

## REINFORCING MARITAL RIGHTS THROUGH PRENUPTIAL AGREEMENTS IN NIGERIA: THE WAY FORWARD

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### Abstract

*The marriage union is usually entered into by parties believing sincerely that they would be together till death but this is not the case always. The rate of divorce the world over has increased and is increasing; Nigeria is not left out in the astronomical increase in divorce rates. It was reported that between January and February, 2020 in Nigeria there was about 4,000 applications for divorce in Nigeria's capital city Abuja<sup>1</sup>. It is an aphorism that divorce is inevitable in the worlds polity therefore it is imperative to protect parties when there is a divorce. Research also shows that women are more affected than men when there is a divorce. There are laws in place already in Nigeria to protect women when there is a divorce but they have proved ineffective to a large extent. Prenuptial agreements are a veritable source of protection for*

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<sup>1</sup> The Maravi post, "4,000 divorce applications already in 2020 in Nigeria's Abuja City", 22 February, 2020, 04:45 PM, <<https://www.maravipost.com/4000-divorce-applications-already-in-2020-in-nigerias-abuja-city/>> accessed 21 April 2020.

*women who are incidentally the weaker party when there is a divorce but Nigeria has no legal framework for prenuptial agreements. The doctrinal methodology was adopted in this research. This work indicated the importance of prenuptial agreements and suggests how to inculcate them into Nigerian laws to protect the rights of women.*

## **1. Prenuptial Agreements and the Rights of a Divorced Wife and her Children**

### **Meaning of Prenuptial Agreements**

One way a woman's right and those of her children can be safeguarded in Nigeria in the event of a divorce is by prenuptial agreements. Prenuptial agreements which are otherwise known as 'Prenups' are agreements made by a couple in contemplation of a marriage that is yet to take place concerning the ownership of their respective assets should the marriage fail. The Merriam-Webster Dictionary<sup>2</sup> defined prenuptial agreements as 'an agreement made between two people before marrying in which they give up future rights to each other's property in the event of divorce or death'. These definitions are very simplistic but they capture the essence of a Prenuptial agreement as an agreement or a contract where the contracting parties are prospective husband and wife and who decide even before getting into the marriage contract to outline how property and assets will be shared between them in the event of a dissolution of the marriage or a death of any of the parties. It has also been legally defined<sup>3</sup> as 'a contract between two people who

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<sup>2</sup> Online Dictionary <<https://www.merriam-webster.com/dictionary/prenuptial%20agreement>>, accessed 9 October 2017.

<sup>3</sup> Farfex The free English dictionary <<http://legaldictionary.thefreedictionary.com/prenuptial+agreement>> accessed 9 October 2017

are about to marry, setting out the terms of possession of assets, treatment of future earnings, control of the property of each, and potential division if the marriage is dissolved'. A more elaborate definition is proffered by the U.S Legal<sup>4</sup> as follows:

A prenuptial agreement is a written contract created by two people planning to be married. The agreement typically lists all of the property each person owns, as well as their debts, and it specifies what each person's property rights will be after they tie the knot. Prenuptial agreements often specify how property will be divided ...

From the foregoing, it shows that the scope of a prenuptial agreement can be very broad, subject to the intentions of the prospective married couple and the law governing prenuptial agreements in the country or state where the agreement is sought to be entered into.

It would seem that prenuptial agreements are mostly entered into by people with means; where either or both parties have substantial assets, children from a prior marriage are in contemplation, or there is in anticipation an inheritance of high value, or where a party or either party has been exploited in a previous marriage<sup>5</sup>. They are usually used by couples who want to set down the terms of their relationship especially in terms of economic advantage before they walk down the aisle and this may in appropriate cases affect the rights of the children they had before the marriage and those they may have in course of the marriage<sup>6</sup>. Prenuptial agreements are

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<sup>4</sup> 'Prenuptial Agreements and Legal Definitions' <<https://definitions.uslegal.com/p/prenuptial-agreement/>> accessed 9 October 2017

<sup>5</sup> Farfex The free English dictionary n.1 above.

<sup>6</sup> *Ibid*

enforceable in many countries of the world including Australia, Austria, Brazil, Canada, China, England and Wales, Finland, France, Germany, Greece, Luxemburg, Netherlands, New Zealand, Philippines, Portugal, Russia, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, etc<sup>7</sup>. There are countries whose laws do not expressly provide for prenuptial agreements but their laws do not expressly provide against it, so they seem applicable. One of such countries is Jamaica<sup>8</sup>. Nigeria is also another country that has no direct positive law on prenuptial agreement but there is also no law out rightly prohibiting it. It is thought that Jamaican laws may permit prenuptial agreements because their laws seem to follow English law in its content and application even though there does not seem to be any judicial pronouncement on the issue<sup>9</sup>. In the Bahamas Prenuptial agreements are not enforceable but the courts may take them into consideration in ascertaining the intentions of the parties to the marriage with respect to division of marital properties but the courts are not bound<sup>10</sup>. It is important to distinguish between prenuptial agreements from marriage brokerage contracts because while prenuptial agreements and marriage brokerage contracts may bear some similarities, the former is largely legal and the latter illegal in most jurisdictions.

## **2. Prenuptial Agreements in Nigeria**

Prenuptial agreements are not common place in Nigeria. It would appear that the cultural and religious climate in Nigeria at this

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<sup>7</sup> Jeremy D, Morley, '*Prenups around the world*' <[http://www.internationaldivorce.com/prenups\\_around\\_the\\_world.html](http://www.internationaldivorce.com/prenups_around_the_world.html)>accessed 9 October 2017.

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid*

present time, would not create a conducive environment for the application of prenuptial agreements in Nigeria<sup>11</sup>. The vast Nigerian population regard prenuptial agreement as alien. The vast majority of Nigerians also, are very religious and see marriage as an institution ordained, brought to be and supervised by God; therefore, a Prenuptial agreement is a derogation from the will and purpose of God for marriage since a prenuptial agreement envisages a divorce<sup>12</sup>. Prenuptial agreements are not provided in so much detail or literature under Nigerian Law but it is obvious that it is not totally absent or illegal. The Matrimonial Causes Act<sup>13</sup>, section.72 provides thus,

The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

The above is like the only statutory provision dealing directly with the validity of prenuptial agreements in Nigeria. It gives the courts in Nigeria powers in considering issues of settlement of property to take into consideration Prenuptial or ante nuptial agreements entered into by the parties. From the foregoing, it is clear that apart from parties, children can be the beneficiaries of a prenuptial

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<sup>11</sup> Elvis Aisha, *'Why you should consider a Prenuptial Agreement before Marriage'*, (2016) <<http://www.nigeriabar.com/2016/02/why-you-should-consider-a-pre-nuptial-agreement-before-marriage#.We8XtltSziU>> accessed 24 October 2017

<sup>12</sup> *Ibid*

<sup>13</sup> Laws of the Federation of Nigeria, (LFN) 2014, cap M7,

agreement under this subsection as it envisages that the courts should do what is just and equitable for the benefit of ‘all the parties to, and the children of the marriage...’ It is laudable that children are provided for in this provision. However, children cannot be parties to a prenuptial agreement as the subsection clearly envisages only the parties to the marriage.

There is a serious dearth of case law on this aspect of the law in Nigeria. However, the case of *Oghoyone v. Oghoyone*<sup>14</sup> is particularly instructive on the position of the courts with regards to prenuptial agreements. In *Oghoyone’s* case the parties had entered a prenuptial agreement before their purported marriage. The court finally found that that marriage was void but in keeping with the spirit and letters of section 72(2) MCA<sup>15</sup> the court went ahead to determine the settlement of property between the parties relying on the prenuptial agreement entered into by the parties. It should be noted however, that in this case there really was no formal prenuptial agreement. The legal framework for the application of Prenuptial agreements in Nigeria is obviously very vague, imprecise and nebulous because section.72(2)MCA gives the court wide discretionary powers to apply or refuse to apply prenuptial agreements unless it is ‘just and equitable’. The criteria for determining what is just and equitable are nowhere defined by the Matrimonial Causes Act<sup>16</sup>. It is submitted that this will give wide latitude to Judges to abuse the provision where they are inclined to do so.

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<sup>14</sup> (2010) 3 NWLR (Pt. 1182) 564.

<sup>15</sup> LFN,2014, CAP M7

<sup>16</sup> *Ibid*

### **3. Advantages/Prospects of Prenuptial Agreements in Nigeria**

Prenuptial agreements have many apparent advantages and it is imperative for Nigeria to join the league of civilised nations having a well-structured legal framework for the application and enforcement of prenuptial agreements. In as much as Nigerians, hypocritically shy away from divorce when in fact divorce is on the increase in Nigeria and it is imperative for parties to a marriage to make contingent plans for the ‘unlikely’ event of divorce. This will help to safe guard the rights of women and children. In Nigeria the man is usually the breadwinner in many cases and better placed economically. It may seem absurd for a woman to start asking for a prenuptial agreement before marriage as it may be interpreted as an attempt to steal from the husband or defraud him. It is important therefore, to make prenuptial agreement part of the procedure for getting married as it is under Jewish culture<sup>17</sup>.

Previously, divorce was obviously not a common occurrence in Nigeria as it is now. This seems to be largely due to the fact that extended families provided a strong support system for marriages so then the issues of divorce did not arise then as much as it does now. Husbands and wives are more independent of their extended families, and are more enlightened now than before; therefore, most times these extended families cannot provide the necessary security for marriages like before. It is therefore imperative that prospective husbands and wives execute a prenuptial agreement before marriage. This will definitely safeguard the rights of women who are economically disadvantaged when there is a divorce.

Nigerians are deeply religious too and that has also helped in curbing the rate of divorce in Nigeria, but not entirely. The

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<sup>17</sup> It is referred to as the ‘ketubah’

predominant religions in Nigeria are traditional religion, Islam and Christianity and these religions provide for divorce even if they do not encourage it<sup>18</sup>. Therefore, people no longer feel ‘irreligious’ when they opt out of a marriage. For this reason it is better for parties to put sentiments aside and enter a prenuptial agreement. It is also untrue that a prenuptial agreement will make a marriage unstable or make it end in divorce earlier than it would have ordinarily lasted. Parties can remain committed to their marriage vows irrespective of a prenuptial agreement. The fact that parties seem to be so much in love as at the time of marriage is no guarantee that there will never be a divorce. It has also been said that prenuptial agreements afford the couple a more worthwhile opportunity to share their future dreams and aspirations instead of living with the illusion that a divorce is impossible.<sup>19</sup> A prenuptial agreement is just a security in the likely or unlikely event of a divorce.

It should be noted that a prenuptial agreement does not only give away property, it can also determine what property can be given out. A party may by a prenuptial agreement exclude property from passing to the other party in the event of a divorce. This is the reason why people who have inheritance or who want to protect wealth from a previous marriage belonging to them and their children in many countries would most likely opt for a prenuptial

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<sup>18</sup> The bible provides for two grounds for divorce. One is on grounds of immorality (matthew 5:32,19:9 and on grounds of abandonment, that is where the unbelieving party abandons the believing party, refer to 1 corinthians 7:15). See maintenance for issue of divorce in Islam

<sup>19</sup> S.C. Ifemeje, ‘A case for Global Enforceable Prenuptial agreements’ [2010] 1 UNIZIK J.I.L.J, 184

agreement<sup>20</sup>. A prenuptial agreement can protect and safeguard a party's personal property, support a party's estate planning, define what property is considered marital or personal property, elucidate special agreements between the prospective husband and wife and establish procedures and formula for deciding future financial matters and obligations<sup>21</sup>.

A prenuptial agreement also has the added advantage that it reduces future conflicts. Settlement of property is a veritable source of conflict and controversy when a marriage ends in a divorce. A party may feel cheated with the outcomes of the distribution, but where there is an existing prenuptial agreement, the parties already know what to expect beforehand and are mostly agreeable to it. This automatically saves the parties cost of litigation and unnecessary further strain on their already broken or fragile relationship. Sometimes, people go through a lot of adjustments and deprivations during marriage while for some marriage is a bed of roses for some others marriage is hell and high waters. For a person who only endured marriage and had to opt for a divorce at breaking point or who was divorced even where he or she was willing to keep clinging to the marriage, a prenuptial agreement would definitely lessen the burden of fighting for financial reparations; and women and children are usually left with the shorter end of the stick most times especially where the man is the one more economically empowered. Further issues of settlement of property upon divorce can lead to terrible media wars and bad publicity for the parties.

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<sup>20</sup> In *Radmacher v Granatino* [2010] UKSC 42, the United Kingdom Supreme Court upheld a prenup which protected a woman's £106m fortune.

<sup>21</sup> *Elvis Aisha* n.11 above.

These can be avoided by executing a prenuptial agreement with confidentiality provisions<sup>22</sup>.

There is an urgent need to provide a legal framework for the drafting and enforcement of prenuptial agreements in Nigeria. This is because, unlike many countries like the United States of America, Canada, the United Kingdom, Australia and other developed countries of the world having laws that are clear and equitable and very protective of women and children where issues of settlement of property upon divorce are so well outlined and applied, the Nigerian law on settlement of property as espoused in the Matrimonial Cause Act<sup>23</sup> does not sufficiently provide for prenuptial agreements. Ironically prenuptial agreements are more common placed in these countries where their laws seem better drafted and applied. The Nigerian law is vague leaving too much discretion to the Judges and this has been exercised in the disfavour of women and children in many cases.<sup>24</sup>

A prenuptial agreement has its demerits just like everything that has merits. Parties may not wish to concern themselves with issues of divorce or what may happen in the event of a divorce when they are about to enter a marriage because, it may seem ominous to them to start discussing prenuptial agreements at that stage . This indeed is not an easy task especially in climes like Nigeria where most people are superstitious or ignorantly religious. Ironically, it is the women that get so emotionally attached and committed and never want to

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<sup>22</sup> *Ibid.*

<sup>23</sup> S.72 LFN,2004,Ccap M7

<sup>24</sup> Elvis Aisha, *n.11 above*. see also *Doherty v Doherty* [2010] All FWLR (pt 519) p.1145 at 1149, *Nwanya Nwanya* (1987) 3 NWLR (pT.62) 697 *Akinbuwa v Akinbuwa* (1998) 7 NWLR (pt 559) 661

bother about things like a prenuptial agreement even though they are the ones to suffer from the lack of a prenuptial agreement when there is a divorce.

For a prenuptial agreement to be valid, parties must disclose their respective properties<sup>25</sup>. A party may not wish to disclose all his or her property to the other party at the point of entering a marriage for reasons of lack of full trust or other genuine considerations. In that case, such a party may not be willing to enter a prenuptial agreement.

Where the parties really have no wealth and therefore nothing much to settle except for anticipated future wealth it may not make so much sense to start entering into a prenuptial agreement. Further, the very act of negotiating a prenuptial agreement may lead to conflict between the parties that may even terminate their relationship if not properly managed.

A prenuptial agreement however, has more pros than cons and parties should be encouraged to enter into prenuptial agreements in Nigeria. The Nigerian state should also develop rules or guidelines as it is in other jurisdictions for drafting and executing a prenuptial agreement.

It is clear from the foregoing that Nigerian statute has not adequately protected the rights of women and children in the event of a divorce. In most cases like in the provision of ancillary reliefs,

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<sup>25</sup> The law in Nigeria does not expressly say so as there are no developed laws on prenuptial agreements in Nigeria, but it is trite in every jurisdiction that prenuptial agreements have a developed law. Therefore, it is safe to say that is the normal position with prenuptial agreements.

there is too much discretion residing with the Judge and so dispensation of justice is left to the whims and caprices of the Judge. Further, the fact that many Judges are not specialised in handling matrimonial causes can lead to a lot of derogation from the rights of women. The establishment of special courts for matrimonial cause has become expedient in Nigeria, because that is the fastest way to bring about specialization which by extension would better safeguard the rights of women and children upon divorce. Moreover, there is no provision for alternative dispute resolution (ADR) or mediation with respect to matrimonial causes. ADR is a much simpler, more cost effective and less acrimonious than going through the full hog of litigation.

#### **4. A Peek at other Jurisdictions**

Prenuptial agreements are given effect in varying degrees in many countries of the world and it has helped tremendously in safeguarding the rights of women and children in these jurisdictions.

##### **4.1 Prenuptial Agreements in England**

Prenuptial agreements are common place in England. It can be safely said that the level of enlightenment is higher there than in Nigeria. Akin to the Nigerian situation there is no statutory provision for prenuptial agreements in England. Prenuptial agreements are not legally enforceable as of right to the parties in England because there is no single legislation creating rules or procedure for the drafting or enforcement of prenuptial agreements; however, there are case laws providing a guide<sup>26</sup>for the courts in

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<sup>26</sup> Kingsley Napley, Present and Future laws on Prenuptial agreements-will they or wont they stand in court? (10 April, 2017)  
<<https://www.kingsleynapley.co.uk/insights/blogs/family-law-blog/present->

upholding prenuptial agreements and it is purely at the discretion of the courts. The landmark case of *Radmacher Granatino v. Granatino*<sup>27</sup> provide a very authoritative guide for the applicability of prenuptial agreements in England and Wales. It laid down three criteria; to wit, the agreement must be freely entered into, the parties must have an understanding and fully appreciate the implications and effect of the prenuptial agreement and the agreement must not be couched in terms that given the prevailing situation between the parties, it would be unfair to enforce the prenuptial agreement even if it was originally voluntarily entered into.

### **1. Voluntariness of the agreement**

It must be shown that there was no undue influence or coercion in the drafting of the prenuptial agreement. It is always an added advantage where it can be shown that parties received independent legal counselling on the implications of the agreement. It would not be a disqualification per se where the prospective husband and prospective groom hire the same lawyer but that might raise a likelihood of bias in favour of the person paying the lawyer. It is usually advised that parties should have separate and distinct legal representation devoid of all forms of undue influences, coercion or misrepresentations. The case of *DB v. PB*<sup>28</sup> is particularly instructive because it dealt with a wife's claims to misrepresentation as an inducement to sign her prenuptial agreement. The court held in favour of her husband that the prenuptial agreement was enforceable because she had separate and independent legal advice and was also warned by her lawyer on the

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and-future-laws-on-prenuptial-agreements-will-they-or-wont-they-stand-up-in-court> accessed 25 May 2020

<sup>27</sup> [2010] UKSC 42

<sup>28</sup> [2016] EWHC 3431 (Fam)

demerits of the terms of the prenuptial agreement but she opted to continue<sup>29</sup>.

Corollary to independent representation is the state of a party's emotional wellbeing as at the time of entering into the prenuptial agreement<sup>30</sup>. It is an elementary principle in contract that parties must have sound contracting minds. Therefore, if a person's emotional or mental wellbeing is compromised or impeached to the extent that it affects his or her perception of the facts or implications of the prenuptial agreement, there cannot be said to be voluntariness in the execution of the prenuptial agreement. Further to emotional wellbeing of the parties is also age and maturity. Where it is obvious that the marriage was contracted with a minor the courts will be more inclined to jettison the prenuptial agreement especially when the erstwhile minor pleads *non est factum* (not my deed). So at all material times, it is important that parties are of full age and maturity so that in the eyes of the law they are deemed to be fully responsible for their decisions in consenting to a prenuptial agreement. By the Ages of Marriage Act, 1929 which is still in force in England, Wales and North Ireland, a person who is 16 years old may contract a valid marriage but must be with parental consent, but at 18 years parental consent is irrelevant<sup>31</sup>. Another factor which the English courts would be inclined to look at, is the timing between when the prenuptial agreement was signed and the wedding day. It is also thought that if the signing of the prenuptial

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<sup>29</sup> Kingsley Napley n.26 above.

<sup>30</sup> *Ibid*

<sup>31</sup> UK parliament, 'The law of marriage' (ND)

<<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/>> accessed 29 May 2020

agreement immediately precedes the wedding there might be a level of undue influence and pressure occasioned by the fact that parties may not be able to pay proper attention to the tenets of the agreement and parties would not want to start arguing or negotiating the prenuptial agreement just before their wedding and so even if they find it disagreeable they may not speak up to preserve the peace.

## **2. Full and frank disclosure; and appreciation of the effects of the prenuptial agreement.**

It is important for parties to fully disclose their assets prior to a prenuptial agreement. This is important so that parties can know the extent of property to cover in the prenuptial agreement and also what property to exclude from it. Parties have the right to choose what property they wish to include in a prenuptial agreement and it would be unfair and dishonest for any party to refuse disclosure where this is done the court will be inclined to refuse enforcement of the prenuptial agreement. Sometimes a party might have inherited wealth or wealth from a previous marriage, or bequest to the children from a previous marriage. These may not be property for the purpose of a prenuptial agreement but it is still important for such property to be disclosed. All these weigh on the mind of the court when there is full disclosure to enforce a prenuptial agreement. It is therefore imperative for parties to know each other's net worth.

## **3. Fairness**

It is true that circumstances change with time; therefore, what was seemingly fair at a time may become unfair with the passage of time. For instance, it may be fair for a husband to agree to pay his wife a million dollars for every child she gives birth to if there is a

divorce. It may be fair if he is a billionaire as at when he signed that prenuptial agreement and when it is time to enforce it in the event of a divorce, but what if his fortune changes and he becomes a pauper as at the time the courts are expected to enforce the prenuptial agreement? It is apparent that it would not be fair to enforce such a prenuptial agreement and the courts would so hold. The courts have unfettered discretion with reference to financial matters when there is a divorce to ensure the protection of the financially weaker party; therefore, the courts would usually make only orders that would cater for the weaker party and then make the interest of the children of paramount importance if there are children to the marriage. It is imperative that the prenuptial agreement meets this requirement so stand the chances of being upheld<sup>32</sup>. It has been suggested that based on the above, the longer the marriage, the lower the chances of enforcing the prenuptial agreement as time would in most cases change the parties' financial status<sup>33</sup>. This should not only be viewed from the perspective of where a party's fortunes go bad because where a party's fortune greatly increased, such a party may be required to do more and this would also invalidate the prenuptial agreement if it gives less than what the court views as fair in the prevailing circumstance. Apart from changes in a party's fortune, the general prevailing economic situation may be a factor to be considered. Therefore, if at the time of signing the prenuptial agreement the provisions made were substantial and suitable to adequately provide for the needs of the weaker spouse but due to prevalent economic situation and parameters like inflationary trends, the provisions are no longer adequate, the court may be inclined to jettison the prenuptial agreement.

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<sup>32</sup> Kingsley Napley n.26.

<sup>33</sup> *Ibid.*

It should be noted that the English courts would not form the habit of ripping apart every prenuptial agreement on the grounds of slight changes in the party's fortunes or position because the courts are also inclined to give effect to the will and intentions of contracting parties especially where it was freely entered on the principle of sanctity of contract even where international agreements need to be interpreted by the court<sup>34</sup>. The Supreme Court has also interpreted the requirement of fairness to encompass three principles; to wit, 'need', 'compensation' and 'sharing'<sup>35</sup>. 'Sharing' here refers to the equitable proportions of the joint matrimonial wealth parties ought to get, 'compensation' refers to what a party should be entitled to based on what that party's contribution has been to the marriage, and 'need' refers to what is adequate for sustenance of each of the parties.

The issue of the enforceability of prenuptial agreements in England has stirred up unprecedented debates with opinions varying largely. It would appear however that the prevalent opinion is that as espoused by a Supreme court Justice in England<sup>36</sup> when he said, 'the current state of affairs maybe inappropriately intrusive and in need of Government review.' Although, the debate about prenuptial agreement in England rages on and it does not look like the Government is in a hurry to address the complexities and pit falls in the enforcement of prenuptial agreements in England, there is at least a silver lining in the clouds. The Law Reform Commission in

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<sup>34</sup> *DP v. PB supra*.

<sup>35</sup> *Radmacher Granatino v. Granatino supra*

<sup>36</sup> Justice Lord Wilson of Culworth, Address delivered at the Bristol Law Club on 22 March, 2017, <<https://www.kingsleynapley.co.uk/insights/blogs/family-law-blog/present-and-future-laws-on-prenuptial-agreements-will-they-or-wont-they-stand-up-in-court>> accessed 2 May 2020.

2014 published a report on Matrimonial Property Needs and Agreements where it recommended the introduction of factors that should make prenuptial agreements enforceable among which are adequate provision and protection of the children of the marriage, stipulating procedural safeguards and financial protection of both parties. A draft nuptial Bill was also attached to that report. The report was well received by the Government and hopefully they may act on it in the nearest future<sup>37</sup>.

## 4.2 Prenuptial Agreements in Australia

Prenuptial agreements are common place in Australia as it is well provided for by the Australian Law. Section. 90 of the Family Law Act<sup>38</sup>.

### 90B Financial agreements before marriage

(1) If:

- a) people who are contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and at the time of the making of the agreement, the people are not the spouse parties to any other binding agreement (whether made under this section or section 90C or 90D) with respect to any of those matters; and
- b) the agreement is expressed to be made under this section; the agreement is a *financial agreement*. The people may make the financial agreement with one or more other people.

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<sup>37</sup> Kingsley Napely n.26.

<sup>38</sup> 1975. This is the extant law on matrimonial Causes in Australia

- (2) The matters referred to in paragraph (1)(a) are the following:
- a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with;
  - b) the maintenance of either of the spouse parties:
    - (i) during the marriage; or after divorce; or
    - (ii) both during the marriage and after divorce.
- (3) A financial agreement made as mentioned in subsection (1) may also contain:
- a) matters incidental or ancillary to those mentioned in subsection (2); and
  - b) other matters.
- (4) A financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

Pre-nuptial agreements are enforceable in Australia. They have a legal enforceable statutory basis as provided for in section 90B above. This is a very proactive measure rather than leaving the entire framework to be drawn by judicial decisions, without positive law on the subject which leads to so much uncertainty as to its enforcement. Pre-nuptial agreements are also known as binding financial agreements in Australia and actually became enforceable in 2000 by virtue of the Family Law Amendment Act, 2000 even though it always had a legal framework from the Family Law Act<sup>39</sup>. Part VIIIA of the Family Law Act<sup>40</sup> stipulates three functions

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<sup>39</sup> 1975

of a lawyer in the process of drafting a prenuptial agreement in Australia. Such agreements must be in writing, signed by both parties, both parties must have a copy of the prenuptial agreement, the extent of spousal maintenance in the event of divorce, and that both parties have received independent legal advice plus an annexure of an independent solicitors certificate to the agreement. Some factors will vitiate any prenuptial agreement under Australian Law<sup>41</sup>. They include the following

1. Fraud
2. Mistake/misrepresentation
3. Undue influence
4. Impracticability of all or part of the agreement to be carried out
5. Provision for children that is inadequate
6. Unconscionable conduct of a party or parties to the agreement and where the agreement is against good conscience.

In the case of *Thorne v. Kennedy*<sup>42</sup> a penniless woman who met a rich wealthy man on a dating site was presented a prenuptial agreement to sign on the eve of her wedding by her prospective husband after she had relocated to Australia for the purpose of the marriage. Her lawyer advised her against signing the agreement, but she did not feel she had a choice and signed. Upon divorce, the court held that there was undue influence from the husband and the husband's action was unconscionable and voided the prenuptial

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<sup>40</sup> 2000

<sup>41</sup> Jeremy D. Moley, 'Prenuptial agreements in Australia' (ND) <<https://www.international-divorce.com/Prenuptial-agreements-in-australia>> accessed 7 December 2020.

<sup>42</sup> [2017] HCA 49

agreement, the financial agreements were set aside on the grounds of unconscionable conduct and undue influence. That case was applied in two cases in 2019<sup>43</sup>. In *Chaffin v Chaffin*<sup>44</sup>, the court held the prenuptial agreement void as it was said that the husband's acts were unconscionable. The agreement was signed ten days before the wedding and the wife was already pregnant which fact the husband deliberately concealed from the wife. The husband was ten years older than the wife as the wife was twenty. The husband was in a significantly superior financial position and wife was dependent on him. Furthermore, as at the time of signing, everything was booked and paid for; the venue, photographer, wedding dress etc. The court set aside the prenuptial agreement as it was obvious the wife could not have done anything about it at the time even though she got legal advice not to sign.

The case of *Delrio v Jindra*<sup>45</sup> bears close similarities with Chaffin's case but the difference were that the parties where same age at the time of signing the agreement even though it was signed a day to the marriage. The application to set aside the prenuptial agreement was brought by the husband and at the time of signing the agreement both parties where financially independent. They both sought and had legal advice. The wedding venue and dress were already paid for by the husband's mother-in-law. The court reached a different decision in this case and refused to set aside the prenuptial agreement. Perhaps, the distinction was the fact that they were both independent at the time of signing that prenuptial

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<sup>43</sup> Caitlin Elliot, 'A Tale of two Financial Agreements' (<[https://www.bnlaw.com.au/page/insights/family\\_Law\\_publications/property\\_settlements/A\\_tale\\_of\\_two\\_financial\\_agreements/](https://www.bnlaw.com.au/page/insights/family_Law_publications/property_settlements/A_tale_of_two_financial_agreements/)> accessed 24 January 2020.

<sup>44</sup> [2019]FamCA 260

<sup>45</sup> [2019]FCCA 1186

agreement. It is submitted that with the disparity in the Judgments in both cases it would seem as though even with the legal framework and laws for prenuptial agreements in Australia, uncertainty still looms large in the enforcement of prenuptial agreements. It is however, noteworthy that these cases mostly stair on unconscionability. Here, unconscionability simply refers to circumstances where the innocent party is found to be subject to a special disadvantage which seriously affects their ability to make a reasonable judgment as to their own best interest<sup>46</sup>.

It can be gleaned from the foregoing that if parties to a prenuptial agreement do not want to run the risk of their agreement being set aside they must ensure that parties have sufficient time to go through and understand the agreement before signing, apparently ten days is not good enough, also one party should not be seen to be vulnerable and absolutely dependent on the other party to the extent that she feels compelled to sign the agreement in order to get economic or other levels of sustenance. This may be cured in situations where the weaker party has independent legal advice and she abides by the advice of her lawyer. In that case it would be shown that she was guided. In all the above cases the weaker parties did not follow the dictates of their lawyer because they felt they were in no position to alter same and it is obvious that this weighed heavily on the mind of the court.

### **4.3 Jewish System of Prenuptial Contract**

The Jewish system of marriage is one that makes the signing of a prenuptial agreement a *sine qua non* for the celebration of a marriage. It provides a system whereby the prenuptial agreement is an integral part of the marriage process and not optional in most

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<sup>46</sup> Caitlin Elliot op.cit

cases. The system is structured to protect the wife. Although divorce is frowned at under Jewish systems it is known and accepted that sometimes it is inevitable, and it is deemed that couples who sign the prenuptial agreement (often referred to as the Ketubah) is out rightly repudiating religious blackmail<sup>47</sup>. It is not seen as irreligious to enter a prenuptial agreement. This is actually a milestone achievement on the psyche of intending couples. The reason why most couples would not take the route of prenuptial agreement is because it feels ominous and ironic that anyone would be going into a marriage and at the same time preparing for a divorce. Therefore, anyone who is able to rise above that belief is laudable. Usually a prospective couple would enter at least two agreements prelude to their marriage. The first one is an arbitration agreement and the second one is a prenuptial agreement. By the arbitration agreement parties choose a bet din (a person or institution) who they elect to submit matrimonial issues like divorce, custody of children, maintenance, and enforcement of prenuptial agreement to. The bet din has the power to decide on the future of the marriage where a party seeks divorce. The decision of the bet din is enforceable in civil courts<sup>48</sup> which by extension makes the prenuptial agreement between the parties enforceable. The ketubah has evolved from when it was determined by the prevalent economic situation of the parties to where in its most recent forms it is fixed.

One outstanding difference between the ketubah and the prenuptial agreements as envisaged under Australian law, British law,

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<sup>47</sup> Marc d. Stern, 'A legal Guide to the Prenuptial Agreement for couples about to wed'(ND) <<https://www.jlaw.com/Forms/prenuptial-article.html>>accessed 6 June 2020

<sup>48</sup> *Ibid*

Nigerian law and laws governing prenuptial agreements in some other jurisdictions is the fact that it is less complex and more easily enforceable. It has a legal form which parties can easily comply with. This does not mean it has no requirements for its enforcement. For instance, it must be signed in triplicate with a copy to the prospective husband, one to the prospective wife and the last is kept by the Rabbi. There are also witnesses to the prenuptial agreement. It is difficult in situations like this for issues of unconscionability to arise as witnesses are there and most importantly the presence of the Rabbi ensuring that parties are compliant with the form for the validation of the prenuptial agreement. It is also encouraged that parties seek advice from their solicitors to ensure that they are on the right track always. There is no requirement that prospective couples cannot use the same solicitors. They both can use the same solicitor and it would not be said to be detrimental to the agreement as might be the case in other systems. The prenuptial agreements would also cater for the needs of the child or children of the marriage if there are any. There is usually less disputations with the ketubah as is fraught in other systems. It should be noted however, that parties to a prenuptial agreement are not stifled, they are at liberty to make other things which are not exactly in the form a part of their prenuptial agreement as far as it is acceptable under their Jewish practices and laws. For instance a party may decide to make provisions for a child of one of the couple from a previous marriage and it would be acceptable.

## **5. Conclusion and Recommendations**

It is apparent from the foregoing that prenuptial agreements are a veritable tool in safeguarding the rights of couples when there is a divorce. It is an invaluable route especially for the protection of

women where they are the weaker party in the marital relationship. It is not a harbinger of trouble it is a safety precaution for both parties to a marriage and if properly harnessed its merits far outweighs its demerits. It reduces the acrimony evident in settlement of property and maintenance when there is a divorce and gives parties certainty as to their fate in the event of a divorce.

The following recommendations are made

- 1) The Jewish system of prenuptial agreement should be an integral part of the prerequisites for celebrating a marriage in Nigeria.
- 2) There should be an identifiable legal framework of positive law for the procedure to be adopted and the enforcement of prenuptial agreement. The Australian provision is a good one and should be adopted. To this end it is imperative that the Matrimonial Causes Act of Nigeria be amended in order to provide for a better enforcement of prenuptial agreement.
- 3) Only family courts should be allowed to adjudicate on matrimonial issues involving prenuptial agreements in its original jurisdiction as it is Australia. This would undoubtedly give experts in matrimonial courses the opportunity to handle matrimonial issues which would lead to a better dispensation of justice
- 4) Laws are useless if the people do not know about them or appreciate them. Therefore, it is important for both governmental, religious bodies and other bodies who stand in a position to enlighten and influence people to educate people within their scope of influence on the need for prenuptial agreements.