REVIEW OF THE EVIDENTIAL BURDEN OF PROOF OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE IN MATRIMONIAL PROCEEDINGS IN NIGERIA

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Abstract

In Nigeria, statutory marriage represents a union of a man and a woman who voluntarily consent to be husband and wife. Where issues arise, wherein any of the spouses, finds it intolerable to live with his or her partner, the party approaches the court for a decree of dissolution of such marriage. It is during such matrimonial proceedings that the burden of proof that the marriage has broken down irretrievably being the sole ground for dissolving such marriage arises. Irretrievable breakdown under the Nigerian MCA as the cornerstone for dissolution of marriage has the problem of evidential burden of proof oscillation between petitioners and respondents due to the inherent contest that requires parties to adduce varying degrees of evidence to support their positions in matrimonial proceedings. Through doctrinal methodology, this study examines the "fault-based" irretrievable breakdown system in Nigeria and the gradual movement to the contemporary "no-fault" or hybrid systems in the UK, Australia, Canada and South Africa as well as the fact-sensitive approach which courts adopt when assessing whether a marriage has broken down beyond repairs. This study found that there is the existence of difficulties in producing credible evidence to meet the statutory threshold of irretrievable breakdown even when a party is trapped in a desperately unhappy marriage with clear emotional reality of marriage collapse. The study also evaluates key policy considerations and recommends legal reforms for achieving fairness, reduction of adversarial conflicts and ensuring procedural justice in determining irretrievable breakdown of marriage in matrimonial proceedings.

Keywords: Dissolution, Evidential Burden, Irretrievable Breakdown, Review, Proceedings

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1. Introduction

Proof of irretrievable breakdown of marriage has been the central legal and evidential burden as well as the practical gateway to securing a decree of dissolution[1] of marriage in Nigeria and many other common law jurisdictions for more than a half century. This cornerstone of matrimonial proceedings can be viewed from both legal and empirical or practical perspectives. Legally, the core issue before a court in dissolution of marriage proceedings is the determination of whether the marriage has broken down irretrievably or otherwise. In practical terms, however, the petitioners must usually produce evidence of one or more statutory grounds[2] to substantiate the allegation of irretrievable breakdown of marriage. The interaction between the formal or legal and empirical or practical terms through the establishment of the required statutory grounds or evidential norms and the adversarial procedure creates a dynamic in which the evidential burden of proof can appear to oscillate or move between the parties and to that end, petitioners must adduce enough evidence to satisfy the court and justify the dissolution of the marriage,[3] while the respondents may be required to rebut particular allegations or face and accept the consequences of the court's acceptance of the petitioner's account.

The oscillation of evidential burden among the parties to matrimonial proceedings is propelled by the need to discharge two types of burdens namely, the persuasive burden and the evidential burden. The persuasive burden which is also known as the legal burden concerns the subject or party who must convince the tribunal on the balance of probabilities and usually remains with the petitioner or the party that is asserting the fact. On the other hand, the evidential burden which may be called testimonial burden is the burden that results from the discharge of the legal burden by the petitioner, and which is placed on the respondent during the proceedings. In other word, the evidential burden is the burden that shifts to the respondent consequent upon the establishment of a prima facie case or a striking evidential picture presented by one party which may require the other party to produce explanatory evidence or risk an adverse finding.[4] This procedural interplay becomes very important in family law where many relevant facts such as emotional

[1] Matrimonial Causes Act, 1970. See section 15(1).
[2] *Ibid*. See section 15(2); and *Owens* v *Owens* (2018) UKSC 41.
[3] EI Nwogugu, *Family Law in Nigeria* (Heinemann Educational Books, Plc 2001) p. 196.
[4] R Cross and JW Tapper, *Cross & Tapper on Evidence* (12th edition Oxford University Press 2018) p. 112.

breakdown, “behaviour”, and consent to separation are personal, subjective and very often, poorly documented.

The need to reduce or avoid aggravating the pains and emotional trauma of vulnerable partners in dissolution matrimonial proceedings has led to the emergence of the debate on the desirability or otherwise of shifting evidential burden in matrimonial proceedings. The antagonists of the shift in evidential burden arguing that rigorous contestation of marital disputes in the name of proving irretrievable breakdown of marriage is time consuming, involving more cost implication and encouraging conflicts since the proceeding is essentially adversarial whereas the family system ought to be without feuds. The views of the antagonists of the evidential burden shift appear to have received the support of the decision in *Owens v Owens*[1] where the Supreme Court held that although Mrs. Owens was trapped in a desperately unhappy marriage, she could not discharge the evidential burden in spite of the clear emotional reality of marital collapse because the behaviour incidents relied upon did not cumulatively meet the statutory standard or threshold.

On their part, the protagonists of evidential burden shift are of the view that there is the need for justice through thorough or proper investigation the time and cost implications notwithstanding. The protagonists have raised the concern as to whether the elimination of shifts in evidential burden does not sidelines judicial scrutiny too far by its potential reduction of opportunities to detect coercion which would enable the courts to fulfill its mandate of justice delivery in matrimonial proceedings.[2]

Although the only ground for dissolution of marriage in Nigeria is irretrievable breakdown[3] of marriage with its attendant contestation and shifts in evidential burden, the debates surrounding evidential shift have engendered reforms in evidential requirements and proof of irretrievable breakdown of marriage for securing the grant of the decree of dissolution of marriage in some jurisdictions. While in the United Kingdom, legal reforms culminating into the enactment of the DDS Act[4] have tended to move from the “fault-based” ground which increases evidential oscillation in the proof of irretrievable breakdown of marriage to the “no fault” system, Australia and Canada have adopted the “no-fault system” with Canada tying its own “no-fault system” to separation which limits evidential burden shift.

[1] *Supra.*
[2] L Trinder and S Mandy, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation 2018), retrieved from <https://www.nuffieldfoundation.org> on 13th December, 2025 @ 12:25 pm.
[3] MCA, section 15(1).
[4] Divorce, Dissolution and Separation Act, 2020 of the UK.

However, South African just like Nigeria adopts irretrievable breakdown as the sole ground for dissolution of marriage but unlike Nigeria and the UK where the courts could not find irretrievable breakdown unless a statutory fact was made out however clear the emotional reality of marital collapse was,[5] South African courts have significant discretion to evaluate evidence holistically.[6]

Notwithstanding the fact that despite recent reforms in the law of divorce in some jurisdictions, evidential burden shifts have not been completely eliminated, it is important for there to be legal reforms in Nigeria that will whittle down the stringency of the requirements of the proof of irretrievable breakdown in matrimonial proceedings to reduce the cost and time of litigation as well as minimise the evidential hurdles that are imposed on parties whose marriages may be as good as "dead" but owing to legal requirements rooted in evidential burden shifts are allowed to remain amidst marital conflicts in the family systems.

2. Conceptual Analysis

2.1 Annulment: This is also known as nullity which refers to a legal declaration that a marriage was never valid at any time and thus treating it as if it never existed. It is granted where there is a fundamental defect such as fraud, bigamy or where one of the parties was having a subsisting marriage with another person before or at the time of marriage. While annulment makes the marriage void *ab initio* making it to have a retrospective effect,[7] a divorce take effect from the date the decree of dissolution was granted.

2.2 Judicial Separation: This is also known as legal separation and it refers to a court order which allows a married couple to live apart while remaining technically and legally married.[8] Unlike divorce which marks the end of marriage and allows the parties to remarry, judicial separation keeps the marital status intact but for non-cohabitation. It may be temporal being for a period or perpetual for an indefinite term and under it, issues like child custody, support property division are resolved. It is a path for those with religious objections to divorce or those who want to keep inheritance rights, but the order or decree is dischargeable if the couple reconcile.

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[5] *Owens* v *Owens* (*supra*).
[6] *S* v *S* (2015) ZACC 62 (S. Afr.).
[7] BA Garner, *Black's Law Dictionary* (8th edition Thomson West 2004) p. 100.
[8] *Ibid*. See p. 515.

2.3 Void Marriage: This is a marriage that is legally invalid from the start which could be because of fundamental flaws like the contravention of the prohibited degree of consanguinity and affinity or when one of the parties was having a subsisting lawful marriage. A void marriage requires no formal court action to end it and the law regards it that it has never existed thus making it to have a retrospective effect.[9]

2.4 Voidable Marriage: This is a marriage that is regarded as valid until a competent court declares it otherwise upon the petition of one of the parties seeking an annulment due to issues like fraud, duress or mental incapacity at the time of consent. In other words, a voidable marriage is cancellable at the instance of one of the parties and it is effective from the date on which the decree becomes absolute.[10]

3. Meaning of Marriage

Marriage is a concept that has no short, straight forward and generally accepted definition. This is because the concept can assume different definitions depending on the sex or sexes and the number of persons involved in the marriage relationship. The lack of universal definition is not only because of differences between statutory and customary systems of marriage but also because of the existence of different types or species of marriage. However, until a few decades ago, marriage was generally believed to be a union between a man and a woman[11] or some women.[12] In Nigeria, it is worthy of mention that statutory marriage is synonymous with monogamous marriage while customary marriage which is essentially polygamous or plural marriage involves one person being married to multiple spouses at the same time and includes, widow inheritance or levirate marriage and sororate marriage.[13] Thus, the meaning of marriage may be more explicit if some types or species of marriages such as monogamous, polygamous, polyandry and same sex marriages are briefly discussed.

It is however important to observe before a discussion of the types of marriages that the Nigerian courts and statutes recognise the core idea of plural marital forms involving statutory marriage and traditional or customary cum Islamic marriage each being governed by distinct rules and remedies. On the one hand, while statutory marriage is governed by

[9] EI Nwogugu, *op.cit*. @ p. 147.
[10] *Ibid.*
[11] Monogamous marriage.
[12] Polygamous marriage.
[13] R Aderibigbe, *Family Law in Nigeria* (Godas Publishing Consult 2004) pp. 1, 21-22.

the Marriage Act, customary marriage is governed by the native law and custom of the community where it was contracted provided that such native law and custom are not repugnant to natural justice, equity and good conscience.[14] On the other hand, the Nigerian judicial practice has shown that the legal identity of "marriage" depends on the source of law invoked.

Consequently, for statutory marriage, the courts apply the formal legal tests and registration where applicable but for customary marriages, the court looks at the customary rites and proof that is admissible under the Evidence Act and relevant case law.

In *Amobi v Nzegwu*,[15] the Supreme Court examined competing claims arising from different marital regimes and emphasised that the nature of the union (statutory or customary) determines applicable remedies and the rights of spouses. Thus, "marriage" in Nigeria is not a single unitary institution but a family of legally cognisable unions whose content and consequences vary with the legal regime under which they were formed. The plurality of marriage forms explains why Nigerian jurisprudence carefully distinguishes validity, capacity and the choice of applicable law when adjudicating matrimonial disputes.

4. Types of Marriage

4.1 Levirate Marriage: This is the marriage practice whereby upon the death of the man, the widow is inherited or traditionally transferred to be the wife of the brother or another close male relative of the deceased. While in some communities, the widow is inherited by a male son of the deceased from another woman, in some other communities, the widow is allowed to choose which of the deceased brothers or close relative she would accept to marry.[16]

4.2 Monogamous Marriage: This is the English type of marriage and in Nigeria, it is either known as statutory marriage or marriage under the Act. It was defined by Lord Penzance in *Hyde* v *Hyde*,[17] as, "… the voluntary union for life of one man and one woman to the exclusion of all others." Similarly, monogamous marriage was statutorily,[18] defined as, "a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the

[14] *Meribe v Egwu* (1976) LLJR-SC.
[15] SC. 135/2005 (unreported).
[16] EI Nwogugu, *Family Law in Nigeria* (Heinemann Educational Books, Plc 2001) p. 65.
[17] (1886) LR 1 P & D 130 @ 133.
[18] Interpretation Act, Cap. 123, LFN 2004.

continuance of the marriage."[19] Thus, the characteristics of monogamous marriage are: a relationship between two persons of opposite sex; voluntariness of the relationship; contemplation of a life time relationship or the life time of the party who predeceases the other party;[20] the exclusion of all other persons; and a relationship that is recognised as between the two parties by the law of the place where it was contracted.

4.3 Polygamous Marriage: This is a voluntary marital relationship for life comprising of one man and two or more wives. According to RM Aderibigbe, "it is a voluntary union of one man and one woman to the inclusion of some others."[21] In Nigeria, polygamy is a feature of the customary law. Thus, the incidents of customary marriages like, quantum of bride price, celebration, rights and duties and dissolution of customary law spouses are governed by customary law which is largely unwritten and variable from one locality to another.[22] Besides, customary law includes Islamic customary law which is largely based on the provisions of the Holy Qur'an and the teachings of Prophet Muhammad known as sunnah or hadith. While polygamous marriage under other customary laws is unlimited as to the number of wives that can be married by one man, the number of wives that can be married by one man under Islamic customary law is regulated hence it is referred to as "restricted" polygamous marriage, the maximum number being four.[23]

4.4 Polyandry Marriage: This is one of the deviations from the tradition meaning of marriage which involves a man and a woman; or a man and two or more wives. Polyandry is a marriage where one woman marries two or more men at the same time, the husbands being referred to as "co-husbands". It is a form of matriarchal polygamous marriage in which a woman takes two or more husbands at the same time; or a situation involving a woman who is having a subsisting marriage with a man taking additional man or men as her husbands, at the same time. In Nigeria, there is evidence that polyandry is unlawful.[24]

4.5 Same Sex Marriage: Same sex marriage is a deviation from natural order. It is a union of persons of the same sex for instance "woman to woman" which may happen where a wealthy barren woman marries a girl for the purpose of bearing children for her; or a

[19] *Ibid.* See section 18.
[20] *Ibid*.
[21] *Op.cit* @ p. 2.
[22] EI Nwogugu, *Family Law in Nigeria* (Heinemann Educational Books Plc 2001) pp. Lxxxi-Lxxxii.
[23] Qur'an 4:3; ID Abdur-Rahman, *Shari'ah: The Islamic Law* (Ta Ha Publishers 1997) pp. 144-148.
[24] EI Nwogugu, *op.cit* @ p. Lxxxiv.

marriage of two women who depend on lesbianism for the consummation of the marriage. Same sex marriage could also be between two males (men) who practice gay. Netherlands, the United States and South Africa are among the countries that have legalised same-sex marriage. However, same-sex marriage is prohibited[25] in Nigeria as at today in 2025.

4.6 Sororate Marriage: This is a marriage system whereby upon the death of a wife, the sister of the deceased who has not passed childbearing may be presented by her family to the widower as a substitute without the necessity of fresh marriage procedures. This type of marriage was regarded as a continuum of the first marriage, but it is already obsolete.[26]

5. Legal Framework Guiding Marriages in Nigeria

Marriage being the first social institution in the world and the root of the family unit is well recognised in every society thus necessitating its regulation. This underscores the involvement of the National Assembly and the House of Assembly of all the States in Nigeria in legislating on various aspects of marriage and family. The Nigerian Constitution[27] listed statutory marriage as one of the items upon which the National Assembly can legislate.[28] This accounts for why the Marriage Act, Matrimonial Causes Act, Matrimonial Causes Rules and the Same Sex Marriage Act are enactments of the National Assembly. By the implications of this constitutional provision, the State House of Assembly of each of the States of the Federation of Nigeria and the legislative arm of all the Local Governments of Nigeria are to legislate on Customary and Islamic law marriages since they are based on the local customs and religions of the various communities in States and Local Government Councils of Nigeria.

Customary marriage in Nigeria is a union contracted according to the native law and custom of the parties' community. It is a product of cultural practices and may involve bride wealth, family ceremonies and local rites. Legally, a customary marriage's validity is assessed by reference to the custom which the parties must prove in evidence and by the general limitation that the custom must not be repugnant to natural justice, equity or good conscience. The Evidence Act[29] and a line of cases require the proof of the specific rites or

[25] Same Sex Marriage (Prohibition) Act, 2013.
[26] RM Aderibigbe, *op.cit* @ pp. 1, 21-22.
[27] CFRN 1999 (as amended).
[28] *Ibid*. See item 61 of the Exclusive Legislative List in the Second Schedule.
[29] The Evidence Act, 2011.

consistent conduct constituting the marriage for it to be regarded as a valid marriage.[30] It is germane to remark that some customary marriages admit polygyny and other marital arrangements which are unacceptable under statutory marriage rules due to their inherent diversity. Consequently, rights, property regimes and grounds for dissolution of marriage often differ between customary and statutory systems of marriage.

By contrast, a marriage under the Act or statutory marriage is governed by the Marriage Act, Matrimonial Causes Act and the procedures which are contained in the Matrimonial Causes Rules. Marriage under the Act is a formal monogamous marital contract that must satisfy prescribed procedural and substantive requirements. Statutory marriages are ordinarily registered and subject to the statutory grounds for nullity and dissolution set out in the Matrimonial Causes Act.[31] The Act provides a uniform legal framework for petitions, jurisdiction and ancillary relief including maintenance, custody, and property orders which makes statutory marriages more readily amenable to judicial regulation.

The practical differences between customary and statutory marriages are important because where a dispute involves a statutory marriage, the High Court exercises jurisdiction under the Matrimonial Causes Act and applies the Act's procedural rules whereas when the marriage is customary, courts look to customary proofs and may apply local customary law to issues of succession, property and responsibilities subject to repugnancy rules. Again, some consequences differ, for instance, plural marriages under custom may complicate entitlement to maintenance or property shares, whereas statutory marriage law presumes monogamy and distributes remedies under a single codified scheme. The net effect is that the legal character of the union decisively shapes both the availability of remedies and the substantive entitlements of the spouses.

6. Scope of Matrimonial Causes Act (MCA)

In Nigeria, the Matrimonial Causes Act is the principal federal statute on matrimonial causes. It is broadly framed to govern divorce, nullity, judicial separation, restitution of conjugal rights, custody and other ancillary reliefs. The Act commences by restricting matrimonial causes to proceedings instituted under its provisions and confers jurisdiction on the High Court of each State to hear cases instituted under it.[32] Part II elaborates on

[30] *Meribe* v *Egwu* (1976) LLJR-SC.
[31] MCA. See sections 15 and 34 – 38.
[32] *Ibid*. See sections 1 & 2.

matrimonial reliefs such as reconciliation, grounds for dissolution and judicial separation, with detailed rules on the proofs required and the procedural safeguards to encourage reconciliation before granting a decree.[33] The Act therefore serves as both a code of substantive grounds[34] and a procedural framework for matrimonial litigation.

Beyond dissolution, the MCA governs the consequences of decrees: remarriage, maintenance, custody and welfare orders for children, enforcement mechanisms, and the registration and enforcement of foreign decrees.[35] The Act also contains provisions on void and voidable marriages, prohibited degrees of consanguinity and the law applicable to auxiliary matters.[36] Crucially, the Act vests the High Court with jurisdiction, ensuring that matrimonial causes are subject to uniform federal regulation while allowing certain summary jurisdiction courts to enforce maintenance orders.[37] The Act's Rules (Matrimonial Causes Rules) elaborate pleading formats, forms of petition, and evidentiary presumptions in dissolution and nullity proceedings.

It is noteworthy to remark that the MCA has a twin purpose namely: the provision of accessible judicial remedies while encouraging reconciliation; and protection of children's welfare. The Act's expansive scope from jurisdictional coverage to enforcement and ancillary relief makes it the central legal instrument for statutory marriages in Nigeria; even where customary or foreign elements arise, the MCA supplies default rules for procedure, jurisdiction and the allocation of matrimonial rights.

7. Validity of Marriage

Validity of a marriage depends on complying with legal and cultural requirements including proper consent, age, capacity of the parties and adherence to formal ceremony rules like licensing and witnesses. Consequently, validity in Nigerian matrimonial law is determined by the regime (whether it is customary or statutory) under which the union was contracted and by statutory prohibitions. The MCA addresses the issues of void[38] and voidable[39] marriages. While a void marriage is an invalid marriage from the start or a marriage that is regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by the parties without the

[33] *Ibid*. See sections 11–17.
[34] *Ibid*. See section 15.
[35] *Ibid*. See sections 33, 71, 91–95.
[36] *Ibid*. See sections 3–8.
[37] *Ibid*. See section 2(1).
[38] *Ibid*. See section 3.
[39] *Ibid*. See section 5.

necessity of any decree annulling it, a voidable marriage is a marriage that is valid until a competent court declares it invalid or a marriage that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.[40]

Thus, while any person can assert the invalidity of a void marriage like when it offends the prohibited degree of consanguinity and affinity or where any of the parties is lawfully married to some other person, it is only one of the spouses to a voidable marriage that can assert the invalidity of a voidable marriage because until he or she brings a proceeding for the dissolution of the marriage and it is annulled, the marriage is valid.[41]

The Supreme Court has applied these statutory principles to concrete disputes. In *Amobi v Nzegwu*,[42] the Court considered whether a foreign-formal marriage and a subsequent customary marriage could co-exist for intestacy and property rights. In the Court's reasoning, validity depends on both the formalities to be observed and the applicable law at the time of contracting the marriage. Thus, the Nigerian courts have repeatedly emphasised that a void marriage is a marriage that produces no legal consequences[43] and that where the statutory conditions for nullity exist, a court may grant a decree to that effect.

With respect to customary marriages, validity derives from whether the union conformed to the native law and custom of the spouses' community and whether those customs are not repugnant to the principles of natural justice, equity and good conscience. To this effect, the Supreme Court in *Meribe v Egwu*[44] recognised that proof of a customary marriage depends upon demonstration of customary rites and the parties' intention to be married under that custom.

It is thus, noteworthy to summarise by stressing that a valid marriage requires capacity, consent and conformity with the formalities prescribed by the relevant legal regime.[45] These statutory benchmarks, together with judicial elaboration, supply the controlling tests that courts apply when determining validity of marriage in Nigeria.

[40] *De Reneville* v *De Reneville* (1948) 1 All E.R. 56.
[41] EI Nwogugu, *op.cit* @ p. 123.
[42] SC. 135/2005 (unreported).
[43] *Oghoyone* v *Oghoyone* (2010) 3 NWLR (Pt.) 1182.
[44] (1976) LLJR-SC.
[45] MCA. See sections 3–6.

8. Dissolution of Marriages

Dissolution means the cancellation or abrogation of a contract with the effect of annulling the contract's binding force and restoring the parties to their original positions.[46] When used in connection with marriage, it means the legal process of formally terminating a marriage and the cancellation of the legal duties of matrimony thereby allowing the spouses to move ahead as single persons. Although, dissolution of marriage is often used interchangeably with divorce, in specific terms, while dissolution refers to uncontested cases where spouses have reached a full separation agreement before filing a petition which could lead to a quick approval by the court, divorce refers to contested cases where the parties failed to agree on terms.[47] Whichever way, the concepts of court ordered dissolution or divorce are significant in resolving the marital issues of child custody, division of assets or property, child visitation, alimony or spousal support and child support.

It is germane to state that by statute,[48] the leave of court is required before there can be the institution of dissolution of marriage proceedings within two years[49] after the date of the marriage. This two year rule is premised on the need to prevent people from rushing into ill-advised marriages and also to deter any of the couple from rushing out when he or she discovers that the marriage was not what he or she expected.[50] The law specifies the circumstances under which the court may grant leave to institute dissolution of marriage proceedings within two years of the marriage to be either the case involving exceptional depravity on the part of the other party to the marriage or that would impose exceptional hardship on the applicant if the leave is not granted.[51]

However, it must be emphasised that what amounts to exceptional depravity and hardship is for the determination of the trial court,[52] and in the determination of the application for leave to institute dissolution proceedings within two years of marriage, the court shall have regard to the interests of the children of the marriage and to the question whether there is any reasonable probability of reconciliation before the expiration of the period of two years.[53]

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[46] BA Garner, *op.cit* @ p. 506.
[47] Shur Law. Retrieved from <https://shurlaw.com> accessed on 20th December, 2025 @ 8:45 am.
[48] Matrimonial Causes Act, 1970.
[49] *Ibid*. See section 30(1) (2).
[50] *Fisher v Fisher* (1948) pp. 263 & 264 (CA); and RM Aderibigbe, *op. cit*. @ p. 46.
[51] MCA. See section 30(3).
[52] EI Nwogugu, *op.cit* @ pp. 151 & 152.
[53] MCA. See section 30(4).

The two year rule notwithstanding, a party to a marriage may commence or institute a dissolution proceeding within two years of marriage without the leave of the court if the petitioner based the proceedings on the respondent's willful and persistent refusal to consummate the marriage or that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent since the marriage.[54] Again, the institution of dissolution proceedings within two years of marriage would not be prevented if the respondent has committed rape, sodomy or bestiality.[55]

9. Grounds for Dissolution of Marriage: Irretrievable Breakdown

Before the enactment of the Matrimonial Causes Act, 1970 in Nigeria, court dissolution of marriage was fault-based being conditional on the court's satisfaction of the respondent having committed a matrimonial offence such as adultery, cruelty and desertion in line with England's then stigmatising matrimonial offences theory that was in vogue.[56]

In England, the situation was turned around through the enactment of the Divorce Reform Act, 1969 that marked a conceptual shift from the matrimonial offence theory to irretrievable breakdown of marriage as a single and dominant ground for dissolution of marriage. By that reform of the divorce law, the role of the court was diagnostic since the reform left unresolved practical questions about what evidence that would suffice in establishing irretrievable breakdown. Consequently, the statute adopted a "facts" approach through the establishment of one of a closed set of facts which is just like preserving the fault-based elements under the matrimonial offences' theory. In other words, the practical result is hybrid through a formal and sole ground of irretrievable breakdown but by a substantive menu that still required the petitioner to prove sometimes highly personal conduct such as unreasonable behaviour or to rely on long separations.[57]

In Nigeria, the concept of irretrievable breakdown of marriage was adopted and taken as the only ground for the dissolution of marriage under the Act.[58] This was remarked by RM Aderibigbe, when he said, "it follows therefore that a petition for divorce which fails to ask for dissolution of the marriage on the ground that it has broken down irretrievably will not

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[54] *Ibid*. See section 15(2) (a) (b).
[55] *Ibid*. See section 16(1) (a).
[56] P Rebecca, "The History of 20th-Century Family Law" *The Cambridge Law Journal*, vol. 64, no. 3, 2005, pp. 543–567; and EI Nwogugu, *op.cit* @ pp. 155.
[57] L Trinder and S Mandy, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation 2018), retrieved from <https://www.nuffieldfoundation.org> on 12th December, 2025.
[58] Matrimonial Causes Act, 1970. See section 15(1); *Ekrebe* v *Ekrebe* (1999) 3 NWLR 514 and *Labode* v *Labode* (1972) NMLR 197.

succeed."[59] It is germane to state that for the court to arrive at the conclusion that irretrievable breakdown of marriage has occurred, any of the following facts must be established: the respondent has willfully and persistently refused to consummate the marriage;[60] the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;[61] respondent's grave and unbearable conduct;[62] desertion by the respondent for a continuous period of at least one year;[63] continuous separation for a period of two years and respondent's consent to dissolution;[64] separation for a continuous period of three years;[65] non-compliance with a decree of restitution of conjugal rights;[66] and absence from the petitioner for such time and circumstances as to provide reasonable grounds for presuming that the respondent is dead.[67]

10. Burden of Proof in Matrimonial Proceedings: Persuasive and Evidential Burden

Understanding how evidential burdens oscillate in matrimonial proceedings requires a careful conceptual distinction between the persuasive or legal burden and the evidential or prima facie burden of proof. The persuasive burden is the obligation to satisfy the court on the required standard of proof in civil and family cases which is the balance of probabilities. That burden ordinarily rests on the party asserting the fact (*actor incumbit onus probandi*) and typically does not shift. By contrast, an evidential burden is the obligation to raise sufficient evidence on an issue to make it legitimately for the tribunal to consider that issue. If the party with the evidential burden discharges it, the tribunal must consider the matter, but the persuasive burden remains where statute and law place it.[68]

In family law the evidential burden often operates dynamically. For example, when a petitioner alleges respondent's behaviour constituting unreasonable behaviour, the petitioner must first adduce sufficient evidence to make the allegation credible but once a prima facie case is made, the evidential burden may then require the respondent either to rebut or explain the conduct on the one hand or accept that the tribunal may infer

[59] RM Aderibigbe, op.cit @ pp. 48.
[60] MCA. See section 15(2) (a).
[61] *Ibid*. See paragraph (b).
[62] *Ibid*. Paragraph (c).
[63] *Ibid*. Paragraph (d).
[64] *Ibid*. Paragraph (e).
[65] *Ibid*. Paragraph (f).
[66] *Ibid*. Paragraph (g).
[67] *Ibid*. Paragraph (h).
[68] R Cross and JW Tapper, *Cross & Tapper on Evidence* (12th edition Oxford University Press 2018).

breakdown on the other hand. Practically, that means that the evidential burden can "oscillate". In other words, a strong evidential show by the petitioner compels the respondent to present contrary evidence or risk the court finding the fact proved on the balance of probabilities. Similarly, where a petitioner relies on separation as a fact and discharges it legally, the evidential burden may shift to the other party or respondent to show that separation was not as claimed.[69] There are two features that make these dynamics distinctive in matrimonial contexts as follows.

First, many relevant facts like emotional distance and intolerability of cohabitation are subjective facts that often lack contemporaneous documentation thus necessitating courts' heavy reliance on the statements of witness, credibility findings and surrounding circumstances which increase the importance of evidential thresholds.

Second, family proceedings are policy-sensitive, and the courts must weigh the potential harm to vulnerable parties and children and reconcile findings with protective civil orders like domestic abuse injunctions that may rest on different standards or proofs.

11. Oscillation of the Burden of Proof

The oscillation of the evidential burden in matrimonial proceedings is a consequence of the interaction of statutory requirements and adversarial presentation of evidence. Under the MCA legal framework, while the legal burden rests consistently on the petitioner, the evidential burden requiring a party to produce enough evidence to prove an issue before the court or tribunal could shift repeatedly.

A clear illustration comes from the statutory structure governing separation facts which explicitly required petitioners to establish separation before the evidential burden moves to the respondent. By section 15(2) (e) of the MCA, a court hearing a petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievably if the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to the decree being granted. It follows that after the petitioner has adduced prima facie evidence of separation or living apart, the evidential burden shifts to the respondent to demonstrate resumed cohabitation and or lack of consent.[70] In *Oyenuga* v *Oyenuga*,[71] the

[69] D Hunt and R Mostyn, "Probability Reasoning in Judicial Fact-finding" *Judiciary of England and Wales*, (2019), retrieved from <https://www.judiciary.uk/wp-content/uploads/2019/10/hunt_and_mostyn_2019.pdf> on 25th November, 2025 at 12:30 pm.
[70] *Ibeawuchi* v *Ibeawuchi* (1973) 3 ECSLR 56.
[71] (1977) 3 CCHCJ 395.

court inferred consent from a letter written by the respondent informing the petitioner that the marriage has broken down and that he would like to file a petition for divorce which is evidence that the respondent does not object to a decree of dissolution being granted.

Similarly, in behaviour-based petitions, once the petitioner establishes a credible narrative, the evidential burden shifts to the respondent to rebut, contextualise or explain alleged conduct. This dynamic or shift was apparent in *Owens v Owens*,[72] where Mr. Owens' detailed rebuttal evidence effectively shifted the burden back to the petitioner who ultimately failed to meet the persuasive burden.

In recent years in the United Kingdom, effort has been made to reduce oscillation by making the petitioner's statement conclusive in England and Wales. This was done through the enactment of the DDS Act[73] which introduced "no fault" divorce and the option for couple to make a joint application for divorce or dissolution which officially came into force on April 6, 2022. This divorce law reform notwithstanding, oscillation persists in related proceedings particularly in domestic-abused fact-finding and financial remedies where the courts must assess competing requests and allegations which require evidential burdens to shift as the narrative unfolds.

Scholarly and practical debates are therefore focusing less on abolishing burden distinctions but on ensuring that rules and case management are followed to prevent unfair shifts that may be disadvantageous to vulnerable parties or produce perverse tactical incentives.[74]

12. Evidentiary Challenges in Proving Irretrievable Breakdown

Evidentiary challenges in demonstrating irretrievable breakdown arise from the inherently private, emotional, and undocumented character of activities in marital relationships. In Nigeria, the points to prove irretrievable breakdown of marriage under the MCA include:[75] willful and persistent refusal to consummate the marriage, adultery which is intolerable to the other partner, unbearable behaviour, desertion and separation. Establishing any of these points has its own difficulties but we shall briefly consider irretrievable breakdown of

[72] (2018) UKSC 41.
[73] Divorce, Dissolution and Separation Act, 2020.
[74] RM Cross, and JW Tapper, *Cross & Tapper on Evidence* (12th edition Oxford University Press 2018); Divorce, Dissolution and Separation Act, 2020, UK Public General Acts *legislation.gov.uk*, 2020 PDF accessed on December 12, 2025 @ 23:00 pm.
[75] MCA. See section 15(2).

marriage through desertion[76] and separation[77] which involve both spouses living apart and which are forms of non-judicial separation. While living apart may be seen and construed as physically departing from living together in one household, it goes beyond that to include situations where there is severance of marital obligations even when the spouses are under the same "roof".[78] It follows that a partner can validly be said to have deserted or separated from the other partner if marital obligations are withdrawn by that particular partner without the consent of the second partner.

In other words, desertion which means the separation of one spouse from the other spouse with the intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse on the one hand; and separation which may simply be seen as living apart without mutual agreement are full of technicalities. Proving desertion or separation involves the establishment of the simultaneous presence and proof of four elements namely, *de facto* separation of the parties which includes the repudiation of marital obligations;[79] *animus deserendi* which involves the intention to withdraw from cohabitation permanently;[80] lack of just cause for the withdrawal of cohabitation which refers to conducts which make continuance of matrimonial cohabitation virtually impossible;[81] and the absence of the consent of the deserted spouse who may have withdrawn his consent to the state of affairs having earlier acceded to a mutual separation.[82]

In the UK, before the enactment of the DDS Act 2020, petitions that were founded on behaviour often relied on subjective narratives that were difficult to corroborate. Respondents could contest or minimise allegations, requiring courts to assess credibility in the absence of objective evidence. One persistent difficulty involved was in defining "living apart," especially where spouses remained in the same home. Courts had to examine personal arrangements, sleeping, eating, finances, household functions in order to determine separation. The statutory guidance which illustrates complexity stated in part that, "…may be treated as living apart even though they share the same household if they

[76] *Ibid*. See section 15(2) (d).
[77] *Ibid*. See section 15(2) (e) (f).
[78] EI Nwogugu, *op.cit* @ pp. 178; *Rosanwo* v *Rosanwo* (1961) WNLR 297.
[79] *Pulford* v *Pulford* (1923), p. 18 @ 21.
[80] *Sowande* v *Sowande* (1969) 1 All NLR 482.
[81] *Sode* v *Sode* in Suit No. HD/35/1966 (unreported).
[82] *Ikpi* v *Ikpi* (1957) WNLR 59.

are living together in the same household only by reason of necessity or convenience."[83] It follows that even when the spouses are living together in the same house, it may happen that they are doing so out of necessity or convenience and not necessarily because they are married in which case they can be regarded as living apart. This is why petitioners frequently struggled to provide evidence of emotional withdrawal, changed domestic routine and other symbolic acts that mark separation. In *Fuller v Fuller,*[84] even financial arrangements had to be dissected to determine whether cohabitation had resumed.

A second evidentiary challenge in proving irretrievable breakdown of marriage concerns power imbalances where victims of coercive control or domestic abuses often cannot produce detailed and chronological accounts of behaviour such as trauma, manipulative obscure documentation and fear. As noted by Herring, the narrow evidential expectations risk disadvantaging vulnerable petitioners particularly where abusive partners strategically deny allegations.[85] These problems are still persistent even after the "no-fault" reform because abuse allegations still arise in child-arrangements and protective-order hearings.

A third evidentiary challenge in establishing irretrievable breakdown of marriage is the limits of credibility assessment because Family Courts rely heavily on the statements of witnesses which are shaped by emotions, selective memory and litigation pressures. The Nuffield Foundation studies found that defended divorces are often turned on "thin and poorly substantiated" evidence that leaves judges engaging in difficult inferential reasoning.[86] Such difficult task of reasoning magnifies the practical effects of who bears the evidential burden at each stage.

Finally, digital procedure and accelerated case management especially in post 2020 reforms can reduce opportunities to fully explore contested facts. Cases may turn on paper evidence alone thereby amplifying structural evidential disadvantages. Thus, although the statutory task of proving breakdown has been simplified, evidentiary challenges remain deeply embedded in the broader ecology of family litigation.

13. Jurisdiction over Marriage Causes

[83] Section 2(6) of the Matrimonial Causes Act 1973.
[84] [1973] Fam 52.
[85] J Herring, *Family Law* (9th edition Pearson / Routledge 2019) p.133.
[86] L Trinder and S Mandy, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation 2018), retrieved from <https://www.nuffieldfoundation.org> on 13th December, 2025 @ 12:25 pm.

In Nigeria, the Matrimonial Causes Act expressly vests jurisdiction in the High Court of each State to hear matrimonial causes instituted under the Act.[87] Nigerian jurisprudence confirms that the High Court is the primary forum for dissolution, nullity and judicial separation, with summary courts retaining limited competence to make maintenance or separation orders when permitted by state law. The Court of Appeal and Supreme Court have frequently adjudicated appeals from High Court decisions on matrimonial causes where they clarify jurisdictional questions and substantive points of family law.[88]

In *Amobi v Nzegwu,*[89] the Supreme Court reviewed competing claims over estate administration that turned on the status of marital unions and confirmed that High Courts have jurisdiction to determine the existence and legal effect of marriages under the MCA and related laws. Similarly, in *Obusez v Obusez*,[90] the Court reiterated the primacy of statutory jurisdictional rules on issues about the application of the Marriage Act and the Matrimonial Causes Act.

It is noteworthy to remark that specialised family courts may exercise concurrent or delegated jurisdiction for welfare matters, custody, and child-related applications, but dissolution and nullity remain within the High Court's core jurisdiction unless statutory exceptions apply. The MCA also permits registration and recognition mechanisms across jurisdictions,[91] enabling the enforcement of orders between courts. Also in practice, litigants commence petitions in the High Court while interlocutory and ancillary relief may involve summary courts, but appellate review lies with the Court of Appeal and the Supreme Court. In fact, judicial decisions have consistently treated the High Court as the primary forum for matrimonial causes, with appellate oversight ensuring uniformity in the law's application.

14. Evidential Proofs for Dissolution of Marriage in Some Other Jurisdictions

Comparative jurisprudence on the grounds for dissolution of marriage reveals many jurisdictions adopting irretrievable breakdown as the basis for divorce have structured evidential burdens in significantly different ways. Historically, England and Wales require petitioners to prove one of the five facts under the Matrimonial Causes Act, 1973 thereby

[87] MCA. See section 2(1).
[88] *Amobi v Nzegwu* SC. 135/2005; *Obusez v Obusez* SC 405/2001.
[89] SC. 135/2005.
[90] *Supra*.
[91] MCA. See sections 76 and 91.

creating a system where evidential burden oscillates depending on whether behaviour, adultery, or separation was alleged. As Trinder and Sefton observed, the pre 2020 reform model "placed the weight of breakdown almost entirely on the petitioner's narrative" often inviting defensive counter narratives from respondents.[92] Following the *Owens* v *Owens* decision, the DDS Act, 2020 eliminated this evidential structure by making the petitioner's statement conclusive.

In Australia, the Family Law Act, 1975 adopts the "no-fault" system. However, by section 48 of the Act, the only ground for divorce is irretrievable breakdown demonstrated solely by twelve months' separation. Separation is treated as a factual question by Australian courts and in case of *the Marriage of Falk,*[93] it was emphasised that the evidential burden rarely shifts beyond proving the fact of separation which can occur "under one roof" provided the marital consortium has ended. The lack of a behaviour-based pathway means evidential oscillation is minimal and disputes typically centre on the interpretation of separation and not on "no-fault".

Similarly, Canada employs a hybrid "no-fault" model under the Divorce Act, 1985 which recognised irretrievable breakdown through separation, adultery, or cruelty. Although adultery and cruelty retain fault-based features, most divorce proceedings on the no-fault separation ground are evidentially treated more flexibly by Canadian courts. In *Knoll v Knoll,*[94] the Ontario court observed that the evidential burden in cruelty cases may shift depending on the credibility and plausibility of narratives, reflecting a functional rather than rigid approach. Nevertheless, the prevalence of separation-based petitions minimises oscillation.

In South Africa, section 4 of the Divorce Act, 1979 adopts "irretrievable breakdown" as the sole ground with illustrative indicators such as prolonged separation, adultery or habitual criminality. South African Courts have significant discretion to evaluate evidence holistically. In *S v S,*[95] the Constitutional Court reaffirmed that no single fact is determinative and that courts may draw inferences from marital history, making evidential burdens modest and context driven.

Thus, across many jurisdictions, three patterns of grounds for divorce may be identified: (i) fault-based grounds which increase evidential oscillation; (ii) separation-based regimes

[92] *Op. cit*.
[93] (1977) 29 FLR 463.
[94] (1981) 34 O.R. (2d) 256 (Ont. C.A.).
[95] (2015) ZACC 62 (S. Afr.)

which limit burden-shifting; and (iii) systems emphasising judicial discretion which tend to treat evidential burdens as fluid rather than formally allocated.

15. Policy Debates on Movement of Evidential Burden in Matrimonial Proceedings

Policy debates concerning the movement of evidential burdens in matrimonial proceedings are centred on fairness, efficiency and the protection of vulnerable spouses. Proponents of a shifting evidential burden argue that matrimonial breakdown is complex and often contested and that courts must allow evidential responsibilities to move dynamically. This approach is consistent with the general principles of civil evidence where once a prima facie case is established, the burden shifts to the respondent to provide an alternative explanation.[96] Thus, in behaviour-based divorce, a flexible evidential framework prevents petitioners from bearing a disproportionate burden and allows judges to contextualise the parties' relationship. Critics on the other hand argued that shifting burdens can reproduce and aggravate inequality in relationships that are marked by coercion or power imbalance contending that an evidential structure that obliges vulnerable spouses the provision of prolong and detailed narratives of mistreatment risks "re-traumatising victims and empowering respondents who strategically deny allegations."[97] This argument was central in supporting the enactment of the DDS Act, 2020 which lawmakers justified as reducing conflict, promoting procedural justice, and preventing respondents from using evidential contests to delay divorce.

Another policy concern involves truth-seeking versus procedural economy. While supporters of shifting evidential burden argue that detailed evidential inquiries may uncover relevant relational dynamics which are beneficial to courts in the determination of ancillary matters such as child arrangements or domestic-abuse findings, non-supporters are of the view that these adversarial inquiries are time-consuming, costly, and potentially destructive to family relationships. This was supported by the Nuffield Foundation report which assessed defended divorces as "resource-intensive and damaging to family well-being" and often turning on thin evidence.[98]

Furthermore, while the antagonists of shifting burdens emphasise legal certainty which reduces ambiguity and protect procedural rights by limiting the circumstances under which

[96] R Cross and JW Tapper, *op. cit*. pp.135-140.
[97] J Herring, *op. cit*. pp.133-137.
[98] L Trinder and S Mandy (*op. cit)*.

respondents must adduce evidence, the protagonists have questioned whether this approach does not sideline judicial scrutiny too far by potentially reducing opportunities to detect coercion or ensuring the voluntariness of proceedings.

In the final analysis, policy tension lies between respecting party's decision and allowing spouses to exit marriages with minimal evidential hurdles on the one hand and ensuring that the justice system appropriately assesses facts to protect children, vulnerable partners and the integrity of the legal system on the other hand.

16. Conclusion

The oscillation of the evidential burden of proof in divorce proceedings reflects broader tensions within family law exemplified through the distinction between fault and no-fault models; subjective and objective understanding of marital irretrievable breakdown; and the conciliatory versus adversarial judicial processes. While evidential burden in behaviour-based petitions is shifting fluidly in jurisdictions like England and Wales thereby allowing courts to examine narratives, credibility and context, some other jurisdictions operate models that rely on separation or simplified statements of irretrievable breakdown, which minimise oscillation and reduce adversarial pressure on litigants. The move toward no-fault divorce is therefore conscious effort to eliminate the evidential contests surrounding irretrievable breakdown and thereby promote access to justice, reduce conflicts and prevent strategic obstruction by respondents.

Notwithstanding the apparent movement towards a no-fault divorce system, evidential challenges are still prevalent in some areas of family litigation, especially in child arrangements, domestic abuse and financial remedy disputes where courts inevitably engage with contested narratives. Therefore, while oscillation has largely been removed from the divorce process itself, it remains relevant to the broader ecosystem of the family justice system. Any law reform must therefore balance minimalism in dissolution with procedural safeguards in ancillary matters. Ultimately, evidential burdens should be structured to ensure fairness, protection of vulnerable parties and avoiding unnecessary adversarial conflicts while maintaining the court's ability to ascertain truth.

17. Recommendations

The following recommendations are hereby offered in the light of the above complexities:

1. Legislatures should maintain simplified, non-fault-based dissolution procedures that prevent unnecessary evidential contestation.
2. Courts should adopt clearer guidelines for evaluating credibility in related proceedings to prevent the re-emergence of unfair evidential burdens.
3. Statutes should include explicit protections for vulnerable spouses, including safeguards when statements of breakdown intersect with coercive control.
4. Judicial training in trauma-informed evidential assessment should be strengthened across family courts.
5. Policymakers should ensure that procedural reforms do not eliminate opportunities for courts to scrutinise evidence where children's welfare or safety is at stake.