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COURSE WRITER: Dr. Violet O. Aigbokhaevbo.

Faculty of Law

University of Benin,

Nigeria

AG. DEAN: Ifidon Oyakhiromen, PhD. BL

School of Law, NOUN

PROGRAMME LEADER:

COURSE COORDINATORS: A Onuora-Oguno, F Anene,

S Godwin- Clark, NOUN

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MODULE 1 MARRIAGE

UNIT 1 FORMAL VALIDITY OF MARRIAGE

MODULE 1

UNIT 1 FORMAL VALIDITY OF MARRIAGE

1.0 INTRODUCTION

Marriage is a contractual relationship between consenting adults.It is not temporary in nature or at the will of the contracting parties. It is a social institution that is globally recognized and governed by social, religious, cultural practices as well as the laws of a particular legal system. Until the middle of the 19th century, distinction was seldom drawn between the formal validity of a marriage and the capacity of parties to marry. It was held that the validity of a marriage was dependent on the *lex locicelebrationis*. In recent times, distinction is often made by the courts between capacity and form. The former is governed by the law of the domicile while the later is in general governed by the *lex loci celebrationis*subject to statutory exceptions.

2.0. OBJECTIVE

The objective of this unit is to acquaint the students with the fact that a marriage is formally valid only when it is compliant with stipulated forms of celebration and to expose them to the forms of marriage celebration.

3.0 DEFINITION OF MARRIAGE

Marriage has been defined as a social institution under which a man and woman establish their decision to live as husband and wife by legal commitments through religious ceremonies etc.

This simplistic definition of marriage is not universally acceptable. The definition of marriage is dependent on each society and cultural sensitivity. Lennarts is of the view that:

> *the legal regulation of marriage in different legal system is extremely varied. The differences in the condition and manner of entry into it as well as the effect of marriage including possibility of the prerequisite or dissolution … of matrimonial bond … are so wide as to render it very difficult to establish any common denominator in terms of law to all unions called marriage.*

Jonathan Hill concurring with Lennarts opines that it is impossible to provide a single definition of marriage because marriage is what the contracting parties intends it to mean to them.

In *Hyde v Hyde* (1886) LRIP &D 130 at 133, Lord Penzance held that marriage as understood in Christendom is the voluntary union for life of one man and one woman to the exclusion of all others.

The Nigerian position on marriage is dictated by its multiethnic, cultural and diverse religious exposure. Premised on this, in Nigeria marriage could be defined as the union between a man and one woman (monogamous marriage), one man and more than one wife (polygamous

marriage) and this could be Christian, Islamic and Traditional forms of marriage. The essential element is that it should be a union between members of the opposite sex. Same sex marriage which has been legalized in Massachusetts, Connecticut, Iowa, Vermont in the United States of America as at 2010 is alien to Nigerian culture. The Nigerian definition of marriage envisages a relationship between heterosexual partners.

4.0 NATURE OF MARRIAGE

In relation to monogamous marriage, Nigeria is the recipient of the common law concept of marriage which is defined as the voluntary union for life of one man and one wife to the exclusion of others marriage has been defined thus:

(a) **It is a voluntary union**: it means it a contract between consenting adults.Lack of consent of either party vitiates consent. The issue of whether marriages arranged by families qualify as voluntary unions remains shrouded in controversy

(b) The union should be intended to be a life long commitment. It is irrelevant that it ends up in separation.

(c)It must be a union of one man and one woman to the exclusion of all others. It envisages a monogamous relationship where the parties will not commit to others during the subsistence of the marriage.

5.0 VALIDITY OF MARRIAGE

Marriage is a contract of a very special kind it can only be concluded as a general rule by a formal public act. Marriage is not usually contracted on the phone or by exchange of letters or mails. Its dissolution also follows a stated formal pattern.

6.0 FORMALITIES OF MARRIAGE

The formalities of marriage are dictated by the laws regulating marriage in the place of celebration of the marriage. Compliance with the formalities stipulated by law is a necessity. The applicable maxim is *locus regitactum*.

In Berthiaume v Datous (1930) AC 79 two Russian Catholics resident in Quebec were married in a Roman Catholic Church in France. The Priest who married them, inadvertently omitted to conduct a civil ceremony as required by French Law. The marriage was voided. Lord Dunedin stated that:

> *if there is one question better settled than any other in international law, it is that as regards marriage _ putting aside the question of capacity locus regitactum. If a marriage is good by the laws of the country where it is effected, it is good all the world over no matter whether the proceeding or ceremony which constituted marriage according to the law of*

> *the place would or would not constitute marriage in the country of the domicile of one or other of the spouse. If the so called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties domicile would be considered a good marriage.*

From the above decision, it is apparent that compliance with the "local form" is all that is necessary. Even when a marriage is invalid by local law at the time of celebration was subsequently validated by retrospective legislation, the principle would still apply.

The *lex loci celebrationis* also determines the validity of a marriage celebrated by proxy

In *Apt v Apt* (1948) p. 43, A marriage celebrated by proxy in Argentina between a man and a woman resident in Argentina and England respectively was upheld since Argentina law considered such marriages valid.

Where the local law recognizes that a valid marriage may be constituted *verba de praesenti* (exchange of promises) it would be accorded recognition.

Identification of the *lex loci celebrationis* is not usually difficult. This is because both parties are present at the ceremony even where it is celebrated by proxy, the operational law is that of the country where the proxy takes part in the ceremony and not the country of the proxy's appointment.

7.0 MEANING OF FORMALITIES OF MARRIAGE

Formalities of a marriage ceremony is required to state

(i) The number of witnesses required

(ii) Hours during which marriages can be celebrated.

(iii) Necessity for publication of banns of marriage.

Formalities of marriage have been extended to include notices to and consent of parents and guardians which are required by some legal systems for a valid marriage to be constituted.

8.0 NECESSITY FOR PARENTAL CONSENT

In resolving the issue of necessity of parental consent in contracting a valid marriage, distinction is drawn between form and capacity. The logical doubtful theory that the question of parental consent relates to the marriage ceremony was adopted. Where the intent of the parties in marrying outside their jurisdiction is to evade the necessity of applying the law of their domicile as to consent, publicity etc is inconsequential in assessing the validity of the marriage in the *lex loci celebrationis*

In *Simonin v Mallac*(1860) 2 SW& T. 67 Two French citizens domiciled in England married. The marriage was held valid by English law but voidable by French law for non compliance with article 152 of the French Civil code which required them to request for and obtain their parental consent before a valid marriage can be contracted.

In Ogden v Ogden (1908) P. 46 (CA)

A domiciled Frenchman married a domiciled Englishwoman in England without the consent of his parents as required by French law. The marriage was held valid in England but voidable in France under Article 148 which provided that a son less than 25 yearsold, required parental consent to contract a valid marriage.

Inspite of the English position that the necessity for parental consent relates to form, it has been argued that the most logical position should be the analysis of the requirement independently in the context of each legal system with a view to deciphering whether it relates to form or capacity.

In the absence of legislative interventions the position in *Ogden v Ogden* with all the criticisms remains entrenched.

9.0 EXCEPTIONS TO THE RULE

Although the general rule is that marriage celebrated under the Act is formally valid in England though in valid by the local law and *vice versa*.There are however situation were the converse position cannot of necessity be upheld. Such situations include

(i) When it is impossible for the parties to use the local form: This situation may arise when the parties are on desert Islands with no marriage procedures or where the states insists that marriage rites should be in accordance with a specific religion which the parties regard as unacceptable or objectionable. In such situations, marriage need not be performed in accordance with the English Common Law Exchanging Marital Vows before any clergyman, layperson or witnesses would suffice to validate the marriage. Where the marriage is celebrated on merchant ships on the high seas in accordance with the formalities prescribed by the law of the ship's port of registration it constitutes a valid marriage. This is provided it is established that it was impracticable for them to wait until they reached port to utilize requisite facilities. The principle also apples to marriage aboard warships.

(ii) Marriage in countries under belligerent occupation: The Second World War and Post war era witnessed the proliferation of marriages between Roman Catholics, Jews resident in Poland and other Eastern European Countries conducted in Germany and Italy. The marriages have been held to be valid provided they were celebrated in accordance with the English Common Law and the husband was either a member of or

associated with the belligerent occupying forces or a body of escaped prisoners of war. Cognizance is not taken of the status of female spouse.

In *Taczanowski v Taczamowski (1957) P. 301 (C.A)* the validity of a marriage celebrated in 1946 in an Italianchurch by a Roman Catholic Priest serving as a polish army chaplain was upheld. The husband was an officer of the polish force serving with the British army in Italy and the wife a polish civilian. The basis of the court of Appeal decision appears to have been that since the husband not by choice but due to orders of his military superior, he was exempt from the operation of the local law unless he submits to it of his own volition.

(iii) Marriage of members of Her Majesty's Forces serving abroad: Section 22 of the Foreign Marriage Act 1892 as extended in 1988 provides that marriage between persons of whom at least one is a member of Her Majesty's Forces Serving extra territorially or otherwise employed in such capacity stated by the order in council or who is a child of a person named in that category may be celebrated by a chaplain serving in the navy, military or air force in such territory or a person authorized by the commanding officer of such forces such marriages are deemed to be as valid as marriages solemnized in the United Kingdom with due observance of all forms required by law.

(iv) Marriages under the Foreign Marriage Act 1892: S.8 of the Foreign Marriage Act provides that a marriage solemnized in any foreign country or place by or in the presence of a "marriage officer" between parties of whom at least one must be a United Kingdom national is deemed to be as valid as if it was celebrated in the United Kingdom with all the required formalities. Marriage officers under the marriage Act include British consuls,ambassadors and members of their diplomatic staff provided they are the recipient of a marriage warrant must be solemnized at the official house of the marriage officer with open doors, between the hours of 8.00 am and 6.00 pm in the presence of two or more witnesses.The ceremony may be in such form as the parties deem fit to adopt. They are mandated to at some stage declare that they are aware of no lawful impediment to the marriage and utter statutory words of consent.

The Act contains requirement as to notice of intended marriage, the filing and entering of such notice, parental consent, the taking of an Oath and the registration of themarriage.These requirements are directory only and not mandatory even if none of them is complied with, the marriage will still be valid provided the requirement of section 8 have been met. Subsequent inquiry as to whether the parties resided within the district of the marriage officer for the requisite three weeks or whether parental consent was given are precluded in the solemnization of the marriage.

The validity of marriage celebration under the Act relates only to form in England and not necessarily capacity. A marriage officer celebrating a marriage under the Act must be satisfied that

(a) at least one of the parties is a United Kingdom national

(b) the local authorities will not object to the solemnization of the marriage.

(c) insufficient facilities exist for the marriage under the local law

(d) the parties will be regarded as validly married by the law of the country in which each party is domiciled.

Where however, in the opinion of the marriage officer, the solemnization of the marriage would be inconsistent with the international law or the comity of nations, he need not solemnize a marriage or allow one to be solemnized in his presence

10.0 CONCLUSION

The Act is advantageous due to its conferment on parties, the permission to disregard the law of the place of celebration and enabling them to obtain marriage certificates which are recognized in England as evidence of marriage.

11.0 SUMMARY

1. Marriage has been said to be a contractual relationship between consenting adults which is regulated by social, religious and cultural practices.

2. Distinction is often made between capacity and form. The former is governed by the law of the domicile while the later is generally governed by the *lex loci celebrationis* subject to statutory exception.

3. There is no universally acceptable definition of marriage. Its definition is dependent on each society and its cultural sensitivity.

4. The Nigerian position on marriage is dictated by its multi ethnic, cultural and diverse religious exposure. Marriage could be defined as the union between a man and a woman (monogamous marriage), between a man and more than one woman (polygamous marriage)it could be Christian, Islamic or Traditional form of marriage.

5. The essential components of marriage is that it must be a voluntary union.It must be intended to be a lifelong commitment and it must be a union between one man and one woman to the exclusion of others.

6. Marriage is a very special contract that can only be concluded as a general rule by a formal public act. It is not usually contracted by exchange of letters or mail.Its dissolution also follows a formal pattern.

7. The formalities of marriage are regulated by the laws of the place where the marriage is celebrated.

8. In resolving the issue of necessity for parental consent for a valid marriage, distinction is drawn between form and capacity.

9. The exception to *lex loci celebrationis* rule are (i) when it is impossible for the parities to use the local form (ii) marriage in countries under belligerent occupation, marriage of members of Her Majesty's forces serving abroad and marriage under the foreign marriage Act 1892 as amended.

10. Where in the opinion of the opinion of the marriage officer, the solemnization of the marriage would be inconsistent with international law standards, he need not solemnize it or be present during solemnization.

12.0 TUTOR- MARKED ASSIGNMENTS.

(1a) What is marriage?

(1b) Explain the nature of marriage

(2) Explain *lex loci celebrationis*as a basis for validity of marriage.

13.0 SUGGESTED FURTHER READING

David McClean Morris: The Conflict of Laws, Fifth Edn. (London: Sweet & Maxwell Ltd 2000)

Willis L. M. Reese "Marriage in American Conflict of Laws in Contemporary Problems in the Conflict of Laws" in the International and Comparative Law Quarterly 26(4) (1977): 252

Omoruyi I.O. An Introduction to Private International Law: Nigerian Perspectives (Benin City: Ambik Press Ltd, 2005)

MODULE 1

UNIT 2 CAPACITY TO MARRY

UNIT 2 CAPACITY TO MARRY

1.0 INTRODUCTION

Capacity to marry is a mandatory condition which parties must fulfil before a valid marriage can be contracted. Failure to comply with stipulated formalities renders the marriage void. Until the middle of the 19th Century, no distinction was drawn between the formal validity of marriage and the capacity of parties to marry. The English court as discussed in the previous unit held that the validity of marriage was dependent on the *lex loci celebrationis.* However, from 1858, the courts began to draw a distinction and uphold compliance with the law of domicile of each of the parties to the marriage contract as a necessity for it validity.

2.0. OBJECTIVE

The objective of this unit is to examine the requirement of capacity to marry as a precondition for the validity of marriage with a view to distinguishing it from the requirement as to form and other marriage formalities.

3.0 DEFINITION OF CAPACITY TO MARRY

Capacity to contract a valid marriage is the ability to of a person to contract a legally binding marriage or be free from all bars to a lawful marriage.

4.0 ESSENTIAL VALIDITY OF MARRIAGE

To have the capacity to contract a valid marriage, the parties must

(a)i. Not be within the prohibited degree of relationship which constitute impediment to capacity which are primarily classified as degrees of consanguinity. This includes where the parties of affinity where they are related by marriage. Degrees of consanguinity relates incestuous relationship which includes marriage to onesbiological or adoptive mother his daughter or adopted daughter, his sister or half sister, his aunt by blood or his niece. A woman may not also marry her father or adoptive father her son, her grandfather, her grandson, her brother or half brother, her uncle by blood or her nephew by blood.

ii. Degrees of affinity refers to where the parties are related by marriage in recent times, degrees of affinity has been modified significantly as not to constitute a bar to a valid marriage.

(b) Marriage between persons who are younger than the age stipulated in the regulatory law (under aged persons)

(c) Neither of the contracting parties must be already married or be in a valid and subsisting marriage.

(d) The parties in the traditional concept of capacity must be heterosexual.i.e male and female.The modern extension of capacity to include same sex relationship is still shrouded in controversy

Possession of any of the disability referred to above renders the marriage void.

5.0 LAW REGULATING CAPACITY

The law regulating capacity to marry is governed by two theories. Dicey's theory referred to as the orthodox view is that capacity is governed by the law of the parties' ante-nuptial domicile i.e dual domicile theory.

Cheshire's theory was that there is a rebuttable presumption was that capacity to many was governed by the law of the husband's domicileat the time of the marriage. Where the parties intended to establish their "matrimonial home" in a particular country and they did so within a reasonable time, it constitutes a rebuttal of the presumption.

The difference between the two theories includes that Dicey's view advocates the idea that the laws of the community of each party to the marriage contract belongs should regulate capacity. The contemporary concept of spousal equality poses challenge to the theory. Cheshire is of the view that the community to which the parties belong after marriage is more significant than their prenuptial residence.

The Dicey theory inspite of its criticism is of popular application. If the *Lexdomicile* or personal law of the parties confers on them the capacity to contract the marriage, it is valid.

In *Mette v Mette (1859) 1 SW & Tr. 416*

A German who was domiciled in English married his deceased wife's sister who was domiciled in Germany. The marriage was valid by German law but invalid under English law. The marriage was held to be void.

In *Brook v Brook (1861) 9 H.L.C. 193* marriage between a man and his deceased wife's sister was held in Denmark which validates such relationship. The parties were however resident in England where such relationship is prohibited. The House of Lords distinguished the formalities of marriage governed by the place of celebration and capacity to marry which is regulated*Lexdomiclii* (party's antenuptial domicile) held the marriage to be void premised on the duty of the parties to obey English Laws and the applicable 1835 marriage Act.

In *Sottomayor v De Barros* (No 1) (1877) 3 P.D 1 The marriage took place in England between two Portuguese cousins domiciled in Portugal. Under Portuguese law, this could only be done with papal dispensation which they did not possess. The marriage was held to be void since their capacity was determined by the law of their antenuptialdomicile and not that of the place of celebration. Thecase was however reconsidered on the basis that they were already domiciled in England.

In *Pugh v Pugh (1951) p. 482*, it was held that an adult officer domiciled in England lacked capacity to marry a fifteen year old Hungarian girl domiciled in Austria. The marriage was held to be void on the ground that he could not marry a person who was less than 16 years.

Marriage from the decision is an issue of status which is regulated by the personal law of the contracting parties

6.0 RELEVANCE OF THE PLACE OF CELEBRATION OF MARRIAGE

Where the place of celebration of a marriage confers validity on the marriage between parties and it is in unanimity with the laws of their antenuptial domicile on the issue of capacity to contract the marriage,there is no issue to context on relevance of the law of the place of celebration.Where however a marriage is prohibited by English Law, it will be held to be invalid by the law of the place of the parties domicile. It presents a very thorny issue where the marriage is celebrated abroad.

7.0 LACK OF AGE

Section 2 of the marriage Act 1949 provides that a marriage contract between parties either of whom is less than 16 years is void for lack of capacity. The minimum age for the contract of a valid marriage varies from jurisdiction to jurisdiction. A marriage celebrated in England where either party is less than 16 years is liable to be held void irrespective of the domicile of the parties.

8.0 LACK OF PARENTAL CONSENT

The popular position appears to be that when parties are compliant with the requisite minimum age to contract a valid marriage and other

requirement, lack of parent consent does not constitute an sufficient impediment

9.0 PREVIOUS MARRIAGE

While the marriage is valid and subsisting, a married man or woman does not have the legal capacity to contract a subsequent marriage. This is however subject to the law of each party's antenuptial domicile.

In *Shaw v Gould (1868) L.R.3.H.L 55*. A couple domiciled in England contracted their marriage and separated there. The Scottish Court of session dissolved the marriage and the woman married a domiciled Scotsman. The divorce was not recognized in England because her first husband never gave up England, his domicile of origin. The House of Lords held that the second marriage was void.

In *Padolecchia v Padolecchia (1968) p.3*,A man domiciled in Italy was divorced from his wife in Mexico the divorce was not recognized in Italy. On a visit to England, he contracted a marriage with a woman who was domiciled in Denmark and became a resident in Denmark. On a petition for a decree of nullity on ground of his own bigamy, the English court held that since the Mexican divorce was not recognized in Italy, the man was not single and so he lacked capacity to many by the law of his domicile.

It is apparent from the above cases that a valid marriage cannot be contracted unless a pre existing one is dissolved

10.0 VALIDITY OF REMARRIAGE AFTER FOREIGN DIVORCE OR NULLITY

The issue of validity of remarriage after foreign divorce or nullity decree is dependent on the recognition of the validity of the foreign divorce or nullity. Section 50 of the Family Law Act 1986 provides that where a divorce or annulment is granted or entitled to recognition in any part of the United Kingdom,it is inconsequential that it may not be recognized elsewhere. This however does not preclude either party to the marriage from remarrying in that part of the United Kingdom or cause a marriage contracted elsewhere to be treated as invalid in that part of the United Kingdom

In *Perrini v Perrini (1979) Fam. 84*A woman domiciled in New Jersey married an Italian man in Italy. On ground of want of consummation, she obtained a decree of nullity from New Jersey. The decree was recognized in England but not in Italy.The husband subsequently went through a marriage ceremony in England with an English woman. The remarriage was held to be valid as the 1971 Act was inapplicable to foreign decree of nullity.

Similarly in *Lawrence v Lawrence (1985) fam 134* where a woman domiciled in Brazil obtained a divorce in Las Vegas, Nevada and immediately remarried a man domiciled in England. The woman's divorce

was not recognized in Brazil but the England Court of Appeal upheld the Divorce and held that since the 1971 Act was inapplicable, she was free to remarry.

11.0 RESTRICTION OF REMARRIAGE OF DIVORCED PERSONS:

Even when a divorce is recognized as valid, restrictions are usually imposed on the parties right to remarry for a stipulated time which varies from jurisdiction to jurisdiction

This is to:

a. Punish the guilty party
b. Safeguard the unsuccessful party's right to appeal
c. Prevent disputes about the paternity of children likely to be born immediately after the proceedings.

The above restrictions are valid in England only when they are applicable to both parties to the marriage contract. Where however it is held to be applicable to only one of the parties, it will be viewed as discriminatory, penal and in operable

In *Scott v Att. Gen (1886) 11 P.D 128*. On the ground of his wife's adultery, a husband obtained a divorce in cape colony, his domicile. A party cited for adultery was mandated not to remarry for as long as the other party remained single. On her return to England and contracting a marriage with the co-respondent in England, it was held to be valid

because as a single woman she could choose her domicile and not be discriminatorily penalized from remarrying.

12.0 LACK OF CONSUMMATION

Lack of consummation of marriage due to the incapacity of one of the parties or willful refusal to do so,where the willful refusal is traceable to impotence invalidates the marriage in nearly all jurisdictions. Where however, it is premised on willful refusal to consummate, there is jurisdictional conflict in decisions. In Australia and Scotland, it does not always constitute an independent ground for divorce. In Canada it could sometimes be a ground for divorce while in England it could be a ground for annulling the marriage.

13.0 SAME SEX MARRIAGE

The traditional concept of marriage envisaged heterosexual relationship (marriage between a man and woman) it is argued that the first marriage was conducted in the biblical garden of Eden when God created man and woman. This notion has been adopted in several jurisdictions. Under English law marriage between persons of the same sex is void. It is however recognized in some jurisdictions as creating contractual obligations between the parties. Due to changing social attitudes, same sex unions are becoming increasingly tolerated

14.0 SUMMARY

i. Capacity to enter into a marriage contract is a precondition for the validity of marriage.

ii. Capacity to marry is the ability to contract a valid marriage or be free from all bars to lawful marriage.

iii. To have capacity to marry, the person must not be within the prohibited degree of consanguinity or affinity.

iv. Capacity to marry is governed by the parties antenuptial domicile.

v. Lack of the requisite age to contract marriage which varies between 16 years to 18 years depending on the jurisdiction renders it void.

vi. Where parties are of age and have the requisite capacity to conduct a valid marriage, parent consent fades into insignificance in most jurisdictions.

vii. A party to a marriage contract cannot contract a subsequent marriage while the marriage is valid or subsisting.

viii. A party to a divorce or annulment proceedings in a foreign country is at liberty to control a valid marriage.

ix. Where parties to a divorce proceeding are restrained from marrying within a stipulated period, it would be upheld to enable parties,tidy up their affairs. Where however it is discriminatory or skewed to favour one of the parties, it would be invalidated by English law and the parties can conduct a valid marriage inspite of the restriction.

x. Failure to consummate a marriage could be a valid ground for divorce or nullity of the marriage depending on the jurisdiction of the parties.

xi. Same sex marriage is invalid in English jurisdictions while in some Jurisdictions provide a basis for enforcing contractual relationship between the parties.

15.0 CONCLUSION

Capacity to marry is fundamental to the determination of the validity of marriage contracts. The conflict laws relates to jurisdictional attitude to such defect in capacity. Is the marriage void, voidable or a nullity. From the analysis of the types of incapacity analyzed in this unit, it is apparent that the nature of the incapacity and the domicile of the parties determines the finding to be made.

16.0 TUTOR MARKED ASSIGNMENT

(1a) Define capacity to marry?

(1b) Analyse the essentials of a valid marriage.

(2) Discuss capacity regulatory laws.

(3) The place of celebration of marriage is relevant to the validity of marriage. Discuss.

17.0 SUGGESTED FURTHER READING

David Mcclean Morris: The Conflict of Laws (London: Sweet & Maxwell, 2000)

MODULE 1

UNIT 3 CONSENT OF THE PARTIES

UNIT 3 CONSENT OF THE PARTIES

1.0 INTRODUCTION

Marriage is a voluntary union between consenting parties. Impliedly, without consent there cannot be a valid marriage betweenthe parties. Such consent must be voluntary and not obtained by fraud. Absence of consent renders a marriage void and voidable depending on the jurisdiction.

2.0. OBJECTIVE

The objective of this unit is to impress on the students the necessity of the parties to voluntarily consent to their marriage before entering the contractual relationship as this si fundamental to the validity of the marriage.

3.0 DEFINITION OF CONSENT TO MARRY

Consent to marry has been defined as the agreement acceptance or approval or permission or acquiescing to enter into a marriage contract with another person with the intention of living together as husband and wife.

4.0 NATURE OF CONSENT OF PARTIES TO A MARRIAGE CONTRACT.

Toconstitute a valid marriage, the parties must be willing to contract for their consent to be deemed valid it must not be given by a person with no

legal capacity such as lunatics, infants, males and females under the age of 16, persons in valid and subsisting marriage and persons within the prohibited degree of consanguinity or affinity.

5.0 FORCED MARRIAGE

A marriage that is contracted under duress and without the full and informed consent of the parties is referred to as "forced marriage"

To constitute duress, the parties to the marriage must feel physical, emotional or psychological pressure. The marriage must be motivated by fear, coercion, deception, abduction and inducement.

Forced marriage is deemed to be abusive of fundamental Human Right and the dignity of the human person. The convention on consent to marry, minimum age for marriage and Registration of marriages provides that no marriage should be legally entered into without the full and free consent of both parties to be personally expressed by them publicly in the presence of competent authority and witnesses approved by law.

6.0 VOIDABLE CONSENT

There are circumstances in which consent though freely given could be legally invalidated. Such circumstance include:

(a) Where a party to a contract at the time of giving the consent was suffering from a mental disability

(b) Where one of the parties at the time of the marriage was suffering from a communicable venerable disease

(c) Where at the time of the marriage unknown to the other party, the woman was pregnant with another man's child.

7.0 SYSTEM OF LAW REGULATING CONSENT.

The issue of the system of law which regulates consent given by parties to a marriage contract is still crystallizing. However, in *Way v Way (1948) P.83 at 88*Hodson J opined that the validity of consent to a marriage contract is better dealt with by reference to the personal law of the parties instead of the place of entry into marriage contract by the parties.

In England, the issue of consent is regulated by the law of the husband's domicile, in Russia, law of the wife's domicile and the law of the place of celebration of the marriage. Nigeria due to its application of the received English law, where no express provision has been made in its domestic laws impliedly follows the English position

In *Szechter v Szechter*wherea Polish Professor divorced his wife and married his jailed secretary to rescue her from prison and facilitate her escape to the West, the Parties antenuptial domicile and law of the place celebration of the marriage were utilized in arriving at the order invalid the marriage.

However in Parojcic and Parojcic (1958) I.W.L.R. 1280.The parties had acquired an English domicile after losing their Yugoslav domicile of origin. It was held that the applicable law was the English domestic law. In most cases the laws regulating capacity to marry also regulate consent of parties.

8.0 SUMMARY

1. Consent of the parties to a marriage contract is essential for the validity of a marriage contract.
2. Consent is defined as agreement, acceptance, approval, permission or acquiescence to enter into marriage contract with another person with the intention of living together as husband and wife.
3. Willingness to contract is central to the validity of any consent given.
4. Lunatics, infants, males and females under the age of 16 or 18 are adjudged as not having the legal capacity to give valid consent.Parties within the prohibited degree of consanguinity and affinity are also excluded
5. Marriage that is contracted without the consent of the parties is deemed to be forced marriage.
6. To constitute forced marriage, the consent to the contract must be obtained by force, intimidation, duress or coercion.

7. Force marriage in most jurisdiction, is deemed to be abusive of fundamental Human Right and the dignity of the human person.

8. Possession of communicable venerable disease, mental disability and pregnancy with another man's child without the knowledge of the other party constitute basis for adjudging the marriage void.

9. The law regulating the validity of consent is not clearly definable. It appears to be governed by the same law regulating the capacity to enter into a marriage contract.

9.0 CONCLUSION

Consent of the parties to a marriage contract is essential to its validity. The necessity for consent is to ensure that marriage contract is entered into by persons freely and without compulsion as well as ensure that persons suffering from specific disability are stopped from validly consenting to a marriage contract.

10.0 TUTOR MARKED ASSIGNMENT

1. Examine the relevance of consent of parties to a marriage contract.
2. Analyse the circumstances when consent though validly given may be invalidated.

11.0 SUGGESTED FURTHER READING

David McClean Morris: The Conflict of Laws (London: Sweet & Maxwell Ltd, 2000)

MODULE 1

UNIT 4 POLYGAMOUS MARRIAGE

UNIT 4 POLYGAMOUS MARRIAGE

1.0 INTRODUCTION

Polygamous marriage is marriage which involves a union between one man and more than one wife where voluntarily contracted constitutes a valid marriage in some jurisdictions. There is in most cases no limit to the number of wives a man can marry is such jurisdictions provided he can provide their basic needs. Inspite of such plurality of wives, the polygamous marriage is expected to last for a lifetime.

2.0. OBJECTIVE

The objective of this unit is to remind the students that the place or country where a marriage is conducted is essential to its validity. Where plurality of wives is acceptable, so long as the parties have the intention of making it a life-long commitment, it would be valid. This is in contrast to the notion that validity is dependent on one man and one wife union.

3.0 NATURE OF POLYGAMOUS MARRIAGE

The determination of whether a marriage is monogamous or polygamous is dependent on by the place of celebration of the marriage and not the personal laws of the parties to the marriage contract. Where polygamy is prohibited under the law of the place of celebration of the marriage e.g. under English law, the marriage will be treated as a monogamous marriage. Where however, both polygamy and monogamy are recognized

under the law, the mode of celebration of the marriage will be the determinant of the nature of the marriage. Where a man is allowed to take only one wife but allowed to have concubines, such a union is regarded as polygamous in nature. Once there is lack of exclusivity of partners in a union for life, it is treated as an implied polygamous relationship.Where a man marries one woman and engages in quick succession of marriage and divorce, he is treated as a serially monogamous.To qualify as a polygamous union there must exist multiple wives or plurality of marriage partners.

4.0 MARRIAGES IN NIGERIA.

The Nigerian domestic law recognized traditional marriage, Islamic marriage under the Act or Court marriage and Christian marriage. Plurality of marriage is a valid form of marriage under traditional and Islamic marriage. There is no limit to the number of wives a man can marry provided the parties to the marriage are willing. However monogamous marriage is mandatory for persons. Contracting Christian marriage and marriage under the Matrimonial Causes Act(Court or Statutory Marriages). Extra marital relationship is a valid ground for divorce. No subsequent valid marriage can be contracted during the subsistence of the marriage

Section 35 of the marriage Act provides:

> *any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be*

incapable, during the continuance of such marriage of contracting a valid marriage under customary law…

It is further provided by section 39 of the marriage Act that it constitutes a crime for a person who is unmarried to contract a marriage with a person he or she knows to be in a valid and subsisting marriage. The offender is liable to be penalized with 5 years imprisonment. A person who having married under the Act, subsequently contracts another customary law marriage is similarly liable to imprisonment for 5 years see section 47 of the marriage Act.

5.0 THE POSITION OF NON NIGERIANS

In cases between Nigerians, the High Court rules provide for the application of customary law.Where non Nigerians are involved, English law or any other law is applicable unless the application of such law would result in substantial injustice.

In *Savage v Macfoy (1909) 1 Renner's G.C. R. 504*. A liberated slave's son came from Sierra Leone to live in Lagos. He married Susannah savage, a Nigerian girl according to Yoruba Customary law in 1900,On his death in 1906, Susannah claimed that as his widow, she was entitled to administer his estate. The could held that since Mcfoy was not subject to Nigerian customary law, he could not have contracted a valid marriage in

Nigeria and that it was irrelevant that he had acquired a domicile of choice in Nigeria.

In *Fonseca v Passman (1958) WRNLR*. A Portuguese domiciled in Nigerian girl under Efik customary law in 1926. When he died intestate and she sought to administer his estate as his widow, the court held that as a domiciled Portuguese he lacked the capacity to contract a valid customary marriage even though he was domiciled in Nigeria.

The above remains the position until overruled.

6.0 CONTEMPORARY TRENDS IN MARRIAGE

Traditional conception of marriage as a heterosexual relationship between consenting partners living together as man and wife for a lifetime has undergone considerable metamorphosis in the 21st century. Some of the variants include

(a) Registered Partnership:

This is a form of contractual relationship where couples decide to live together as partners and enjoy similar relationship like formally married partners. It is a midway between cohabitation and formal marriage. Such partnership are sometimes registered for the purpose of formalization of the relations. The contemporary notion of registered partnership does not discriminate between homosexual and heterosexual relationships.

In the Netherlands, the Registered Partnerships Act 1998 provides a couple can become partners provided they are not already in subsisting marriage with another person and the relationship is registered by the Civil Registrar. Under the Act, registered partners have rights that are analogous to those of a married couples. Where children are born during the partnership,on the determination of the relationship the applicable rules to custody of children in divorce settlements, are also applicable

7.0 DIVERGENCE BETWEEN MARRIAGE AND PARTNERSHIP

Inspite of the similarity between married couples and partnership in living and responsibility to children from the relationship, there are areas of divergence between them.The procedure for dissolution of partnership is different. Under Dutch law, an application of dissolution of marriage usually involves both spouses but a partnership can be dissolved by only one partner. A partnership can be dissolved with the consent of the partners without recourse to legal proceedings.

In *Fitzpatrick v Sterling Housing Association (1999) 4 ALLER 705* the surviving partner sought to remain in their apartment as a protected tenant under the Rents Act 1977. It was held that the partner had not lived with the original tenant as his or her wife or husband but that he was a member of the family of the deceased partner. This was in consideration of the fact that it was possible for a stable homosexual relationship to be recognized as a familiar relationship.

(b) Same Sex Marriage:

Same sex marriage is marriage between people of the same sex. It is immaterial that it is between males or females.It has been accorded recognition on the basis that the Fundamental Right to dignity of the human person and the right to marry and establish a family is not gender specific. People should not be discriminated against on grounds on sexual or marriage partners. The opponents argued that tolerance of same sex marriage is inimical to law and order and preparatory to the tolerance of bestial relationship.

8.0 CHALLENGES OF PARTNERSHIP

The major challenge of partnership in private international law is its lack of universal acceptance. Reception of such relationship varies from one legal system to the other. A person making a claim in reliance on such a relationship is confronted with the court's attitude to such relationship. The validity of same sex marriage is dependent on the *lex domicile.* However on grounds of public policy, countries like Nigeria do not accord such relationship recognition.

9.0 SAME SEX MARRIAGE IN NIGERIA

Inspite of the conflict of law stipulation that capacity to marry is regulated by the *lex domicile,* Nigeria on grounds of public policy does not recognize same sex marriage even if contracted in another jurisdiction.

Section 214 of the criminal code provide that:

Any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and on conviction liable to imprisonment for 14 years. Attempting to commit the offence is punishable with a term of imprisonment of 7 years.

10.0 NIGERIAN SAME SEX MARRIAGE VARIETY

Although same sex marriage is not recognized as a valid form of marriage in Nigeria, a variant of woman to woman marriage is practiced in Nigeria and recognized as valid under customary law in some communities in Nigeria. Under this system of marriage, a childless womandesirous of establishing her own family is permitted to enter into a marriage contract with a girl on the payment of her bride price. This entitles her to claim any child the girl has. It is devoid of any sexual contact between the parties. It is solely for the purpose of enabling the childless woman have children to bear her name. Inspite of the courts in Nigeria declaring the practice as repugnant it continues to thrive in communities mostly in the eastern part of Nigeria.

In *Helena Odigie v IyareAika (1985) 1 Nig.* Bulletin contemporary law, 51 the Plaintiff a childless woman "married" the Defendant when she was told to be the mother of the children she could not have. The defendant to

the Plaintiffs knowledge became pregnant for a man in their village. The Plaintiff paid all the ante natal and post natal bills and named the child at birth. When the father of the child relocated to another village with the child, the Plaintiff instituted proceedings for his return. The Appellate Court held that:

> *…it is odious custom to permit a woman to marry a woman. It is equally attrocious and against public policy to deprive unwilling natural biological parents for any reason of their child and vest the same on childless parents or childless man or woman as if the child were a chattel…*

thecustom was held unenforceable because it was repugnant to natural justice equity and good conscience.

11.0 SUMMARY

1. Polygamous marriage is a contractual relationship between a man and more than one woman.
2. The determination of whether a marriage is polygamous or monogamous is dependent on the place of celebration of the marriage and not the personal laws of the parties to the marriage contract.
3. Where a man marries, divorces and remarries in quick succession,he is deemed to be serially monogamous and not

polygamous. To be deemed polygamous there must be marriage between a man and multiple women.

4. Nigeria recognizes Christian, traditional, Islamic and court (statutory) marriage. Polygamous marriage is valid under traditional and Islamic marriage but could constitute a ground for divorce in Christian and statutory marriage.

5. Customary law in Nigeria is applicable to marriage between Nigerians but inapplicable to marriage between non Nigerians or a Nigerian and non Nigeria. See *Savage v Mcfoy and Fonseca v Passman*

6. Contemporary trends in marriage relationship include registered partnership and same sex marriage.

7. Same sex marriage is marriage between people of the same sex. Its validity as a form of marriage depends on the *lex domicile*

8. In Nigeria same sex marriage is not recognized as a valid form of marriage

9. The Nigerian variant of same sex marriage involves a childless woman paying bride price for a girl to have children for her to establish her family. It does not involve sexual contact between the parties.

10. Although considered repugnant to natural justice, equity and good conscience, it continues to thrive in communities in easternNigeria.

12.0 CONCLUSION

The validity of polygamous marriage as a form of marriage is dependent on the law of the place of celebration of the marriage. A polygamous marriage can be converted to a monogamous marriage by severing relations with all but one of the partners while a monogamous marriage can be converted to a polygamous relation by the man marrying more than one wife

13.0 TUTOR MARKED ASSIGNMENT

1. Analyse contemporary trends in family relations and challenges confronting such practices.

14.0 SUGGESTED FURTHER READING

Omoruyi I. O. Private International Law: Nigerian Perspectives (Benin City: Ambik Press Ltd 2005)

David McClean Morris: The Conflict of Laws (London: Sweet & Maxwell Ltd, 2000)

MODULE 2 MATRIMONIAL CAUSES

UNIT 1 JURISDICTION

MODULE 2

UNIT 1 JURISDICTION

1.0 INTRODUCTION

Matrimonial causes is the generic name for suits relating to (a) malicious Jactitation (b) nullity of marriage (c) restoration of conjugal rights (d) divorce on account of cruelty or adultery or other issues arising from the marriage (e) alimony (g) custody or guardianship of infants in the marriage. Jurisdiction over matrimonial causes is usually dependent on the domicile of the parties. Where a court exercises authority which it does not purpose, its decision amounts to a nullity.

2.0. OBJECTIVE

The objective of this unit is to analyse the various proceedings involved matrimonial causes with a view to exposing the students to issue of the court's jurisdiction to adjudicate over such causes which is fundamental to the validity of any proceeding embarked on by the parties.

3.0 MEANING OF JURISDICTION

Jurisdiction is the authority a court has to decide matters before it or to take cognizance of matters presented in a formal way for its decision. In considering whether a court has jurisdiction, the determining factor which guides the court is the claim instituted. In matrimonial causes, the determining factor is whether the parties are domiciled in the jurisdiction

where the proceeding is instituted. It is pivotal to the adjudication process no matter how well the proceedings have been conducted.

4.0 DETERMINATION OF JURISDICTION

In the past, the determinant of jurisdiction laid down by the Privy Council in *Le Mesurier v Le Mesurier*(1895) A.C 517 at 540 was that the only true test of jurisdiction that could confer on a court the authority to adjudicate on the matrimonial issues between that parties was the domicile of the parties, since at common law the husband's domicile was implied to be the woman's domicile. Consequently, a deserted woman seeking matrimonial remedy was confronted with severe jurisdictional challenges. To remedy this situation, the Domicile and Matrimonial Proceedings Act 1973 was enacted to incorporate the proposal by the law commission.

4.1 THE PRESENT POSITION

The present position advocated by section 5(2) of the Domicile and Matrimonial Proceedings Act 1973 applicable in English courts entertaining proceeding for divorce and judicial separation are

(a) Is domicile in England on the date when the proceedings are begun or

(b) Was habitually resident in English throughout the period of one year ending with that date.

The basis of jurisdiction could therefore be either the domicile of the husband or wife. Equal spousal treatment was therefore guaranteed in the English jurisdiction

5.0 NIGERIAN POSITION ON JURISDICTION

The Nigerian position is almost analogous to the English position. The Matrimonial Causes Act is the regulatory mechanism for matrimonial causes proceedings relating to dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage.Section 2 of the Act provides that a Petitioner in proceedings for a decree for dissolution of marriage and other matrimonial issues must be domiciled in Nigeria. Irrespective of the of habilitation of the parties in Nigeria, proceedings can be instituted in any of the High Courts in Nigeria.

In *Bhojwani v Bhojwani (1995) 7 NWLR (Pt. 407) 349*, the court of Appeal held that a Petitioner in a proceeding for dissolution of marriage who was unable to establish a Nigerian domicile could not institute proceedings there.

To ameliorate the hardship that may be foisted on parties by strict adherence to the rules, Matrimonial Causes created two kinds of special domicile as follows:

(a) If a deserted wife has been domiciled in Nigeria immediately before the desertion she will be deemed to be domiciled in Nigeria for the purpose of the Act.

(b) A wife who is resident in Nigeria for a period of three years immediately preceding the date of instituting the proceeding under the Act would be deemed domiciled in Nigeria for the purposes of this Act

6.0 JURISDICTION TO ENTERTAIN NULLITY OF MARRIAGE

The jurisdiction of the court to entertain petitions on nullity of marriage used to generate considerable controversy. This was resolved with the enactment of section 5(3) of the Domicile and matrimonial proceedings Act which provides that if either party to the marriage is

(i) domiciled in England on the date of commencement of the proceedings.

(ii) habitually resident in England within the 12 months before the commencement of the proceedings

(iii) dies before the date of commencement of the proceedings and was at his death domiciled in England or ordinarily resident in England in the 12 months terminating on the date of death.

The English courts could entertain the petition of nullity of marriage.The court is however at liberty to in certain circumstances exercise its power to stay proceedings.

7.0 NIGERIAN POSITION

The Nigerian position on the issue of jurisdiction in relation to nullity of marriage is essentially a re-enactment of the English position. Section 2 of the matrimonial causes Act stipulate that domicile in Nigeria is mandatory for the exercise of the courts jurisdiction in matrimonial causes. "Domicile in Nigeria" means residence in either of the 36 states of the Federation.

In *Bhojwani v Bhojwani* (1995) 7 NWLR (pt 407) 349 the court held that a person domiciled in Nigeria may institute matrimonial causes proceeding in any of the state of Federation whether or not he is domiciled in that particular state.

There are two special kinds of domicile created for the following circumstances

(i) where a deserted wife has been domiciled in Nigeria immediately before her marriage or the desertion, she will be deemed to be domiciled in Nigeria

(ii) where the wife is domiciled in Nigeria for a continuous period of three years preceding the date of instituting the institution of the proceedings, she will be deemed domiciled in Nigeria for the purpose of the Act.

These special categories are created to address any disability that may be foisted on the Petitioner by the rule that the operational domicile is the domicile of the male spouse.

8.0 SUMMARY

(1) Matrimonial causes is the generic name used to classify suits arising from malicious jactitation, nullity of marriage, restoration of conjugal rights, divource onaccount of cruelty, adultery, alimony and guardianship of infants in the marriage.

(2) For the courts to adjudicate on issues arising from matrimonial causes between the parties, either spouse must be domiciled in the jurisdiction of where the proceeding is sought to be instituted.

(3) The Nigerian position on jurisdiction is a substantial reenactment of the common law position.

(4) In Nigeria to remedy the hardship that could be foisted on the Petitioner by strict adherence to the rule the operational domicile is that of the husband.Special provisions have been made for deserted wife's and deceased spouses.

(5) The issue of jurisdiction is pivotal to the validity of any decision taken in a matrimonial cause proceedings. Where the court lacks jurisdiction any decision arrived constitutes a nullity.

9.0 CONCLUSION

A party seeking a decree of nullity of marriage must comply with the condition precedent for the exercise of the court jurisdiction which is the status of the domicile of the parties must be discernible and traceable to the state, country or territory where the court is located unless the proceedings is liable to be adjudged incompetent.

10.0 TUTOR MARKED ASSIGNMENT

The domicile of a Petitioner in a Matrimonial Cause Proceeding is a Primary determinant of its competence. Do you agree?

11.0 SUGGESTED FURTHER READING

David McCleanMorris: The Conflict of Laws (London: Sweet and Maxwell, 2000).

Omoruyi I.O Private International Law: Nigerian Perspective (Benin City: Ambik Press Ltd 2005)

MODULE 2

UNIT 2 STAY OF PROCEEDINGS IN MATRIMONIAL CAUSES.

UNIT 2 STAY OF PROCEEDINGS IN MATRIMONIAL CAUSES.

1.0 INTRODUCTION

A stay of proceedings is the antithesis of the speedy hearing of a pending matter. It is putting the proceedings on hold due to special and exceptional circumstances disclosed to the court by the Applicant. It is a discretionary remedy which the court is reluctant to exercise unless compelling reasons are advanced and it is in the interest of justice not to continue with the proceedings.

Where however, these is an appeal against any aspect of the court's ruling or mode of conducting the proceedings any application for stay of proceedings pending the determination of such appeal is deemed to be obligatory

2.0. OBJECTIVE

The objective of this unit is to analysestay of matrimonialproceedings by identifying the circumstance in which an application for a stay will be entertained by a court with a view to impressing on the students that it is not granted as a matter of course but in exceptional circumstances which the court deems compelling enough to do so.

3.0 CATEGORIES OF STAY OF MATRIMONIAL PROCEEDINGS

Stay of matrimonial proceedings areclassified into two-

(a) Discretionary stay of proceedings

(b) Mandatory stay of proceedings

The Courts power to grant stay of proceedings is required to be exercised judicially and judiciously.

4.0 PRINCIPLES GUIDING THE GRANT OR REFUSAL OF AN APLICATION FOR STAY OF PROCEEDINGS

The guiding principles for grant or refusal of stay of proceedings are include the following

(a) The Applicant must establish that there are special and exceptional circumstance to warrant the grant of the application

(b) The court must consider the rights of both the Applicant and the Respondent. The court takes into consideration the justice and equity of the application, the hardship that will be caused if the application is not granted is usually balanced against the hardship that will be occasioned by granting it.

(c) Where it constitutes an abuse of judicial process, an application for stay of proceeding will not be granted.

(d) An application for stay of proceedings delays and prolongs the proceedings

(e) An application for stay will be granted if a final determination is likely to render the rights sought to be protected null and void

(f) Where there is a competent appeal pending.

5.0 NECESSITY FOR STAY OF PROCEEDINGS

(1) Where any proceedings under the matrimonial causes Act for divorce or nullity of marriage or divorce is pending in another jurisdiction a stay of proceeding is a necessity to avoid conflicting decisions or avoid abuse of court processes

(2) Where it appears to the court before the commencement of the proceeding for divorce that the parties to the marriages have resided together after its celebration and that jurisdiction has primacy of proceedings since the marriage can be said to in principle "belong" to that jurisdiction.

The balance of fairness and convenience between the parties makes it appropriate and necessary that when proceedings are commenced in one jurisdiction, it should be dispensed with before further steps are taken in another court.

Where a party to a matrimonial proceedings applies for stay of proceedings the court has an obligation to grant it when the application establishes substantial grounds for the grant. The court however has a discretion to grant a stay of execution where it deems it necessary for the just and effectual determination of the issues between the parties.

In ***De Dampierve v De Dampierve*** (1988) A. C. 92

H. was a French aristocrat whose family estates produced cognac. He marriedW. also a French national in 1977. In 1979 they moved to England where their only son was born in 1982. In 1985, the child was taken to New York and the marriage broke down. In May 1985, H. instituted divorce, proceedings in France. In July 1985 W. instituted proceedings in England. H. sought a stay of proceedings. It was upheld in the House of Lords on the basis that it was logical that litigation between both parties who were French and Married in France should be conductedby French Court

6.0 STAY OF PROCEEDINGS PENDING INTERLOCUTORY APPEAL

Courts are usually hesitant in granting stay of execution pending interlocutory appeals due to the unnecessary delay involved. This is because such issues could be appealed against on the final determination of the issues between the parties and delivery of judgement. The attitude of the court is to prevent parties from being made victims of the effect of avoidable delay for which interlocutory appeals are notorious.

7.0 CONCLUSION

A grant for stay of proceedings is a discretionary power which the court is mandated to exercise judicially and judiciously based on the fact and circumstances of a particular case which must be supplied by the Applicant

8.0 SUMMARY

1. Stay of proceedings is the antithesis of the speedy trial of a pending matter.
2. It is putting a matter on hold due to special and exceptional circumstance disclosed to the court by the applicant
3. It is a discretionary remedy that is seldom granted by the court unless dictated by the interest of justice.
4. Stay of proceedings are categorized as mandatory stay of proceedings and discretionary stay of proceedings.
5. The power to grant stay of proceeding is required to be exercised judicially and judiciously by the court.
6. A balance is expected to be struck between the hardship that will be occasioned by not granting the application for stay of proceedings and the hardship that will be caused by its grant.
7. A stay of proceeding will be granted if a refusal will render the rights sought to be protected nurgatory
8. A stay of proceedings is usually granted when there is a competent appeal pending.
9. Where any proceedings for divorce or nullity of marriage is pending in two jurisdictions, a stay of proceeding in one of the jurisdictions is a necessity to avoid conflicting decisions or abuse of court processes

10. The courts are usually hesitant in grantingstay of proceedings pending the determination of interlocutory appeal. This is to prevent its abusive utilization as a tool for attaining unnecessary delay of proceedings

9.0 TUTOR MARKED ASSIGNMENT

(a) Unless an applicant has established beyond doubt that an application ought not to go on it a stay of proceedings should not be granted, the Registered Trustees of the *four Square Gospel Church in Nigeria and Ors. vDr Kola Adeyinka and Ors.* (2010) NWLR (PT1195)33 at 43. State the principles regulation the grant of stay of proceedings.

10.0 SUGGESTED FURTHER READING

David Mcclean Morris: The Conflict of Laws (London: Sweet and Maxwell, 2000).

MODULE 2

UNIT 3 FOREIGN DIVORCE, NULLITY AND SEPARATION DECREES RECOGNITION

UNIT 3 FOREIGN DIVORCE, NULLITY AND SEPARATION DECREES RECOGNITION

1.0 INTRODUCTION

The issues encompassing divorce and other matrimonial causes decrees are far from resolved. The domicile of the parties is not universally accepted as the sole determinant of jurisdiction. In countries with civil law tradition, nationality of the parties is a prominent determinant of jurisdiction. This has resulted in "limping marriage" which is accorded recognition in one jurisdiction but invalidated in another. The consequential hardship foisted on parties has led to increased agitation for the liberalization of the rules regulating recognition of foreign decrees as a control measure to address the resultant inconvenience.

2.0. OBJECTIVE

The objective of this unit is to examine the challenge foisted on parties to divorce, nullity and separation proceeding by failure of universal acceptance of decrees obtained in the process with a view to exposing the students to inconvenience posed to parties and efforts being made to curtail the "limping marriage" syndrome.

3.0 MEANING OF RECOGNITION

Recognition is a formal acknowledgement conveying approval or validity or perception of something as being in existence, true, realistic or acceptance ofa matrimonial process as having occurred or a decree as duly obtained form a regular proceeding.

4.0 RECOGNITION UNDER THE MATRIMONIAL CAUSES ACT.

In Nigeria, recognition is usually accorded to decrees obtained from courts of competent jurisdiction. They are regarded as valid and subsisting unless and until set aside by an appellate court.

Section 81(1) of the Act provides that:

> *A dissolution or nullity of marriage made before the commencement of the Act by a court in Nigeria or made after the commencement of this Act by such a court in accordance with the transitional provision of this Act shall be recognized as valid in all states of the Federation.*

5.0 RECOGNITION OF FOREIGN DECREES IN NIGERIA

A dissolution or annulment of a marriage effected in accordance with the law of a foreign country is accorded recognition in Nigeria where at the date of the proceedings that resulted in the dissolution or annulment, the party at whose instance the annulment was effected or both parties was domiciled or resident in that foreign country.

See section 81(2) of matrimonial causes Act.

5.1 DISSOLUTION OF MARRIAGE BY A DESERTED WIFE.

Where dissolution of marriage is at the instance of a deserted wife domiciled in a foreign country either immediately before her marriage or immediately before desertion she is deemed to have been domiciled in that foreign country at the date of the institution of the proceedings that resulted in the dissolution see section 81(3)(a) of MCA.

Where a wife at the date of institution of the proceedings that resulted in the dissolution or annulment of her marriage in accordance with the law of the foreign country was resident for a period of three years immediately proceeding the said date, she shall be deemed to have domiciled in that foreign country.

5.2 OTHER CASES

Recognition of validity is also extended to other cases apart from dissolution or annulment where they are recognized as valid under the law of the foreign country in which the parties were domiciled on the date of the granting of the decree

Similarly any dissolution or annulment of marriage that is recognized as valid under the rule of private international law is recognized as valid in Nigeria and its scope is not limited by the earlier discussed positions.

See section 81(4)

6.0 FACTORS REGULATING RECOGNITION OF FOREIGN DECREES

1. The facts relied on to obtain the Decree under the law of a foreign country must be proved and established for the purpose of the law of the foreign law.

2. The rules of private international law must recognize the validity of the Decree. The parties must not be denied natural justice in the determination of the issues between them.

3. The dissolution or annulment must not be obtained by fraud.

4. The dissolution and annulment must have been effected by decree, legislation or otherwise before the commencement of this Act.

5. The proceedings must be commenced before a competent court.

6. The parties before the court must be proper parties.

7.0 GROUNDS FOR REFUSAL OF RECOGNITION

There certain circumstances which influence withdrawal of recognition or non recognition of a decree obtained under the Matrimonial Causes Act. They include:

(a) Where the divorce or nullity is inconsistent with the subsisting decision granted by a court of competent jurisdiction

(b) Where it was granted on a wrong premise have a valid and subsisting marriage.

(c) Where fair hearing was denied to parties in the proceedings or the proceedings were deliberately skewed to obtain a predetermined decision in favour of one of the parties to the proceedings

(d) The divorce or annulment must be obtained from a regular proceedings which must be well documented.Lack of documentation could be inimical to the recognition of a divorce or annulment as valid.

(e) Where recognition would be contrary to public policy, equity and good conscience, recognition will be withheld.

(f) Where the divorce or nullity of marriage is obtained by fraud, it will not be recognized as valid.

(g) In Nigeria, parties to matrimonial proceeding refer to heterosexual partners. Same sex marriage is illegal in Nigeria and decrees arising from proceedings relating to such union are not recognized in Nigeria

8.0 LIMPING MARRIAGES

Limping marriages refers to the marital status of people considered as married under the law of one state or country while under the law of another state such marriage is unrecognized, considered inexistent and not binding.

In *Padolechia v Padolechia*the husband was domiciled in and married in Italy in 1943 but subsequently obtained a divorce in Mexico and

contracted another marriage in England. In a petition to annul the marriage on the ground that the first marriage was valid and subsisting, the court up held the submission.

In situations where it will be unjust and inappropriate for the decree to be binding extra territorially, a limping marriage will be created.

In Kendall v Kendall (1977) Fam208

The husband's lawyers deceived the wife into applying for a divorce which she was not desirous of obtaining. The processes were filed in a language she did not understand.The recognition was withheld in England on grounds of public policy.

9.0 CONCLUSION

To reduce the incidence of limping marriages, it is necessary to establish cognizable universally acceptable standards regulating recognition of decrees granted pursuant to the Matrimonial Causes Act instead of the present situation which leaves parties to a marriage contract to the whims of each nation state and the uncertainty that is foisted on parties extra territorially.

10.0 SUMMARY

1. Recognition is the formal acknowledgement conveying approval or validity or perception or acceptance of a decree as dully obtained from a regular matrimonial cause proceedings.

2. Section 8191) of the Matrimonial Cause Act provides for the recognition in Nigeria of decrees obtained from courts of competent jurisdiction.

3. Where the decree is obtained in a foreign country, it is accorded recognition in Nigeria where the party at whose instance the decrees was obtained or both parties were domiciled or resident in that foreign country

4. Where a dissolution of a marriage is obtained by a deserted wife. Domiciled in a foreign country either immediately before the marriage or before the desertion, she is deemed to have been resident in that country at the date of the proceedings which resulted in the decree.

5. Recognition is also accorded to decrees recognized as valid under the law of the foreign country where they were granted as well as under the rules of private international law.

6. To be recognized as valid, foreign decrees must have been obtained in a regular matrimonial proceeding and not fraudulently.

7. Where there is denial of fair hearing or the proceedings were skewed to obtain a predetermined result, recognition of the foreign decree will be denied.

8. Where recognition will be contrary to public policy, it will either be withheld or denied.

9. Where recognition is given on the wrong premise that there was a valid and subsisting marriage, it will be withdrawn.

10. In Nigeria, recognition is only accorded to heterosexual partner relationship and underMatrimonial Causes decrees. Same sex marriage is considered illegal in Nigeria.

11. Where marriage is recognized as valid in one jurisdiction, the marriages is considered alimping marriage.

11.0 TUTOR MARKED ASSIGNMENT

1a. Define recognition

1b. Analyse the factors that could influence refusal to grant recognition.

2a. Explain the concept of "limping marriage"

2b. State the determinants of recognition of foreign Matrimonial Causes Decrees in Nigeria.

12.0 SUGGESTED FURTHER READING

David Mcclean Morris: The Conflict of Laws (London: Sweet and Maxwell, 2000).

Omoruyi I.O An Introduction to Private International Law: Nigerian Perspective (Benin City: Ambik Press Ltd, 2005)

MODULE 2

UNIT 4 PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE UNDER THE MATRIMONIAL CAUSES ACT.

UNIT 4 PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE UNDER THE MATRIMONIAL CAUSES ACT.

1.0 INTRODUCTION

Presumption of death of a spouse on the ground of long absence of marriage in such circumstances that it is the only reasonable deduction that can be made is a ground for dissolution of marriage under the Matrimonial Causes Act. It is to provide a safeguard measure for spouses who find themselves trapped in such situations.

2.0. OBJECTIVE

The objective of this unit is to analyse the circumstances pursuant to which a spouse can be presumed dead to entitle the other party to a decree of dissolution of marriage with a view to examining the choice of law applicable to the parties confronted with such situation.

3.0 GROUNDS FOR PRESUMPTION OF DEATH OF A SPOUSE.

Section 15 (2)(h) of the matrimonial causes Act states that where a party to the marriage has been absent from the Petitioner for such a time and is such circumstance as to provide reasonable grounds for presuming that he or she is dead, the court is inclined to granting a dissolution of the marriage using the following circumstance as a premise.

(a) Where for a period of seven years immediately preceding the date of the Petition the other party to the marriage was continually absent from

the Petitioner and there is no reasonable ground for believing that he was alive at any time within the said period unless the presumption is rebutted. See 16 (2) (a) of the Matrimonial Causes Act

(b) Attempts must have been made by the Petitioner to make contact with the other party to no avail and it must be impracticable to determine his where about.

(c) There must be no connivance between the parties to conceal the where about of the Respondents

4.0 AMBIT OF THE RELIEF.

The relief is distinct from dissolution of marriage because it predicated on providing a basis for a partner who is unable to find his spouse to obtain relief. It provides a safeguard against a situation that could arise if the party that is presumed dead rebuts that presumption by showing up and establishing that he is very much alive.

5.0 JURISDICTION TO ENTERTAIN PROCEEDINGS

The exercise of the jurisdiction of the court to entertain the proceeding for presumption of death and dissolution of the marriage is dependent on the domicile of the Petitioner in any state in Nigeria on the date of commencement of the proceedings and the Petition must be instituted in the High Court of any state whether the Petitioner is domiciled in that particular state or not. See section 2 of the Matrimonial Causes Act.

6.0 CHOICE OF LAW.

The choice of law is determined by the domicile of the parties at the time of the institution of the proceeding.

7.0 RECOGNITION OF FOREIGN DECREES

Foreign decrees which refer to decrees granted outside Nigeria or by non Nigeriancourts are recognized in Nigeria as valid. Impliedly this includes presumption of death and dissolution of marriage see s. 81 of Matrimonial Causes Act.

8.0 CONCLUSION

Dissolution of marriage on the basis of presumption of death of one of the parties is essential to establishing an escape valve for parties plagued by the uncertainty of their status. Its distinct provision which classifies it as a rebuttable presumption renders it distinguishable from other reliefs under the Matrimonial Causes Act.

9.0 SUMMARY

1. Dissolution of marriage based on the presumption of death of a party to a marriage contract is one of the relief provided in 15(2)(h) of the matrimonial cause proceedings.

2. To be eligible for the relief, the Petitioner must establish that the other party has been absent for such time and in such circumstances as

to provide reasonable ground for sustaining the presumption that he or she is dead.

3. The Petitioner has to establish that the other has been continually absent from the marriage for a period of seven years preceding the date of the institution of the proceeding and the Petitioner has reason to believe the other party may be dead.

4. To sustain the presumption there must be loss of contact between the parties and attempts to reestablish it must have been made without success.

5. There must be no connivance between the parties to the marriage to conceal the where about of the parties presumed dead.

6. The relief is limited in scope. It is restricted to parties who have reasonable grounds to believe their spouses dead. It is utilized as a safeguard measure to ensure that untold hardship is not foisted on the other party.

7. The court with jurisdiction to entertain the proceedings is the domicile of the Petitioner.

8. A Petitioner domiciled in Nigeria has discretion to institute proceeding in any state of the Federation irrespective of whether he is ordinarily domiciled in the particular state or not.

9. The choice of law is dependent on the Law of the domicile of the parties at the time of the institution of theproceedings

10. Foreign decrees which refer to decrees granted outside Nigeria are recognized in Nigeria pursuant to section 81 of the Matrimonial Causes Act.

10.0 TUTOR MARKED ASSIGNMENT

a. Explain the circumstances in which presumption of death and dissolution of marriage decree are made under the MatrimonialCauses Act.

b. Analyse the choice of law applicable to the parties to a marriage seeking to institute proceeding based on presumption of death of a spouse.

11.0 SUGGESTED FURTHER READING

David Mcclean Morris: The Conflict of Laws (London: Sweet and Maxwell, 2000).

Omoruyi I.O An Introduction to Private International Law: Nigerian Perspective (Benin City: Ambik Press Ltd, 2005)

MODULE 2

UNIT 5 MAINTENANCE, CUSTODY AND SETTLEMENT

UNIT 5 MAINTENANCE, CUSTODY AND SETTLEMENT

1.0 INTRODUCTION

On granting a Petition for divorce, judicial separation or nullity of marriage the court is empowered to make consequential orders relating to maintenance of the children of the marriage or the other party to the marriage custody, guardianship, welfare, education of children and settlement of properties. Such properties could be located within or outside the jurisdiction of the court provided the order of the court will not be rendered nugatory. In making theconsequential orders,location of parties or properties sought to be settled outside the jurisdiction of the court does not operate as a bar.

2.0. OBJECTIVE

The objective of this unit is to impress on the students that apart from granting petition for divorce, nullity of marriage judicial separation etc. the court orders are often supported by ancillary or consequential orders relating to maintenance of children and the order party as well as resolution of issues relating to custody of children and settlement of property. This is with the aim of acquainting them with the nature and scope of such consequential orders.

3.0 MAINTENANCE PROCEEDINGS.

Maintenance under the matrimonial causes Act refers to the payment of an allowance to a spouse during or after the proceedings to enable the

spouse alleviate some of the financial burdens foisted on the party by the proceedings. In some jurisdictions it is referred to as "alimony".

Where parties affected by a matrimonial causes decree are unable to reach an agreement which is mutually acceptable. The court has the responsibility of making consequential orders relating to the maintenance of the other party and children of the marriage designed to be as fair as possible to both parties.

3.1 ISSUES CONSIDERED BY THE COURT

Issues considered by the courts in arriving at a decision including the duration of the marriage, age of couple, financial resources of the parties, contributions during the marriage, financial needs of the parties and the young children of the marriage as well as the earning capacity of the Petitioner is also taken into consideration.

3.2 PURPOSE OF MAINTENANCE

Maintenance is not a punitive measure. It is to restore the Petitioner and the children of the marriage as much as possible to the same position as they were before the dissolution of the marriage.

Section 70 of the Matrimonial Causes Act provide for maintenance of a party and children in a marriage pending the disposal of the proceedings and after granting the decree sought taking cognizance of the earning

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

3.3 SCOPE OF MAINTENANCE PROCEEDINGS:

Maintenance of children of the marriage orders are restricted to children of the marriage who are yet to attain the age of twenty one years. To extend the scope, special circumstance that justify the making of such an order for the benefit of the child are stated in Section 70(4)

The court may make an order for a lump sum or weekly, monthly, yearly or other periodic sum to be paid. Such payment could be either be made payable directly to the parties to the marriage or a trustee to be appointed or a public officer or other authority for the benefit of a party to the marriage. The court however, ordinarily does not make an order increasing or decreasing an amount ordered to be paid as maintenance. This can only occur where the circumstance of the parties or any child for whose benefit the order was made has changed to such an extent as to justify interference with the initial order. Where material facts were withheld from the courtor false evidence was adduced at the time of making the maintenance order the court if it deems it fit in the interest of justice to vary its initial order would do so. See section 72 of the Matrimonial Causes Decree

4.0 CUSTODY OF CHILDREN OF THE MARRIAGE.

4.1 DEFINITION OF CHILDREN OF THE MARRIAGE

Children of the marriage under the Matrimonial Causes Decree includes

(a) any child adopted since the marriage by the husband wife or by either of them with the consent of the other.

(b) any child of the husband and wife born before the marriage whether legitimized by the marriage or not.

(c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if at the relevant time, the child was ordinarily a member of the household of the husband and wife. Where however, a child of the marriage has been adopted by a third party, he shall not be deemed to be a child of the marriage at the relevant time. This means at the time of the proceedings.

4.2 CUSTODY PROCEEDINGS

In proceedings relating to custody guardianship, welfare, and education of children the interest of the children is usually prioritized by the court. Where the court deems it desirable to do so, could make an order placing the children in the custody of a person other than a party to the marriage. Where a child is placed in the custody of a party to the marriage an order for access to the child by the other party may be included by the court on such terms as it deems fit. See section 71 of Matrimonial Causes Act.

5.0 PROPERTY SETTLEMENT PROCEEDINGS

Property settlement proceedings refer to the division of property owned or acquired by marriage partners during their marriage.

5.1 POWER OF COURT

The Court may 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 in such a manner as the court considers just and equitable in the circumstances of the case see section 72(1)

Where there is existence an ante nuptial or post nuptial settlement relating to part of or all the property between the parties the court is empowered to make such order as it deems fit taking cognizance of their existence where it deems it just and equitable to do so.

In the absence of special circumstances dictating otherwise, children who have attained twenty one years are usually not the beneficiaries of court orders relating to settlement of property.

6.0 CONCLUSION

Maintenance, custody of children and property settlement proceedings are consequential orders made by the court to ensure a just and effectual determination of the issues between the parties in a matrimonial proceedings.

7.0 SUMMARY

1. Apart from granting Petition for decree of marriage, relating to nullity, divorce and judicial separation, consequential orders are usually made relating to maintenance, custody of children and settlement of property.

2. Maintenance under the Matrimonial Causes Act refers to the payment allowance to a spouse during or after the proceedings to enable the spouse alleviate some of the financial burdens foisted on them by proceeding.

3. In maintenance proceedings, issues considered by the court in arriving at a decision include duration of the marriage, age of the couple, financial resources of the parties, financial needs of the parties and the young children of the marriage as well as the earning capacity of the Petitioner.

4. Maintenance is not a punitive measure. It is to restore the Petitioner and the children of the marriage as much as possible to the same position they were before the dissolution of the marriage.

5. Maintenance orders are restricted to children of the marriage who are yet to attain 21 years unless there exist special circumstances that dictate otherwise.

6. The court ordinarily does not make an order either increasing or decreasing an amount ordered to be paid as maintenance except in exceptional circumstances and in the interest of justice. See section 72 of Matrimonial Causes Act.

7. Children of the marriage under the Matrimonial Causes Act include any child of the husband and wife born before the marriage whether legitimized by the marriage or not, children adopted by either of them but exclude children of the marriage adopted by third parties.

8. Proceedings relating to custody, guardianship, welfare and education of children usually prioritise the interest of the children in the custody to the proceedings.

9. In property settlement proceedings, the court may order the division of property owned or acquired by a partner during the marriage.

10. The court has power to order a party or parties to a Matrimonial Cause proceeding to make such property settlement as it deems necessary.

11. Where there is in existence a prenuptial or ante nuptial agreement between parties to the proceedings, the court may make orders taking cognizance of their existence if it deems it fit, just and equitable to do so.

8.0 TUTOR MARKED ASSIGNMENT

The Court in addition to making decrees under the Matrimonial Causes Act empowered to make consequential orders relating to Maintenance and Custody of children. Discuss.

9.0 SUGGESTED FURTHER READING

David Mcclean Morris: The Conflict of Laws (London: Sweet and Maxwell, 2000).

10.0 STATUTE

Matrimonial Causes Act 1970 Cap M7 Laws of the Federation of Nigeria. 2004.

MODULE 3 ISSUES RELATING TO CHILDREN

UNIT 1 JURISDICTION OF NIGERIAN COURT IN CUSTODY AND GUARDIANSHIP OF CHILDREN

MODULE 3 ISSUES RELATING TO CHILDREN

UNIT 1 JURISDICTION OF NIGERIAN COURT IN CUSTODY AND GUARDIANSHIP OF CHILDREN

1.0 INTRODUCTION

Issues relating to children iscentred on parental rights and duties.Custody and access to children or parental responsibility to children. This is premised on the incapacity of young children to look after themselves. Exercising jurisdiction on issues relating to children is in the discharge of the duty to ensure that adequate provision is made for their care.

Nigeria owes a duty of protection to its citizens and non citizens who are resident in Nigeria and its citizens who are resident extraterritorially. This duly is extended to Nigerian children. The courts in Nigeria specifically the High court has jurisdiction to adjudicate on issues relating to custody and guardianship of children. This is to ensure a just and effectual determination of the issues relating to parental responsibility to children.

2.0. OBJECTIVE

The objective of this unit is to impress on the students that issues relating to parental responsibility to children form an integral part of administration of justice system. This is with a view to enhancing their realization that vesting of jurisdiction in the High Court to decide on issues relating to child care and guardianship of children is to avoid role conflict between courts and ensure speedy trial.

3.0 DEFINITION OF CHILD

A child is defined by the Child Rights Act 2003 as a person who has not attained the age of eighteen years. While the children and young persons Act enacted in Eastern, Western and Northern Nigeria further classifies a child as a person under the age of 14 yearsbut is under the age of 17 years. The definition of child varies from one jurisdiction to the other in Nigeria and the purpose of the definition.

The Matrimonial Causes Act puts the age of maturity at 21 years.

4.0 MEANING OF GUARDIANSHIP

Guardianship is the legal arrangement under which a person (guardian) has a duty of care and management of both the child and his estate of property during his minority.

5.0 MEANING OF CUSTODY

Custody refers to the care, control and maintenance of a child which a court may award to one of the parents following a divorce or separation proceedings.

6.0 DISTINCTION BETWEEN GUARDIANSHIP AND CUSTODY

"Guardianship" and "Custody" in some jurisdictions are used inter changeably while is some other jurisdictions they are used to refer to different responsibilities. For purpose of clarity, in *Haig v Spence* (2010)

BCSC 270, Justice Elliot Myers stated that there is a distinction at law between custody and guardianship. Guardianship involves the capacity to make decisions regarding major issues impacting on a child's life including medical or educational decisions while custody is only the right to have physical care and control of the child.

In practice, sole custody can be awarded to one parent while joint guardianship can be awarded between the two parents. This is usually to enable the non custodial parent to have a say in major decisions affecting the child's life.

Guardianship powers usually extend to when the child attains twenty one years or a girl child marries.

7.0 JURISDICTION OF THE COURT

Jurisdiction refers to the authority granted to a body to make pronouncement which are legally binding and administer justice on issues relating to children.

Jurisdiction on issues relating to children is vested in the High Court as the court often has to make consequential orders or directives on issues relating to custody and guardianship of children.

In proceedings relating to custody and guardianship of children, the interest of the children are of paramount consideration and the court usually makes such orders as it deems proper. See section 71 of the Matrimonial Causes Act.

The court can exercise statutory powers even if the child is not resident in Nigeria. This is because the court has the power to make ancillary orders in matrimonial proceedings whenever it has jurisdiction to entertain the main suit.

7.1 JURISDICTION TO APPOINT GUARDIANS

The court has jurisdiction to appoint a guardian for a child in a number of situations

(a) Where the child has no parents

(b) Where there is no parent or anyone exercising parental responsibility for him.

(c) Where a parent awarded guardianship for him dies during the pendency of the order

(d) Where in a matrimonial proceedings, the court is of the view that the child of the marriage ought to be separately represented.

8.0 JURISDICTION OVER CUSTODY ISSUES

Custody issues usually arise where there is disagreement over which of the parties to the matrimonial proceedings has a right to make decisions

relating to the residence, education, physical care, religious and cultural upbringing of the child. It could also arise where one the parents is considered unfit to make a good or informed judgement as to what is most suitable for the child.

8.1 CUSTODY SETTLEMENTS

Custody settlements in matrimonial proceedings involve either of the following

(a) one parent having sole. Custody which is permanent and to the exclusion of the other.

(b) Joint custody which involves one parent being granted custody which is to be shared with the non custodial parent who is to be allowed visitation rights and an input into issues relating to education health care etc. The non custodial parent is expected to pay maintenance allowance or child support to the custodial parent

(c) The parents could also share custody of the child in which case the child is required to spend time in his parents' homes at times to be agreed by the parties.

8.2 CRITERIA FOR CUSTODY AWARDS

Criteria for custody awards has always been what is in the best interest of the child – section 71 of Matrimonial Causes Act.

In practice except in exceptional circumstances, custody of children is usually awarded by courts to their mothers with the fathers expected to pay maintenance allowance for them.

In the absence of meaningful guidelines, the judges have the task of determining what is in the best interest of the child using consideration which could sometimes be arbitrary.

9.0 REMOVAL OF CHILD FROM JURISDICTION

Where the responsibility for the care of a child is the subject of a matrimonial proceedings, removal of the child from the jurisdiction of the court for a continuous period is usually discouraged except with the knowledge and consent of the parties to the proceedings or the court

Where a child is made a ward of the court it operates as an automatic restriction to his removal without the necessity for a formal restriction or removal order.

10.0 CONCLUSION

The jurisdiction of the court relating to thecustody and guardianship of children is to ensure that the interest of the child who is considered incompetent to personally deal with his own affairs is justly and effectually determined while prioritizing what it considers to be in the best interest of the child.

11.0 SUMMARY

1. The High Court is vested with the jurisdiction to adjudicate on issues relating to custody and guardianship of children arising from matrimonial proceedings.

2. Child is defined as anyone below the age of 21 years under the Matrimonial Causes Act and 18 years under the child Rights Act 2003.

3. Guardianship of children refers to the legal assignment of duty of care of a children and her property to another person known as guardian.

4. Custody refers to an award made by court to either or both parents of a child entitling them to the care, control and maintenance of the child after a separation or divorce proceeding.

5. Guardianship and custody differ in the scope of application of the order.

6. Removal of a child who is the subject of a matrimonial proceeding or declared a ward of the court is usually with the specific consent of both parties to the proceedings or the court.

7. In all proceedings relating to children, the best interest of the child is usually prioritized by the court.

12.0 TUTOR- MARKED ASSIGNMENTS.

(1a) Whois a child?

(1b) Discuss issues considered by the court in the appointment of guardians.

(2a) Distinguish between custody and guardianship

(b) Analyse the types of custody settlements.

13.0 SUGGESTED FURTHER READING

David Mc.Clean Morris: The Conflict of Laws, Fifth Edn. (London: Sweet & Maxwell Ltd 2000)

14.0 STATUTES

Child Rights Act 2003

Matrimonial Causes Act

MODULE 3

UNIT 2 EFFECT OF FOREIGN ORDERS

MODULE 3

UNIT 2 EFFECT OF FOREIGN ORDERS

1.0 INTRODUCTION

Where a child is present in a particular country of which he is a national and he is habitually resident in that country, that country evidently has jurisdiction in respect of custody and guardianship issue. Foreign orders are inapplicable to such a child except in exceptionally cases where such guardianship is been challenged.

2.0. OBJECTIVE

The objective of this unit is to examine the jurisdiction of the court to make orders which could be operational extraterritorially with a view to impressing on the students that sovereignty of states to adjudicated on issues relating to children which falls within their territorial competence is recognized and respected in international law.

3.0 MEANING OF FOREIGN ORDERS

Foreign orders are orders obtained from courts outside the territory or jurisdictional boundaries of Nigerian court.

4.0 IMPLEMENTATION OF FOREIGN CUSTODY ORDERS IN NIGERIA

Foreign orders are not automatically implementable in Nigeria inspite of the fact that they are recognized as valid by virtue of section 81 of the Matrimonial Causes Act

Where however the same parties have in respect of the same issues obtained judgement in a foreign country, it is binding on the parties and operates as *res judicata*

An order of court is enforceable under any of the following circumstances

(a) Where the Respondent is a subject of the foreign country in which the jugdement was obtained

(b) Where the Respondent was present in the country when the action was instituted

(c) Where the Respondent was privy to the forum where he was sued

(d) Where the Respondent voluntarily appeared

(e) The foreign order is recognized as binding under private international law

Presence in a country or court at the time of the commencement of the proceedings even if transitory is deemed to be submission to the jurisdiction of the court.

5.0 BAR TO IMPLEMENTATION

A Respondent can successfully challenge the enforcement of a foreign order premised on the following which operate as a bar to implementation.

(a) Where fraud is alleged and substantiated in the process of obtaining the foreign order as fraud vitiates any proceeding. Issues between the parties can then be relitigated.

(b) Where the foreign order is manifestly unjust and its implementation will be offensive to natural justice

(c) Where the foreign order is contrary to public policy from the Nigeria perspective, it can be impeached

(d) Where it negates the principle of private international law.

(e) The judgementbe final and not interlocutory. In other words the issues between the parties must not have been substantively adjudicated upon before arriving at the order

6.0 CHILD ABDUCTION

Child abduction or child kidnapping are treated as a distinct specie of infraction internationally and it is usually viewed with outrage consequently countries have an implied commitment to arrest the situation by enforcing foreign orders relating to child kidnapping or abduction.

The courts in implementing orders relating to abduction usually take cognizance of the psychological damage to the child occassionedby his

sudden removal from a familiar environment at a time when his family life was been disrupted. It is balanced against possible challenges that the child could be confronted with if returned to his country of abduction or habitual residence.

The Hague Convention on the Civil Aspects of International Child Abductionparticularly part I of the Child Abduction and Custody Act 1985 encouraged Member states to in cases of removal or retention of custody to ensure that custodial rights are reinstated or enforced through the return of the child to his habitual residence.

Nigeria is not a signatory to the Hague Convention and there are increasing incidence of non compliance by signatory countries.

7.0 IMPLEMENTATION OF FOREIGN JUDGEMENTS BY REGISTRATION

Foreign judgements can be enforced in Nigeria by registration of such judgements in Nigerian courts. The Foreign Judgements (Reciprocal Enforcement) Act cap F35 Laws of the Federation of Nigeria 2004 provides for the enforcement of the judgement of superior courts of a foreign country in Nigeria.Superior court refers to High Court and Federal High Court, Appellate Court, Supreme Courts and its equivalent. However superior court utilized in this Act refers to the High Court and Federal High Court.

The Act is applicable to enforcement of order provided:

(a) It is final and conclusive between the parties

(b) The sum payable is not in respect of taxes or other charges in the nature of a fine or penalty

(c)The judgement is after the coming into operation of this Act

(d) It must be a final and conclusive judgement.

(e) It must be recognized as a binding judgement by the registering court.

8.0 GROUNDS FOR REFUSING RETURNS IN CUSTODY CASES

Where a child is removed from his usual habitation and taken to another jurisdiction an order for his return will be ignored in the following circumstances.

(a) Where the body, person, or institution requesting his return was not exercising custody rights over the child at the time of his removal or retention

(b) There was consent or acquiescence at the time of removal of the child

In *Re A (Minors) (Abduction Custody Rights*) A father resident in Australia wrote complaining that his wife's removal of their child to England was illegal but that he was not insisting on his rights. It was held to constitute acquiescence when he subsequently tried to retract his position.

(c) Where there is a grave risk that if the child is returned he may be exposed to physical or psychological trauma.

The court is usually wary of placing the child in an intolerable situation. In *Mcmillan v Mcmillan*1989S.L.T 350 where the applicant parent had history of alcoholism and depression and the adoptive parent would be unable to accompany the child if it was returned, the order was refused.

(d) Where the child objects to his return, his view will be considered vis a vis the perculiar circumstances of his abduction

(e) Where the application for the return of the child is not brought timeously. The court will be reluctant to enforce an order for his return on the basis that he would have settled into his new environment and would be disruptive to remove the child to another jurisdiction

Enforcement of Foreign orders in Nigeria shall be examined in detail in subsequent Modules

9.0 CONCLUSION

Foreign orders are not automatically enforceable extraterritorially because the sovereign rights of other countries are acknowledged and respected under international law. However, in specific instance like when kidnapping has occurred or where there exists bilateral cooperation agreement between the states as to enforcement of court orders in each others jurisdiction countries are usually more accommodating.

10.0 SUMMARY

1. Foreign orders are not automatically enforceable extraterritorially.

2. Where however the same parties and the same subject matter have been litigated in a foreign court and substantive judgement, it operates as res judicata.

3. Where fraud, non observance of rules of natural justice, where the foreign order is manifestly unjust or contrary to public policy and private international law, such foreign orders will not be enforced.

4. The interest of the child is usually prioritized in the enforcement of foreign judgements. Where enforcing the order will traumatize the child physically and psychologically the court will be reluctant to enforce the order.

5. The foreign order must be issued by a superior court.

6. The Enforcer must not be guilty of laches and acquiescence.

7. In Nigeria, the Foreign Judgement(Reciprocal Enforcement) Act provides for the registration and enforcement of orders obtained form superior courts.

8. The application for the enforcement of the order must be timeous.

11.0 TUTOR- MARKED ASSIGNMENTS.

Analyse the circumstances in which foreign orders are enforceable in Nigeria.

12.0 SUGGESTED FURTHER READING

Omoruyi I.O An Introduction to Private International Law: Nigerian Perspective (Benin City: Ambik Press Ltd, 2005)

David Mc.Clean Morris: The Conflict of Laws, (London: Sweet & Maxwell Ltd 2000)

13.0 STATUTES

Matrimonial Causes Act

Foreign Judgement (Reciprocal Enforcement) Act

MODULE 4

LEGITIMACY, LEGITIMATION AND ADOPTION

UNIT 1 LEGITIMACY

MODULE 4

UNIT 1 LEGITIMACY

1.0 INTRODUCTION

Legitimacy refers to the status of conferred on a child at the time of her birth whether the child is born by parents who are legally married or outside wedlock. It is the totality of how a child is perceived and rights and priviledges he is entitled to in relation to his parents estate. In Nigeria, every child born by parents whether in a formal or legal marriage or not.

2.0. OBJECTIVE

The objective of this unit is to analyse the concept of legitimacy and the factors influencing the recognition of a child as legitimate.

3.0 MEANING OF LEGITIMACY

Legitimacy means the status which a legitimate child acquires at the time of his or her birth. The traditional concept is that child is legitimate if he or she is born or conceived in lawful wedlock within a marriage which is valid under English rules of the Conflict of Laws. Legitimacy entitles a child to full recognition as a member of a particular family and entitlement to the rights accruing to such membership. In contrast, a child born outside wedlock is referred to as illegitimate and his handicap lies in the fact that although he is a child with identifiable parents, he is not

recognized as an heir and occupies an inferior position to the legitimate child.

4.0 NIGERIAN POSITION.

The concept of "bastard" child is inoperative in Nigeria as section 42(2) of the 1999 constitution unequivocally provides that no citizen of Nigeria should be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

In *Adeyemi v Bamidele*(1968) 1 All NLR 31 at 37during the lifetime of the deceased he cared for and fed 5 of the children whose paternity was being contested to the knowledge of his closest relative. The supreme court held that they were the children of the deceased.

In practice social stigma still attaches to a child born outside wedlock

5.0 LEGITIMACY UNDER CUSTOMARY LAW

Under customary law, mere acknowledgement by the father that the child was his is sufficient to confer him with legitimacy and renders him eligible to inherit from his father's estate.

In *Taylor v Taylor* (1960) LLR. 286. It was held that a father's acknowledgement of the paternity by the father is sufficient to confer legitimacy on the children. This is the only standard and recognized mode of determining legitimacy

6.0 PRESUMPTION OF LEGITIMACY IN CUSTOMARY LAW

A child could be presumed to be legitimate even if born after the dissolution of marriage of the parents and the repayment of bride price. In Igbirra Customary Law, a child born within ten calendar months of divorce is deemed to be the legitimate child of the former husband irrespective of the fact that he could not be the father of such child.

In *Mariyama v SadikuEjo* (1961) NRNLR 81. The Appellant divorced the Respondent and remarried fifteen months after sexual intercourse ceased between them but within ten months of their divorce, she gave birth to a child. The Respondent claimed the child was his under Igbirra native law and custom.

On appeal, the culture was held to be repugnant to natural justice, equity and good conscience as it would be wrong in principle to hand over a child to a total stranger merely because dowry has not been refunded

7.0 POSITION IN ENGLAND

A child conceived before marriage is regarded as legitimate if born after parents were divorced. A child born after artificial insemination is legitimate even if the donor is not the husband except where it is established that the husband did not consent to the insemination.

Where the law of the domicile of both parents at the time of the birth of the child regards the child as legitimate, it will be deemed to be legitimate inEngland.

Children of polygamous union are ordinarily regarded as illegitimate. Where however, the law of domicile of the parents at the time of birth, the child be regarded as legitimate, the child will be deemed to be legitimate.

Where the child is the product of a void marriage, the child will be deemed to be legitimate if either of the parents at the time of its birth considered themselves to be in a valid relationship

In *Shaw v Gould* (1861) 9H.L.C193 where the marriage of the couple was held to be void because Scottish divorce could not be recognized in England. The children of the marriage where held to be illegitimate and could not inherit either land or movable property under the testators will.

Foreign legitimation by subsequent marriage is not recognized in England unless the father is domiciled both at the time of the child's birth and also at the time of the subsequent marriage in a country were legitimation is permitted.

Where the parents of an illegitimate person marries, the children of the marriage are conferred with legitimacy provided the father is at the date of the marriage domiciled in England and Wales

8.0 EFFECT OF LEGITIMATION

A legitimated person has the same rights and obligations in respect of maintenance and support of himself or of any other person in the same manner as if he had been legitimated.see section 8 cap 87 vol. iv, Laws of Bendel State 1996 (as applicable in Edo State)

9.0 CONCLUSION

Legitimacy of a child is at the core of his right and beneficial interest in the estate of his father. Paternity disputes are common in settlement of estate claims. Maternal disputes are inexistent except in adoption and surrogate cases. Any dispute relating to maternal or paternal dispute is disruptive of the social status of the person involved and societal attitude varies from one jurisdiction to the other.

10.0 SUMMARY

1. Legitimacy refers to the status of a child at birth whether the child was born within or outside wedlock.

2. Legitimacy accords a child full recognition as a member of a particular family.

3. A child born within wedlock is referred to as "Legitimate" while a child born outside wedlock is held to be "illegitimate" or bastard.

4. Legitimacy accords a child the right to inherit from his father's estate in contrast to an illegitimate child.

5. Under customary law, mere acknowledgement of a child is sufficient to confer him with legitimacy.

6. Where a child is born within ten months of the divorce under customary law, there is an irrebutable presumption that the child belonged to the previous husband. This presumption has been rebutted by higher courts on the ground that it is repugnant to natural justice, equity and good conscience.

7. In Practice a child born outside wedlock is usually stigmatized.

8. In Nigeria, the 1999 constitution provides that no citizen should be discriminated against on grounds of the circumstances of his birth and the concept of "bastard" child is inoperative in Nigeria.

9. In England, a child conceived within wedlock but born after parents are divorced is considered legitimate.

10. A child born after artificial insemination is legitimate even if the donor is not the husband provided it is done with the knowledge and consent of the husband.

11. Children of polygamous union are often regarded as illegitimate in Nigeria.

12. Where a child is the product of a void marriage, the child will be deemed to be legitimate if at the time of his conception, his parents considered themselves to be in a valid marriage.

13. Where the parents of an illegitimate child decides to contract a valid marriage, it confers the child with legitimacy.

14. A legitimated person has the same rights and obligation as any other legitimate child.

11.0 TUTOR- MARKED ASSIGNMENTS.

(a) Explain the concept of legitimacy

(b) "Under customary law, a child may be regarded as legitimate even if his mother never acquired the status of a wife" Nwogugu E.I. Assess the veracity of this statement.

12.0 SUGGESTED FURTHER READING

Nwogugu E. I. Family Land in Nigeria (Ibadan: Intec Publishers, 2011)

David Mc.Clean Morris: The Conflict of Laws, (London: Sweet and Maxwell Ltd 2000)

13.0 STATUTES

The Constitution of the Federal Republic of Nigeria (as Amended)

The Laws of Bendel State of Nigeria 1976.

MODULE 4

UNIT 2 LEGITIMATION

MODULE 4

UNIT 2 LEGITIMATION

1.0 INTRODUCTION

Legitimation aims at curing the defects in the circumstances of a Childs' birth which prevents him from benefitting from his paternity. Some of the modes of curing the defects include retrospective legitimation which could range from parents of the child conducting a valid marriage to his father's acknowledgement of his existence.

2.0. OBJECTIVE

The objective of this unit is to examine the various modes of legitimizing the circumstances of birth of a child born outside wedlock by addressing his paternity hurdles.

3.0 MEANING OF LEGITIMATION

Legitimation is the process by which an illegitimate child acquires legitimacy. It aims at curing the defects surrounding the circumstances of the birth of the child with a view to affording him the opportunity of benefitting from the recognition of the paternity of the child by his natural father.

4.0 MODES OF LEGITIMATION.

The various modes of legitimization include:

4.1 STATUTORY LEGITIMATION

The legitimacy Act 1929 Cap 88, Laws of Bendel State of Nigeria vol. iv, 1976 provides that a person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply by Petition to the High Court for a decree declaring that the Petitioner is the legitimated child of his parents

See section 4 (1)

A legitimated person shall have the same rights and shall be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate andsubject to the provisions of this Law, the provisions of any Act or Law relating to claims for damages, compensation, allowance, benefit, or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person.

See section 8

Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Law, and the father of the illegitimate person was or is at the time of the marriage, domiciled in a place other than within the State by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in the State be recognized as having been so legitimated from the commencement of this law or from the date

of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a place in which legitimation by subsequent marriage was permitted by law. See section 9(1)

5.0 LEGITIMATION BY SUBSEQUENT STATUTORY MARRIAGE

Where the parents of an illegitimate person marry or have married one another whether before or after the commencement of this Act, the marriage shall if the father of the illegitimate person was or is at the date of the marriage domiciled in Nigeria render that person.If living, legitimate from the commencement of this Act from the date of the marriage whichever happens last see section 3(1)

5.1 PREREQUISITE FOR THE APPLICATION OF SECTION 3(1) OF THE LEGITIMACY ACT.

The following preconditions must exist for legitimation by subsequent statutory marriage

(a) The parents of the illegitimate child must subsequently marry each other

(b) The subsequent marriage must be marriage under the Act and not under customary law.

(c)The person sought to be legitimated must be alive at the time of the marriage

The subsequent marriage retrospectively legitimizes the illegitimate child from the date of the marriage or the commencement of the Act.

6.0 EFFECT OF LEGITIMATION

It confers a person with the same rights and obligation as if he had been born legitimate. He is entitled to all the claims for damages, compensation, allowance or benefit accruing to a legitimate person. He is entitled to claim for and on behalf of the estate of his parents where necessary.

A legitimated person is entitled to interest in property to the same extent as if they were born legitimate. Where an dies illegitimate person with children on the commencement of the Act but before his legitimation through the marriage of his parents, his wife and children will be entitled to the benefits accruable to him in the same manner as if he was born legitimately provided they were alive at the time of the marriage of their grand parents and their father would have been legitimated if he was alive.

7.0 CONCLUSION

Recognition of the paternity of the child by his natural father is central to the validity of the process of legitimation. Inspite of the provisions of section 39(2) of the 1999 amended constitution, prohibiting discrimination against a person based on the circumstance of his birth, its failure to

abolish the concept of illegitimacy has encouraged the practice of utilizing the paternity of a child as a yardstick for assessing his suitability to enjoy the same rights as a legitimate child.

8.0 SUMMARY

a. Legitimation is the process by which an illegitimate child acquires legitimacy.

b. Its objective is to cure the defect foisted on a person by the circumstance of his birth.

c. It affords a person the opportunity of benefitting from the acknowledgement of his birth by his natural father.

d. The modes of legitimation includes statutory legitimation and legitimation by subsequent statutory marriage.

e. Statutory legitimation by marriage is not automatic in the conferment of legitimacy but is dependent on:

(i) The marriage must be statutory and not customary

(ii) The parents of the illegitimate child must subsequently marry each other

(iii) The person sought to be legitimated must be alive at the time of the marriage. Where however the person sought to be legitimated has a wife and children and he dies, he can serve as the conduit for conferring legitimacy on his children and they will be entitled to the rights and

benefits accruable to him in the same manner as if their father was born legitimate provided they are alive at the time of the marriage of their grant parents.

(iv) The effect of legitimation is to confer the legitimated person with the same rights and obligations as if he had been born legitimate.

9.0 TUTOR- MARKED ASSIGNMENTS.

(a) What is legitimation?

(b) Examine the condition precedent for the existence of a valid legitimation.

(c) Explain the effect of a valid legitimation.

10.0 SUGGESTED FURTHER READING

Nwogugu E. I. Family Land in Nigeria (Ibadan: HEBN PublishersPlc, 2011)

MODULE 4

UNIT 3 ADOPTION

UNIT 3 ADOPTION

1.0 INTRODUCTION

Adoption is the process by which relationship of parents and child is established between a child and third parties who are not his natural parents and who may not be biologically related to the child in any manner. Early adoption mostLYcentredaround placements of babies born outside marriage with married couple unable to have children of their own due to infertility. Adoption is relevant to a person's status as it affects a person's rights and obligation.

2.0. OBJECTIVE

The objective of this unit is to examine the concept of adoption, conditions for its validity and its relevance to a person's rights and obligation

3.0 CONCEPT OF ADOPTION

At birth a child has inalienable relationship with his parents that is legally recognized and protected by law. In Nigeria, due to the extended family practice that is enthrenched,non family members are also taken into homes, cared for and absorbed into the family unit. Religious organizations and other non governmentalorganizations routinely assume

the responsibility of caring for children and function as their parents throughout their life time. To formalize the relationship and transform it to a legally binding relationship,adoption was instituted as a statutory creation with specific regulations governing it enacted by states

4.0 SUITABILITY TO ADOPT.

Any person who is a matured adult of sound mind i.e not less than 25 years and at least 21 years older than the juvenile sought to be adopted is eligible to adopt a child.Anambra, Imo and Rivers State however insist on family ties with the adoptee. Any person of sound mind and an ostensible means of livelihood may apply to court to adopt a juvenile. Various states define Juvenile as a person under seventeen years (Anambra, Imo, Rivers, Ogun and Lagos State) or Eighteen years (Edo, Delta, Cross River and Oyo State). The Courts are usually more inclined to granting a joint application of husband and wife for adoption. However, where a sole applicant is a male, the court is usually not favourable to allowing him adopt a female juvenile except in exceptional cases. This is to protect the juveniles from sexually abusive relationships.

Consensus between spouses is usually a condition precedent for granting an adoption order.

5.0 SUITABILITY TO BE ADOPTED

Any Juvenile may be adopted with restrictions across the states of the Federation. This usually varies from insistencethat only abandoned children whose parents and relatives are unknown or untraceable can be adopted in Bendel and Lagos State see Section 3 (1) of the Bendel State Adoption Edict, 1979 and section 1(1) of Lagos state Edict to restricting adoption to unwanted babies of unmarried mothers who are not in a position to take care of them or whose fathers either do not want the baby, are unknown or cannot be traced or are unwilling to care for the child or mother of the baby is insane or has relatives who are unwilling to take care of the babies or recommended for adoption by doctors(applicable in Ogun State).

Arrangements could be madefor the adoption of a juvenile in respect of whom a corrective order has been made committing him to the care of an individual with no family ties to him see section 26(2) of the Children and Young Persons Law.

In some States, adoption order in respect of a child is restricted to indigenes of the state see Oyo State Adoption of Children Edict, 1984

6.0 CONDITION PRECEDENT TO MAKING AN ADOPTION ORDER

The following preconditions are mandated to be satisfied before an adoption order can be made

(a) The Applicant and the Juvenile sought to be adopted must be resident in the state where the Application for adoption is made

(bi) Spousal consent must be sought and obtained by the Applicant for an adoption order.

(ii) Parental consent may be necessary for the viability of an application of adoption order where parents are known but it is not mandatory in cases where the parents of the Juvenile are unknown or untraceable

(iii) The jurisdictional competence of the court making the adoption of the court is fundamental for the sustenance of an adoption order. Only courts within the jurisdiction where the juvenile is resident have powers to make valid adoption orders.

(iv) The Applicant must be reputable and not a derelict. He must have an ostensible means of livelihood and must have an established and identifiable residence.

(v) The Applicant must be able and willing to be responsible for the maintenance, education and welfare of the child sought to be adopted.

(vi) Adoption constitutes the severance of parental rights and the assumption of those rights by the third party applying to adopt the child. All parties involved must be aware of their change in status.

7.0 LEGAL IMPLICATION OF ADOPTION.

Adoption is a fundamental alteration in the status of both the adopted child and his parents with legal implication including:

(i) The extinguishing of all rights, duties, obligations and liabilities of the adopted juvenile's biological parents. This includes right to appoint a guardian and consent or dissent to marriage.

(ii) The adopter shall be responsible for all such rights, duties, obligations and liabilities exercisable in respect of the child as if the child was their biological child.

(iii) On the death of the adopter intestate, his estate naturally devolves on the adopted person as if he was the biological child of his adopted parents.

(iv) In any disposition of property *intervivos* or by will any reference to the "child" or children of the adopter includes adopted persons.

8.0 PROHIBITED CONDUCT IN ADOPTION

Adoption orders are subject to some restrictions with stipulated penalties for their infractions. Some of the prohibited conduct include:

(i) Entering into marriage relationship between the adopted juvenile with his adopted parents or their natural child is prohibited.

(ii) Offering or receiving consideration for adopting a juvenile except with the leave of the court.

(iii) Possession of a juvenile for the purpose of procuring his adoption outside a particular state.

9.0 EXTRA TERRITORIAL ADOPTION

Inter country adoption commenced as an altruistic response to provide succor for orphans and displaced children in World War II, the Korean War and the Vietnam War. The abandonment and institutionalization of children due to pervasive property in their country of origin has increased the pressure to adopt extra territorially.

The increasing number of intermediaries and agencies willing to facilitate the adoption process accounts for the thriving practice. The United States is the main receiving country of children from China, Russia, Vietnam, Guatemala and Columba.

10.0 CONCERNS ABOUT EXTRA TERRITORIAL ADOPTION

In spite of the proliferation of extra territorial adoption, the practice has raised ethical concerns on the basis that there is improper balancing of the needs of the children sought to be adopted and the adopting adults. The requirement of the adults is usually prioritized.

The material comfort provided and opportunity provided adopted children for a better life does not insulate them from the racism they are often exposed to.

Their removal from their culture and uprooting them from their environment could challenge the children with identity crisis with

psychological implications. Poorly regulated extraterritorial adoption may encourage abandonment, child sale and kidnapping.

The Hague convention is intended to control, regulate and secure the welfare of internationally adopted children.

11.0 THE HAGUE CONVENTION

The Hague Convention on private international law attempted to establish legally binding standards to guarantee the welfare of internationally adopted children which came into force in 1995. The main objective of the convention was to:

(a) establish safeguards to ensure that inter country adoption is in the best interest of the child.

(b) Encourage greater interaction and cooperation between countries to prevent abduction, sale and trafficking in children.

(c) Secure recognition of adoption made under the convention which is designed to be simpler and more child friendly

(d) It is intended to raise standards and eliminate abuses

11.1 APPLICATION OF THE HAGUE CONVENTION

The Hague convention applies where a child who is habitually resident in one contracting state is relocated by a person who is habitually resident in another contracting state either for or after adoption.

It must be established that both the adopters are suitable and the child sought to be adopted is adoptable.Under the Hague Convention a child is only adoptable if the adoption is in his best interest after due consideration has been given to his wishes and interest. The child's consent must be informed and obtained without duress.

The adopted child must have the capacity to be allowed entry into the receiving state.

The Hague convention stipulate that contracting states must designate a central authority to discharge their duties under the Convention. These include promoting cooperation over inter country adoption internally, provision of information to other central authority and the Permanent Bureau about the law in their country and eliminating obstacles to the operation of the Convention.Other public authorities or accredited bodies may be delegated to carry out the duties of the central body in case of individual adoption such as the collection and exchange of information about the child, the Applicants and measures to prevent abuses of adoption practice.

The Hague convention is expected to effectively regulate inter country adoption and improve the practice

12.0 RECOGNITION OF FOREIGN ADOPTION ORDERS

The legal effect of the validity of an adoption order is not affected by whether it was granted in another state of the federation or in a foreign country. Adoptionaffects a person's status which is determined by the law governing a person's domicile. Where the adopter and the adopted are domiciled in the same country at the time of adoption, it does not pose a problem as the adoption will be recognized in Nigeria inspite of the regulatory procedures. Where however the parties are domiciled in different countries, opinions are divergent. One school of thought is of the view that the adoption must be validated by the *lex domicile* of both parties for it to be recognized in Nigeria while the other school of thought is of the view that an adoption order will be recognized if it is made in accordance with the law of the adopter's domicile

13.0 CONCLUSION

Statutory regulation of placement of children with persons who are not their biological parents or family is essential to avoid exploitation of the vulnerability of children and to ensure that the interest of the child sought to be adopted is prioritized at all times.

14.0 SUMMARY

a. Adoption is the process by which a relationship of parents and child is established between a child and third parties, who are not his biological parents.

b. The effect of adoption is to extinguish the rights, duties and obligation of a child's natural parents and confer them on a third party who may have no family ties to the child.

c. Adoption is a life changing experience as it affects a persons status, rights and obligations.

d. For a person to be eligible for an adoption order, the Applicant must be suitable and not have financial disability. He must not be less than 25years old and he must be at least 21years older than the juvenile sought to be adopted.

e. The juvenile sought to be adopted must be suitable. His consent to be adopted must be informed and not obtained by duress.

f. Marital relationship between the adopted juvenile and his adopted parents and siblings is prohibited.

g. Giving or accepting, offering consideration for the purpose of facilitation process or taking a child outside his family for the purpose of procuring his adoption is prohibited.

h. Pervasive poverty and displacement of children by war has increased the necessity for extra territorial adoption.

i. To ensure proper balancing of the needs of the adopting parents and the interest of the children sought to be adopted the Hague Convention formulated standards, procedures and requirement to be fulfilled by citizens of contracting states.

j. The Hague Convention encourages greater interaction between states to prevent abduction, trafficking and sale of children under the guise of adoption.

15.0 TUTOR- MARKED ASSIGNMENTS.

(1a) Define adoption

(1b) Analyse the eligibility rules for adopters and juvenile sought to be adopted.

(2a) Discuss the condition precedent to the making of a valid adoption order.

(2b) What is the legal implication of a valid adoption process.

(3) "The Hague Convention sets out the conditions that must be satisfied before an order can be made" Discuss.

16.0 SUGGESTED FURTHER READING

Nwogugu E. I. Family Land in Nigeria (Ibadan: Intec Printers Ltd 2011)

Mosson J. M, Bailey-Harris R., and ProbertCretney R.J, Principles of Family Law (London: Sweet and Maxwell Ltd, 2008)

MODULE 5

SUCCESSION

UNIT 1 INTESTATE SUCCESION

UNIT 1 INTESTATE SUCCESION

1.0 INTRODUCTION

Succession refers to the process by which property is transferred to a new owner on the death or a previous owner. Succession could either be testate or intestate. Intestate succession is the mode of succession where the deceased has not written a Will directing how his property is to be distributed.The court is confronted with a plaetoral of applicable laws to choose from and it is expected to make an appropriate decision after a careful appraisal of all the relevant laws. In this unit, intestate succession shall be examined.

2.0. OBJECTIVE

The objective of this module is to examine succession, its variants and application of regulatory laws with a view to exposing the students to the validity of intestate mode of succession and the challenges it poses.

3.0 MEANING OF SUCCESSION

The administration of the estate of a dead person becomes an issue after all debts, duties and expenses have been paid. Succession refers to the process by which his properties and entitlement are taken over by another person.

4.0 MEANING OF INTESTATE SUCCESSION

Intestate succession refers to a mode of succession governing the administration of the estate of a deceased person who did not make a Will. When a person writes a Will which fails to satisfy the validity test, the estate will be administered in the same manner as if he had died intestate.

5.0 INTESTATE SUCCESSION TO MOVABLE PROPERTY.

For over 200 years, it has been settled law that intestate succession to movable property is governed by the law of the deceased last domicile. It however does not affect the right of the foreign government to take over property adjudged ownerless on the principle of *bona vacantia*

6.0 INTESTATE SUCCESSION TO IMMOVABLE PROPERTY

Intestate succession to immovable property is governed by *lexsitus*i.e the law of the place where the immovable property is located except where succession is governed by customary law.

7.0 APPLICATION OF INTESTATE SUCCESSION

Intestate succession is either customary or non customary. The application of both modes of succession vary from state to state and from locality to locality with various levels of complication and lack of clarity. In Lagos, Ogun, Oyo, Ondo, Edo and Delta State, intestate succession to the property of deceased spouses is governed by the Marriage Act and the Administration of Estate Law, Cap 1, Laws of Western Region of Nigeria,

1959 which provides that where a person marries under the Act and the spouse dies intestate after the commencement of the law, his property should be distributed in accordance with the administration of Estate Law in the same manner as if he had died testate notwithstanding any customary law to the contrary. See section 49(5) of the Administration of Estate Law.

8.0 ADMINISTRATION OF ESTATE GOVERNED BY CUSTOMARY LAW

Administration of Estate Law is inapplicable to an estate governed by customary law or where the distribution is carried out under the authority of a customary court.

Customary law is deemed to be applicable in causes and matters where the parties are deemed to be natives and in cause and matters between natives and non natives where it appears to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable.

In *Zaidan v Mohsens (1973) 1 ALLNLR 56,* the parties were of Lebanese Moslems descent. The deceased married his Defendant wife under Muslim law before he died intestate while himself, his wife and his mother domiciled in Lebanon. In proceedings instituted by his mother who claimed entitlement of leasehold properties owned by her deceased son in

Warri, Nigeria.The court had to decide on the applicable intestate succession law. The Supreme Court observed that the applicable law was the Moslem Customary Law of Lebanon which is binding between the parties and not the Administration of Estates Law inspite of the fact that the parties have been resident in Nigeria for a long time.

9.0 DISTRIBUTION OF PROPERTY UNDER THE ADMINISTRATION OF ESTATE LAW 1959

The distribution of property under the administration of Estate Law is stated as follows:

(a) where the intestate is survived by a husband or wife but no issue, parents, brother or sister of whole blood, the estate will be held in trust for the surviving husband or wife absolutely

(b) where the intestate leaves a husband, or wife and issue, the surviving spouse is entitled to take the personal chattels absolutely. The residuary estate of the intestate will be charged with the payment of a net sum of money equivalent to the value of one –third of the residuary estate, free of death duties and costs to the surviving spouse at the rate of two and a half percent from the date of the date until the sum is paid or appropriated. One third of the estate is to be held on trust for the surviving spouse during his or her lifetime and subsequently on statutory

trust for the children of the interstate while the remaining two – thirds will be held on statutory trusts for the issue of the intestate.

(c) if the intestate leaves a husband or wife and parents, brother or sister of the will be as in (b) above. After the payment of the stipulated net sum and interest thereon, the residuary estate (less the personal chattels) is to be held as to one half in trust for the surviving parent or parents or where no parent survives on statutory trust for the brothers and sisters of the intestate.

(d) if the intestate leaves issue but no husband or wife, the residuary estate of the intestate is expected to be held on statutory trusts for the issue of the intestate.

The residuary estate of the intestate will devolve on the state as bona vacantia in the absence of any person taking an absolute interest in the estate.

(e) where property is distributed on intestacy among the children of the deceased, equity presumes that the father intends to preserve the family harmony by giving to his children almost equal portion see section 50(i)(iii) of the Administration of Estates Law 1959

10.0 JURISDICTION OVER FOREIGN IMMOVABLES

Where a high court has jurisdiction to administer the estate of the deceased, its jurisdiction extends to the determination of title to property locatedextra territorially for the purpose of administration.

In *Salubi v Nwariaku*(2003) 7NWLR (Pt 819) 426 the deceased died intestate and was survived by a widow, he married under the ordinance and children of the marriage and hadother children out of wedlock. He left immovable property in Benin City, Lagos, Sapele and Warri. Letters of Administration were granted to his widow and his eldest son Dr. T. E.A Salubi. The widow declined to administer the estate. In an application to set aside the letters of administration instituted by the oldest surviving child, Mrs. Nwariaku on behalf of the other beneficiaries of the estate, applied for the distribution of the estate to all the beneficiaries in accordance with the administration of Estate Law. In Response to the Appellants objection that some of the properties were out sideBendel State and the High Court was incompetent to adjudicate on any issues relating to them.The supreme court held that the High Court of a state has jurisdiction to entertain an action arising from the administration of the estate of a deceased person who died intestate irrespective of the fact that the letters of administration is in respect of property within the state while the estate consists of property outside the state.

11.0 CONCLUSION

The non uniformity of customary law mode of distribution of property in intestate succession in Nigeria poses challenges due to the lack of clarity and difficulty in deciphering applicable rules in some jurisdictions. It is believed that with time attempts will be made to encourage more uniformity in the applicable rules across the country.

12.0 SUMMARY

1. Succession refers to the process by which property is transferred to a new owner on the death of a previous owner.

2. Succession could either be testate or intestate.

3. Intestate succession refers to the mode of administration of the estate of a deceased person who did not write a Will.

4. Where a person writes a Will which does not pass the validity test, the person's estate will be administered in the same manner as if he had died intestate.

5. Movable property of a person who dies interstate is governed by the law of the person's last domicile.

6. Intestate succession to immovable property is governed by *lexsitus*i.e the law of the place where the property is located.

7. Intestate succession is either customary or non customary.

8. Where a person marries under the marriage Act and her spouse dies intestate, the property is distributed in accordance with the administration of estate law inspite of any customary law to the contrary.

9. Where the distribution is carried out under the order of a customary court, the administration of estate law is inapplicable.

10. Customary law is applicable in causes and matters where the parties are deemed to be natives and in causes and matters between natives and non natives where it appears to the court that substantial injustice would be done by a strict adherence to any other law which would otherwise be applicable.

13.0 TUTOR- MARKED ASSIGNMENTS.

(1a) Define intestate succession

(1b) Analyse the applicable law governing the distribution of property of a person who dies intestate.

14.0 SUGGESTED FURTHER READING

Nwogugu E. I. Family Land in Nigeria (Ibadan: HEBN Publishers Plc, 2011)

MODULE 5

UNIT 2 TESTATE SUCCESION

UNIT 2 TESTATE SUCCESION

1.0 INTRODUCTION

Testate succession involves the passing of rights or property by Will. Will includes a testament, a codicil, an appointment by Will or by writing in the nature of a Will in the exercise of a power. Subject to the Wills Law, the mode of distribution of the estate of a person who dies testate is usually stated in the Will.

2.0. OBJECTIVE

The objective of this unit is to guide the students to distinguish testate and intestate succession with a view to affording students the opportunity of appreciating the peculiarities of each mode of succession and their adaptation in Nigeria.

3.0 NATURE OF A WILL

A Will has two fundamental characteristics. It is ambulatory and revocable and it is *AminusTestandi*

A Will takes effect from the demise of the testator and does not affect properties disposed of before the making of the Will. A Will is a flexible instrument that can be revoked, amended and altered by the Testator as he deems fit provided the necessary formalities are complied with.

A Testator must have the requisite *mensrea* that the instrument should be his last Will and Testament. It must be free and voluntarily executed. Where there is compulsion and lack of the requisite mentis, the Testator will be held to lack the *aminus* to execute a Will.

4.0 CAPACITY TO MAKE A WILL

The choice of law governing capacity to make a Will is the conflict of law rule of *lex domicile* of the testator for movable property at the time of the execution of the Will while the *lexsitus* governs immovable property.

Under the Wills Act 1937 as amended aid the Wills Law, 1852 every person of age and of good physical and mental health has the capacity to make a will irrespective of whether or not the person is subject to customary Law.

4.1 PERSONS WITH DISABILITY

The following persons are considered incapable of executing a valid Will. They include:

(a) Infants: Persons under eighteen years are considered incompetent to execute a Will. However, infants undergoing military service are accorded special exception to make priviledged Wills.

(b) Persons of Unsound Mind: Persons of unsound mind and memory are considered incapable of making a valid Will. The mentis of the

Testator at the time of making the Will is a relevant consideration in assessing its validity. Where a person of unsound mind executes a Will during the period of lucidity or in between episodes the Will could be adjudged to be valid in the absence of any evidence to the contrary

(c) Illiteracy: Illiteracy is not a handicap to the execution of the Will if it is established and reflected in the Will that at the time of execution of the Will, it was read in English and interpreted in the language commonly spoken by the Testator and he appears to understand the content of the Will before its execution. In other words the Will must contain an illiterate jurat or it will be held to be incompetent.

(d) Blindness: A blind person is not incapacitated from making a Will but extreme care must be taken to avoid fraudulent interventions.

(e) Fraud: Fraud invalidates a Will.

(f) Coercion: It is essential to the validity of a Will that it must be executed free of psychological pressure on the Testator

5.0 PRIVILEDGED WILLS

Priviledged Wills are a specie of Wills exempted from the usual requirement as to capacity and form.

Section 11 of the Wills Act 1837 provide that any soldier, marine or seaman in actual service may dispose of his personal estate without compliance as to form under the Act.

5.1 CONDITION PRECEDENT TO ITS APPLICATION

The conditions to be satisfied for the application of the Priviledged Wills is that the soldier, seaman and mariner must be in actual service.

6.0 FORMAL REQUIREMENTS OF A WILL

To constitute a Will, the following formalities must be complied with

(i) The Will must be in writing: The Law stipulates that all Wills must be in writing and should not be oral

(ii) The Will must be signed by the Testator or by someone in his presence and by his direction. In the case of an illiterate Testator, a thumb print will suffice in the place of a signature.

(iii) Testator's Signature's Witnessing: The Testator's signature must be witnessed by two persons present who need not be present at the same time.

(iv) Attestation by the Witness: The witnesses to the Testator's signature must append their signatures after that of the Testator as attestation to the Testator's signature. The witnesses signature must be in the presence of the Testator.

6.0 OBLITERATIONS, ALTERATION AND INTERLINEATIONS

Any alterations, obliteration and interlineations on the Will by the Testator and his witnesses is required to be signed by them in the margin opposite the alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the Will.

See section 21 of the Wills Act, 1837, section 18 of the Wills Law and section 82 of Succession Law Edict, 1987.

7.0 REVOCATION OF WILLS

An executed Will can be revoked at anytime by the execution of a later Will. Revocation may be express or implied. An express revocation may be by an express clause in the Will or the wording of the Will. An implied revocation could be inferred where there is inconsistency between the provisions of a later and an earlier Will. For example where a specific property is given to X in a Will and a subsequent Will gives the same property to Y.

7.1 REVOCATION BY DESTRUCTION

A Will can be revoked by withdrawing it from existence either by burning, tearing or destroying it by the Testator or with his knowledge and consent or in his presence or by his directions.

The destruction of the Will by the Testator must be with the intention of revoking it. Where the destruction is done in error or at a time when the Testator was suffering from mental incapacity or drugs, it would not amount to a revocation.

8.0 REVOCATION BY SUBSEQUENT MARRIAGE

Subject to the law of the Testator's domicile marriage revokes any previous Will made by either party to the marriage. A subsequent void marriage Will not revoke a Will under the rules of the conflict of laws. e.g where the parties are within the prohibited degree of affinity and consanguinity

9.0 REVIVAL OF WILLS

Except where a Will is completely destroyed, it may be revived by re-executing it or by executing a codicil which expresses an intention to revive the Will.

10.0 EFFECT OF WILLS

A Will becomes operational on the death of the Testator in the absence of any provision to the contrary.

11.0 CONCLUSION

testate succession is usually clearer and easier to deal with. However, due to the high illiteracy level in Nigeria, increasing high estate fees solicitor's fees, intestate mode of succession is still prevalent.

12.0 SUMMARY

1. Testate succession involves the passing of rights or property by Will.

2. Will embraces testament, a codicil an appointment by Will or by writing in the nature of a Will in the exercise of a power.

3. A Will has two fundamental characteristic. It is ambulatory and revocable as well as *aminustestandi*.

4. A Will takes effect from the demise of the Testator.

5. A Will is a flexible instrument that can be amended altered and revoked.

6. For a Will to be valid, it must be freely and voluntarily executed. There must be no undue influence on the Testator, compulsion or coercion.

7. Infants and persons of unsound mind have no capacity to execute Wills.

8. Illiterate and blind persons suffer from qualified disability.

9. Fraud and coercion vitiates a Will.

10. A Will is revoked by the execution of a subsequent Will or codicil by the Testator

13.0 TUTOR MARKED ASSIGNMENTS.

1. Discuss the formal requirement of a Will.

2. Analyse the circumstance pursuant to which an executed Will can be revoked.

14.0 SUGGESTED FURTHER READING

Nwogugu E. I. Family Law in Nigeria (Ibadan: HEBN Publishers Plc, 2011)

David Mcclean Morris: The Conflict of Laws (London: Sweet & Maxwell Ltd, 2000)

MODULE 6

FOREIGN JUDGEMENTS IN NIGERIAN COURTS

UNIT 1 FOREIGN JUDGEMENTS IN NIGERIAN COURTS

1.0 INTRODUCTION

Litigation sometimes have transnational outreach. Enforcement of court'sjudgement obtained in one jurisdiction in another could pose enormous challenges. Consequently, most Plaintiffs prefer to institute proceedings in the jurisdictions where the property is located. In Nigeria the Foreign Judgement (Reciprocal Enforcement) Act 2004 has attempted to ease the inconvenience through its provision which provide for the recognition and enforcement of judgement and orders obtained extraterritorially

2.0. OBJECTIVE

The objective of this unit is to expose the students to the challenges of enforcement of judgement and orders obtained in foreign jurisdictions and attempts by Private International Law rules tried to ease the problem by advocating more recognition by nations of such extra territorially obtained orders.

3.0 ENFORCEMENT OF FOREIGN JUDGEMENT

Once a foreign judgement is recognized, the successful party then seeks to enforce the order in the recognizing country. As discussed in Module 2 unit 3recognition of foreign judgement is either done unilaterally or

premised on the principle of comity of nations.Enforcement refers to the various steps taken by the successful party to implement the judgement and give value to the order obtained.

4.0 JUSTIFICATION FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT

Since the mid nineteenth century.the English Courts have justified the recognition and enforcement of foreign judgments on the doctrine of obligation of states to each other. Parties are under obligation to comply with judgement and orders obtained from court with competent jurisdiction to mediate on issues between the parties.

5.0 DISTINCTION BETWEEN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT.

A foreign judgement must first be recognized before it can be enforced in Nigeria. The converse is not necessarily true.A foreign judgement may be recognized although it may not be enforced.

A foreign judgement in rem in respect of title to immovable property situate in a foreign country is unenforceable in Nigeria.

A foreign judgement may be recognized and utilized as a basis for challenging a subsequent action in a Nigerian court based on the same issues and subject matter already decided in the foreign court on the principle of res judicata

Enforcement necessarily involves recognition while recognition does not involve enforcement.

6.0 RECOGNITION AND ENFORCEMENT AT COMMON LAW

For a foreign judgement to be enforceable at Common Law, the adjudicating court must have jurisdiction over the defendant in an international sense. Where the exercise of a court's jurisdiction is contrary to recognized international law principles even where the court properly exercises its jurisdiction, it will not be enforced.

In *Emmanuel v Symon* (1908) 1 KB 2, 02 the court stated that there are five cases in which the courts will enforce a foreign judgement. They include:

(a) Where the Defendant is a subject of the foreign country in which the judgement has been obtained

(b) Where he was resident in the foreign country at the time of commencement of the action.

(c) Where the Defendant in the character of the Plaintiff has selected the forum in which he is afterwards sued.

(d) Where he has voluntarily appeared and

(e) Where he has contracted to submit himself to the forum in which the judgement was obtained.

From the above, it is apparent that there must be presence, residence and submission to the jurisdiction of the court.

(a) **Presence**: The Defendant must have been served with a Writ of Summons which he responded to with his presence. It is irrelevant that his presence was fleeting or merely transitory. The choice of the criterion of presence over residence is borne out of the fact that it is easier to ascertain presence than residence. Where the Defendant is a corporation, the requirement of physical presence applicable to natural persons is modified. Under English Law, the corporation at the time of the commencement of the action, must be carrying out substantial business in the jurisdiction or must have some semblance of permanent presence in the country of trial. The critieria to be fulfilled is set out in *Adams v Cape Industries Plc* (1928) 44 T.L.R 746 as:

(i) The company must have established and maintained at its own expense a fixed place of business of its own in that country and for a reasonable length of time or has carried on its business there either directly or through its employees or agents

(ii) The overseas corporation has a representative in the foreign country carrying on business there on behalf of the company and from a fixed place for a reasonable period of time.

In the case of a conglomerate or group of companies, the presence of a subsidiary may be treated as the presence of the parent company

provided the subsidiary exist for the purpose of carrying on the business of the parent as its agent.

In *Littauer Glove Corporation v F.W Millinghton Ltd* (1928) 44 T.L.R. 746. The Service of a Writ on the Managing Director of an English Company at a customer's office while on a visit to New York as a salesman for his company was held not to confer jurisdiction on the New York court since the company could not really be said to be carrying on business in New York.

(b) **Submission**: Submission to the jurisdiction of the court could occur, (a) Where the Defendant was the Plaintiff in the original court and the judgement was given against him in a counter claim. He cannot claim that the court lacked jurisdiction with regards to the counter claim

(b) Where the Defendant voluntarily appears to Defend the proceedings on the merits, he is held to have submitted to the court's jurisdiction even where he is also challenging the jurisdiction of the court.

(c) **Contract or other Agreement**:where the Defendant enters into a contract or agreement to submit himself to the jurisdiction of the foreign court, he cannot subsequently plead lack of jurisdiction of that court. Such Agreement must however be express, clear and unequivocal

7.0 CONCLUSION

The world is fast becoming a global village and removal of judicial boundaries to the attainment of the fruits of judgement of a victorious

party is the guiding principle for the recognition and enforcement of foreign judgements in Nigerian courts.

8.0 SUMMARY

1. Enforcement of the judgement obtained in one jurisdiction in another jurisdiction could pose enormous challenges.

2. In Nigeria, enforcement of foreign judgements is regulated by the Foreign Judgement (Reciprocal Enforcement) Act 2004.

3. Recognition is the prerequisite to enforcement of foreign order.

4. Justification for the recognition and enforcement of foreign order is the doctrine of obligation of states.

5. Enforcement and Recognition are distinguishable. For a foreign judgement to be enforced, it must first be recognized. A foreign order can be recognized without necessarily enforcing it.

6. For a judgement or order to be enforceable, the Defendant must have submitted himself to the jurisdiction of the court issuing the order.

7. Presence and Residence are necessary requirementsfor submission to the jurisdiction of the court.

8. Enforcement of foreign judgements is essential to ensuring that successful litigants are not deprived of the fruit of their judgement

9.0 TUTOR MARKED ASSIGNMENTS.

Distinguish between recognition and enforcement of foreign judgement

10.0 SUGGESTED FURTHER READING

Omoruyi I.O., An Introduction to Private International Law: Nigerian Perspectives (Benin City: Ambik Press, 2005)