.
[159] Enemo 154.

titled, 'Reform of the Grounds of Divorce: The Field of Choice' (Field of Choice Report)[160] published later that year.

The Field of Choice considered divorce laws in New Zealand and Australia amongst jurisdictions. It agreed with the Putting Asunder Report that the matrimonial offence theory should be replaced with the irretrievable breakdown theory.[161] However, the point of departure was the judicial inquest. It found that if the conduct of the parties was still in question during a judicial inquest, the goal of reducing the bitterness and humiliation associated with divorce proceedings would be defeated and the marriages would not be dissolved in a decent manner.[162] The Commission proposed a combination of fault and non-fault based grounds.[163] The non-fault based grounds would serve the interest of parties who wished to avoid an acrimonious divorce, while the fault based grounds would serve the interests of spouses who wished to get a divorce forthwith. The no-fault divorce grounds required long separation periods — 2 years or 5 years.[164] The contents of this report, to a large extent formed the basis of subsequent English divorce law, namely the Divorce Reform Act 1969[165] and the current Matrimonial Causes Act 1973.

In terms of the Matrimonial Causes Act 1973, irretrievable breakdown of marriage became the only ground for divorce. In place of a judicial inquest, certain facts were to be proved to establish the irretrievable breakdown. Facts which could prove an irretrievable breakdown included adultery and intolerability; intolerable behaviour; desertion for two years; separation for two years plus the respondent's consent to the divorce; and separation for five years irrespective of the respondent's consent.[166]

The result was that proof of one of the five facts would establish irretrievable breakdown and ensure the grant of a decree of divorce by a court. However, the inability to prove any of the facts would show that that the marriage had not broken down irretrievably, and the decree of divorce

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[160] (1966) Law. Com. No. 6; CMND. 3123 H.M.S.O.
[161] DiFonzo 895.
[162] Ibid 896.
[163] Ibid 895; Putting Asunder Report para 105.
[164] They were enshrined in Sections 1(2)*(d)* and *(e)* of the English Matrimonial Causes Act 1973.
[165] DiFonzo 897; Enemo 155. The Nigerian Matrimonial Causes Act, 1970 was modelled on the English Divorce Reforms Act. See Enemo 156.
[166] Section 1(2)*(a)* - *(e)* of the English Matrimonial Causes Act 1973.

would not be granted.[167]

However, while England, Canada and Nigeria still operate a divorce system which acknowledges both fault based and non-fault based facts in proof of irretrievable breakdown, some jurisdictions have developed laws to provide for the irretrievable breakdown of marriage based on strictly non-fault based facts usually, separation. The Australian Family Law Act[168] is an example of this approach. In section 48, it provides as follows:

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

California was the first state in the United States to adopt a non-fault based system of divorce.[169] Section 2310 of the California Family Code provides as follows:

> Dissolution of the marriage or legal separation of the parties may be based on either of the following grounds, which shall be pleaded generally:
>
> (a) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.
>
> (b) Incurable insanity.

New Zealand also provides that:

> (1) An application for an order dissolving a marriage or civil union may be made only on the ground that the marriage or civil union has broken down irreconcilably.
>
> (2) The ground for the order is established in law if, and only if, the court is satisfied that the parties to the marriage or civil union are living apart, and have been living apart for the period of 2 years immediately preceding the filing of the application for an order dissolving the marriage or civil union; and no proof of any other matter shall be required to establish the ground. [170]

The common law divorce process and divorce law have come a long way from their inception two

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[167] Enemo 155; Herring 109.
[168] No 53 1975.
[169] Charlene Wear Simmons 'State grounds for divorce: A brief history' in Charlene Wear Simmons *Readings on No-Fault Divorce* (1998) 6. Today, all the fifty states in the United States provide for some form of no-fault divorce.
[170] Section 39 Family Proceedings Act 1980 No 94.

centuries ago. These days, in most common law jurisdictions, divorce is granted on the grounds of irretrievable or irreconcilable breakdown of marriage. However, jurisdictions differ in whether the facts adduced to prove the irretrievable breakdown are fault based or non-fault based.

2.4 THE GOALS OF GOOD DIVORCE LAW

Definitions given to the term 'divorce' can be extrapolated to provide the goals of divorce. From the definitions in 2.1 above, the goal of divorce can simply be said to be the severance of all legal marital ties between the spouses. However, the history of divorce and divorce law described above shows that the goal of divorce is not simply the termination of marriage.

The Morton Commission perceived the goal of good divorce law to be the preservation of the institution of marriage.[171] The Putting Asunder Report subtly sought the goal of marital reconciliation[172] while the Field of Choice Report sought all of the above and more: the preservation of the institution of marriage, marital reconciliation where possible, dissolution of dead marriages and a dissolution process which causes minimal harm to the parties going through divorce.[173]

This section seeks to determine the aims of good divorce and divorce law and by extension, the aims of a good divorce process. To facilitate a clear discussion, the goals of divorce law will be the reference point because the divorce laws will ultimately guide the divorce process.

As mentioned in 1.6 above, this thesis adopts best practices, contents of reports as well as the principles in legislation from Australia, England and South Africa as its yardstick for assessing the goals of divorce law.

Several scholars and statutes in these jurisdictions have enunciated on the features and objectives of good divorce law. Some have stated these objectives explicitly while others have subsumed them in underlying principles of divorce statutes.

The Field of Choice Report of 1966 set out the following as the objectives of good divorce law.

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[171] Morton Commission Report 13.
[172] DiFonzo 894.
[173] Field of Choice Report para 15.

> To buttress, rather than to undermine, the stability of marriage … When, regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress, and humiliation.[174]

The second objective was explained further as follows:

> First the law should make it possible to dissolve the legal tie once that has become irretrievably broken in fact. If the marriage is dead, the object of the law should be to afford it a decent burial. Secondly, it should achieve this in a way that is just to all concerned, including the children as well as the spouses and which causes them the minimum embarrassment and humiliation. Above all, it should seek to take the heat out of the disputes between husband and wife and certainly not further embitter the relationships between them or between them and their children. It should not merely bury the marriage, but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future.[175]

In summary, good divorce law is one which buttresses the stability of marriage and dissolves dead marriages decently by treating parties with maximum fairness, promoting minimum bitterness, distress and humiliation for the parties, and encouraging harmonious post-divorce relationships between the parties and their children.

In 1966, the Governor of California set up a commission to review the state of divorce and divorce laws in California. The commission published a report, the Report of the Governor's Commission on the Family[176] where they stated succinctly, the goal of law:

> The direction of the law must be … towards family stability – towards preventing divorce where it is not warranted, and towards reducing its harmful effects where it is necessary … if a marriage is viable, it is the job of the Court … to afford the parties what help they need and the Court can give. If the marriage has irretrievably foundered, then it must be the goal of the Court to aid the litigants to respond as maturely as possible to the difficult experience of the divorce. If the procedure, by "relieving tensions, or offering comfort or interpretation", can enable the litigants to respond less hysterically or vindictively and more reasonably to the experience of divorce, the legal issues can be more intelligently and constructively analyzed by the Court and counsel, and the Court may more easily develop final orders which will operate to the best interests of the parties – and children – involved.[177]

In summary, the Commission proposed that the primary goal of divorce law should be family stability, other goals were reduction of emotional stress of the parties as well as ensuring that

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[174] Ibid.
[175] Ibid para 17.
[176] Report of the Governor's Commission on the Family 1-2, California (1966).
[177] Ibid 33–34.

provisions are made for the best interests of the parties and their children.[178]

Section 43 of the Australian Family Law Act provides for principles to be applied by courts when hearing matters for divorce:

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> (ca) the need to ensure protection from family violence; and
>
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

In summary, the Act provides for the preservation of the institution of marriage, protection of the family, protection of the rights and interests of children, protection from family violence and encouragement of reconciliation and improvement of post-divorce relationship.

The failed[179] English Family Law Act 1996, provided guiding principles in Section 1. These principles attempted to define the role the rule of law should play in divorce proceedings:

> The court and any person, in exercising functions under or in consequence of Parts II and III, shall have regard to the following general principles —
>
> (a) that the institution of marriage is to be supported;
>
> (b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
>
> (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end—

[178] Shortly after the publication of this report, a reform of the divorce process in California was effected and California became the first state in the United States to drop all fault grounds and adopt strictly no-fault grounds. It will be referred to periodically in this study for this reason.

[179] This Act was passed in 1996. It provided for no-fault divorce as well as divorce mediation. Pilot studies were carried out to ascertain the most effective means of carrying out the the new provisions of the Act especially information meetings and mediation, the results of the studies were unsatisfactory and the Act was abandoned.

> (i) with minimum distress to the parties and to the children affected;
>
> (ii)with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
>
> (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
>
> (d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.[180]

In summary, good divorce law should support the institution of marriage, save salvageable marriages, dissolve broken marriages with minimum distress to the parties and children, promote good post-divorce relationship between the parties and children, save costs for the state and the parties and protect parties and children from any risk of violence.

Section 1801 of the Californian Family Code provides as follows:

> The purposes of this part[181] are to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.

From the review of the legislation and law commission reports of various jurisdictions set out above, we can distill the following as the objectives of good divorce law:

2.4.1 A good divorce law should preserve the institution of marriage and the stability of the family

Marriage, 'the voluntary union for life of one man and one woman, to the exclusion of all others' in the words of Lord Penzance in *Hyde v Hyde*[182] is as much an institution as it is an ideal upheld by the law.[183] In Nigeria, the definition of marriage is expanded to include marriages contracted under customary law which may be polygamous.[184]

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[180] Sections 1(1)*(a) – (d)* of the Act.
[181] Division 5 of the Family Code which provides for Conciliation Proceedings.
[182] [L.R.] 1 P. & D. 130.
[183] Vivian E Hamilton 'Principles of US family law' (2006) 75 *Fordham Law Review* 38.
[184] See 1.6 above.

Marriage leads to the creation of the basic unit of society, the building block and foundation of every society: the family.[185] In Nigeria, as elsewhere in Africa, the primary way through which a family is formed is through marriage.[186]

According to the International Covenant on Civil and Political Rights 1996, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.'[187] If societal stability depends on the stability of the family, then the need to safeguard the institution of marriage cannot be overemphasized. A good divorce law should therefore, in the interests of society at large, seek to preserve the institution of marriage and the stability of the family.[188]

The English Law Commission posited this objective as one of the leading objectives of good divorce law, 'to buttress rather than undermine the stability of marriage.'[189] Section 1(1)*(a)* of the English Family Law Act 1996 provides that divorce law should support the institution of marriage.

The Australian Act in Section 43(1)*(a)* provides for the preservation of the institution of marriage as one of the guiding principles of Australian Family courts in divorce proceedings:

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
>
> …

It further provides in Section 43(1)*(b)* for

> .. the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society …

Thus it is clear that many jurisdictions have policies which hold that a good divorce law can and should preserve the sanctity of the marriage institution. Some proponents of this view hold that

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[185] Ibid.
[186] O T Ahenkorah 'Matrimonial property rights of women upon divorce in Ghana, under the prism of legal empowerment. To which extent does the lack of substantive legislation on property settlement upon divorce in Ghana constitute a breach of the CEDAW?' available at *https://www.duo.uio.no/bitstream/handle/10852/39725/201.pdf?sequence=1,* accessed 28 June 2018.
[187] Article 23.
[188] Herring 105.
[189] Field of Choice Report para 15.

this should be done by discouraging divorce.[190] In support of this principle, the Report of the Governor's Commission on the Family stated that the goal of law should be 'to further the stability of the family'[191] by ' … preventing divorce where it is not warranted …'.[192]

One way to discourage divorce would be by making the process harder, through the use of fault provisions.[193] Opponents argue that making divorce harder would simply force people to stay in broken 'empty shell' marriages and that such marriages do not promote family stability.[194] They also argue that the law cannot make people love each other – if parties find that they cannot get divorced legally, they will simply separate. The resultant disjointed families will hardly make for the stable families. These opponents therefore propose allowing parties to divorce, remarry and rebuild their lives to prevent disjointed families.[195]

Proponents of making divorce harder believe that this would prevent people from rushing recklessly into marriages and rushing out as quickly as they rushed in, thereby preserving the sanctity of the institution of marriage:

> A good divorce law can and should ensure that divorce is not so easy that the parties are under no inducement to make a success of their marriage and overcome temporary difficulties.[196]

Some laws try to achieve this aim by providing for a minimum number of years for parties to be married before they can institute proceedings for divorce, thus ensuring (or at least trying to ensure) that parties remain married and try to work out their differences or save the marriage before turning to the divorce. Section 5(1) of the Irish Family Law (Divorce) Act 1996 provides for a minimum period of four years, Section 44(1)(b) of the Australian Family Law Act provides for a minimum period of two years[197] while Section 3(1) of the English Matrimonial Causes Act 1973 provides for a minimum period of three years:

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[190] Morton Commission Report 15.
[191] Report of the Governor's Commission on the Family 31.
[192] Ibid 33.
[193] As proposed by the Morton Commission. 18 out of the 19 members of the Commission elected to retain the matrimonial offence principle. See Morton Commission's Report 13.
[194] Herring 130.
[195] Herring 107, 130-1.
[196] Field of Choice Report para 16.
[197] This minimum period may be reviewed by the court if it finds that the carrying out the provisions of the act may cause hardship to the parties or the children of the marriage.

> … no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage…

2.4.2 A good divorce law should save marriages that are salvageable

A good divorce law should not just preserve the institution of marriage but should go a step further to save salvageable marriages from dissolution. One of the ways in which proponents try to achieve this aim is through encouraging reconciliation between the parties.[198] Ergo, one of the provisions common to most divorce laws is the provision for reconciliation.

In Australia, this aim is found under Section 43(1)*(d)* of the Family Law Act:

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a) …
>
> (d) the means available for assisting parties to a marriage to consider reconciliation ...

Section 13(B)(1) of the same Act also provides:

> (1) A court exercising jurisdiction in: (a) proceedings for a divorce order; or (b) financial or part VII proceedings instituted by a party to a subsisting marriage; must consider, from time to time, the possibility of a reconciliation between the parties to the marriage.

Most family and divorce laws, recognizing the fact that not all ailing marriages must die, create the opportunity for couples to reconcile through a variety of provisions. Most divorce laws enjoin the courts to adjourn divorce proceedings if the judge finds that there might be a reasonable prospect for reconciliation between the parties.[199] Section 6(2) of the English Matrimonial Causes Act provides as follows:

> If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation.

Section 13(B)(2) of the Australian Family Law Act provides:

> If, during the proceedings, the court considers, from the evidence in the proceedings or the attitude of the parties to the marriage, that there is a reasonable possibility of a

[198] Field of Choice Report para 29–32; Herring 106.
[199] The failed English Family Law Act 1996: s 1(1)*(b)*.

> reconciliation between the parties, the court may adjourn the proceedings to give the parties the opportunity to consider a reconciliation.

Section 4(3) of the South African Divorce Act[200] also provides:

> If it appears to the court that there is a reasonable possibility that the parties may be reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.

This objective is also enshrined in Section 2334 of the California Family Code and Section 10(2)*(a)* of the Canadian Divorce Act.[201] In Section 10(1), Canada goes a step further to require each court to investigate the possibility of reconciliation before considering evidence in divorce cases.

Some laws also require divorce lawyers to discuss with parties the possibility of reconciliation and the avenues for reconciliation open to them[202] as well as to submit a certificate of compliance with such provision.[203] Some laws provide for a waiting period between filing the petition and the hearing or between filing the petition and grant of the decree of dissolution[204] or between the grant of the decree *nisi* and the decree absolute.[205]

Some laws also provide for a trial period of reconciliation which may not affect proof of living apart or desertion for divorce proceedings based on separation or desertion. Section 8(3)*(b)(ii)* of the Canadian Divorce Act provides thus:

> (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
>
> (i) … or
>
> (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totaling, not more than ninety days with reconciliation as its primary purpose.

Section 2(5) of the English Matrimonial Causes Act also has similar provisions. Some laws also

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[200] Divorce Act 70 of 1979. See also section 6(1) of this Act and sections 7 and 9 of the Children's Act 38 of 2005.
[201] R.S.C. 1985, c. 3 (2nd Supp.)
[202] Section 9(1)*(b)* of the Canada Divorce Act; s 6(1) of the English Matrimonial Causes Act; s 12(E)(2) of the Australian Family Act. It requires the same of family counsellors, family dispute resolution practitioners and arbitrators. See also s 12(G)(1) of the Australian Act.
[203] Section 9(3) of the Canada Divorce Act; s 6(1) of the English Matrimonial Causes Act.
[204] Section 2339 of the California Family Code.
[205] Section 1(5) of the English Matrimonial Causes Act. See also s 5(1) of the Irish Family Law (Divorce) Act; s 3(1) of the English Matrimonial Causes Act.

provide for rescission of the decree *nisi* where parties have decided to reconcile.

Opponents of the reconciliation objective argue that divorce is usually the last alternative for most couples.[206] They insist that parties will have exhausted all avenues for reconciliation before approaching the courts for a divorce and as such, by that time, reconciliation is no longer possible.[207] Thus forcing them to go through a reconciliation process would be a farce[208] and a waste of state resources.

In summary, this goal of a good divorce aims at the encouragement and provision of the opportunity for marital reconciliation.[209]

2.4.3 A good divorce law should reduce bitterness between the parties

Divorce is an intensely emotional process which triggers powerful negative emotions, particularly bitterness and anger.[210] Frequently, one party, who is ready and able to end the marriage and move on with his or her life, requests a divorce from the other party, who may be completely taken by surprise or may still be willing to attempt reconciliation.[211] This leads to bitterness and anger on the part of the abandoned spouse who may often retaliate by trying to make the divorce difficult, thereby transferring their anger to the other party. Other matters such as settlement of property, child custody and maintenance may serve to aggravate an already bad situation and lead to acrimonious divorce proceedings. Divorce proceedings are even more acrimonious where the law requires proof of a matrimonial offences for the grant of a decree of divorce.[212] This requires parties to adduce evidence which is often humiliating and inflammatory (and sometimes fabricated), to prove that their spouse has committed acts grievous enough to warrant a divorce. Even worse, some divorce cases are conducted in open court, and thus members of the public are able to observe

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[206] Herring 106-7.
[207] Mervyn Murch *Justice and Welfare in Divorce* (1980) 14; Herring 107.
[208] H W Wilkinson 'Reports of Committees: The Law Commission: Reform on the Grounds of Divorce. The Field of Choice' (1967) 30 *The Modern Law Review* 185.
[209] Adekile O 'Legal framework for settling marital disputes through reconciliation in Nigeria' at 16, available at *http://ssrn.com/abstract=1503384*, accessed on 13 March 2016.
[210] DiFonzo 880; Stephen Cretney 'The law and the family - Time for divorce' (2003) 32 *Comm. L. World Rev.* 113-114; Payne 4; 'Emotional Stages of Divorce' available at *https://www.mediate.com/divorce/pg62.cfm,* accessed on October 12 2019.
[211] Ibid.
[212] Herring 118.

spouses wash their proverbial dirty linen in public.[213]

A good divorce law must attempt to reduce bitterness between the parties[214] by removing, reducing or at least not aggravating[215] the acrimony associated with divorce proceedings. In California, the Report of the Governor's Commission on the Family affirmed that good divorce law should ' … further the stability of the family … by … reducing harmful effects [of divorce].'[216] This reduction of bitterness is necessary to help the parties make suitable arrangements for their post-divorce future particularly arrangements for any children of the marriage. It also serves the best interest of the children if the parents are able to maintain a cordial relationship during and after the divorce process. [217]

One way to achieve this would be a system of divorce without blame through no-fault divorce.[218] The no-fault divorce recognizes that a marriage has broken down irretrievably and dissolves it without apportioning blame for the breakdown.[219] It does not attempt to examine the conduct of the parties in order to apportion blame, nor does it try to ascertain the cause of the breakdown of the marriage. The court simply satisfies itself that the marriage has broken down irretrievably and a decree is granted. This is the least acrimonious way to conduct the divorce process and aims to protect the parties.

2.4.4 A good divorce law should give empty shell marriages a decent burial

The argument here is that if a court finds that a marriage has broken down irretrievably and there is no possibility of reconciliation, a good divorce law should make it possible to dissolve the marriage cordially and expeditiously. It is common knowledge that not all marriages will endure till the death of the spouses. It is also common knowledge that not all couples will stay together in a harmonious relationship for the rest of their lives. Proponents of this principle argue that when parties can no longer stay together happily and their marriage has broken down, the courts should recognize this and simply give the dead marriage a decent burial.[220] They argue that a good divorce

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[213] See Canada and Nigeria.
[214] English Family Law Act 1996, s 1(1)*(c)(i)*.
[215] Herring 108.
[216] Report of the Governor's Commission on the Family 33.
[217] Field of Choice Report para 17.
[218] Field of Choice Report paras 92-93.
[219] See 2.3.4 below.
[220] Field of Choice Report para 120(1).

law should encourage the parties to let go of the damaged relationship and begin afresh.[221] This is best achieved through the use of no-fault based grounds such as the separation grounds. Most divorce laws provide for separation periods after which a party may institute divorce proceedings either with or without the consent of the other party.

The first type of separation-based divorce requires the consent of the other spouse. Section 1(2)*(d)* of the English Matrimonial Causes Act provides:

> The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say … that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition … and the respondent consents to a decree being granted.

A similar provision can be found in Section 11 of the Family Law (Scotland) Act 2006.

The second type of separation-based divorce typically provides for a longer separation period after which a party may unilaterally institute divorce proceedings without the consent of the other spouse. For example, section 1(2)*(e)* of the English Matrimonial Causes Act provides for a five-year separation period.

However, it is to be noted that current trends are moving away from the conditions above and simply requiring the fulfilment of the living apart period which is now usually either 1 year as in Australia[222] or 2 years as in New Zealand.[223]

The no fault principle recognizes the fact that a marriage might come to an end and be dissolved with minimum conflict and acrimony particularly where both parties consent to the divorce. A good divorce law should therefore provide no-fault grounds for divorce.

Opponents of this principle argue that the no fault principle, particularly in cases of mutual consent, would give rise to increased divorce rates and may therefore be counterproductive in a legal system where preserving the institution of marriage is an underlying principle.[224]

Proponents argue that rates of marital breakdown would be high even if the divorce rates are low

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[221] *Minton v Minton* (1979) A.C. 593, 608.
[222] Section 48(2) of the Australian Family Law Act.
[223] Section 39 of the New Zealand Family Proceedings Act 1980.
[224] Herring 106.

because people, unable to divorce, would simply abandon their marriages and form illicit relationships with new partners leading to further breakdown of the institution of marriage and the instability of the family.[225]

2.4.5 A good divorce law should promote good post-divorce relationship between the parties

This goal becomes particularly necessary where parties must continue post-divorce transactions or where are children of the marriage.[226] Even though the divorce is the legal termination of the spousal relationship, where there are children, the parental relationship endures.[227] A good divorce law should therefore strive to ensure that parties with children should have a cordial relationship after the divorce.

Section 43(1)*(d)* of the Australian Family Law Act provides for this as follows:

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a) …
>
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.[228]

Good post-divorce relationships between parents has been shown to greatly mitigate the difficulties faced by their children.[229] The Law Commission in its paper, 'Family Law: The Ground for Divorce' (Ground for Divorce Report), stresses this fact:

> … it is known that the children who suffer least from their parents' break-up are usually those who are able to retain a good relationship with them both. Children who suffer most are those whose parents remain in conflict.[230]

A good divorce law should as far as possible put machinery in place[231] to encourage harmonious

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[225] Field of Choice Report para 25(h); Herring 108.
[226] Herring 107.
[227] Ibid.
[228] See also the English Family Law Act 1996, s 1(1*)(c)(ii)*.
[229] MP Richards & M Dyson *Separation, Divorce and the Development of Children: A review* (1982) 74.
[230] Law Com No 192, HC 636 of 1989/90 para 2.19.
[231] Some of these measures are family counselling and mediation.

post-divorce relationship between the divorced couple and their children.

2.4.6 A good divorce law should protect vulnerable parties

A good divorce law should protect parties who are made vulnerable and weak by the divorce, particularly the economically weaker spouse, victims of domestic violence and the children of the marriage.

2.4.6.1 A good divorce law should protect the economically weaker spouse

Poverty is one of the major consequences of divorce.[232] This is sometimes as a result of the fact that the family must now maintain two separate households. Divorce leads to poverty particularly among women and children.[233] Most divorce laws provide for maintenance of the children of a broken marriage but not necessarily for the spouse. A good divorce law must also protect the economically weaker spouse. The Canadian Divorce Act provides for a spousal support order for this reason. Below are the objectives of the spousal support order:

> An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.[234]

In most cases, the economically weaker spouse is the wife who in the early years of marriage may have given up her career to have and care for the children of the marriage thus becoming a low income earner or housewife.[235] Years down the line, if she is divorced, she finds herself unable to pay for the lifestyle to which she has become accustomed. She also finds herself unable to break into the workforce to earn a steady income and where she finds employment, it is usually work

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[232] Jay D Teachman & Kathleen M Paasch 'Financial impact of divorce on children and their families' (1994) 4 *Children and Divorce* 68.
[233] Ibid 69.
[234] Section 15.2(6).
[235] Clare Huntington 'Family law achievements and challenges in the US' (May 2015) UN Expert Group Meeting available at *http://www.un.org/esa/socdev/family/docs/egm15/Huntingtonpaper.pdf,* accessed 26 January 2017.

that does not pay enough to support her family.[236] This problem has arisen in many countries and some have tried to make laws to mitigate the ill effects of divorce on the housewife. A common provision is one which ensures that a decree absolute will not be granted until the petitioner has made adequate provision for the maintenance of the respondent. The South African Divorce Act attempts to prevent injustice to one spouse using the following provision:

> When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.[237]

Perhaps the most proactive provision exists in the English Matrimonial Causes Act 1973 which provides thus:

> (1) The respondent to a petition for divorce in which the petitioner alleges five years' separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.
>
> (2) Where the grant of a decree is opposed by virtue of this section, then—
>
> (a) if the court finds that the petitioner is entitled to rely in support of his petition on the fact of five years' separation and makes no such finding as to any other fact mentioned in section 1(2) above, and
>
> (b) if apart from this section the court would grant a decree on the petition,
>
> the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and is of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.
>
> (3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.[238]

Simply put, even dissolution based on proof of the fact of a five-year separation period may not be granted if such divorce would cause great financial hardship to the respondent.

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[236] Teachman & Paasch 70.
[237] Section 9.
[238] Section 5 of the English Matrimonial Causes Act.

A good divorce law therefore requires provisions for the promotion and protection of the interests of the parties most likely to suffer economic harm as a result of the divorce.

2.4.6.2 A good divorce law should protect the victims of domestic violence

A good divorce law must protect the parties and children who may be victims of domestic violence. Where the possibility of domestic violence is present, a good divorce law must make provision to protect victims during and after the divorce process. Section 60CC(2) of the Australian Family Act provides that in determining the best interests of a child, the court must consider the need to protect the child from family violence.

> 1) … in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).
>
> (2) The primary considerations are:
>
> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.'

Section 43(1)*(ca)* of the same Act specifies protecting children from family violence as one of the underlying principles of the Act.

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a.) …
>
> (ca) the need to ensure protection from family violence.[239]

A good divorce law must also provide for screening protocols for the detection of victims of abuse as well as procedural safeguards for their protection. Section 60CG of the Australian Act provides a guide.

> (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
>
> (a) is consistent with any family violence order; and
>
> (b) does not expose a person to an unacceptable risk of family violence.

[239] See also s 60B(1)*(b)*.

> (2) For the purposes of paragraph (1)*(b)*, the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

In section 67ZBB, the Australian law further requires the courts to take prompt action to protect the children or any of the parties to the marriage in the event of an allegation or risk of family violence. Herring further hypothesizes that a shorter simpler divorce process will reduce the risk of divorce induced family violence.[240]

2.4.6.3 A good divorce law should protect the interests of the children of the marriage

Children of broken marriages are often the bearers of the worst effects of divorce.[241] Embittered parents sometimes use them as pawns and bargaining chips when negotiating terms of settlement.[242] It is said that when elephants fight, the grass suffers. Sometimes, children fail to understand the reasons behind the break-up of the family and parents embroiled in the emotionally draining divorce process fail to proffer an explanation to their children.[243] A good divorce law should provide for the best interests of the children of the marriage. Section 43(1)*(c)* of the Australian Act, provides as follows:

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a) …
>
> (b) …
>
> (c) the need to protect the rights of children and to promote their welfare ...

Most divorce laws provide for the best interests of the child as the primary consideration when making custody orders. Section 60CA of the Australian Act further provides that in making a parenting order, the court must consider the best interests of the child.

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.
>
> Sections 60B(1)*(a) – (d)* provide for the ways in which the best interests of the child may be met:
>
> The objects of this Part are to ensure that the best interests of children are met by:

[240] Herring 107.
[241] Ifemeje *Contemporary Issues* 125.
[242] Ibid 132.
[243] Herring 108.

> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Section 16(8) of the Canadian Divorce Act provides as follows:

> In making an order under this section[244] the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

See also section 9 of the South African Children's Act:

> In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.[245]

Some legal systems have interpreted the principle that divorce laws must protect the interests of children to mean that, in determining the outcome of the petition for divorce itself the best interests of the child must be the paramount consideration. Such an interpretation means that a decree for dissolution will not be made even in cases where irretrievable breakdown has been proved until adequate arrangements have been made for the welfare of the children of the marriage. Section 41 of the English Matrimonial Causes Act provides as such:

> (1) The Court shall not make absolute in decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied-
>
> (a) …
>
> (b) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that –
>
> (i) arrangements for the welfare of every child so names have been made and are satisfactory or are the best that can be devised in the circumstances.

A similar provision is found in section 6(1) of the South African Divorce Act.

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[244] The section on custody of children.

[245] Act 38 of 2005. See also s. 7 which sets out the factors that the court should consider when determining the best interests of the child.

n summary, a good divorce law provides for the protection and promotion of the interests of the children of a failed marriage.

2.4.7 A good divorce law should deal with the emotional aspects of the divorce

The emotional turmoil created by the divorce process has been described by parties as one of the most emotionally challenging events in life.[246] Parties going through the divorce process frequently experience a rollercoaster of negative emotions revolving around bitterness, anger, and sometimes, fear.[247] Divorce is, therefore, as much an emotional process as it is a legal process[248] and therefore a good divorce law should deal with the emotional aspects of divorce for the spouses and the children of the marriage.[249] Proponents suggest that this can be achieved by providing pre- and post-divorce counselling for the parties and the children of the marriage.

The Australian Act provides for family counselling for parties for several reasons. One reason is to help parties adjust to separation or divorce.

> Section 13A(1)*(a)(i) – (iii)* provides as follows:
>
> '(1) The objects of this Part are:
>
> (a) to facilitate access to family counselling:
>
> (i) … and
>
> (ii) to help people adjust to separation or divorce; and
>
> (iii) to help people adjust to court orders under this Act; …

An additional reason is to prepare and inform parties about the effects of divorce and the divorce process. Section 12B provides as follows:

> (1) The regulations may prescribe information that is to be included in documents provided to persons under this Part, relating to non-court based family services and court's processes and services.
>
> (2) Without limitation, information prescribed under this section must include information about:

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[246] Cretney 113-114; Rachid Baitar, Ann Buysse, Ruben Brondeel, Jan De Mol & Peter Rober 'Styles and goals: Clarifying the professional identity of divorce mediation (2013) 31 *Conflict Resolution Quarterly* 57.
[247] 'Emotional Stages of Divorce' 1.
[248] Baitar et al 58.
[249] Herring 108.

> (a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings); and
>
> (b) the services provided by family counsellors and family dispute resolution practitioners to help people affected by separation or divorce; and
>
> (c) the steps involved in the proposed proceedings; and
>
> (d) the role of family consultants; and
>
> (e) the arbitration facilities available to arbitrate disputes in relation to separation and divorce.

This is a desirable but problematic goal as it would require time and money from the state making it a terribly expensive venture.

2.4.8 A good divorce law should save costs for the parties and the state

One of the simplest and most straightforward means of achieving this goal would be simplifying the actual divorce process. Litigating divorce incurs heavy expenditure for the state.[250] Reduction of the length of time taken from filing of petition to granting the decree absolute can greatly reduce the state's expenses. This would also ensure reduction in legal fees incurred by the parties. Proponents argue that making divorce harder may elongate the process leading to increased cost for the parties and the state. Section 1(1)(c)*(iii)* of the repealed English Family Law Act 1996 states that the divorce process should not involve unnecessary expenditure for the state or the parties.

2.4.9 A good divorce law should be fair and just to both parties

The matrimonial offence theory is faulted because one party, usually the respondent, is labelled the "guilty' party. It apportions blame for the breakdown of the marriage to one person whereas in most cases, both parties are at fault.[251] This dynamic conflicts with the principle of maximum fairness mentioned in the Field of Choice Report:

> … When, regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, … [252]
>
> … If the marriage is dead, the object of the law should be to afford it a decent burial … it should achieve this in a way that is just to all concerned …[253]

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[250] Herring 105.
[251] Field of Choice Report para 58; G Wright & D M Stetson 'The impact of no-fault divorce law reform on divorce in American States' (1978) 40 *Journal of Marriage and the Family* 575.
[252] Ibid para 15.
[253] Ibid para 17.

The result is that a husband may file a petition for divorce on fault-based grounds and a wife, (also seeking a divorce but wishing to avoid the stigma of being found to be the guilty party) may file a cross petition seeking dissolution of the marriage but alleging the husband to be at fault.

Proponents of the principle of maximum fairness state that one way in which a good divorce law can dissolve a marriage with fairness to both parties is through the use of the no-fault divorce.[254] The no-fault principle enables parties seeking divorce to obtain the divorce without 'throwing mud' at their spouses.

Another group proposes that maximum fairness to both parties can be achieved through a dual system of fault and no-fault divorce:

> One principle can serve the case of the spouse who has suffered serious offence. The other can serve those spouses in respect of whom no glaring misconduct can be identified and those who seek divorce against the will of a relatively innocent party.[255]

2.5 SUMMARY

This section has articulated the goals of a good divorce law as follows: the preservation of the institution of marriage, saving salvageable marriages, reduction the bitterness between parties during the divorce process, granting empty shell marriages a decent burial, promotion of cordial post-divorce relationships between parties, protection of vulnerable parties — the economically weaker spouse, victims of abuse and children —, dealing with the emotional aspects of divorce, saving costs for the parties and the state and ensuring a fair process for the parties. These aims of a good divorce law are of great import because they determine the aims of a good divorce process. This study henceforth proceeds on the premise that the literature discussed above provides a solid foundation for understanding the goals of a good divorce law and that consequently, a good divorce process will be one which attempts to achieve all the aims set out above. The next chapter discusses divorce law and divorce process in Nigeria with a view to determining whether or not they achieve the goals of a good divorce law as set out in this chapter.

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[254] Ibid para 105; Patricia L Winks 'Divorce Mediation: A Non-adversary Procedure for the No-Fault Divorce' 19 *J Fam L* 630.
[255] Ibid para 105.

CHAPTER THREE

DIVORCE LITIGATION IN NIGERIA

3.1 INTRODUCTION

This chapter provides an overview of the divorce litigation process in Nigeria with respect to both customary and statutory marriages. The first section proffers first a background, and then a brief examination of the customary and statutory divorce litigation process. The second section of the chapter examines the legal framework for the dissolution of statutory and customary marriages in Nigeria with a view to determining how well, if at all, these frameworks achieve the goals of good divorce law.

As previously mentioned, only customary marriages were contracted in the South-East Nigeria in the precolonial era.[256] The British colonists and the missionaries introduced statutory marriages and Christian marriages. However, the customary marriages continued, persisted and endured. The result was a dual system recognizing both customary and statutory marriages. While customary marriages were regulated by the customary laws of the spouses, statutory marriages were regulated by English laws on marriage. Consequently, dissolution of these marriages, customary and statutory, were also regulated by the same laws by which they were contracted. The following section provides an overview of these processes.

3.2 DIVORCE LITIGATION IN NIGERIA

3.2.1 Statutory Law

On March 17th 1970, the first divorce law was promulgated in Nigeria, the Matrimonial Causes Act, Cap M220, Laws of the Federation of Nigeria, 1970.[257] Nigeria's Matrimonial Causes Act drew heavily from the provisions of the English Divorce Reform Act, 1969.[258] This Act has been the primary piece of legislation regulating the process of statutory divorce in Nigeria till date. The Act provides for divorce litigation as the only form of dispute resolution available to divorcing

[256] See 1.6 above.
[257] It is now the Matrimonial Causes Act, Cap M7, Laws of the Federation of Nigeria, 2011.
[258] Enemo 156.

couples in Nigeria. It further provides that proceedings for the dissolution of marriage may be instituted only in High courts in Nigeria,[259] by way of a petition.[260]

The divorce petition must be filed in the courts along with a certificate signed by the counsel for the petitioner to the effect that they have informed the petitioner of methods of reconciliation available to them.[261] The petition must be based on the only ground for divorce: irretrievable breakdown of marriage contained in Section 15(1).[262] Such breakdown however, can only be established by proof of one of eight facts, contained in Section 15(2)*(a) – (h)*.[263]

> (1) A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts-
>
> *(a)* that the respondent has willfully and persistently refused to consummate the marriage;
>
> *(b)* that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> *(c)* that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> *(d)* that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;
>
> *(e)* that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;
>
> (*f)* that the parties to the marriage have lived apart for a continuous period of a least three years immediately preceding the presentation of the petition;
>
> *(g)* that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree or restitution of conjugal rights made under his Act;
>
> *(h)* that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

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[259] Section 2(1).
[260] Ibid.
[261] Order II Rule 2 of the Matrimonial Causes Rules of 1983.
[262] *Damulak v Damulak* (2004) 8 NWLR (pt.874) 151 at 166 and *Ezirim v Ezirim* (unreported) Suit No. FCA/L/56/76 Court of Appeal Lagos Division, February 6, 1981.
[263] *Onabolu v Onabolu* (2005) 2 SMC 137.

Failure to prove any of the facts above will lead to the dismissal of the petition even if both parties desire the divorce.[264] The burden of proof is on the petitioner[265] and the standard of proof is the satisfaction of the court.[266]

Proof of any of these facts, in the course of a hearing which must be conducted in open court,[267] will lead to the grant of a decree *nisi* in the first instance.[268] After three months, and on application of either the petitioner or the respondent, the decree *nisi* becomes a decree absolute.[269] This results in the end of the marriage such that the parties are free to remarry as if the marriage had been dissolved by death.[270]

In practice, the divorce litigation process is not so simple. It is plagued by court delays, exorbitant legal fees, the stigma of divorce as well as stigmatizing public hearings. These factors come together to make the divorce process in Nigeria a nightmare. This will be explained in more detail in chapter four.

3.2.2. Customary Law

Compared to the process for dissolution of statutory marriages, the process for dissolution of customary marriages in South-East Nigeria is neither well developed nor structured. It is rarely codified and does not enjoy uniformity across communities. This lack of uniformity of customary laws in Nigeria also means that the dissolution process differs from community to community. However, most customary laws in South-East Nigeria[271] have one thing in common: the return of the bride price by the wife's family to the husband's family signals the end of the marriage and the termination of the union of the two families.[272]

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[264] *Ekrebe v Ekrebe* (1999) 3 NWLR (pt. 596) 514 at 517. Note that consensual divorce is not recognized under the Nigerian Matrimonial Causes Act. See generally *Umoren v Umoren* Suit No FCT/HC/PET/52/2011 at 15.
[265] *Akinbuwa v Akinbuwa* (1998) 7 NWLR (pt. 559) 601 at 669.
[266] *Oviaso v Oviaso* (1973) SC/264/70.
[267] Section 103. See also *Menakaya v Menakaya* (2001) 16 NWLR (pt. 738) 203 and Order 1 Rule 9(1) of the Matrimonial Causes Rules.
[268] Section 56. See also *Amobi v Nzegwu* (2014) All FWLR (pt. 730) 1285.
[269] Section 58(1)*(b)*.
[270] Section 33; *Ani v Ani* (2002) 5 NWLR 166.
[271] Note that as mentioned in 1.6 above, particular reference is made to the South-East Nigeria as the primary location of this thesis. Therefore, customary laws considered in this work will be those applicable in South-East Nigeria.
[272] *Eze v Omeke* supra 136.

As discussed above,[273] a customary marriage is a marriage of not just a man and a woman or women but of a man and his family and a woman and her family. As such, family members of the couple are actively involved in the resolution of marital disputes including the dissolution of the marriage.[274]

Before the advent of customary courts, there existed an established hierarchy for the mediation of disputes within the family. Disputes were taken before a meeting of elders of both families and finally to the clan or village elders,[275] if the parties failed to resolve the issues at the family level.[276] The aim of these meeting was typically to encourage the parties to settle their issues and reconcile.[277] The elders believed in living in peace and harmony and promoting the peaceful coexistence of the society. With colonialism came customary courts and couples began to take disputes outside the family to the courts.[278]

Typically, customary marriages in South-East Nigeria can be dissolved in one of two ways: the non-judicial method or the judicial method.

The Non-Judicial Method

This method involves the termination of marriage without recourse to the customary courts.[279] It involves termination by an act or acts of the parties to the marriage. The actions which may be taken to show lack of willingness to continue with the marriage range from mild actions such as calling a meeting of both families to inform them,[280] to extreme actions such as violently evicting a spouse from the marital home.[281] This non-judicial method was the only mode of dissolution of marriages before the establishment of customary courts. The sole requirement for termination of marriage using this method is the return of the bride price.

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[273] 1.6 above; Nwogugu 63.
[274] *Okpanum v Okpanum* (1972) ECSLR 561.
[275] Olomojobi Yinka 'Marriage in Nigeria across ages: Problems and prospects' at 6, available at *http://dx.doi.org/10.2139/ssrn.2858618,* accessed sun 24 June 2019.
[276] Ibid.
[277] Diala 'Judicial Recognition' 111-112.
[278] Uchendu 161.
[279] *Okpanum v Okpanum* supra.
[280] Ibid.
[281] Nwogugu 232.

The non-judicial divorce may be consensual or unilateral.[282] The consensual non-judicial divorce occurs when the spouses agree to end the marriage and the bride price is returned to the husband's family at an agreed upon date.[283] The unilateral non-judicial divorce occurs where one party (either the husband or wife) decides to end the marriage without the express consent of the other. This can be achieved by a forceful ejection of the wife from the matrimonial home by the husband[284] or the voluntary vacation of the matrimonial home by the wife without the husband's consent.[285] Arrangements for the return of the bride price would be made subsequently.[286]

The perceived advantage of the non-judicial divorce is that it is easy, saves cost in time and money, and avoids the stigma associated with public divorce proceedings.[287] However, this method is rife with disadvantages, the major one being that parties can divorce their spouse at will and without their consent. Many an unsuspecting spouse, usually, the wife, has been thrown out unceremoniously as a result of the existence and continued acceptance of this method. It offers no protection to the spouse who is taken unawares, usually the wives. This method of divorce also provides no records for the parties. This reason amongst others encouraged the use of the judicial method.

The Judicial Method

The judicial method is simply the termination of customary law marriages in a court of competent jurisdiction usually, the customary court[288] This method of customary divorce has become

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[282] Ibid; Maurice Izunwa 'A critique of certain aspects of the grounds, procedure and reliefs attaching to customary divorce law in Southern Nigeria' (2015) 7 *Journal of Law and Conflict Resolution* 32.
[283] *Nwagwa v Ubani* (1997) 10 NWLR (pt. 526) 559.
[284]Hon. Justice I. A Umezulike, 'Property rights of women in divorce: Issues, problems and proposals for reform' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 174.
[285] Obi Samuel Nwankwo Chinwuba *Modern Family Law in Southern Nigeria* (1966) 364.
[286] It may be returned immediately and accepted by the husband's family where both families wish to severe ties. It may also be returned at a future date. For example, where the wife wishes to remarry, the bride price could be returned to the first husband from the proceeds of the bride price paid by the second husband.
[287] Achike O 'Problems of creation and dissolution of customary marriages in Nigeria' in Roberts S (ed.) *Law and the family in Africa* (1977) 151.
[288] Tom Anyafulude *Principles of Practice and Procedure of Customary Courts in Nigeria through the Cases* (2010) 295. Magistrate Courts are sometimes vested with jurisdiction to dissolve customary marriages, usually, in locations without customary courts. See Morenike Susan Ichebe 'Procedures on customary divorce law in southern Nigeria (2016) 4 *International Journal of Law and Legal Studies* 170; Izunwa M O 'Divorce in Nigerian statutory and customary marriages: A comparative critique of grounds, procedures and reliefs attaching thereto' (2015) 3 *Peak Journal of Social Sciences and Humanities* 81; Osondu Ajuzie C *Modern Nigerian Family Law and Practice: With Full Commentary on the Matrimonial Causes Rules 1983* (2012) 98.

increasingly popular in recent times. Its popularity is hinged on that fact that it provides record of the dissolution of the marriage which form part of the public record. Section 30(1) of the Births, Deaths, Etc. (Compulsory Registration) Act[289] mandates the registration of all divorces made by the customary courts.

Divorces through the judicial method are mostly instituted by women.[290] One major advantage of this system is that the parties have a record of the divorce. It therefore provides ex-wives with a record of dissolution of marriage and in essence, the capacity to contract another legal customary marriage.

The judicial method provides a fallback option where the non-judicial method fails. This method becomes a viable option where parties have attempted 'traditional family mediation'[291] and sometimes arbitration[292] and have failed to come to an amicable resolution.[293] It has become an option where the parties have also agreed upon the dissolution of the marriage but not the amount of bride price to be refunded; or where the husband has refused to receive the bride price from the wife's family thus binding her unwillingly to him[294] or in the case of unilateral dissolution.[295]

The disadvantage of the judicial method is that parties who are unsatisfied with the judgment of the court may resort to the non-judicial divorce method above. Furthermore, customary court processes are adversarial.[296] In spite of this, the courts are also required to attempt to reconcile the parties.[297] Unlike codified statutory law which provides for the ground of irretrievable breakdown

[289] Cap B9 Laws of the Federation of Nigeria 2011. Note that the requirements for such registration include the names of the parties, date of marriage and effective date of dissolution.
[290] Rahmatian 285; Obi *Modern Family Law* 369.
[291] That is, mediation within the extended family. Boniface describes it as a mediation process by elders. Boniface 'African-style mediation' 381-2. The goal of this type of mediation is reconciliation. Boniface 'African-style mediation' 383
[292] Izunwa 'Divorce in Nigerian' 81.
[293] Aloysius Enemali *The Formal Requirements of the Celebration of Marriage: A Comparative Study of Canon Law, Nigeria Statutory Law and Nigeria Customary Law* (2013) 48.
[294] The court may receive the bride price from the wife's family where the husband fails to show up or refuses to accept the bride price.
[295] *Uke v Iro* (2001) 11 NWLR (pt. 723) 197.
[296] Diala 'Judicial Recognition' 129.
[297] Section 12 of Customary Court Law of Lagos State; Rahmatian 285.

and facts in proof of that ground without which a decree of dissolution of marriage will not be made, there are no stipulated grounds for dissolution of customary law marriages.[298]

Spouses married under customary law can therefore dissolve their marriages at will and without cause.[299] The courts simply require the parties to establish that they no longer wish to be married. Indeed, once parties institute proceedings for dissolution of marriage, the court is bound to grant a decree of dissolution,[300] the petitioner need not have a ground for the dissolution of marriage.[301]

The result is that when a ground is proffered — sometimes, the ground could be as ludicrous as lack of interest (usually by husband)[302] or simply being 'tired of the marriage'[303] — it leads to dissolution of marriage. Other grounds which have become accepted by reason of frequent usage are witchcraft, infertility, impotency, laziness, cruelty and adultery (of the wife).[304]

Where codified customary laws exist, the following have been listed as grounds for divorce:

> Betrothal under marriageable age; refusal to consummate the marriage; harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man; impotency of the husband or sterility of the wife; conviction of either party for a crime involving a sentence of imprisonment of five years or more; ill treatment; cruelty or rejection of either party for three years or more; adultery; leprosy contracted by either party; desertion for a period of two years or more.[305]

Some of the grounds may resemble the facts, proof of which will lead to proof of the ground of irretrievable breakdown required for statutory divorce. However, the two systems are vastly different. For example, adultery as a ground for divorce is accepted under customary law only if it is committed by the wife. Proof of other wrongdoing is essential to sustain a husband's adultery as a ground for divorce.[306]

In customary law, regardless of the method of divorce — judicial or non-judicial — the repayment of the bride price usually signals the termination of the marriage. Consent of the parties or a long

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[298] Nwogugu 233.
[299] Ibid 231-235.
[300] Obi *Modern Family Law* 365.
[301] Achike 150.
[302] Ibid 150-1.
[303] *Ononiwu v Ononiwu & Another* (Unreported) Suit No. CC/EZ/IK/1D/2009 Judgment of 3 June 2010 at 3.
[304] Osondu 98.
[305] Section 7 of the Marriage Divorce and Custody of Children Adoptive By-Law Order 1958 which applies to parts of Ogun, Oyo, Ondo, Delta and Edo States.
[306] Obi *Modern Family Law* 367; Nwogugu 233.

separation are of no consequence if the bride price is not refunded. The court will hold that such a marriage still subsists until the bride price has been refunded.[307] Where the judicial method is used, the court judgment must make a pronouncement with regards to the repayment of the bride price or risk being devoid of authority (in the sense that the divorce will not be recognized by the community).[308] The court may rule that the bride price must be repaid in full, in part or not at all.[309]

The effect of the dissolution of the customary law marriage is that the woman is free to remarry as if she was never married.[310] The termination has no effect on the husband's ability to marry other wives because he is able to contract as many valid customary law marriages as he wishes. The wife cannot marry again before the divorce, because even though polygamy is accepted under customary law, polyandry is not.[311]

3.3 THE NIGERIAN MATRIMONIAL CAUSES ACT, CUSTOMARY LAW AND THE GOALS OF GOOD DIVORCE LAW

Having explored the process of dissolution of statutory and customary marriages under the Nigerian Matrimonial Causes Act and the customary marriage laws applicable in South-East Nigeria, it is pertinent to attempt to determine the efficiency of these laws by examining them through the lenses of the goals of good divorce law discussed in the preceding chapter.[312]

3.3.1 A good divorce law should preserve the sanctity of marriage and the stability of the family

One of the most important goals of good divorce law is the preservation of the sanctity of the marriage institution and the family unit.

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[307] *Lawal Osula v Lawal Osula* (1995) 9 NWLR (pt. 419) SC 59. Any children born of the wife with any other man before the repayment of the bride price to the former husband 'belong' to such former husband as the children are deemed to be born during the subsistence of the marriage. This custom failed the repugnancy test as was held in *Edet v Essien* (1932) 11 NLR. 47.

[308] *Eze v Omeke* supra 136.

[309] Section 16(2) of the Local Government Declaration of Native Authority (Tiv Customary Marriage Law) Order, 1985; See also ss 9 and 10 of the Marriage, Divorce and Custody of Children Adoptive By-Law Order 1958 Cap 78 Laws of Oyo State 1998. The bride price will not be refunded if the ground for the divorce was leprosy on the part of the wife. In deciding this, the court may consider the duration of the marriage, the number of children, if any. *Nwagwa v Ubani* supra.

[310] ABC Egu (ed.) *Imo State Customary Laws and Judicial Precedents* (2011) 35.

[311] *Kpelanya v Tsoka & Anor* (1971) NNLR 66.

[312] See Chapter 2.

Statutory Law

The first major step taken by most divorce laws is the creation of provisions which discourage divorce. These provisions attempt to safeguard the institution of marriage by deterring people from rushing in and out of marriage at will.

Section 30(1) of the Nigerian MCA provides as follows:

> Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within two years after the date of the marriage except by leave of the court.[313]

This provision, referred to as the two-year rule, seeks to ensure that parties work towards preserving their marriage for at least two years before attempting to dissolve it. It also ensures that frivolous petitions are not brought before the court. It is to be noted that there are a few exceptions to this provision. Leave to institute proceedings before the expiration of the stipulated period will be granted where refusal will cause the applicant exceptional hardship or if there are incidents of exceptional depravity on the part of the other spouse[314] or if the respondent has committed any of the matrimonial offences which come within sections 15(2)*(a*) or *(b)* or 16(1)*(a)* of this act.[315] In determining an application for leave under this section, the court must also consider the possibility of reconciliation between the parties and interests of any children of the marriage. These exceptions and considerations further strengthen this provision as they ensure the protection of an abused/innocent spouse while creating room for the possibility of reconciliation.

The law further provides where the parties rely on the living apart facts encapsulated in section 15(2) subsections (e) and (f), they may institute proceedings for dissolution of marriage only after they have lived apart for a continuous period of two and three years respectively. This ensures that petitions are not instituted frivolously because, it is assumed that the long separation periods allow spouses ample time to carefully consider their decision.

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[313] See s 44(1B) of the Australian Family Law Act

[314] Section 30(3); *Akere v Akere* (1962) WNLR 323 where a husband committed adultery with the wife's cousin and also gave his wife a sexually transmitted disease. *Majekodunmi v Majekodunmi* (1966) NMLR 191. Note that leave is not required where the matters complained of are related to the respondent's refusal to consummate the marriage, adultery or commission of rape, sodomy or bestiality. See s 30(2); Parties may institute proceedings based on matters which occurred during the two-year period after the expiration of the period. See s 30(8).

[315] Section 15(2)*(a*) or *(b)* provide for the respondent's willful and persistent refusal to consummate the marriage and adultery as facts in proof of the ground for divorce while 16(1)*(a)* provides for the respondent's commission of rape, sodomy or bestiality since the marriage.

In *Ugbah v Ugbah,*[316] the court noted that the reason behind its decision was the preservation of the sanctity of the marriage institution.

> The aim and purport of this prohibition is the need to preserve the sanctity of the marriage institution …

Customary Law

In Africa, marriages are viewed as the basis for the family[317] which in turn forms the basis of the society.[318] As such, the indigenous laws and customs of most communities seek to protect the institution of marriage with a view to protecting the family unit as well as the larger society. Marriage is viewed not just as a union of the spouses but a union of the families and the interests of these families are superior to the individual interests of the spouses.[319] Consequently, most customary marriage laws in South-East Nigeria discourage divorce because marriage is perceived to be indissoluble.[320] Instead, spouses are encouraged to reconcile and where they are unable to do so, to separate for a period until such a time as they are able to reconcile.[321]

On the face of it, it seems that the communal life encouraged by the local customs protects the institution of marriage. However, the continued acceptance of the non-judicial method of divorce, especially the unilateral non-judicial method constitutes a threat to the sanctity of the institution of marriage. In addition to this, there are no stipulated grounds for divorce, with the result that parties are at liberty to adduce frivolous grounds such as lack of interest, to sustain a case for dissolution of a customary law marriage. This tears at the fabric of the institution of marriage. The customary courts are also bound to grant a decree of dissolution once parties apply for divorce. No inquiry is made into the cause of the breakdown of marriage. Indeed, these courts does not even attempt to

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[316] (2009) 3 NWLR (pt. 1127) 108. In this case, a wife commenced maintenance proceedings while in an existing marriage. The court held that ancillary proceedings (for maintenance, custody and settlement of property) must be incidental to principal proceedings such as proceedings for dissolution of marriage.
[317] Imam-Tamim 1.
[318] Ahenkorah 1.
[319] Taslim Olawale Elias *The Nature of African Customary Law* (1956) 146.
[320] Taslim Olawale Elias *The Groundwork of Nigerian Law* (1954) 288.
[321] Kirsty Button, Elena Moore & Chuma Himonga 'South Africa's system of dispute resolution forums: The role of the family and the state in customary marriage dissolution' (2014) at 12-14, available at *http://cssr.uct.ac.za/pub/wp/339/,* accessed 12 June 2017; Akintunde Emiola *Principles of African Customary Law* (1997) 77.

establish breakdown. Further to this, these courts do not provide a framework nor create opportunities for parties to reevaluate their decisions.

It is clear from the discussion above that the statutory and customary systems differ with regard to their approach to the preservation of the institution of marriage. The Nigerian Matrimonial Causes Act attempts to preserve the sanctity of marriage[322] and the stability of the family unit and these objectives have been acknowledged and backed by judicial precedent as seen in the case of *Ugbah v Ugbah*. These provisions are also up to date with family law provisions in other jurisdictions especially Australia and the United Kingdom. The same cannot be said of the customary divorce laws — the availability of the quick, unilateral, non-judicial divorce and the lack of grounds which must be proven to sustain a decree of divorce make the divorce process extremely easy, thereby weakening the marriage institution.

As observed by commentator Morenike Ichebe:

> 'The non-judicial method of divorce is unconscionable and should be expunged from the customary laws of the country, failing this, they should be declared to be repugnant to natural justice, equity and good conscience. Non-judicial divorce does not promote the stability of marriage, if anything, it makes the marriage institution unstable.'[323]

3.3.2 A good divorce law should save marriages that are salvageable

Statutory Law

The primary way in which good divorce laws attempt to save marriages that are salvageable is by making elaborate provisions for reconciliation.[324] Not all marital disputes will lead to the dissolution of marriage. A good divorce law should recognize that not all couples before the court really desire a divorce. Many divorce laws therefore encourage or require reconciliation measures before or during divorce proceedings, and sometimes, even after the grant of a decree *nisi*.[325]

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[322] Boparai 534.
[323] Ichebe 169.
[324] See Chapter 2.
[325] See generally s 43(1)*(d)* of the Australian Family Law Act and s 2(5) of the English Matrimonial Causes Act.

As discussed in Chapter Two, divorce laws may encourage reconciliation in various ways. The divorce law may impose a duty on the court to consider the possibility of reconciliation[326] and on counsel to inform parties of the avenues available for reconciliation.[327] It may also require the court to adjourn hearing for the purpose of attempting reconciliation.[328] Parties may also attempt reconciliation without fear of losing their right of action to institute divorce proceedings based on separation grounds.[329]

The Nigerian Matrimonial Causes Act provides for reconciliation in several ways.

Adjournment of proceedings

The most important reconciliation provisions are contained in Part II of the Nigerian Matrimonial Causes Act under sections 11-14. These provide a duty on the court to consider the possibility of reconciliation, as well as the adjournment of proceedings to attempt reconciliation.

Section 11 provides that the court is duty bound to consider the possibility of reconciliation.

> (1) It shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may-
>
> adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;
>
> with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;
>
> nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.

However, if two weeks after the adjournment of proceedings for the purpose of reconciliation, one of the parties requests for the resumption of hearing, the court shall resume hearing.[330] Where the

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[326] Section 13(B)*(1)* Australian Family Law Act; s 6(2) of the English Matrimonial Causes Act.
[327] Section 12(E)*(2)* Australian Family Law Act; s 6(1) of the English Matrimonial Causes Act.
[328] Section 13(B)*(2)* of the Australian Act.
[329] Section 2(5) of the English Matrimonial Causes Act.
[330] Section 11(2) of the Nigerian Matrimonial Causes Act.

judge attempts to act as the conciliator as stated in section 11(1)*(b)* and the reconciliation attempt fails, another judge must hear the suit unless the parties specifically request for the same judge.[331] Where a marriage conciliator is retained, they shall be required to swear an oath of secrecy.[332] Evidence received by the court during the reconciliation process cannot subsequently be admissible in court.[333]

Duty of Counsel

The law also imposes a duty on counsel to ensure that the parties consider reconciliation.[334] It requires that counsel for parties seeking the divorce decree must submit with their petition, a certificate duly signed by said counsel stating that they informed the parties of facilities available to assist them with reconciliation. Failure to submit such certificate will render a petition void.[335]

Statutory Bar Period

The two-year rule in section 30 (mentioned above) also provides ample time for parties to reconcile. Section 30(4) specifically provides that courts must consider the possibility of reconciliation between the parties before the expiration of the two-year period.

In furtherance to this section, order IV rule 2 (e) and (f) of the Nigerian Matrimonial Causes Rules provide that an affidavit in support of an application under section 30 must state whether attempts have been made to reconcile the parties and the details of such attempts as well as any circumstances which may assist the court in determining the existence of the possibility of reconciliation between the parties before the expiration of the two-year period.

Trial Period

Parties must show the existence of a continuous period of separation to rely on sections 15(2)*(d) – (f)* in an action for dissolution of marriage. Where parties resume cohabitation after separation and live together for more than six months, the continuousness of the separation period will be

[331] Section 12 of the Nigerian Matrimonial Causes Act.
[332] Section 14 of the Nigerian Matrimonial Causes Act.
[333] Section 13 of the Nigerian Matrimonial Causes Act.
[334] Order 11 Rule 2 of the Matrimonial Causes Rules 1983.
[335] *Anyaso v Anyaso* (1998) 9 NWLR (pt. 564) 150, 174-5.

broken. This will delay divorce since the parties will have to start the count afresh should they separate again and intend to rely on the fact of separation. The trial period allows parties to cohabit for the purpose of reconciliation without losing their right of action for dissolution of marriage. This section therefore encourages reconciliation.

The Act provides for this trial period in section 17. The Act refers to this section in the marginal notes as 'additional provisions to encourage reconciliation'.

> (1) Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining for the purposes of section 15(2)*(c)* of this Act whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.
>
> (2) In considering for the purposes of section 15(2) of this Act whether the period for which the respondent has deserted the petitioner or the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be.

Rescission of Decree Nisi

Section 60 provides for a rescission of a decree *nisi* where the parties have reconciled.

> Notwithstanding anything contained in this Part, where a decree *nisi* has been made in proceedings for a decree of dissolution of marriage, the court may, at any time before the decree becomes absolute, upon the application of either of the parties to the marriage, rescind the decree on the ground that the parties to the marriage have become reconciled.

The court in *Mmaduekwe v Mmaduekwe*[336] found that the effect of the provisions above is the preservation of the sanctity of the institution of marriage.

The courts have also sought other ways to encourage reconciliation. In *Uka v Uka*,[337] the wife (respondent) failed to file an answer to her husband's petition within the stipulated 28-day period

[336] Reported in Kenny Aina 'Family law and dispute resolution in Nigeria: The place of mediation' in *African Initiative for Mediation* (2007) *Second Quarterly Newsletter* 9.
[337] (2005) 2 SMC 109-110.

as she was attempting reconciliation, with the help of her family, to save the marriage. Default judgment was entered against her despite the fact that she eventually filed an application for extension of time after her reconciliation attempt failed. On appeal, the court allowing her appeal held that attempting reconciliation was a good reason for her failure to file an answer within the stipulated period and the lower court's decision was set aside.

In Nigeria, the society and culture lend themselves to reconciliation. As a result, in most instances, spouses with marital issues attempt reconciliation with friends, members of their extended family or their religious organizations before turning to the courts.[338] In keeping with the culture, the attitude of Nigerian courts therefore is that '… a marriage shall not be dissolved if it capable of being settled.'[339]

The Nigerian Matrimonial Causes Act provides for reconciliation of disputing spouses through various channels, thereby ensuring that it is on par with its western counterparts. It therefore achieves the reconciliation goal of good divorce law.

Customary Law

This goal is also achieved considerably by the customary marriage laws. Perhaps the most effective medium of reconciliation employed by indigenous laws and customs regulating marriages is reconciliation through the extended family. Customary law marriages are unions of families, not just spouses.[340] Consequently, the health and life of the marriage and the resultant family are as important to the spouses' extended families as they are to the spouses themselves. These extended families and indeed sometimes the community in general, have vested interests in the progress of the marriage to the extent that they actively participate in dispute resolution within the family.[341]

[338] Diala 'Judicial Recognition' 111. Note that the process used by parties in this context is likened to mediation however, it is mediation with the sole goal of reconciliation.
[339] See *Nwosu v Nwosu* (1992) 6 SCNJ 59; *Unegbu v Unegbu* (2004) 11 NWLR (pt. 884) 332.
[340] Elias *The Nature of African Customary Law* 146.
[341] Ifemeje *Contemporary Issues* 119.

Spouses turn to the customary courts when they are unable to resolve their disputes and even then, the customary courts must again attempt reconciliation.[342] Customary court laws enjoin the courts to ensure that reconciliation attempts are made in the course of proceedings.[343]

Thus, the customary laws on marriage adequately provide for reconciliation, thus attempting to achieve the goal of saving marriages that are salvageable.

3.3.3 A good divorce law should reduce the bitterness associated with divorce

Statutory Law

Not all marriages will stand the test of time. A good divorce law should therefore ensure that those marriages that are unsalvageable are dissolved in the quickest and least acrimonious manner possible. One way to reduce the bitterness typically associated with the divorce process is the introduction of no-fault divorce systems. The no-fault principle best achieves this aim as it operates on the premise that marriages can be dissolved with minimum conflict.

It is common knowledge that where the court requires proof of a matrimonial offence to grant a decree of dissolution of marriage, proceedings are usually drawn out, bitter, and acrimonious. To mitigate the harsh effects of the traditional litigation-based divorce system, several jurisdictions have introduced no-fault divorce systems, specifically the irretrievable breakdown system.

Section 15(1) of the Nigerian Act provides for irretrievable breakdown of marriage as the only ground for dissolution of marriage.

In *Shokunbi v Shokunbi*, the court stated that,

> It is the actual state of the marriage that the court has to inquire into, as to know whether or not, it is still viable, rather than concern itself with the question of guilt or innocence of either party which point is irrelevant.[344]

The Act further provides in Section 15(2)*(e)* and *(f)* for separation grounds. These provisions ensure that the dissolution of marriage is conducted in a cordial manner as parties do not need to

[342] Rahmatian 285.
[343] Section 12 of the Customary Court Law of Enugu State.
[344] CCHCJ/7/76 at 1913 SC. See also Michael Attah and I.L Oyakhirome "Assessing Judicial Perspectives on "Living Apart" Under the Matrimonial Causes Act 1970" Vol. 2 no. 2 *ABSU Law Review* (2018)116-131.

establish a matrimonial offence on the part of their spouse. Instead, they need only prove that they have lived apart for the prescribed period and it is immaterial who initiated the separation.

On the face of it, it appears that the Nigerian Matrimonial Causes Act is committed to reducing the acrimony associated with the divorce process. However, a holistic view of the contents of section 15, might create a different impression.[345]

Five of the eight facts necessary to prove irretrievable breakdown of marriage require proof of fault on the part of the respondent. The five facts are the respondent's willful and persistent refusal to consummate the marriage;[346] the respondent has committed adultery, and the petitioner finds it intolerable to live with the respondent;[347] the respondent's intolerable behavior;[348] the respondent's desertion;[349] and the respondent's refusal to comply with an order for restitution of conjugal rights.[350] In addition, spouses desirous of commencing divorce proceedings immediately must rely on these fault-based provisions because the no-fault provisions encapsulated in sections 15(2)*(e)* and *(f)* require a two-year and three-year waiting period respectively, before the institution of matrimonial proceedings. The presence of these fault based provisions detracts from the spirit of the no-fault principle because the petitioner must make allegations of fault against the respondent to be able to prove irretrievable breakdown of marriage. This invariably leads to bitterness particularly because sometimes these allegations are false.

The presence of the absolute and discretionary bars to divorce petitions[351] also constitute a reliance on the fault theory because they provide that the petitioner's 'fault' (such as the commission of a matrimonial offence or contribution to the commission of a matrimonial offence by the respondent) precludes the grant of a divorce decree even when the petitioner has established a fact of irretrievable breakdown of marriage.

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[345] See 3.2.1 above.
[346] Section 15(2)*(a)*.
[347] Section 15(2)*(b)*.
[348] Section 15(2)*(c)*.
[349] Section 15(2)*(d)*.
[350] Section 15(2)*(g)*.
[351] Sections 26-28 of the Matrimonial Causes Act.

Fault provisions make divorce extremely difficult in Nigeria. Some Nigerian scholars have gone as far as stating that the presence of fault provisions in the Nigerian MCA is a violation of the citizen's human rights.[352]

Customary Law

The customary divorce system may seem to resemble a no-fault system in that parties to a customary marriage require no allegations of fault to prove irretrievable breakdown of marriage. Parties need only express an unwillingness to continue with the marriage to be granted a decree of divorce. It must be noted, however, that customary marriage laws (codified and otherwise) also provide for spouses' wrongdoing or fault such as adultery or witchcraft, as reasons for dissolution of marriage. Even though the courts do not require the parties to strictly prove these grounds, such alleged misconduct can influence the court's judgment in terms of award of custody or quantum of bride price to be repaid. Therefore, fault does come into play in the dissolution of customary law marriages.

The availability of the separation provisions mitigates to a certain degree, the harshness of the otherwise fault based divorce regime practiced in Nigeria. However, the overwhelming majority of the provisions of the Nigerian divorce laws (statutory and customary) are fault-based and therefore fail to achieve this goal of good divorce law.

3.3.4 A good divorce law should give empty shell marriages a decent burial

Statutory Law

To ensure a decent burial for unsalvageable marriages, a good divorce law must try to reduce the the humiliation associated with going through the divorce process and should enable the parties to make post-divorce arrangements in an expeditious and cordial manner.

Section 103 of the Matrimonial Causes Act provides that proceedings for dissolution of marriage must be held in open court. As a result, members of the public, including the media, are privy to

[352] Nnamuchi Obiajulu '"I would have left him but …" A critique of the fault-oriented approach to dissolution of marriage' available at *http://ssrn.com/abstract=2542481* accessed on 28 September 2017.

the private and intimate details of the parties' lives as well as the mudslinging present in acrimonious proceedings. This ensures that the process is humiliating for the parties. This is aggravated by the fact that the predominantly religious and conservative Nigerian society stigmatizes divorcees, especially female divorcees.[353] By section 103 of the Act, divorce proceedings held in chambers and away from the public will be declared null and void. This was held in the case of *Menakaya v Menakaya.*[354] In that case, one of the parties was a political figure and the family sought to protect themselves. As a result, parts of the divorce proceedings were held in chambers and subsequently, the appeal court ordered that the case be tried afresh.

It is worthy of note that the Act provides one exception to the provision which is that divorce cases may be held in private if the rules of court provide for such proceedings to be held in chambers. Order 1 Rule 9(1) of the Matrimonial Causes Rules provides that proceedings for maintenance, welfare and custody of a child may be held in chambers. This is on all fours with the proviso to section 36(4)*(a)* of the Nigerian Constitution which states that cases may be withdrawn from the public hearing to protect the private lives of individuals amongst other reasons.

The Matrimonial Causes Act therefore achieves this goal midway. To wholly achieve the decent burial aim of divorce law, the Nigerian courts must remove matrimonial causes from the public domain.

Customary Law

In the same way, the customary court laws provide for customary courts to conduct proceedings in open court in the presence of both parties to prevent the breach of parties right to fair hearing.[355]

The Nigerian Matrimonial Causes Act and the customary marriage laws therefore fail to meet this aim of good divorce law. Rather, they aggravate the already traumatic litigation process with the presence of provisions which guarantee exposure to shame and humiliation for families going through divorce.

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[353] DJ Smith 'Promiscuous girls, good wives, and cheating husbands: Gender inequality, transitions to marriage, and infidelity in Southeastern Nigeria' (2010) 83 *Anthropological Quarterly* 123.
[354] (2001) supra 203.
[355] *Barr. (Mrs.) Maudline Nwakuche v Chief Gogo Nwakuche* (2018) 1 ESCCALR 24.

3.3.5 A good divorce law should promote good post-divorce relationships

Statutory Law

A good divorce law should encourage and promote amicable post-divorce relationship between parties to a marriage. This is necessary for several reasons, the most important of which are to facilitate making arrangements for the future — particularly where there are children — and to support the emotional adjustment of the spouses and the children of the marriage, if any.

It is common knowledge that where there are children, divorce may not mark the end of the relationship between the divorced parties, because the parental relationship between the parties continues.[356]

It is also common knowledge that children are often the victims in divorce cases.[357] It is therefore necessary for the sake of the parties and their children to conduct the divorce process in a manner likely to encourage a good post-divorce relationship between the parties themselves and between the parties and their children.

Good divorce law achieves this aim by providing for a divorce process that is free from acrimony, or at least ensuring that bitterness is kept to a minimum. Even where the divorce simpliciter is without rancor, the resolution of the ancillary matters (maintenance, child custody) using the litigation process may embitter parties.

Several jurisdictions, for example the United Kingdom and Australia, have enshrined this aim as one of the guiding principles in their divorce laws and recognizing the limitations of the litigation process in this respect, have put mechanisms in place such as family counselling and mediation to ensure the achievement of this aim.[358]

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[356] Herring 107.
[357] Field of Choice Report para 47, 49; James A Hardon *Divorce* (2004) 3.
[358] See 2.3.3 above.

Robert Emery, in a survey conducted over the course of ten years, found that mediation increases the prospect of good parental relationships between children and their noncustodial or non-residential parents.[359]

The Nigerian Matrimonial Causes Act makes no express provision for the encouragement of a harmonious relationship between the parties and between the parties and their children post-divorce. In addition, its choice of divorce litigation as not only the primary dispute resolution method but indeed the sole dispute resolution method, works against this aim of creating good post-divorce relationships.

Customary Law

The position is the same with customary marriage laws. No provisions are made to ensure harmonious post-divorce relationships between the parties themselves or the parties and their children (particularly in the case of noncustodial parents).

Wives in customary marriages are particularly disadvantaged after divorce because customary laws favour husbands.[360] The laws and the courts recognize and uphold the husband's right of ownership of everything pertaining to the marriage, including the wife,[361] properties acquired by the family during the course of the marriage, and all the children of the marriage.[362] The result is that upon dissolution, wives of customary marriages leave the marriage with almost nothing. The laws make no provision for wives to receive maintenance, matrimonial property or custody of the children of the marriage.[363] This ensures a strained relationship between the couple and often between the wife and the children.[364]

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[359] Emery, Sbarra & Grover 22.
[360] Charles Mwalimu *Nigerian Legal System* (2007) 624.
[361] See 3.3.6.1 below.
[362] See 3.3.6.1 below.
[363] See 3.3.6.1 and 3.3.6.3 below.
[364] Men have been known to actively prevent contact between their children and their ex-wives (See *Bibilari v Bibilari* Suit No FCT/HC/PET/176/11*)* until the children come of age and perhaps choose to seek their mothers out.

3.3.6 A good divorce law should protect vulnerable parties

Research has shown that women and children are the greatest casualties of divorce.[365] They therefore usually make up the class of persons referred to as the weak and vulnerable parties in the context of divorce. These vulnerable parties are further classified into three: the economically weaker spouse, the victims of domestic violence and the children of the marriage.

3.3.6.1 The economically weaker spouse

A good divorce law must make provision for the economically weaker spouse, that is, the spouse who is most likely to suffer financial disadvantage as a result of the divorce. This spouse could be the husband or the wife.[366] Divorce laws achieve this aim by providing for this spouse through orders for maintenance and equitable division of marital property.

A. Maintenance

Statutory Law

Most divorce laws provide for the economically weaker spouse through maintenance orders aimed at providing for the spouse during the divorce process and after the decree of dissolution of marriage is granted. The Nigerian Matrimonial Causes Act provides for spousal maintenance in section 70:

> 1) Subject to this section, the court may, in proceedings with respect to the maintenance of 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 to 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, earnings capacity and conduct of the parties to the marriage and all other relevant circumstances.

[365] Ezinna E Enwereji 'Indigenous marriage institutions and divorce in Nigeria: the case of Abia State of Nigeria' (2008) 5 *European Journal of General Medicine* 168; Teachman & Paasch 69.

[366] The law and courts have come to recognize this by using gender neutral terms in provision for maintenance. See Section 70 above which uses the phrase 'a party to a marriage'.

Thus the law empowers the court to provide for maintenance of the spouses and the children of the marriage after the dissolution of marriage under section 70(1),[367] and during proceedings through an order of maintenance under section 70(2).[368] This section provides for maintenance during the pendency of the divorce suit, which endures from the service of petition until the decree is granted.[369] Depending on the circumstances of the case, maintenance can be paid over a continuous period or as a lump sum.[370]

Even though the Nigerian courts have full discretion to grant maintenance orders, they must consider the factors enumerated in section 70 when determining whether and to what extent to grant spousal maintenance. The factors include means and earning capacity of the parties, conduct of the parties as well as other relevant circumstances.[371]

The parties' means refers to their income[372] as well as assets[373] such as properties, businesses, cars. Their earning capacity refers to their ability to earn income based on several indices such as age, qualifications, state of health, number and age of children.[374] Order XIV Rule 4 further provides for a certificate of means which may be used by the courts to determine the parties' earning capacity. All other relevant circumstances which directly affect the parties' financial situation will also be considered.[375] Such factors include the lifestyle of the parties during the marriage,[376] and other financial needs and obligations they may have, such as a duty to the extended family or an aged parent.[377]

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[367] *Damulak v Damulak* supra 151; *Adeleke Adejumo v Toyin Adejumo* (2010) LPELR 3062. In this case, H declared his salary as his means of income but failed to disclose the rent from his property. The court awarded W a maintenance payment over and above his monthly salary).
[368] *Olu-Ibukun v Olu-Ibukun* (1974) 4 ECSLR 706, 711.
[369] *Meme v Meme* (1965) NMLR 391.
[370] See section 73 of the Act.
[371] *Nanna v Nanna* (2006) 3 NWLR (pt. 966) 1, 40-41; *Menakaya v Menakaya* (1996) 9 NWLR (pt. 422) 250, 301. *Idowu v Idowu* (2016) All FWLR (pt. 863) 1688; *Akinboni v Akinboni* (2002) 5NWLR (pt. 1761) 565, 582.
[372] *Ibeawuchi v Ibeawuchi* (unreported) Appeal no FCA/E/5/82of 22nd September 1982; *Damulak v Damulak* supra 151, 171-3.
[373] *Anyaso v Anyaso* supra 175-6.
[374] *Rogers v Rogers* (1962) 3 FLR 398, 401-3.
[375] *Tomkins v Tomkins* (1948) 175.
[376] *Odusote v Odusote* (2012) 3 NWLR (pt. 1288) 478.
[377] *Judge v Judge* (2009) 1 FLR 1287; *Dawodu v Dawodu* (1974) 5 CCHCJ 1207.

The Nigerian courts do not consider the conduct of any party when determining whether to order maintenance except in situations where such conduct is of an economic nature and affects the means or needs of the parties.[378]

The most proactive provision of the Matrimonial Causes Act institutes spousal maintenance as a prerequisite for the grant of a decree absolute. Section 25 of the Act reads:

> On the application of the respondent made in the course of proceedings for a decree of dissolution of marriage, the court may, if it considers it just and proper in the circumstances of the case to make provision for the maintenance of the respondent or other provision for the benefit of the respondent, refuse to make a decree unless and until it is satisfied that the petitioner has made arrangements satisfactory to the court to provide the maintenance of other benefit as aforesaid upon the decree becoming absolute.

Courts may enforce maintenance orders by attachment or sequestration and recovery of judgment debt, through other high courts or summary courts.[379]

At first glance, the Matrimonial Causes Act provides adequately for the economically disadvantaged spouse. However, as explained in Chapter Four, this promise of the blackletter law is seldom realized in practice.[380]

Customary Law

Under most customary laws in Nigeria, the husband has a duty to maintain his wife.[381] However, this duty ends when the marriage is dissolved.[382] Customary law does not provide for spousal maintenance after dissolution of marriage,[383] even where it is clear that the wife will suffer great economic hardship as a result of the divorce, as is often the case. Indeed, until recently, this was true of many customary laws in African countries, spousal maintenance after dissolution was non-existent.[384] Consequently, the customary marriage wife was often left empty-handed after divorce.

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[378] Order XIV Rule 6(7) and Rule 15 of the Nigerian Matrimonial Causes Rules; *Tabansi v Tabansi* (2009) 12 NWLR (pt. 1155) 415.
[379] Sections 88-92 of the Matrimonial Causes Act.
[380] See 4.1.3 below.
[381] Nwogugu 292.
[382] Ibid 293.
[383] Diala 'Judicial Recognition' 113; Nwogugu 293; Olawale Ajai 'Rights of women and children in divorce: The human rights equation' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 14; Rahmatian 295.
[384] Rahmatian 300.

B. Settlement of Property or Division of Household Assets

Statutory Law

The law and the courts also provide for the economically weaker spouse through equitable division of the property acquired during the marriage. Such property may be real or personal property.[385]

Section 72 of the Act provides:

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

The courts may also uphold or vary terms of pre- and post-nuptial settlement agreements made for or by the parties.[386] Again, although the provisions of the law seem adequate as they specifically enjoin Nigerian courts to make orders which are just and equitable, in practice, the courts' interpretation of the law during the divorce process creates outcomes which are prejudicial to the divorcing spouses and which are far from the outcomes envisaged by the Act.[387] It is imperative that the law is updated to include recognition of other forms of contribution besides financial contribution.

English law also provides for the financially weaker spouse by giving them a percentage of the high income earner's income for a period as well as a percentage of the high income earner's pension.[388] English law further provides that property be distributed equitably between the divorcing spouses, particularly property which was acquired as a result of their joint efforts. These efforts could be financial or otherwise, for example, homemaking.[389] Similar provisions should be incorporated into the Nigerian Act to ensure adequate protection of the financially weaker spouse.

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[385] *Kafi v Kafi* (1986) 3 NWLR (pt. 27) 175.
[386] Section 72(2).
[387] See Chapter 4 for details of the problems associated with post-divorce division of property in Nigeria.
[388] *Brooks v Brooks* (1995) 2 FLR 13, 15.
[389] Lambert v Lambert (2002) EWCA Civ. 1685; see also s 114(2) of the Tanzanian Law of Marriage Act 1971.

Customary Law

Women cannot assert property rights under customary law; they were themselves viewed as chattels.[390] The courts have also given credence to these customs by finding that both the wife[391] and her property[392] belonged to her husband and he has right of possession over them.[393] Customary law therefore makes no provisions for settlement of property on the wife, irrespective of her contribution to such property.

While the Nigerian Matrimonial Causes has made some laudable strides to protect the weak and vulnerable parties through maintenance and property division provisions, these provisions cannot be applied to customary law marriages. Section 69 expressly excludes customary marriages.

> In this Part of this Act,[394]
>
> "marriage" includes a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law, …

However, some countries have attempted to solve this problem with legislation. In Ghana, the primary legislation for statutory marriages, the Ghanaian Matrimonial Causes Act,[395] — which regulates monogamous marriages — provides in section 41(2) that maintenance provisions contained therein apply also to customary law and polygamous marriages.[396] Section 41provides that the Act shall apply to marriages other than monogamous marriages upon an application to the court by a party to such non-monogamous marriage. In other words, parties to customary marriages, upon application to the courts, may enjoy the matrimonial reliefs typically available only to parties to monogamous statutory marriages. In addition, the Ghanaian courts held in *Mensah v Mensah*[397] that both parties shall upon divorce have equal share in marital property acquired during the course of the marriage.

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[390] CORI Thematic Report 'Nigeria: Gender and Age' 22, available at *http://www.refworld.org/pdfid/514830062.pdf*, accessed on 24 June 2019.
[391] *Kehinde & Anor v Akinlade* (1982) OGSLR 299, 305.
[392] *Nwugege v Adigwe* (1934) 11 NLR 134.
[393] *Onwuchekwa v Onwuchekwa* (1991) 5 NWLR (pt. 194) 739.
[394] Part IV on Maintenance, Custody and Settlement of Property.
[395] Act No 367 1971.
[396] See also s 115 of the Law of Marriage Act of Tanzania and s 8 of the Recognition of Customary Marriages Act of South Africa.
[397] (2012) 1 SCGLR 505.

South African Law provides for universal community of property and this protects the weaker spouse.[398] Where parties do not expressly state which property regime will guide their marital property, there exists a presumption that they will be married under the community of property regime, which provides that property acquired by the spouses whether before or during the marriage will be distributed equally between them upon dissolution.[399] The Recognition of Customary Marriages Act makes provisions for monogamous couples married under the customary law to have the same property rights during and upon dissolution of marriage as parties married under statutory law.[400]

The Nigerian laws on post-divorce distribution of marital property for customary marriages do not meet the goal of good divorce law of protecting the economically weaker spouse.

3.3.6.2 Victims of Domestic Violence

Statutory Law

The Nigerian Matrimonial Causes Act fails to provide for parties to a marriage who may be victims of domestic violence during or as a result of the divorce process. While provisions for the protection of persons, especially children, from violence within the family have been made in the Child's Right Act and the Violence Against Persons (Prohibition) Act 2015, the scourge of domestic violence as a result of the end of a marriage or the proceedings for divorce is not within the contemplation of the Act. The courts, however, have considered this problem in a handful of cases.

In *Nwosu v Nwosu*,[401] for example, the court stated that where there was a reasonable fear or threat of violence during the course of breakdown of marriage or proceedings for divorce, a wife had the right to leave the home with the children.

Despite the promise of the case law, it is imperative that the Nigerian Act, like its Western counterparts, recognizes the need to prevent and protect parties from domestic violence during the

[398] South Africa Law Commission Report on Customary Marriages paras 6.3.4.1 – 10.
[399] Amanda Barratt *Law of Persons and the Family* 2 ed (2017) 284.
[400] Recognition of Customary Marriages Act 120 of 1998 s 7(2). Section 8(4)*(a)* extends the proprietary rights upon dissolution contained in the Divorce Act to marriages contracted under customary law.
[401] (2012) 8 NWLR (Pt 1301) 1.

divorce process and to ensure that post-divorce orders do not put parties at the risk of domestic violence.

Customary Law

Under customary law, the situation is much more dire. Not only do the laws fail to provide for the protection of vulnerable members of the family from domestic violence during the divorce process but customary law also sanctions the physical chastisement of wives by husbands during the marriage.[402]

The Nigerian statutory and customary laws on marriage therefore fail to protect the vulnerable members of the family from domestic violence, before, during and after the divorce process.

3.3.6.3 Children of the marriage

Statutory Law

A good divorce law should protect the interests of children of the marriage during and after the divorce process. The general rule is that in all proceedings relating to children, the welfare of the children should be a primary consideration.[403] This principle is provided for in section 71 of the Nigerian Matrimonial Causes Act which reads:

> (1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests 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.

The Matrimonial Causes Rules provide further that

> (1) Where, at the date of a petition for a decree of dissolution of marriage, children of the marriage to which the petition relates are living, the petition shall state-
>
> (*a*) the arrangements proposed by the petitioner concerning the welfare and, where appropriate, the advancement and education, of the children who are then living; or
>
> (*b*) the petitioner's reasons for not stating in the petition the arrangements so proposed.[404]

[402] Egu 58.
[403] UN Convention on Rights of the Child Article 3.
[404] Order V Rule 14.

In Nigeria, under statutory law, in the event of a divorce, both parents have equal rights to the custody of the children of their marriage[405] and the courts have held it is best for both parents to have custody of the children where both parents have control over the affairs of the child but one parent has physical custody of the child.[406]

The provisions in the Act for the protection of the interests of the rights of the child are sparse and far less extensive as those in other jurisdictions. For example, many jurisdictions have legislation that lists the factors which the courts must take into consideration when determining which parent should have custody of the children. There is no express provision in the Nigerian legislation bearing these factors. The courts have tried to bridge this lacuna in the law. Various cases have attempted to enumerate factors which may be considered in the determination of the best interests of the child. However, the *locus classicus* which has formed the basis for cases dealing with the custody of children is *Williams v Williams.*[407] In that case, a couple separated, the husband left the marriage with their sons and the wife with the daughter. Eventually, the parties became embroiled in a bitter custody battle for the daughter. Custody was granted to the mother after the judge considered the child's age and gender amongst other factors. The factors considered in that case have since become the major factors considered in the determination of the custody of children. Subsequent cases such as *Alabi v Alabi*,[408] *Buwanhot v Buwanhot,*[409] *Olowoofoyeku v Olowoofoyeku*[410] have followed almost strictly the factors laid down in the *Williams'* case. These factors are detailed below.

Age of the child

Over the years, the courts have found that except in cases of immoral conduct which may affect the child, it is in the best interest of children of tender years to stay with their mothers.[411]

Sex of the child

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[405] See section 71 above.
[406] *Williams v Williams* supra; Nwogugu 264.
[407] (1987) 2 NWLR (pt. 54) 89; see also *Hayes v Hayes* (2000) 3 NWLR (pt. 648) 276.
[408] (2007) 9 NWLR (pt. 1039) 297.
[409] (2009) 16 NWLR (pt. 1166) 22; see also *Obajimi v Obajimi* (2011) 21 WRN 9, 23.
[410] (2011) 1 NWLR (pt. 1227) 177.
[411] *Olatedohun v Olatedohun* Suit No HG/111/70 of 6th July 1971; *Tabansi v Tabansi* supra.

The courts have also found in overwhelming numbers that it is in the best interest of female children to stay with their mothers and male children with their fathers.[412] In *Oyelowo v Oyelowo,*[413] the court stated that the cultural leanings of Nigeria make it imperative that male children stay with their fathers. Contrast with *Odogwu v Odogwu*[414] where court stated thus:

> … it is detrimental to their welfare and ultimate happiness and psychological development if the maternal care available is denied …

Conduct of parents

The conduct of a parent will only be considered in proceedings for custody of a child if it can be shown that such conduct will directly affect the welfare of the child.[415] In *Olatedohun v Olatedohun,*[416] the mother practiced juju which though it disturbed the father, did not affect the welfare of the 3-year-old child of the marriage. Custody was awarded to the mother. In *Anyaso v Anyaso,*[417] the court found that the father was morally corrupt and lived as such and it would not be in a child's best interests to reside with him. He was thus denied custody. In *Kolawole v Kolawole*,[418] the mother was denied custody because she had tried to kill the child once.

Adequacy of provisions for the education and accommodation of the child

The courts will also consider which parent is best equipped financially to care for the children as well as the arrangements made by the parents.[419]

Other factors will also be considered along with this. The most financially stable parent may not be the best parent to provide other needs of the child in which case, custody may be given to one parent while the financially strong parent provides support for the child.

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[412] *Bibilari v Bibilari* supra.
[413] (1987) 2 NWLR (pt. 56) 239.
[414] (1992) 2NWLR (pt. 225) 539.
[415] *Ajidahun v Ajidahun* (2000) 4 NWLR (pt. 654) 605.
[416] Supra.
[417] Supra.
[418] Suit No HLC/450/81 of 1st July 1982.
[419] *Damulak v Damulak* supra 155.

> Welfare of the child is not the material provisions in the home – goods, clothes, food, air conditioners, televisions, all gadgets normally associated with the middle class. It is more of the happiness of the child and his psychological development.[420]

Other factors include wishes of the child,[421] emotional attachment to a particular parent[422] and the need to keep siblings together.[423]

One of the ways in which a good divorce law provides for the interests of the children of the marriage is by ensuring that the necessary arrangements are made for the children in the course of the divorce proceedings. Some jurisdictions go as far as providing that a divorce will not be granted until such arrangements have been made to the satisfaction of the court.[424]

This is provided for in the Nigerian Matrimonial Causes Act, which specifies in section 57 that where there are children of the marriage who are below the age of sixteen or to whom the court orders that the section should apply, a decree *nisi* will not be made absolute until adequate arrangements have been made for the children to the satisfaction of the court.

The Nigerian Matrimonial Causes Rules also provides for independent legal representation of children in Order IX Rule 11 where necessary.

In summary, the Nigerian legislation has taken laudable strides to ensure the protection of the interests of the children of the marriage during divorce proceedings. However, the legislation should be improved by providing a list of factors which must be considered while deliberating on the best interests of the child. This is necessary to ensure that all cases concerning the welfare of children are screened through the same lens and not subject to the whims and caprices of individual judges.

Customary Law

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[420] *Odogwu v Odogwu* supra; *Dawodu v Dawodu* supra; *Anyaso v Anyaso* supra.
[421] *Buwanot v Buwanhot* supra; *Odogwu v Odogwu* supra 560.
[422] *Williams v Williams* supra.
[423] *Wakeham v Wakeham* (1954) All ER 434 CA, 435.
[424] Section 11(1)*(b)* of the Canadian Divorce Act.

Historically, customary courts seized with jurisdiction to determine the question of custody of children born of customary law marriages upon the dissolution of those marriages based their rulings on the principles of the customary law applicable to the spouses.[425] Most of these principles favour fathers. Some of these principles are: fathers have automatic custody of their children;[426] a father's right to the custody of his children is absolute,[427] irrespective of his conduct during and after the marriage.[428] Mothers were considered for custody only when the children were too young to stay with the father, as in the case of nursing babies and toddlers. In such cases, mothers were granted custody only until the children were old enough to be claimed by their father.[429]

Under Igbo customary laws — the customary laws which are applicable in most parts of South-East Nigeria — the general rule is therefore that the children of the marriage belong to the husband as long as he has paid the bride price of the wife. This rule is so strictly observed in some localities that if upon divorce, the wife's family fails to refund the bride price, she is considered to still be a wife to the ex-husband and children born of her fathered by another man, will belong to the first husband.[430]

Customary law therefore fails to take into consideration the best interests or the welfare of the child in matters relating to dissolution of marriage. Rather it concentrates on the father's right of absolute ownership of his children thereby equating them with objects to be 'owned and possessed'.[431]

In recent times, judicial activism has made it possible for the customary courts to apply the welfare or paramountcy principle over and above the rights of the father in custody cases. This happened in the case of *Okwueze v Okwueze*.[432]

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[425] Obi *Modern Family Law* 374-375; Nigerian Institute of Advanced Legal Studies 'Restatement of Customary law' (2013) 346.
[426] Osondu 111.
[427] *Abiakam v Anyanwu* (1975) 5 ECLR 305; Egu 35; See also *Edet v Essien* supra.
[428] Obi *Modern Family Law* 376.
[429] Ibid.
[430] *Edet v Essien* supra.
[431] See 4.1.7 below.
[432] (2004) 52 WRN 78; (1989) 3 NWLR (pt.109) 321; *Ikenga Okoye v Chinelo Okoye* (unreported) Suit CCAE/3D/2 judgment of the Customary Court of Appeal Enugu State reported in Anyafulude 321. Note that these prejudicial customary laws still apply in the region, but not in the customary courts.

In addition, codified customary laws have been amended to include the provisions of the welfare principle — that the welfare of the child should be the primary consideration in all cases relating to the child.[433] Some states have also included this principle in their customary courts laws.[434] In summary, while Nigerian statutory and customary laws have made considerable progress in the achievement of the goal of protecting children of the divorcing couples, they must still improve on the provisions available to mirror international best practices.

3.3.7 A good divorce law should deal with the emotional aspects of divorce

Statutory Law

Ensuring that the emotional aspects of divorce are given as much consideration as the legal aspects should be one of the aims of good divorce law. This is usually achieved through the use of amelioratory dispute resolution processes like mediation and through the use of family counselling to prepare parties for the divorce process and for life after divorce. Despite the pervasiveness of provisions for the amelioration of the harsh emotional effects of divorce on the family in marriage and divorce laws all over the world, as well as affirmative action in form of arrangements for mediation and family counselling, the Nigerian Matrimonial Causes Act and Rules have made no provision to incorporate family counselling and mediation into the divorce process. This has created a huge gap in the divorce laws in Nigeria.

It is worthy of note that Nigerian divorce laws make provisions for mediation with the aim of reconciliation, the gap identified is a lack of provision for mediation and family counselling for couples who do not wish to reconcile but wish to divorce. Nigerian divorce laws should therefore be updated to include provisions dealing with this important aspect of the divorce process.

Customary Law

The position is the same with customary law. There is no provision for divorce mediation or family counselling to prepare parties for life after divorce. Instead, all mediation efforts are geared

[433] Section 14 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order 1958.
[434] Enugu State Customary Court Law s 16(1).

towards reconciliation. The Nigerian laws on marriage therefore fail to achieve this goal of divorce law.

3.3.8 A good divorce law should save costs for the parties and the state

Statutory Law

The divorce process, particularly when conducted through the courts and reliant on fault-based factors, is a costly process for both the state and the parties in terms of time and money. A good divorce law should ensure that the divorce process does not cost the state judicial system and the parties themselves more than is absolutely necessary.[435]

An effective way to achieve this aim would be to expedite the divorce litigation process. This is, however, easier to achieve in a judicial system which recognizes and operates only a non-fault based divorce system. In this context, the courts do not need to inquire into the state of the marriage to ascertain fault. The spouses need only present proof of separation for the required period and the divorce decree will be granted. The Nigerian system although accommodating the fault-free separation provisions also relies on fault-based provisions to prove divorce. Indeed, the majority of the facts required to prove irretrievable breakdown are fault-based.[436] The system requires proof of fault which usually involves a trial and can take years to determine. Heightened evidential obligations add to the cumbrousness of the divorce process.[437] It will therefore be an almost impossible exercise to put a time limit on the fault-based divorce litigation process.

It is worthy of note that parties sometimes manipulate the rules and technicalities of court to further stretch the divorce process in order to frustrate their spouses.[438] This happened in the cases of *Umeakuana v Umeakuana*[439] where the petition was struck out after eight years and in *Menakaya*

[435] Herring 107.
[436] See 3.3.3 above.
[437] Michael Attah 'Prescriptive and evidential challenges in Nigeria's fault divorce regime' (2017) 20 *Nigerian Law Journal* 512.
[438] Anthony C Diala 'The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria' (2018) 18 *African Human Rights Journal* 721-2. Here a man appealed the decision of the lower court and the court after that until frustrated, the wife abandoned the case and settled out of court (at great cost to her).
[439] (2009) 3 NWLR (pt. 1129) 598.

v Menakaya[440] where the court ordered a rehearing after eight years as a result of actions and prayers of parties.

Customary Law

Proceedings at the customary courts are typically informal, simple and expedited.[441] Although fault based reasons may also be adduced as grounds for divorce, strict evidential proof is not required as is found with statutory law.[442] The law in Enugu state expressly provides that all matrimonial causes before the customary courts must be dispensed with in three months.[443] They are also considerably cheaper than proceedings at the high courts. They are therefore cost-effective for the parties and the state.

The Nigerian Matrimonial Causes Act makes no provision for a completely no-fault based divorce. It therefore fails to save costs for the parties and the states.

3.3.9 A good divorce law should be fair and just to both parties

Statutory Law

A good divorce law should be fair and just to both parties in several ways. One of such ways is to avoid apportioning blame to either party for the breakdown of the marriage. Scholars have found that it is almost always impossible to apportion blame for the death of a marriage to a single party. Usually, both parties are at fault, albeit at varying degrees. Fault based divorce laws have therefore been viewed as flawed and unfair to parties because no one party can be blamed completely for the breakdown of a marriage.[444] In spite of the fact that the Nigerian Matrimonial Causes Act provides for non-fault based factors in section 15(2)*(e)* and *(f)*, the presence of fault provisions in section 15(2)*(a),(b),(c),(d)* and *(g)* makes it impossible for it to achieve this aim.

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[440] Supra.
[441] Clara C Ochiabutor *Introduction to Legal Method in Nigeria* (2012) 156-157.
[442] Ibid 157.
[443] Enugu State Customary Courts Practice Directions 2013 s 4.
[444] Herring 131.

In addition, the non-fault based divorce provision require a separation period of either two or three years while the fault-based provisions have no such restriction. As a result, parties wishing to get divorced quickly, (in less than two years) must rely on fault provisions.

On the other side of the spectrum, research has also suggested that apportioning blame during the divorce process is necessary and may be therapeutic for some parties and is therefore fair and just.[445] This could arise, for example where spouses find themselves unceremoniously cast off simply because the other spouse desires a new relationship. Such a spouse may benefit from having a divorce decree in their favour and against the spouse, showing the other spouse's guilt.[446]

However, the overwhelming view is that it is not the court's place to determine fault, and the court should restrict itself to the irretrievable breakdown of marriage. Attempting to determine fault, which is at best an impossible exercise, will increase the prospect of proceedings becoming acrimonious, and will be unfair and unjust to at least one, if not both parties.[447]

Customary Law

As stated earlier, under the customary laws, grounds for divorce can be both fault based or otherwise. However, fault or not, the customary marriage wife is treated unfairly because customary laws favour husbands.[448] Wives are often left destitute and without access to their children.[449] They suffer the stigma of being divorced and may face ostracization as a result. The situation is much worse where the ground for divorce is a grievous one such as witchcraft or infertility.

3.4 SUMMARY

The pertinent question is: do the Nigerian Matrimonial Causes Act and customary laws achieve the aims of good divorce law?

Societal perception of the sacredness of the marriage institution and the premium placed on child bearing as the primary goal of marriage provide an explanation for the fact that the Nigerian

[445] Henry Hood 'The role of conduct in divorce suits and claims for ancillary relief' (2009) 39 *Family Law* 948.
[446] Herring 129.
[447] Ibid.
[448] Mwalimu 624.
[449] See 3.3.6.3 above.

Matrimonial Causes Act and customary marriage laws seem to achieve most with regard to the goals of preserving the institution of marriage, saving marriages through reconciliation provisions and protecting the interests of children. The last goal is achieved with some help from case law and customary court laws. The prevalence of patriarchy explains the reasons behind the lack of protection of the vulnerable members of the family particularly women in the cases of domestic violence and the lack of promotion of their rights to maintenance and equitable division of property. Both statutory and customary marriage laws also fail to adequately encourage the reduction of bitterness and fair and just treatment of both parties during divorce proceedings as well as good post-divorce relationships. Both also fail to consider the emotional aspects of the divorce and to ensure that proceedings are conducted in such a manner as to grant dead marriages a decent burial.

The law's inability or refusal to make the divorce process less onerous on the parties, despite several calls by Nigerian citizens for the amendment of the Act, is evidence of society's and indeed the legislature's aversion to the dissolution of marriage. The problems which arise as a result of the above are the subject of the next chapter.

CHAPTER FOUR

PROBLEMS OF DIVORCE IN NIGERIA

4.1 INTRODUCTION

In the preceding chapters we examined the nature and goals of the good divorce and good divorce law and how far the primary laws on marriage and divorce in Nigerian have gone in the achievement of these goals. This chapter goes beyond the black letter law and examines how the law operates in practice. The chapter investigates how the social, cultural and economic conditions in Nigeria prevent or obstruct this good divorce. It details the peculiar problems associated with divorce in Nigeria showing that divorce litigation is unable to solve these problems. Indeed, it usually worsens the situation. The chapter shows the negative effects of the divorce litigation process on the divorcing couple, the children of the marriage, and the courts. It proves that the socio-cultural atmosphere in Nigeria, the use of divorce litigation as the primary dispute resolution process, and the dependence on strict rules of customary and statutory marriage laws are prejudicial to families going through divorce and prevent the achievement of the good divorce in Nigeria. It ends with a discussion of the two major problems faced by the courts in the course of litigating divorce.

4.1.1 Double Marriages

As mentioned previously,[450] the double marriage is a prevalent phenomenon in Nigeria,[451] as in other African countries.[452] Most of the marriages contracted in Nigeria today are multi-tiered because most couples wishing to associate with their ancestral roots and extended family, while simultaneously protecting their rights under the civil law, contract both customary and statutory marriages.[453] This phenomenon is encouraged by Nigerian family law which permits couples to

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[450] See 1.7 above.
[451] Boparai 550.
[452] Botswana: Anne Griffiths *In the shadow of marriage: Gender and justice in an African community* (1997) 57; Lesotho: Letsika, Q (2005) 'The place of Sesotho customary law marriage within the modern Lesotho legal system' 2 *University of Botswana Law Journal* 84.
[453] Olokooba 198-9.

contract two marriages between themselves if the customary marriage is contracted before the statutory marriage.[454]

Problems arise when these couples decide to terminate the marriage. The question becomes, which marriage should be dissolved: the customary marriage, the statutory marriage, or both?

There are two theories in this regard: the conversion theory and the co-existence theory. There is no settled or express law favouring either of these theories. This means that the parties can argue either way and the courts will choose which argument to follow. As shown below, there is convincing case law for both the conversion and the coexistence theories.

Proponents of the conversion theory postulate that a subsequent statutory marriage supersedes a prior customary marriage.[455] The customary marriage is then subsumed in the statutory marriage and the marriage between the parties is regulated by statutory law. In terms of this theory, to dissolve the marriage between the couple, it is only necessary to dissolve the statutory marriage for the customary marriage to be dissolved. Simply put, dissolution of the statutory marriage constitutes automatic dissolution of the customary marriage. This was the court's position in *Teriba v Teriba and Rickett*,[456] where it stated that:

> The true position is that the customary marriage is converted by the Act marriage which in effect, supersedes it. Therefore, if the Act marriage is subsequently dissolved, the customary marriage cannot revive.

Thus if the statutory marriage totally obliterates the customary marriage such that it ceases to exist as was stated in *Odive v Nweke Obor and Anor,*[457] then the dissolution of the customary marriage is not necessary at all.

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[454] A combined reading of Sections 11 and 47 of the Marriage Act Cap Laws of the Federation of Nigeria 2011. Note that the opposite procedure – a statutory marriage and a subsequent customary marriage - is prohibited. See section 35 of the Marriage Act.

[455] *Jadesimi v Okotie-Eboh* 128. Michael Attah 'Divorce in Nigeria's dual marriage system: Did *Jadesimi* v *Okotie-Eboh* rest the issue? (2016) 2 *Lead City University Law Journal* 1; F O Osadolor and O Enabulele 'Dual marriage status in Nigeria' (2007) 109-160 *International Family Law* 135.

[456] Suit no 1/211/67 of 2/769 (unreported) Ibadan High Court reported in Olokooba 200, 203.

[457] (1973) ECSNLR 733, 735.

In *Jadesimi v Okotie-Eboh,*[458] the couple married under *Itsekiri* custom in 1942. In 1947, the husband wrote and registered a will at the Probate Registry. Subsequently, the couple went through a statutory marriage in 1961 after which the husband wrote and registered yet another will at the Probate Registry. Upon his death, his family, unaware of the existence of the wills executed letters of administration. The discovery of the wills led the daughter to file suit in the court arguing that according to section 18 of the Wills Act 1837, the subsequent statutory marriage of 1961 revoked the 1947 will. The court held that the later statutory marriage did not revoke the will, it reaffirmed the parties earlier valid customary marriage, but converted it from a polygamous marriage to a monogamous marriage.[459]

This poses several problems for spouses of customary law marriages. One of such problems is that since the customary marriage no longer exists, the husband cannot claim a refund of the bride price paid to the wife's family.[460] While proponents deem this a fair outcome, the consequences are far reaching. If such bride price is not repaid, the wife cannot contract a valid customary marriage with another man during the ex-husband's life time. This hardly affects the husband, who under customary law is permitted to marry as many wives as possible, but can be devastating to the wife who cannot remarry and is therefore 'shackled' to him until he dies.[461]

The coexistence theory on the other hand postulates that a prior customary marriage and a subsequent statutory marriage can co-exist alongside each other. Each marriage is equal in its own rights and creates separate rights and obligations for the parties.[462] This theory therefore suggests that the dissolution of the customary marriage will not constitute the dissolution of the statutory marriage and vice versa. Each marriage must be dissolved according to the family law system by which it was formed: the statutory marriage by the high court under the Matrimonial Causes Act,

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[458] Supra 128.
[459] Note that the position of the court in this case is unclear. It further stated that customary and statutory marriages are independent of each other and the statutory marriage contracted under the Act was not superior to the customary marriage. *Jadesimi v Okotie-Eboh* supra 142.
[460] Boparai 550; see the case of *Mchenje v Kunake* (1912) SRLR 107. Where a high court upheld a husband's right to sue for a refund of bride price after the dissolution of a statutory marriage contracted after the customary marriage.
[461] In *Edet v Essien* supra, a woman contracted a second marriage without first returning the bride price from a previous marriage. The court held that the children of the new marriage belonged to the first husband as he alone had paid her bride price and therefore 'owned her children'. This judgment was finally overturned at the Supreme court but after a protracted legal battle.
[462] *Akparanta v Akparanta* (1972) 2 ECSNLR 779, 783; *Afonne v Afonne* (1975) ECSNLR 159, 168-169.

the customary marriage by the customary courts subject to the customs of the couples' ethnic group and or clan.[463]

This theory poses its own problems. Where only one marriage — whether statutory or customary — is dissolved, the second marriage continues to exist.[464] Therefore, parties must dissolve both marriages to ensure total severance of all marital ties between them. In *Ohochuku v Ohochuku*,[465] the couple contracted a statutory marriage in England four years after a customary marriage, which was celebrated in Nigeria. The wife sought a divorce through the English courts in 1959. The court dissolving the statutory marriage held that it did not have the power to dissolve a polygamous marriage (the customary marriage) and thus the determination of the customary marriage was left to 'someone else'.[466]

Couples are therefore faced with the procedural disadvantages of carrying out not one but two divorce processes under two divorce litigation systems. This proves to be particularly resource-intensive consuming both time and money of the parties.

In addition, there may be a conflict in the outcomes of the two systems. This will most likely happen because customary law favours the rights of men over that of women.[467] For example, customary law does not recognize the right of a divorced wife to maintenance from her former husband,[468] whether or not such a wife needs maintenance to survive and the husband has the capacity to provide it easily. It also fails to recognize the rights of women — wives, widows and daughters — to ownership of family property,[469] while at the same time upholding a father's absolute right of ownership of his children.[470] Under the statutory law, however, claims for maintenance and division of property can be made in favour of either party,[471] and awards of

[463] *Udeze-Nwannia v Udeze-Nwannia* [2013] EWCA Civ. 725.
[464] *Akparanta v Akparanta* supra.
[465] [1960] 1 WLR 183; [1960] 1 All ER 253.
[466] Per Wrangham J.
[467] Izunwa 'A critique' 31.
[468] See 4.1.3 below.
[469] In April 2013, the Court of Appeal held in *Eucharia Nwinyi (Nee Okonkwo) & 6 others* v *Anthony Ikechukwu Okonkwo* (unreported) Appeal No. CA/E/189/2008, delivered 19 April 2013 that 'under the *Abagana* native law and custom,' women have no right of inheritance in their late father's compound or to partake in the sharing of their father's properties.
[470] See 4.1.7 below.
[471] See ss 70 and 72 of the Matrimonial Causes Act.

custody are dependent not on proof of paternal rights, but on the determination of the best interests of the child.

A conflict would arise, for example, where the high court dissolves the statutory marriage and awards maintenance and custody of the children in favour of the wife, and the customary court — which does not recognize maintenance of a divorced wife — refuses to make an order for maintenance and awards custody of the children to the husband. Under these circumstances, which judgment will apply?

The process for dissolution of marriage also differs between the two systems. Under customary law, a non-judicial divorce, — without recourse to the customary courts — is sufficient to effectively dissolve a marriage. This is impossible under statutory law, which requires the dissolution of marriage solely through the state high courts.

In *Udeze-Nwannia v Udeze-Nwannia*,[472] the husband contracted a valid customary marriage and a subsequent valid statutory marriage with his first wife in Nigeria in 1988. Eighteen years later, in 2006, he contracted customary and statutory marriage ceremonies with a second wife after purportedly dissolving the previous marriages to the first wife through a non-judicial customary divorce. The husband contended that the dissolution of the first customary marriage constituted a dissolution of the first statutory marriage as well. The court found the marriage to the second wife to be null and void holding that a dissolution of the customary marriage to the first wife did not constitute a dissolution of the statutory marriage to that first wife. Therefore, the husband was not free to remarry, rendering the second marriage void. Both marriages had to be dissolved according to the laws by which they were contracted.

Even though there has been a proliferation of literature and some level of judicial activism on double marriages in Nigeria and the legal implications of these marriages, none of these academic treatises proffer a tenable solution to these problems.[473] This is mostly as a result of the fact that most of these papers are narrow in scope[474] discussing only one possible problem of multi-tiered marriages or attempting to determine the superiority of one theory over the other. An all-

[472] Supra.
[473] Imam-Tamim 1. He discusses the shortcomings of available literature on multi-tiered marriages in Nigeria.
[474] Ibid 5-6.

encompassing solution will be one which takes into consideration the ill-effects of the two theories jointly and individually.

4.1.2 Division of Matrimonial Property

Post-divorce division of matrimonial property in Nigeria poses serious problems for both statutory and customary marriages but more so for the latter.

For statutory marriages, section 72 of the MCA provides as follows:

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

On the face of it, this provision appears to take into consideration the interests of all the parties to the marriage particularly the financially weaker spouse. However, the provision is weak in that it provides no standard formulae for post-divorce division of matrimonial property. Instead, it vests the courts with the wide discretion to make such property orders as they deem fit considering the principles of justice and equity.[475]

Some universally accepted principles have arisen as a result of this type of judicial discretion. In the United Kingdom and Canada, marital assets are distributed equally (with a few exceptions), irrespective of the parties' conduct during the marriage.[476] In the United Kingdom, the courts have also acknowledged the non-financial contribution of the homemaker as sufficient contribution to the families' assets to entitle such spouse to an equal share in such assets.[477] This holds true in some African countries like Tanzania.[478]

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[475] Nwogugu 271.
[476] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618; Attah Michael *Family Welfare Law in Nigeria* (2016) 141.
[477] *Miller v Miller; McFarlane v McFarlane* supra; White v White [2001] 1 AC 596. See also *Schrepfer v Ponelat* [2010] ZAWCHC 193 and *Butters v Mncora* [2010] ZAECPEHC 72 as reported in Barratt A 'Whatever I acquire will be mine and mine alone': Marital agreements not to share in constitutional South Africa (2013) 130 *The South African Law Journal* 688, 701.
[478] Section 114(2) of the Tanzanian Law of Marriage Act 1971.

In Nigeria however, the application of the wide discretion by the courts has been criticized as being neither fair nor just but rather discriminatory,[479] as the courts have failed to take into consideration some of the equitable principles mentioned above. The attitude of the courts is that he who asserts proves.[480] Therefore, a party who asserts ownership rights over a piece of property must adduce adequate evidence to prove the existence of such right.[481] Where a spouse fails to provide sufficient proof of sole ownership of property or at least proof of direct and tangible financial contribution to the acquisition of such property, the courts will not uphold such right.[482]

Women have been prejudiced by these negative judicial attitudes for many reasons.[483] Where a wife has contributed financially to the acquisition of matrimonial property, the courts require that she provides detailed evidence of financial contribution, usually in form of title documents in her name, or receipts showing contribution,[484] or witnesses.[485] Where she is unable to provide evidence of such contribution, she is unable to claim ownership of property.

> If … the respondent has given a lump sum of N6000 or any sum to her husband, she should have led evidence in support. If she bought building materials and gave them to her husband, she was duty bound to lead evidence in support. If her monetary contribution was by way of cheque, evidence ought to have been led also.[486]

The inability to provide receipts, witnesses or other forms of proof of financial contribution to the acquisition of marital property has been fatal to many a claim of joint ownership of marital property by women.[487] In addition to this, critics protest that the 'show your receipt'[488] phenomenon requires

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[479] Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 251; MOA Ashiru 'Gender discrimination in the division of property in divorce in Nigeria' (2007) 51 *Journal of African Law* 316-331.
[480] AI Dankani 'The law and practice of divorce in Nigeria: Its shortcomings as and consequences on women and children. Position Paper of the Federal Ministry of Women Affairs' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 245.
[481] In *Mueller v Mueller* (2006) 6 NWLR (pt. 977) 627, 644-5, both parties provided evidential proof of contribution to the property and the courts distributed the property equally between them.
[482] Attah '*Family Welfare Law in Nigeria'* 190; *Essien v Essien* (2009) 9 NWLR (pt. 1146) 306.
[483] Attah '*Family Welfare Law in Nigeria'* 190; Ashiru 318.
[484] *Nwanya v Nwanya* (1987) 3 NWLR (pt. 62) 697.
[485] *Amadi v Nwosu* (1992) 5 NWLR (pt. 241) 273, 279.
[486] *Nwanya v Nwanya* supra 704; Attah '*Family Welfare Law in Nigeria'* 190.
[487] *Ibid*; *Onwuchekwa v Onwuchekwa* supra; *Amadi v Nwosu* supra.
[488] A phrase coined by Diala. Diala 'Judicial Recognition' 112.

that spouses keep strict account of all expenditure on the family during the marriage in anticipation of divorce.[489]

This is further aggravated by the fact that the social reality in Nigeria is that matrimonial property is usually acquired in the husband's name,[490] even where both parties have contributed equally to the acquisition of said property. The result is that upon divorce, the husband claims most, if not all, of the valuable matrimonial property, making property reallocation in favour of women rare in practice under statutory law because these women are unable to claim joint ownership of matrimonial property for want of documentary proof.[491]

A further dimension to this problem is the court's refusal to recognize the non-financial contribution of the wife-homemaker. She must show evidence of direct financial contribution to the matrimonial property before her claim of joint ownership can be upheld.[492]

This practice has been criticized as discriminatory against women[493] and in contrast to the worldwide practice of acknowledging the non-financial contribution of women in marriage.[494] It fails to recognize or redress the traditional roles ascribed by society to married spouses:[495] the husband is the primary breadwinner while the wife is the primary caregiver and homemaker,[496] who together with any children of the marriage, is financially dependent on the husband. The result is that petitions for division of marital property are mostly instituted by women.[497]

In *Sodipo v Sodipo*[498] the court valued the marital property at N10,000,000 (Ten million naira) and yet granted the sum of N200,000 (Two hundred thousand naira) to the homemaker wife, because

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[489] O A Ipaye 'The doctrine of bars to divorce: A case for its abolition' (1990) *Nigerian Current Law Review* 224; Carol Arinze-Amobi 'Discriminating/Inequitable distribution of marital property upon divorce – A critique' (2004) 1 *Unizik Law Journal* 189.
[490] Attah '*Family Welfare Law in Nigeria'* 185; Eunice N Uzodike 'Settlement and division of property on divorce' in J A Omotola *Essays on Nigerian Law* (1989) 111; Ashiru 318; Taiwo Ajala 'Socio economic consequences of marital failure in Nigeria' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 19-20.
[491] Ashiru 318.
[492] *Sodipo v Sodipo* (1990) 5 WRN 98; *Essien v Essien* supra 331-2.
[493] Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 251.
[494] Ajala 24.
[495] Ashiru 331.
[496] Barratt 'Whatever I acquire' 689, 701. When she works outside the home, she is usually a low income earner.
[497] Ashiru 317-318.
[498] Supra.

she failed to show direct financial contribution to the property even though she had been the primary homemaker in the marriage for over forty years.

The wide discretion given to judges by the Act was supposed to ensure justice and fairness to all the parties to the marriage, but judges choose to apply strict principles of property law[499] refusing to take into consideration the peculiar dynamics of marriage and the gendered division of labour indicative of the sociocultural climate of many countries, including Nigeria.[500]

The situation is abysmal under customary law. Customary law and courts do not recognize matrimonial property rights of women regardless of whether they made direct financial contribution to the acquisition of such property. Women simply cannot assert property rights under customary law.[501] They are themselves viewed as chattels.[502] In *Onwuchekwa v Onwuchekwa*[503] the court found that both the customary wife[504] and her property[505] belonged to the husband and he had a right of possession over them. The court applied the customary laws of *Isiukwuato*, a village in South-East Nigeria.

The position of customary law with regards to women and matrimonial property is that the rights of the customary law wife are subsumed under the rights of the husband giving rise to a situation similar to the 'femme coverture'[506] of mediaeval Europe. The Igbo wife can only acquire landed property through her husband.[507] She acquires land without the husband only where the marriage

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[499] Umukoro B E 'Settlement of matrimonial property upon divorce: Challenges and the need for reform in Nigeria and some other commonwealth countries in Africa' (2006) 1 *Commercial and Property Law Journal* 117; Chinedu Justin Efe 'The need for statutory introduction of the concept of matrimonial property in Nigeria' (2019) 63 *Journal of African Law* 105.

[500] Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 249, 251; Ajala 19; Barratt 'Whatever I acquire' 689.

[501] Diala 'Judicial Recognition' 94; Obi Samuel Nwankwo Chinwuba *Customary Law Manual* (1977) 321-322.

[502] CORI Thematic Report 22.

[503] Supra.

[504] *Kehinde & Anor v Akinlade* supra 305; In some customs, the widow is inherited (along with other property) by the deceased husband's kinsmen in the levirate marriage. Dankani 237.

[505] *Nwugege v Adigwe* supra.

[506] Diala 'The shadow of legal pluralism' 706; Yusuf Aboki 'Property rights of the customary and Islamic law spouse' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 149.

[507] Ashiru 320; Obi *Customary Law Manual* para 321. Emeasoba U B 'Land ownership among the Igbos of South-East Nigeria: A case for women land inheritance' (2012) 3 *Journal of Environmental Management and Safety* 100. Diala writes that this was caused by colonial rule. Women had better property rights in precolonial Igboland. Diala 'Judicial Recognition' 92.

was unstable.[508] Landed property is viewed as communal property owned by the family and therefore incapable of being alienated by women.[509]

The result is that upon dissolution of marriage, the customary law wife is cast off with nothing,[510] she may only lay claim to some personal effects and cooking utensils.[511] Even worse is the fact that her family is still required to refund the bride price paid by the husband's family.[512] This situation is prevalent in South-East Nigeria.

In summary, post-divorce property laws in Nigeria favour husbands.[513] Women have lost faith in a system that has failed them repeatedly[514] deeming the quest for marital property an exercise in futility which further depletes the meagre funds (if any) available to them. Diala found in his survey that some divorcees were totally unaware of the possibility of instituting proceedings in court for division of assets.[515] Ninety two percent of the divorced women in his sample did not contest matrimonial property post-divorce.[516]

4.1.3 Maintenance Orders

As outlined in Chapter Three, section 70 of the Matrimonial Causes Act empowers the court to provide for maintenance of the spouses and the children of the marriage after the breakdown and dissolution of marriage,[517] and during proceedings for an order of maintenance.[518] Furthermore, the section sets out factors which the court must consider prior to making an order of maintenance as the means or income of the parties, their earning capacity and conduct and all other relevant circumstances.[519]

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[508] Diala 'Judicial Recognition' 97.
[509] Ibid; *Nzekwu v Nzekwu* (1989) 2 NWLR (pt. 104) 373.
[510] O F Emiri 'Property rights of women in divorce: The need for a new equity' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 166-7; Nigerian Institute of Advanced Legal Studies 348.
[511] Diala 'The shadow of legal pluralism' 711. Diala 'Judicial Recognition' 111, 138. These items may be acquired without the husband's agency. *Duruaku v Duruaku & Another* (Unreported) Suit No. CC/EZ/IK/2D/2004 Judgment of 26 March 2009 at 2, reported in Diala 'Judicial Recognition' 161.
[512] Emiri 167.
[513] Ashiru 328.
[514] Diala 'Judicial Recognition' 111.
[515] Ibid.
[516] Ibid.
[517] See s. 70(1); *Damulak v Damulak* supra 151; *Adeleke Adejumo v Toyin Adejumo* supra.
[518] See s. 70(2); *Olu-Ibukun v Olu-Ibukun* supra.
[519] *Nanna v Nanna* supra 41; *Damulak v Damulak* supra 151; *Eluwa v Eluwa* (2013) LPELR 22120 (CA).

The essence of maintenance awards is to keep the parties (as much as possible) in the position they would have been in had the marriage not been dissolved.[520] Even though the maintenance provision is gender neutral, maintenance orders are usually sought by wives.[521] This is partly because the gendered division of labour puts women in economically-disadvantaged positions post-divorce thereby giving rise to the need for maintenance. It is also partly because the Nigerian socio-cultural clime, plus his pride and ego, make it impossible for the Nigerian man, seen as the primary provider for the family, to seek to be maintained by his wife.[522]

The Matrimonial Causes Act further provides for spousal maintenance as a prerequisite for the grant of a decree absolute.[523]

On the face of it, the Act seems to provide adequately for the maintenance of parties to a broken marriage. However, this is far from the case.[524] Spousal maintenance is hotly contested by parties[525] and rarely granted in Nigeria by judges in Nigeria.[526] In the words of Udo Udoma in *Coker v Coker*[527]

> The very idea of maintaining a wife after divorce appears to me to be foreign to the African conception of marriage and divorce.

In practice, child maintenance is the form of maintenance routinely granted in Nigeria. Successful claims for child maintenance are made every day.[528] However, because it is usually granted to women who have custody of their children, the dearth of spousal maintenance orders goes unnoticed. Judges believe that maintenance for the wife is implied in the maintenance for the children.[529]

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[520] *Menakaya v Menakaya* (1996) supra 301; Ifemeje *Contemporary Issues* 168-9; Attah '*Family Welfare Law in Nigeria'* 143-4; *Bazunu v Bazunu* (1975) 5 UILR (pt. 1) 125.
[521] Attah '*Family Welfare Law in Nigeria'* 13.
[522] Ifemeje *Contemporary Issues* 166; Ajai 11.
[523] Section 25.
[524] Ifemeje SC 'A legal appraisal of maintenance under the Matrimonial Causes Act 1970' (2004) 6 *A Journal of Nigerian Academic Forum* 140.
[525] Michael Attah 'Divorcing marriage from marital assets: Why equity and women fail in property readjustment actions in Nigeria' (2018) 62 *Journal of African Law* 427.
[526] Diala 'The shadow of legal pluralism' 711, Attah '*Family Welfare Law in Nigeria'* 143, *Bazunu v Bazunu* supra; Where it is granted, it is usually inadequate. See *Menakaya v Menakaya* supra.
[527] Suit No WD/19/196.
[528] *Buwanhot v Buwanhot* supra; *Odusote v Odusote* supra; *Tabansi v Tabansi* supra.
[529] Diala 'Judicial Recognition' 153.

The result is that the childless homemaker who has spent decades in a marriage may find herself in sudden penury upon divorce. In *Onabolu v Onabolu,*[530] the petitioner wife ceded custody of the children to the respondent and prayed for spousal maintenance whereupon counsel for the respondent claimed that if the children were to be educated by the respondent, then the petitioner could not justify why the respondent should maintain her. This position was upheld by the court.

Contested claims for maintenance breed enmity between spouses, particularly where the courts enable a wealthy spouse to avoid providing for a financially weaker spouse, usually the wife.[531] This leads to further adversity during the divorce proceedings.[532]

In summary, the award of maintenance is rare in practice for various reasons. The negative judicial attitude of courts is the primary reason, closely followed by the failure of women to apply for spousal maintenance.[533] Research has shown that women choose not to apply for maintenance to ensure a clean break from the relationship and avoid financial dependence on the ex-husband.[534] Where claims for maintenance succeed, the courts tend to award lump sum payments to encourage a clean break between the parties.[535]

Under customary law, the husband has a duty to maintain his wife[536] and children.[537] While the duty to maintain his children endures until the children come of age, whether or not the marriage subsists, the duty to maintain the wife terminates with the dissolution of the marriage.[538] The result is that the customary wife is not entitled to post-divorce maintenance even if she is in dire need of it and the husband is able to provide for her.[539] Where she has custody of the children, she may have access to his funds as a result of his provision of necessaries for his children.[540] However this is as far as it goes for the customary marriage wife whether the marriage is terminated judicially,

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[530] Supra para 159 F.
[531] Barratt 'Whatever I acquire' 689.
[532] Attah '*Family Welfare Law in Nigeria'* 133.
[533] Ibid 132.
[534] Diala 'Judicial Recognition' 111; L Amede Obiora 'Kindling the domain of social reform through law: A case study' (1995) 13 *Third World Legal Studies* 121; *Ayangbayi v Ayangbayi* (1979) 10–12 CCHCJI 225.
[535] *Menakaya v Menakaya* (2001) supra.
[536] Nwogugu 292; Nigerian Institute of Advanced Legal Studies 350.
[537] Ibid.
[538] Nwogugu 293; Nigerian Institute of Advanced Legal Studies 348; Rahmatian 295; Osondu 100.
[539] *Ndubueze v Ndubueze* CCAE/50/2013, 248.
[540] The attitude of the courts is that spousal maintenance is subsumed in child maintenance.

in court,[541] or non-judicially.[542] Neither the courts nor the family and society recognize the customary marriage spouse's right to maintenance.[543] Until recently, this situation held true for many African countries.[544]

This is one of the reasons that women seek to contract statutory marriages in addition to the customary marriages. Section 69 of the Matrimonial Causes Act excludes the application of the sections of Act providing ancillary relief following divorce to customary marriages.[545] This section effectively ensures that spouses of customary marriages cannot benefit from the only statute that provides for compensation or relief in divorce cases.[546] Notwithstanding the fact that the prospects for successful maintenance claims for statutory marriages are low, they are better than the nothing available under customary law.

In summary: in practice, the award of spousal maintenance to the economically weaker spouse is rare in Nigeria. The only form of maintenance which is readily available is that which arises when the spouse has the care and custody of the children of the marriage. The childless homemaker is very often cast off with nothing upon the dissolution of marriage whether she has contracted a statutory[547] or customary marriage.[548]

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[541] Nwogugu 294.
[542] Diala 'The shadow of legal pluralism' 723, 727.
[543] Diala 'Judicial Recognition' 113; Nwogugu 293; Ajai 14; Rahmatian 295.
[544] Rahmatian 300.
[545] It defines marriage to 'include a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law.' Note that this is no longer the position in Ghana which provides in section 41(2) of its Matrimonial Causes Act for ancillary matrimonial reliefs to be applied to both customary and polygamous marriages.
[546] *Enweozor* v *Enweozor* (2012) LPELR-8544(CA); Diala 'Judicial Recognition' 19. Agbede opines that this exclusion of customary law marriages from statutory protection does not reflect the fact that it is the most common form of marriage in Nigeria, nor that most Nigerians combine customary law marriage with statutory marriage. Agbede I O 'Recognition of double marriage in Nigerian law' (1968) 17 *International and Comparative Law Quarterly* 735.
[547] *Bazunu v Bazunu* supra; Attah '*Family Welfare Law in Nigeria'* 143.
[548] Diala 'Judicial Recognition' 103, 113; Nwogugu 293; Ajai 14; Rahmatian 295.

4.1.4 Stigma

The Igbos are a religious people.[549] The result is that among them,[550] marriage is still viewed as a sacred[551] and divine[552] institution which is primarily indissoluble.[553] Under customary law, marriage is a viewed as 'life's highest vocation'[554] ordained by the gods.[555] The statutory marriage is viewed almost in the same manner because the Igbos are predominantly Catholic and therefore contract marriage under the auspices of the Catholic Church, which views marriage as an indissoluble institution.[556] Therefore, religious and socio-cultural expectations make divorce undesirable[557] with the result that spouses, particularly women, struggle to ensure the stability and longevity of their marriage.[558]

As a result of this high premium placed on marriage, society frowns upon the dissolution of marriage such that, if a marriage breaks down, the spouses, their children and their families are subject to social stigma.[559] Family members,[560] particularly the spouses and the children, are engulfed in a cloud of shame which may affect the quality of their lives.[561] Perhaps the major brunt of this stigma is borne by the wife, whom society perceives as irresponsible, unable to withstand the rigours of married life or unable to sustain her marriage.[562] Societal status is achieved by women upon assuming the twin roles of wifehood[563] and motherhood.[564] Losing these roles diminishes her.[565] In Ntoimo's words: 'Every woman is expected to marry and remain married all her life …'[566]

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[549] Oforchukwu J I 'A Biblical and Theological Study (Analysis) of Marriage and Divorce Among Igbo Catholic Christians (Nigeria) (unpublished Master of Theology thesis, South African Theological Seminary, 2010) 30.
[550] Ntoimo & Akokuwebe 8.
[551] Hon. Justice Dolapo Akinsanya 'Divorce litigation in Nigeria: A judge's perspective' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 220; Oforchukwu 60; Nwoko KC 'Female husbands in Igbo land: Southeast Nigeria' (2012) 5 *The Journal of Pan African Studies* 73.
[552] Oforchukwu 40.
[553] Anthony Ekendu Onyeocha *Family Apostolate in Igbo land* (1983) 42; Taslim Olawale Elias *Nigerian Land Law and Custom* (1962) 292. This region has the lowest rate of divorce in the country. Ntoimo & Akokuwebe 4, 8.
[554] Oforchukwu 40.
[555] The supreme beings worshipped by the people.
[556] Ntoimo & Akokwube 8.
[557] Ibid.
[558] Ibid. Ajala 24.
[559] Achike 151; Enwereji 165; Diala 'Judicial Recognition' 55; Oforchukwu 73.
[560] Azinge 59.
[561] Hardon 5.
[562] Dankani 244-5; Akinsanya 220.
[563] Ola, Oni & Akanle 64.
[564] Ntoimo & Isiugo-Abanihe 386.
[565] Ola, Oni & Akanle 65.
[566] Ntoimo & Isiugo-Abanihe 386.

This stigma of divorce is further worsened by the divorce litigation process which is held in open court. This holds true for both customary divorce litigation[567] and statutory divorce litigation.[568] Members of the public are privy to the private and sometimes sordid details of the couple's lives.[569] To further worsen the situation, the details of court proceedings form part of public records[570] making them available to the public forever. This further fans the flames of stigmatization.

In a bid to avoid the stigma associated with a public divorce, spouses married under statutory law sometimes simply separate[571] and move on with their lives[572] while spouses married under customary law contract a non-judicial divorce.[573] As a result, spouses forfeit whatever advantage or protection they may have gained from the law. A survey carried out after the 2006 census shows that the rate of separation is higher than the rate of divorce in Nigeria.[574]

4.1.5 Reconciliation

The need to promote the stability of the institution of marriage — the bedrock of society and the union of two families[575] and sometimes the bedrock of communities — has led to the advancement of the cause for reconciliation when marital problems arise.[576]

As explained in Chapter Three, section 11 of the Matrimonial Causes Act imposes a duty on the courts to make adjournments during divorce proceedings to grant parties the opportunity to attempt reconciliation.[577] The Matrimonial Causes Rules urges counsel for the divorcing couple to provide them with information on avenues for reconciliation available through the provisions of the Act as

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[567] *Nwakuche v Nwakuche* supra.
[568] Section 103 of the Matrimonial Causes Act; *Menakaya v Menakaya* (2001) supra 203.
[569] The adversarial nature of litigation in Nigeria, coupled with the unfriendly social climate towards divorce, requires that the couple allege unprintable offences such as witchcraft, rape, sexual depravity, bestiality, to justify their desire to be divorced from the other party. In *Omo-efe Tawiyah v Stephanie Iseko Ayuba* SUIT NO. FCT/HC/CV/287/15, the wife accused the husband of drug dealing and indecent assault of their daughter while the husband accused the wife of leading an immoral and wayward life specifically, taking nude pictures with the intention of posting them on pornographic websites. He presented the nude pictures of his wife as exhibits.
[570] Section 15 of the Customary Court Law of Enugu State.
[571] Ifemeje *Contemporary Issues* 112.
[572] Ashiru 329.
[573] Achike 151; Enwereji 165.
[574] Ntoimo & Akokuwebe 4. A separated wife can still bear her husband's surname and the title of 'Mrs.' ensuring that she still appears to and is treated by society as a married woman. This position does not hold true for the divorcée.
[575] Oforchukwu 36.
[576] Diala 'Judicial Recognition' 112-113; Nigerian Institute of Advanced Legal Studies 326; Rahmatian 285.
[577] See also ss 12–14 which provide for the continuance of proceedings after reconciliation attempts, the inadmissibility of evidence gathered during the reconciliation attempt and the marriage conciliator's oath of secrecy.

well as organizations which provide marital reconciliation services.[578] Failure to comply with the provisions of this rule is fatal to the petition.[579] In practice, however, this requirement is a mere formality[580] as there is no machinery in place to check whether counsel actually complies with the Rules.[581] Counsel need only sign the certificate of compliance and the petition proceeds.

Section 17 of the Matrimonial Causes Act further grants spouses the opportunity to attempt reconciliation for short periods without losing the right of action accruing to them as a result of living separately.[582] The Act refers to this section in the marginal notes as 'additional provisions to encourage reconciliation' as set out in Chapter Three above.

In practice, because Nigeria is a deeply religious society where religious, cultural and social norms emphasize the sanctity of the marriage institution,[583] courts are inclined to encourage reconciliation in an effort to save marriages by granting long periods of adjournments to enable parties to reconsider their decision to dissolve their marriage. The attitude of the courts is that: '… a marriage shall not be dissolved if it is capable of being settled.'[584]

The result is that even though the Matrimonial Causes Act recommends 14 days' adjournment in Section 11, scholars[585] and the courts alike do not believe this period is sufficient, hence the courts often grant adjournment periods for a long time to really encourage reconciliation.

The situation is much the same under customary law. The need to preserve the sanctity of the marriage institution ensures that reconciliation is the primary goal when disputes arise within the

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[578] Order II Rule 2 of the Matrimonial Causes Rules; *Anyaso v Anyaso* supra 174-5.
[579] Ibid.
[580] Aina 11.
[581] Titi Kehinde 'Divorce law in Nigeria: A legal practitioner's viewpoint' in Ajai & Ipaye (eds) *Rights of Women and Children in Divorce* (1997) 201.
[582] *Abisuga v Abisuga* (1974) 6 CCHCJ 819.
[583] Nwogugu 140.
[584] *Amadi v Nwosu* supra; *Unegbu v Unegbu* supra. In the case of *Uka v Uka* supra, the wife/respondent failed to file an answer to her husband/petitioner's petition within the stipulated 28-day period as she was attempting mediation, with the help of her family and the church, to save the marriage. Default judgment was entered against her, in spite of the fact that she eventually filed an application for extension of time when all reconciliation attempts failed. On appeal, the court allowing her appeal held that attempting reconciliation was a good reason for her failure to file an answer within the stipulated period and the lower court's decision was set aside. In *Okafor v Okafor* (Unreported) Suit No. 0/60/71 the wife refused reconciliation attempts made by the husband and the court 'punished her' by refusing to make financial provisions for her following the divorce.
[585] Ijaiya 87.

family.[586] Mediation is deeply enshrined in the Nigerian culture. Customary court rules therefore provide for reconciliation where possible at any point during the proceedings.[587]

However, the emphasis on reconciliation is often prejudicial to women. They may be prevailed upon, sometimes even threatened, by family and friends to stay in a bad marriage for several reasons: to save the family the cost of refunding the bride price,[588] or to save them the shame and stigma of a divorce.[589] Upon divorce, they may also be prevailed upon to forego some rights in a bid to sue for peace between the families.[590] In *Olowoofoyeku v Olowoofoyeku*[591] the wife instituted a divorce petition whereupon, the husband cross-petitioned for divorce as well. The wife was prevailed upon by family, friends and church elders to withdraw her petition. The husband however refused to withdraw his petition. The wife was further advised to concede custody to the husband (because she was unemployed) and subsequently, the divorce decree, as well as custody of the children were granted in the husband's favour. Unfortunately, when she appealed the decision of the lower court, the court of appeal ruled against her, relying on her choices in the lower court.

In *Okoye v Okoye*[592] the customary court, in a bid to encourage reconciliation, granted an order of separation to the husband petitioner who sought an order of divorce. While the court was attempting to save the marriage, it placed the woman in peril because the husband could have carried on with his life, marrying as many wives as he pleased but the respondent wife would have been bound to him still, married (in name) but unmarried in essence and unable to remarry.

Among the Igbos, once parties go to court, chances of reconciliation diminish. This is because, it is against the ethos of the people to litigate in court against persons considered to be family or friends.[593] For example, in the case of *Essien v Essien,*[594] a wife sought an interlocutory injunction

[586] Nwogugu 140.
[587] Section 13 of the Customary Courts Law of Rivers State, 1999; Obi *Modern Family Law* 369; *Anyaegbunam v Anyaegbunam* (1973) 3 ECSLR 243.
[588] Diala 'Judicial Recognition' 147.
[589] Ibid.
[590] Ibid 107-8.
[591] Supra.
[592] *Ikenga Okoye v Chinelo Okoye* supra.
[593] Obiora 118.
[594] Supra.

in court to stop her husband from selling the matrimonial home. The husband thereafter filed for divorce.[595]

The provisions of the law on reconciliation and the court's attitude are laudable because they are aimed at saving salvageable marriages, one of the cardinal goals of a good divorce law. However, these provisions are counterproductive because, the sociocultural orientation of the people requires that the spouses must have explored multiple avenues for reconciliation before the institution of the divorce petition. When a marriage is in trouble, the couple undergoes several levels of informal dispute resolution through multiple agencies such as the extended family, religious organizations such as the church, as well as friends and professional counsellors.[596] Divorce is usually the last resort.

The provisions for adjournment of already protracted divorce proceedings therefore further protracts the litigation proceedings, delaying the healing process necessary for the spouses and children of the marriage. Adjournment increases the economic cost of the divorce to parties, fails to achieve the purpose for which it was created,[597] puts the parties (especially the economically weaker spouse) in a state of limbo — married yet not married — and increases the risk of harm through domestic violence to the vulnerable members of the family.[598]

4.1.6 Bitterness and the Grounds for Divorce

A good divorce law should reduce the bitterness associated with divorce. Perhaps the origin of most of the problems associated with divorce in Nigeria is rooted in the grounds for divorce, particularly the facts which parties must prove to be awarded a divorce decree.

As set out in Chapter Three, section 15 of the Matrimonial Causes Act provides for divorce based on irretrievable breakdown, but requires the petitioner to prove one or more of the following facts to prove the irretrievable breakdown, i.e., willful and persistent refusal to consummate the

[595] Attah '*Family Welfare Law in Nigeria'* 194.
[596] Diala 'Judicial Recognition' 111; Ifemeje *Contemporary Issues* 119; Kehinde 193; See the cases of *Tabansi v Tabansi* supra and *Uka v Uka* supra.
[597] Kehinde 201.
[598] Herring 132.

marriage,[599] adultery and intolerability, [600] intolerability simpliciter,[601] desertion,[602] separation for a two-year period and the other spouse does not object to a divorce,[603] separation for a three-year period,[604] refusal to comply with an order of restitution of conjugal rights,[605] and presumption of death.[606]

Nigeria runs a mixed system of fault and no-fault divorce. While claiming by virtue of section 15(1) of the MCA that the faultless reason of irretrievable breakdown of marriage is the only ground for divorce, 5 of the 8 facts necessary to prove this ground are fault-based. They are, willful and persistent refusal to consummate the marriage, adultery and intolerability, intolerability simpliciter, desertion and refusal to comply with an order of restitution of conjugal rights.

The use of these facts invariably leads to a bitterly acrimonious process,[607] where parties adduce evidence to establish the other party's wrongdoing in a bid to achieve divorce. This is further aggravated by legal practitioners who often advise petitioners to combine several facts thereby making the proceedings even more acrimonious.[608] Also, it has become increasingly difficult to prove these facts due to heightened evidential obligations[609] and this further worsens the acrimony generated by proceedings as parties go to great lengths to malign each other. This bitter oftentimes dirty legal battle leaves the parties lifelong enemies, damaging any prospect for an amicable post-divorce parenting relationship[610] and leading to additional trauma for the children of the marriage, dwindled financial resources for the parties and costs to the state.

In the divorce litigation battle it matters not that both parties may wish to be divorced.[611] What matters is in whose favour the divorce decree is granted as was shown in *Onabolu v Onabolu*.[612]

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[599] Section 15(2)*(a)*.
[600] Section 15(2)*(b)*.
[601] Section 15(2)*(c)*.
[602] Section 15(2)*(d)*.
[603] Section 15(2)*(e)*.
[604] Section 15(2)*(f)*.
[605] Section 15(2)*(g)*.
[606] Section 15(2)*(h)*.
[607] Ifemeje *Contemporary Issues* 78.
[608] *Ajai-Ajagbe v Ajai-Ajagbe* (1978) 10-12 CCHCJ 182.
[609] *Dunu v Dunu* Unreported, Judgment of the High Court of Lagos State, Ikeja Division, Suit No ID/109WD/2000, judgment of Phillips J delivered 28/11/2003; *Bibilari v Bibilari* supra.
[610] Ijaiya 80.
[611] Note that consensual divorce is not legal in Nigeria.
[612] Supra para 158 C-D.

In that case, counsel for the husband respondent pled the court to disregard the wife petitioner's petition and find in favour of the husband respondent's cross petition. Meanwhile both parties sought dissolution of the marriage and agreed that custody of the children be awarded to the husband. The bone of contention was the wife's prayer for monies owed to her and spousal maintenance. Counsel for the husband further prayed that in the event that the wife's claim was upheld, she would not be entitled to costs.[613]

Parties have been known to accuse each other, sometimes falsely, of witchcraft or the practice of juju,[614] gross infidelity or sexual depravity,[615] domestic violence or aggravated assault,[616] indecent assault of the children of the marriage,[617] amongst other reputation-damaging matrimonial offences.

Under customary law, the grounds for divorce are less defined[618] than the grounds in statutory law.[619] However they are no less damaging. Parties may seek divorce on grounds of their spouse's alleged adultery (of the wife only), laziness, witchcraft or practice of juju, disrespect, impotence, infertility or ill-treatment.[620] These are all inflammatory allegations, leading to acrimonious proceedings and soured post-divorce relationships for the spouses and their families. Parties may also seek divorce for no clear and rational reason, but simply because they are 'tired of the marriage'.[621] Simply put, a spouse may be unceremoniously and suddenly divorced for no reason other than the other party's sudden lack of interest in the marriage.[622]

The fault-based grounds for divorce constitute a major problem of the divorce process in Nigeria as they exacerbate the adversarial nature of litigation, creating long-lasting negative consequences for the divorcing family, the state and the stability and sanctity of the institution of marriage. Recognizing this, parties boycott the divorce process altogether, choosing instead to separate with

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[613] Ibid para 161H.
[614] *Sotomi v Sotomi* (1976) 2 FNR 174.
[615] *Alabi v Alabi* supra.
[616] *Ayangbayi v Ayangbayi* supra.
[617] *Stephanie Omo-Efe Tawiyah v Omo-efe Tawiyah* Unreported Judgement delivered HC of the FCT Dated 27th May 2013 Suit No. FCT/HC/PET/15/12.
[618] Obi in *Modern Family Law* opines that the appropriate terminology is 'reasons' and not 'grounds' 306.
[619] Nwogugu 233.
[620] Obi *Modern Family Law* 291-2, 366-7; Nwogugu 233-4; Enemo 225-6; Osondu 98; s 7 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order WRLR 456 of 1958; Rahmatian 286; Enwereji 166.
[621] Dankani 247; *Ononiwu v Ononiwu supra* 3.
[622] Achike 150-1.

whatever is left of their dignity and reputation intact and to avoid stigma for themselves and their families.[623]

4.1.7 Custody

As discussed in Chapter Three, section 71 of the Matrimonial Causes Act provides that the best interests of the child must be the paramount consideration in child custody matters. Before the introduction of the paramountcy principle, custody was viewed as a parental right,[624] in particular, a paternal right.[625] This is rooted in the patrilineal culture of most of the ethnic groups in Nigeria including the Igbos of South-East Nigeria.[626] With the advent of the paramountcy principle enshrined in the Child's Rights Act,[627] came child-friendly provisions such as section 71 of the Matrimonial Causes Act.

While laudable, this provision failed to provide objective criteria for the determination of the best interests of the child. Rather, it gave the courts a wide discretion to make orders it deems proper in the circumstances, leaving the provision open to individual and subjective interpretation. The Supreme Court in *Williams v Williams*[628] therefore proposed several factors to be considered in custody cases which have been loosely followed by other courts. The factors include sex, age and wishes of the child, adequacy of arrangements for the child, keeping siblings together, financial ability of parents.[629]

Judicial activism has made it possible for the courts to apply the welfare or paramountcy principle over and above all other considerations in custody cases,[630] including the rights of the father.[631]

Despite these advancements, in practice, the award of custody is still perceived by the courts as a paternal entitlement as will be shown below. Fathers have been known to seek and be awarded custody of children even where they intend to place such children in the care of third parties such

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[623] Ifemeje *Contemporary Issues* 112; Ashiru 329.
[624] Attah '*Family Welfare Law in Nigeria'* 45, 50, 53.
[625] Ibid 49.
[626] Ibid 45, 50, 53.
[627] No. 26 of 2003.
[628] Supra.
[629] *Nanna v Nanna* supra; *Damulak v Damulak* supra 151; *Odogwu v Odogwu* supra.
[630] *Obajimi v Obajimi* supra 23.
[631] See for example *Okwueze v Okwueze* supra.

as grandparents,[632] stepmothers,[633] and other relatives.[634] This paternal entitlement is often cloaked under reasons such as sex of children, ethnic affiliation, amongst others. In *Oyelowo v Oyelowo*,[635] the court granting custody to the father found that the 'rightful and natural place' for boys was with their fathers. In *Nwosu v Nwosu,*[636] the court found that leaving the children with their mother (a non-Igbo woman) would deny the children the opportunity to learn about their father's culture (the Igbo culture).

The court's reliance on the financial ability of the parents as a factor to determine custody has also furthered the cause of paternal entitlement to custody. The result is that the economically weaker spouse (in the Nigerian context, almost always the wife) may lose custody simply because she lacks the financial power to provide for the child, even where she is in the best position to care for the child.[637] Many divorce petitions are undefended because wives are unable to bear the cost of legal representation.[638] In such cases, custody is granted in favour of the party before the court, usually the father.[639]

The only factor that favours mothers sometimes, even where they are the financially weaker party, is the tender years doctrine which posits that children of tender years will fare better in the care of their mothers.[640]

Another problem associated with divorce petitions which include prayers for custody is the win/lose approach adopted by the courts; where one party 'wins' custody of the children and the other 'loses'. Custody cases are therefore fiercely adversarial and parties are forced to adduce evidence to prove that they have a better claim and the other party is an irresponsible or unfit parent. Mudslinging is a tool employed in custody battles with spouses accusing each other of all sorts of atrocities to show unfitness for custody. Examples from decided cases include accusations

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[632] *Bello v Bello* (1979) 1-3 CCHCJ 179.
[633] *Buwanhot v Buwanhot* supra.
[634] *Afonja v Afonja* (1971) UILR 105.
[635] Supra.
[636] Supra.
[637] *Nzelu v Nzelu* (1997) 3 NWLR (pt. 494) 491. In this case, the courts awarded custody to the father after considering the facts that the father earned much more than the mother and lived in a 3-bedroom apartment while the mother lived in a 2-bedroom apartment. See also *Ihonde v Ihonde* (Unreported) WD/85/70 Judgment of the High Court of Lagos State, delivered 17th April 1972.
[638] Ajala 29.
[639] Attah '*Family Welfare Law in Nigeria'* 66.
[640] *Tagbo v Tagbo* (Unreported) High Court of East Central State (1972); *Odogwu v Odogwu* supra.

of practicing juju,[641] indecent assault of the child,[642] wickedness and cruelty to the child,[643] and immoral conduct likely to affect the wellbeing of the child.[644] In all of this, the wishes of the child, — though a factor articulated in the *Williams* case — are rarely considered.

Under the customary law, fathers have automatic right of 'custody'[645] of the children borne of their wives.[646] This position may be contested only where the wife's bride price has not been paid. As soon as this requirement of marriage is fulfilled, all children borne of the wife (whether or not they are his biological children) belonged to the husband and his family[647] and bear his surname.[648] This rule is so strictly observed in some localities that if upon divorce, the wife's family fails to refund the bride price, children born of the wife to another man, will belong to the first husband.[649]

Upon dissolution of marriage, custody of the children is automatically awarded to the father,[650] irrespective of his conduct during the marriage,[651] or his ability to care for the children.[652] The courts have found the father's right to custody of his children to be absolute.[653] So much so that upon his death, his right to custody of the children devolves to his male next of kin, irrespective of the wishes of the mother. The result is that when a man dies, the court in applying customary law will award custody of his children to his family instead of his wife. There are, of course exceptions to this rule such as where the child is nursing or still of a tender age. In such cases, the mother is allowed temporary custody until the child is old enough to return to the father.[654]

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[641] *Olatedohun v Olatedohun* supra.
[642] *Stephanie Omo-Efe Tawiyah v Omo-efe Tawiyah* supra.
[643] *Alabi v Alabi* supra.
[644] Ibid; *Stephanie Omo-Efe Tawiyah v Omo-efe Tawiyah* supra.
[645] Children are regarded as human assets or a part of matrimonial property under customary law. Note that in actual parlance, the word used is 'ownership' Diala 'Judicial Recognition' 93, 104.
[646] Egu 35; Ajai 16.
[647] Ajai 15.
[648] Diala 'Judicial Recognition' 104-5.
[649] *Edet v Essien* supra: the court finally held this custom to be repugnant to principles of equity, justice and good conscience.
[650] Obi *Modern Family Law* 319, 376; Osondu 111.
[651] Obi *Modern Family Law* 376.
[652] Ibid.
[653] *Abiakam v Anyanwu* supra.
[654] Obi *Modern Family Law* 376; Elias *Groundwork of Nigerian Law* 297; Diala 'Judicial Recognition' 105.

While this paramountcy principle has been enshrined in existing laws for over 50 years,[655] the courts have only recently begun to put it into practice with the integration of the welfare principle into customary court laws.[656] In *Okoye's* case[657] the customary court of appeal overturned the lower court's judgment which, recognizing a deceased father's absolute paternity right, granted custody to a financially challenged uncle instead of the boy's mother. In *Mrs Chinyere Egbo v Augustine Egbo,*[658] the court, allowing the appeal of the appellant mother overturned the decision of the lower court, which had awarded custody of the widowed appellant's male child to the deceased father's brother according to the *Nnewe* custom.[659] Kehinde has found that in practice, custody of children 7 years and above is still awarded to fathers by customary courts in Lagos state whether or not this was in the best interest of the children.[660]

It is submitted that in spite of the statutory provisions enshrining the paramountcy principle, the sociocultural atmosphere of the country, which invariably leads to prejudice on the part of the male-dominated judiciary,[661] affects the outcome of custody awards both under customary[662] and statutory marriages. The success of the interpretation and application of these provisions depends wholly on the judiciary. A reorientation of the judiciary is therefore necessary to ensure the consideration of the interests of the children over and above all other interests.

4.1.8 Patriarchal Principles of Customary Law

As discussed above, under customary law, women are perceived to be subordinate to men.[663] The wife is more often than not perceived to be a chattel, owned and maintained by the husband.

Upon divorce, the wife is cast off like a chattel, losing the right to maintenance as well as rights to any share in the family property or land to which she may have contributed financially or otherwise

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[655] Section 14 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order 1958 provides that the welfare of the child should be the primary consideration in all cases involving the child.
[656] See s 16(1) of the Enugu State Customary Court Law.
[657] See *Ikenga Okoye v Chinelo Okoye* supra; *Ferdinand Ude and 3 Ors v Josephine Ude* (Unreported) Suit No. CCAE/118/2010 Judgment of the Customary Court of Appeal Enugu State delivered 21st February 2011 reported in Anyafulude 234.
[658] (Unreported) Suit No. CCAE/115/2012 Judgment of the Customary Court of Appeal of Enugu State delivered on 23rd February 2011 reported in Anyafulude 236.
[659] Nnewe is a village in South-East Nigeria.
[660] Kehinde 195.
[661] Ajai 195; Ashiru 328.
[662] Ajai 16.
[663] Ibid.

during the course of the marriage. She may also most likely lose custody of any children of the marriage who by customary law 'belong' to the husband. The result is that the post-divorce principles of customary law are unfair to the customary law wife.

According to Ayua,[664]

> From a modern perspective, the sheer injustice and calculated self-interest of these traditional norms is breath taking. They are designed to render divorce totally unviable option for women but at the same time have men unfettered to discard wives they may be tired of and even profit by it in so doing.

Several customary law institutions contribute to the disempowerment of the customary law wife upon divorce.

Bride Price. The payment of bride price[665] further propagates the idea of the customary wife as a piece of property bought by the husband and with which he can do as he pleases. Upon divorce, the husband usually seeks a refund of this bride price, [666] like someone who has bought a faulty product and wishes to return it. Also, the refund of the bride price signifies the end of the marriage[667] and the freedom of the customary law wife to remarry.[668] Many customary law wives have found themselves thrown out of the marital home (in other words, no longer married) yet unable to remarry as the husbands refuse to accept a refund of the bride price, thus trapping them.[669] The continued acceptance of the practice of bride price payment is detrimental to the status of women in the traditional Igbo society and contributes to the marginalization of the customary law wife upon divorce.

Non-judicial Divorce:[670] This is the termination of marriage without recourse to the customary courts.[671] It is an accepted method of dissolution of customary marriage in South-East Nigeria.[672]

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[664] Ayua IA *Law Justice and the Nigerian Society* (1995) 212.
[665] Section 4 of the Customary Marriage (Special Provisions) Law of Enugu State.
[666] Izunwa 'A critique' 36.
[667] If the bride price is not refunded, the court will hold that such a marriage still subsists. *Lawal-Osula v Lawal-Osula* (1995) 10 SCNJ 84 or (1995) 9 NWLR (pt. 419) SC 59.
[668] Egu 35.
[669] They have since learnt to pay the bride price to the court or to the village head to avoid this. Obiora 118.
[670] See 3.2.2 above.
[671] *Okpanum v Okpanum* supra.
[672] Rahmatian 285.

It may be consensual or unilateral[673] and is usually effected by an act[674] or acts of the parties such as the eviction of the wife from the matrimonial home by the husband[675] or the abandonment of the matrimonial home by the wife.[676]

The non-judicial method is rife with disadvantages, the major one being that parties can divorce their spouse at will and without their consent. Many an unsuspecting spouse, usually the wife, has been thrown out unceremoniously as a result of the existence and continued acceptance of this method. The unilateral nature of this method also means that upon eviction from the matrimonial home, the wife faces automatic forfeiture of matrimonial property.[677] This method of divorce also provides no records for the parties and a recalcitrant party may choose to deny the divorce at any time. It therefore puts women in a precarious position.

Polygamy. Polygamous marriages are accepted under customary law in Igboland.[678] A study by Ukaegbu shows that over a third of his subjects had contracted polygamous marriages.[679] In precolonial Nigeria, polygamous marriages were contracted for economic reasons.[680] They were indicative of a man's socio economic status. The more wives a man had, the more hands he had to work on his farms, especially if the wives bore many children.[681] Today, polygamous marriages are mostly contracted where a couple is childless or unable to bear a male child.[682]

A school of thought however posits that the average African is polygamous by nature and that monogamy was introduced by colonialism and Christianity.[683]

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[673] *Uke v Iro* supra 197; Izunwa 'A critique' 32; Nwogugu 232.
[674] *Ononiwu* v *Ononiwu supra.*
[675] Diala 'Judicial Recognition' 101.
[676] *Uke v Iro* supra 196.
[677] Diala 'Judicial Recognition' 157.
[678] Edmund O Egboh 'Polygamy in Igboland' (1972) 22 *Civilizations* 431; Diala 'Judicial Recognition' 104.
[679] Alfred O Ukaegbu 'Fertility of women in polygynous unions in rural Eastern Nigeria' (1977) 39 *Journal of Marriage and the Family* 397.
[680] Oforchukwu 37; Diala 'Judicial Recognition' 74.
[681] Egboh 432.
[682] Ibid 436.
[683] Ibid 437; In line with this philosophy, in Lagos State, polygamy is accepted even under statutory law. The state expunged the section of its criminal code which criminalizes bigamy stating that no one had been convicted of the crime in decades and the provision was therefore redundant. Lagos State is the only southern state in Nigeria where a man can contract multiple statutory marriages simultaneously.

Polygamous marriages in Igboland are always in favour of the husband.[684] That is, a man can marry multiple wives simultaneously but a woman can marry only one husband at a time.[685] The result is that a husband is not obliged to terminate a previous marriage in order to marry a new wife – he is able to contract as many valid customary law marriages as he wishes. The situation is not the same for the wife. She can only contract one valid marriage at a time, so a previous marriage must be dissolved before she can contract a new one. This creates a significant power imbalance in divorce negotiations because while the woman needs a divorce to move on, the husband does not.[686]

Economically, women in polygamous marriages fare worse than those in monogamous marriages and are more likely to be financially dependent on their husbands.[687] Consequently, they are also more disadvantaged[688] and vulnerable upon divorce.[689]

Customary Family Mediation[690] When couples decide to separate or one spouse decides to abandon the marriage, members of both families first try to mediate the issues — in a family meeting — in a bid to encourage the parties to settle and reconcile.[691] Customary family mediation is essentially a dispute resolution meeting between families geared towards reconciliation.[692] It has been defined as the resolution of disputes within the family by older family members and elders[693] with the goal of reconciliation.[694] Customary family mediation is common in most African societies because the (extended) family is the first port of call when disputes arise within the family.[695] This process is hinged on the maintenance of peace and harmony in the community,[696] it prioritizes communal

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[684] Obi *Modern Family Law* 266.
[685] *Kpelanya v Tsoka & Anor* supra.
[686] Generally, it is easier for men to marry and remarry. Ntoimo & Akokuwebe 7.
[687] Rachel J Howland & Ashley Koenen 'Divorce and Polygamy in Tanzania (2014) at 15, available at *http://ecommons.luc.edu/social_justice/15,* accessed on July 18 2018.
[688] Ajai 16.
[689] Howland & Koenen 7.
[690] Chieka Ifemesia *Traditional Humane Living Among the Igbo: An Historical Perspective* (1979) 70
[691] Diala 'Judicial Recognition' 112-3; Rahmatian 285; Button, Moore & Himonga 12-14.
[692] Anne Griffiths 'The problem of informal justice: Family dispute processing among the Bakwena: A case study' (1986) 14 *International Journal of the Sociology of Law* 362; Button, Moore & Himonga 12-14.
[693] Boniface 'African-style mediation' 391; Jacqueline Nolan-Haley 'Mediation and access to justice in Africa: Perspectives from Ghana' (2015) 21 *Harv. Negot. L. Rev.* 78, 84.
[694] Amadou Dieng 'ADR in Sub-Saharan Countries' in Ingen-Housz, A (ed) *ADR in Business, Practical Issues Across Countries and Cultures* (2011) 11; Button, Moore & Himonga 8, 12; Boniface Amanda 'A humanistic approach to divorce and family mediation in the South African context' (2012) 12 *AJCR* 112; Griffiths 'The problem of informal justice' 362.
[695] Rahmatian 285; Button, Moore & Himonga 8; Nolan-Haley 84.
[696] Nolan-Haley 81; Boniface 'A humanistic approach' 112, 114.

relationships and interests over individual interests.[697] The result is that in a bid to achieve these goals, rather than dissolve a dead marriage, for example, parties may be pressured into less than satisfactory and sometimes unsafe outcomes - which may be contrary to their interests - such as reconciliation or separation with room to consider reconciliation at a later date.[698] Where parties are encouraged to separate rather than divorce, the situation has no effect on the men who are able to contract as many marriages as possible simultaneously, however it leaves the customary wife in a state of limbo, economically disadvantaged,[699] cast away and uncared for by an 'ex-husband' yet unable to contract another marriage. This process is mostly disadvantageous to women[700] for several reasons. Cultural norms which govern customary family mediation tend to favour men over women as a result of perceived gender roles in most African communities which portray women as subordinate to the men, and noble, and self-sacrificing relationship builders and home makers.[701] The result of this gendered role is that during customary family mediation, especially in cases involving dissolution of marriage, women are encouraged to give up interest in economic assets in the interest of peace, for child custody[702] or for the interests of the larger family/community. They are also unable to negotiate effectively, if at all, as a result of power imbalance flowing from weaker economic bargaining power,[703] gender inequalities.[704]

There is the unspoken belief that the wife sustains the marriage.[705] During these family meetings, pressure is therefore mounted upon women to bend over backwards to accommodate their husbands and bear her problems in order to save the marriage, prevent stigmatization for the families, and protect the children of the marriage.

The reconciliation goal of the family mediation process is also disadvantageous to women. Ultimately, the interests of the institution of marriage, the extended family, the community and

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[697] Boniface 'African-style mediation' 391; Boniface 'A humanistic approach' 118; Nolan-Haley 79.
[698] Button, Moore & Himonga 8-9.
[699] Ibid 9.
[700] Anne Griffiths 'Mediation gender and justice' (1998) 154 *Mediation Quarterly* 337; Button, Moore & Himonga 8; Elsje Bonthuys 'Family contracts' 121 *South African Law Journal* 879-80.
[701] Bonthuys 'Family Contracts' 896.
[702] Ibid 897.
[703] See generally Griffiths 'Mediation gender and justice'
[704] See a case study conducted in Botswana in Griffith's 'The problem of informal justice' where a divorced wife was unable to negotiate for economic assets effectively as a result of power imbalance and gender inequalities; See also Griffiths 'Mediation, gender and justice' 337; Bonthuys 'Family Contracts' 897.
[705] Dankani 244-5.

sometimes the children are considered over and above that of the wives, who become the ultimate sacrificial lamb. In some cases, the wife's family, may refuse to return the bride price if she, against their wishes, insists on leaving the marriage – if they perceive that the end of the marriage may result in the loss of some benefits. Diala found that nowadays, men do not attend family mediations and even when they do, they do not abide by the decisions reached at these meetings.[706]

In addition to the above discriminatory principles of customary law, matrimonial causes in customary marriages favor men over women, especially in matters relating to divorce, child custody, maintenance and division of assets.[707]

In summary, under customary law, post-divorce outcomes for women are particularly prejudicial.[708] According to Diala,[709] '… the heartrending circumstances surrounding divorce in southern Nigeria epitomize the demeaning socio-cultural position of women under customary law.' This drives the need to contract double marriages. The statutory marriage supplies the security which the customary marriage cannot.[710]

4.1.9 Negative Judicial Attitude

A wife fled her matrimonial home with her four minor children (all under 10) as a result of the husband's maltreatment. The husband instituted proceedings in which the learned judge said,

> … there is also the fact that the defendant, having deserted her husband is now living with the children as a single mother. Her own mother who owns and lives in the house where these children are staying is also a single woman being divorced of long-standing (sic). I have the view that most women who are not under the influence of any man have no inhibitions or morals.'[711]

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[706] This is exemplified in the case of *Olowoofoyeku v Olowoofoyeku* supra where a couple was discouraged from getting a divorce after which the wife withdrew her petition for divorce and the husband went ahead with his cross-petition.
[707] Mwalimu 624.
[708] Emeka Chianu 'The horse and ass yoked. Legal principles to aid the weak in a world of unequals' (2007) Inaugural lecture University of Benin 153-4.
[709] Diala 'The shadow of legal pluralism' 715.
[710] Olokooba 199.
[711] *Nwosu v Nwosu* (2012) supra. On appeal, the Court of Appeal reprimanded the lower court for these words.

The statement above presents a snapshot of the prejudicial attitude of the judiciary. This poses a huge problem for women as they are faced with a male-dominated judiciary[712] with preconceived socio-cultural ideas of women's role in society.[713] Courts repeatedly rely on negative social and religious values[714] which disadvantage women.[715]

This is worsened by the fact that wide discretion is given to the judiciary to interpret the provisions of the customary and statutory laws on marriage particularly in matters ancillary to divorce such as maintenance, division of property and child custody. In *Akinboni v Akinboni,*[716] the court rejected the respondent wife's claim to joint ownership of the marital property. Instead, it granted her the right to reside on the marital property depending on her 'good behaviour'.

In his thesis, Diala explores judicial attitudes to the post-divorce division of matrimonial property in customary marriages in South-East Nigeria. He interviewed 86 participants and found that women were denied matrimonial property post-divorce as a result of negative judicial prejudices about women.[717]

Critics claim that judges fail to interpret rules to the benefits of spouses and children[718] and that therefore, the creation of guidelines for the determination of matters ancillary to divorce should not be left to the courts.[719] Instead, legislation should detail clear and equitable criteria for the determination of such matters.[720] They assert that the discretion given to the judges is too wide.[721]

The reorientation of the judiciary[722] is an absolute necessity to effect substantial change to the application of provisions of family law in Nigeria and to adequately protect the rights of women

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[712] Ashiru 328; Ajai 195.
[713] Obiora 124.
[714] Judges have been known to quote the bible at parties in court. *Ethelbert Nonyelu v Regina Umennuihe and Umennuihe Adawu* (unreported) Suit No CC/ID/80/2004 Judgment of 30 march 2010 reported in Diala 'Judicial Recognition' 169 where the judge referred to one the parties as a liar and warned that she would end up in the lake of fire, referring to hell as described in the last book of the Bible, the book of Revelation.
[715] Ashiru 331; Ifemeje *Contemporary Issues* 52; O A Ipaye 'Reflections on the law and practice of family law in Nigeria' in *Perspectives in Laws and Justice*. Essays in Honour of Justice Eze-Ozubu (1996) 213.
[716] Supra 564.
[717] Diala 'Judicial Recognition' 189-90.
[718] Umukoro 122.
[719] Arinze-Amobi 198.
[720] Ajai 249.
[721] Umukoro 123; Ifemeje *Contemporary Issues* 197.
[722] Ajala 29.

and children upon divorce. Judicial attitude must change if ever equality or fair treatment can be achieved under both customary and statutory marriage laws.[723]

4.1.10 Accessing the Court System

It is common knowledge in Nigeria that litigation is a resource intensive venture. It requires time and money, both of which the disputants can ill afford sometimes.[724] Divorce litigation is not an exception. The cost of accessing the courts, and retaining a legal practitioner is prohibitive. The result is that only the financially buoyant can afford professional legal services in Nigeria. In practice, only the rich can get a proper divorce. Families might find hard-earned and much-needed resources squandered during the years spent in divorce litigation. The prohibitive cost of litigation in Nigeria constitutes a very real problem for the homemaker wife.[725] Women are thrust into poverty upon divorce, particularly where they have been homemakers, have young children and do not have employment. They are obliged to depend on the good will of family and friends,[726] and in extreme cases have turned to sex work to make ends meet.[727]

Diala found that the majority of divorce cases are filed by men[728] while Ajala found that 65% of the divorce petitions in Nigeria are undefended, primarily because the respondents (usually the wives) cannot afford to contest such petitions.[729] This invariably means that where there are children of the marriage and divisible matrimonial property, the wife loses access to both as well as any hope of maintenance.[730]

In addition to the financial cost of litigation, the time cost of litigation is another barrier to access to justice in divorce proceedings.[731] As mentioned in 3.3.8 above, a contested divorce based on the fault provisions can take years to determine, and if the consequent judgment is appealed, the parties

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[723] Ajala 25; Ajai 12, 16.
[724] A civil case can take decades to be resolved. See Emilia Onyema & Monalisa Odibo 'How Alternative Dispute Resolution Made a Comeback in Nigeria's Courts' available at *https://www.africaresearchinstitute.org/newsite/publications/counterpoints/alternative-dispute-resolution-made-comeback-nigerias-courts/,* accessed on 29 June 2018.
[725] Ifemeje *Contemporary Issues* 89; Ajala 29.
[726] Hardon 5.
[727] Enwereji 168; Hollos M 'Migration, education, and the status of women in Southern Nigeria' (1991) 93 *American Anthropologist* 852, 867.
[728] Diala 'Judicial Recognition' 146.
[729] Ajala 29.
[730] Attah '*Family Welfare Law in Nigeria'* 66.
[731] Ifemeje *Contemporary Issues* 206.

may be embroiled in a protracted legal battle.[732] As discussed above, in *Menakaya v Menakaya*[733] the court ordered a rehearing *de novo* after eight years.[734] In *Kafi v Kafi*[735] the court took one year and one month from the date of the decree *nisi* to make a ruling on the ancillary relief, in addition to the years already spent in court on the principal relief.

Diala found that a number of his participants who had managed to find the funds to institute or defend divorce proceedings were forced to abandon them after the first attempt or as a result of series of appeals. In one case, a wife obtained judgment in her favour at the lower court but the husband appealed twice until, battle-weary, she settled out of court, and dropped all her claims, settling instead for the husband's agreement to pay the school fees of the children.[736]

Women and children are often the worst hit by the negative effects of divorce in Nigeria.[737] It is therefore important that they are afforded the opportunity to better negotiate the terms of their divorce. A solution must be found for the time and money cost of divorce litigation to ensure access to justice for all the members of the divorcing family, particularly the economically weaker spouse.

4.1.11 Overburdened Court Dockets

The primary dispute resolution process available in Nigeria is litigation through the courts.[738] The operation of this one-track dispute resolution process is one of the reasons for the overburdened court dockets in Nigeria. Nigeria has been described as a 'highly litigious society.'[739] The Lagos State Bureau of Statistics records that 82,918 civil cases were filed from 2014 to 2016 in the high courts[740] of the state, and 59,440 civil cases respectively were filed at the magistrate courts during the same period, making a total of 142,358 civil cases. These numbers are for Lagos State alone.

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[732] Ibid 89; Onyema & Odibo.
[733] Supra.
[734] See 3.3.8 above.
[735] Supra.
[736] Diala 'The shadow of legal pluralism' 721-2.
[737] Enwereji 168.
[738] Onyema 96.
[739] Onyema & Odibo.
[740] Lagos Digest of Statistics 2017, available at *https://mepb.lagosstate.gov.ng/wp-content/uploads/sites/29/2017/01/2013-Digest-of-Statistics.pdf,* accessed on 01 July 2019.

It does not require a stretch of the imagination to visualize the state of the court dockets in Nigeria. Divorce litigation operates within this flawed system.

4.1.12 Cost of Litigation

Besides the cost of litigation to the parties, there is a cost to the state as well. State resources must be spent litigating and re-litigating divorce and divorce related issues. This puts a drain on the resources of the state in terms of time and money. Onyema's survey of commercial cases filed at the Lagos State high courts in 2012 found that the average resolution period from filing to judgment was about 583 days (over a year and half).[741] This period increased dramatically, sometimes taking a decade or longer, if the parties appealed the judgment.[742] Onyema cited two cases that were resolved in 23 years[743] and 18 years[744] respectively. She noted in another study that in 2012, there were 54 high court judges serving the entire state with a population estimated at over 20 million.[745]

A lack of statistics makes it impossible to consider the actual cost (in Naira and Kobo) of litigation to the state. However, whatever the cost, it is worsened by divorce litigation. The acrimonious nature of divorce litigation means that sometimes parties contest every issue possible, including those upon which they agree, in a bid to punish the other spouse.[746] Parties may go as far as failing to disclose assets during proceedings, refusing to carry out the judgment of the court upon resolution, or engaging in inordinate appeals, thus ensuring further and aggravated financial costs to themselves and the state.[747]

In summary, the impact of the problems of divorce in Nigeria are enormous and far-reaching and are felt not only by the divorcing couple and their children but also by the state. These problems

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[741] Onyema & Odibo. See also Onyema 99.
[742] Onyema 100.
[743] *Ariori v Elemo* (1983) 1 SCNLR 1.
[744] *Emeka Nwana v Federal Capital Development Authority* (2007) 4 SCNJ 433.
[745] Onyema 99. Note that, in January 2019, the Lagos State House of Assembly called for the increase of the number of judges from 59 to 120. See Oladimeji Ramon 'Lawmakesr okay 120 judges for Lagos' available at *https://punchng.com/lawmakers-okay-120-judges-for-lagos/,* accessed on 03 July 2019.
[746] Herring 111.
[747] Diala 'Judicial Recognition' 109.

are further exacerbated by the nature of divorce litigation, an acrimonious, resource-intensive procedure.

4.2 SUMMARY

The practical problems associated with the divorce process in Nigeria are as numerous as they are onerous, irrespective of the family law system under which the marriage was contracted. Some of the problems identified in this chapter include the double marriage phenomenon, division of marital assets and maintenance, divorce-induced stigma, negative judicial attitude, emphasis on reconciliation, patriarchal principles of customary law, acrimonious divorce proceedings as a result of the grounds of divorce, exorbitant cost of litigation and custody of children. From the above, it is possible to draw some clear conclusions. First, the incidence of divorce is high in Nigeria.[748] Secondly, the vulnerable parties most likely to suffer the various problems associated with the divorce process in Nigeria, are the women and children. Thirdly, the post-divorce situation of the statutory law wife, although bad, is much better than that of the customary law wife. Fourthly, a reorientation of the judiciary would go a long way in resolving some of these problems. Fifthly, litigation can no longer meet all the needs of the divorcing family, particularly the needs of the vulnerable members. Finally, it is time for the Nigerian family law system to try a new dispute resolution method – mediation.

[748] Ntoimo & Isiugo-Abanihe 392.

CHAPTER FIVE

CAN DIVORCE MEDIATION WORK IN NIGERIA?

5.1 INTRODUCTION

The previous chapters presented an overview of the problems of the divorce process in Nigeria, as well as the gaps in the substantive law on marriage and divorce. This chapter considers the potential of divorce mediation as a process which may be applied to the dissolution of marriage in Nigeria. It compares the divorce litigation process to the divorce mediation process in a bid to determine which process is more appropriate for dissolution of marriage in Nigeria. It seeks to answer the following questions: Does divorce mediation achieve the goals of a good divorce process? Can divorce mediation solve the problems associated with divorce in Nigeria? Which process (mediation or litigation) best achieves the twin goals of solving the problems associated with divorce in Nigeria as well as achieving the goals of a good divorce process?

Countries all over the world have turned to mediation — as an alternative to litigation — for the resolution of disputes within the family.[749] Several comparative research studies — spanning decades[750] — have been conducted in the areas of divorce mediation and litigation to determine the most effective process for the amicable dissolution of marriage with minimal damage to the family.[751] The indices for comparison range from cost savings — in terms of money and time — to the divorcing couple and the courts, to client satisfaction, improved post-separation relationship between the couple and their children, settlement rates, compliance with mediated agreement, and adequate provision for the psychological and legal needs of the spouses and the children.[752] Over and over again, divorce mediation has trumped divorce litigation. Mediation has been found to yield more benefits than litigation.[753]

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[749] Some examples include Australia, United Kingdom, United States, and Canada.

[750] Beck, Sales & Emery 452; Emery R E, Laumann-Billings L, Waldron M C, Sbarra D A & Dillon P 'Child custody mediation and litigation: Custody, contact, and co-parenting twelve years after initial dispute resolution' (2001) 69 *Journal of Consulting and Clinical Psychology* 323–32. Emery Robert E, Matthews Sheila G & Wyer Melissa M 'Child custody mediation and litigation: Further evidence on the differing views of mothers and father' (1991) 59 *Journal of Consulting and Clinical Psychology* 410–18; Kelly 'A decade of divorce mediation research' 373–85; Hahn & Kleist 165.

[751] Shaw 451.

[752] Kelly 'Family mediation research' 5; Beck, Sales & Emery 447-82; De Jong 'Judicial stamp' 97.

[753] Shaw 451; Kelly 'Family mediation research' 28.

These studies are extensive. While they are not conclusive, they are highly persuasive. It is therefore not the object of this thesis to travel the same route as the scholars above. Rather, this study focuses specifically on Nigeria, and it compares divorce mediation and divorce litigation using a different set of indices: the goals of a good divorce process and the ability to solve the particular problems associated with divorce in Nigeria. These indices are chosen for the following reasons. One, the goals of the good divorce process provide a universal yardstick for measuring the effectiveness of the divorce process. Secondly, the capacity to provide solutions to the unique problems in the society where the process will be implemented provides a specific yardstick for the measurement of the effectiveness of the divorce process.

A good divorce process must therefore satisfy the universal goals of good divorce processes as well as be adapted to satisfy the peculiar problems of the society in which it will be implemented. Nigerian divorce processes must therefore pass the test of a good divorce process as well as possess the capacity to provide solutions to the problems which are peculiar to the divorce process in Nigeria.

5.2 DOES THE DIVORCE MEDIATION PROCESS ACHIEVE THE GOALS OF A GOOD DIVORCE PROCESS?

A comparison of the processes of divorce mediation and divorce litigation will hereunder be undertaken, employing the goals of a good divorce process identified in previous chapters as the indices for comparison.

5.2.1 Does the divorce mediation process preserve the sanctity of marriage?

A good divorce process should recognize the sanctity of the marriage institution and its necessity for the progress and stability of society[754] and should encourage the preservation of the institution.[755] It should discourage parties from jumping in and out of the institution of marriage at will.[756] This goal can be achieved by ensuring that divorcing couples are fully informed about the divorce process and its consequences for themselves and their children, and have adequate opportunity to consider these before terminating their marriage.[757]

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[754] Herring 106.
[755] Looking to the Future Report para 3.6.
[756] See 2.3.1 above.
[757] Looking to the Future Report para 3.6.

While divorce laws provide some opportunities for reflection for the parties, in practice, this is rarely the case. The divorce litigation rarely provides spouses with the opportunity to consider the wisdom or otherwise of their actions, let alone the consequences. As Herring aptly describes, as soon as spouses brief a divorce lawyer, the divorce process is wrested from them and taken over by the lawyers,[758] the courts and the judges, leaving no room for direct communication or reflection. Consequently, the spouses have little or no control over most of the divorce proceedings.

On the other hand, the informal and comfortable atmosphere created by divorce mediation provides ample opportunity for spouses going through divorce to communicate effectively[759] and reflect on their marriage, all the while looking to the future and not dwelling on the past.[760] It also provides parties with the opportunity to discuss personal and intimate matters in a manner that would have been impossible in a courtroom.[761]

Contested divorces are messy.[762] Preservation of the institution of marriage can also be secured by ensuring that the divorce process is conducted in a cordial and dignifying manner or failing this, at least ensuring that the process is restricted to the parties and the arbiter and not any and all members of the public.

The consensus-building nature of mediation[763] ensures that bitterness and acrimony are kept to a minimum during the mediation process without affecting the parties' rights to express their views and concerns. This therefore ensures that the process is as cordial and dignifying[764] as possible and the sanctity of the marriage institution preserved.

Furthermore, the privacy of the divorce mediation process ensures that spouses can terminate what is left of their marriage with dignity[765] — away from the prying eyes of the public as well as the

[758] Herring 118, 132.
[759] Herring 141.
[760] Looking to the Future Report para 5.9; De Jong 'A pragmatic look' 521
[761] Herring 142; De Jong 'Judicial stamp' 5.
[762] Herring 131.
[763] Beck & Sales 16, Moore 166.
[764] Parliament of Australia 'Divorce mediation' 259.
[765] Dale Bagshaw 'The move towards primary dispute resolution in family law: The role of government and implications for justice' (1997) 2 *Flinders J. L. Reform* 3.

indelible ink of court records — thereby protecting themselves, as well as preserving the sanctity of the institution of marriage.

In contrast, divorce litigation, a primarily adversarial process, encourages parties to come up with — sometimes false — allegations of wrongdoing against each other.[766] By airing their dirty linen in public,[767] the process effectively drags not only the spouses' reputation and marriage, but the sacredness of the entire institution in the mud.

Divorce mediation therefore produces better outcomes than divorce litigation in terms of the preservation of the institution of marriage.

5.2.2 Does the divorce mediation process save marriages?

The decision to end a marriage is never an easy one. Often, spouses who file for divorce are not absolutely certain that they wish to get divorced.[768] A good divorce process should therefore be able to identify such spouses and save their marriage where possible.[769]

The divorce mediation process can achieve this goal. It offers couples seeking divorce an avenue to carefully reconsider their concerns and plans before taking such an enormous step. As stated previously, one of the salient features of divorce mediation is its encouragement of effective communication between divorcing spouses.[770] This communication process grants spouses the opportunity to hear and understand each other's concerns.[771] In the course of communicating, they may also discover the underlying issue[772] causing the divorce and may find that they are able and willing to deal with it. They may thus abandon the divorce process altogether and decide to save their marriage.[773]

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[766] Herring 118.
[767] In Nigeria, divorce proceedings must be held in open court. Section 103 of the MCA, *Menakaya v Menakaya* (2001) supra.
[768] Looking to the Future Report paras. 2.15 and 5.21; Herring 118.
[769] Herring 106.
[770] Ibid 141.
[771] Bridge C 'Family mediation and the legal process: an unresolved dilemma' (1997) 17 *New Zealand Universities Law Revue* 237.
[772] Lisa Parkinson 10; De Jong 'Judicial stamp' 4-5.
[773] Divorce mediation also encourages couples to save their marriages where possible by inviting them to go to other processes like counselling. Looking to the Future Report paras 5.4 and 2.16.

> Because the parties discuss matters face to face, family mediation is much better able to identify marriages which might be capable of being saved than is the legal process.[774]

As soon as a spouse engages lawyers to initiate the filing of a divorce petition, they are asked first and foremost to 'dig up dirt' on the other spouse.[775] This is communicated to the other spouse through the petition and automatically, the spouses take up opposing sides of the table. Once the proverbial battle lines are drawn, the prospects of saving the marriage are reduced drastically, if not completely extinguished.[776] De Jong found that as soon as parties expressed interest in divorce proceedings, lawyers advised the husbands to dissipate assets and the wives to provide copies of all the documents in the household.[777] The battle lines were drawn immediately.

In summary, the amicable nature of the divorce mediation process lends itself more to marital reconciliation than the acrimonious nature of divorce litigation. Divorce mediation is therefore better able than divorce litigation to identify and save salvageable marriages.[778]

5.2.3 Does the divorce mediation process reduce the bitterness associated with divorce?

A good divorce process should attempt to reduce the conflict between the divorcing spouses[779] to ensure a less emotionally damaging process for the spouses and children of the marriage during and after the divorce. Condemned for its acrimonious nature[780] and the use of fault grounds which are notorious for promoting bitterness in divorce proceedings,[781] divorce litigation fails to achieve this goal.[782]

Divorce mediation became popular as a result of its capacity to ensure the reduction of spousal conflict,[783] and it therefore achieves this goal of a good divorce process. The features of the divorce

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[774] Looking to the Future Report para 5.4; Bridge 237.
[775] Herring 118.
[776] Looking to the Future Report para. 2.14.
[777] De Jong M 'The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce' (2010) 2 *STELL LR* 225, 233; De Jong 'A pragmatic look' 516.
[778] Bridge 237.
[779] Herring 107, 141
[780] De Jong M 'Giving children a voice in family separation issue: A case for mediation' (2008) *J. S. Afr. L* 787; De Jong 'Divorce mediation in Australia – valuable lessons for family law reform in South Africa' (2007) *XL CILSA* 283; De Jong 'Mediation and other appropriate forms of dispute' 577.
[781] Herring 131; De Jong M 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation (2005) 1 *TSAR* 33.
[782] Herring 131.
[783] Beck & Sales 57, 64; Looking to the Future Report para 5.11.

mediation process — communication, negotiation, privacy, non-adversarialness, — lend themselves easily to this aim.

Mediation looks to the future and not to the past.[784] Spouses going through divorce are encouraged to discuss positive and mutually satisfactory ways of restructuring their family rather than dwell on past mistakes and the cause of breakdown of the marriage, as is the case with divorce litigation.

Mediation is a communication-based,[785] party-orientated process,[786] the outcome of which is dependent on the spouses and not an independent umpire.[787] This encouragement of effective communication between the parties aids conflict reduction.[788] The absence of a decision-wielding umpire who must be 'won-over' by the couple, ensures that the spouses do not need to come up with trumped-up allegations of misconduct to 'win' their case.[789] This further ensures that conflict between the spouses is not aggravated beyond the actual issue(s) leading to their divorce.

The reverse is the case with divorce litigation. The presence of a judge with the power to brand a party responsible for the breakdown of the marriage, and to hand down a binding judgment on the parties encourages mud-slinging and the making of allegations to 'win' or persuade the judge to take one party's side, thereby further exacerbating the conflict between the divorcing spouses.

Divorce mediation is also a private process.[790] Sessions are conducted behind closed doors with only the mediator and the spouses present in the room. The privacy of the process creates a safe environment for the parties to express themselves without fear and to discuss intimate details about their family and marriage.[791] This privacy also ensures that conflict between the couple is not heightened as they are not burdened with the fear of knowing that the public will be privy to the details of their marriage particularly if such details are flagrantly coloured by a recalcitrant

[784] Looking to the Future Report para 5.9; Haynes & Charlesworth 13-14; De Jong 'A pragmatic look' 521.
[785] De Jong 'A pragmatic look' 520.
[786] Ibid. De Jong 'Judicial stamp' 97.
[787] Ibid.
[788] Paul Randolph 'Compulsory mediation: The need for mediation in family law' (2010) 160 *New Law Journal* Issue 7411 & 7412.
[789] De Jong 'Judicial stamp' 97.
[790] Milne, Folberg & Salem 8.
[791] Jane C Murphy J & Robert Rubinson *Family Mediation: Theory and Practice* (2009) 42.

spouse's lies. The privacy of divorce mediation communications further ensures that matters discussed during the mediation cannot be used subsequently in litigation.[792]

Again, the reverse is the case with the litigated divorce. With a few exceptions,[793] court hearings are open to the public. Furthermore because of the acrimonious nature of litigation, the spouses constantly malign each other in a bid to 'win' — to have judgment entered in their favour — sometimes bringing to light the most sordid details of their marriage. This further aggravates the already conflict-laden situation.

From the above, divorce mediation is therefore better able to achieve this goal of a good divorce process than is divorce litigation.

5.2.4 Does the divorce mediation process give empty shell marriages a decent burial?

A good divorce process should ensure a cordial and dignified end for marriages which have proved to be unsalvageable.[794] This goal is best achieved through a no-fault, blame-free process geared towards creating beneficial post-divorce arrangements for the future of the spouses and that of their children. The primary goal of divorce mediation is the achievement of a mutually beneficial settlement agreement for the divorcing spouses.[795] To this end, it creates a civil divorce process which empowers the parties to communicate effectively,[796] come to terms with the end of the marriage, take control of the process of divorce[797] and make their own agreement for their life, post-divorce. Divorce mediation is founded on the principle of self-determination,[798] which enables it to achieve this aim. In terms of this principle, divorce mediation vests in the parties – and not a judge – the power to take charge of and resolve their own dispute.[799] Thus the parties going through divorce have control of their (divorce) mediation process.[800] They have the opportunity to participate actively in the dissolution process and to create a mutually satisfactory and enduring

[792] De Jong 'A pragmatic look' 520.
[793] For example, cases involving minors or child abuse, and similar.
[794] Field of Choice Report para 120(1).
[795] Looking to the Future Report para 5.6.
[796] De Jong 'Judicial stamp' 4.
[797] Ibid 2.
[798] De Jong 'A pragmatic look' 519; Payne 10.
[799] Welsh 420.
[800] De Jong 'Judicial stamp' 2; Boniface 'A humanistic approach' 108.

settlement agreement to which they both agree. The role of the divorce mediator therefore, is to help the spouses reach agreement by facilitating discussions between them.[801] As such, the final decision in their dispute is made by the spouses themselves and is not dependent of the whims and prejudices of a strange third party.[802] This ensures that the marriage is dissolved in the most cordial manner possible. This is contrasted with the divorce litigation process where the spouses take a back seat to the lawyers, who typically engage in a fiercely dirty battle of wits in a bid to turn the judge's decision in their client's favour.

Divorce mediation presupposes also that spouses are in the best position to create the optimal agreement, which will adequately solve their problems and satisfy their needs and interests.[803] Divorce mediation therefore attempts to give them control of the process in a bid to create the opportunity for them to craft those agreements.[804] Again, this is contrasted with the litigated divorce where the court further disempowers parties by leaving the final decision making — in what is sometimes the most important event of their lives — to a judge. In a study conducted by Kelly,[805] divorcing couples reported satisfaction with their role and the role of the courts in the divorce mediation process.

Again, by its very nature, mediation is a consensus-building and relationship-saving dispute resolution process.[806] This therefore enables mediation to achieve an amicable, or at the very least, a cordial divorce process far better than the primarily adversarial divorce litigation process. Divorce mediation therefore achieves this goal of a good divorce process better than divorce litigation.

5.2.5 Does the divorce mediation process promote good post-divorce relationships?

A good divorce process should encourage and enhance the prospects of cordial post-divorce relationships between spouses and between spouses and their children.[807] Divorce mediation easily achieves this goal because one of the major benefits attributed to it is the capacity to mend or save

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[801] De Jong 'A pragmatic look' 520.
[802] Lande 'Revolution in family law dispute resolution' 423.
[803] De Jong 'A pragmatic look' 517.
[804] Leonard L Riskin 'Mediation and lawyers' (1982) 43 *Ohio State Law Journal* 29.
[805] Kelly 'Mediated and adversarial divorce' 71-88.
[806] Moore 166.
[807] Section 43(1)*(d)* of the Australian Family Law Act

relationships.[808] This feature therefore encourages and enables spouses to maintain a constructive parental relationship at the conclusion of the divorce process.[809] Spouses going through divorce have reported satisfaction with the effect of divorce mediation on their post-divorce relationship.[810] Pearson and Thoennes[811] after several studies of divorce mediation programs in the United States concluded that divorce mediation creates improvement in parental and spousal relationship particularly increased communication between the spouses and between the spouses and their children. They reported an increased level of cooperation between the parents as well as an improvement in parents' ability to understand the needs of their children.[812] Emery, after a twelve-year study on the impact of divorce mediation found that it had long-term benefits for parents and children particularly improved relationships between the children and nonresidential parents and between the parents themselves.[813]

As aforementioned, divorce mediation is an amelioratory, consensus-building, relationship-saving, dispute resolution process, thus enabling the achievement of good post-divorce relationships[814] hence its popularity in family disputes. The same cannot be said for divorce litigation, an adversarial process which reportedly heightens spousal conflict[815] thereby making it impossible for spouses to maintain good post-divorce relationships.[816]

5.2.6 Does the divorce mediation process protect vulnerable parties?

There are casualties in every divorce process. Generally, these casualties are the women and children of the marriage.[817] Specifically, they are often the economically weaker spouse, the minor children of the marriage and victims of domestic abuse. A good divorce process must ensure effective protection for these vulnerable parties.

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[808] De Jong 'A pragmatic look' 517.
[809] Herring 141; Haynes & Charlesworth 1; Emery, Sbarra & Grover 22.
[810] Jessica Pearson & Nancy Thoennes 'Mediating and litigating custody disputes: a longitudinal evaluation' (1984) *Family Law Quarterly* 497, 499; Kelly 'Family mediation research' 8, 12.
[811] Jessica Pearson & Nancy Thoennes 'Divorce mediation' 9.
[812] Kelly 'Family mediation research' 29.
[813] Emery et al 'Child custody mediation and litigation: Custody, contact, and co-parenting' 323–32.
[814] Lisa Parkinson 331.
[815] Emery, Sbarra & Grover 25.
[816] Haynes & Charlesworth 3.
[817] Enwereji 168; Emery *Renegotiating Family Relationships* 125; Ifemeje *Contemporary Issues* 126-31.

5.2.6.1 Does divorce mediation protect the economically weaker spouse?

A good divorce process should ensure that the economically weaker spouse is adequately provided for. This is typically achieved through a fair distribution of the assets of the family either through settlement of property or the provision of spousal maintenance.

The divorce mediation process is geared towards creating an agreement which is beneficial to the divorcing couple.[818] To achieve this end, it empowers them to negotiate effectively believing the parties — and not the courts — to be in the best position to generate a solution best suited to their needs.[819] This effective negotiation involves gathering accurate information on the present and future financial and other holdings of the couple, deducing the latent interests behind their positions and then brainstorming for creative options[820] for redistributing their assets, targeted at satisfying the specific needs and interests of the couple.

Where divorce litigation works with a 'fixed pie'[821] — that is, the parties' 'positions' which are pleaded in the divorce petition and which the court cannot deviate from — divorce mediation is not thus restricted. Divorce mediation enlarges the pie, encouraging the parties to look beyond their 'positions' to generate more options, and come up with solutions which a judge cannot or may not be able to consider[822] and which are better able to satisfy their *actual* needs and interests.

Where divorce litigation may rely on substantive and procedural rules of law which may further disempower an economically weaker spouse,[823] divorce mediation considers only the interests of the parties before it without undue regards to legal rules.[824]

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[818] De Jong 'Judicial stamp' 97.
[819] Riskin 33; De Jong 'A pragmatic look' 517.
[820] Emery *Renegotiating Family Relationships* 173-6; Haynes & Charlesworth 5.
[821] Roger Fisher & William Ury *Getting to Yes: Negotiating an Agreement Without Giving In* (2012) 61.
[822] Chip Rose 'Mediating financial issues: Theoretical framework and practical application' in Folberg, Milne & Salem, *Divorce and Family Mediation* (2004) 186; Ann L Milne 'Mediation and domestic abuse' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 313; De Jong 'The need for new legislation' 236.
[823] A good example would be the unspoken procedural rule in Nigeria that all spouses must provide proof of ownership via receipts before they can claim ownership of property, a provision which works against women because more often than not, their contributions are not documented either because they were in home making or even where such contribution was financial, the property in contention was acquired in the husband's name. See 4.1.2 above.
[824] Milne, Folberg & Salem 8.

Case law[825] and scholarship[826] in South Africa have found mediation better able than divorce litigation to enable parties reach an effective agreement in the determination of post-divorce financial arrangements.

Ultimately, divorce mediation operates on the premise that divorcing couples are in the best position to develop creative options and thus make the agreement that would best suit their needs.[827] In addition, research has found that divorced couples have reported satisfaction with the division of assets during the divorce mediation process more frequently than in the litigation process.[828]

5.2.6.2 Does divorce mediation protect victims of domestic violence?

Changes in the status of the family such as those caused by separation or divorce may lead to new incidents or increased occurrence of violence within the family.[829] A good divorce process should ensure the protection of spouses from domestic violence during the divorce process. Research has found that lengthy divorce processes increase the chances of the occurrence of divorce-induced domestic violence.[830] Divorce mediation has been shown to be a moderately short process, particularly when compared to divorce litigation.[831] Based on this premise, divorce mediation is therefore less likely to give rise to divorce-induced domestic violence than divorce litigation. Opponents of mediation of domestic abuse cases have argued that divorce mediation is incapable of providing adequate protection for victims of abuse[832] and such victims should not be referred to mediation[833] because they would be unable to bargain or negotiate freely for fear of the abusing spouse,[834] among other reasons. They argue that the safety of victims is compromised as they remain in close contact with the abuser[835] as a result of the communication-based nature of mediation. They also contend that where divorce mediators are not adequately trained to detect

[825] *MB v NB* supra para 58.
[826] De Jong 'The need for new legislation' 239.
[827] Rose 86; James 15; De Jong 'A pragmatic look' 517.
[828] Kelly 'A decade of divorce mediation research' 379. In a study conducted by Diala, he found that an agency of the government, the Social Welfare Department assisted women through a mediation process to retrieve martial property from their husbands. Diala 'Judicial Recognition' 105-7, 115.
[829] Herring 132; Ver Steergh 150; Milne 309.
[830] Ibid.
[831] Ayrapetova 418.
[832] Milne, Folberg & Salem 17.
[833] Milne 309-312; Ver Steergh 182.
[834] Ayrapetova 419.
[835] Ibid.

and deal with cases of domestic violence, they are unable to recognize or deal with the power imbalance caused by this and that the victim suffers.[836]

However, Milne[837] and Ver Steergh[838] found that in the presence of safeguards, divorce mediation produced better outcomes than litigation for victims of domestic violence. Such safeguards include the use of caucuses, shuttle mediation or separate meeting rooms, separate entrances and exits for the spouses and separate sessions.[839] They opine that a screening process is necessary to identify these cases of domestic violence, to ensure that the afore-mentioned safeguards are put in place to protect and promote the interests of the weaker party or victim. Scholars also aver that mediators of cases with elements of domestic abuse should be persons with knowledge and experience in dealing with domestic abuse.[840]

After subsequent research, Milne[841] concluded that while divorce mediation may not be suitable for some cases involving domestic abuse, where the victim requests mediation[842] and gives informed consent to the use of divorce mediation, then divorce mediation would be suitable for such party.[843]

Kelly[844] also argues that divorce mediation might be applied to cases with domestic violence as the process may prevent further violence. Kelly[845] studied nine family mediation programs in the United States after which she reiterated earlier findings, adding that divorce mediation had the ability to deal with high conflict cases such as cases where domestic violence occurred in the family.

Proponents of mediating divorces with cases of domestic abuse opine that divorce mediation is an adequate process for some cases of domestic violence because it empowers the weaker party[846] and creates a conducive atmosphere for parties to divulge and discuss details of the abuse. They claim

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[836] Milne 310-312.
[837] Milne 312-314.
[838] Ver Steergh 202, 204.
[839] Milne 324-5.
[840] Murphy & Rubinson 53.
[841] Milne 313.
[842] Ver Steergh 204; s 407 Model Code on Domestic and Family Violence 1994.
[843] Milne 313; Looking to the Future Report para 5.29.
[844] Kelly 'A decade of divorce mediation' 381; Milne 313.
[845] Kelly 'Family mediation research' 3–35.
[846] In support of the principle of self-empowerment described in 5.2.3 below.

that divorce litigation does not adequately protect the interests of victims of domestic violence[847] and prosecuting the abuse is not a guarantee that the cycle of abuse will come to an end.[848] Indeed, divorce litigation was shown to increase the incidence of domestic abuse[849] while divorce mediation reduces such incidences. They point out that if victims of domestic violence request divorce mediation, it should be made available to them[850] and if they are excluded from the divorce mediation process without their consent, it would be tantamount to disempowering them in the same manner as the abuse itself.[851] They further provide proof of high levels of satisfaction with mediation by parties with a history of domestic abuse.[852]

From the above, it can be deduced that divorce mediation better meets the goal of protecting victims of domestic violence[853] particularly where parties — victims in particular — consent to or request divorce mediation.

5.2.6.3 Does divorce mediation protect the children of the marriage?

Children are affected negatively by divorce.[854] One study has presented children as the actual casualties of divorce.[855] A good divorce process should therefore seek to promote and protect the interests of children of divorcing parents. This goal is achieved by ensuring that adequate care arrangements – in the best interests of the children — are made. It is also achieved by ensuring that the psychological and emotional trauma associated with divorce, particularly parental conflict,[856] is significantly reduced, and separate representation is engaged for the children where their parents are incapable of recognizing and prioritizing their interests during the divorce process.

[847] Milne 313, 315.
[848] Ver Steergh 180.
[849] Herring 132.
[850] Ver Steergh 202.
[851]Milne 315; Lisa Parkinson 50.
[852] Hahn & Kleist 169.
[853] Ibid.
[854]Ver Steergh 167; Nelson Brianna L 'Divorce mediation and its impact on children' (2013). *Master of Social Work Clinical Research Papers* 1-2; Saposnek D T 'Value of children in mediation: A cross-cultural perspective' (1991) 8 *Mediation Quarterly* 327; De Jong 'Giving children a voice' 785.
[855] Ifemeje *Contemporary Issues* 125;
[856] Emery, Sbarra & Grover 22; Nelson 23; De Jong 'A pragmatic look' 521; Ground for Divorce Report para 2.19.

Does divorce mediation achieve this goal? One of the aims of the divorce mediation process is the promotion and protection of the best interests of children.[857] Standard VIII of the Model Standards of Practice for Family and Divorce Mediation[858] best describes this goal:

> A family mediator shall assist participants in determining how to promote the best interests of children.

Divorce mediation achieves this goal by ensuring that adequate arrangements are made for the children by the people who know them best: their parents.[859] It encourages and equips parents through the principle of parental self-determination[860] to identify and prioritize their children's needs when making arrangements for the family's post-divorce future.[861] The principle of parental self-determination posits that parents are in a better position to make adequate arrangements for their children[862] and should be empowered to do so.[863] Emery has identified the empowerment of parents as one of the fundamental objectives of divorce mediation.[864]

Divorce mediation therefore encourages the use of Parenting Plans, defined as 'a series of detailed agreements about each parent's conduct in the future'[865] and 'a detailed agreement about legal and physical custody, schedule details (e.g., holidays), communication and dispute resolution.'[866] These plans, usually put together by the parents, ensure that adequate arrangements are made for the children's future using neutral words and under conditions which are favourable to the children and both parents.[867]

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[857] Schepard 529; Rafti Klodiana & Veliu Sofjana 'Addressing sensitive issues in family mediation: An Albanian study of mediator perceptions (2017) 11 *European Journal of Social Sciences* 220; De Jong 'A pragmatic look' 521.
[858] Available at *https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/Model_Standards_of_Practice_.pdf*, accessed on 18 October 2019. These standards were developed by a joint effort of the Academy of Family Mediators (AFM), the Association of Family Courts and Community Professionals (AFCC), the American Bar Association (ABA) Family Section and other organizations to provide uniform standards for mediation practice and increase public confidence in the family mediation process.
[859] Emery *Renegotiating Family Relationships* 150; De Jong 'Judicial stamp' 6.
[860] Emery *Renegotiating Family Relationships* 148: Looking to the Future Report para 5.11.
[861] De Jong 'A pragmatic look' 521; Couples have chosen to participate in the divorce mediation process for this reason. Ver Steergh 177; Kelly & Gigy 267.
[862] Looking to the Future Report para 5.11.
[863] Emery *Renegotiating Family Relationships* 148.
[864] Ibid; Payne 11.
[865] Marilyn S McKnight & Stephen K Erickson 'The plan to separately parent children after divorce' in Folberg, Milne, & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 131.
[866] Emery *Renegotiating Family Relationships* 62.
[867] Ibid.

While divorce litigation provides for factors to be considered before granting custody of children to parents, the parents are still pitted against each other in the tense, acrimonious environment created by the custody battle which only one party may win, thereby increasing parental conflict, which is detrimental to the interests of the children.[868]

Divorce mediation better achieves this goal than divorce litigation because, generally, parents know their children best and when unencumbered by conflict and negative emotions, they are in a better position than judges — third parties — to make suitable arrangements for the care of their children.[869]

Divorce mediation also significantly reduces the trauma experienced by children during and after the divorce.[870] Research has shown that parental conflict is the leading cause of psychological and emotional stress and damage for children of parents going through a divorce,[871] more so than the divorce itself. As the reduction of conflict is one of the hallmarks of divorce mediation, it ensures that the goal of minimization of parental conflict in the interests of the children is also achieved.[872] On the other hand, divorce litigation by its very nature increases parental conflict and increases the trauma experienced by children of divorcing parents.[873]

Divorce mediation also ensures that the interests of the children are adequately protected even if the parents are so deeply entrenched in conflict that they are unable to acknowledge the interests of their children. Mediation achieves this by interviewing the children or retaining an expert to

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[868] McKnight & Erickson 130; 153; Emery & Wyer 473.
[869] De Jong 'Judicial stamp' 3; Salem 375; Emery *Renegotiating Family Relationships* 111; Lisa Parkinson 340; Herring 137.
[870] Boniface 'A humanistic approach' 108-9; Schepard 529; Rafti, Klodiana & Veliu Sofjana 'Addressing sensitive issues in family mediation: An Albanian study of mediator perceptions (2017) 11 *European Journal of Social Sciences* 220; De Jong 'A pragmatic look' 521; Looking to the Future para 5.11; De Jong 'Judicial stamp' 3, 6; Salem 375; Emery *Renegotiating Family Relationships* 111; Lisa Parkinson 340; Herring 137; Saposnek 161; Looking to the Future Report para 5.11.
[871] Murphy & Rubinson 43; Ver Steergh 173; Looking to the Future Report para 4.37; Emery, Sbarra & Grover 22; Nelson 23; De Jong 'A pragmatic look' 521; Ground for Divorce Report para 2.19; McKnight & Erickson 130, 153; Emery & Wyer 473.
[872] Parental self-determination also reduces conflict and increases cooperation of parents. See Emery *Renegotiating Family Relationships* 111, 149; Wolcott 48.
[873] Emery & Wyer 473; De Jong 'Giving children a voice' 787.

speak on behalf of the children. The goal of this exercise is the ascertainment, promotion and protection of the needs and interests of the children.[874]

Recognizing the need for divorce mediation as a result of the positive difference it makes in the lives of children going through divorce, legislation in many jurisdictions worldwide now require that in matters concerning children, mediation must be attempted before litigation.[875] In South Africa, in the case of *Van den Berg v Le Roux*,[876] the court ordered the couple to mediate matters concerning their child, stating that mediation was better suited to their dispute, and warning the parties not to return to the court again until they had attempted mediation. Similarly, in Zimbabwe the courts have found mediation to be a more suitable process for couples going through divorce than litigation.[877]

In summary, divorce mediation is far more beneficial to children[878] than litigation because it reduces the impact of divorce on them.[879] Research has also found that children whose parents go through divorce mediation fare better than those whose parents litigate their divorce.[880]

5.2.7 Does the divorce mediation process take care of the emotional aspects of divorce?

Divorce is a psychologically damaging experience for the divorcing spouses and their children.[881] During the divorce, couples go through all the negative emotions associated with grief and loss such as bitterness, anger, sadness.[882] Research has found divorce to be one of the highest stress inducing events in life.[883] A good divorce process must take cognizance of the emotional aspects of the divorce process and their impact on the family going through divorce.

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[874] Saposnek 'Working with children in mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 161.
[875] Australia: Section 60I of the Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006 provides for mandatory mediations in parenting matters before parties may file applications in court. Brandon & Stodulka 196. United States: The contents of Section 60I of the Australian Family Law Act hold true for most of the states in the United States. See generally, Ayrapetova 417 and Milne, Folberg & Salem 5. South Africa: See section 33(2) of the Children's Act 38 of 2005 read in conjunction with section 33(5).
[876] Supra; See *Townsend-Turner and another v Morrow* supra, where a similar order was given by the court.
[877] *G v G* 2003 (5) SA 396 (Z).
[878] Boniface 'A humanistic approach' 108; Emery *Renegotiating Family Relationships* 149.
[879] Looking to the Future Report para 5.11.
[880] Adegoke 113.
[881] Herring 107.
[882] Carbonneau 1130.
[883] De Jong 'A pragmatic look' 515.

Mediation can achieve this. It 'offers an environment well suited to identifying and addressing the strong emotional issues associated with divorce and parenting conflicts.'[884] Mediation reduces the trauma associated with the divorce process.[885] Divorce mediation meets this goal by creating an enabling environment for the spouses to address some of their emotional needs[886] through effective communication during the dissolution process. Divorce mediation enables couples to discover the real or underlying issues in their dispute,[887] express their feelings of bitterness and anger constructively,[888] air their concerns,[889] and learn and understand the concerns and needs of the other spouse[890] and their children.[891]

> Mediation often includes discussion of family relationships and issues which a court would be unlikely to consider but which are of great importance to the parents and the children concerned.[892]

One major advantage of divorce mediation over divorce litigation lies in the fact that while litigation is geared towards the determination of the parties' rights and the legal aspects of the divorce, thereby neglecting the emotional aspects,[893] the divorce mediation process considers both the emotional and the legal aspects of divorce[894] thereby providing a more holistic process and making the divorce process less damaging for the spouses and the children of the marriage.[895]

Emery et al,[896] after a study of a court-based custody mediation program in the United States, recorded higher client satisfaction with the mediation process than the litigation process. The study found that parents preferred mediation to litigation because they felt that their emotional and legal needs were adequately taken care of. Divorce mediation is better able than divorce litigation to take care of the emotional aspects of the divorce.[897]

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[884] Nawi & Hak 'Towards the development' 4; Herring 141.
[885] Ifemeje *Contemporary Issues* 199-200; Izunwa & Ifemeje 37.
[886] De Jong 'Judicial stamp' 6.
[887] Pearson & Thoennes 'Divorce mediation' 19.
[888] De Jong 'Judicial stamp' 2-3.
[889] Beck & Sales 27-39; Meierding 234.
[890] Meierding 234; Pearson & Thoennes 'Divorce mediation' 22-3.
[891] Pearson & Thoennes 'Divorce mediation' 22-3.
[892] Lisa Parkinson 48; Herring 142.
[893] De Jong 'A pragmatic look' 33.
[894] Haynes & Charlesworth 29; Milne, Folberg & Salem 3.
[895] Kelly 'Family mediation research' 3.
[896] Emery, Sbarra & Grover 23.
[897] Bridge 231, 237.

5.2.8 Does the divorce mediation process save costs for the parties and the state?

A good divorce process should provide cost savings in terms of time and money for the divorcing couple as well as the state.[898]

The movement away from litigation to alternative methods of dispute resolution arose out of a need to improve efficiency in the administration of justice. An important goal of divorce mediation therefore is the reduction of the cost of divorce for the family and the state.[899]

Divorce mediation enables the courts to decrease expenditure associated with managing divorce cases.[900] It achieves this by reducing court hearings associated with initiating as well as re-litigating divorce cases,[901] and reducing the cost of processing divorce cases by reducing the divorce caseloads.[902]

> Reducing the number of initial hearings and the amount of relitigation in divorce cases was an early goal of mediation.[903]

Couples are less likely to consider appeals or re-litigation after mediation as a result of their satisfaction with the mediation process and consequent compliance with the settlement agreements[904] that they actively partook in creating.[905]

Litigating divorce, on the other hand, is cost-intensive for the state.[906] Divorce mediation, by saving costs for the state, achieves this goal better than divorce litigation.[907]

Divorce litigation is also quite expensive for spouses, while divorce mediation helps them to minimize costs.[908] In a study conducted by Kelly,[909] she found that couples who litigated their

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[898] Herring 107.
[899] Beck, Sales & Emery 449; Lisa Parkinson 333; Wolcott 48.
[900] De Jong 'Judicial stamp' 5; Herring 142.
[901] Beck & Sales 99.
[902] Ibid 111.
[903] Ibid 102.
[904] Kelly 'A decade of divorce mediation research' 373; Emery, Sbarra & Grover 27; De Jong 'Judicial stamp' 4.
[905] De Jong 'Judicial stamp' 2; Knuppel 128; Pearson & Thoennes 'Mediation and divorce' 26.
[906] Herring 105.
[907] Lisa Parkinson 333.
[908] Looking to the Future Report para 5.19; Bridge 237.
[909] Joan Kelly 'Is mediation less expensive? Comparison of mediated and adversarial divorce costs' (1990) 8 *Mediation Quarterly* 15.

divorce spent twice as much as couples who mediated their divorce. Emery,[910] also found that parties who settled their disputes via divorce mediation incurred less costs than parties who chose the litigation track. In the South African case of *MB v NB*,[911] the court opined that divorce mediation saves time and money and would have been a better process for the parties than litigation.[912] The court further penalized counsel for both parties for failing to refer their clients to mediation early on in the dispute.[913]

It is noteworthy, however, that mediation is cheaper only where it is successful. Where divorce mediation fails and spouses must still incur the cost of litigation, then mediation ceases to be the cheaper alternative.[914]

Cost-effectiveness in terms of time is one of the benefits of divorce mediation. The average mediation is effectively conducted in four to six two-hour sessions spanning two to three months.[915] The divorce mediation process progresses quickly because the divorcing spouses are present at the same time, in the same room working progressively towards reaching an agreement under the watchful eye of a facilitative mediator.[916]

One of the major advantages of the divorce mediation process over the divorce litigation process therefore is the former's timeliness.[917] Divorce litigation, particularly in the docket-laden courts of today, is riddled with adjournments[918] and has acquired a reputation for being protracted,[919] and sometimes unnecessarily so. While the average mediation case can be conducted in one to six sessions, the average litigated case can take years to reach resolution.[920] Divorce mediation is also more time-effective than divorce litigation partly as a result of the fact that it is much easier to get

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[910] Emery, Matthews & Wyer 'Child custody mediation and litigation: Further evidence' 410-418.
[911] Supra.
[912] Ibid para 58.
[913] Ibid paras 49-60.
[914] Herring 142; Skelton A & M Carnelley (eds) *Family law in South Africa* (2010) 347; Knox 25.
[915] Emery *Renegotiating Family Relationships* 144. He recommends at least three sessions of two hours each and no longer than six sessions for child custody mediation but eight to twelve two-hour sessions for comprehensive divorce mediation. See also Gary J Friedman *A Guide to Divorce Mediation: How to reach a fair, legal settlement at a fraction of the cost'* (1993) 18.
[916] De Jong 'A pragmatic look' 520.
[917] Ayrapetova 418; Lisa Parkinson 333.
[918] Onyema 99.
[919] In Nigeria, the average civil litigation case can go on from 5 to 20 years. Onyema 99.
[920] Ibid.

dates for mediation sessions than to get dates in docket-laden courts.[921] Emery found that parties settled their disputes faster through mediation than litigation[922] and that divorce mediation can in fact be conducted in half the time used to achieve a divorce through litigation.[923]

In South Africa, Lewis JA in *FS v JJ*[924] stated that mediation saved couples the unnecessary cost of an expensive and lengthy divorce process, costs which are routinely associated with divorce litigation.

In summary, the divorce mediation process therefore achieves the cost savings goal of a good divorce process better than the divorce litigation process.

5.2.9 Is the divorce mediation process fair and just to both parties?

A good divorce process should be fair and just to the spouses. One way to ensure fairness to both parties is to avoid apportioning blame to either of them for the demise of the marriage.[925]

Reducing acrimony and enhancing communication are hallmarks of divorce mediation. These objectives are impossible in an atmosphere of fault-finding. The good divorce mediator therefore avoids apportioning blame. Rather, mediation encourages spouses to look to the future[926] and not the past, that is, to make future plans for the good of all the members of the family rather than dwelling on past hurts and mistakes and blaming each other for the failure of the marriage.[927] Mediation creates an opportunity for parties to air their concerns.[928] This enables both parties to hear and be heard and to accept responsibility for their actions during the marriage. This process is also liberating and therapeutic for the parties without pointing accusatory fingers. This ensures

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[921] Beck, Sales & Emery 452.
[922] Emery, Sbarra & Grover 27.
[923] Ibid.
[924] 2011 3 SA (SCA) para 54 (138J-139C).
[925] Putting Asunder Report 24.
[926] De Jong 'A pragmatic look' 521.
[927] This is not to say that parties do not speak of the past or that such events are trivialized by the mediator, it simply means that the mediator encourages parties to discuss them as much as is necessary to enable the parties *become comfortable*, after which he gears them towards developing concrete future plans for the family. De Jong 'A pragmatic look' 521.
[928] Meierding 234.

that the process is fair and just to both parties as it is generally impossible to determine which party is solely responsible for the demise of the marriage.[929]

> The mediation process is not concerned with allegations but with issues. It encourages the couple to come to terms with the past, look to the future, meet each other on equal terms …[930]

This position is contrasted with that of divorce litigation in Nigeria where divorce petitions are still based on fault grounds and therefore always end in a finding of fault.

> … justice in the context of divorce law has traditionally been taken to mean the accurate allocation of blameworthiness for the breakdown of the marriage.[931]

However, the divorce litigation process, which is still practiced in Nigeria, cannot assess blame effectively.[932] Rarely can the spouses determine who is really or completely at fault, much less the law.[933] The irony then is that the spouse found guilty in court may actually not be at fault.

> [litigation] does not achieve the maximum fairness to all concerned for a spouse may be branded as guilty in law though not the more blameworthy in fact.[934]

When a party feels that they are being blamed unfairly for the demise of the marriage, this might lead to increased conflict during the divorce process.[935] In the Putting Asunder report, the Law Commission clearly stated the ills of the use of the words 'guilty' and 'innocent'.[936]

It is to be noted that some scholars posit that mixed fault and no fault provisions sometimes ensure fairness to parties[937] believing that a finding of fault can be liberating for some parties such as an abandoned spouse.[938] However, the overwhelming majority state that the cons of fault-finding far outweigh any potential benefits. It is noteworthy that divorcing spouses have found divorce mediation to be a fairer process than divorce litigation.[939]

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[929] Herring 131.
[930] Looking to the Future Report para 5.9.
[931] Ibid para 3.14, Many countries have adopted no-fault divorce regimes partly as a result of this. See Australia, the United States.
[932]'Looking to the Future Report para 3.14.
[933] Herring 117, 131.
[934] Field of Choice Report para 28.
[935] Ibid para 25.
[936] Putting Asunder Report 24.
[937] Looking to the Future Report para 4.4.
[938] Field of Choice Report para 105.
[939] Salem 376.

In refusing to apportion blame to the parties, divorce mediation achieves this goal of fairness and justice to both parties.

An examination of the section above shows that divorce mediation is better able than divorce litigation to achieve most of the goals of a good divorce process. This, in addition to other research carried out by several scholars, explains the growing popularity of divorce mediation as the dispute resolution process of choice for family dispute resolution in many countries.[940] In the UK, the government found that the use of divorce mediation helped it better achieve the goals of a good divorce system.[941] In Australia, mediation has become the primary dispute resolution process in the family dispute resolution system.[942] In the USA,[943] 40 states require all cases concerning children to be taken to mediation first before bringing them before the courts.

The next section considers whether divorce mediation is able to solve the peculiar problems associated with divorce in Nigeria.

5.3 CAN THE DIVORCE MEDIATION PROCESS PROVIDE A SOLUTION TO THE PROBLEMS OF DIVORCE IN NIGERIA?

The popularity of the divorce mediation process can be traced to its success in family dispute resolution in several countries in the world.[944] This section seeks to determine the possibility of divorce mediation meeting a similar need in Nigeria. Chapter Four set out the problems associated with divorce in Nigeria. This section seeks to determine if the divorce mediation process is able to resolve, or at the very least ameliorate, the harsh effects of these problems, particularly in comparison to the divorce litigation process currently in use in the country. The first ten subsections below examine the possible benefits of the divorce mediation process to the parties themselves, while the last two subsections seek to determine possible benefits of the divorce mediation process to the courts.

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[940] Canada: Payne 1; Chile: Bainham 171; Malaysia: Nawi 'Mandating mediation' 4.
[941] Looking to the Future Report para 5.21.
[942] Astor Hilary (2008) 'Making a 'genuine effort' in family mediation: What does it mean?' available at *http://ssrn.com/abstract=1294019,* accessed on 12 April 2013.
[943] Ayrapetova 417-26; Lande 'Revolution in family law dispute resolution' 411.
[944] Izunwa & Ifemeje 44.

5.3.1 Double Marriage

As previously mentioned, two basic theories guide the dissolution of double marriages in Nigeria.[945] The coexistence theory encourages the dissolution of both marriages thereby putting the couple through the rigours of the dissolution process not once but twice. The conversion theory, on the other hand, believes that the dissolution of the statutory marriage in court will simultaneously and automatically dissolve the customary marriage as well as the statutory marriage. Because there is no express or settled law on this matter, the parties can argue either way and the courts will choose which argument to follow.

How then can mediation be applied to these theories?

Mediation has been used effectively in several jurisdictions for the successful resolution of disputes arising as a result of divorce such as determination of custody, property (re)distribution and maintenance.[946] These disputes arising out of matters ancillary to the divorce are sometimes more contentious than the actual divorce[947] and contribute substantially to the acrimony associated with the divorce process.

Irrespective of the nature of the marriage contracted — customary or statutory — the ancillary issues remain essentially the same: where there are children of the marriage, the need to determine the custodial parent and consequent financial arrangements; where property was acquired during the course of the marriage, the need for the redistribution of such property; where there is an economically weak spouse, the need to provide for that spouse's maintenance.

Where mediation is applied to the determination of these matters and the parties come to an agreement, such agreement may be tendered to the courts — customary or state or both — as the parties' determination of the events included in the agreement such that the court is faced with dealing with the divorce petition *simpliciter*.

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[945] See 4.1.1 above.
[946] Izunwa & Ifemeje 44.
[947] William Fox 'Alimony, property settlement and child custody under the new divorce statutes: No fault is not enough' (1972) 22 *Cath. UL. Rev.* 365.

Therefore, parties who subscribe to the coexistence theory can therefore file this agreement along with their divorce petitions at both courts (customary and statutory) thereby effectively reducing the time spent on the petitions

Furthermore, this pre-litigation divorce mediation option further deals with the problem of conflicting outcomes, a possible problem under the coexistence theory. Where parties go through two different divorce processes the likelihood of conflicting outcomes especially in terms of the ancillary matters are very high. Here is an example:.

Mr H and Mrs W contracted both customary and statutory marriages. They subscribe to the coexistence theory and have therefore dissolved both marriages through the two different legal systems by which they were contracted. Mrs W was awarded custody of the children of the marriage as well as spousal maintenance at the state court, while the customary court (which prioritizes the rights of husbands) granted custody of the same children to her husband Mr H and refused Mrs W's prayer for maintenance. Mrs W has refused to give up the children who are currently in her custody while Mr H has refused to pay spousal maintenance to Mrs W Each party claims that his/her position is supported by a judgment of a court of law.

This situation is typical under the coexistence theory.

Where mediation is applied to the vignette above, the couple would go to mediation, come to a mutually satisfactory agreement over custody and maintenance and then file their agreement along with their divorce petitions at the two courts. The courts will subsequently adopt this agreement as its ruling on the ancillary matters and will simply rule on the divorce simpliciter.

This saves the parties the resources which would have been expended in dealing with the ancillary matters twice (in both courts) only to come out with conflicting results and perhaps the cost of re-litigation as well.

This mediated process also ensures that the most contentious parts of the divorce process are kept away from the already adversarial process of litigation and are resolved using a process which is better suited — mediation. Another advantage of using mediation is that it ensures that the parties control those aspects of the dissolution of their marriage which are best resolved by the parties

themselves[948] while the court controls those aspects of the dissolution of the marriage which are best dealt with by the law.[949]

Under the conversion theory, the assumption is that a subsequent statutory marriage extinguishes a prior customary marriage and as such, the dissolution of the statutory marriage constitutes effective dissolution of the customary marriage as well. This dissolution of the statutory marriage without any consideration for the prior customary marriage can be problematic for the parties.

The divorce mediation process however may consider other issues concerning the parties which statutory law may not be able to, especially those issues arising out of the prior customary law marriage which the statutory marriage has rendered ineffective, but which may still be of import to and affect the parties. An example of such an issue would be the repayment of the bride price which is necessary to effectively dissolve the customary marriage, but which statutory law and courts, by virtue of the subsequent statutory marriage, do not acknowledge. Here is an example:

If Mr H and Mrs W decided to rely on the conversion theory, then they need only terminate the statutory marriage. However, this position would become problematic if Mrs W decides to contract another customary marriage with Mr N because under customary law, she remains Mr H's wife till the customary marriage is dissolved and bride price returned. This rule applies even if statutory law and the conversion theory tell her otherwise.

Mediation provides a solution to this problem. Mediation is an informal, flexible and creative process; therefore, specific customs, practices and perspectives can easily be built into the mediation process.[950] During the mediation process, along with other ancillary matters, the parties may therefore agree that the customary marriage may be dissolved by a refund of the bride price as well as any other process required by the custom of their people.[951] The courts would subsequently adopt this agreement and rule solely on the dissolution of the statutory marriage before it. This way, all the interests of the parties, legal and otherwise, are satisfied.

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[948] The ancillary matters.
[949] The legal dissolution of the marriage.
[950] De Jong M 'Mediation and other appropriate forms of dispute resolution' 584-5.
[951] Mediation is not bound by rules of law or customs but by the rules the parties have agreed upon. De Jong 'A pragmatic look' 519.

Mediation can therefore be applied to the problems arising out of the conversion theory as well.

It is noteworthy that the use of the mediation process and the consequent mediated agreement will be most effective where the parties seek a divorce under the separation provisions which need only the proof of the required separation period for the grant of the divorce decree.

In summary, where parties have contracted double marriages, matters ancillary to the divorce may be determined through divorce mediation and the resultant agreement subsequently filed in both the customary and the statutory courts during the divorce process, leaving the courts with the resolution of the divorce *simpliciter*. These can then be resolved expeditiously especially where the parties rely on the non-fault separation provisions (for the dissolution of the statutory marriage where parties prove that they have lived apart for the required separation period) and tender the mediated agreement before the court. The court would then be bound to grant the divorce decree and on the terms agreed upon by the parties.

Can mediation provide a solution to the problems associated with the dissolution of double marriages in Nigeria? From the above, it appears that applying divorce mediation to the dissolution of marriage in Nigeria effectively deals with the problem of double marriages. It also expedites the divorce process, ensures that the matters which are most important to the parties (usually the ancillary matters) are resolved by the parties themselves and it reduces the acrimony and cost associated with the divorce process. Finally, it provides a solution to the problem of double marriages in Nigeria irrespective of the applied theory (coexistence or conversion).

5.3.2 Division of matrimonial property

The division of matrimonial property is a serious bone of contention in most Nigerian divorce cases because statutory and customary law produce very unsatisfactory outcomes for wives in property related disputes,[952] particularly customary law. Negative judicial attitudes as a result of negative sociocultural values and beliefs of the people worsen this situation.[953]

Mediation can be applied to the problem of unfair distribution of matrimonial property, to provide more satisfactory outcomes for wives, as well as for all the parties affected by the divorce. The

[952] Ashiru 316.
[953] Ibid.

fact that mediation ensures the protection and promotion of the interests of *all* the parties to the mediation cannot be overemphasized. Mediation ensures that the primary factor to be considered in the determination of equitable redistribution of property is the interests of the parties involved (particularly vulnerable parties like wives) rather than provisions of the law or custom.[954] As such, mediation avoids all the arduous conditions which the law requires women to prove before property to which they have contributed sweat or money can be awarded to them.

Mediation also creates the opportunity for parties to consider non-legal interests which would ordinarily not be entertained in court.[955] It further creates the opportunity for the exploration of creative non-legal options for satisfying these interests, thereby ensuring higher chances of party satisfaction.[956] Kelly and Gigy[957] found that 70% of their sample consisting of 106 couples (212 people) chose divorce mediation to ensure an equitable distribution of their property.

Where parties therefore resolve their property issues during mediation, they are better able to arrive at lasting and satisfactory outcomes which meet the needs of all the members of the family.[958]

5.3.3 Maintenance

Spousal maintenance awards are not routinely granted under Nigerian Family law even though statutory law explicitly provides for them.[959] Spousal maintenance is also a problem in Nigeria because women, who are oftentimes in need of post-divorce maintenance[960] rarely seek it.[961]

At the heart of divorce mediation is the goal of ensuring that the settlement agreement is one which recognizes and addresses the interests of all family members.[962] As discussed above, engaging in mediation enables parties to have positive and productive conversations about the future in a safe,

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[954] Milne, Folberg & Salem 8; De Jong 'The need for new legislation' 236.
[955] Haynes & Charlesworth 29.
[956] De Jong 'The need for new legislation' 236; Alison Taylor *The Handbook of Family Dispute Resolution: Mediation Theory and Practice* (2002) 318; De Jong 'Judicial stamp' 97.
[957] Kelly & Gigy 263, 270.
[958] De Jong 'The need for new legislation' 235-6.
[959] See 4.1.3 above.
[960] De Jong 'The need for new legislation' 230.
[961] See 4.1.3 above.
[962] Ayrapetova 418; De Jong 'Judicial stamp' 97.

amicable and comfortable environment.[963] This also contributes to reaching mutually satisfactory agreements relating to maintenance.[964]

Furthermore, the self-empowerment function[965] of divorce mediation will encourage women to voice their needs and demand maintenance where necessary. This empowerment can be achieved through several means including encouraging women to obtain information, expert advice, legal representation or even financial resources.[966]

Izunwa and Ifemeje contend that maintenance is one of the divorce related issues which will be well-handled by mediation as opposed to litigation.[967] Their argument is that parties are more likely to comply with the terms of a settlement agreement which they created voluntarily than with an order from a third party, a judge, particularly if they perceive that order to be unfair or wrong.

Mediation is therefore able to mitigate some of the effects of the maintenance problem in Nigeria.

5.3.4 Stigma

Mediation cannot take away the stigma associated with divorce in Nigeria. In countries like Nigeria — a relatively conservative, religious and cultural society — where divorce still attracts stigma for the divorcing couple, the children of the marriage and sometimes, their extended family,[968] nothing can eliminate the stigma, except perhaps not getting divorced at all. However, mediation can reduce this stigma by keeping the most contentious parts of the divorce process (the mediation of the ancillary matters) private and away from public scrutiny.

As shown in 4.1.4 above, the primary cause of stigma during Nigerian divorce proceedings is the fact that divorce cases are conducted in open court, proceedings form part of public records and are therefore available to the public. Most parties seek to keep the details of their family disputes away from strangers who may stray into an open courtroom, and to avoid having the details form

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[963] Beck & Sales 27.
[964] David Scott-MacNab & James G Mowatt 'Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce.' (1986) *De Jure* 316.
[965] Ugochinyelu Okolo 'Is the Mediator a therapist? A critique of the role of the mediator in Bush and Folger's Transformative model of mediation. (2015) 1 *Journal of International and Comparative Law* 1. See generally, Bush & Folger '*The Promise of Mediation: The transformative approach to conflict'* (1995).
[966] Bagshaw 8.
[967] Izunwa & Ifemeje 44.
[968] Azinge 58-9.

part of public court records forever. The aversion to divorce-induced stigma is so strong that some couples choose simply to separate rather than go through the divorce process,[969] thereby creating a phenomenon which Herring describes as 'empty shell' marriages.[970]

Mediation is essentially a private process. Privacy is one of the hallmarks of mediation.[971] Proceedings are restricted to the mediator and the parties. The process therefore protects the parties from the prying eyes of the public. Furthermore, mediation is a confidential process.[972] In essence, mediation communications cannot be used outside the mediation process and particularly not in legal proceedings.[973] This further ensures that they do not form part of public record[974] and cannot be viewed or used by parties other than the parties to the process. This also creates an enabling atmosphere for parties to air their deepest concerns without fear of exposure.[975]

Therefore, the privacy and confidentiality of the divorce mediation process protect the dignity of the family[976] while divorce litigation exposes them. The benefits of privacy and confidentiality may also be able to encourage parties who would ordinarily merely separate to legally terminate their empty-shell marriages.

In essence, while the divorce mediation process will not save parties from divorce-induced stigma entirely, it provides better protection than the litigation process, which actually aggravates stigma.

5.3.5 Reconciliation

> Because the parties discuss matters face to face, family mediation is much better able to identify marriages which might be capable of being saved than is the legal process.[977]

> Mediation encourages couples to save their marriages where possible.[978]

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[969] Ntoimo & Akokwuebe 4.
[970] Herring 106, 130.
[971] De Jong 'A pragmatic look' 519; Moore 151; Beck & Sales 51.
[972] De Jong 'A pragmatic look' 520; Taylor 222.
[973] Lande 'Revolution in family law dispute resolution' 423; This is provided for in several laws regulating the mediation process. Section 4(a) of the Uniform Mediation Act 2003; see also Article 15(b) of the Practice Directions for the Lagos State MultiDoor Courthouse, 2008.
[974] Milne, Folberg & Salem 8.
[975] De Jong 'A pragmatic look' 520.
[976] Bagshaw 1, 3.
[977] Looking to the Future Report para 5.4.
[978] Ibid.

One of the goals of a good divorce process is an ability to identify and save salvageable marriages. Mediation can promote this goal. As aforementioned, divorce mediation is a consensus-building process which reduces conflicts and is opposed to adversarialness.[979]

While reconciliation is one of the goals of mediation, it is not the paramount goal. Mediation is geared towards satisfying the interests of all the parties before it. It achieves this by encouraging direct communication between the parties, as effective communication is one of the hallmarks of mediation.[980] This effective communication creates an avenue for parties to hear and be heard and to understand the needs of the other party,[981] and this creates opportunities for the satisfaction of the interests of the parties. Mediation by its very nature is a consensus-building process, which encourages joint problem solving and attempts to get parties to view themselves as teammates trying to solve a problem, rather than competitors at opposite sides of the table.

The mediation process therefore will not hound parties into reconciliation _even when such reconciliation is against the best interests of the parties- as would customary family mediation but would rather attempt to determine and satisfy the parties' latent needs.

5.3.6 Bitterness and the Grounds for Divorce

As discussed above,[982] a good divorce law should reduce the bitterness associated with divorce. Time has shown that the adversarial nature of litigation further worsens the divorce process. The fault-based nature of the Nigerian divorce law system is also one of the biggest problems with divorce in Nigeria.[983] Allegations of fault are the engineers of divorce-induced acrimony.[984]

Mediation dispenses with the need to make allegations of fault as it is essentially a collaborative process which encourages consensual decision making. This effectively reduces the bitterness and acrimony of the divorce process. Where mediation is attempted before litigation, it can

[979] Beck & Sales 57, 64.
[980] Viney 97; De Jong 'Judicial stamp' 97
[981] Herring 141, Bridge 231, 237.
[982] See 4.1.6 above.
[983] See 3.1.6 above.
[984] Ifemeje *Contemporary Issues* 78.

substantially reduce the bitterness the parties bring to the divorce process. Research has shown that mediation is particularly successful where parties engage in it before litigation.[985]

Herring notes that matters ancillary to the divorce — child custody, maintenance and property redistribution — are sometimes more contentious than the actual divorce.[986] Where parties successfully mediate the ancillary matters before litigation, they are able to achieve, — at the very least — a civil relationship which will enable them engage more constructively with the proceedings for the divorce *simpliciter*.

Divorce mediation encourages no-fault divorce. Where parties are able to get past their bitterness during the mediation process, they may be more amenable to instituting the final divorce proceedings using the no-fault provisions thereby avoiding the acrimony that comes with fault based divorce. Where parties seek the divorce based on no-fault provisions, that is, the separation provisions contained in sections 15(2)*(e)* and *(f)* of the Nigerian Matrimonial Causes Act,[987] the benefits of pre-litigation mediation become apparent. Changes of allegations of fault and bitterness are significantly reduced during the divorce process. However, even where fault provisions are relied upon for the substantive divorce suit, pre-litigation mediation may yet reduce some of the tension in the subsequent divorce process.

In summary, engagement in divorce mediation before litigation reduces the acrimony associated with divorce litigation whether parties choose fault or no-fault divorce proceedings.

5.3.7 Child Custody

The custody of the children of the marriage is often times the most hotly contested issue during the divorce process.[988] In principle, both parents have equal rights to custody of the children of their marriage under the black letter statutory law.[989] In practice, the judge has a wide discretion to award custody, and the parties therefore have to fight bitterly to persuade the judge to look with

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[985] Law Reform Commission of Hong Kong Report 'The Family Dispute Resolution Process' (2003) 62. (Hong Kong Report)
[986] William Fox 'Alimony, property settlement and child custody under the new divorce statutes: No fault is not enough' (1972) 22 *Cath. UL. Rev.* 365.
[987] *Ajidahun v Ajidahun* supra 612; *Omotunde v Omotunde* (2001) 9 NWLR (pt. 718) 284.
[988] Aina 10.
[989] *Nwosu v Nwosu* (2012) supra.

favour upon them. Mediation encourages parties to look beyond their personal problems and focus on the interests of their children.[990] This focus on the interests of the child ensures that the current trend to award custody of children to fathers irrespective of the circumstances of the children and family will be curbed. It also ensures that the issue of custody is not viewed as a paternal right. Rather the interests of the child will be of paramount consideration during the process of determination of custody.

More often than not, mothers are at a disadvantage during custody battles as a result of socio-cultural values of societies and, sometimes, their inability to muster the required funds to pursue an action for divorce or custody.[991] This situation has also caused the prevalence of custody awards to fathers. Mediation as a relatively inexpensive process — compared to litigation — therefore provides a worthy alternative, ensuring that more women can partake in the process of determination of custody of their children. This will further reduce the current problem of treating the issue of custody of children as a paternal right.

5.3.8 Patriarchal principles of customary law

Patriarchal principles of customary law come into play during the divorce process when ancillary matters such as custody, property settlement and maintenance disputes must be resolved. In general, these principles disempower women.[992] As earlier stated, customary law makes no provision for the divorced wife ensuring that most times, she receives neither maintenance nor property nor even her children.[993]

Mediation is a flexible process[994] which is not bound by the rigid rules of any law or custom. The mediation process can therefore ensure that the customary law wife is provided for in ways that customary law and the customary court divorce litigation process (which must abide by rules and principles of customary law) cannot.

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[990] Lande 'Revolution in family law dispute resolution' 424; Shaw 449; De Jong 'A pragmatic look' 521.
[991] See 4.1.7 above.
[992] See 4.1.8 above. Ola, Oni & Akanle 65.
[993] See 4.1.8 above.
[994] Lande 'Revolution in family law dispute resolution' 426.

Furthermore, the mediation process itself is geared towards the protection and promotion of the interests of parties.[995] This again ensures that the process will place the interests of the mediating parties above rigid rules of customary law, particularly those with proven negative effects.

Finally, divorce mediation also seeks to empower parties especially weaker parties, enabling them to develop the capacity for strength of self[996] as well as their dispute resolution skills. Divorce mediation can therefore also empower the customary law wife to better articulate and air her needs, interests and concerns, and stand up for herself. Duryee stated that women were more satisfied than men with the process and result of divorce mediation as they felt like they were able to air their concerns and be heard, and to take control.[997]

5.3.9 Negative Judicial Attitude

The Nigerian judiciary is comprised primarily of men.[998] Most of these men are deeply steeped in societal and religious beliefs as a result of the political and religious climate of the country. Inevitably, they sometimes forget to apply the principles of equity, justice and good conscience to the cases before them.[999] This failing on their part impacts women unfavourably.[1000] For example, in *Nwosu v Nwosu*,[1001] where a judge was quoted saying that a woman who did not reside under a man's roof would have questionable morals. This attitude coupled with the wide discretion given to judges works untold hardship for women.[1002]

Divorce mediation removes judges from the divorce process in the place where it matters most: the determination of the ancillary matters, matters which are of the utmost importance to the parties and which ideally should be handled by the parties for optimum results.

It is true that the mediator may be susceptible to the same failings of the judges, but the mediation process by its nature is a party-driven process and this protects the parties from the personal biases

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[995] Milne, Folberg & Salem 8.
[996] Okolo 1.
[997] Kelly J B & Duryee M A 'Women's and men's views of mediation in voluntary and mandatory mediation settings' (1992) 30 *Family and Conciliation Courts Review* 34-49.
[998] See 4.1.9 above.
[999] See the case of *Nwosu v Nwosu* (2012) supra.
[1000] Diala 'Judicial Recognition' 160.
[1001] Supra; See 4.1.9 above.
[1002] Diala 'Judicial Recognition' 160, 181.

and prejudices of the mediator by ensuring that the mediator cannot impose a binding decision on the parties.[1003]

Finally, perhaps the most appealing feature of mediation is its voluntary nature. Parties may decide whether or not to participate in the mediation process or reach an agreement.[1004] This empowers parties to walk away from the process if the mediator's attitude becomes questionable. Parties may subsequently begin a new session with a new mediator or pursue other dispute resolution options. The mediation process is therefore better able than litigation to protect parties from the negative effects of the personal prejudices and bias of the third party umpires, particularly judges.

5.3.10 Accessing the Court System

Divorce impoverishes spouses, particularly wives.[1005] Many wives cannot afford the cost of living alone,[1006] let alone litigation,[1007] and this can keep them in unwanted marriages.[1008] When they manage to leave the marriage, they are unable to bear the cost of litigation and may subsequently find themselves childless and without property.[1009] Access to justice is a very real problem for the indigent in Nigeria[1010] particularly women. This is one of the reasons why heavily subsidized government-funded mediation centres thrive in Nigeria. They provide access to justice to the poor.[1011]

Several mediation initiatives have been established in Nigeria since the late 1990s. Some of them include the citizens' mediation centres, the MultiDoor courthouses, amendments of high court civil

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[1003] Lande 'Revolution in family law dispute resolution' 423.
[1004] Moore 19-20.
[1005] See 2.3.6.1 above.
[1006] Hollos 867.
[1007] Ifemeje *Contemporary Issues* 89.
[1008] Ola, Oni & Akanle 66.
[1009] Hollos 852, 867.
[1010] Charles O Adekunle 'Access to justice in Nigeria: An extrapolative appraisal of its socio-legal barriers' at 1, available at *www.researchgate.com* accessed on 15 May 2016; Carolyn Logan 'Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' (2017) 3, 8, 23, available at *https://afrobarometer.org/publications/pp39-access-to-justice-in-africa,* accessed on 16 September 2019.
[1011] Section 14 of the Enugu State Citizens Rights and Mediation Centre Law of 2007 provides that the services of the Centre shall be for the less privileged. See Akanbi MM 'Kwara State Multi-Door Courthouse: An idea whose time has come' Paper delivered at the Inauguration of the Committee on the Proposed Kwara State Multi-Door Courthouse, High Court Complex Ilorin, Kwara State, 29 July 2008; DFID Nigeria's Security, Justice and Growth Programme 'Legal Assistance and Advice Provided through Law and Mediation Centres' available at *https://www.britishcouncil.org.ng/sites/default/files/law_mediation_centres.pdf* accessed on 10 July 2018; Ani, Comfort Chinyere 'Alternative Dispute Resolution (ADR) in Nigeria: A study of the Lagos Multi-Door Courthouse (LMDC)' in Ernest Uwazie (ed) *Alternative Dispute Resolution and Peace-building in Africa* (2014) 48; Adekunle 9.

procedure rules to add provisions which require judges to encourage disputants to attempt alternative dispute resolution, amongst others. The most successful of all these initiatives has been the citizens' mediation centres. They have resolved hundreds of thousands of cases and saved the courts billions of naira. [1012] Cases are resolved speedily at these centres and they are either cost-free or heavily subsidized. These factors have contributed enormously to the Centre's growth and popularity.[1013]

One of the goals of mediation is the reduction of the time and money cost of dispute resolution.[1014] Mediation is more cost effective than litigation[1015] and this has contributed greatly to its growing popularity as the appropriate dispute resolution method for families going through divorce. As aforementioned, it is easier to get a mediation session than a court date. Mediation is also cost-effective, and when it is conducted in a government-owned facility is either heavily subsidized or is completely free, ensuring that the indigent (particularly the financially weaker spouses) have access to justice. Mediation is also a more straightforward process than litigation and is therefore far easier for parties to understand and participate effectively in the process.[1016] Mediation is therefore a cheaper alternative to litigation and is thus able to mitigate the problem of access to justice for the indigent members of the family. In summary: the mediation process is 'more accessible than litigation.'[1017]

The last two subsections of the chapter describe the benefits of mediation to the courts.

5.3.11 Overburdened court dockets

Overburdened court dockets are a regular occurrence in Nigeria because litigation is the primary[1018] mode of dispute resolution in the country. The introduction of mediation as a mainstream alternative will lessen the burden on the courts. Compliance with the settlement agreement significantly reduces the likelihood of re-litigation or appeals arising as a result of their divorce. Research has shown that divorce mediation leads to higher compliance rates than judgments

[1012] See 7.1 below.
[1013] Ibid.
[1014] Beck, Sales & Emery 449; Kelly 'Family mediation research' 3.
[1015] Beck, Sales & Emery 447; Mienkowska-Norkiene 119.
[1016] De Jong 'Judicial stamp' 5.
[1017] Ibid.
[1018] In many parts of the country, it is the sole mode of dispute resolution.

arrived at as a result of divorce litigation,[1019] and that re-litigation of mediated agreements is lower than re-litigation of litigation judgments.[1020] Divorce mediation can therefore lighten the burdened court dockets in Nigeria.

5.3.12 Cost of litigation

One of the most popular recorded reasons for the success of the mediation process is its cost effectiveness in terms of time and money for both the parties and the state.[1021] Mediating divorce will ensure that the state saves money that would have otherwise been spent on litigating and re-litigating contentious divorce cases. It also saves the time the courts could have spent on these cases thereby leaving resources available to tackle the cases which must be resolved using litigation and the law.[1022]

5.4 SUMMARY

Mediation is not a panacea. It cannot provide permanent solutions to all the issues which plague the Nigerian family dispute resolution system, especially in divorce cases. However, from the above, there is evidence that divorce mediation can and does proffer solutions to a good number of these problems. In spite of the fact that litigation provides some safeguards which mediation cannot, mediation is the better route to divorce for the reasons discussed in this chapter. The chapter shows how different features of mediation enable the process achieve the goals of the good divorce and solve some of the divorce related problems in Nigeria. The amelioratory nature equips the process to preserve the institution of marriage, save salvageable marriage, provide decent burials to dead marriages, reduce bitterness associated with divorce and promote good post-divorce relationships. The process also affords protection and promotion of the interests of vulnerable parties by empowering weaker spouses to negotiate better,[1023] providing safety protocols in cases with elements of domestic abuse and by prioritizing the interests of any children of the marriage. It further acknowledges and deals with the emotional aspects of divorce, fails to apportion blame thereby ensuring a fair and just process for both parties and saves cost in time and money for both the parties and the state. Mediation is therefore far better placed than the divorce litigation process

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[1019] Emery, Sbarra & Grover 27.
[1020] Beck & Sales 99, 102; Emery & Wyers 475.
[1021] See 5.1.8. above; De Jong 'A pragmatic look' 520.
[1022] De Jong 'Judicial stamp' 8.
[1023] It enables parties to determine the terms of their divorce themselves. See John Ford 'The scope of divorce mediation: A question for Namibia' in *African Initiative for Mediation, Second Quarterly Newsletter* (2007) 19.

to achieve the goals of a good divorce process and to provide some much needed relief and protection for families going through divorce in Nigeria in addition to saving them and the courts costs in terms of time and money.

The mediation process also provides a satisfactory solution to the problems of divorce in Nigeria. By empowering parties to negotiate better, consider options outside the legal pie and promoting the interests of all the parties to the process, it encourages the fair distribution of marital property and provision of maintenance where necessary. Its amelioratory nature promotes reconciliation, reduces the acrimony of the divorce process and enables discussion about custody while its privacy and confidentiality ensure protection from stigma. The lack of a decision wielding umpire protects parties from the negative attitude of the judiciary. Finally, as mentioned above, it saves resources in terms of time and money for the parties and the state.

This thesis therefore proposes the adoption of divorce mediation into the Nigerian family dispute resolution system through an institutionalized divorce mediation program. This introduces the question: What is an institutionalized divorce mediation program? This is the subject of the next chapter.

CHAPTER SIX

CONCEPTUALIZING AN INSTITUTIONALIZED DIVORCE MEDIATION PROGRAM

6.1 INTRODUCTION

The thesis so far has been able to establish the need for divorce mediation in Nigeria. This chapter attempts to conceptualize an ideal institutionalized divorce mediation program in a bid to determine the possibility of the creation of such a program in Nigeria.

There is a general consensus the world over that mediation is better suited than litigation to the resolution of disputes within the family.[1024] One fundamental reason is the fact that mediation effectively enables families going through divorce to avoid all the procedural disadvantages attributed to divorce litigation.[1025] Mediation also enables the state save time and money and decongest its courts.[1026] The result of this widespread confidence in the merits of mediation is the institutionalization of divorce mediation in several jurisdictions in the world.[1027] In this context, Sharon Press defines institutionalization as:

> … any entity (governmental or otherwise) which, as an entity, adopts ADR procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR processes, and government agencies that incorporate ADR processes in developing rules and regulations.[1028]

The institutionalization of mediation has further been defined to include the practice of mediation by professional mediation bodies.[1029]

McAdoo and Welsh defined institutionalization '… in terms of availability and routine use of alternatives to trial'[1030] and 'institutionalized' as ' … well-established and widely used …'[1031]

[1024] Nawi 'Mandating mediation' 4; The Hong Kong Report 6.
[1025] Jacqueline Heaton 'The extension of mediation and piercing the trust veneer on divorce in South Africa' (2015) *Int'l Surv. Fam. L.* 311; Helga Schultz '*A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System'* (unpublished Master of Laws thesis, University of Kwazulu-Natal, 2011) 15-19.
[1026] Schultz 18-19.
[1027] De Jong 'A pragmatic look' 523-6.
[1028] Sharon Press 'Institutionalization: Saviour or saboteur of mediation?' (1997) 24 *Florida State University Law Review* 904.
[1029] Forrest Mosten 'The institutionalization of mediation' (2004) 42 *Family Court Review* 293.
[1030] McAdoo & Welsh 408.
[1031] Ibid 407.

In summary, institutionalized divorce mediation programs are programs routinely offered by organizations or institutions with standard rules of procedure such as the courts; professional bodies or government agencies. Proponents of institutionalized mediation programs aver that institutionalization thrives because it results in the promotion of the mediation process as well as increased usage of the process.[1032] Opponents claim that the introduction of rules, standards and laws to regulate institutionalized mediation results in changing the mediation process from a flexible to a more rigid process.[1033]

The benefits of institutionalized divorce mediation programs however outweigh the disadvantages because these programs continue to thrive in several countries worldwide such as the United States (particularly California), South Africa, and Australia.[1034] Divorce mediation programs in these countries include the court-annexed divorce mediation program provided by the Family Court Services Unit attached to the courts in California;[1035] the divorce mediation program by the Office of the Family Advocate — a government establishment attached to the courts — in South Africa;[1036] and the divorce mediation program provided by community mediation centres called Family Relationship Centres, and subsidized by the government of Australia.[1037] Particular reference is made to these countries for several reasons. One, Australia[1038] and California[1039] are the pioneers of institutionalized divorce mediation programs — through their courts — in the world. Two, family mediation is therefore deeply embedded in their family law systems and has been widely accepted and practiced for over two decades.[1040] Finally, the Australian family mediation program has also been subjected to the most extensive evaluation exercise ever done in the area

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[1032] Press 'Institutionalization' 906–8; Sharon Press 'What happens when mediation is institutionalized? To the parties, practitioners and host institutions' (1994) 9 *Ohio State Journal on Dispute Resolution* 319.
[1033] Press 'What happens' 319.
[1034] Knox 26-37.
[1035] Knox 35.
[1036] Schultz 33, 49-50. Note that mediation services are also provided for under section 6(4)*(a)* of the South African Children's Act and Rule 41A of the Uniform Rules of Court. See also Heaton 'The extension of mediation' 315.
[1037] Patrick Parkinson 'The idea of family relationship centres in Australia' (2013) 51 *Family Court Review* 195. Note the family mediation program provided by Hong Kong Government through the Family Court, modelled after the family mediation program in Australia. Hong Kong Report 77. In Hong Kong, the success of the Family Mediation Pilot Scheme launched in 2000, led to the formal recognition of mediation as a primary dispute resolution process in the country. Today, Practice Direction 15.12 (Matrimonial and Family Proceedings) provides for parties with family disputes to attempt mediation prior to litigation and other dispute resolution processes. See Knox 27.
[1038] De Jong 'Divorce mediation in Australia' 280-1.
[1039] Knox 33.
[1040] Australia: Since 2006, Cooper Donna Maree & Brandon Mieke 'Non-adversarial advocates and gatekeepers: Lawyers, FDR practitioners and co-operative post-separation parenting' (2008) 19 *Australasian Dispute Resolution Journal* 104, Schultz 104; De Jong 'Divorce mediation in Australia' 280-1. California: Since the 1980s. Knox 33.

of family mediation with over 28,000 participants.[1041] South Africa has the most developed divorce mediation programs in Africa.[1042]

6.2 GOALS (BENEFITS) OF INSTITUTIONALIZED DIVORCE MEDIATION PROGRAMS

Institutionalized mediation programs have been established for a myriad of reasons. The Australian Family Law Rules provide for the goals of family mediation in Order 25A rule 10(1)*(a)*:

> (i) communicate with each other regarding the matters in dispute: and
>
> (ii) find satisfactory solutions which are fair to each of the parties and (if relevant) any children; and
>
> (iii) reach agreement on matters in dispute …

In California, the objective of divorce mediation provided for in section 3161 of the California Family Code and section 4607 of the California Civil Code is listed as:

> … minimization of acrimony between divorcing couples, encouraging continuing relationship between children and their parents and agreement on parties' visitation rights.

A recurrent objective of family and divorce mediation programs around the world is the protection of the interests of children during divorce.

The operational guidelines for the Family Relationship Centre[1043] — one of the primary providers of the divorce mediation service in Australia — provides:

> … aim of joint family dispute resolution is to assist parents to agree on arrangements for the care of their children post-separation. The primary focus of joint family dispute resolution sessions at Family Relationship Centres should be on the needs of the children.[1044]

In South Africa, the aim of the Mediation in Certain Divorce Matters Act — which provides for the Office of the Family Advocate — is

> … to combine the principles of the legal protection of the interests of the minor children, with that of a court-like mediatory approach to divorce where such children are involved. In other words, the family advocate monitors and possibly controls the

[1041] Kaspiew et al *xvii*.
[1042] De Jong 'Judicial stamp' 98.
[1043] The Family Relationship Centres are community-based centres which were introduced in Australia in 2006 to provide marriage and divorce support for families. Patrick Parkinson 195.
[1044] Operational Framework for Family Relationship Centres 6.

> outcomes of the settlements pertaining to custody, in the interests of the minor child, through a mediatory approach to the negotiations.[1045]

From the above, we can deduce that primary objectives of institutionalized divorce mediation programs are the protection and preservation of the interests of the members of the family going through divorce (the spouses and their children), by minimizing acrimony between the spouses to foster good post-divorce relationships, and empowering them to communicate effectively and reach fair solutions for all the members of the family.

Other objectives include ameliorating the harsh effects of litigation by providing a process which is non-adversarial, flexible and simple, saves time and cost and allows parties to express themselves.[1046] Settlement of disputes and the creation of settlement agreements,[1047] — which ensure the decongestion of court dockets — have also been recognized as objects of these divorce mediation programs.

The goals of institutionalized divorce mediation programs are therefore comparable to the goals of the good divorce discussed extensively in Chapter Two. These goals, where successfully achieved, become the benefits of these programs.

6.3 FEATURES OF INSTITUTIONALIZED DIVORCE MEDIATION PROGRAMS

An examination of the essential structural and procedural features of an effective institutionalized divorce mediation program is necessary to determine how these programs work. These key features are discussed below.

6.3.1 Mandatory Mediation

A primary feature of most institutionalized mediation programs is compulsion of parties. However mandatory mediation has been the subject of scholarly debate. Opponents of mandatory mediation aver that voluntariness and respect for parties' wish to either opt in or out of mediation is one of the hallmarks of the mediation process,[1048] and therefore compelling mediation is against the

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[1045] Schultz 49.
[1046] Mcadoo 404-5.
[1047] Press 'What happens' 309.
[1048] De Jong 'An acceptable' 39.

essence of mediation.[1049] They insist that mandating mediation may put vulnerable parties at risk[1050] in cases where there is a power imbalance between the parties or a history of domestic violence. Proponents however argue that voluntariness has been proven to attract a low level of participation[1051] and that for parties to experience the numerous benefits of divorce mediation, they must participate in the process.[1052] A third school of thought finds that mediation should be mandatory and yet voluntary. Simply put, parties ought to be compelled to participate in mediation to be able to experience the benefits of the process; however, they would not be compelled to settle, to ensure the preservation of the voluntarism ethos of mediation.[1053]

Research has also shown that mandating mediation is an effective way of publicizing mediation[1054] and ensuring participation of parties.[1055] Current trend worldwide is therefore for mandatory mediation.[1056] 78% of the courts in the United States can mandate or have authority to mandate mediation in divorce cases particularly cases involving children.[1057] In Norway and the Netherlands, mediation must be attempted before litigation in divorce cases.[1058] Family mediation is also mandatory in California where the law expressly states that mediation must be undertaken before or during court hearings in cases relating to child custody.[1059] In South Africa parties must attempt mediation first before instituting proceedings in court.[1060]

The case for the effectiveness of mandatory mediation in combating low participation was proven in Australia.[1061] When mediation was first introduced in Australia, in the 1990s, it was voluntary

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[1049] Schultz 66; Jacqueline Durand 'The institutionalizing of mediation and its effect on unrepresented parties: Is justice really the goal of court-mandated mediation' (2016) 29 *Geo J Legal Ethics* 980; Stella Vettori 'Mandatory mediation: An obstacle to access to justice?' (2015) 2 *African Human Rights Law Journal* 377.

[1050] Vicki Waye 'Mandatory mediation in Australia's civil justice system' (2016) 45 *Common Law World Review* 215; Nawi 'Mandating mediation' 5.

[1051] Nawi 'Mandating mediation' 3; Durand 980; Welsh 423.

[1052] De Jong 'An acceptable' 37-8.

[1053] Knox 20.

[1054] Ibid; Isolina Ricci 'Court-based mandatory mediation: Special considerations' in Folberg, Milne & Salem *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 415;

[1055] Knox 20; De Jong 'An acceptable' 37-8.

[1056] Goldberg 'Family mediation is alive and well in the United States of America: a survey of recent trends and developments' (1996) *TSAR* 369-70.

[1057] De Jong 'A pragmatic look' 523.

[1058] Ibid 524-5.

[1059] Section 4607 of the California Civil Code; s 3170 of the California Family Code.

[1060] De Jong 'A pragmatic look' 527; See also s 33(2) and 33(5) of the Children's Act.

[1061] Waye 215-17; M De Jong 'Australia's Family Relationship Centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' (2017) 2 TSAR 309.

and was underutilized by Australians;[1062] disputants still preferred the courts. This was also the case in the Unites States[1063] and Malaysia.[1064] A marked improvement in participation, publicization and public confidence in the program was recorded when mediation was made mandatory.[1065] Today, family mediation is mandatory in Australia, it is a requirement for the institution of proceedings revolving around parenting matters at the family court.[1066] Research has shown that resolving family disputes through mediation is more successful if parties attempt mediation before instituting proceedings in court.[1067] Mandatory mediation is therefore essential to 'bring parties to the table'.

6.3.2 Good Faith Participation

The effectiveness of mandatory mediation is dependent on the good faith requirement.[1068] Parties have a duty to participate with good faith during the mediation process whether or not mediation is voluntary.[1069] 'Good faith' has been defined as '… a directive to parties and others to participate in the mediation process … with "best efforts"'.[1070] It has also been defined as centered around ' … the obligation to tell the truth.'[1071]

> … a real, honest exertion or attempt, realistically directed at resolving the issues.[1072]

While no substantial and universal definition of good faith exists, several examples have been proposed for behaviours which might imply bad faith. They include refusal to attend mediation or to participate, lying and withholding necessary information or documents.[1073]

Opponents of the good faith requirement argue that this requirement is best described as ' … undermining core mediation values of party self-determination, confidentiality, and third party

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[1062] De Jong 'An acceptable' 38.
[1063] Welsh 423; Durand 980.
[1064] Nawi 'Mandating Mediation' 3.
[1065] Kaspiew et al 305.
[1066] Section 60I of the Australian Family Law Act.
[1067] Hong Kong Report 62.
[1068] Kathleen A Devine 'Alternative Dispute Resolution: Policies, participation, and proposals' (1991) 11 *Rev. Litig.* 98; Kimberlee K Kovach 'Good-Faith in mediation: Requested, recommended, or required? A New Ethic' (1997) 38 *S. Tex. L. Rev.* 596.
[1069] Schultz 77.
[1070] Carol L Izumi 'Prohibiting "Good Faith Reports" under the Uniform Mediation Act: Keeping the adjudication camel out of the mediation tent' (2003) 2003 *J. Disp. Resol.* 70.
[1071] Peter N Thompson 'Good faith mediation in the federal courts' (2011) 26 *Ohio State Journal on Dispute Resolution* 365.
[1072] Astor 3.
[1073] Izumi 71.

neutrality.'[1074] They further argue that it is an indefinite term, the determination of which is completely subjective and dependent on the prejudices of the mediator.[1075]

Proponents on the other hand contend that the good faith requirement ensures protection of the parties and the process from abuse by recalcitrant parties,[1076] and guarantees a fair and efficient process.[1077] Proponents suggest the use of incentives[1078] and penalties[1079] — typically cost sanctions — to enforce the good faith requirement.

The Australian Family Law Act requires that parties must 'make a genuine effort to resolve ... '[1080] their disputes. It further requires family dispute resolution practitioners to submit a certificate stating that parties made an effort to resolve their dispute through family mediation before instituting an application for a parenting order in court.[1081] These certificates state that the parties either participated actively or otherwise, refused to attend mediation, attended but did not reach resolution or mediation was stopped because it was found to be inappropriate for the case.[1082] This certification system ensures that parties actively and genuinely participate during mediation sessions otherwise they will incur penalties such as bearing the total mediation or court costs of both parties, an order to return to mediation or go to court.[1083] The guidelines of the Australian Family Relationship Centres also provide that the Centre ' … may refuse services to a client who is … clearly acting in bad faith.'[1084] It further describes behaviour which constitutes bad faith as fraudulent and malicious acts and ta advantage of another party.[1085]

In South Africa, this certification process for divorce mediation was recommended by the court in the case of *Townsend-Turner v Morrow*.[1086] However, it does not yet form part of the formal

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[1074] Ibid 68.
[1075] Wayne D Brazil 'Continuing the conversation about the current status and the future of ADR: A view from the court' (2000) *J. Disp. Resol.* 31-3.
[1076] Thompson 377; Izumi 70.
[1077] Maureen A Weston 'Checks on participant conduct in compulsory ADR: Reconciling the tension in the need for good-faith participation, autonomy, and confidentiality' (2001) 76 *IND. L.J.* 643.
[1078] Knox 25. See footnote 5.
[1079] Izumi 73.
[1080] Section 60I(1).
[1081] Section 60I
[1082] Section 60I(8). Recommendation 6 of the Hong Kong Report requires that the parties should have a certificate of compliance with the good faith requirement to show the court that mediation was not attempted, attempted and failed, or not attended. Hong Kong Report 87. Under the pilot family mediation scheme of Hong Kong, this certificate was called the Mediation Co-ordinator's report. Hong Kong Report 22.
[1083] Section 13C and D of the Family Law Act; Schultz 166-7; Astor 12.
[1084] Operation Framework for Family Relationship Centres 23.
[1085] Ibid.
[1086] Supra 55E.

divorce litigation system. De Jong[1087] proposes some sanctions in South Africa such as adjourning the case in court until mediation takes place[1088] or awarding costs against the unwilling party.[1089] A mechanism for ensuring good faith participation is therefore an essential requirement for institutionalized divorce mediation programs.

6.3.3 Screening for Safety

The safety of mediation participants, particularly victims of abuse has been a contentious issue for decades.[1090] Most mediation programs have a premediation screening session to determine case appropriateness for mediation with particular reference to the safety of the parties. This session typically screens for any of the following, power imbalance, domestic or family violence, any substance abuse or mental health issues.[1091]

In California, mediators are required to screen cases for domestic violence, child abuse or power imbalance[1092] using a protocol created by the California Judicial Council.[1093] Safety measures such as the use of safety plans have been introduced by the state to ensure that parties who are affected by the above issues are able to participate freely in mediation.[1094] The California Family Code also empowers intake staff to screen people out of mediation.[1095]

In Australia, at least half of the matters brought before the Centres have elements of domestic violence.[1096] The family mediators therefore have a primary duty to screen for domestic violence.[1097] Extensive screening protocols are in place to ensure that matters are suitable for mediation by screening for domestic violence and power imbalance. Regulation 25 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 provides as follows;

> In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether

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[1087] M De Jong 'Opportunities for mediation in the new Children's Act 38 of 2005' (2008) 71 *THRHR* 636.
[1088] Section 64(1) of the Children's Act, South Africa
[1089] Ibid s 48(1)*(d)*.
[1090] See discussion in 5.1.6.2 above; Milne 305-35.
[1091] Taylor 183-8.
[1092] Section 5.215 California Rules of Court, 2007; ss 211, 1850(8) and 3170(b) of the California Family Code.
[1093] Knox 37, 46.
[1094] Section 5.210 California Rules of Court, 2007. See the discussion in 5.1.6.2 above for procedural safeguards employed for protecting victims of abuse during mediation.
[1095] Knox 46.
[1096] Kaspiew et al 234; Patrick Parkinson 209.
[1097] Kapiew et al 237.

> the ability of any party to negotiate freely in the dispute is affected by any of the following matters:
>
> (a) a history of family violence (if any) among the parties;
>
> (b) the likely safety of the parties;
>
> (c) the equality of bargaining power among the parties;
>
> (d) the risk that a child may suffer abuse;
>
> (e) the emotional, psychological and physical health of the parties;

Regulation 62 further provides for the duty of mediators to

> ... assess for appropriateness for mediation, considering family violence, the safety of the parties, the equality of bargaining power, the risk of child abuse, the emotional, psychological and physical health of the parties and any other matter the mediator considers relevant to the proposed mediation.

Staff of the Family Relationship Centres are trained to understand and detect risk factors and to help parties create safety plans.[1098] They are also authorized to determine case appropriateness for mediation using a screening tool,[1099] the Family Law Detection of Overall Risk Screen (DOORS) (2012).[1100]

Institutionalized divorce mediation programs must therefore recognize the need to identify and protect parties whose safety might be threatened before and during the mediation process and provide adequate measures to protect them.

6.3.4 The Role of the Mediator

Divorce mediation programs typically adopt the facilitative model of mediation, as this is 'the baseline approach' for mediation[1101] and the original model of mediation employed by family mediators during the advent of the field.[1102] The facilitative element of mediation was so ingrained into the nature of mediation that most definitions of the term 'mediation' make reference to it.[1103] Facilitative mediation has been described as ' … guiding people through a communication process in which the parties' voices, thoughts, feelings and ideas are the important factors.'[1104]

[1098] Operational Framework for Family Relationship Centres 27.
[1099] Ibid 23-4.
[1100] This screening tool is available at *http://www.familylawdoors.com.au/,* accessed on 12 October 2019.
[1101] Bernard Mayer 'Facilitative mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 49.
[1102] Milne, Folberg & Salem 14.
[1103] Mayer 31. Mediation has been defined frequently as 'facilitated negotiation'.
[1104] Mayer 30.

Facilitative mediation is process oriented, concentrating more on ensuring that the parties are sufficiently guided through process rather than on the possibility of settlement.[1105] This model is acclaimed for empowering parties[1106] and condemned for its tendency to make the process longer and therefore more expensive.[1107]

> Mediators using a facilitative style focus on eliciting the principal's opinions and refrain from pressing their own opinions about preferable settlement options.[1108]

The role of the facilitative mediator is therefore one of a process guide who assists parties communicate.

On the other end of the spectrum is the evaluative model of mediation. Evaluative mediation is settlement-oriented laying greater emphasis on reaching a settlement than the conduct of the process.[1109]

> Mediators using an evaluative style develop their own opinions about preferable settlement options and may try to influence principals to accept them.[1110]

The evaluative mediator assesses the dispute, shows parties the strengths and weaknesses of their case and may suggest possible outcomes if litigation is attempted.[1111] This model has been commended for being effective in achieving settlement agreements[1112] and criticized for endangering the notion of mediator neutrality and impartiality[1113] and disempowering parties.[1114] The evaluative mediator is effectively a reality tester who gives information and advice with a view to enabling parties reach settlement.

Research has found that most family mediators employ both models of mediation and that it may be detrimental to the parties to strictly follow one model.[1115]

In South Africa, the Family Advocate assumes a more evaluative role, advising parties on the merits and otherwise of their case.[1116] In Australia, the facilitative model of mediation is employed

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[1105] Mayer 49.
[1106] Ibid 32-3.
[1107] Milne, Folberg & Salem 15.
[1108] John Lande 'Toward more sophisticated mediation theory' (2000) *J. Disp. Resol.* 322-3.
[1109] L Randolph Lowry 'Evaluative mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 72-3.
[1110] Lande 'Toward more sophisticated mediation theory' 322-3.
[1111] Milne, Folberg & Salem 15.
[1112] Lowry 76.
[1113] Milne, Folberg & Salem 15.
[1114] Lowry 74.
[1115] Mayer 50-1.
[1116] Y C Steyn *The Role of Court Based Mediation in the Resolution of Divorce* (unpublished Master of Laws thesis, North-West University, 2015) 14-15.

even though this is not expressly stated in the law.[1117] It is to be noted that the mediators at the Centres also play an evaluative role. The Family Law Regulations 2008 empower family dispute resolution practitioners to provide legal advice if they are lawyers.[1118] The mediation process at the Centres has also been described as 'settlement-oriented'.[1119]

As mentioned above, most family mediators employ both models, therefore the effective divorce mediation program ought to encourage the adoption of both facilitative and evaluative roles during the mediation process.

6.3.5 Cultural Competence

Considerations of the cultural context of a people is necessary in the creation of mediation programs[1120] as its absence may lead to resistance to the program.[1121] Mediation is a flexible process which can be tailored to different cultural, religious and value systems depending on the needs of the parties.[1122] Mediators can therefore ascertain the needs of parties and adapt the mediation process to the achievement of those needs. Such needs include cultural, linguistic, religious, literacy and financial needs. They may lead to barriers in accessing the mediation service.[1123] The ability to adapt to the cultural needs of parties is generally described as the cultural competence of a mediator.

Cultural competence has been defined as:

> … comprising the values, skills and knowledge that guide the mediator in intercultural dispute resolution.[1124]

Cultural competence of mediators ensures the best possible process and outcome for the parties.[1125] In Australia, Family Relationship Centres are committed to ensuring the removal of all barriers to

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[1117] Cooper & Brandon 107.
[1118] Rule 29(d).
[1119] Cooper & Brandon 107.
[1120] S Moodley 'Mediation: The increasing necessity of incorporating cultural values and systems of empowerment' (1994) CILSA 44, 46-8
[1121] Julia Ann Gold 'ADR through a cultural lens: How cultural values shape our dispute process' *J. Disp. Resol.* (2005) 289.
[1122] De Jong 'An acceptable' 39; Moodley 46-8.
[1123] Operational Framework for Family Relationship Centres 16; Knox 48.
[1124] Lola Akin Ojelabi, Thomas Fisher, Helen Cleak, Alikki Vernon & Nikola Balvin 'A cultural assessment of family dispute resolution: Findings about access, retention and outcomes from the evaluation of a Family Relationship Centre' (2011) 17 *Journal of Family Studies* 223.
[1125] Ibid 230-1.

accessing their service on the basis of either language, religion or culture.[1126] The Operational Framework provides as follows:

> All Centres provide flexible, culturally sensitive and accessible service delivery models and practices to Indigenous clients in their area, and have in place strategies to achieve this.
>
> Strategies to enable effective delivery of Centre services to Indigenous clients might include:
>
> providing services at culturally appropriate sites that are welcoming for Indigenous families
>
> recruiting Indigenous staff in the Centre
>
> arranging outreach visits to communities in their catchment areas ...[1127]

The courts in California require that all court appointed mediators must be well-versed in the cultural context of the clients in their area of jurisdiction.[1128] An effective institutionalized divorce mediation program must therefore provide culturally competent mediators.

6.3.6 Scope

If effective mediation must be attempted before the institution of petitions for divorce, all matters relating to the divorce must be resolved.[1129] Simply put, effective divorce mediation must resolve all divorce related issues namely, child custody, child and spousal maintenance and distribution of assets. This ensures that spouses maximize the benefits of the divorce mediation process and do not go through multiple processes, including litigation to resolves all the possible matters related to the divorce.

This is not the case with the California Family Court Services Unit which concentrates on cases relating to child custody or other parental disputes.[1130]

In South Africa, under the Mediation of Certain Divorce Matters Act and the Children's Act, the scope of divorce mediation is limited to child-related disputes,[1131] however, under the Rules of the

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[1126] Operational Framework for Family Relationship Centres 16; Ojelabi et al 'A cultural assessment' 222.
[1127] Operational Framework for Family Relationship Centres 17.
[1128] Knox 34-5, 48, 56.
[1129] Sandra Burman & Denise Rudolph 'Repression by mediation: Mediation and divorce in South Africa' (1990) 107 *S. African L. J.* 276.
[1130] Knox 35.
[1131] Preamble to the Mediation in Certain Divorce Matters Act 24, 1987; Jacqueline Heaton *South African Family Law* 3 ed (2010) 166-7; De Jong 'Mediation and other appropriate forms of dispute' 607.

Magistrate Courts, all divorce related issues may be mediated.[1132]

In Australia, the Centres are charged with the mandate to mediate all family related disputes including disputes arising out of divorce and separation.

> Where both children's issues and property are involved, the Centre may deal with both issues as part of a family dispute resolution process.[1133]

The role of the Centres also includes assisting ' … separated families to resolve disputes about future parenting arrangements for their children and/or to settle the division of their property pool …'[1134] The Australian model which provides for the resolution of all disputes relating to the separating family provides a more effective system for an institutionalized divorce mediation program.

6.3.7 Referral System

In most jurisdictions with institutionalized divorce mediation programs, public and private mediation service providers are made available to spouses seeking divorce. These programs also provide for public mediation through the courts[1135] and or private mediation through other mediation service providers.[1136] In Australia,[1137] South Africa and California, divorce mediation services may be accessed through the courts or private mediators.[1138]

It is worthy of note that in these jurisdictions, the primary divorce mediation service providers are the institutionalized divorce mediation institutions. In the case of Australia, these are the Family Relationship Centres.[1139] They are perceived as the 'entry point' into the family dispute resolution system.[1140] Simply put, most cases for family dispute resolution first go to these Family Relationship Centres after which they may be resolved at the Centre through mediation, or referred to the courts or other agencies.[1141] The Centre therefore provides an effective referral system for its

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[1132] Rule 2(1)*(a)* of the Rules regulating the conduct of proceedings of the Magistrate Courts of South Africa. Heaton 'The extension of mediation' 315.
[1133] Operational Framework for Family Relationship Centres 8. See generally, 7-9.
[1134] Ibid 6.
[1135] The Mediation of Certain Divorce Matters Act, South Africa provides for public divorce mediation through the office of the Family Advocate. Heaton 'The extension of mediation' 313-314.
[1136] The South African Children's Act provides for private or public mediation by the courts or other mediation service providers. Heaton 'The extension of mediation' 314-315.
[1137] Section 19A Australian Family Law Act; Kaspiew et al 76, see Table 4.11.
[1138] South Africa: Heaton 'The extension of mediation' 313-15; California: Knox 34-5.
[1139] Kaspiew et al 76, see Table 4.11; See generally, Patrick Parkinson.
[1140] Kaspiew et al 110.
[1141] Patrick Parkinson 198.

divorce mediation program. Cases may be initiated at these programs through court referrals or walk ins.[1142]

6.3.8 Funding

Government support is crucial to the advancement of institutionalized mediation programs[1143] especially in the area of funding.[1144] Therefore, many institutionalized divorce mediation programs are funded — wholly or in part — by the government. Ready examples are found in Hong Kong, and Canada.[1145] The state of California funds its family mediation program. The mediation service at the Family Court Services Unit is provided free of charge.[1146]

The Australian government heavily subsidizes its family mediation program.[1147] It funds all the Family Relationship Centres: their staff, infrastructure, trainings and publicity programs. It also funds the sessions ancillary to the mediation service such as the premediation session and parent education classes.[1148] Additionally, it funds some mediation sessions for the indigent and subsidizes it for parties who earn above a certain income level.[1149] Support from government through funding and other activities funding ensures the sustainability of these mediation programs.

6.3.9 Fees

Mandatory mediation must ensure a consistent and fair process for 'citizens of all incomes'.[1150] Therefore an effective divorce mediation program is one which provides mediation services to all citizens irrespective of their income. One of the ways institutions have ensured that mediation is available to all citizens particularly the poor is by providing free or heavily subsidized mediation programs. An example is found in California. The family mediation service in the state is free to its citizens if the matter in dispute is related to child custody.[1151]

[1142] South Africa: Heaton 'The extension of mediation' 316; Hong Kong: Hong Kong Report 19; California: Knox 35.
[1143] The success of family mediation in Australia is as a result of government support in establishing both the Family Relationship Centres and the Family Law Regulations in 2006. Knox 49.
[1144] History has shown that many mediation service providers especially at community level suffer from lack of funds. See Press 'Institutionalization' 906, footnote 11; De Jong 'An acceptable' 42; De Jong 'A pragmatic look' 529.
[1145] California: s 1852 of the Family Code; Hong Kong: Hong Kong Report 20, 52-3; Canada: Hong Kong Report 9.
[1146] Note that free mediation services are available only to couples with issues relating to child custody. Knox 35.
[1147] Waye 222.
[1148] Knox 31.
[1149] Operational Framework for Family Relationship Centres 9, 18-21.
[1150] Ricci 414-415.
[1151] Knox 35.

However, Ricci notes that if these systems serve only the indigent, then a parallel system for the wealthy may exist[1152] and this presupposes that a more expensive and better system exists which the indigent cannot afford. This makes the free or heavily subsidized divorce mediation program appear substandard. Again, an example is found in California. While the Californian model is laudable, as it can be expected that a state which compels mediation should pay for the service which it has imposed on its citizens, this has not proved sustainable in the long run.[1153] The quality of services offered by the Family Justice Services is compromised because the state has struggled with the cost of providing mediation free of charge to all citizens with parenting disputes. The result is that parties are less than satisfied with the process because some have felt pressured into speedy, unsatisfactory agreements.[1154] Furthermore, richer clients would therefore prefer to go to private mediation to avoid the ill effects of the court-annexed program.

In Australia however, a different model is observed.[1155] The first hour of mediation is administered without cost to the parties. However, they are charged a token fee for subsequent hours. This token fee is determined via a sliding scale formula where parties who earn above than a fixed income level pay more than persons who earn below that level. For example, parties who earn over $50,000 per annum pay $30 for the second and third hours of mediation and will be billed according to the Family Relationship Centre's fees policy for subsequent hours while parties who earn less than $50,000 have the first three hours free and are charged based on the Family Relationship Centre's fees policy for subsequent hours.

The Hong Kong Report citing the Australian model recommended that charging a fee was expedient particularly for persons who could afford to pay,[1156] to encourage parties to participate actively.[1157] The Australian formula therefore provides a model for programs of this nature because it ensures a fair process for citizens from all walks of life.

[1152] Ricci 414.
[1153] Knox 50.
[1154] Ibid.
[1155] Operational Framework for Family Relationship Centres 9, 18-21.
[1156] Hong Kong Report 28.
[1157] Ibid.

6.3.10 Qualification, Training and Accreditation of Mediators

> Where mediation is made compulsory through legislation, it is obviously the state's responsibility to ensure country-wide, high quality mediation services to all its citizens.[1158]

To ensure quality and integrity of the mediation process and uniformity of practice and procedure, as well as public confidence in the process, universal mediator accreditation programs must be established.[1159] The state of California requires court appointed mediators[1160] to possess knowledge of the court system, family law procedure, and the indigenous people in the court's area of jurisdiction as well as a Master's degree in a behavioural science and two years' experience in counselling.[1161] California codes and rules of court also provide guidelines for training, accreditation and continued education on subject areas such as domestic violence, family and custody law and procedure.[1162] The state also provides a list of accredited providers of mediator training.

Currently, there is no national accreditation standard for family mediators in South Africa.[1163] The Australian government has devised a standard and universally recognized national policy to regulate the training and accreditation of its family dispute resolution practitioners found in the Family Law (Family Dispute Resolution Practitioners) Regulations.[1164] All practitioners must be listed on the Register under the Attorney General's Department.[1165] The minimum qualification required of them is a degree in law or other behavioral or social science[1166] as well as mediation training.[1167] The Australian Family Law Act also provides for the Accreditation Rules[1168] which guide the Regulations. An effective program must therefore provide uniform standards for the training and accreditation of its family mediators.

[1158] De Jong 'An acceptable' 40.
[1159] De Jong 'A pragmatic look' 529-31.
[1160] Mediators attached to most of the courts in California are staff mediators, i.e. the mediators are employees of the court. Knox 35.
[1161] Knox 34, see footnote. In Hong Kong, the mediators must have either a social science or law background of the Hong Kong Report 57, see para 4.28.
[1162] Section 1816 of the California Family Code; Ss 5.210 and 5.230 of the California Rules of Court, 2007.
[1163] Steyn 47; Scholars have called for standard training programs, standard accreditation requirements and uniform standards of practice and procedure for all accredited mediators in South Africa. See De Jong 'An acceptable' 44-5; De Jong 'A pragmatic look' 529-31.
[1164] Regulations 4 – 22 in Parts 2 – 4.
[1165] Knox 30.
[1166] Ibid; Regulation 60(1) of the Family Law Regulations; Operational Framework for Family Relationship Centres 11.
[1167] Regulation 60(2) of the Family Law Regulations.
[1168] Section 10A.

6.3.11 Enforcement

Research has shown that when public mediation services are attached to formal institutions run by the state — such as the courts —, people have confidence in the service and the process, particularly because of its 'security services'.[1169] One of these security services, is the mechanism for the enforcement of judgments. Effective divorce mediation programs ensure the provision of effective enforcement mechanisms for their settlement agreements to protect the interests of parties in the event of default. One of such mechanisms is a partnership with the formal courts to the effect that settlement agreements may be filed in court to become consent orders or consent judgment such that they carry the weight of the law and can be enforced — in the event of default — using formal court enforcement procedures.[1170]

In South Africa, a settlement agreement reached pursuant to the Children's Act and the Magistrate Court Rules can be enforced as an order of court.[1171]

In Australia[1172] and California,[1173] agreements reached during the dispute resolution process at the Family Relationship Centres may be submitted to court for formalization as consent orders.

Institutionalized divorce mediation programs therefore provide for efficient enforcement mechanisms to ensure effective settlement agreements.

6.3.12 Public Awareness

Lack of information is one of the primary impediments to acceptance of mediation.[1174] If the full benefits of the institutionalized divorce mediation program will be experienced, public awareness of the availability of the program is crucial.[1175] Worldwide, mediation programs have been publicized using campaign tools such as seminars, information pamphlets, community outreach programs, workshops, media advertisements and 'mediation week' schemes.[1176] Mandating mediation has also proved to be an effective tool for publicity.

[1169] De Jong 'An acceptable' 40.
[1170] Schultz 21-2.
[1171] Ibid 82-83; s 72(2) of the Children's Act.
[1172] Operational Framework for Family Relationship Centres 18; Schultz 137. This is also the case with Alberta, Canada. See Knox 26.
[1173] Knox 15, 26.
[1174] SPIDR Report on National Standards for Court Connected Mediation Programs para 1.5.
[1175] De Jong 'A pragmatic look' 531; Milne, Folberg & Salem 21.
[1176] Milne, Folberg & Salem 21. SPIDR Report para 3.1.

Evaluation of the history of mediation in Australia has shown that a greater level of publicity and participation was recorded in the country when mediation became mandatory.[1177] When the Family Relationship Centres were launched, the Australian government funded a heavy publicity campaign. Pamphlets containing information about the services offered by the Centres were deposited in public places like schools, doctor's offices.[1178] Some of these pamphlets were made in indigenous languages[1179] to ensure the widest possible reach. The Centres also offered free mediation for the first three hours.[1180] This further publicized the affairs of the Centre and attracted new clients. Today, the Centres still offer new clients up to three free or heavily subsidized hour-long mediation sessions every two years.[1181] An effective institutionalized mediation program is one with an effective system for public education.

6.3.13 Objectives of the Program

One of the key ingredients of the design of any effective mediation program is a set of clearly defined aims and objectives. They guide the affairs of the program, facilitate the evaluation of the program and inform user expectation for the Centre.

The goals of the programs in South Africa, California and Australia are detailed above.[1182] These goals ensure a clear road map for the administrators, mediators, clients and assessors of the Centre. They are therefore a sine qua non for an effective institutionalized divorce mediation program.

6.3.14 Evaluation

For institutionalization of mediation to be effective, it must be evaluated.[1183] Evaluation of mediation programs exposes challenges and weaknesses of such programs, identifies areas for further improvement and reveals to what extent such programs achieve the aims for which they were established.[1184] Hong Kong conducted an evaluation of the family mediation pilot scheme

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[1177] Kaspiew et al 305.
[1178] Patrick Parkinson 202.
[1179] Ojelabi et al 'A cultural assessment' 231.
[1180] Patrick Parkinson 204.
[1181] Ibid 205; Operational Framework for Family Relationship Centres 20.
[1182] See 6.2 above.
[1183] Press 'What happens' 329.
[1184] Knox 59.

which informed the recommendations made by the law reform commission towards the establishment of an institutionalized divorce mediation program in the country.[1185]

An extensive evaluation of the family law reforms leading to the creation of the Family Relationship Centres, involving over 28,000 participants was conducted in Australia by a group headed by Kaspiew.[1186] They found that the applications for divorce filed at the courts and the use of lawyers had dropped since the institution of the Family Relationship Centres,[1187] and the participation in Family Dispute Resolution processes had increased.[1188] High settlement rates as well as client satisfaction with the mediation process and outcome were also recorded.[1189] An effective program must therefore make provision for routine appraisals.

6.3.15 Regulatory Framework

An effective divorce mediation program must have enabling legislation to regulate the substantive and procedural needs of the program. Several legal instruments have been created in Australia to effectively regulate the Australian family dispute resolution system. They include the Family Law Act, the substantive law on the family, marriage and divorce in Australia; the Family Law Rules,[1190] which give clarity to the operations of the provisions of the Family Law Act; the Family Law Regulations[1191] which regulate the family dispute resolution practitioners, and the Operational Framework for the Family Relationship Centres[1192] which provide guidelines for the operations of the Family Relationship Centres. In California, the Civil Code and the Family Code regulate the use of mediation in family matters before the court while the Mediation of Certain Divorce Matters Act,[1193] the Children's Act,[1194] and the Rules of the Magistrate Courts[1195] provide for substantive and procedural aspects of divorce and family mediation in South Africa.[1196] Australia provides a

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[1185] Hong Kong Report 24-5. See California: Knox 37.
[1186] Kaspiew et al.
[1187] Ibid 50; See also Patrick Parkinson 208-9.
[1188] Kaspiew et al 50.
[1189] Kaspiew et al 82, see Table 4.2.0.
[1190] Family Law Rules 2004.
[1191] Family Law (Dispute Resolution Practitioners) Regulations 2008 Select Legislative Instrument 2008 No. 183 as amended.
[1192] Revised July 2019
[1193] Act 24, 1987.
[1194] Act 38, 2005.
[1195] The amended rules were published in Government Notice R183 in Government Gazette 37448, 18 March 2014; De Jong 'Mediation and other appropriate forms of dispute resolution' 609, see footnote 274.
[1196] Canada: The Notice to Mediate (Family) Regulation, 2007 and the British Columbia Family Law Act 2013.

good example of an institutionalized divorce mediation program which works with adequate provision for both the substantive and procedural features of its divorce mediation program.

6.4 SUMMARY

This chapter discussed institutionalized divorce mediation programs: definitions, goals, benefits and key features. It examined the key structural and procedural features of effective divorce mediation programs to enable a review of the citizen's mediation centres, the institutions proposed for the integration of divorce mediation into the Nigerian family dispute resolution system. Some of these features include mandatory mediation, good faith participation, safety protocols, the role and cultural competence of mediators as well as their qualifications, training and accreditation. Other features considered also include funding and fees, the scope of the activities of such programs, the regulatory framework, objectives and methods of evaluation for the program.

CHAPTER SEVEN

THE CITIZENS' RIGHTS AND MEDIATION CENTRE

7.1 INTRODUCTION

The preceding chapters have made an argument for the integration of divorce mediation into the Nigerian family dispute resolution system through an institutionalized divorce mediation program. This chapter proposes the citizens' mediation centre, found in several states in Nigeria, as a possible model for the institutionalization of divorce mediation in the country. The Citizens' Rights and Mediation Centre, attached to the Ministry of Justice in Enugu State, is presented as a case study.

This chapter briefly describes the citizens' mediation centres in Nigeria, and the basis for the choice of these mediation centres as carriers of the divorce mediation project. The features of the effective divorce mediation program discussed in the previous chapter will provide indices for the examination of the Citizens Rights and Mediation Centre to determine its suitability as a possible vehicle for the institutionalization of divorce mediation in Nigeria. Barriers to the successful implementation of this program at the Centre and means of overcoming these barriers conclude the chapter.

7.2 THE CITIZENS' MEDIATION CENTRE

The first citizens' mediation centre in Nigeria was established in Lagos State in 1999[1197] by the Lagos State Government in response to the need to provide greater access to justice for the citizens of the state.[1198] This Centre was aptly described in a World Bank report as:

> … a public sector managed unit for processing legal disputes by offering salaried mediators to resolve disputes outside the courts of justice.[1199]

[1197] Walsh 12, 51; DFID Nigeria 5; *http://lagosstatecmc.org/who%20we%20are.html*.
[1198] *http://lagosstatecmc.org*.
[1199] Walsh 51.

It is therefore a wholly government-funded agency[1200] which offers access to justice to the poor and vulnerable residents of host communities through the provision of no-cost mediation services.[1201]

Prior to the creation of the Centre, justice was available only through the regular courts in the state, which were overburdened and financially unavailable to the average Lagosian, particularly the poor.[1202] The average case took as long as five (5) years from institution to resolution[1203] and the costs to the parties, as noted above, were prohibitive.

> The aim *[of the Centre]*[1204] was to address the costs of accessing legal services and case load congestion in the courts[1205] through providing low cost and speedy dispute resolution services accessible by the poor and vulnerable.[1206]

The Centre's primary mandate, provided for in its governing legislation, the Citizens Mediation Centre Law,[1207] therefore was the provision of free and speedy dispute resolution for its clients, described as the indigent residents of the state, particularly women and children.[1208]

This Law also described the powers and functions of the Centre as follows:

(1) Mediate on disputes reported to the Centre in respect of:
    a) landlord and tenant matters;
    b) employer and employee matters;
    c) family matters;
    d) debt related matters; and
    e) other matters which the Governing Council of the Centre may deem appropriate.
(2) Assist disputing parties to appear before the Centre for the resolution

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[1200] It was instituted as a unit of the Ministry of Justice, which provides the necessary infrastructure and staff for the Centre. See Walsh 51.

[1201] DFID Nigeria 5.

[1202] Some of the costs associated with litigation include the court fees, remuneration of lawyers and the cost of travel to the courts. See Justice for All 'Increasing access to Justice' Impact Report Issue 4 (March 2014) 2, available at *https://www.britishcouncil.org.ng/sites/default/files/impact_report_increasing_access_to_justice_march_2014.pdf* accessed on 7 October 2019. (Justice for All (March 2014)).

[1203] Onyema 99.

[1204] Insertion by me.

[1205] *http://lagosstatecmc.org/who%20we%20are.html.*

[1206] DFID Nigeria 3.

[1207] Lagos State Citizens' Mediation Centre Law 2007.

[1208] Section 14 of the Citizens' Mediation Centre Law; DFID Nigeria 5; Walsh 12, Sabine Hertveldt 'Repairing A Car with The Engine Running' (2007) 47, available at *https://www.doingbusiness.org/content/dam/doingBusiness/media/Reforms/Case-Studies/2007/DB07-CS-EC-Nigeria.pdf,* accessed on 5 October 2019; *https://lagosministryofjustice.org/offices/citizens-mediation-centre/;* Cases at the Centre were sometimes resolved within hours or days. See Justice for All 'Increasing access to Justice' Impact Report Issue 5 (October 2014) 1, available at *https://www.britishcouncil.org.ng/sites/default/files/impact_report_c2_3_increasing_access_to_justice_oct2014.pdf,* accessed on 7 October 2019. (Justice for All (October 2014)). The Centre's ultimate aim was to ensure that cases were resolved within three months of receipt of the case. See Walsh 52.

of their disputes.
(3) Publicize its services and facilities.
(4) Provide free dispute resolution options.
(5) Resolve disputes within the shortest possible time.[1209]

The first of its kind in the country,[1210] the Lagos Citizens' Mediation Centre was enormously successful.[1211] Indicators for the measurement of the Centre's success include cost savings in terms of real Nairas saved by the courts and citizens by using mediation services instead of litigation. Between 2012 and 2015 alone, the Centres saved the courts over 2.9 billion Naira.[1212] Another indicator of the Centre's success is the increasing rate of successful resolution of disputes.[1213] This is particularly clear in the volume of cases referred to the centres.[1214] From 2014 to 2016 alone, the Centres in Lagos received more than 100,000 cases.[1215]

The Centre has also recorded a reduction in the number of cases tried in court[1216] as well as a marked increase in the diversity of clients. More women[1217] as well as wealthy individuals and organizations[1218] avail themselves of the services provided at the Centre. The Centre has also recorded a decrease in the number of settlements requiring enforcement through the courts.[1219] This is a testament to the quality of the services and settlements arrived at at the Centre.[1220] The success

[1209] Section 3 of the Citizen Mediation Centre Law 2007.
[1210] Ani Comfort Chinyere 'Alternative Dispute Resolution (ADR) in Nigeria: A study of the Lagos Multi-Door Courthouse (LMDC) in Uwazie Ernest (ed.) *Alternative Dispute Resolution and Peacebuilding in* Africa (2014) 50.
[1211] Walsh 58.
[1212]Justice for All 'Access to mediation and legal assistance services' Impact Report Issue 6 (October 2015) 4, available at *https://www.britishcouncil.org.ng/sites/default/files/cip_2.3.pdf,* accessed on 16 September 2019. (Justice for All (2015)).
[1213] This has increased from 42% in 2012 — see Justice for All (October 2014) — to 54% in 2015 — See Justice for All (2015).
[1214] Walsh 54-5.
[1215] 34281 cases in 2014. See *http://lagosstate.gov.ng/Digest_of_Statistics_2017.pdf p.125;* 37,274 cases and 41,112 cases in 2015 and 2016 respectively. See DFID Nigeria 5.
[1216] Hertveldt 47.
[1217] Many women are satisfied with these mediation centres with the number increasing steadily. For example, from 81% in 2014 to 87% in 2015. See Justice for All (2015) 2, 4. The number of cases instituted by women also increased. For example, from 30% of cases at the centre, in the first half of 2012 to 44% in the first half of 2013. Justice for All 'Increasing Access to Justice' Impact Report Issue 3 (September 2013) 3. (Justice for All (2013)).
[1218] The patronage of the most evident in the value of settlements reached at the centre. For example, the total value of settlement reached at the Centre from January to August 2018 alone was N829,110,221 (eight hundred and twenty-nine million naira). At the current exchange rate of N360 to $1, this figure amounts to $2,303,083.95. *http://lagosstatecmc.org/statistics.html.*
[1219] Justice for All (2013) 3; Justice for All (2015) 4.
[1220] Justice for All (2013) 3.

of the Lagos centres led to the establishment of similar centres all over the country, modelled on the Lagos centres.[1221]

7.3 THE CITIZENS' MEDIATION CENTRE AND THE DIVORCE MEDIATION PROJECT. THE WHY.

This section proffers the reasons why the Citizens' Mediation Centre is proposed for use as the vehicle for the institutionalization of divorce mediation in Nigeria.

Firstly, the Centre already provides an institutionalized mediation program. Using Press' definition,[1222] it is a government entity which adopts ADR — in this case, mediation — as part of doing business. According to McAdoo and Welsh, it is 'well established' and 'widely used' and engages in '…routine use of alternatives to trial' — mediation. While currently, its services do not include divorce mediation, it is a full-fledged institutionalized mediation system that works with paid and trained staff, infrastructure with fully equipped offices in all the local government areas in the state, a substantive law,[1223] practice directions,[1224] and partnerships with the community and the courts. Thus, most of the elements necessary for the creation of a divorce mediation program are already provided by the Centre, with the result that the introduction of a divorce mediation service would not require an overhaul of the present system, merely an improvement. Therefore, minimal resources in terms of time and cost will be required for the creation of a divorce mediation program at the Centre. The establishment of such a program from scratch would be a capital intensive project requiring the acquisition of physical infrastructure and staff. It will also require staff training, drafting of laws, sensitization programs and more. In summary, the Centre already provides an institutionalized mediation program, therefore minimal resources will be required to add an additional service to this program.

Secondly, it is a department of the Ministry of Justice, and so it enjoys the full support of the state. Experience has shown that this is a *sine qua non* for the successful operation of programs of this nature.[1225] This government support serves a dual purpose. First, it ensures the sustainability of the

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[1221] Hertveldt 47; Walsh 12, 58.
[1222] See 6.1 above.
[1223] The Lagos State Citizens' Mediation Centre Law mentioned above.
[1224] In 2011, Citizens Mediation Centre (Procedure) Guideline Practice Rules (2011) to further regulate proceedings at the centre.
[1225] Countries with thriving family mediation programs such as Australia and the United States are wont to provide funding for these program through the Government. The Australian government heavily subsidizes its family mediation program. It funds all the Family Relationship Centres: their staff, infrastructure, trainings and publicity

Centre and the projects undertaken by the Centre (such as a divorce mediation unit) because these will be funded and maintained by the government.[1226] Secondly, it confers authority on the Centre as a credible dispute resolution authority and one which is backed by and carries the weight of the law. This in turn ensures public confidence in the Centre,[1227] which is necessary to ensure compliance with the rules of process and procedure as well as resultant settlement agreements. Thus, part of the reason for proposing the Centre as the vehicle for the institutionalization of divorce mediation in Nigeria is the fact that it is already recognized by members of the Nigerian public as a government institution.[1228]

The centres were also selected for this project because like the Family Relationship Centres in Australia, they have a wide reach with a presence in several states in the country, and in remote local governments within those states,[1229] thereby making the rollout of a national divorce mediation project immediately feasible.[1230]

The Centres were also chosen as the appropriate vehicle for this project because of their success in the provision of mediation services in Nigeria over the past two decades.

One of the most compelling reasons for proposing the mediation centres as vehicles for the institutionalization of divorce mediation in Nigeria is the fact that these centres already provide family mediation services to the public.[1231] Cases relating to custody, distribution of property and spousal and child maintenance are routinely filed in the centres. However, resultant agreements do not usually form part of divorce settlements or judgments. Most cases of this nature are filed by unmarried partners or parties wishing to maintain their married status while seeking a relief from the Centre. The availability of family mediation services at the Centre would therefore aid the transition to an institutionalized divorce mediation program.

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programs. It also funds the sessions ancillary to mediation service such as the premediation session and parent education classes. Additionally, it funds the mediation session for the indigent and subsidizes it for parties who earn above a certain income level. Waye 222; See Knox 31. The California Family Mediation Program is also wholly-funded by the government. See Knox 35.

[1226] Walsh 57.

[1227] DFID Nigeria 9.

[1228] Ibid.

[1229] Patrick Parkinson 200.

[1230] It is to be noted that Boniface has called for the institutionalization of divorce mediation in South Africa through centres modelled after the Australian Family Relationship Centres in South Africa. See Amanda Boniface 'Family mediation in South Africa: Developments and recommendations' (2015) *THRHR* 405-6.

[1231] Section 3(1)*(c)* of the Lagos State Citizens' Mediation Centre Law.

In addition to the above, the successful implementation of the Lagos Citizens Mediation Centre model in several states in the country ensures the successful implementation of a national divorce mediation program because the vehicles (the mediation centres in all the states) already exist in many states in the country.

Having detailed the reasons behind the choice of the mediation centres as the vehicle for the institutionalization of divorce mediation in Nigeria, a case study of the citizens' mediation centre in Enugu state called the Citizens' Rights and Mediation Centre (CRMC) is presented below.

7.4 THE CITIZENS' RIGHTS AND MEDIATION CENTRE (CRMC), ENUGU STATE

Like the Lagos Mediation Centre, the quest for greater access to justice and provision of free legal services for the citizens of Enugu State gave rise to the proposal for the creation of the Citizens' Rights and Mediation Centre by the Enugu State Justice Reform Team.[1232] The Centre was established in August 2005 by the Enugu State Government under its Ministry of Justice, with the support of the Department for International Development (DFID) of the United Kingdom in terms of the Enugu State Citizens' Rights and Mediation Centre Law, 2004.[1233] It was closely modelled after the Lagos Centres. The Centre comprises two units, the Mediation Unit and the Human Rights/Legal Aid Unit created to carry out the duties of the Centre described in section 5 of the Law as the provision of free legal services and advice,[1234] and free alternative dispute resolution services.[1235] This Centre was chosen as the case study because it is the biggest mediation centre of its kind in the primary location for this research, South-East Nigeria.[1236]

7.5 CONSIDERATIONS FOR THE IMPLEMENTATION OF DIVORCE MEDIATION AT THE CITIZENS' RIGHTS AND MEDIATION CENTRE

This section examines the Citizens Rights and Mediation Centre using the key features of an effective divorce mediation program set out in Chapter Six and the findings from the interviews conducted at the Centre.

[1232] DFID Nigeria 7.
[1233] Cap. 45 Vol. III of the Laws of Enugu State, 2004.
[1234] Section 5(b).
[1235] Section 5(c). Note that the Centre charges a moderate application fee. see 7.4.9.
[1236] Ukwu 4.

7.5.1 Mandatory Mediation

Successful institutional mediation programs are often mandatory.[1237] At present, the mediation program at the Citizens' Rights and Mediation Centre is voluntary. Parties may choose to refuse to submit to mediation or may withdraw from the process at any time before a settlement agreement is signed as a result of the principle of voluntariness enshrined in Section 4 of the Centre's Law.[1238] Most of the mediators identified the voluntariness of mediation as one of the challenges they face at the Centre.[1239] This voluntariness often resulted in parties leaving the process while it was underway, or refusing to honor the letters of invitation sent to them, thereby refusing to submit to mediation at the Centre. 10 out of 13 mediators[1240] stated that parties had walked out of mediation sessions while they were underway and 8 out of 13 identified parties' refusal to honor invitations as a challenge.[1241] Mediators noted that allowing parties walk in and out of the Centre at will trivialized the affairs of the Centre[1242] and could result in a loss of confidence in the Centre.[1243]

When asked whether mediation should be voluntary or mandatory, 2 mediators were undecided,[1244] 4 plus the Director chose voluntary mediation without reservations,[1245] 2 chose both mandatory and voluntary mediation[1246] and 5 mediators chose mandatory mediation.[1247]

Of particular interest are the mediators who reported that mediation should be both mandatory and voluntary. One of them, Mediator 10 stated that participation should be mandatory (so that parties would be compelled to come to the mediation table, to afford them the opportunity to experience its benefits),[1248] while reaching settlement should be voluntary (parties could choose to abandon

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[1237] See 6.4.1 above. It is indeed generally accepted that even where the mediation process is made mandatory, parties can never be forced to reach a decision and any agreements they do reach are voluntary.

[1238] The Citizens' Rights and Mediation Centre Law Cap 45 Law of Enugu State 2004. Note that s 9(2) also requires mediators to ensure that parties submit voluntarily to mediation.

[1239] 10 out of 13 mediators: Mediators 2, 3, 5, 6, 7, 9, 10, 11, 12, and 13.

[1240] Mediators 2, 3, 4, 6, 7, 8, 9, 11, 12 and 13.

[1241] Mediators 3, 5, 6, 7, 10, 11, 12 and 13.

[1242] Mediators 7 and 8.

[1243] Mediators 5 and 7. They opined that parties who initiated cases at the centre were effectively left with no relief if the Centre could not compel their 'opponents' to either respond to the invitation or participate in the process. this would make these parties lose faith in the Centre. The Director in particular noted that, just that morning, a woman had come to complain that the Centre had invited the respondent in her matter 3 – 4 times and he had refused to honor the invitation. There was nothing the Centre could do

[1244] Stating that it should depend on the nature of the case. Mediators 11 and 13.

[1245] Mediators 1, 2, 6, and 12 and the Director. They opined that mediation is essentially a voluntary process therefore any form of compulsion would be against the ethos of the process.

[1246] Mediators 4 and 10.

[1247] Mediators 3, 5, 7, 8, and 9. They reported that mediation had to be mandatory, so that parties would be able to experience its benefits. See Bridge 237.

[1248] This view was also held by Mediator 9.

the process if it failed to meet their needs). Mediator 4 said that while mediation should be voluntary, it should also be mandated by law as a requirement for the institution of civil suits in court to encourage decongestion of the courts.

It is noteworthy that 3 out of the 5 mediators who chose voluntary mediation (as well as the Director) recognized this voluntariness as one of the challenges faced at the Centre.[1249] It is particularly noteworthy that Mediators 10 and 11 reported that family matters should be compulsory. Mediator 11 noted that this was important in cases brought against fathers for child maintenance or child welfare.

In summary, the choice of voluntary mediation, poses several problems for the Centre as shown by the testimonies of the mediators above. In addition to that, the Centre loses the benefits which arise as a result of mandating mediation such as increased publicity and patronage.

To establish an effective divorce mediation program, to keep up with international best practices and relying on the suggestions by Mediators 10 and 11, the Centre must compel attendance and participation at divorce mediation. Parties may then have the liberty to decide whether or not to settle.[1250] Mediator 5, in the same vein as Clark[1251] suggests the use of penalties and incentives to compel participation.

7.5.2 Good Faith Participation

Section 9 of the Centre's Law confers a duty on mediators at the Centre to ensure that parties negotiate in 'good faith'.[1252] However, this law fails to provide a definition of 'good faith' or behaviour which constitutes good faith. Mediators at the Centre noted that ensuring good faith participation was not an easy task and the execution of that duty depends a great deal on the skill and competence of the mediator.[1253] The Centre makes no provision for guidelines for ensuring good faith participation,[1254] the mediators therefore used several tools to elicit good behaviour. Majority used private sessions to 'reality test',[1255] preach[1256] or as several said 'appeal to the

[1249] 2, 6, and 12.
[1250] This solution as also recommended by Carbonnaeu. Carbonneau 1171.
[1251] Bryan Clark *Lawyers and Mediation* (2012) 140-141. Clark recommends the provision of subsidies for adherents and cost sanctions for defaulters
[1252] Section 9(2)*(c)*: Note that the Law fails to define the what will constitute 'good faith'.
[1253] Mediators 5 and 7.
[1254] All the mediators agreed except Mediator who mentioned that the in-house training provided by the Centre provided some assistance for executing this task.
[1255] Mediators 1, 2, 4, 8, 10, 11, 12, and 13.
[1256] Mediator 9.

conscience' of the parties.[1257] Some explained the benefits of the mediation process in a bid to show the parties why it was in their best interest to negotiate in good faith.[1258] Others attempted to build trust and encourage good behaviour by creating a comfortable and relaxing environment for the parties.[1259] Mediator 7 reported that a mediator may terminate the process if a party continues to negotiate in bad faith; this view is supported by Erickson.[1260]

Standard practice is that the requirement for ensuring good faith participation should fall on the parties.[1261] While it appears that the mediators at the Centre have attempted to execute this duty, it is recommended that if such a duty is also placed on clients of the Centre, it will ensure a greater degree of good faith participation than is currently obtainable at the Centre.

Certificates of compliance have been used worldwide to encourage good participant behaviour in mediation.[1262] To ensure good-faith participation of parties during the mediation, provision should be made for these certificates at the Centre.

7.5.3 Screening Protocols

Effective divorce mediation programs worldwide provide measures for screening cases for the safety of its users prior to the mediation. At present, there is no established screening process for domestic violence, power imbalance or any other barriers to effective negotiation at the Centre. This is particularly necessary because of the prevalence of cases with elements of domestic violence at the Centre. 10 out 13 mediators reported mediating cases with elements of domestic violence,[1263] with 5 reporting that there was a high prevalence of these cases at the Centre.[1264] Mediator 7 expressly said:

> 'There is hardly a family case that doesn't have a touch of domestic violence'

The closest to a screening process — referred to as the Enquiry[1265] — conducted at the Centre simply checks if the subject matter of the dispute is within the jurisdiction of the court.[1266] When

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[1257] Mediators 1, 3, 6, and 9.
[1258] Mediators 1, 6, 8, 9, and 13. The Director also fell in with this group.
[1259] Mediators 7, 10, 11, and 13. The Director agreed with this.
[1260] Erickson Stephen K 'The legal dimension of divorce mediation' in Folberg & Milne (eds) *Divorce Mediation: Theory and Practice* (1998) 304-35.
[1261] See 6.3.2 above.
[1262] Ibid.
[1263] Mediators 1, 2, 3, 4, 5, 7, 8, 9, 10, and 11.
[1264] Mediators 1, 2, 7, 10, and 12.
[1265] By the mediators.
[1266] Section 14(2) of the Citizens' Rights and Mediation Centre Law.

asked if a screening for safety process was necessary for the Centre, 5 mediators responded in the affirmative[1267] and 8 mediators as well as the Director replied in the negative[1268] with 1 stating that elements of domestic violence could be discovered during the mediation.[1269]

It is to be noted that 4 out of the 8 mediators who answered in the negative reported that there was no need for a screening process because safety issues could be identified during the 'Enquiry'.[1270] So it appears that 9 mediators plus the Director[1271] recognize the importance of screening for safety. However further training is required for all the mediators to ensure adequate protection of the users of the Centre.

The mediators must be trained not only to recognize cases where the safety of parties may be compromised but also to respond effectively to the needs of parties in such cases. The Centre must also develop an extensive screening protocol.

7.5.4 The Role of the Mediator

The model of mediation practiced at the Citizens Rights and Mediation Centre is not clearly stated anywhere, however the facilitative model may be inferred from the wording of section 9(2) of the CRMC Law.

> 9 (2) a mediator shall
>
> (a) be an impartial *facilitator*[1272] who is acceptable to all parties…

When asked the role of the mediator at the Centre, 7 mediators reported that they played both facilitative and evaluative roles,[1273] 1 out of the 7 said that in addition to being facilitative and evaluative, she could also be directive when faced with stubborn parties[1274] and the remaining 6 reported that they played facilitative roles.[1275] From the above, it appears that the scales are skewed in favour of facilitative mediation. However, it is noteworthy that 5 out of the 6 mediators who claimed facilitative roles would consider some laws during the course of mediation and evaluate

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[1267] Mediators 3, 5, 7, 8, and 10.
[1268] Mediators 1, 2, 4, 6, 9, 11, 12, and 13.
[1269] Mediator 6.
[1270] Mediators 1, 2, 12, and 13. The Director agreed with this group.
[1271] Mediators 1, 2, 3, 5, 7, 8, 10, 12, and 13.
[1272] Emphasis mine.
[1273] Mediators 2, 7, 8, 9, 10, 11, and 13. Note that mediators 8 and 10 stated that they would be evaluative in private sessions.
[1274] Mediator 8.
[1275] Mediators 1, 3, 4, 5, 6, and 12.

cases, and offer advice to the parties based on those laws.[1276] In the final analysis, it seems that all but 1 of the 13 mediators interviewed play both facilitative and evaluative roles.

The users of the Centre also found that the mediators played both facilitative and evaluate roles. They all noted that the mediators attempted to guide them through the process but they also offered advice on occasion[1277] and seemed settlement-oriented.[1278]

The findings are of interest because all the mediators at the Centre are lawyers and it is therefore not unusual that they would conduct the mediator process 'in the shadow of the law'. In the words of the Director:

> 'We take cognizance of everything … we take cognizance of the customs … and you look at what the law says …'
>
> 'It is not our duty here to do the opposite of what the law says …'

Deductive reasoning here shows that the mediators at the Centre play both facilitative and evaluative roles. This bodes well for the Centre.

7.5.5 Cultural Competence

Cultural competence requires that mediators are able to communicate effectively with the parties, to understand their languages, customs, values and more. There was unanimous agreement in the Centre that the mediators were well equipped to respond to the linguistic, and cultural needs of the clients from the indigenous community. The employment of staff from among the indigenous people is oftentimes an effective way of ensuring that the needs of indigenous clients will be identified and met.[1279]

The state where the centre is situated, Enugu, and indeed all the other states in the South Eastern region, is made up of Igbo people. Therefore, the majority of the clients who patronize the Centre are of Igbo descent. The Centre is staffed by mediators who are primarily of Igbo descent, all except 1 (Mediator 9)[1280] are Igbo. The mediators therefore opine that they are culturally competent to meet the needs of their clients from their indigenous community.[1281] Agreeing with the

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[1276] Mediators 1, 3, 4, 6, and 12. Note that Mediator 1 said she would evaluate matters before her using case law, in particular she gave an example of a recent supreme court decision.
[1277] Users 1 - 5.
[1278] Users 2 and 4.
[1279] Kaspiew et al 57.
[1280] He is Yoruba — the ethic group which dominates the Southwestern part of Nigeria.
[1281] All the mediators attested to this.

mediators, users also reported being able to communicate effectively with the staff at the Centre and being given the option to communicate in Igbo.[1282]

The primary languages adopted at the Centre are Igbo and English.[1283] The mediators reported that on the rare occasion that they were faced with clients who speak neither English nor Igbo nor Pidgin[1284] or who have other communication challenges like being deaf and dumb,[1285] interpreters[1286] were employed. One mediator noted that the mediators are from different parts of the state such that if a mediator is faced with a custom he does not understand, at least one other mediator in the Centre will be able to respond to it.[1287]

The Centre therefore appears to have culturally competent staff and to have taken extra measures to ensure that the needs of non-indigenous clients are also met.

7.5.6 Scope

The scope of the matters which may be referred to the Centre is generally restricted to civil matters,[1288] with the exception of a few matters like divorce.[1289] While criminal matters are generally outside the jurisdiction of the Centre,[1290] simple offences like theft and assault may be mediated at the Centre.[1291]

Civil matters which the court can entertain are listed in section 5 of the law of the Centre, some of them are tenancy, land, family, and debt recovery matters. 10 out of 13 mediators plus the Director, reported that most of the matters handled at the Centre are family matters.[1292] Mediator 10 reported that if 300 cases were filed at the Centre in a given month, 250 out of that 300 would be family matters, while Mediator 3 noted that if she had 15 cases in a month, 10 out of the 15 cases would be family matters. All the mediators listed issues concerning the child custody and child

[1282] All but one of the users attested to this.
[1283] The mediators and the users attest to this.
[1284] See Mediators 2, 3, 7, 8, 10, and 11. Note that Pidgin English is also referred to as Broken English.
[1285] Mediators 3, 10 and 11.
[1286] Mediators 1, 7, 9, 10, and 12.
[1287] Mediator 13.
[1288] The mediators unanimously agreed to this.
[1289] Mediators 11 and 13. As previously mentioned, the high courts alone have the jurisdiction to entertain divorce suits.
[1290] Director. Also note that the terms of reference provided for in s 5 of the Centre's Law provides for only civil matters.
[1291] Mediator 9 and the Director.
[1292] Mediators 1, 2, 3, 4, 5, 7, 8, 10, 11, and 12.

maintenance — reported as child welfare at the Centre — as constituting the bulk of the family matters, with a few relating to redistribution of property[1293] and adultery.[1294]

Findings show that similar to other effective institutionalized mediation programs, the Centre has a clearly delineated scope of matters which it can handle. Findings further show that family matters make up the bulk of the Centre's caseload, and that issues behind the bulk of the family matters are issues which constitute the legal consequences[1295] of divorce such as child custody, maintenance and redistribution of property. Spousal maintenance was not mentioned in the course of any of the interviews. It appears that spouses do not generally seek this relief during the course of mediation at the Centre.

7.5.7 Referral System

The Centre is the primary provider of mediation services at the Ministry of Justice in the state.[1296] Section 14(3) of the Law provides that 'the Centre shall receive complaints directly from affected persons or through referrals from non-governmental organizations.'

Findings show that in addition to these two avenues, cases are initiated at the Centre through referrals from individuals,[1297] the courts,[1298] and other institutions,[1299] including government institutions.[1300] The individual referrals are usually grouped into referrals from satisfied clients[1301] and referrals from acquaintances.[1302]

The highest volume of the cases recorded at the Centre are initiated through walk ins.[1303] A good percentage of these walk-ins learnt about the Centre through radio adverts which the mediators refer to as radio jingles.[1304]

[1293] Mediator 9.
[1294] Mediators 4, 5, 7, and 11.
[1295] Matters ancillary to the divorce.
[1296] As earlier mentioned, it is the department of the Ministry of Justice which provides mediation services. Other departments provide other services.
[1297] Mediators 1, 4, 5, 6, and 11. This was the case for User 2
[1298] Mediators 3, 4, 5, 8 and 12. This was the case with User 4.
[1299] This was the case for User 1.
[1300] This was the case for User 5.
[1301] 'CRMC Governing Council Applauds ESBS, Seeks Partnership with the Media' (2018) *Citizens' Rights and Mediation Centre Quarterly Journal* 14.
[1302] This was the case for User 2. Most of the mediators had mediated cases which were referred from the courts. Mediators 1, 2, 3, 6, 7, 8, 11, 12, and 13.
[1303] Mediator 7 and the Director.
[1304] Mediators 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, and 13.

Note that with some cases, the Centre serves as a referral agency as well. The mediators may — during the Enquiry stage — find a case inappropriate for the Centre[1305] and subsequently advice the parties to seek redress in the courts or other institutions.[1306]

7.5.8 Funding

The Centre is a department of the state Ministry of Justice. It is therefore primarily state-funded,[1307] through the Ministry. The mediators were unanimous in their agreement that the state provides the facilities, staff remuneration, staff trainings and funding for all the activities of the Centre including publicity. The Director further reported that the state through the Ministry of Justice provides funding through a monthly allowance made to the Centre to cover the cost of the operations for the month. He noted that the N1000 fee paid by the users of the Centre was paid directly into an account owned and operated by the state and the Centre had no access either to this account or the funds therein.

The Director also reported challenges with inadequate funding particularly with respect to the office of the bailiff. He stated that this office does not receive funding from the state and is therefore funded primarily by users,[1308] and in pro bono cases, by the mediators themselves. He suggested an increase in the Centre's monthly allowance as a possible solution to the problem of funding. Another mediator, 7 also reported that the Centre suffered from inadequate funding and should seek funding from donor agencies.

Findings reveal that while the Centre is primarily funded by the state as most successful institutionalized mediation programs are, similar to the program in California, it suffers from inadequate funding.

7.5.9 Fees

As noted in the previous chapter, several institutionalized mediations programs in the world provide their services free of charge to their clients. This is not the case with the Centre. Currently,

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[1305] For example, cases with elements which could constitute a serious criminal offence.

[1306] Mediator 11 noted that parties may be advised to go to the police or other institutions such as TAMARSARC (TAMAR Sexual Assault Referral Centre) a referral centre for victims of sexual assaults.

[1307] It may also receive grants from non-governmental and other donor agencies. See s 16 of the Citizens' Rights and Mediation Centre Law.

[1308] See 7.4.9 on Fees.

there is an application fee of N1000 (one thousand naira only).[1309] This fee is described as an expression of commitment by the users.[1310]

However, some mediators and users note that an additional fee is sometimes necessary to fund the bailiff's office to enable the service of letters of invitation to respondents.[1311]

When asked if the fees should be reviewed, upwards or downward, most of mediators[1312] and the Director preferred to maintain the status quo. They opined that the Centre was established primarily to serve the indigent and that an upward review would in Mediator 7's words, ' … defeat the purpose for which the Centre was founded.' Mediators 6 and 7 further stated that sometimes, the users could not afford to pay the N1000 and mediators often waived or paid the fees for them, and on several occasions, paid their transport fares as well. 2 mediators proposed either a downward review or a total removal of the fees.[1313] Majority of the mediators (12) therefore chose to retain the current fees or reduce/remove the fees.

When asked if their answer would be different if the users were richer and therefore able to pay more, they opined that government should provide justice for all, rich or poor. It is to be noted that 2 of the 12 mediators suggested that an exception should be made in debt recovery cases. Here, they opined, users should pay a percentage of the recovered funds to the Centre to enable it provide free services to the indigent.[1314]

It is also noteworthy that a further 4 out of the 12 mediators seemed to express the desire to maintain the status quo because they stated that they could not determine a suitable yardstick for measuring the user's income.[1315] This may mean that if given further information about the sliding scale formula employed in the Australian Family Relationship Centres, they may be amenable to an upward review of the fees for persons who can afford to pay more.

[1309] $2.77 (Two dollars and seventy cents) at N361.5 to $1 exchange rate and R49.5 (Forty-nine rands and fifty cents) at N20.20 to R1 exchange rate; or All the interview participants attested to it. Note that some of the Users did not pay the sum either because they were respondents in the matter, as was the case with User 2 or because their matter was referred from the courts as was the case with User 4. Prior to 2018, Mediator 8 noted, it was N250 (Two hundred and fifty naira only), that is, $0.69 (sixty-nine cents) or R12.3 (Approximately nine rands and thirty cents).

[1310] DFID Nigeria 7.

[1311] User 4; Mediators 3, 8, 9, 10.

[1312] Mediators 1, 2, 5, 6, 7, 8, 9, 10, 11, and 12.

[1313] Mediators 3 and 4.

[1314] Mediators 4 and 6.

[1315] Mediators 3, 6, 9, and 7.

Only 2 mediators and the Director thought that an upward review of the fees would be necessary for richer clients to enable the state government to increase its internally generated revenue.[1316]

Findings reveal that the users and most of the mediators seem satisfied with the current fee structure employed at the Centre. However, they also reveal that the Centre is in need of funds[1317] and some of the mediators are amenable to the idea of charging richer clients more, particularly where a good fee structure formula exists. A possible solution to the Centre's problems,[1318] can be found in the suggestion by Mediators 8 and 13, to charge richer clients more. This can be implemented using the sliding scale formula in operation at the Australian Centres.[1319] For example, parties whose income falls below the minimum wage will enjoy free mediation service at the Centre, subject to the N1000[1320] application fee, whereas parties whose income is above the minimum wage will pay for the service.

Although originally established to serve the interests of the poor and vulnerable, it appears that the quality of its services has ensured that its patrons are not limited to the poor because according to the mediators, the Centre currently serves the interests of people from all walks of life, the poor and the rich alike.[1321]

7.5.10 Qualification, Training and Accreditation of Mediators

Currently, the minimum requirement for employment at the Ministry of Justice is a Bachelor's degree in Law as well as passing the professional Bar exam.[1322] This is therefore the only requirement to become a mediator at the Centre, which as earlier mentioned is a department of the Ministry of Justice. Findings reveal that all the mediators at the Centre therefore are first legal officers (as employees of the Ministry of Justice) before they are mediators. While this has the appearance of a uniform accreditation scheme, the disparity in their qualifications are revealed when the subject of their mediation training is considered.

Most of the mediators have had no formal mediation training except the in-house training organized periodically by the Centre,[1323] while some have undertaken advanced certification

[1316] Mediators 8 and 13.
[1317] See 7.4.8 above.
[1318] Also worthy of note is the suggestion for debt recovery cases by Mediators 4 and 6.
[1319] See 6.3.9 above.
[1320] South Africa R49.5; The United States $2.77
[1321] Mediators 1, 2, 4, 5, 6, 8, 9, 10, 11, and 13.
[1322] The degree is reference BL in Nigeria.
[1323] Mediators 2, 3, 9, 10, 12, and 13.

courses[1324] from various institutions the most popular of which is the Institute of Chartered Mediators and Conciliators of Nigeria (ICMC), the premier professional body for mediators in Nigeria.

Disparity in the training, knowledge and experience of the mediators can lead to lack of consistency in the services offered at the Centre. It appears that the Centre tries to manage this through the use of informal mentorship programs where new mediators comediate with older mediators so that the latter can provide mentorship to the former for a period.

The Centre must develop regulations to provide for the training qualification and accreditation of its mediators particularly for the divorce mediation program.

7.5.11 Enforcement

Settlement terms reached at the Centre are written in a Memorandum of Understanding (MOU) which becomes binding on the parties as soon as they sign it.[1325] However, in the event of a default by any of the parties, the Centre does not have the power to enforce the terms of the Memorandum of Understanding. Mediators reported this as one of the challenges facing the Centre.[1326]

To combat this challenge, the Centre has a working partnership with the courts. Settlement agreements reached at the Centre can upon application by the parties be filed and enforced by the courts as judgments of court by virtue of section 14(3) and (4) of the Citizens Rights and Mediation Centre Law.[1327] It is to be noted that with the new amendment to the Law, the Director can also, *suo motu*, apply to the courts for the conversion of a memorandum of understanding reached at the Centre to a judgment of court.[1328]

Despite the problems of access to justice recorded in Nigeria, over two thirds of the population ascribe authority to the courts, place a premium on court judgements, and a great percentage of people would therefore obey court judgments.[1329] Therefore the partnership between the Centre and the courts further ensures the Centre's viability as a vehicle for the establishment of a divorce mediation program.

[1324] Mediators 1, 5, 6, 7, 8, and 11.
[1325] Section 13 of the Citizens' Rights and Mediation Centre Law.
[1326] Mediators 6, 8, 10, 12, and 13.
[1327] See also DFID Nigeria 9.
[1328] Section 13(i).
[1329] 67%. Logan 13.

7.5.12 Public Awareness

Section 17 of the Centre's Law provides that the Centre shall organize educational programs such as conferences and workshops to educate its staff and the public on the features and merits of the mediation process as well as the operations of the Centre. To this end, mediators reported that the Centre educates the public through publication of the Centre's journal[1330] and distribution of information pamphlets written in English and Igbo,[1331] radio jingles,[1332] billboards and sign posts,[1333] advocacy visits and community outreach programs, information stalls at community events, school visits, presentations to meetings of local organizations, as well as partnerships with grassroots organizations like church groups and community meetings[1334] and other family oriented agencies and non-governmental organizations. The Centre already successfully conducts public awareness programs.[1335] It therefore satisfies the publicity goal of institutionalized mediation programs. The establishment of branches in all the local governments of the state would also greatly increase the prospects for speedy and effective publicity. Mandating the divorce mediation program at the Centre will further increase publicity.

7.5.13 Objectives of the Centre

The Law expressly provides as one of the aims of the Centre, the provision of legal and alternative dispute resolution services to the less privileged especially women and children and the physically challenged residents of the state.[1336] Findings reveal that all the mediators attest to the Centre's goal of ensuring access to justice for the less privileged. This forms the basis for their insistence on the retention, reduction or removal of the application fee.[1337] The Centre provides clearly defined goals which are measurable. For the purposes of the divorce mediation program, the objectives of the Centre will then be amended to include goals for the divorce mediation program. These goals will include the goals of good divorce law as well as measures to mitigate the problems of divorce in Nigeria enumerated in Chapters Two and Four above.

[1330] Mediator 7.
[1331] Chike Igwesi 'Repositioning the Justice Sector: Achievements of Governor Ifeanyi Ugwuanyi's Administration in Enugu State' (March 2018) 8 *Citizens' Rights and Mediation Centre Quarterly Journal* 44.
[1332] Mediators 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, and 13
[1333] Mediator 2.
[1334] Mediator 12.
[1335] Igwesi 44.
[1336] Section 14(1)*(a)* and *(b)* of the Citizens' Rights and Mediation Centre Law.
[1337] See 7.4.9 above.

7.5.14 Evaluation

As stated in 6.3.14 above, evaluation of any program is necessary to determine its progress. The primary aim of the Centre is the provision of alternative dispute resolution services to poor especially women, children and the physically challenged.

Findings reveal that the Centre achieves the aim through the provision of mediation services. It further achieves it by heavily subsiding its services.[1338] Mediators report that the Centre's clientele is made up of mixed class of people[1339] but mostly the poor[1340] and the illiterate.[1341] The Director added that a majority of the Centre's clients are women. It is to be noted that the bulk of the Centre's caseload is from family matters, and all the mediators at the Centres reported that most of the family matters had issues relating to children.[1342] This provides evidence that the Centre provides its services to children, albeit indirectly. The provision of interpretation services to ensure that persons with hearing disability also receive mediation services at the Centre also provide evidence of rendering services to the physically challenged.[1343]

The Centre also achieves its aims through the provisions of branches in all 17 local government areas in the state,[1344] making the Centres accessible to citizens in the remote parts of the state.[1345]

Other common performance indicators included client satisfaction with the service, and disposal time.[1346] Users reported that they were very satisfied with the services at the Centre in terms of time[1347] and cost[1348] of the service as well as the outcome.

The Centre's law also enjoins mediators to resolve disputes in 'the shortest possible time'.[1349] It specifically provides in section 10 that resolution of disputes at the Centre must be more time and cost effective than formal adjudication. The mediators noted that the average session at the Centre

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[1338] Parties are required to pay only an application fee of N1000.
[1339] Mediators 1, 2, 3, 5, 6, 8, 9, 10, 11, and 13.
[1340] Mediators 1, 3, 4, 5, 8, 9, 12, and 13.
[1341] Mediators 3, 4, 6, 7, 8, and 9.
[1342] See 7.3.6 above.
[1343] Three mediators 3, 10 and 11 reported that they had mediated cases with parties who were deaf and dumb.
[1344] provided for in S 22 which provides for the establishment of branches of the centre throughout the state. "Governor Ugwuanyi opens CRMC offices within the 17 L.G. Areas' (March 2018) 8 *Citizens' Rights and Mediation* Centre *Quarterly Journal* 17; The Director mentions these 17 branches in his interview.
[1345] Ukwu 4.
[1346] Walsh 54-5.
[1347] All the Users.
[1348] All the Users.
[1349] Section 5(c).

was two to five hours long and duration of most cases ranged from one day[1350] to three months.[1351] It is to be noted that they mentioned that family cases were usually the longest to resolve.[1352]

Majority of the users reported that they communicated effectively with the mediators at the Centre,[1353] expressed satisfaction with their overall experience at the Centre[1354] and would recommend the Centre to family and friends.[1355] User 10 specifically stated that 'The God of justice has come to Enugu State'.[1356]

While the findings above provide a very brief evaluation of the affairs of the Centre, an extensive evaluation of the services of the Centre must be conducted to determine the extent of the Centre's progress, and to show room for improvement. This will also be necessary to check the progress of a divorce mediation program established at the Centre.

7.5.15 Regulatory Framework

At present, the affairs of the Centre are regulated by two legal instruments. The first, the Citizens Rights and Mediation Centre Law, is the substantive law guiding the Centre. The second, the Practice Directions, constitute the procedural law and are made pursuant to section 23 of the Law which empowers the Attorney General of the state[1357] to create regulations to guide the affairs of the Centre. In 2016, the Law was amended to include new provisions to enable the Centre run more effectively. One of amendments empowers the Director to initiate the conversion of a Memorandum of understanding to a consent judgment of court for the purposes of enforcement.[1358]

While the existence of the Law and the Practice directions as well as the capacity of the Attorney General to make further regulations to guide the Centre are laudable, the Centre will require an amendment of these instruments to provide for the divorce mediation program.

[1350] Mediators 4, 5, 6, 10, 11 and the Director.
[1351] The Centre's ultimate aim was to ensure that cases were resolved within three months of receipt of the case. Walsh 52.
[1352] Mediators 1 and 10.
[1353] User 9 preferred to go to court. She expressed concern that the process was too long (parties were allowed too much time to talk about irrelevant matters) and informal (Parties were allowed too much freedom at the Centre. The parties in her case yelled a lot during the process).
[1354] Users 1,2,3, 4, 6, 7, 8, 10, 11, 12, 13, 14 and 15. User 5 stated that the mediation process had not come to an end.
[1355] Users 1,2, 3, 6, 7, 8. 10, 11, 12, 13, 14 and 15. Users 4 and 5 have already begun to recommend the Centre to family and friends.
[1356] Expressing happiness over the affairs of the Centre.
[1357] He is the administrative head of the Ministry of Justice and therefore the Centre.
[1358] Section 13.

7.6 CHALLENGES FACING THE ESTABLISHMENT OF A FAMILY MEDIATION DEPARTMENT AT THE CENTRE

Findings from the above section reveal that with some amendments, the Centre is equipped to provide the foundation for the institutionalization of a divorce mediation program. However, this project will not be without challenges. This section examines some of the challenges which the Centre might encounter when creating a program of this kind.

7.6.1 Funding

In spite of the fact that a framework for the establishment of a divorce mediation program is already available at the Centre, substantial funding will nevertheless be required for projects such as public education on the features and function of the new program, the creation of new practice directions and rules of procedure, the development of new screening protocols for detecting cases of domestic violence and power imbalance, monitoring and evaluation of the new program, amongst other projects necessary for the successful establishment of the program. Funding will also be required for the training of mediators in the rudiments of family law and dealing with cases where the safety of clients is in issue. Adapting the Centre to provide for a divorce mediation program will therefore be a capital intensive project. However, it is noteworthy that this will be significantly cheaper than developing the program from scratch, outside the Centre. Any and all of the suggestions made by the mediators may be adopted to assist the Centre create a pocket for the divorce mediation programs.

7.6.2 Amendment of Regulatory Framework

At present, Nigerian laws on marriage and divorce do not expressly provide for divorce mediation. Therefore, to achieve effective institutionalization of divorce mediation at the Centre, the substantive laws on marriage and divorce in Nigeria: The Matrimonial Causes Act 1970, the Marriage Act 1914, the Matrimonial Causes Rules 1983, as well as the Centre's Law must be amended to include provisions for the establishment and regulation of divorce mediation programs. New provisions or whole legal instruments must also be created to regulate qualification, training and accreditation of mediators. Universal standards of mediation practice and procedure must also be created to guide the divorce mediation process at the Centre. It is to be noted that this is a time-intensive process. it might take years to complete.

In the interim, two options may be used.

1. *The Compulsory Conference Provision in Order II Rules 33 – 37 of the Matrimonial Causes Rules*

The Matrimonial Causes Rules requires that a compulsory conference must be held before the courts can grant ancillary reliefs such as maintenance, custody of children of a marriage and settlement of property.[1359] The aim of the conference is for parties to reach a mutually satisfactory agreement regarding post-divorce arrangements such as those listed above. The requirement for the compulsory conference is provided for in Order XI Rules 33 – 37. Rule 33 provides:

> Where
>
> (a) a defended suit includes proceedings with respect to
>
> (i) the maintenance of a party to the proceedings;
>
> (ii) settlements;
>
> (iii) the custody or guardianship of an infant child of the marriage to which the proceedings relate; or
>
> (iv) the maintenance, welfare, advancement or education of a child of that marriage,
>
> and the petitioner and respondent are not in agreement as to the order that should be made by the court upon the trial of those proceedings in the event that the court does not make an order dismissing those proceedings; or
>
> (b) a defended suit includes proceedings for a decree of dissolution of marriage or of nullity of a voidable marriage in a case where there are children of the marriage
>
> …
>
> and the petitioner and respondent are not in agreement concerning the arrangements that, in the event of a decree of dissolution or of nullity of marriage being made, should be made for the welfare, advancement and education of those children, this Part[1360] shall apply to the suit.

By Rule 34, the Matrimonial Causes Rules requires that this compulsory conference must be held before a suit is set down for trial. However, this requirement may be dispensed with if the Registrar finds that it may be impracticable for the parties to convene this conference. Rule 35 describes this conference as:

> … a conference at which the petitioner and respondent discuss, and make a bona fide endeavour to reach agreement on any matters in question.

[1359] *Menakaya v Menakaya* (2001) supra 236-63.
[1360] Part 6 of Order XI titled, 'Compulsory Conference'

The parties may or may not be represented by lawyers during the compulsory conference[1361] which is facilitated by a third party appointed by the parties.[1362]

Rule 41(7) also provides that a matter may be set down for trial after parties have reached an agreement of the payment of maintenance either through an order of court or a written agreement between the parties. Noncompliance with the provisions of the above rules may not be fatal to the case.

A collective reading of the provisions above shows that before a suit is set down for trial, parties are encouraged to go through a compulsory conference to determine matters ancillary to the principal suit. Agreements arrived at the end of the conference are subsequently filed in court which may subsequently commence hearing on the principal suit and adopt the agreement of the parties when making the judgment on the principal issue. Where parties fail to convene or attend a conference, the proceedings shall not be rendered void — except by the direction of the court — however all or part of the proceedings may be set aside.[1363]

In practice, this conference is not compulsory because non-compliance is not fatal to proceedings. To use this rule in the interim, judicial activism may be required to enforce its provisions.

2. Practice Directions

As previously mentioned, section 23 of the Centre's Law empowers the Attorney General of the state to make regulation to guide the Centre from time to time as he deems fit. Through this law, the Attorney General's office is in the position to make immediate amendments to the rules to begin the establishment of a divorce mediation program. These immediate amendments will include the factors enumerated in 7.4.

[1361] Order XI Rules 35(2), 36 and 37

[1362] Rule 37(6).

[1363] *In Menakaya v Menakaya* (2001) supra, counsel for the parties engaged in the compulsory conference. However, they were unable to reach an agreement on all the issues. The parties therefore presented the partial agreement to the Judge. However, without setting the suit down for trial, the Judge entertained the matter in chambers. Finally, he delivered a judgment effectively ruling on the portions upon which the parties didn't agree based on his discretion without hearing evidence from the parties. The judgment was overturned on appeal and the parties had to start afresh. The fact that the case was held in chambers and the judge didn't set the matter down for trial plus the fact that one of the matters which the parties agreed upon was the dissolution of the marriage (consensual divorces are illegal in Nigeria) nullified the proceedings.

7.7 AN INSTITUTIONALIZED DIVORCE MEDIATION PROJECT IN NIGERIA. THE HOW.

In order to embed divorce mediation into the Centre's activities effectively, it is proposed that a divorce mediation department be established at the Centre for the resolution of family disputes relating to divorce and separation.

With the establishment of this department, parties who wish to institute a petition for dissolution of marriage either in the customary or high courts must first of all attempt mediation — of the ancillary matters — at the Centre.[1364] Following a successful mediation, a settlement agreement in form of a Memorandum of Understanding and a certificate of compliance will be signed by the parties and the mediator. Such certificate will state whether or not mediation was attempted or attempted and failed or whether the parties participated actively during the mediation process or otherwise.

Therefore, at the time of filing a petition for divorce at either of the courts, parties must submit along with petition documents, a settlement agreement from the Centre in the form of a Memorandum of Understanding and a certificate of compliance duly signed by a mediator at the Centre.[1365] The Memorandum of Understanding must address such matters as custody of any children of the marriage, distribution of any assets acquired in the course of the marriage and maintenance of any of the parties to the marriage. This will enable the court to dispense the principal suit effectively and expeditiously with minimal time and money costs to the parties and the state.

It is envisaged that the mediation process may deal with some of the acrimony that follows the decision to get a divorce and that after attempting mediation, parties would have reached a mutually satisfactory agreement with regards to the ancillary matters and would therefore be willing to file for divorce using the separation provisions.

[1364] The World Bank study found that cases could be resolved successfully through mediation before institution of action in court especially by government funded agencies such as the Citizens' Mediation Centres which offer no-cost mediation services. Walsh 81.

[1365] To ensure compliance with these directives, rules of procedure must be amended to ensure that the absence of the above documents will invalidate any petition for divorce.

The adoption of the separation provisions produces the least acrimonious divorce proceedings. They also encourage speedy resolution of the substantive divorce suit because parties need only prove that they have lived apart for the stipulated separation period to be granted a decree of divorce. There is no room for an inquiry into the state of the marriage nor any room for judicial discretion.

Where the parties choose to rely on fault grounds — perhaps because they cannot abide the long separation period — the Memorandum of Understanding may still be tendered in court so that the court will have to deal with the divorce *simpliciter*. This will inevitably save time and money for the spouses and the state. Reliance on fault provisions may not be as cost-effective as reliance on the no-fault provision. However, they are still more cost-effective than litigating the entire divorce — that is, the substantive suit as well as the ancillary matters.

Something similar was done in an unreported case, *Stephanie Omo-Efe Tawiyah v Omo-efe Tawiyah.*[1366] There, the parties mediated the custody of the child in a Social Welfare Office. Custody was awarded to the mother because the child was young. Subsequently, the mother filed for divorce relying on a fault provision but she brought the settlement agreement reached earlier at the Social Welfare Office to the attention of the court and this guided the court as it gave its judgment.

In the long term, it is envisaged that fault provisions be expunged from the Matrimonial Causes Act such that through the divorce mediation program of the Centre, spouses going through divorce shall have autonomy to decide and to regulate personal and private matters relating to their divorce leaving the dissolution of the legal ties to the courts.

7.8 SUMMARY

This study explored the features and functions of the Citizens Rights and Mediation Centre in Enugu State to determine its suitability for the institution of a proposed divorce mediation program. Careful examination has shown that the Centre is well able to provide a foundation for the establishment of a divorce mediation program. It possesses most of the key features of an effective institutionalized divorce mediation program. The Centre's current procedure for enforcement and public education are excellent. Although the mediators at the Centre require formal training in identifying and dealing with cases with elements of domestic violence, they possess training first

[1366] Supra.

as lawyers and then informally as mediators with some having acquired additional formal training from professional mediation bodies. Most of the mediators are also culturally competent and have a good grasp of the necessary roles which a mediator must play during the mediation process. The matters for resolution at a divorce mediation program are within the current scope of the affairs of the Centre. The objectives of the Centre, its regulatory framework and the fees structure are currently in good condition but will require amendment to provide for a divorce mediation program. The Centre already has a standard relationship with the courts, lawyers and other community mediation programs. These ensure publicity and referral.

Finally, mediation at the Centre must be mandatory and or at the very least, mandatory only for the divorce mediation program if parties are to partake in the benefits of divorce mediation. Good faith participation must also be mandated to ensure party participation.

Funding for the affairs and infrastructure of the Centre as well as the amendment of the Centre's regulatory framework were identified as some challenges to the establishment of this program at the Centre. However, it is noted that these challenges are not insurmountable.

The establishment of a divorce mediation program at the Centre is therefore not only possible, but will require minimal expense on the part of the state, and minimal changes on the part of the Centre, when compared to the cost of establishing a brand new program.

Findings in this chapter reveal that the Centre is indeed a viable vehicle for the institutionalization of divorce mediation in Nigeria.

CHAPTER EIGHT

CONCLUSION

8.1 INTRODUCTION

This chapter is constructed in four parts. The first part provides concise summaries of the preceding chapters; the second provides answers to the research questions sought by this thesis while the third provides recommendations based on these summaries and answers. The fourth section concludes the thesis with proposals for further research.

The basis for recommendation of a divorce mediation program in Nigeria is the promotion, protection and preservation of the interests of the members of the family going through divorce and minimization of cost in terms of emotional, financial and time costs. The divorce mediation program therefore will be geared towards achieving the goals of good divorce: minimal acrimony during and after proceedings, encouraging post-divorce relationship between the spouses and the spouses and the children, protecting the interests of the children and ensuring that the spouses suffer the least amount of emotional, financial and other damage possible. A secondary goal of the divorce mediation program will be provision of a solution to the myriad of problems peculiar to the Nigerian system of family dispute resolution system, particularly with regards to the dissolution of marriage.

8.2 SUMMARY OF CHAPTERS

The first chapter of this thesis provides the foundation upon which this research is laid. It examines the concept of divorce mediation, particularly, the definition, goals and history of divorce mediation. It further introduces the objectives of this research as well as the rationale for the production of this thesis, and the research questions which will be probed in the course of the study. A brief literature review and outline of the structure and research methodology conclude the chapter.

Chapter Two in discussing the subject of divorce, its history, and the objectives of the good divorce law and process, provides the contextual background for this thesis. In its examination, it considers divorce laws from several jurisdictions particularly the United Kingdom from which the divorce

laws in Nigeria were adopted. It further considers the goals of a good divorce law and process. These goals provide some of the indices with which divorce mediation and litigation will be compared throughout this work, particularly in Chapter Five. These goals also further provide a yardstick for measuring the effectiveness of divorce laws in Nigeria, particularly the Nigerian Matrimonial Causes Act as well as customary laws which apply in South-East Nigeria. The examination of the divorce process in Nigeria both under customary and statutory law form the subject of Chapter Three. The chapter concludes that divorce laws and the divorce process in Nigeria do not achieve the universal goals of the good divorce.

Chapter Four provides a succinct overview of the problems which confront the divorcing couple in Nigeria with a view to highlighting the inadequacies of the divorce litigation process in the preservation and protection of the rights and interests of the family going through divorce in Nigeria as well as the state and the institution of marriage. It concludes that divorce litigation fails to achieve its second goal of providing a solution to the problems peculiar to the community where it will be implemented.

Chapter Five examines the divorce mediation process to determine first, if this process achieves the goals of a good divorce process; and second, its ability to provide solutions to the problems which plague the divorce process in Nigeria. A running theme in this chapter is a comparison of the divorce mediation and divorce litigation processes. Chapter Six discusses the institutionalized divorce mediation program considering definitions, goals and benefits. It also examines the key features of an institutionalized divorce mediation program drawing lessons from South Africa, Australia and California. These features provide indices for the examination of the Citizens' Rights and Mediation centre in Chapter Seven.

Chapter Seven provides an exposé of the Citizens Rights and Mediation Centre through an empirical study to show — through participants comprising the administrators, mediators and clients of the centre — the nature of the operations of the Centre. It determines the suitability of the Centre as the appropriate vehicle for the institution of divorce mediation in Nigeria and suggests possible reforms which may enable this Centre provide a viable institutionalized divorce mediation program. Chapter Eight concludes the thesis with research findings, recommendations and conclusions.

8.3 RESEARCH FINDINGS

8.3.1 Preliminary Research Questions

Three preliminary research questions were identified in this thesis.

What are the goals of a good divorce law?

In Chapter Two of this thesis, the goals of good divorce are set out. This chapter determines that good divorce law and process must do the following: preserve of the institution of marriage, save salvageable marriages, reduce the bitterness between parties during the divorce process, grant empty shell marriages a decent burial, promote cordial post-divorce relationships between parties, protect vulnerable parties — the economically weaker spouse, victims of abuse and children —, deal with the emotional aspects of divorce, save costs for the parties and the state and ensure a fair process for the parties.[1367]

What are the unique problems associated with divorce in Nigeria?

An in-depth analysis of the problems that plague the divorce process in Nigeria is the subject of Chapter Four. The problems articulated in this chapter include: dissolution of double marriages, division of matrimonial property, maintenance, divorce-induced stigma, detrimental emphasis reconciliation, custody battles, patriarchal principles of customary law, difficulty in accessing the court system, the probative cost of litigation in terms of time and money for both the parties and the state, negative judicial attitudes, the fault based grounds for divorce among others.[1368]

*Why is the government-sponsored Citizens' Rights and Mediation Centre a viable platform for the incorporation of divorce mediation in the Nigerian divorce process**?***

The answer to this preliminary question is set out in Chapter Seven, in particular, section 7.3. The Centre was proposed as a viable platform for institutionalized divorce mediation for many reasons. The reasons are articulated below. The Centre is already an, it is a government-funded institution, as a result it already enjoys the support of the state. The Centre already successfully provides mediation services to the public, it has a wide reach with offices in all the local government areas.

[1367] See 2.3.1 to 2.3.9.
[1368] See 4.1.1 to 4.1.12.

8.3.2 Broad Research Questions

Three broad research questions were identified in this thesis.

Whether divorce mediation achieves the goals of a good divorce process?

In Chapter Five, the effectiveness of divorce mediation as a good divorce process is examined against the goals set out in Chapter Two. The chapter finds that divorce mediation achieves the goals of a good divorce process, that is, preservation of the institution of marriage, saving salvageable marriages, reduction of bitterness between parties during the divorce process, granting empty shell marriages a decent burial, promotion of cordial post-divorce relationships between parties, protection of vulnerable parties — the economically weaker spouse, victims of abuse and children —, dealing with the emotional aspects of divorce, saving costs for the parties and the state and ensuring a fair process for the parties. The unique features of mediation which ensure the above include the privacy and confidentiality of the process, its fairness (which it achieves by refusing to apportion blame for the demise of the marriage), the amelioratory nature of the process and the relative cheapness of organizing mediation proceedings amongst other reasons. Furthermore, Chapter Five finds that divorce mediation achieves these goals better than the divorce litigation process.

Whether divorce mediation can solve the unique problems associated with divorce in Nigeria?

A careful examination of the divorce mediation process in Chapter Five reveals that the features of the process — such as privacy and confidentiality — lend themselves easily to the reduction and in some cases, total eradication of these problems. This chapter concludes that even though divorce mediation is not a panacea,[1369] it does provide solutions to the unique problems of divorce in Nigeria. Furthermore, it ameliorates the harsh effects of the divorce litigation process.

Whether divorce mediation can be incorporated into the present divorce litigation system through the Citizens' Rights and Mediation Centre?

Findings from Chapters Six and Seven provide the answer to this question. Chapter Six describes the features of an effective institutionalized divorce mediation program such as mandatory mediation, good faith participation, screening protocols for violence, the roles, cultural competence and qualifications, trainings and accreditation of mediators, the scope of the affairs of the Centre, its referral system and the system of fees and funding of the activities of the Centre. It

[1369] Hong Kong Report 12.

further delineates the modes of enforcement of mediated agreements, the objectives of the centre, methods of evaluation and its regulatory framework. Chapter Seven examines the Citizens' Rights and Mediation Centre in the light of the indices provided in Chapter Six, to determine its suitability as the vehicle for the institutionalization of divorce mediation in Nigeria. This examination is further informed by outcomes from the empirical investigation into the operations of the Centre. Findings recorded in Chapter Seven reveal that divorce mediation can be incorporated into the Centre with minimal changes to its current system.

8.4 RECOMMENDATION

The conclusions drawn from this thesis show that divorce mediation if adopted in the Nigerian family dispute resolution system may make an enormously positive difference in the regulation of the process of dissolution of marriage in Nigeria to the benefit of the institution of marriage, the members of the family going through divorce as well as the state.

The thesis therefore strongly recommends the institutionalization of divorce mediation in Nigeria through the citizens' mediation centres. Specific proposals for reforms to enable the establishment of this program are listed in Chapter Seven and summarized below.

8.4.1 Amended Regulatory Framework.

It is recommended that the primary laws on marriage and divorce in the country — that is the Matrimonial Causes Act, the Marriage Act and the Matrimonial Causes Rules, — and the primary laws and regulations governing the Centres — the Citizens' Rights and Mediation Centre Law, and Practice Directions — be amended to include provisions for divorce mediation. These provisions deal with the factors enumerated in 7.4 above.

It is further recommended that universal standards of mediation practice and procedure must also be created to guide the mediation process at the Centre. These may be modelled after the Operational Guidelines for the Family Relationship Centres.

In the interim, two options maybe used:

1. *The Compulsory Conference Provision Order II Rules 33–37 of the Matrimonial Causes Rules*

The compulsory conference being a dispute resolution process presided over by a chairperson selected by the parties for the development of a party-led workable agreement on payment of maintenance, redistribution of property and child custody may be likened to the divorce mediation process.[1370] Therefore, the provisions for this conference may easily provide the legal foundation for divorce mediation at the Centre until express provision can be made by the Act.

2. Practice Directions of the Centre

It is recommended that pursuant to the powers granted to him in section 23 of the Centre's Law, the Attorney General of the state should make regulations to guide the divorce mediation program or amend current practice directions to include provisions for the regulation of divorce mediation at the Centre. These may serve the program until the primary laws are amended.

8.4.2 Enforcement

In terms of this thesis proposal, is recommended that the settlement agreement arrived at after mediation at the Centre will be tendered in court along with the petition for dissolution of marriage. This agreement will subsequently form part of the judgment of the court on the substantive suit.

8.4.3 Scope

For divorce mediation at the Centre to be effective, all ancillary matters relating to the divorce must be resolved as part of the mediation process.[1371] It is therefore recommended that the divorce mediation program at the Centre will mediate all matters relating to divorce such as child custody, distribution of assets and maintenance. Resolution of these potentially contentious matters — which constitute the legal consequences of divorce — at the mediation stage would lighten the burden placed on the courts and the parties during the divorce process. It is noteworthy that currently, these ancillary matters form the bulk of the family matters dealt with at the Centre.[1372]

8.4.4 Referral

It is recommended that the primary divorce mediation service provider would be the Centre. This is to ensure universal standards of practice and procedure as well as effective monitoring and evaluation of the divorce mediation program. Also, the existence of 17 branches of the Centre in the state, should ensure that the mediation staff of the Centre will be capable of handling the State's case load.

[1370] See 7.4.2.
[1371] Burman & Rudolph 276.
[1372] See 7.4.6.

8.4.5 Mandatory mediation

It is recommended that a mandatory divorce mediation process be adopted at the divorce mediation program at the Centre to ensure that all divorce cases are subject to uniform practice and procedure as well as to ensure the active participation of the parties and the reduction of court dockets. Mediation has been described as the better way to resolve the divorce and mandating it is the only effective way to ensure that all the parties attempt mediation.

8.4.6 Qualification and training

It is recommended that the Enugu State government devises a uniform standard mediator accreditation program for training, accreditation and continuing education of the mediators that staff the Centre. Where this will prove to be capital intensive, the state government may in the interim, endorse the already established training providers such as the Institute of Chartered Mediator and Conciliators (ICMC) favored by the mediators at the Centre.

The mediators at the Centre are basically trained in commercial mediation, with no specialized training in family or divorce mediation. It is further recommended that divorce mediators at the Centre undergo training in family mediation, family dynamics, and family law and procedure. Training for acquisition of the skills necessary for dealing with cases with elements of power imbalance and domestic violence amongst other barriers to successful negotiation will also be required.

8.4.7 Fees

It is recommended that the divorce mediation program of the Centre should continue to provide heavily subsidized mediation services to the indigent while charging a token fee to parties who can afford to pay. It is thus recommended that the sliding scale model used in Australia be adopted. It is recommended that the parties pay a token for several reasons: the parties will attach more value to the process and such payments will enable the Centre to internally generate revenue to fund its activities.[1373]

8.4.8 Evaluation

It is recommended that the Centre evaluate the performance of the divorce mediation program periodically, to ensure that the program meets the goals for which it was established, to identify challenges and weaknesses, and devise plans to improve the activities of the program where

[1373] Mediator's suggestions in 7.4.9 are worthy of note.

necessary. It is recommended that the activity at the Centre would be a pilot scheme to check the feasibility of the project before rolling it out.

8.4.9 Good faith participation

Parties must be required to provide proof of reasonable attempt to mediate matters ancillary to divorce at the Centre before institution of the divorce petition. Such proof may be effected by using a certification system.[1374] Simply put, a certificate of compliance with divorce mediation must be signed off by a mediator before a party can institution proceedings for divorce in court. This ensures that parties not only go to mediation but also attempt to negotiate in good faith. Penalties for non-compliance would also be articulated in this provision.

8.5 CONCLUSION

This thesis has determined and therefore proposes that divorce mediation is both suitable and essential for the divorce process in Nigeria. The bases for this proposal are 1) that the divorce mediation process achieves the goals of a good divorce process and 2) that the divorce mediation process has been revealed to provide a possible solution to the numerous and indeed peculiar problems posed to the citizens and the state by the divorce process in Nigeria.

The empirical study of the Citizens Rights and Mediation Centre, Enugu State revealed that this Centre is a viable model for the creation of an effective institutionalized divorce mediation program. The efficient operations of this program at this Centre will therefore lead to the creation of similar programs all over the country. It further proves that the citizens' mediation centres spread out throughout the country are suitable vehicles for the institutionalization of divorce mediation in Nigeria because they are the oldest, most successful formal institutionalized divorce mediation program in the country, with several centres all over the country. Their services are cheap, expedient, simple and therefore readily available to the indigent. Furthermore, the Centres already enjoy public confidence as well as support and funding by the State Government. Perhaps the most significant factor is that currently, the resolution of family disputes — revolving around matters such as child custody, maintenance and distribution of marital assets — are already within the scope of the Centre's activities and indeed make up a greater percentage of its workload.[1375]

[1374] See 6.3.2.
[1375] See 7.4.6.

The Centre is therefore well equipped to accept divorce cases which will primarily revolve around the same matters listed above. The institutionalization of divorce mediation in Nigeria through these Centres should therefore require minimum changes to an already existing system.

Further empirical research may reveal the actual possibility of this thesis in practice, particularly research involving a pilot study of divorce mediation through one of the Centres.

BIBLIOGRAPHY

STATUTES

South Africa:

Children's Act 38, 2005.

Mediation in Certain Divorce Matters Act 24, 1987.

Recognition of Customary Marriages Act 120, 1998.

Nigeria:

Child's Rights Act No. 26, 2003.

Citizens Mediation Centre (Procedure) Guideline Practice Rules (2011).

Customary Court Law, Cap. 32, Laws of Enugu State, 2004 (as amended in 2011).

Customary Marriage (Special Provisions) Law, Cap. 33, Laws of Enugu State, 2004.

Lagos State Citizens' Mediation Centre Law Cap. L79, Vol. V, Laws of Lagos State, 2007.

Local Government (Declaration of Native Authority (Tiv Customary Marriage Law) Order, 1985.

Interpretation Act, Cap 123 Laws of the Federation of Nigeria, 2011.

Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order WRLR 456 of 1958.

The Citizens' Rights and Mediation Centre Law Cap. 45 Vol. III, Laws of Enugu State, 2004.

The Marriage Act, Cap. M6 Laws of the Federation of Nigeria, 2011.

The Nigerian Matrimonial Causes Act, Cap. M7 Laws of the Federation of Nigeria, 2011.

Foreign:

Australian Family Law Act No. 53, 1975.

Australian Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006.

Australian Family Law (Dispute Resolution Practitioners) Regulations 2008 Select Legislative Instrument 2008 No. 183 as amended.

California Civil Code.

California Family Code.

California Rules of Court, 2007.

Divorce Act 70 of 1979 of South Africa.

Divorce Act. (R.S.C. 1985, c. 3 (2nd Supp.)) (Canada).

Divorce and Matrimonial Causes Amendment Act 1920 (11 GEO V 1920 No 70) (New Zealand)

Divorce Reforms Act, 1969. (England).
Family Law Act, 1996. (England).
Matrimonial Causes Act, Laws of Ghana No. 367 of 1971.
Model Code on Domestic and Family Violence 1994.
New Zealand Family Proceedings Act No. 94, 1980.
Practice Directions of the Lagos MultiDoor Courthouse 2008.
SPIDR Report on National Standards for Court Connected Mediation Programs.
Tanzanian Law of Marriage Act, 1971.
The British Columbia Family Law Act, 2013.
The Matrimonial Causes Act, 1973 (England).
The Notice to Mediate (Family) Regulation, 2007 (Canada).
UK Practice Direction 3A, 2011 (England).
Uniform Mediation Act 2003.

CASES

South Africa:

FS v JJ 2011 (3) SA (SCA).
G v G 2003 (5) SA 396 (Z).
MB v NB 2010 (3) SA 220 (GSJ).
Townsend-Turner and another v Morrow 2004 (1) All SA 235 (C).
Van den Berg v Le Roux 2003 (3) All SA 599 (NC).

Foreign:

Atherton v Atherton 181 U. S.155, 21 Sup. Ct. 544, 45 L. Ed. 791.
Brooks v Brooks (1995) 2 FLR 13.
Butters v Mncora [2010] ZAECPEHC 72.
Hyde v Hyde [L.R.] 1 P. & D. 130.
Judge v Judge (2009) 1 FLR 1287.
Lambert v Lambert [2002] EWCA Civ. 1685.
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618.
Minton v Minton (1979) AC 593, 608.

Rogers v Rogers (1962) 3 FLR 398.

Schrepfer v Ponelat [2010] ZAWCHC 193.

Tomkins v Tomkins (1948) 175.

Wakeham v Wakeham (1954) All ER 434 CA.

White v White [2001] 1 AC 596.

Nigeria:

Abiakam v Anyanwu (1975) 5 ECLR 305.

Abisuga v Abisuga (1974) 6 CCHCJ 819.

Adeleke Adejumo v Toyin Adejumo (2010) LPELR 3062.

Afonja v Afonja (1971) UILR 105.

Afonne v Afonne (1975) ECSNLR 159.

Ajai-Ajagbe v Ajai-Ajagbe (1978) 10-12 CCHCJ 182

Ajidahun v Ajidahun (2000) 4 NWLR (pt. 654) 605.

Akere v Akere (1962) WNLR 323.

Akinboni v Akinboni (2002) 5 NWLR (pt. 1761) 564.

Akinbuwa v Akinbuwa (1998) 7 NWLR (pt. 559) 601.

Akparanta v Akparanta (1972) 2 ECSNLR 779.

Alabi v Alabi (2007) 9 NWLR (pt. 1039) 297.

Amadi v Nwosu (1992) 5 NWLR (pt. 241) 273 or *(1992) 6 SCNJ 59*.

Amobi v Nzegwu (2014) All FWLR (pt. 730) 1285.

Ani v Ani (2002) 5 NWLR 166.

Anyaegbunam v Anyaegbunam (1973) 3 ECSLR 243.

Anyaso v Anyaso (1998) 9 NWLR (pt. 564) 150.

Ariori v Elemo (1983) 1 SCNLR 1.

Ayangbayi v Ayangbayi (1979) 10-12 CCHCJI 225.

Barr. (Mrs.) Maudline Nwakuche v Chief Gogo Nwakuche (2018) 1 ESCCALR 21.

Bazunu v Bazunu (1975) 5 UILR (pt. 1) 125.

Bello v Bello (1979) 1-3 CCHCJ 179.

Bibilari v Bibilari Suit No FCT/HC/PET/176/11.

Buwanhot v Buwanhot (2009) 16 NWLR (pt. 1166) 22.

Coker v Coker Suit No WD/19/196.

Damulak v Damulak (2004) 8 NWLR (pt. 874) 151.

Dawodu v Dawodu (1976) CCHCJ 1207.

Dunu v Dunu Unreported, Judgment of the High Court of Lagos State, Ikeja Division, Suit No ID/109WD/2000, judgment of Phillips J delivered 28/11/2003

Duruaku v Duruaku & Anor (Unreported) Suit No. CC/EZ/IK/2D/2004 Judgment of 26 March 2009.

Edet v Essien (1932) 11 NLR 47.

Ekrebe v Ekrebe (1999) 3 NWLR (pt. 596) 514.

Eluwa v Eluwa (2013) LPELR 22120 (CA).

Emeka Nwana v Federal Capital Development Authority (2007) 4 SCNJ 433.

Enweozor v *Enweozor* (2012) LPELR-8544(CA).

Essien v Essien (2009) 9 NWLR (pt. 1146) 306.

Ethelbert Nonyelu v Regina Umennuihe and Umennuihe Adawu (unreported) Suit No CC/ID/80/2004 Judgment of 30 March 2010.

Eucharia Nwinyi (Nee Okonkwo) & 6 others v *Anthony Ikechukwu Okonkwo* (unreported) Appeal No. CA/E/189/2008, delivered 19 April 2013.

Eze v Omeke (1977) I ANSLR 136.

Ezirim v Ezirim (unreported) Suit No. FCA/L/56/76 Court of Appeal Lagos Division, February 6, 1981.

Ferdinand Ude and 3 Ors v Josephine Ude (Unreported) Suit No. CCAE/118/2010 Judgment of the Customary Court of Appeal Enugu State delivered 21 February 2011.

Hayes v Hayes (2000) 3 NWLR (pt. 648) 276.

Hyde v Hyde (2002) EWCA Civ. 1826.

Idowu v Idowu (2016) All FWLR (pt. 863) 1688.

Ihonde v Ihonde (Unreported) WD/85/70 Judgment of the High Court of Lagos State.

Ikenga Okoye v Chinelo Okoye (Unreported) Suit No. CCAE/3D/2010, Judgment of the Customary Court of Appeal Enugu State delivered 2 February 2011.

Jadesimi v Okotie-Eboh (1996) 2 NWLR 128.

Kafi v Kafi (1986) 3 NWLR (pt. 27) 175.

Kehinde & Anor v Akinlade (1982) OGSLR 299.

Kolawole v Kolawole Suit No HLC/450/81 of 1st July 1982.

Kpelanya v Tsoka & Anor (1971) NNLR 66.

Lawal-Osula v Lawal-Osula (1995) 10 SCNJ 84 or (1995) 9 NWLR (pt. 419) SC 59.

Majekodunmi v Majekodunmi (1966) NMLR 191.

Mchenje v Kunake (1912) SRLR 107.

Meme v Meme (1965) NMLR 391.

Menakaya v Menakaya (1996) 9 NWLR (422) 250.

Menakaya v Menakaya (2001) 16 NWLR (pt. 738) 203.

Mensah v Mensah (2012) 1 SCGLR 505.

Mrs Chinyere Egbo v Augustine Egbo (Unreported) Suit No. CCAE/115/2012 Judgment of the Customary Court of Appeal of Enugu State delivered on 23rd February 2011.

Mueller v Mueller (2006) 6 NWLR (pt. 977) 627.

Nanna v Nanna (2006) 3 NWLR (pt. 966) 1.

Ndubueze v Ndubueze CCAE/50/2013, 248.

Nwagwa v Ubani (1997) 10 NWLR (pt. 526) 559.

Nwanya v Nwanya (1987) 3 NWLR (pt. 62) 697.

Nwosu v Nwosu (1992) 6 SCNJ 59.

Nwosu v Nwosu (2012) 8 NWLR (pt. 1301) 1.

Nwugege v Adigwe (1934) 11 NLR 134.

Nzekwu v Nzekwu (1989) 2 NWLR (pt. 104) 373.

Nzelu v Nzelu (1997) 3 NWLR (pt. 494) 472.

Obajimi v Obajimi (2011) 21 WRN 9.

Odive v Nweke Obor and Anor (1973) ECSNLR 733.

Odogwu v Odogwu (1992) 2 NWLR (pt. 225) 539.

Odusote v Odusote (2012) 3 NWLR (pt. 1288) 478.

Ohochuku v Ohochuku (1960) 1 WLR 183; [1960] 1 All ER 253.

Okafor v Okafor (Unreported) Suit No. 0/60/71.

Okpanum v Okpanum (1972) (1972) ECSLR 561.

Okwueze v Okwueze (2004) 52 WRN 78; (1989) 3 NWLR (pt.109) 321.

Olatedohun v Olatedohun Suit No HG/111/70 of 6th July 1971.

Olowoofoyeku v Olowoofoyeku (2011) 1 NWLR (pt. 1227) 177.

Olu-Ibukun v Olu-Ibukun (1974) 4 ECSLR 706.

Omo-efe Tawiyah v Stephanie Iseko Ayuba SUIT NO. FCT/HC/CV/287/15.
Omotunde v Omotunde (2001) 9 NWLR (pt. 718) 252.
Onabolu v Onabolu 2 SMC 135.
Ononiwu v Ononiwu & Anor (unreported) Suit No CC/EZ/IK/ID/2009 Judgment of 3 June 2010.
Onwuchekwa v Onwuchekwa (1991) 5 NWLR (pt. 194) 739.
Oviaso v Oviaso (1973) SC/264/70.
Oyelowo v Oyelowo (1987) 2 NWLR (pt. 56) 239.
Shokunbi v Shokunbi CCHCJ/7/76 at 1913 SC.
Sodipo v Sodipo (1990) 5 WRN 98.
Sotomi v Sotomi (1976) 2 FNR 174.
Stephanie Omo-Efe Tawiyah v Omo-efe Tawiyah Unreported Judgement delivered HC of the FCT Dated 27 May 2013 Suit No. FCT/HC/PET/15/12.
*Tabansi v Tabansi (*2009) 12 NWLR (pt. 1155) 415.
Tagbo v Tagbo (Unreported) High Court of East Central State (1972).
Teriba v Teriba and Rickett Suit no 1/211/67 of 2/769 (unreported) Ibadan High Court.
Udeze-Nwannia v Udeze-Nwannia [2013] EWCA Civ. 725.
Ugbah v Ugbah (2009) 3 NWLR (pt. 1127) 108.
Uka v Uka (2005) 2 SMC 109.
Uke v Iro (2001) 11 NWLR (pt. 723)196.
Umeakuana v Umeakuana (2009) 3 NWLR (pt. 1129) 598.
Umoren v Umoren Suit No FCT/HC/PET/52/2011.
Unegbu v Unegbu (2004) 11 NWLR (pt. 884) 332.
Williams v Williams (1987) 2 NWLR (pt. 54) 89.

ARTICLES AND BOOKS

Aboki, Y 'Property Rights of the Customary and Islamic Law Spouse' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.
Achike, O 'Problems of Creation and Dissolution of Customary Marriages in Nigeria' in Roberts, S (ed.) *Law and the Family in Africa* (1977) Mouton Publishers, The Hague.

Adegoke, TG 'Socio-cultural factors as determinants of divorce rates among women of reproductive age in Ibadan metropolis, Nigeria' (2010) 8 *Stud Tribes Tribals* 107.

Adesanya, YA 'Divorce litigation in Nigeria: Proposal towards an alternative dispute resolution procedure' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Agbede, IO 'Recognition of double marriage in Nigerian law' (1968) 17 *International and Comparative Law Quarterly* 735.

Aina, K 'Family law and dispute resolution in Nigeria: The place of mediation' in *African Initiative for Mediation,* (2007) *Second Quarterly Newsletter* 6.

Ajai O. 'Rights of Women and Children in Divorce: The Human Rights Equation' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Ajala, T 'Socio economic consequences of marital failure in Nigeria' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Akinsanya, D 'Divorce litigation in Nigeria: A judge's perspective' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Ani, CC 'Alternative dispute resolution (ADR) in Nigeria: A study of the Lagos multi-door courthouse (LMDC) in Uwazie, E (ed) *Alternative Dispute Resolution and Peacebuilding in* Africa (2014) Cambridge Scholars Publishing, New Castle upon Tyne.

Anyafulude, T *Principles of Practice and Procedure of Customary Courts in Nigeria through the Cases* (2010) Mercele Press, Enugu.

Arinze-Amobi, C 'Discriminating/Inequitable Distribution of Marital Property upon Divorce – A critique' (2004) 1 *Unizik Law Journal* 189.

Ashiru, MOA 'Gender discrimination in the division of property in divorce in Nigeria' (2007) 51 *Journal of African Law* 316.

Attah, M 'Divorce in Nigeria's dual marriage system: Did *Jadesimi* v *Okotie-Eboh* rest the issue?' (2016) 2 *Lead City University Law Journal* 1.

Attah, M 'Divorcing marriage from marital assets: Why equity and women fail in property readjustment actions in Nigeria' (2018) 62 *Journal of African Law* 427.

Attah, M *Family Welfare Law in Nigeria* (2016) AMBIK Press, Benin.

Attah and I.L Oyakhirome "Assessing Judicial Perspectives on "Living Apart" Under the Matrimonial Causes Act 1970" Vol. 2 no. 2 *ABSU Law Review* (2018)116-131.

Attah, M 'Prescriptive and evidential challenges in Nigeria's fault divorce regime' (2017) 20 *Nigerian Law Journal* 512.

Ayinla, LA 'Enhancing sustainable development by entrenching mediation culture in Nigeria' (2014) 21 *Journal of Law, Policy and Globalization* 19.

Ayrapetova, Y 'Mandatory divorce mediation program passed in Utah' (2005) 7 *Journal of Law and Family Studies* 417.

Ayua, IA *Law Justice and the Nigerian Society* (1995) Nigerian Institute of Advance Legal Studies, Lagos.

Azinge, E 'Settlement of disputes: An appraisal of alternatives to adjudication in matrimonial, chieftaincy and land disputes' (1993) 4 3 *A Journal of Contemporary Legal Problem* 58.

Bagshaw, D 'The Move towards Primary Dispute Resolution in Family Law: The Role of Government and Implications for Justice' (1997) 2 *Flinders J. L. Reform* 1.

Bainham, A *The International Survey of Family Law* (2005) Jordan Publishing Limited, Bristol.

Baitar R, Buysse A, Brondeel R, De Mol J & Rober P 'Styles and goals: Clarifying the Professional identity of divorce mediation (2013) 31 *Conflict Resolution Quarterly* 57.

Barratt, A *Law of Persons and the Family* (2016) Pearson Education, South Africa.

Barratt, A 'Whatever I acquire will be mine and mine alone': Marital agreements not to share in constitutional South Africa (2013) 130 *The South African Law Journal* 688.

Beck CJA, Sales BD & Emery RE 'Research on the impact of family mediation' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Beck, CJA & Sales BD *Facts Myths and Future Prospects* (2001) American Psychological Association, Washington.

Boele-Woelki, K *Principles of European Family Law Regarding Divorce and Maintenance* (2004) Intersentia, Nederlands.

Boniface, AE 'African-style mediation and western-style divorce and family mediation: Reflections for the South African context' (2012) 15 *PER* 378.

Boniface, AE 'A humanistic approach to divorce and family mediation in the South African context' (2012) 12 *AJCR* 101.

Boniface, AE 'Family mediation in South Africa: Developments and recommendations' (2015) 78 *THRHR* 397.

Bonthuys, E 'Family Contracts' 121 *S. African L. J.* 879.

Boparai, H 'The customary and statutory law of marriage in Nigeria' (1982) 3 *Journal of Comparative and International Private Law* 530.

Brandon M & Stodulka T 'A comparative analysis of the practice of mediation and conciliation in family dispute resolution' (2008) 8 *QUTLJJ* 194.

Brazil, WD 'Continuing the conversation about the current status and the future of ADR: A view from the court' (2000) *J. Disp. Resol.* 11.

Bridge, C 'Family mediation and the legal process: an unresolved dilemma' (1997) 17 *New Zealand Universities Law Revue* 231.

Brown, DG 'Divorce and family mediation: History, review, future directions' (1982) 20 *Conciliation Courts Review* 1.

Burman S & Rudolph D 'Repression by mediation: Mediation and divorce in South Africa' (1990) 107 *S. African L. J.* 251.

Burton, F *Family Law* (2003) Routledge-Cavendish, England.

Bush RB & Folger JP *The Promise of Mediation: The transformative approach to conflict* (2004) Jossey-Bass, San Francisco.

Button K, Moore Elena & Himonga C 'South Africa's system of dispute resolution forums: The role of the family and the state in customary marriage dissolution' (2016) 42 *Journal of Southern African Studies* 299.

Carbonneau, T 'A consideration of alternatives to divorce litigation' (1986) *U. ILL. L. REV*. 1119.

Chianu, E 'The horse and ass yoked. Legal principles to aid the weak in a world of unequals (2007) Inaugural lecture, University of Benin, Benin.

Clark, B *Lawyers and Mediation* (2012) Springer, Germany.

Cooper DM & Brandon M 'Non-adversarial advocates and gatekeepers: Lawyers, FDR practitioners and co-operative post-separation parenting' (2008) 19 *Australasian Dispute Resolution Journal 104.*

Cretney, S 'The law and the family - time for divorce' (2003) 32 *Comm. L. World Rev.* 101.

'CRMC Governing Council Applauds ESBS, Seeks Partnership with the Media' (March 2018) 8 *Citizens' Rights and Mediation Centre Quarterly Journal* 14.

Dankani, A I 'The law and practice of divorce in Nigeria: Its shortcomings as and consequences on women and children. Position Paper of the Federal Ministry of Women Affairs' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.
Davel, T 'The child's right to legal representation in Nagel, C ed. *Huldigingsbundel vir JMT Labuschagne* (2006) Lexis Nexis Butterworths, Durban.
De Jong, M 'A pragmatic look at mediation as an alternative to divorce litigation' (2010) 3 *Journal of South African Law* 515.
De Jong, M 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation (2005) 1 *TSAR* 33.
De Jong, M 'Australia's Family Relationship Centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015? (2017) 2 *TSAR* 298.
De Jong, M 'Divorce mediation in Australia: Valuable lessons for family law reform in South Africa' (2007) *XL CILSA* 280.
De Jong, M 'Giving children a voice in family separation issue: A case for mediation' (2008) *J. S. Afr. L* 785.
De Jong, M 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 *Journal for Contemporary Roman-Dutch Law* (*THRHR*) 95.
De Jong, M 'Mediation and other appropriate forms of dispute resolution upon divorce' in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) Juta, Cape Town.
De Jong, M 'Opportunities for mediation in the new Children's Act 38 of 2005' (2008) 71 *THRHR* 630.
De Jong, M 'The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce' (2010) 2 *STELL LR* 225.
Devine, KA 'Alternative dispute resolution: Policies, participation, and proposals' (1991) 11 *Rev. Litig.* 83.
Diala AC 'The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria' (2018) 18 *African Human Rights Journal* 706.
Dieng, A 'ADR in Sub-Saharan countries' in Ingen-Housz, A (ed) *ADR in Business: Practice Issues across Countries and Cultures* (2011) Kluwer Law International BV, The Netherlands.

DiFonzo, JH 'Customized marriage' 75 *Ind. L.J.* (2000) 875.

Douglas, K 'The teaching of ADR in Australian law schools: Promoting non-adversarial practice of law' (2011) 22 *ADRJ* 49.

Durand, J 'The institutionalizing of mediation and its effect on unrepresented parties: Is justice really the goal of court-mandated mediation' (2016) 29 *Geo J Legal Ethics* 973.

Efe, CJ 'The need for statutory introduction of the concept of matrimonial property in Nigeria' (2019) 63 *Journal of African Law* 105.

Egboh, EO 'Polygamy in Igboland (South-Eastern Nigeria) With special reference to polygamy practice among Christian Ibos' (1972) 22 *Civilizations* 431.

Egu, ABC (ed.) *Imo State Customary Laws and Judicial Precedents* (2011) Joe Mankpa Publishers, Owerri.

Elias, TO *Groundwork of Nigerian Law* (1954) Routledge & Kegan Paul, London.

Elias, TO *Nigerian Land Law and Custom* (1962) Routledge & Kegan Paul, London.

Elias, TO *The Nature of African Customary Law* (1956) Manchester University Press, Manchester.

Elvis-Imo IG & Okonkwo T 'Revisiting the question of double-deck marriage in Nigeria' (2016) 6 *African Journal of Law and Criminology* 132.

Emeasoba, U B 'Land ownership among the Igbos of South-East Nigeria: A case for women land inheritance' (2012) 3 *Journal of Environmental Management and Safety* 97.

Emery, R *Renegotiating Family Relationships: Divorce, Child Custody and Mediation* (2012) The Guildford Press, New York.

Emery R & Wyer MM 'Divorce mediation' (1987) 42 *American Psychologist* 472.

Emery R, Sbarra D & Grover T 'Divorce mediation: Research and reflections' (2005) 43 *Family Court Review* 22.

Emery R E, Laumann-Billings L, Waldron MC, Sbarra DA & Dillon P 'Child custody mediation and litigation: Custody, contact, and co-parenting twelve years after initial dispute resolution' (2001) 69 *Journal of Consulting and Clinical Psychology* 323.

Emery R E, Matthews S G & Wyer M M 'Child custody mediation and litigation: Further evidence on the differing views of mothers and fathers' (1991) 59 *Journal of Consulting and Clinical Psychology* 410.

Emiola, A *Principles of African Customary Law* (1997) Emiola Publishers, Ogbomosho, Nigeria.

Emiri, OF 'Property rights of women in divorce: The need for a new equity' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Enemali, A *The Formal Requirements of the Celebration of Marriage: A Comparative Study of Canon Law, Nigeria Statutory Law and Nigeria Customary Law* (2013) Trafford Publishing, USA.

Enemo, IP *Principles of Nigerian Family Law* (2006) Spectrum, Ibadan.

Enwereji E E 'Indigenous marriage institutions and divorce in Nigeria: The case of Abia State of Nigeria' (2008) 5 *European Journal of General Medicine* 165.

Erickson, SK 'The legal dimension of divorce mediation' in Folberg J and Milne A (eds) *Divorce Mediation: Theory and Practice* (1998) Guildford Press, New York.

Ezzell, B 'Inside the minds of America's family law courts: The psychology of mediation versus litigation in domestic disputes' (2001) 25 *Law & Psychol. Rev.* 119.

Fisher R & Ury W 'Getting to Yes: Negotiating an agreement without giving in' (2012) RH Business books, London.

Ford, J 'The scope of divorce mediation: A question for Namibia' in *African Initiative for Mediation, Second Quarterly Newsletter* (2007) 14.

Fox, W 'Alimony, property settlement and child custody under the new divorce statutes: No fault is not enough' (1972) 22 *Cath. UL. Rev.* 365.

Friedman, G & Anderson M 'Divorce mediation's strengths' (1983) 3 *California Law* 36.

Friedman, GJ *A Guide to Divorce Mediation: How to reach a fair, legal settlement at a fraction of the cost'* (1993).

Garner, BA (ed.) *Black's Law Dictionary* (2004) Thomson/West, Minnesota.

Gold, JA 'ADR through a cultural lens: How cultural values shape our dispute process' (2005) *J. Disp. Resol*. 289.

Goldberg, V 'Family mediation is alive and well in the United States of America: A survey of recent trends and developments' (1996) *TSAR* 358.

'Governor Ugwuanyi opens CRMC offices within the 17 L.G. Areas' (March 2018) 8 *Citizens' Rights and Mediation Centre Quarterly Journal* 17.

Griffiths, A 'Mediation gender and justice in Botswana' (1998) 154 *Mediation Quarterly* 335.

Griffiths, A 'The problem of informal justice: Family dispute processing among the Bakwena: A Case Study' (1986) 14 *International Journal of the Sociology of Law* 359.

Griffiths, A *In the shadow of marriage: Gender and Justice in an African Community* (1997)

University of Chicago Press, Chicago.

Hahn RA & Kleist DM 'Divorce mediation: Research and implications for family and couples counseling' (2000) 8 *The Family Journal* 165.

Hamilton, VE 'Principles of US family law' (2006) 75 *Fordham Law Review* 38.

Hardon, JA *Divorce* (2004) The Real Presence Association, Inc. 4 *The Business & Management Review.*

Haynes, J & Charlesworth S *The Fundamentals of Family Mediation* (1996) The Federation Press, Sydney.

Heaton, J 'The extension of mediation and piercing the trust veneer on divorce in South Africa' (2015) *Int'l Surv. Fam. L.* 311.

Heaton, J *South African Family Law* (2010) LexisNexis, South Africa.

Hendricks, CL 'The trend toward mandatory mediation in custody and visitation disputes of minor children: An overview' (1993) 32 *U. Louisville J. Fam. L.* 491.

Herring, J *Family Law* (2011) Pearson Education Limited, England.

Hoffman, W (ed) *Family Mediation in South Africa: Present Practices and Future Vision* (1991) Papers from the Third National Conference of the South Africa Association of Mediators in Family Matters (Johannesburg 1992).

Hollos, M 'Migration, education, and the status of women in Southern Nigeria' (1991) 93 *American Anthropologist* 852.

Holmes, AS 'The double standard in the English divorce laws, 1857-1923' (1995) 20 *Law & Social Inquiry* 601.

Hon. Justice I. A. Umezulike, 'Property rights of women in divorce: Issues, problems and proposals for reform' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Hood, H 'The role of conduct in divorce suits and claims for ancillary relief' (2009) 39 *Family Law* 948.

Howland, RJ & Koenen A 'Divorce and polygamy in Tanzania" (2014). Social Justice. Paper 15. Available at *http://ecommons.luc.edu/social_justice/15,* accessed on July 18 2018.

Ichebe MS 'Procedures on customary divorce law in southern Nigeria (2016) 4 *International Journal of Law and Legal Studies* 168.

Ifemeje SC 'A legal appraisal of maintenance under the MCA 1970' (2004) 6 *A Journal of Nigerian Academic Forum* 140.

Ifemeje, SC *Contemporary Issues in Nigerian Family Law* (2008) Nolix Educational Pub, Enugu.

Ifemesia, C *Traditional Humane Living Among the Igbo: An Historical Perspective* (1979) Fourth Dimension Publishers, Enugu.

Igwesi, C 'Repositioning the Justice Sector: Achievements of Governor Ifeanyi Ugwuanyi's Administration in Enugu State' (March 2018) 8 *Citizens' Rights and Mediation Centre Quarterly Journal* 44.

Ijaiya, H 'Alternatives to adjudication in settlement of matrimonial disputes' (2004) 1 *UDUSLJ* 79.

Ipaye, OA 'Reflections on the law and practice of family law in Nigeria' in *Perspectives in Laws and Justice*, Essays in Honour of Justice Eze-Ozubu (1996)

Ipaye, OA 'The doctrine of bars to divorce: A case for its abolition' (1990) *Nigerian Current Law Review* 224.

Izumi, CL 'Prohibiting "Good Faith Reports" under the Uniform Mediation Act: Keeping the adjudication camel out of the mediation tent' (2003) *J. Disp. Resol.* 67.

Izunwa MO & Ifemeje S 'Non-inclusion of mediation process in Nigerian divorce law: An urgent call for review' (2011) 8 *Journal of Law and Diplomacy* 36.

Izunwa, M 'A critique of certain aspects of the grounds, procedure and reliefs attaching to customary divorce law in Southern Nigeria' (2015) 7 *Journal of Law and Conflict Resolution* 31.

Izunwa, MO 'Divorce in Nigerian statutory and customary marriages: a comparative critique of grounds, procedures and reliefs attaching thereto' (2015) 3 *Peak Journal of Social Sciences and Humanities* 77.

James, P *The Divorce Mediation Handbook: Everything you need to know* (2001) Jossey-Bass, San Francisco.

Kaspiew R, Gray M, Weston R, Moloney L, Hand K & Qu L '*Evaluation of the 2006 Family Law Reforms*' (2009) Australian Institute of Family Studies, Melbourne.

Kehinde, T 'Divorce law in Nigeria: A legal practitioner's viewpoint' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Kelly J & Gigy LL 'Divorce mediation: Characteristics of clients and outcomes' in Kressel K, Pruitt DG & Associates (eds) *Mediation Research: The Process and Effectiveness of Third Party*

Intervention (1989) Jossey-Bass, San Francisco.

Kelly JB & Duryee MA 'Women's and men's views of mediation in voluntary and mandatory mediation settings' (1992) *Family and Conciliation Courts Review,* 30.

Kelly, J 'Is Mediation less expensive? Comparison of mediated and adversarial divorce costs' (1990) 8 *Mediation Quarterly* 15.

Kelly, JB 'Family mediation research: Is there empirical support for the field?' (2004) 22 *Conflict Resolution Quarterly* 3.

Kelly, JB 'Mediated and adversarial divorce: Respondents' perceptions of their processes and outcomes' (1989) 24 *Mediation Quarterly* 71.

Kelly, JB 'Parent interaction after divorce: Comparison of mediated and adversarial divorce processes' (1991) 9 *Behavioral Sciences and the Law* 387.

Kelly, JB 'A decade of divorce mediation research: Some answers and questions' (1996) 34 *Family and Conciliation Court Review* 373.

Knuppel, ST 'Promise and problems in divorce mediation' (1991) *J. Disp. Resol.* 127.

Kovach, KK 'Good-Faith in mediation: Requested, recommended, or required? A new ethic' (1997) 38 *S. Tex. L. Rev.* 575.

Lande, J 'Revolution in family law dispute resolution' (2012) 24 *Journal of the American Academy of Matrimonial Lawyers* 411.

Lande, J 'Toward more sophisticated mediation theory' (2000) *J. Disp. Resol.* 321.

Letsika, Q 'The place of Sesotho customary law marriage within the modern Lesotho legal system' (2005) 2 *University of Botswana Law Journal* 73.

Lowry, LR 'Evaluative mediation' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Mayer, B 'Facilitative mediation' in Jay Folberg et al (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) 29.

McAdoo B & Welsh NA 'Look before you leap and keep on looking: Lessons from the institutionalization of court-connected mediation' (2004) 5 *Nev. L.J.* 399.

McKnight MS & Erickson SK 'The Plan to Separately Parent Children after Divorce' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Meierding, NR 'Managing the communication process in mediation' in Folberg J, Milne AL &

Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Merriam, SB *Qualitative Research: A Guide to Design and Implementation (*2009) Jossey-Bass, San Francisco.

Mienkowska-Norkiene, R 'Inequality in divorce mediation - Reasons, manifestations and ways to avoid it. Lessons for Lithuania' (2012) 11 *Social Work* 119.

Milne AL & Folberg J 'The theory and practice of divorce mediation: An overview' in Folberg J & Milne A (eds) *Divorce Mediation: Theory and Practice* (1998) The Guildford Press, New York.

Milne AL, Folberg J & Salem P 'The evolution of divorce and family mediation' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Milne, AL 'Mediation and Domestic Abuse' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Moloney L, Qu L, Hand K, De Maio J, Kaspiew R, Weston R & Gray M 'Mandatory dispute resolution and the 2006 family law reforms: Use, outcomes, links to other pathways and the impact of family violence' (2010) 16 *Journal of Family Studies* 192.

Moodley, S 'Mediation: The increasing necessity of incorporating cultural values and systems of empowerment' (1994) 27 *CILSA* 44.

Moore, C *The Mediation Process – Practical Strategies for Resolving Conflict* (2003) Jossey-Bass, San Francisco.

Mosten, F 'The institutionalization of mediation' (2004) 42 *Family Court Review* 292.

Murch, M 'Justice and Welfare in Divorce' (1980) Sweet & Maxwell, London.

Murphy J & Rubinson R *Family Mediation: Theory and Practice* (2009) LexisNexis, New York.

Mwalimu, C *The Nigerian Legal System* (2007) Peterlang Publishing Inc, New York.

Nigerian Institute of Advanced Legal Studies (ed) *Restatement of Customary Law* (2013) NIALS, Lagos.

Nelson, BL 'Divorce mediation and its Impact on children' (2013) *Master of Social Work Clinical Research Papers.* Paper 240.

Nnamuchi, O '"I would have left him but …" A critique of the fault-oriented approach to dissolution of marriage' (2014) available at *http://ssrn.com/abstract=2542481* accessed on 28 September 2017.

Ntoimo LFC & Akokuwebe ME 'Prevalence and Patterns of Marital Dissolution in Nigeria' (2014) 12 *The Nigerian Journal of Sociology and Anthropology* 1.

Ntoimo LFC & Isiugo-Abanihe U 'Determinants of singlehood: A retrospective account by older single women in Lagos, Nigeria' (2014) 27 *African Population Studies* 386.

Nwogugu, EI *Family law in Nigeria* (2014) HEBN Publishers, Ibadan.

Nwoko, KC 'Female Husbands in Igbo Land: Southeast Nigeria' (2012) 5 *The Journal of Pan African Studies* 69.

Obi, SNC *Modern Family Law in Southern Nigeria* (1966) Sweet & Maxwell, London.

Obi, SNC *Customary Law Manual* (1977) Government Printer, Enugu.

Obiora, LA 'Kindling the Domain of Social Reform through Law: A Case Study' (1995) 13 *Third World Legal Studies* 103.

Ochiabutor, CC *Introduction to Legal Method in Nigeria* (2012) Wildfire Publishing House, UK

Ojelabi LA, Fisher T, Cleak H, Vernon A & Balvin N 'A cultural assessment of family dispute resolution: Findings about access, retention and outcomes from the evaluation of a Family Relationship Centre' (2011) 17 *Journal of Family Studies* 220.

Okolo, U 'Is the mediator a therapist? A critique of the role of the mediator in Bush and Folger's transformative model of mediation. (2015) 1 *Journal of International and Comparative Law* at 1.

Ola TM, Oni RB & Akanle FF 'Divorced women in Nigeria: Empowered or disempowered?' (2015) 1 *Social Inquiry into Well-Being* 61.

Ajai, O 'Rights of Women and Children in Divorce: The Human Rights Equation' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

Olokooba, SM 'Analysis of legal issues involved in the termination of "double-decker'' marriage under Nigeria law' (2007) *Nigerian Current Law Review* 194.

Onyema, E 'The Multi-Door Court House (MDC) Scheme in Nigeria: A case study of the Lagos MDC' (2013) 2 *Apogee Journal of Business, Property & Constitutional Law* 96.

Onyeocha, AE *Family Apostolate in Igbo land* (1983) Roma.

Osondu, AC *Modern Nigerian Family Law and Practice: With Full Commentary on the Matrimonial Causes Rules 1983* (2012) Printable Pub. Co., Lagos.

Parkinson, L *Family Mediation* (1997) Sweet & Maxwell, London.

Parkinson, P 'The idea of family relationship centres in Australia' (2013) 51 *Family Court Review* 195.

Payne, JD 'Family conflict management and family dispute resolution on marriage breakdown and divorce: Diverse options' (1999) 30 *Revue générale de droit* 663.

Pearson J & Thoennes N 'Divorce mediation: Reflections on a decade of research' in Kressel K, Pruitt DG & Associates (eds) *Mediation Research: The Process and Effectiveness of Third Party Intervention* (1989) Jossey-Bass, San Francisco.

Pearson J and Thoennes N 'Mediating and litigating custody disputes: a longitudinal evaluation' (1984) *Family Law Quarterly* 497, 499.

Pearson J & Thoennes N 'Mediation and divorce: The benefits outweigh the costs' (1982) 4 *Fam. Advoc*. 26.

Press, S 'Institutionalization: Saviour or saboteur of mediation?' (1997) 24 *Florida State University Law Review* 903.

Press, S 'What happens when mediation is institutionalized? To the parties, practitioners and host institutions' (1994) 9 *Ohio State Journal on Dispute Resolution* 307.

Rafti K & Veliu S 'Addressing sensitive issues in family mediation: An Albanian study of mediator perceptions' (2017) 11 *European Journal of Social Sciences* 219.

Rahmatian, A 'Termination of marriage in Nigerian family laws: The need for reform and the relevance of the Tanzanian experience' (1996) 10 *Int'l J.L. Pol'y & Fam.* 281.

Randolph, P 'Compulsory mediation: The need for mediation in family law' (2010) 160 *New Law Journal* Issue 7411 & 7412.

Richards MP & Dyson M *Separation, Divorce and the Development of Children: A Review* (1982) DHSS, London.

Ricci, I 'Court-based mandatory mediation: Special considerations' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Riskin, L L 'Mediation and lawyers' (1982) 43 *Ohio State Law Journal* 29.

Roberts, M 'Divorce mediation: The development of the regulatory framework in the United Kingdom' (2005) 22 *Conflict Resolution Quarterly* 509.

Rose, C 'Mediating financial issues: Theoretical framework and practical application' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Rowntree G & Carrier NH 'The resort to divorce in England and Wales' 1858 – 1957' (1958) 11 *Population Studies* 188.

Salem, P 'The emergence of triage in family court services: The beginning of the end for mandatory mediation?' (2009) 47 *Family Court Review* 371.

Saposnek, DT 'Value of children in mediation: A cross-cultural perspective' (1991) 8 *Mediation Quarterly* 325.

Saposnek, DT 'Working with children in mediation' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Schepard, A 'The model standards of practice for family and divorce mediation' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Schepard, A 'Model standards of practice for family and divorce mediation: The symposium on standards of practice' (2001) 39 *Family Court Review* 121.

Scott-MacNab, D & Mowatt JG 'Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce.' (1986) *De Jure* 313.

Shaw, LA 'Divorce mediation outcome research' (2010) 27 *Conflict Resolution Quarterly* 447.

Simmons, CW 'State Grounds for Divorce: A Brief History' (1998) California Research Bureau, California State Library, California.

Skelton A & Carnelley M (eds) *Family law in South Africa* (2010) Oxford University Press, South Africa.

Smith, DJ 'Promiscuous girls, good wives, and cheating husbands: Gender inequality, transitions to marriage, and infidelity in Southeastern Nigeria' (2010) 83 *Anthropological Quarterly* 123.

Statsky, W *Family Law: The Essentials* (2014) Cengage Learning, Boston.

Taylor, A *The Handbook of Family Dispute Resolution: Mediation Theory and Practice* (2002) Jossey-Bass, San Francisco.

Teachman JD & Paasch KM 'Financial Impact of Divorce on Children and their Families' (1994) 4 *Children and Divorce* 63.

Thoennes NA & Pearson J, 'Predicting outcomes in divorce mediation: The influence of people and process' (1985) 41 *Journal of Social Issues* 115.

Thompson, PN 'Good faith mediation in the federal courts' (2011) 26 *Ohio State Journal on Dispute Resolution* 363.

Uchendu, VC *The Igbos of Southeast Nigeria* (1965) Holt, Rinehart and Winston, New York.

Ukaegbu, AO 'Fertility of women in polygynous unions in rural Eastern Nigeria' (1977) 39 *Journal of Marriage and the Family* 397.

Ukwu, F 'Citizens' rights and mediation centres at local government level' (2013) 6 *Citizens' Rights and Mediation Centre Quarterly Journal* 4.

Umukoro, BE 'Settlement of matrimonial property upon divorce: Challenges and the need for reform in Nigeria and some other commonwealth countries in Africa' (2006) 1 *Commercial and Property Law Journal* 116.

Uzodike, E N 'Settlement and division of property on divorce' in Omotola, JA *Essays on Nigerian Law* (1989) Faculty of Law, University of Lagos, Lagos.

Ver Steergh, N 'Yes, no, and maybe: Informed decision-making about divorce in the presence of domestic violence' (2003) 9 *William & Mary Journal of Women and the Law* 145.

Vettori, S 'Mandatory mediation: An obstacle to access to justice?' (2015) 2 *African Human Rights Law Journal* 355.

Waye, V 'Mandatory mediation in Australia's civil justice system' (2016) 45 *Common Law World Review* 214.

Welsh, NA 'Reconciling self-determination, coercion and settlement in court connected mediation' in Folberg J, Milne AL & Salem P (eds) *Divorce and Family Mediation: Models, Techniques and Applications* (2004) The Guildford Press, New York.

Weston, MA 'Checks on participant conduct in compulsory ADR: Reconciling the tension in the need for good-faith participation, autonomy, and confidentiality' (2001) 76 *IND. L.J.* 591.

Wilkinson, HW 'Reports of Committees: The Law Commission: Reform on the Grounds of Divorce. The Field of Choice' (1967) 30 *The Modern Law Review* 185.

Winks, PL 'Divorce Mediation: A nonadversary procedure for the no-fault divorce' (1980-81) 19 *J Fam L* 615.

Wolcott, I 'Mediating divorce: An alternative to litigation' (1991) 28 *Family Matters* 47.

Wright, G & Stetson, D M 'The impact of no-fault divorce law reform on divorce in American States' (1978) 40 *Journal of Marriage and the Family* 575.

INTERNET SOURCES

'Essentials of family mediation' available at *https://www.russell-cooke.co.uk/media/1811/essentials-of-family-mediation.pdf*, accessed on 20 April 2013.
accessed on 16 July 2018.

Adekile, O 'Legal framework for settling marital disputes through reconciliation in Nigeria' available at *http://ssrn.com/abstract=1503384*, accessed on 9 July 2019.

Adekunle, CO 'Access to justice in Nigeria: An extrapolative Appraisal of its socio-legal Barriers' available at *www.researchgate.com* accessed on 15 May 2016.

Ahenkorah, OT 'Matrimonial property rights of women upon divorce in Ghana, under the prism of legal empowerment to which extent does the lack of substantive legislation on property settlement upon divorce in Ghana constitute a breach of the CEDAW?' available at *https://www.duo.uio.no/bitstream/handle/10852/39725/201.pdf?sequence=1,* accessed on 28 June 2018.

Akanbi, MM 'Kwara State Multi-Door Courthouse: An idea whose time has come' Paper delivered at the Inauguration of the Committee on the Proposed Kwara State Multi-Door Courthouse, High Court Complex Ilorin, Kwara State, 29th July, 2008. Available at *https://www.nbailorin.com/download/TUESDAY,%2029TH%20JULY,%202008.pdf,* accessed on 14 October 2019.

Astor, H 'Making a 'genuine effort' in divorce mediation: What does it mean?' available at *http://ssrn.com/abstract=1294019,* accessed on 12 April 2013.

Boardman SK, Fiske J, Israel L & Neumann K 'Marital mediation: An emerging practice' available at *http://www.mediate.com/articles/maritalmediation1.cfm,* accessed on 25 April 2013.

Parliament of Australia 'Divorce Mediation' available at *https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/laca/famserv/chap10.pdf,* accessed on 02 April 2014.

'Emotional Stages of Divorce' available at *https://www.mediate.com/divorce/pg62.cfm,* accessed on October 12 2019.

Hertveldt, S 'Repairing a car with the engine running' (2007) available at *https://www.doingbusiness.org/content/dam/doingBusiness/media/Reforms/Case-Studies/2007/DB07-CS-EC-Nigeria.pdf*, accessed on 5 October 2019.

Huntington, C 'Family law achievements and challenges in the US' May 2015 UN Expert Group Meeting, available at *http://www.un.org/esa/socdev/family/docs/egm15/Huntingtonpaper.pdf*, accessed 26 January 2017.

Imam-Tamim, MK 'A doctrinal review of literature on multi-tiered marriage in Nigerian family law' Postgraduate colloquium on innovation in postgraduate research. Organized by Goal Centre, Islamic Science University Malaysia (USIM) on 10 June 2015. Available at *https://www.researchgate.net/profile/Muhammad_Kamaldeen_IMAM-TAMIM/publication/281664989_A_doctrinal_review_of_literature_on_multi-tiered_marriage_in_Nigerian_family_law/links/55f3937a08ae6a34f6607298/A-doctrinal-review-of-literature-on-multi-tiered-marriage-in-Nigerian-family-law,* accessed on June 22 2018.

Lagos Digest of Statistics 2017. Available at *https://mepb.lagosstate.gov.ng/wp-content/uploads/sites/29/2017/01/2013-Digest-of-Statistics.pdf,* accessed on 01 July 2019.

Logan, C 'Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' (2017) Afrobarometer Policy Paper No. 39, available at *https://afrobarometer.org/publications/pp39-access-to-justice-in-africa,* accessed on 16 September 2019.

Nawi, NF 'Mandating mediation in family law conflict in Malaysia: Exploring judges and lawyers' perspectives' available at *http://ssrn.com/abstract=1872860*, accessed on 12 April 2013.

Nawi, NF & Hak NA 'Towards the Development of a Mandatory Family Mediation Program in the Malaysian Civil Legal System' available at *https://www.researchgate.net/publication/277325482_Towards_the_Development_of_a_Mandatory_Family_Mediation_Program_in_the_Malaysian_Civil_Legal_System,* accessed on 26 June 2014.

Oladimeji, R 'Law maker okay 120 Judges for Lagos' available at *https://punchng.com/lawmakers-okay-120-judges-for-lagos/,* accessed on 03 July 2019.

Olomojobi, Y 'Marriage in Nigeria across ages: Problems and prospects (September 24, 2016). *Available at https://ssrn.com/abstract=2858618,* accessed 24 June 2019.

Osadolor, FO & Enabulele O 'Dual marriage status in Nigeria' (2007) 109-160 *International Family Law* 135.

Umezuruike, C 'The concept of double-decker marriages in Nigeria' available at *http://www.umezchambers.com/articles-publications/10-the-concept-of-double-decker-marriages-in-nigeria,* accessed on 24 June 2018.

Walsh, B 'In search of success: Case studies in justice sector development in Sub-Saharan Africa' (2010) Washington DC; World Bank, at 12, 51, available at: *http://documents.worldbank.org/curated/en/291991468009961030/pdf/574450ESW0P1121n0Africa010June02010.pdf,* accessed on 16 September 2019.

REPORTS

'Communique issued at the end of the national conference on the rights of women and children in divorce' in Ajai O & Ipaye T (eds) *Rights of Women and Children in Divorce* (1997) Friedrich Ebert Foundation, Lagos.

CORI Thematic Report 'Nigeria: Gender and Age' available at *http://www.refworld.org/pdfid/514830062.pdf,* accessed on 24 June 2019. (CORI Thematic Report).

European Asylum Support Office 'Country of Origin Information Report: Nigeria, Actors of Protection' available at *https://www.easo.europa.eu/sites/default/files/publications/2018-EASO-COI-Nigeria-ActorsofProtection.pdf,* accessed on 04 January 2020 (European Asylum Support Office Report).

Justice for All 'Access to mediation and legal assistance services' Impact Report Issue 6, (October 2015) Available at *https://www.britishcouncil.org.ng/sites/default/files/cip_2.3.pdf,* accessed on 7 October 2019. (Justice for All (2015)).

Justice for All 'Increasing Access to Justice' Impact Report Issue 3 (September 2013) available at *https://www.britishcouncil.org.ng/sites/default/files/c2.3_impact_report_sept2013.pdf,* accessed on 7 October 2019. (Justice for All (2013)).

Justice for All 'Increasing Access to Justice' Impact Report Issue 4 (March 2014) 2, available at *https://www.britishcouncil.org.ng/sites/default/files/impact_report_increasing_access_to_justice_march_2014.pdf* accessed on 7 October 2019. (Justice for All (March 2014)).

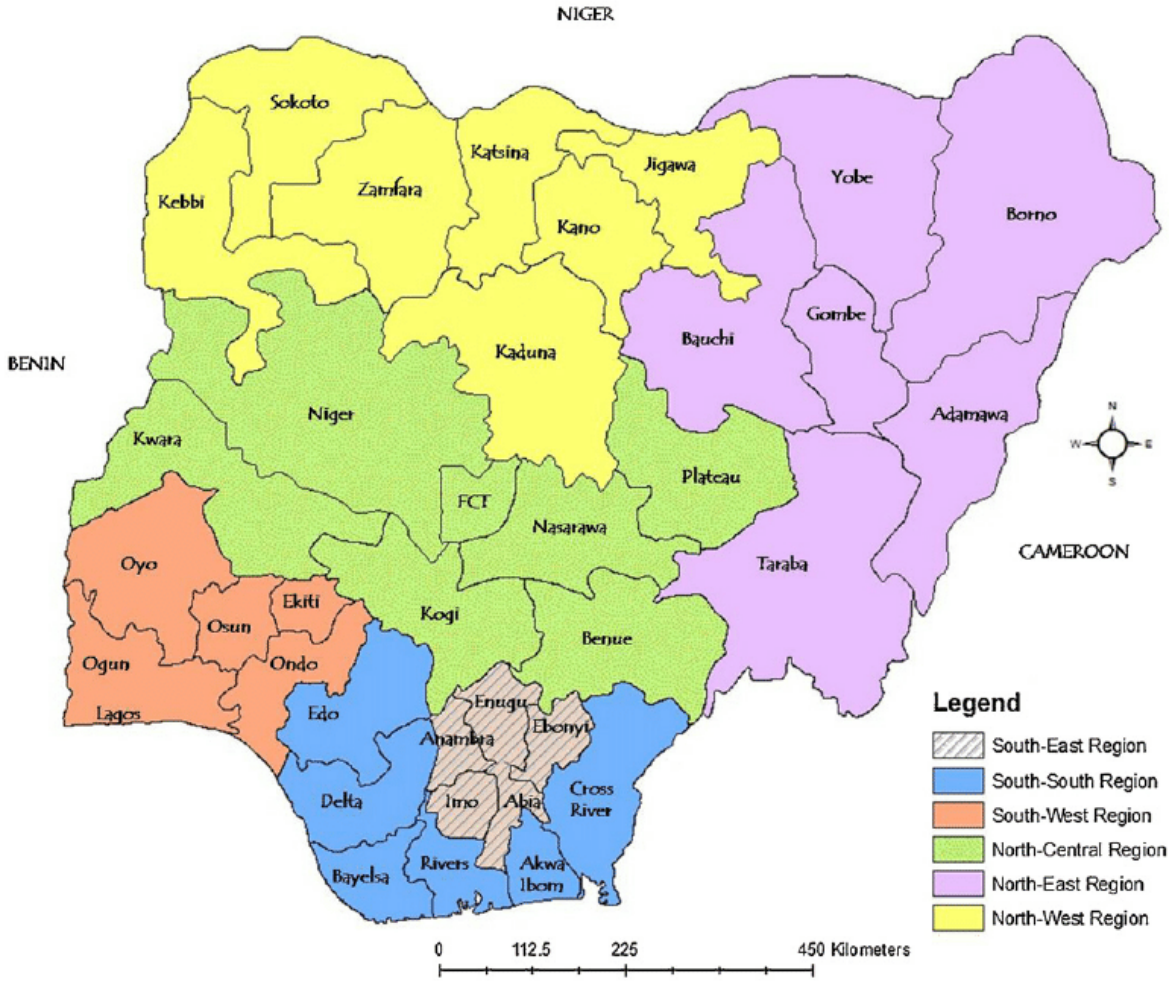
Justice for All 'Increasing Access to Justice' Impact Report Issue 5 (October 2014) available at *https://www.britishcouncil.org.ng/sites/default/files/impact_report_c5_gender_impact_report_oct2014.pdf,* accessed on 7 October 2019. (Justice for All (October 2014)).
Law Commission 'Family Law: The Ground for Divorce' Law Com No 192, HC 636 of 1989/90 (Ground for Divorce Report).
Law Reform Commission of Hong Kong 'The Family Dispute Resolution Process' (2003) 62. (Hong Kong Report).
Lord Chancellor's Department, 'Looking to the Future: Mediation and the Ground for Divorce. (White Paper, CM 27990 of 27 April 1995). (Looking to the Future Report).
'Putting Asunder: A Divorce Law for Contemporary Society' Society for the Promotion of Christian Knowledge, (S.P.C.K) London 1966. (Putting Asunder Report).
Reform of the Grounds of Divorce: The Field of Choice (1966) Law. Com. No. 6; CMND. 3123 H.M.S.O. (Field of Choice Report).
Report of the Governor's Commission on the Family 1-2, California (1966).
Royal Commission on Marriage and Divorce (The Morton Commission) of 1951. (Report CMD. 9678). (Morton Commission Report).
South Africa Law Commission 'Report on Customary Marriages' (1998).

UNPUBLISHED THESES

Diala, AC *Judicial Recognition of Living Customary Law in the Context of Women's Matrimonial Property Rights in South-East Nigeria* (unpublished PhD thesis, University of Cape Town, 2014).
Helga Schultz '*A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System'* (unpublished Master of Laws thesis, University of Kwazulu-Natal, 2011).
Knox, B *A Consideration of a Mandatory Family Mediation model under Section 9 of the British Columbia Family Law Act* (unpublished Masters of Arts thesis, University of Victoria, 2014).
Oforchukwu, JI *A Biblical and Theological Study (Analysis) of Marriage and Divorce Among Igbo Catholic Christians (Nigeria)* (unpublished Master of Theology thesis, South African Theological Seminary, 2010).

Steyn, YC *The Role of Court Based Mediation in the Resolution of Divorce* (unpublished Master of Laws thesis, North-West University, 2015).
Viney, JW *The Modern Divorce* (unpublished Master of Jurisprudence thesis, Durham University, 2011).

APPENDIX A



1376

[1376] Available at *https://www.researchgate.net/figure/Map-of-Nigeria-showing-the-six-6-geopolitical-zones-For-interpretation-of-the_fig1_51795009*, accessed on 10 February 2020.

APPENDIX B

Table 1.1 TOTAL NUMBER OF CASES INSTITUTED AT THE CENTRE FROM 2014 – 2017

YER	TOTALL NUMBER OF CASES	PENDING	RESOLVED	ABANDONED	DISCONTINUED/ WITHDRAWN	LEGAL AID
2014	442	124	164	104	49	23
2015	315	254	111	40	30	23
2016	284	92	108	45	39	17
2017	205	122	36	27	20	27

Table 1.2 TYPES OF DISPUTES INSTITUTED AT THE CENTRE FROM 2014 – 2017

YEAR	TOTAL NUMBER OF CASES	LAND	FAMILY	WORK PLACE	TENANCY	DEBT	CHILD WELFARE	COMPEN-SATION	INHERI-TANCE	LOCAL	LEGAL AID
2014	442	83	101	18	53	87	35	13	12	23	16
2015	315	44	85	7	59	63	21	3	12	21	23
2016	284	35	71	3	34	53	11	5	4	17	14
2017	205	23	76	-	29	24	11	-	4	5	27

APPENDIX C

Faculty of Law: Research Ethics Committee

Private Bag X3 ▪ Rondebosch ▪ 7701 ▪ South Africa
Room 6.29 ▪ Kramer Building ▪ Middle Campus
Tel: +27 021 650 3080 Fax: +27 021 650 5660
E-mail: lamize.viljoen@uct.ac.za Internet: www.law.uct.ac.za

Certificate of Approval

PRINCIPAL INVESTIGATOR/SUPERVISOR: AMANDA BARRATT STUDENT: UGOCHINYELU ANIDI – OKLUGO001 FACULTY: LAW DEPARTMENT: PRIVATE LAW	**ETHICS REFERENCE NUMBER: L0111-2019** ORIGINAL APPROVAL DATE: 17-December-2019 APPROVAL EXPIRY DATE: 16-December-2020

PROJECT TITLE: Towards the Institutionalization of Divorce Mediation in Nigeria.

PURPOSE OF RESEARCH: For Doctoral degree in Law. This thesis proposes the establishment of divorce mediation programs in Nigeria.

CONDITIONS OF APPROVAL

This Certificate of Approval is valid for the above term provided there is no change in the protocol.

Modifications
To make any changes to the approved research procedures in your study, please submit a formal "Request for a Modification" to the REC Administrative Office. You must receive ethics approval before proceeding with your modified protocol.

Renewals
Your ethics approval must be current for the period during which you are recruiting participants or collecting data. To renew your protocol, please submit a "Request for Renewal" form before the expiry date on your certificate. You are responsible for submitting this by at least 2 months prior to the expiry date of clearance date issued.

Project Closures
When you have completed all data collection activities and will have no further contact with participants, please formally notify the REC: Law as well as your supervisor where applicable.

Certification

This certifies that the University of Cape Town Law Faculty's Research Ethics Committee has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Cape Town Research Regulations Involving Human Participants.

Associate Professor Kelley Moult
LAW REC: CHAIRPERSON

Certificate Issued On: 17/12/2019

APPENDIX D

INTERVIEW QUESTIONS FOR ADMINISTRATORS/MEDIATORS

A. INTRODUCTION

1. Do you have any objection to this interview being audio-recorded?
2. I will ask questions to guide the information you provide. You are welcome to provide any other information that you consider valuable to the objectives of the research.
3. You may choose not to answer any question or to withdraw from this interview at any point. However, I would be glad if you choose to assist me by participating.
4. Do you mind if your personal details such as your name, age, tribe and position are included in my PhD dissertation? I will assign a pseudonym to you immediately, if you wish to remain anonymous.

B. BACKGROUND OF INTERVIEWEE

1. Please state your name
2. Please state your age
3. Please state your sex
4. Please tell me your position in the CRMC
5. What are your duties in the CRMC?
6. Please tell me your educational (degree) and mediation qualifications (number of hours of training)
7. Please tell me how long you have worked as a mediator?

C. THE CRMC: MEDIATION IN PRACTICE

1. Can you tell me your opinion of the mediation process at the Centre in comparison to litigation in court? In your opinion, what are the benefits and disadvantages of the mediation process?
2. What type of matters may be referred to the Centre? What type of matters have you handled in the Centre? Family, Debt recovery, Tenancy matters, others?
3. Can you tell me the issues that your clients for family matters have? What is the volume of

family matters compared to other matters?

4. How are cases initiated at the Centre? Walk ins, Referrals (Courts, satisfied clients), institutions. Can you describe the intake procedure for new clients?
5. How is a case deemed suitable for the Centre? What are the factors considered by the Centre before accepting a case for mediation?
6. Can you please describe the role of the CRMC mediator during the mediation? Facilitative? Directive? Evaluative?
7. Can you describe how the Centre is funded? (Provisions for facilities such as office equipment, staff salaries, infrastructure, vehicles, stationaries)
8. Can you briefly explain the cost implications of mediation for the Centre's clients?
9. Do you think this could be reviewed? Upwards or downwards? If no. why? If yes, why? How?
10. Would your answer be different if the demography of the clients of the Centre changed? (richer clients)
11. Have you encountered power imbalance or domestic violence in the course of mediating at the Centre? How do you deal with such cases? Does the Centre provide guidelines for dealing with such cases?
12. Do you think that there are circumstances in which mediation may be inappropriate? If yes, can you describe such circumstances?
13. In your opinion, is a pre-mediation screening process for power imbalance, domestic violence and assessment of appropriateness for mediation useful or necessary?
14. If yes, how do you think this screening process would work?
15. On the average, what is the duration of mediation sessions? How many sessions per case? How many hours per session?
16. Do you think the duration of cases should be regulated? If yes, in your opinion, what would be appropriate?
17. Can you describe the Centre's clientele? What is the demography of the Centre's clients? Old? Young? Illiterate? Educated? Rich? Poor?
18. What is the primary language employed at the Centre?
19. Is the process sometimes conducted in vernacular?
20. Are the mediators at the Centre familiar with the culture of the indigenous community?

21. Have you had clients outside the indigenous community? (Non-Igbo) Yoruba, Hausa. How do you ensure that the needs of such clients are met: language, culture, etc.?

22. How are agreements enforced? Have you ever had to enforce an agreement because of party's failure to honour the terms of their agreement?
23. Have you mediated cases that have gone to or have come from the courts?
24. How do you ensure that parties participate actively and with good faith? Have you had parties that concealed information? How do you deal with such parties? What measures do you think the Centre can take to encourage good faith participation?
25. Can you describe laws you take into consideration during the mediation process? (Judicial precedents? Customary law manuals? State laws on the family?)
26. Have you had parties who walked away from the process while it was underway?
27. Can you briefly explain some problems/challenges that you encounter in the course of mediation? How can they be solved?
28. In your opinion, should mediation be voluntary or mandatory? Why?

Thank you.

***

INTERVIEW QUESTIONS FOR USERS

A. INTRODUCTION

1. Do you have any objection to this interview being audio-recorded?

2.I will ask questions to guide the information you provide. You are welcome to provide any other information that you consider valuable to the objectives of the research.

3.You may choose not to answer any question or to withdraw from this interview at any point. However, I would be glad if you choose to assist me by participating.

4.Do you mind if your personal details such as your name, age, tribe and position are used in my PhD dissertation? I will assign a pseudonym to you immediately, if you wish to remain anonymous.

B. BACKGROUND OF INTERVIEWEE

1. Please state your name
2. Please state your age
3. Please state your sex
4. Please tell me how long you have known the CRMC

C. THE CRMC: MEDIATION IN PRACTICE

1. How did you initiate your case at the Centre?
2. How much did it cost you to mediate at the centre? Were you satisfied with this amount?
3. How long did your case take from start to resolution? Do you think the duration of cases should be regulated?
4. Were you able to communicate effectively with the staff at the Centre?
5. Can you please describe the role of the CRMC mediator during the mediation? Facilitative? Directive? Evaluative?
6. Did you encounter any problems/challenges during your time at the centre?
7. Can you describe how these problems/challenges can be solved/managed.
8. Can you tell me your opinion of the mediation process at the Centre in comparison to litigation in court? In your opinion, what are the advantages and disadvantages of the mediation process?
9. How did you hear about the mediation services offered at the CRMC?
10. Can you describe your experience at the centre? Time spent? Cost? Satisfaction with outcome of mediation?
11. Would you recommend mediation at the CRMC?
12. Did you consider other dispute resolution methods before going to the Centre? Why did you choose mediation at the CRMC?

Thank You.