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Planning for Divorce before the Marriage: The Concept of Pre-Nuptial Agreement and its Enforceability in Nigeria

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Abstract

Pre-nuptial agreement is adjudged one of the ways of resolving the increasing marital disputes and issues that may arise when a marriage contract breaks down. The concept of a pre-nuptial agreement is largely unknown under the family law system of many African countries, including Nigeria. This has been connected to the social, religious, and cultural beliefs or notions of African societies on marriage and its related issues. In Nigeria, the rise or rampancy of divorce cases has been linked to the absence of a prior legal arrangement between parties on how marriage affairs would be regulated. Given this, this study examines the recognition and enforceability of prenuptial agreements under Nigerian family law. The paper adopts a qualitative research methodology using a doctrinal method of legal research. This paper found that there is no definite legal framework in Nigeria for a pre-nuptial agreement. Though there is a shadow of the concept in the Matrimonial Cause Act, there is lack of clarity on its recognition and enforceability in Nigeria. The paper therefore, concludes that there is a need for a definite legal framework for prenuptial agreements in Nigeria to reduce the incidents of post-marital crisis in the area of property settlements, amongst others.

Keywords: Pre-Nuptial Agreement, Post-Nuptial, Divorce, Property Settlement, Marriage

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1. Introduction

A pre-nuptial agreement is generally a unique form of agreement usually entered into by parties who are anticipating marrying each other while they still contemplate a future divorce[831]. The motive of this form of agreement is to regulate the affairs of parties by conferring rights, duties, and responsibilities on each of the parties to avoid unnecessary crises over the sharing of properties, and alimony, among others[832]. Some married couples use prenuptial agreements to create contractual conditions that will specify how their assets would be divided in the case of divorce[833]. It caters to the post-divorce need of the parties to the marriage as well as third parties including creditors[834]. Therefore, the contract might be crucial to an estate plan because they specify how assets will be distributed in the event of a death or divorce[835]. According to Onya

The increase in the incidence of dissolution of marriage in the Nigerian society has necessitated intending couples to consider a prenuptial agreement, especially with regards to what happens to property, third parties such as children as well as other interest arising from the marriage. These considerations have given rise to the development of prenuptial agreement.[836].

Though discourse on pre-nuptials is fast taking center stage in the literature on family law and social media[837], it is fraught with controversy as to its appropriateness and enforceability in many

[831] Belinda Fehlberg and Bruce Smyth "Binding Pre-Nuptial Agreements in Australia: The First Year" *International Journal of Law, Policy and Family*, (2002) 16(1), 127-140

[832] J.T. Oldham "With all my Worldly Goods I Three Endow, or Maybe not: A Reevaluation of the Uniform Premarital Agreement Act after three Decades" *Duke Journal of Gender Law& Policy,* (2011)Vol. 19, 83

[833] Dalling Samuel, "Regulating Pre-nuptial Agreements: Balancing Autonomy and Protection" a Thesis Submitted to Durham University, 2013, 4; Judith T. Younger, "Perspectives on Antenuptial Agreements: An Update" *Journal of the American Academy of Matrimonial Lawyers* (1992) 8(1) 8

[834] Margaret Ryznar and Anna Stqpieh-Sporek, "To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context" *Chapman Law Review* (2009) 13(27) 27-62

[835] Bart A. Basi & Ed Bodnam, "Premarital Agreements: Retirement Plan Rules Supersede Premarital Contract", Tax'n For Law(1996) 24, 226

[836] Obinna Onya, "Validity of Prenuptial Agreement in Nigeria and the Public Policy Test" *International Journal of Comparative Law and Legal Philosophy* (2021) 3(1) 175

[837] Gail Frommer Brod, "Premarital Agreements and Gender Justice" *Yale Journal of Law & Feminism* (1994)6, 229

[8] S. Thompson, "Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice"(*Bloomsbury Publishing*, 2015) 45-62

jurisdictions[8]. Legal scholars have opined that a pre-nuptial agreement is not only "unromantic" but also "cold-blooded"[838].They argue that the pre-nuptial agreement itself is contrary to public policy [10] . They maintain that the government should promote marriage and that pre-nuptial agreements promote divorce because they anticipate divorce. In the decided case of ***Hyman v Hyman***[11], pre-nuptial agreements were deemed invalid under old English law because they were thought to be against public policy since they undermined the idea of marriage as a permanent partnership. The notion that public policy should forbid the enforcement of pre-nuptial agreements which frequently included provisions for the possibility of divorce was put forth[839].

On the contrary, some argued that pre-nuptial agreements promote marriage because they give married couples the ability to fashion their relationship[840].Under the English jurisprudence, the current position is as summarised in the landmark decision of ***Radmacher v Granatino***[841] where the Supreme Court acknowledged that courts should, in the exercise of their discretion under the Matrimonial Causes Act 1973, give weight to such agreements depending on the circumstances[842]. However, the Court issued a warning, instructing courts to evaluate the substance and procedural fairness of the terms, taking into consideration those that passed the requirements and excluding others. courts were not to blindly follow the terms imposed by the divorced couple.

Prenuptial agreements are said to be helpful in situations where a couple is thinking about getting married, even though it would not be the first marriage for either side[843]. Divorce is a difficult emotional process. A well-written prenuptial agreement could be utilised in this circumstance to help "mature couples...regulate future enjoyment of their assets[844]". A pre-nuptial agreement is one of the marriage-related concepts, which is fast gaining popularity within international family law[845]. It is a subject that is gaining prominence in national imagination[846]. The concept is not a

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[838] Janice Montague, 'Family Law: Ancillary Relief – Pre- and –Post-Nuptial Agreements' Cov LJ (2008) 13(2) 36, 38 [10] J. L. Dolgin, "Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies: The Parent-Child Bond" *Connecticut Law Review* (1994) 26, 1261, 1268; Peter Sevareid, "Increase In Value of Separate Property In Pennsylvania: A Change in What Women Want", Temple Law Review (1995) 68, 557, 596; W. F. Fraatz, "Comment, Enforcing Antenuptial Contracts In Minnesota: A Practice in Search of a Policy Basis in the Wake of McKee-Johnson v Johnson, *Minnesota Law Review* (1992) 77, 441, 444 [11] (1929) AC 601

[839] Ibid cited in Obinna Onya (n 6) 175

[840] C. Biemiller, "The Uncertain Enforceability of Prenuptial Agreements: Why the Extreme Approach in Pennsylvania is the Right Approach for Review" *Drexel Law Review*, (2013) 6, p. 133

[841] [2010] UKSC 42, [2010] 2 FLR 1900

[842] Kamilia K. Anuar, "Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate"*Oxford University Undergraduate Law Journal* (2017)6, 45

[843] Law Commission, Marital Property Agreements – A Consultation Paper (Law Com No 198, 2011) 1-4

[844] This position was decided in the English case of *Radmacher (formerly Granatino) v Granatino* [2009] EWCA Civ 649.

[845] F. Jens-Uwe, 'So Hedge, therefore, who Join Forever: Understanding the International of No-fault Divorce and Premarital Contracts' *International Journal of Law, Policy and the Family*, (2009) 23(3), 235-276

[846] Emy Sigler, "Case Comment, Elgar v. Probate Appeal: The Probate Court's Implied Pow- ers to Construe and to Enforce Pre-Nuptial Agreements", *Connecticut Probate Law Journal* (1994) Vol. 9, 145

new idea, either legally or culturally[847]. In any marital relationship, it has always been the concern and desire of most women folks that, if there is a divorce or if any of the spouses died that they would not end up homeless[848]. This position, among many others, engineered the wide acceptance of prenuptial agreements within jurisdictions where the concept has become legalized.

It has been erroneously argued that pre-nuptial agreement for all intent and purpose is an exclusive reserve of the wealthy in society[849]. While it is true that a prenuptial agreement can be utilised to protect the wealth or property of a wealthy party, especially from being shared equally with the other spouse[850], it is also available as an option for any social class of person whenever there is the concern for the determination of how property may be shared in the future in case of divorce. The non-existence of a fixed rule on the settlement of marital properties has been of serious concern to scholars of international family law[851]. They, therefore, believe that pre-nuptial agreement helps to take care of the challenges that the non-existence of fixed rules on marital property settlement may occasion.

There is no gainsaying that the conventional notion of marriage has undergone significant change in many nations around the world over the past few decades[852]. The term pre-nuptial agreement should not be confused with the marriage of old days settlement, which was concerned not mainly with the effects of divorce but with the establishment and maintenance of families[853]. Prenuptial comes into play in divorces, of course, but that is not all. Apart from establishing how assets are divided when a married couple splits up, pre-nuptial agreements also can determine what a party can get when the marriage ends[854].Some proponents of pre-nuptial agreements argue that it protects the interests of both parties to the agreement and prevents an eventual court battle when the relationship ends. However, some critics say there is nastiness that can arise in negotiating a

[847] N.R. Schembri, "Prenuptial Agreements and the Importance of Independent Counsel" Journal of Civil Rights and Economic Development (2003) 17(2)313-346

[848] Amrita Ghosh and Pratyusha Kar "Prenuptial Agreements in India: An Analysis of Law and Society" *NUJS L. Rev. (2019)* 12, 1. Available at http://nujslawreview.org/wp-content/uploads/2019/12/12-2-Ghosh-and-Kar.pdf [accessed 8th August 2023]

[849] Helen Newman, "The Increasing Importance of Nuptial Agreements in Light of Recent Cases and Statutory Developments' *Journal of Huddersfield Student Research* (2017) 3(1) 131

[850] Joanna Miles, 'Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money' *Modern Law Review* (2011)74(3) 430, 442.

[851] Ncube Welshman, "Re-allocation of Marital Property at the Dissolution of Marriage in Zimbabwe." *Journal of African Law* (1990)34, p.1

[852] Sylvia Ifemeje "The Legal Definition of Marriage and the Changing Concept of Marriage – A Global Overview" *Unizk Law Journal*, (2007), p229

[853] C. Amberlynn,"The Uniform Premarital Agreement Act and Its Variations Throughout theStates"*Journal of the American Academy of Matrimonial Lawyers* (2010) Vol. 23, p. 355.

[854] S.M. Israel, '*Is Prenups a must for couples'*<http://www.wsj.com/articles/is-a-prenuptial-agreement-a-must-formost-couples-1425271056> Accessed 8th August 2023

prenuptial and it can cripple a marriage before it commences, and that there are laws that can balance the welfare of both spouses when they split[855], rather than using a pre-nuptial agreement.

In some states such as Canada, and the United States, courts recognize that marriage is a business or contractual relationship and that couples should be free to remain autonomous within marriage. Hence, the adoption of the Uniform Premarital Agreement Act (UPAA) of 1983 a set of laws on premarital agreements. The UPAA provides a list of property-related items on which couples may agree when entering the prenuptial agreement. It also includes a stipulation allowing couples to be in agreement on any matter, including their rights and responsibilities. However, in Africa except for South Africa, the pre-nuptial agreement has been opposed as a concept that equates a man with a woman in terms of rights which is contrary to the cultural belief of African societies[856]. The African culture has been described as "illiberal towards women's rights"[857]. The insistence of an African woman for the draft of a prenuptial agreement is an invitation to be labelled "gold-digger" or a "fortune hunter"[858].

It is not surprising that while some countries may have embraced pre-nuptial agreement as a welcomed development[859], in Nigeria, the idea of a pre-nuptial agreement is uncertain under family law. Some folks have attributed the concept to a Western idea. Some postulate that the idea is contrary to Public Policy. It is against this background that this article attempts to examine the enforceability of pre-nuptial agreements in Nigeria in resolving a post-marriage crisis on finance, property sharing, and alimony, among others in this era of an increasing rate of divorce.

2. The Concept of Pre-Nuptial Agreement

A Pre-nuptial agreement also known as a premarital agreement or antenuptial agreement, is a contract made in expectation of marriage that specifies the rights and duties of the parties[860]. Such an agreement usually includes terms for property distribution in the event the marriage terminates. The concept is also defined as an agreement by which a man and a woman or same-sex partners, who are about to marry or register as a civil partnership, seek to regulate their affairs during their marriage or partnership and in the event of a relationship break down[861].The agreement is an effort by parties to define for themselves their rights, obligations, and responsibilities that flow from the

[855] B.Y. Cheryl, 'Prenuptial *Agreement:YES: It May Be Fun, but it Can Save a Lot of Heartache heartaches*<http://www.wsj.com/articles/is-a-prenuptial-agreement-a-must-for-most-couples-1425271056> Accessed 1stNovember 2022

[856] S.C. Ifemeje, "A case for Global Enforceable Prenuptial Agreements" *Nnamdi Azikiwe Journal of Internationa Law and Jurisprudence* (2016) 1, 153

[857] A.G. Karibi – Whyte, "Succession Rights of Women in Nigeria Law" (Law and Family, Enugu 1994) p23 cited in S.C. Ifemeje (n 29) 153

[858] Hyman v Hyman (1929) A.C. 601 cited in S.C. Ifemeje (n 29) 153

[859] For example, Australia, America Canada, New Zealand, South Africa

[860] Elizabeth R. Carter, "Rethinking Premarital Agreements: A Collaborative Approach" *New Mexico Law Review*., (2016) 46, p. 354

[861] Family Agreement: seeking Certainty to Reduce Disputes. The Recognition and Enforcement of Pre-nuptial Agreements in England and Wales, P.5.Available at http://www.resolution.org.uk/site_content_files_/files/family_agreements.pdf. Accessed 23 July 2016at 8:50 pm

marital relationship and that otherwise would be regulated and determined by state law upon death, annulment, separation, or divorce[862].

The concept, which is commonly abbreviated to Prenup or Prenupt, is a contract entered into before the focal contract by the people intending to marry or enter into an agreement with each other. The substance of a pre-nuptial agreement can vary widely but commonly includes provisions for the division of property and spousal support in a divorce or break up of a marriage. They may also include conditions for the forfeiture of property as a consequence of annulment of marriage on the reason of adultery; further terms of guardianship may be added as well. A pre-nuptial agreement is an unusual kind of contract[863]. It exists as a result of the contemplation of divorce by marrying parties; therefore, the subject matter of the agreement is unique[864].

A pre-nuptial agreement can cover various issues[865], however, the most common, include assets and financial aid rights during and after marriage, personal rights and duties of the couple during marriage, and the education and nurturing of children to be born to the couple[866]. Typically, a prenuptial contract is used by one spouse or mutually by spouses to maintain personal assets and income detach during the marriage or to shield certain assets before one spouse embarks on a dangerous investment or new livelihood[867].When people sign pre-nuptial agreements, they enter a contract that outlines the financial assets, possessions, and responsibilities each party has if their marriage ends in divorce. Pre-nuptial agreements are not only for the wealthy. Individuals with prior marriage or children may want a pre-nuptial agreement to outline that property goes to their children instead of the new spouse[868]. For instance, they may want to keep the family property, such as heirlooms, if the marriage fails. Also, people may want to protect themselves against their future spouse's debt or avoid arguments during divorce proceedings[869].

The idea of a pre-nuptial agreement is not a new one either culturally or legally. There is a Jewish marriage contract known as ***"Ketubah"*** that dates back to 2000 years[870]. In England around the

[862] Ibid

[863] Allison Martson, "Planning for Love: The Politics of Prenuptial Agreements" Stanford Law Review (1997) 49(4) 887-916

[864] Ibid

[865] Catherine Fairbairn, "Pre-nuptial Agreements" *The House of Commons Library,* Briefing Paper Number 03752(2017) 3-17https://researchbriefings.files.parliament.uk/documents/SN03752/SN03752.pdf [accessed 8th of August 2023

[866] Nicholas Marfori, "For Richer, Not Poorer: Premarital Waivers of Spousal Support in California" *Loyola of Los Angeles Law Review* (2016*)* 49, 843

[867] Mary C. Doherty, "Romantic Premarital Agreements: Solving the Planning Issues without the D Word" *Journal of the American Academy of Matrimonial Lawyers (*2016) 29, p. 35

[868] Ibid

[869] Nigel Lowe, "Prenuptial agreements: the English Position" InDret (2008) Vol. 1, 1-12

[870] S.C. Ifemeje, "A case for Global Enforceable Prenuptial Agreements" *Nnamdi Azikiwe Journal of Internationa Law and Jurisprudence* (2016) 1, 152.

sixteen century, prospective spouses used them to adjust the legal rules that would or else govern their assets rights during and after marriage[871].By the mid-seventeenth century, premarital contract were so vital that Parliament required them to be documented. By 1700, they were so commonplace as to be the subject of jokes in the English popular theater[872].The practice dates back to the primordial Egyptians, and prenuptial agreements have existed for many centuries in the AngloAmerican custom[873]. In earlier times, the parents of either spouse negotiate the contract on the new couple's behalf[874]. However, in the United States of America, these contracts or agreements are still useful; the rich and elite often make use of the prenuptial agreement[48].

3. Other Categories of Marital-Related Agreements

This paper is primarily focused on pre-nuptial agreement. However, there is the yawning need to briefly examine other variants of pre-nuptial agreement which perhaps has almost the same implication as a pre-nuptial agreement. Under this heading, this article will discuss three such other forms of agreement that are closely related to a pre-nuptial agreement. These forms of agreement are post-nuptial agreement, Mid-nuptial agreement, and Cohabitation agreement.

3.1 Post-Nuptial Agreement

Post-nuptial agreement (also known as a post-marital agreement) is an agreement entered into by the parties after the marriage that sets forth the rights and obligations of each party in the event of divorce[875]. A post-nuptial agreement can be used when no divorce is contemplated or when divorce is not imminent. A separation agreement is entered when divorce is imminent.

Postnuptial agreements are created and signed by spouses after they marry. It is similar to prenuptial agreements because it outlines information such as responsibilities or assets[50]. However, post-nuptial agreements are typically used to resolve some type of problem in the marriage and can be in lieu of alimony. The contact may seek to regulate spouses' behavior, such as spending too much money, household responsibilities, or adultery. Also, the contract can be created after there some change in finances after the spouses were married, which can include but are not limited

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[871] Premarital Agreement "International Encyclopedia of Marriage and Family (2003) Available at http://www.enclopedia.com/reference/encyclopedias-almanacs-transcripts-and-maps/premarital-agreements Accessed 16 August, 2017

[872] Ibid

[873] Gary Debele and Susan Rhode, "Prenuptial Agreements in the United States*"*Available at https://www.iafl.com/media/1169/prenuptial_agreements_in_the_us.pdf Accessed 11th August 2023

[874] Colleen Sullivan, "History of Prenuptial Agreements: Prenups Are Not a New Idea. http://marriage.about.com/od/agreements/qt/prenuphistory.htm Accessed8th August 2023 [48] J.T. Oldham, "Would Enactment of the Uniform Premarital and Marital Agreements Act in All Fifty States Change US Law Regarding Premarital Agreements?" *Family Law Quarterly*, (2012) 46(3), 367-384

[875] B. Clark B, "Should greater prominence be given to pre-nuptial contracts in the law of ancillaryrelief?"*Child and Family Law Quarterly*(2004) 399 [50] Ibid

to buying a business, inheriting money, or changing a career. Postnuptial agreements may modify a pre-nuptial agreement[876].

3.2: Mid-Nuptial Agreement

As the name suggests, a Mid-nuptial agreement is an agreement that is entered into between spouses during the marriage[52]. This could be an initial agreement or a prior agreement variation, such as a pre-nuptial agreement[877]. There may be numerous reasons for couples to draft a Midnuptial contract or agreement; usually, it is used when a major change in financial situation has occurred since the marriage of the couples. Even if the spouses have no plans for divorce, many find security in knowing that their financial interest is protected, whether the marriage continues or not.

3.3: Cohabitation Agreement

A cohabitation agreement exists between two unmarried individuals who live or intend to live together, defining their intentions, rights, and obligations concerning each other living together and upon the termination of their relationship[878].The contract can include which partner receives any shared investment property or pets[879].

3.4: Family Agreement

This is a confidential obligation between older people and their relatives and friends which is planned to accommodate the desires of the older person as they age, and are consistent with the wish, needs, resources, and aspirations of the other persons who assume the place of the counterparty (often the carers) [56] . Family contract or agreements can also be described as independent care contract or agreements, personal services contracts, or lifetime care contracts[880]

4. Legal Requirements of a Pre-nuptial Agreement

A pre-nuptial agreement is a contract, just like any other contract in the business world. However, unlike the general nature of other forms of contract in the business world, a pre-nuptial agreement cannot exist between strangers; rather, it is premised on love and trust between two persons who

[876] J.C. Colucci, "The P World: Ohio Should Adopt the Uniform Premarital Agreement Act to Achieve Consistency and Uniformity in the Treatment of Prenuptial Agreement" *Cleveland State Law Review,* 66,p. 215 [52] J.A. Parness, "Parentage Prenups and Midnups" *Georgia State University Law Review* (2107) 31, 343

[877] Ibid

[878] B.A. Atwood and H.B. Brian, "A New Uniform Law for Premarital and Marital Agreements" Family Law Quarterly, (2012) 46(3), 313-344

[879] S. Kennedy, "Ignorance is not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements" *Family Court Review*, (2014) 52(4), 709-724 [56] John Wade, "Marriage and Cohabitation Contracts" The National Legal Eagle (2011) 17(2) 3-5

[880] Ibid

intend to get married[881].A pre-nuptial agreement being a contractual relationship has the general legal requirements of a valid contract. This position is in line with the decided case of ***Azubike vs Govt. of Enugu* State** for an agreement to be enforceable at law, it must possess the essential elements of a valid contract[882]. An agreement or a contract must include four necessary elements to be regarded as an agreement or a contract[60]. If anyone of these essential elements is missing, the agreement or a contract will not be legally binding or enforceable[61].

4.1. Offer

A pre-nuptial agreement has elements of a contract because there must be an offer from either intending marriage spouse. The proposal is to be tabled and discussed by both parties and can also be represented by independent counsel. In pre-nuptial agreements, an offer is said to be valid whenever a proposal is discussed and accepted by the other party to the marriage contract, and counsel representing the couple has to look at the terms of the proposal presented to the other party. It must be noted that unlike other forms of contract, pre-nuptial agreements cannot be made orally, except in writing[62]. Therefore for a pre-nuptial agreement to be legally valid and enforceable in court, it must be written. Also, worthy of note, a pre-nuptial agreement offer can only be made between two parties, unlike other contracts where it can be made to the whole world there is a limit in pre-nuptial agreement as to several people offer can be made too, it is strictly between two intending or marries couples.[63] Once a party brings up the idea of a prenup, there is an offer waiting for acceptance.

4.2. Acceptance

An acceptance is the last expression of consent to the terms or condition of an offer[64]. By receipt of the offer, the offeree signify his intent and readiness to be bound by the offer's conditions. When an offer is agreed on, it is transformed into a promise, and a breach of it will give rise to an action. An acceptance, like an offer, may by word of mouth, in writing, or by conduct. For acceptance of an agreement to be valid, it must be unqualified. It must correspond with the offer. Any deviation or alteration of the offer while accepting the offer will be regarded as invalid. In other words, a response to an offer is only valuable as an acceptance if it accepts all terms or conditions of the offer without equivocation, qualification, or condition. An attempt to accept an offer with the condition amount as a counteroffer and not acceptance.

In essence, a pre-nuptial agreement can only be enforceable if the party to the contractual obligations accept*s* all terms of the offer without equivocation, qualification, and addition. Unlike other forms of contract, pre-nuptial agreements must be accepted in writing and not by conduct or oral, the documents passing between the couples and signed[65].In a pre-nuptial agreement, an offer can be made by either of the parties, and it becomes an offer when one party raises it, and the other party consents to it. Then there will be deliberation on what it should contain. The offeror is always

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[881] Robert Digiacomo, '*Quit Fighting-get a Postnuptial Agreement'*<http://www.edition.cnn.com/2008/LIVINGpersonal/04/02/postnuptial.agreement/index.html.> Accessed 2nd January 2020

[882] (2014) (Pt. 1400) 364 at 392, the court held that a legally enforceable agreement must necessarily have the following ingredients to wit: Offer, Acceptance, Consideration, Intention to create a legal relationship, and the capacity to

the one that has something at stake to lose in case the marriage did not work. It is one who has enough property interest and wants to secure the same in case the marriage did not work.

contract. These five necessary ingredients must co-exist as a contract cannot in law, be formed in the absence of any of the ingredients.

[60] *Shell Petroleum Development Company Ltd v Frontline Television Ltd* (2011) LPELR 4952*; Amana Suites Hotel Ltd vs P.D.P* (2007) 6 NWLR (Pt. 1031) 453

[61] Ibid

[62] Peter T. Leeson and Pierson Joshua, "Prenups" *Journal of Legal Studies*, (2016) 45(2), p. 367.

[63] Ibid

[64] Treitel, The Law of Contract (5th Ed.) p. 13 cited in Sagay, I.E "Nigerian Law of Contract" (Spectrum Law Publishing, 1991) P. 13

[65] Charlotte K. Goldberg, "If It Ain't Broke, Don't Fix It": Premarital Agreements and Spousal Support Waivers in California"*Loyola of Los Angeles Law Review (*2000) 33, p 1245.

4.3. Consideration

A pre-nuptial agreement must be supported by consideration by the either of the parties to the agreement, a bargained-for barter of something of worth (usually the mutual promise to marry in the case of a pre-nuptial agreement, although courts may sort for extra consideration when one party appears to benefit everything and give up nothing)[883].In quest of enforcing a pre-nuptial agreement or contract, a person must prove that some consideration was furnished by him/her in return for the other party's assurance or promise[884]. It is a fundamental rule of law that for the prenuptial agreement to be valid and enforceable, there must be a consideration. In pre-nuptial agreements, consideration comes in contracting the marriage; the couple making the offer and accepting the offer must have agreed to marry each other to make the contract valid and enforceable.

4.4. Capacity to Contract

The parties or intending couples must possess have the capacity to contract in terms of age and mental competence or fitness. The Married Woman's Property Act abolished the long perennial issues of a married woman's non-contractual capacity[885]. To the extent that they can contract with their husband and there are liable for that, therefore, no more impediment for intending married or marriage to enter into the valid and enforceable pre-nuptial and post-nuptial agreements.

5. How Enforceable is the Pre-Nuptial Agreement in Nigeria?

[883] Brian Bix, Bargaining in Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage" *William and Mary Law Review* (1999) 40(1) 145-207

[884] Michelle Butler, "Part Two: Alimony and the Marriage Contract: California PremaritalAgreements Waiving or Specifying Spousal Support Obligations" 20 *Journal Contemporary Legal Issues*(2009) 41, p. 41

[885] Married Woman's Property Act of 1848

The concept of Pre-nuptial agreement is strange in Nigeria. The idea has been primarily considered by many as a Western construct, which conflicts with Africa's cultural concept of marriage[886]. To anticipate or envisage a marriage's dissolution before it begins is considered by many as a "bad omen"[887]. Thus the idea of a pre-nuptial agreement in Nigeria can be viewed with strangeness as an idea contrary to public policy and an accepted norm. Society views it as taboo and contrary to public policy[888].Furthermore, marriage was (and still mainly is) considered a sacred institution created by God and initiated by love; any attempt to imply its contractual nature as evidenced in the signing of prenup (as done in "foreign lands") was considered unacceptable, and abominable. African countries, except South Africa, have shunned or refuse to recognise pre-nuptial contracts or consider their enforceability[889]. This adamant move could be traced to the African sociological backdrop; African traditions have been bluntly criticized as very ''illiberal towards women's rights''[890].

In Nigeria, the idea of a pre-nuptial agreement has been faulted on various grounds. These grounds include but are not limited to the following:

1. Public policy and cultural values attributed to the nature of marriage
2. A pre-nuptial agreement is viewed as ousting the jurisdiction of the court on issues contained therein
3. The sanctity of marriage is weakened or jeopardized where parties have already contemplated or anticipated a divorce before entering into the marriage.

It could, therefore, be argued that cultural factors have seriously jeopardized the growth of prenuptial agreements in Africa. For instance, any African woman who insists on drawing up a prenuptial agreement before marriage would run the risk of being labeled "gold–digger''or "a fortune hunter[891].Nigeria is a religiously and culturally inclined country. Either religious or cultural beliefs guide an average Nigerian's conduct. This position, in a way, has also sneaked into our legislative standards. No law in Nigeria explicitly deals with a pre-nuptial agreement. The Matrimonial Causes Act (MCA) [892] , which regulates marriage-related matters and recognizes the possible existence of a pre-nuptial agreement, did not explicitly deal with the concept. The Act is currently the only legislation that regulates the distribution of properties when a marriage breaks

[886] A. Zia "Prenuptial Agreements, Sacred Marriages, and the Radmacher Judgment" *Journal of Comparative Law* (2013) 8, 192

[887] Elvis Asia, "Why You Should Consider a Prenuptial Agreement before Marriage" DNL Legal and Style, (2019). Available at https://dnllegalandstyle.com/2019/practical-and-legal-reasons-for-pre-nuptial-agreement-in-nigeriaelvis-e-asia/ [Accessed 8th August 2023]

[888] Mathew Obaro, "Examination of Prenuptial Agreement in United States of America and United Kingdomand Its Jurisprudential Lessons For Nigeria (LL.M Dissertation, University of Ilorin, 2017) P. 148

[889] Ibid

[890] A.G. Karibi-Whye, "Succession Rights of Women in Nigeria Law" (*Law and Family*, 1994) 23

[891] S.C. Ifemeje, (n 29) 2-7

[892] Cap M7 LFN 2004

down. Therefore, the enforceability of pre-nuptial agreements in Nigeria remains a myriad more particularly because the concept has not received any judicial recognition yet.

However, Section 72 of the Matrimonial Causes Act is to the effect that:

> i. The Nigeria court may, in any proceedings under this Act, by order requires the intending couples to the marriage or to make for the assistance of all or any of the parties to, and the kids of, the marriage, such a settlement of the assets – to which any of the intending couples are entitled, as the court may consider fair and just in the circumstances of the case. ii. The court, in any proceeding under the Marriage Causes Act, shall make such order as the court considers just and unbiased concerning the claim for the assistance of all or any of the intending couples to, and the offspring of the marriage of the whole, or some part of the assets, dealt with by *ante-nuptial or post-nuptial settlement* on the parties to the marriage or either of them.

A careful perusal and digestion of Section 72 Matrimonial Causes Act suggest that the Act recognizes the rights of parties to a marriage to enter into a pre-nuptial or post-nuptial agreement. However, it empowers the court to make an order that it considers just and equitable in any circumstances, notwithstanding any pre or post-nuptial agreement. The court reserves the discretion to distribute the asset of the marriage for the benefit of all, notwithstanding the existence of any ante or post-nuptial agreement. Furthermore, the court is not bound by the subsistence of any ante or post-nuptial agreement in the exercise of its discretion in distributing properties. What guides the courts is justness and equitableness.

Section 72 is like bedrock for a pre-nuptial agreement in Nigeria, but there is no single legislation regulating what a pre-nuptial agreement is. The Section merely makes a mention of pre-nuptial and nothing more. It envisages the fact that it might be in existence and nothing more. It is merely speculative. Even though pre-nuptial agreements are not prevalent in this part of the world, they may still be enforceable in courts[893]. Parties are bound by their agreement in as much as the agreements are not vitiated by other factors. For instance, they are written law in Nigeria that governs succession, custody of children, divorce, and dissolution of marriages.

Any agreement, no matter how well-drafted, which seeks to oust the provisions of these laws, fails in court. Outside these, the courts are generally inclined to uphold the content of any agreement that is devoid of duress, misrepresentation, undue influence, and or fraud[77].

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[893] M. Bello, 'Examination of the applicability and enforceability of prenuptial agreement in Nigeria andUnited Kingdom'; Babayomi Olutumbi, "Understanding Prenuptial Agreement: The Nigerian Perspective" (August 25, 2022) Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4200469 [accessed 11th August 2023] [77] J.H. Blomberg, "Unconscionability: The Heart of the Uniform Premarital Agreement Act"*Journal of Family Law,*(2001)15, p. 131.

In essence, the enforcement of a pre-nuptial agreement is mainly dependent on the court's discretion based on what it terms fair and equitable. The court is not bound by the existence of a pre-nuptial agreement even if it is valid, and it conforms to all the requirements of a valid contract.

6. Conclusion

Pre-nuptial agreements, as shown above, are recognised under the Matrimonial Causes Act, but for religious and cultural beliefs, the concept is almost viewed as a taboo such that it has become almost a bizarre phenomenon. The practice is seen by many as a Western construct. The usefulness of pre-nuptial agreements outweighs its perceived disadvantages, contrary to the view of many. The factors militating against its general acceptance in Nigeria are also attributable to illiteracy and lack of sensitization about its uses.

There is a call for Nigeria to adopt a well-designed law or learn from countries that are already thriving in this area of family law, such as the United States of America, Netherlands, Canada, etc. However, South Africa is the only African country where a pre-nuptial contract or agreement is directly recognized and enforceable. A pre-nuptial contract or agreement, in all ramification, allows the intending couples to take more obligation in arranging their affairs. Marriage is now regarded as an equal partnership; consequently, intending parties or couples should be educated or encouraged to arrange and draw up their marital affairs agreement to suit their particular situation.

A prenuptial contract is not a break-up or divorce plan; it can be likened to assurance or insurance. The insurance or protection of one's property against fire does not mean or envisage one is inviting a fire to obliterate it, and the fire may certainly not take place, but when it does, the consequence will be ameliorated or cautioned. People also believe that negotiating a prenuptial contract often degenerates into disagreement even prior to the marriage. However, it suffices to say that starting a bond between intending couples with a contract or agreement sets out the facts of what will transpire upon the demise of any of the parties or divorce, and it can stimulate a sense of faith or trust. As this may be, sincere communication about finance or well-being before marriage, which a prenup symbolizes, can advance the value of relationships and provide an avenue for communication in marriage.

There is a need for Nigeria to have a definite legal framework that regulates this area of family law. For example, the United States of America and the United Kingdom have a settled legal framework on pre-nuptial agreements. A settled legal framework gives clarity and direction for pre-nuptial agreements. With the alarming explosion in the divorce rate in Nigeria, there is a need for intending couples to resort to pre-planning and signing of pre-nuptial agreements before entering into marriage contracts as warmly embraced by many countries of the world such as Canada, New Zealand, among others.

7. Recommendations

In light of the discussions above and having examined the extent or recognition and enforceability of pre-nuptial agreements in Nigeria, this paper makes the following recommendations:

1. There is the yawning need to sensitize Nigerians on the benefit of a pre-nuptial agreement. It saves the court from the rigors of a post-divorce property settlement. As wrongly believed, a pre-nuptial agreement does not encourage divorce, but rather it strengthens the marital relationship as both parties are rest assured of what is expected in the marriage. None of the spouses is surprised; they both live in a world of reality, not imagination. People should be informed that pre-nuptial agreements are not only for the wealthy as wrongly conceived.
2. There is the need for recognition of pre-nuptial agreement in Nigeria through the enactment of a definite legal framework regulating it.