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A COMPARATIVE ANALYSIS OF SPOUSAL MAINTENANCE IN NIGERIA AND SOUTH AFRICA

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Abstract: *

This paper is on maintenance of spouse in Nigeria and Republic of South Africa. There are a number of issues that flow directly from matrimonial causes like annulment, restitution of conjugal rights, judicial separation, divorce and so on which courts in Nigeria and South Africa are empowered to address and make orders in respect of same, whenever parties to a marriage or any other interested third party requests the courts to do so.

The paper utilizes secondary data such as textbooks, journals, case laws, and statutes etc. The paper addresses inter-alia; maintenance of spouse under the Act and customary law in Nigeria and South Africa, Means of parties to the marriage, earning capacity of the parties, enforcement of maintenance order, maintenance agreement, and maintenance under South Africa and Comparison between the two jurisdictions. The findings amongst others are, it is the obligation of a husband of a valid marriage to maintain his wife during the marriage. The husband's obligation terminates with the dissolution of the marriage under common law but statutory provisions prescribe for during and after the dissolution of such marriage, enforcement of maintenance order. When courts deal with proceedings for these reliefs in respect of marriages celebrated under the Act, they have recourse to the provisions of the Matrimonial Causes Act in reaching at just decisions. The concept of maintenance is not recognized under customary law.

It was recommended that the extant laws be reformed in line with international best practices. Reliefs for maintenance should be available to any of the parties to the statutory marriage pending the disposal of proceedings. In granting the relief, courts are enjoined to have due regard to the means, earning capacity and

conduct of the parties to the marriage and all other relevant circumstances.

Keywords: Spousal, Maintenance Order, Marriage and Earning Capacity.

Introduction

The word maintenance according to concise oxford Dictionary is derived from the term to 'maintain', which means to support.¹ The word maintenance itself means the process of maintaining or being maintained and the provision of the means to support life especially by work etc. According to Encyclopedia Britannica; maintenance means maintaining or assisting a party with money or otherwise.²

There are a number of issues that flow directly from matrimonial causes like annulment, restitution of conjugal rights, judicial separation, divorce etc., which courts in Nigeria are empowered to address and make orders in respect of same, whenever parties to a marriage or any other interested third party requests the courts to do so. These issues are collectively known as ancillary reliefs and are provided for under Part IV of the MCA, 1970. These reliefs are orders for maintenance, custody and settlements of property. Sections 70 – 73 of the MCA empower the High Court to make orders for ancillary reliefs in favour of either party to a marriage and/or the children of the marriage.

It is the obligation of a husband of a valid marriage to maintain his wife during the marriage. This is a common law principle... the husband obligation terminates with the dissolution of the marriage under common law but statutory provisions prescribe for both during and after the dissolution of such marriage.

This paper seeks to discuss maintenance of spouse both under the Act and customary law in Nigeria and South Africa.

Maintenance of Spouse in Nigeria

Ancillary reliefs within the context of matrimonial causes are those reliefs that are subsidiary to the reliefs granted in a main cause or matter; i.e. orders made in a matrimonial suit like judicial separation or divorce. In a situation where a marriage has broken down irretrievably and a court has made a decree of divorce, there usually are other issues that are dependent on or "ancillary to" the major issue of divorce. Questions like who is to maintain who, or how to share the property jointly owned by the parties, or who gets custody of the children of the marriage necessarily needs to be addressed by the

¹Allen, R.E (1990) *The Concise Oxford Dictionary of Current English*, 8th ed Oxford University Press, p. 715

²Encyclopedia Britannica Vol.14, 1768.692

<http://www.gutenberg.org/ebooks/39632>.accessed March 14/2020

court where proceedings for same are before the court. Any orders made in furtherance of these questions are classified as ancillary orders which are essentially supplementary or subsidiary to the main orders in a matrimonial suit.

There are three types of ancillary reliefs provided for under the MCA. These are: maintenance, custody of children and settlement of property. This paper will dwell more on maintenance.

Maintenance in matrimonial proceedings implies the duty to provide for the needs of members of the family, which duty is enforceable by an order of court where necessary. The concept of maintenance is traceable to Common Law wherein a husband was obliged to maintain his wife as part of his matrimonial duties, however the husband cannot claim maintenance from his wife.³ During that dispensation, a wife was at liberty to pledge her husband's credit in procuring the needs of the family whenever the husband deserted her without providing maintenance, especially where she had no adequate means of supporting herself. For all intents and purposes such a deserted wife became her husband's agent of necessity; meaning that any tradesman from whom she purchased necessities like food, clothing, medication, housing etc. on credit, could sue the husband to pay for such necessities. Since the intervention of statute, the concept of maintenance has been brought within statutory regulation and expanded to accommodate husbands as beneficiaries of orders for maintenance.

In *Adeyemi v Adeyemi*,⁴ Fakayode, J. stated that at common law, a wife has a right to claim maintenance from her husband but that now by statutory provision, the question of maintenance is a matter within the discretion of the court to grant or to withhold.

Primarily, the husband's duty under the common law is to provide his wife with the necessities of life. This duty is prima facie complied with if he provide a home for her, and the wife has no right to separate maintenance in separate home unless she can justify living apart from her husband. This obligation remains if the spouses are obliged to live apart, for example owing to the illness of one of them provided that there is no desertion on the part of the wife.⁵ In the case of *Price v Price*,⁶ the wife had left the matrimonial home without

³Sagay, I., *Nigerian Family Law [Principles, Cases, Statutes & Commentaries]* (Ikeja: Malthouse Press Ltd., 1999). 134 –387.

⁴ Suit no.1/198/70 as cited in Sagay. I (1999) *Nigerian Family Law, Principled, Cases, Statutes and Commentaries*.

Malthouse Press Ltd, Lagos

⁵Bromley.P. M, and Lowe.N.V, *Family Law*, 8th Edition (London: Butterworth and Co. Publishers Ltd, 1992). 650

⁶ (1951)CA P.413

justification but later made a genuine offer to return, which the husband refused. She then applied for an order of maintenance against him under the Matrimonial Causes Act, 1950, Section 23, and the judge made an order. The husband appealed but the appeal was dismissed.

There is no doubt that at common law if a wife chooses willfully and without justification to live away from her husband, so long as she absents herself, she cannot render him liable for necessities supplied to her, or for her maintenance by the union, for the reason that she has of her own free will deprive herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long period of absence to return at any time.⁷

The Supreme Court acknowledged this fact in the case of **Olu-Ibukun v Olu-Ibukun**.⁸ This means that either party to a statutory marriage may apply to court for an order of maintenance where the parties are unable to reach an agreement on the issue. Ordinarily, parties to a marriage can make an agreement for maintenance as between themselves on the terms they deem fit. So that where the parties to a statutory marriage have privately agreed between themselves on the issue of maintenance, they may request the court to simply sanction the agreement as made.

Where there is no existing private agreement for maintenance between the parties to a marriage, Section 70 of the MCA clearly spells out the rules guiding the grant of the relief of maintenance in respect of marriages contracted under the Act. The provisions of this section clearly indicate that the relief of maintenance may be granted to either:

- (i) A party to the marriage, whether or not a decree had been made against that party in the main proceedings in relation to which the proceedings for maintenance were instituted.
- (ii) Any child of the marriage who is below 21 years.
- (iii) Any child of the marriage who is above 21 years, if in the opinion of the court, there are special circumstances that justify the making of an order of maintenance in his/her favour.

Section 70(1) of the Matrimonial Causes Act provides for the power of the court to grant maintenance order. The section provides thus;

⁷Hall J. C. (1971) Sources of Family Law Cambridge U.K.

commensurate with his qualifications, the court would consider his capacity to earn more income from getting the right job for which he is qualified. Even in cases where a party is unemployed, the courts do not hesitate to award maintenance against such a party for as long as the party can be gainfully employed if he tries to work.

The Supreme Court considered the meaning of the term 'earning capacity, income and assets' in the case of **Negbenebor v Negbenebor**.¹³ The lower court from whose judgement the husband appealed in this case, had added the value of a house, owned by the husband and money he had in a bank to the regular earning of the husband to constitute his income. The court then added the wife's earning to this total sum, divided it by three and held that the wife was entitled to one-third of the total sum as her maintenance.

The Supreme Court held that the learned judge was in error. The latter had confused the basis of assessment, which should have been the respondent's income, as distinct from his assets. In this case, the lower court had wrongly based the assessment of maintenance on the respondent's assets. The income of the husband in this case was his salary, which was \$1,260 per annum, and his earnings of \$300 per annum from private practice. His total income was therefore \$1,560 and not \$4,910 (which included half the value of the respondent's house plus \$350 savings). Using the correct figures, the supreme court found that the correct amount of maintenance which the respondent ought to have been ordered to pay per annum was \$218 instead of \$1,332 which the lower court calculated as the correct amount. In the case of **Griffith v Griffith**,¹⁴ the husband aged fifty one had been in remunerative employment as a consulting engineer. But for three years up to the hearing, he had been unemployed. On the basis of the evidence adduced in respect of his earnings while in employment, the court held that it was reasonable to attribute to him a potential earning capacity of five thousand pounds per annum.

Moreover, the question whether the wife's earning capacity will be taken into account in the award of maintenance is regulated by some basic principles. In **ROSE v ROSE**,¹⁵ the parties had been married for twenty years; there were two children, one of whom was about four years old. The wife was aged 41, had not had to work during the marriage, and had no normal trade or calling. As to the general principle to be applied, Denning, L.J (as he then was) said

After the divorce the wife claimed maintenance, and the question is whether she ought to go out to work, I

¹³ (1971) 1 ALL N.L.R 210

¹⁴ (1974) 1 WLR 1350

¹⁵ (1987) 481 U.S 619

agree that no general rule can be laid down on the matter, but this wife is certainly under no legal duty to go out to work in order to reduce the maintenance that her husband should pay. It would be quite unreasonable to expect her to do so when she has to look after young child. If a wife does earn, then her earning must be taken into account: or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account or if she has worked regularly during the married life and might reasonably be expected to work after divorce, the potential earnings ought to be taken into account

In the English case of **McEwan v McEwan**,¹⁶ the husband was a retired constable on a monthly pension of £6 (six pounds) at age 59. He was unemployed at the time proceedings for maintenance was filed against him by the wife. The court awarded the entire £6 of his pension to the wife on the ground that had he tried, he could have obtained suitable work to earn a living; thereby taking advantage of the husband's earning capacity to make the order for maintenance.

Conduct of the Parties to the Marriage

The conduct of parties that the court considers in making an order of maintenance is of a broad and general nature and not necessarily the conduct of the parties that allegedly led to the breakdown of the marriage. Even though Nigerian courts are yet to define the characteristics of the conduct envisaged, the English courts have interpreted similar provisions in the English Matrimonial Proceedings and Property Act, 1970 to mean conduct that is "both obvious and gross" so much so that "... to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice..." By this interpretation, conduct that can dissuade the court from awarding maintenance must be conduct that is of a grievous nature. In **Harnett v Harnett**,¹⁷ the court opined that the issue of conduct becomes relevant in proceedings for maintenance only where something in the conduct of the relevant party makes it "inequitable to leave that out of account having regard to the conduct of the other party as well in the course of the marriage. "Thus, grievous conduct by one spouse which is injurious to the life, limb or psyche of the other party have been held to justify the court's refusal to award maintenance in favour of such a party against the other party."

– the victim of such gross conduct. Examples of such gross or grievous conduct include:

- i. A wife who fired a shotgun at her husband when he locked her out of the matrimonial home.¹⁸
- ii. A man who inflicted a serious and permanent injury on his wife.¹⁹
- iii. A husband who committed adultery with his daughter-in-law in the matrimonial home.²⁰

In the English case of **Trestain vTrestain**,²¹ a decree *nisi* was granted by the court of first instance to the husband on the ground of the wife's cruelty. On appeal the court of appeal found that the husband's conduct was in fact responsible for the breakup of the marriage. It therefore held that the decree was not a bar to the wife's obtaining an award of maintenance. In the case of **Cunningham v Cunningham**,²² the wife committed adultery with a stranger who came for a weekend visit. The Judge granted a decree of divorce to the husband and refuses to award maintenance to the wife because her conduct was the main cause of the breakup of the marriage.²³

Other Relevant Considerations

This last requirement confers on the court a wide discretion to consider other factors in awarding maintenance. The courts are at liberty to look at the totality of the evidence before it in terms of the income, assets and properties, financial needs, commitments and responsibilities of parties, their ages and potential productivity levels, age of the marriage, standards of living of both parties etc. In **Dawodu v Dawodu**,²⁴ the court held that extended family responsibilities fall under this head in determining a claim for maintenance. Thus, in the unreported case of **Ikpi v Ikpi**,²⁵ wherein the petitioner husband averred that he made monthly allowance for his aged aunt in addition to the education and upkeep of four of his uncle's children plus other monthly disbursements, the court held that it would give consideration to established family obligations in the light of contemporary culture and societal values; however, such considerations would be subject to the court's discretion and

¹⁸ *Armstrong v. Armstrong* (1874) 5 S.C 128

¹⁹ *Jones v. Jones* (1976) 557 P.2d 239

²⁰ *Dixon v. Dixon* (1974) 360 N.E.2d 486.

²¹ (1950) WLR 198

²² (19572)Q.B 396

²³ Nwogugu, E. I., *Family Law in Nigeria* [Revised edition] (Ibadan: Heinmann Educational Books, 1990). 199.

²⁴ [1974] 5 CCCHCJ 617

²⁵ Suit No. HD/88/83 of 13/4/84 (unreported) High Court of Lagos

overriding duty of awarding due maintenance to spouses in fitting cases.²⁶

Enforcement of Maintenance Order

Where a husband against whom a maintenance order is made fails to comply; the wife may seek a court order for the attachment of the respondent's property.²⁷ If such order remained un discharged within six weeks, it renders the respondent liable to being regarded as insolvent and may thereafter be detained in custody for a period not exceeding six months from the expiration of the initial six weeks, and following this imposes certain disabilities on him, e.g. he is disqualified from contesting elections into legislative or any elective executive positions.

She may also recover the arrears of maintenance due to her as a judgement debt in a court depending on the amount. If he fails to pay after a specific court judgement to that effect, the processes discussed above may follow.

Maintenance Agreement

For a maintenance agreement to be valid and enforceable, it has to constitute a contract between the parties. However, if it is not made by deed the party seeking to enforce a promise to pay maintenance must show that she (he) has furnished consideration. If there is no consideration at all, a promise not made by deed will be unenforceable.²⁸

By virtue of Section 34 of Matrimonial Causes Act, an agreement has to be in writing and made between spouses or former spouses. It must also be an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or a separation agreement in writing between the same parties containing such agreements. An agreement containing no such arrangement can come within the statutes only if it is a separation agreement made whilst the parties are still married to each other.²⁹ An agreement must be in writing and made between spouses. Under section 34(2) of Matrimonial Causes Act 1970, financial arrangement are defined as "provisions governing the rights and liabilities towards one another when living separately of the parties to the marriage (including a marriage which has been dissolved or annulled in respect of the making or securing of payment or the disposition or use of any

²⁶Tijani, N., *Matrimonial Causes in Nigeria: Law and Practice* (Lagos: Renaissance Law Publishers Ltd, 2007) .142 – 60.

²⁷ Section 70(4) Matrimonial Causes Act

²⁸Bromley

property: including such rights and liabilities with respect to the maintenance of education of any children of the family”.

Maintenance Under South Africa Law

Maintenance law in South Africa is based on the existence of the common law concept of the duty of support between dependent parties. As a result of this duty of support, parents are obliged to support their children whilst they are unable to support themselves. This is a right of all children. There has been a constant evolution of the scope of the common law concept of duty of support through both case law, and legislation, culminating in the Maintenance Act 99 of 1998. However, due to structural and procedural issues tied to the implementation of the Act, children's rights often go unprotected, particularly in cases where members of the public enter and engage in the maintenance system unrepresented. The South African maintenance system rests on two pillars, namely a public grant system and a private judicial system. The public maintenance system is intended to act as a safeguard in supporting children and dependent persons where the judicial system fails to do so.³⁰ This system is primarily grant based, with the South African child support grant having been introduced in 1998. The grant system is administered by the Department of Social Development to any person who cares for a child under the age of 14 years, subject to certain financial restrictions. It has become widely acknowledged that, owing to the disarray of the judicial system, an increasing number of people who find no assistance in the maintenance court are turning to the state maintenance grant for relief, thus placing an unbearable strain on South Africa's welfare resources (*"the private maintenance system functions so poorly that many women turn early to the state for the support of themselves and their children"*).³¹

The private judicial maintenance system, based on the legal duty to support one's dependents, and judicial determination in the event of a dispute. This system specifically relates, *inter alia*, to the support parents are legally obliged to provide for their children in terms of accommodation, food, clothing, medical expenses and the other

³⁰ B Clarke, 'The New Maintenance Bill - Some incremental reform to judicial maintenance procedure' (1998) De

Rebus 63; B Clarke 'The South African Child's Right to Maintenance - A Constitutionally Enforceable Socio-Economic Right?' available at <http://www.staidenshomeschool.com>, accessed on 13 January 2012); D Bud lender & B Moyo (ed) 'What about the children?: The Silent Voices in Maintenance' (2004) 72.

³¹ SA Law Commission Issue Paper 5 Review of the maintenance system (1997) 13, 14, 39; Lund Committee on Child and Family Support Report of the Lund Committee on Child and Family Support (1996) 5, 43, 44;

necessities of life. It is essential, in order for one to exercise one's right to maintenance effectively, that laws and mechanisms should be in place with the aim of ensuring that custodial parents receive the support required for the rearing of their children.³² Provision of these laws specifically includes the necessity of a competent and functioning maintenance court system.

There is general agreement amongst academic writers that the problems facing the maintenance system currently are predominantly administrative as opposed to legislative.³³

The primary responsibility for the support of children should lie with parents, and this responsibility should continue whether or not the relationship between the parties survives. South Africa's legal vehicle for such support if the parental relationship breaks down is the judicial maintenance system. The central problems with this system are administrative, rather than there being defects in the law. It works so poorly that the government is sending the wrong signals about parental responsibility and, in particular, about the financial responsibility of fathers."

This judicial maintenance system shifts the maintenance responsibility away from the state and towards parents. However, the basis of this system is an incorrect assumption that all parents and guardians have sufficient access to resources enabling them to fulfill their duty of support towards their children. There is also a further assumption that the private maintenance system is effective in furthering the interests of the child.³⁴

The court in recent years had interpreted the word spouse and survivor.

The Constitutional Court, in the case of **Volks v Robinson**,³⁵ protected the institution of marriage when a claim for maintenance of a surviving spouse was at issue. The deceased and his heterosexual life-partner, Ms Robinson, had been living together for 16 years but were never married and as a result, the executor of the deceased state rejected a claim for maintenance on the basis that Ms Robinson was not "a survivor" as contemplated by the Maintenance of Surviving

³²D Singh, K Naidoo and L Mokolobate "Coming to court for child support – the policy, the practice and reality.

A case study of black women in the maintenance system at the Johannesburg Family Court (2002 – 2004) (2004) 17 ActaCriminologica143.

³³ See note 2.

³⁴ B Clarke, note 30.

³⁵(2005) 5 BCLR 446 (CC).

Spouses Act.³⁶ Ms Robinson applied to the court for an order declaring that she was entitled to lodge a claim for maintenance against the estate, alternatively declaring that the Act was unconstitutional and invalid as it did not include a person in a permanent life partnership. The High Court agreed with her. The Constitutional Court agreed that the exclusion of heterosexual life-partners from the protection of the Maintenance of Surviving Spouses Act amounted to discrimination on the basis of marital status but it found that the discrimination was not unfair. It held that the Constitution recognizes marriage as an institution³⁷ and in view of this and the international recognition of the institution of marriage, the law may distinguish between married and unmarried people and therefore deny benefits to unmarried people that are extended to married people. The judges held that the case must be seen in the context of all the rights and duties emanating from marriage. Spouses in a marriage *inter alia* have a legal reciprocal duty of support towards each other, but this duty of support does not extend to unmarried parties. It therefore follows that the Constitution does not require that an obligation be placed on the estate of a deceased person in circumstances where the law did not during his life time place such an obligation on him. The Court therefore refused to extend the protection of the Maintenance of Surviving Spouses Act to heterosexual life partners.³⁸

Our courts and legislature have also extended the protection of family units and marital relationships to include same-sex partnerships and polygamous marriages. In **Gory v Kolver**,³⁹ the Court explained the reasons for the difference between its decision and that given in the Robinson case and its willingness to extend protection to same-sex couples on the basis that, whereas heterosexual couples could legally get married in South Africa, same-sex couples could not. Where heterosexual couples therefore chose not to get married, they could not depend on the protection of the law when it comes to inheritance on intestacy and claiming maintenance from the estate of the partner. Same-sex couples on the other hand did not have the option of getting married and it was therefore fair to extend spousal benefits to them if their relationship conformed to certain guidelines.

³⁶Maintenance of Surviving Spouses Act 27 of 1990.

³⁷ Section 15(3)(a)(i) of the Constitution of the Republic of South Africa, 1996.

³⁸Cooke 2005 SALJ 542; Lind 2005 Acta Juridica 108- 130.

³⁹ (2007) 4 SA 97 (CC)

Some Acts have been introduced or amended to provide for partners in such marriages.⁴⁰ Our courts have also had several opportunities to deal with this issue,⁴¹ but the Constitutional Court was first faced with the issue of the constitutionality of the position of spouses in a religious marriage in **Daniels v Campbell**.⁴² The applicant was married to her late husband in terms of Muslim law. Despite the marriage being factually monogamous, she was not in law recognized as a spouse and therefore could not inherit from his intestate. The High Court found the provisions of the Intestate Succession Act to be unconstitutional on the basis that the narrow interpretation of the word "spouse" violated Section 9 of the Constitution.⁴³ It ordered that Section 1 of the Intestate Succession Act was to be read as though "spouse" would include a husband or wife married in accordance with Muslim rights in a de facto monogamous union. The Court held that it would be correct to include women married in terms of Muslim rights within the definition of "spouse" both from the perspective of fairness and inline with the common linguistic interpretation of the word "spouse".⁴⁴

Court protected polygamous marriages in **Hassam v Jacobs**,⁴⁵ where it held that the significance attached to a polygamous union in terms of Muslim religious law and the dignity of parties to a polygamous Muslim marriage should be equal to that attached to parties to a civil or customary marriage. The Court accordingly held that the term "spouse" in the Intestate Succession Act should be interpreted to include spouses in polygamous Muslim marriages.⁴⁶ In the pivotal **Be V. Magistrate**,⁴⁷ the Constitutional Court also provided protection for multiple spouses. Although the Court was of the opinion that the legislature was the appropriate forum in which to amend the customary law of succession and the Intestate Succession Act, the Court held that as an interim solution Section 1 of the

⁴⁰ The Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Births and Deaths Registration Act 51 of 1992, Insolvency Act 24 of 1936; the Black Laws Amendment Act 38 of 1927; the Civil Proceedings Evidence Act 25 of 1965; the Child Care Act 74 of 1983.

⁴¹ *Kalla v The Master* (1995) 1 SA 261 (T); *Rylands v Edros* (1997) 2 SA 690 (C); *Amod v*

Multilateral Motor Vehicle Accidents Fund (1999) 4 SA 1319 (SCA)

⁴² (2004) 5 SA 331 (CC).

⁴³ *supra*

⁴⁴ *Govender v Ragavayah* (2009) 1 All SA 371 (D).

⁴⁵ (2008) 4 All SA 530 (C)

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⁴⁷ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African*

Intestate Succession Act should be applied to all intestate estates. With reference to the calculation of the child's share when the deceased is survived by more than one spouse, the Court held that:

- (a) A child's share in relation to the intestate estate of the deceased should be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased person.
- (b) Each surviving spouse should inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette (R125 000 at present), whichever is the greater.
- (c) Notwithstanding the provisions of subparagraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate must be equally divided among the surviving spouses.⁴⁸

Once parties are legally married, a reciprocal duty of support arises between husband and wife. This duty is terminated by divorce. However, parties may enter into a settlement agreement regarding maintenance that the one spouse will pay to the other or the court granting a decree of divorce may make an order with regard to the payment of maintenance in favour of one of the parties.⁴⁹ Such an order can remain in force until death or remarriage.⁵⁰

If maintenance is not agreed to or Court ordered at the time of divorce, it cannot be claimed at a later date.⁵¹ It is pivotal that the person claiming maintenance must establish a need to be supported, and the person against whom an order is sought must have the resources to provide such maintenance. It was held in the case of **AV v CV**,⁵² that the awarding of spousal maintenance was in the discretion of a court and not a right *per se*. The same sentiments were expressed by the court in the case of **Botha v Botha**.⁵³ What is

⁴⁸ Bhe case supra,

⁴⁹ Section 7(2) of the Divorce Act

⁵⁰ Neo Morei, Should Spousal maintenance be Left Solely to Judge's Discretion?, *Mediterranean Journal of Social Sciences*, Rome-Italy: MCER Publishing, 2014, available at Doi:10.5901/mjss.2014.v5n23p109 accessed on 8 March 2020

⁵¹ Skelton, A. (ed). et al, *Family law in South Africa* (1st ed) (Oxford University Press, 2010). 129

⁵² (2011) (6) SA 189 (KZP)

⁵³ (2009) (3) SA 89 (W)

particularly interesting about this case is that the judgment confirms that, taking into account the so-called 'clean break' and constitutional principles, there is no automatic right to maintenance after divorce. Entitlement to maintenance must first be shown before a court can determine the quantum and duration thereof. The court will consider a wide range of factors when it decides on awarding the other party maintenance, viz:(Section 7 (2) of the Divorce Act)

1. The existing and prospective means of the parties.
2. The respective earning capacities of the parties.
3. The financial needs and obligations of the parties.
4. The age of each party.
5. The duration of the marriage.
6. The standard of living of the parties prior to the divorce.
7. Any order in terms of section 7(3) of the Divorce Act (redistribution order).
8. Any other factor that the court may take into consideration.

It is very clear that a court can only grant an order for maintenance after a consideration of the factors listed. However, the court is not obliged to consider all factors nor to grant an order as a party is not as of right entitled to maintenance. The court must judge each case on its merits.

There are basically three types of maintenance orders:

- i. Rehabilitative maintenance- where a maintenance order applies for a specific period of time. This is normally awarded to younger or middle-aged women who have for years devoted themselves to the upbringing of the children and who were full time involved in the household. The purpose of this type of maintenance is to enable these women to be trained or retrained for a job or a profession.
- ii. Permanent maintenance- the court may award lifelong maintenance to a woman that is too old/elderly to find a job.
- iii. Token maintenance- token maintenance is an order for a minimal amount. The court will make such an order if there is no reason to grant maintenance at the time of the divorce, but it foresees that the spouse may in future need maintenance. The court would then be able to increase the amount in future should the need arise.⁵⁴

There are effectively two types of marriages and both cater for the extreme: Marriage in community of property which involves the sharing of the joint state and marriage out of community of property

⁵⁴ Skelton, note 50 134

by ante-nuptial contract in which there is no sharing involved and the wife enjoys full legal status. Section 9 of the Divorce Act empowers the court to order a spouse to forfeit wholly, or in part, the financial benefits derived from the marriage.⁵⁵ The reason for the forfeiture is, in essence, matrimonial misconduct. For example, a badly behaved wife may be compelled to forfeit any part of the joint estate not contributed by her. In a marriage out of community of property, she may be compelled to forfeit a marriage settlement contained in an ante-nuptial contract. Apart from the forfeiture of benefits principle, the other device which can be employed to modify the natural results of dissolution of a marriage is the maintenance provision in the Divorce Act.⁵⁶ Although there is no statutory right to maintenance by reason of marriage and no act proclaims that maintenance in any amount for any period will be ordered by reason solely of the marriage and the inability of one-party to maintain the standard of living to which he or she has become accustomed, Section 7(2) permits the court to order one spouse to support the other after divorce. However, it has to be acknowledged that this provision was not sufficient to bring solutions to all the problems arising from the financial consequences of a particular propriety system in the sense that the language of s 7(2) is clearly discretionary and the spouse seeking an award has no right as such.⁵⁷

The discretionary power of the court to make an award includes the power to make no award at all.⁵⁸ Although Section 7(2) of the Act can and should be used by the courts to ensure fairness between the parties, The contrary has been achieved in some of the cases, for example, in the case of **Rousalis v Rousalis**,⁵⁹ after 13 years of a marriage out of community of property the wife sued her husband for divorce on the ground of irretrievable breakdown of the marriage.⁶⁰ During the marriage, the parties had carried on a business in which the wife had worked as a partner. The business had been sold and the proceeds of R400 000 were deposited in a bank account in South Africa in the joint names of the spouses and their ten-year-old son of the marriage. The wife claimed two-thirds of the R400 000, as being her share and that of her child. This part of her action failed because the court held that the Divorce Act gave it jurisdiction to canvass matrimonial issues but not to resolve partnership disputes. That is to

⁵⁵Sinclair, J. (1983). Marriage: Is it still a commitment for life entailing a lifelong duty of support? *ACTAJURIDICA*. 470.

⁵⁶ Divorce Act of 1979.

⁵⁷Schafer Family Law Service First binder, under C26 .21

⁵⁸ Neo Morei, note 49.

⁵⁹(1980) (3) SA 446 (C).

⁶⁰Section 4 of the Divorce Act.

say, the proceeds of the sale of business in which the spouses had worked jointly, as husband and wife, could not be divided in accordance with the law of marriage, but only according to contracted or commercial principles. This decision implies that traditional marriage out of community of property really does mean that from the marriage itself no sharing arises. As a marriage out of community of property, it was held in this case, that the 'patrimonial benefits' that are subject to forfeiture are limited to formal marriage settlements contained in the ante-nuptial contract. In general, Section 9 of the Divorce Act has provoked comments on the distribution of property. It becomes important to consider the maintenance provision in section 7(2) of the Act. This section featured prominently in the *Rousali's* case and Van der Heever J, after affirming that section 7(2) provided the court with a wide discretion when awarding maintenance, said that a wife of long standing who has assisted her husband materially in building up his separate estate would be entitled to far more by way of maintenance than one who did no more for a few years than share his bed and keep his house. This decision was followed by *Kroon v Kroon*;⁶¹ the court found that, having regard to the duration of the marriage, that is, 20 years, during which the wife did not work in the open market but fulfilled the role of housewife and mother, she should be awarded maintenance. However, the court stated that it does not distribute maintenance with any degree of liberality to women who can and ought to work after divorce. The tone of the judgments seems to reveal a judicial sympathy for women married out of community of property whose husbands amassed substantial separate estates *stante matrimonio* and who find themselves entitled to little when the marriage breaks down.⁶² In particular, the obvious inclination of the learned judge to reward a woman who has been not only a homemaker but also an earner is highly significant. It is also clear from the judgment in *Rousali's* case that Justice Van der Heever wished to recognize the wife's entitlement to some portion of her husband's estate as compensation for her dual role as a homemaker and an earner.

However, section 7(2) does not contain the notion that proprietary interests can be earned through intangible contribution such as homemaking. It therefore, becomes difficult to attach a monetary value to a wife who has been exclusively preoccupied with the caring for the home and family. It is submitted that in the circumstances the courts should award an order for rehabilitative maintenance as of right. The purpose of a rehabilitative maintenance order is to

⁶¹(1986) 4 S.A 616 (EC)

eliminate the economic disadvantages a spouse has to suffer as a result of a divorce. In particular, it envisages that a woman who during the marriage has possibly done little or no work outside her home, should be paid maintenance.

Comparism Between the Two Jurisdictions

In both jurisdictions, either of the parties could apply to court for maintenance order. It must be noted that in Nigeria only the marriage recognized by the Act that either of the spouse could claim maintenance. In South Africa statutes recognized all forms of marriage including customary marriage and so each of the spouse could claim maintenance.

While in Nigeria, the court will consider the means and earning capacity of the parties, conducts of the parties etc., in South Africa, the court under Section 7 of the Divorce Act will in the absence of an express agreement by the parties consider the means of the parties, the earning capacity of the parties, financial needs and obligation of the parties as well as the age of the parties, parties standard of living, etc.⁶³

Conclusion

Ancillary reliefs are supplementary orders given by a court dealing with matrimonial proceedings involving parties to a marriage. These reliefs are maintenance, custody of children and settlement of property. When courts deal with proceedings for these reliefs in respect of marriages celebrated under the Act, they easily have recourse to the provisions of the MCA contained in Sections 69 – 75 for guidance in arriving at just decisions. This cannot be said in respect of customary law marriages since some of these reliefs are alien to customary law. With respect to maintenance dealt with in this unit, it has been established that the relief of maintenance is available to spouses married under the Act in appropriate circumstances; whereas the concept of maintenance is not recognized under customary law. It has also been established that the relief of maintenance is available to any of the parties to the statutory marriage either temporarily pending the disposal of proceedings as provided for under Section 70(2) of the MCA, or on a more permanent basis, after the disposal of a principal suit like divorce or judicial separation as provided for under Section 70(1) of the MCA. In granting the relief, courts are enjoined to have due regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

⁶³ Section 7(2) Divorce Act South Africa.