

Bargaining in the Shadow of the Law: The Facts of Divorce as it stands today

by

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Abstract

Fair enough, dark chocolates and mediation share the same resemblance or mutually have a lot of similarities. These two have been used from 2000BC; they have different articles from different centuries that have been published about this two. Thus, they are famous and well documented. However, both work, have had divergent opinions on how, why, what and when they can be used. Recently, ADR Advocates or enthusiasts and the judicial branch in different jurisdictions are determined and motivated to understand those mentioned above and they are also eager to enlighten their citizenry.

Consequently, we embrace the same aims or objective for mediation as we examine the expression 'bargaining in the shadow of the law', which so many researchers have written countless articles on for so many decades. Hence, 'bargaining in the shadow of the law' raises a pertinent question on the interplay between litigation and alternative dispute resolution mechanisms; which are now at the forefront of the jurisdictional litigation process in both emerging and developed legal systems. Here we give a brief overview of the traditional African method (TAM) of settling disputes before it was repackaged or formalised as Alternative Dispute Resolution(ADR). We focus on Family mediation, and it's intricacies and explore the role of lawyers, mediators, and courts in the issue of bargaining over family wealth and custody prerogatives. This article concludes by addressing the issue raised in the question relating to how couples bargain concerning family wealth and custody during divorce.

The Conceptualisation of Key Terms and Concepts

The keywords in this article that require an explanation from the onset are the term ADR which is the acronym of Alternative Dispute Resolution and TAM which is the acronym of the Traditional African Method. The central theory of this work is Bargaining in the Shadow of the Law: The Facts of Divorce as it stands today.

Introduction

The traditional African method (TAM) of settling disputes centuries ago, though still prevalent in this millennium involves a neutral party from a family unit assisting in settling disputes or conflicts between one or two parties. This had so many benefits and was solely used before the colonisation of African countries and in Nigeria, to be precise. This colonisation era ushered in a new system of settling dispute which is known as Litigation.

Litigation involves *'the act, process or practice of settling a dispute in a court of law'*.¹ However, the latter became problematic due to its complexities or rigorous processes associated with the aforementioned system. The westerners who colonised these African countries were opportune to have witnessed the benefits² of the TAM of settling disputes; they decided to key into this system by repackaging it which they adopted and coined a new name for-Alternative Dispute Resolution (ADR). Thus, ADR was later transplanted back to Africa as a new method of settling disputes - with the inference that ADR was our first choice but this wasn't the case because this was part and parcel of the Africa value and culture of settling disputes amicably which enables

¹ Merriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/litigation>> accessed 22nd January 2020

² Jerome T. Barrett, Joseph P. Barrett, A History Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement (First Edition, Jossey-Bass 2004) p.2.

living in peace as 'one'. Thus, litigation is their alternative. On its second return, it's been formalised as one-stop-shop classified in different units known as Arbitration, Mediation, Negotiation, Conciliation, and Early Neutral Evaluation. There is a lot of documentation, it is confidential, the neutrals are trained³ and it has people who are educated and have the prerequisite skills. That's the difference between now and then; that is the extent to which the TAM has evolved. Hence, Alternative Dispute Resolution (ADR) can be defined as

'a process deployed by an institution or a private individual within or outside a structured court system to resolve disputes in an acceptable informal manner facilitated by a neutral party'.⁴

Flowing from the above, as a concept, ADR has no clear definition⁵, it is rather approached from divergent points of view or different historical views or perception. However, while it seems these views are divergent, no doubt the substance is still very much the same.

This discourse, however, focuses on family mediation, private and flexible means of settling a dispute.

The Family mediation council stated that Family mediation as

"where a neutral, professionally trained mediator assists you, your ex, or other family members to communicate better with each other and consensually work out their own agreement about issues relating to arrangements for children after break up which is called custody, residence or contact, Child maintenance payments and Finances-what to do with your house, savings, pensions, debts"⁶by negotiation.

³ The Lagos Multi-Door Courthouse Neutral's Handbook (First Edition, Lagos Multi-Door Courthouse 2017) p.19

⁴ Chinwe Stella Umegbolu, "Why I am excited about Research" (BBS Staff and Student Research Conference 2019)

<http://blogs.brighton.ac.uk/chinwe/2019/09/27/why-i-am-excited-about-my-research/> accessed 22nd December 2019

⁵ Susan Blake, Julie Browne, Stuart Sime, A Practical Approach to Alternative Dispute Resolution (Second Edition Oxford University Press 2012) p.5.

⁶ Family Mediation Council (FMC) < <https://www.familymediationcouncil.org.uk/family-mediation/> > accessed 22nd January 2020

Flowing from the above, it simply connotes a process where all the parties are the winners. Unlike litigation, mediation creates a positive negotiation environment in which anger and anxiety are reduced and substituted by a healthy concern for issues that bothers both parties and for the decisions each must take.⁷ The focal point here is that before divorce or dissolution of marriage takes place, there must be marriage or civil contract.⁸ In hindsight, the method of dissolving marriages was mainly through the court.⁹ Like earlier stated in this article, due to the complexities with the adversarial system, Mediation was introduced. Hence, Mediation as an alternative method has many benefits over litigation like encouraging party autonomy.

Furthermore, a more seemingly insightful benefit of mediation was stated by Folgar et al '*in a period of divorce, family mediation provides a therapeutic means of settling intricate issues upon which is likely to impact positively and psychologically upon the couple*'.¹⁰ As a result, supplements adjudication, which is a preferred adversarial way of settling custody disputes between divorcing and separating parents. It is significant to point out that in divorce, existing legal frameworks governing custody, alimony, child support, and marital property are all evident for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.¹¹ Parkinson has suggested that divorcing couples '*do not bargain in the shadow of the law*' meaning that when the party's come to the negotiating table they have at the back of their mind the knowledge of what prerogatives and elements the court could take into consideration¹². However, Hazel Genn is of the opinion that mediation requires the parties to come as they are that is to discard any ideas of legal entitlements and bargaining over positions¹³ during their meditation session but rather focus on

⁷Donald T. Saposnek, Chip Rose, *The Psychology of Divorce* (Mediate.com, Mediators& Everything Mediation) <<http://www.mediate.com/articles/saporo>> accessed 28th September 2018

⁸Jana Singer, *The Privatization of Family Law* (University of Maryland Law School ,1992)1p.456

⁹ Ibid 1505

¹⁰Robert A. Baruch Bush, Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass 2005)p 13-15.

¹¹Robert H. Mnookin, Lewis Kornhauser, *Bargaining in the Shadow of the Law,* *The Case of Divorce*, 1978-79, 88 Yale L J 950959-963.

¹² Lisa Parkinson, 'The Place of Mediation in the Family Justice System' (2013) 25 Child & Fam L Q 200 p.205

¹³ Roger Fisher, William Ury, *Getting to yes: Negotiating an agreement without giving in* (Published by Random House Business Books 2012)p.1

problem-solving¹⁴. In all fairness, negotiating an agreement without the backdrop of the law could be detrimental to all the parties involved and also for the mediators, who could find themselves faced with lawsuits.

In the light of the above, it is visible or crystal clear that disputants on the matrimonial subject do not bargain in a vacuum. This is because many a time, the bargaining abilities of the parties are somewhat determined or based on their consciousness of the position of the law.¹⁵ So, it suffices to say that divorcing parents usually reach an accord over the division of family wealth and custodial prerogatives on their own; they bargain in the shadow of the law.¹⁶

BARGAINING OVER FAMILY WEALTH AND CUSTODY PREROGATIVES

Whenever a marital conflict reaches its peak, where the center can no longer hold, divorce is imminent. Then the reality is that family wealth and custodial arrangements for any children become intricate knots that must be untied. One of the ways of sorting out this quagmire, when it occurs is by bargaining between the parties.¹⁷

¹⁴ Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2009) at p.82

¹⁵Dalrock, Bargaining in the Shadow of the law <<http://dalrock.wordpress.com/2012>>accessed on 23rd September 2018.

¹⁶Robert H. Mnookin, Lewis Kornhauser, Bargaining in the Shadow of the Law,' *The Case of Divorce*, [1979] 88 Yale L J 950960-963.

¹⁷John Wade, Forever Bargaining in the Shadow of the Law-who sells Solid Shadows? (Who advises what, how and when?)(Bond University) <<https://epublications.bond.edu.au/law>> accessed on 23rd March 2018.

Thus to have a healthy bargain, parties would bargain within the shadows of the law.¹⁸ For example, parties involved in negotiation may promise, threaten, bluff or deliberately exaggerate their chances of winning in court, with the hope of persuading the other side to accept.¹⁹ Many other strategies may be used, but they are all coloured by the consciousness of the law.²⁰

Hence, one such way in which parties may have a healthy bargain in the shadows of the law is through a mediator. This is because a mediator will take into cognizance what solutions both parties can agree upon, especially where children are involved. However, before we look into the role of a family mediator as well as lawyers, we need to explore the depth of the two basic concepts involved, which are family wealth and custody prerogatives.

FAMILY WEALTH

When one talks of custody arrangements for children, alimony, child support and marital property, one can confirm that we are within the framework of the family wealth. The family wealth is a broad term and varied. Thus is divided into the following subheadings for ease of purpose.

ALIMONY

According to the Oxford Dictionary, Alimony can be defined '*as a husband's or wife's provision for a spouse after separation or divorce, maintenance*'.

¹⁸Mnookin & Lewis, Bargaining in the Shadow of the Law (n13)972-975.

¹⁹Ibid972-975.

²⁰Ibid972-973.

Alimony and child support are an essential part of family wealth. Thus, this forms a crucial part of the subject of a bargain in a time of divorce. Alimony can be defined as a regular or lump-sum payment to a spouse after a divorce. Traditionally, it is the husband that society expects typically to pay alimony which is evident in *Prest v Petrodel Resources Ltd.* Also, in *White v White*, where the yardstick of equality was introduced; thus, fairness, requires the court to take into consideration the circumstances of the case. The issue of fairness was backed by the case of *Prest v Petrodel Resources Ltd.*

The above cases demonstrate the shift in legal thinking as was illustrated in *White v White* and this legal thinking is still prevalent till today, which affects the way couples bargain in the shadow of the law. However, in *McFarlane v McFarlane* where in the past a 'blameless' wife was entitled to lifelong periodical payments from her husband, and this entitlement survived divorce. This clean break from this landmarked case created a shift in thinking that a husband is to provide continuing maintenance of his wife for the rest of her life, which had hitherto been a common feature of court orders, towards an approach in appropriate cases which leads to each spouse becoming financially free of the other. It's been argued that the motive for the change was to aid or enable the spouses truly to terminate their marriage ties by settling their financial affairs in a manner that left each one free to start again without any continuing obligations to a former spouse.'

Furthermore, Sec.25A of the Matrimonial and Family Proceedings Act 1984 buttresses the point stated above:

- 1) 'If the court decides to exercise any of its powers under any of sec.22A to 24A in favour of a party to a marriage, it shall be the duty of the court to consider whether it would be appropriate; as to exercise those powers that the financial obligations of each party towards the other would be terminated as soon as after the grant of a divorce order or a decree of nullity as the court considers just and reasonable'.

2) 'Where the court decides in such a case to make a periodical payments order in favour of a party to the marriage, the court shall, in particular, consider whether it would be appropriate to require those payments to be made or secured only for such terms as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party'.²¹

CHILD SUPPORT

Child support or maintenance is a process where the non-custodial parent pays to the other party which involves periodic payments, and this can be arranged in two ways, by a family-based arrangement which is private, cheaper and which protects the child's best interest or using statutory child maintenance service or the courts.

There is a need for divorcing parents to use wisdom on how they go about negotiation on issues relating to child maintenance. This point finds statutory backing in Sec.9 (2) of the Child Support Act 1991; 'nothing in the Act shall prevent any person from entering into maintenance'. In other words, the law gives access to divorcing couples to reach their agreements, and this was captured by private ordering. Hence private ordering means that the agreement was reached or contacted by the parties themselves and all the law had to do was to rubber-stamp it. Additionally, the existence of a maintenance agreement shall not prevent any party to the agreement or any person, from applying for a maintenance assessment

²¹ Section.25A of The Matrimonial and Family Procedural Causes Act 1974

However, the only possible circumstances where the court would likely intervene are in Sec. 9(3) Child Support Act 1991 the excerpt states as follows:

3. .where any agreement contains a provision which purports to restrict the right of any person to apply for a maintenance assessment

4 ... no court shall exercise any power that it has to vary any agreement so as-

(a) to insert a provision requiring the absent parent to make or secure the making of periodic payments by way of maintenance...to or benefit of that or

b) to increase the amount payable under such provision.'

In light of the preceding, the act makes it clear that the jurisdiction of the child support agency cannot be ousted by a maintenance agreement. The effect of Sec .9 is to put the parent with care in a dominant position in a case where the absent father fails to pay the amount agreed upon the terms of the agreement.

Lending credence is the case of *Lord Lilford v Glynn*, where the court of appeal stated that the wealth of a parent does not amount to exceptional circumstances. Consequently, it was held that it had been wrong to order a millionaire father to settle a lump sum in trust for each of his children and to also make provision for the payment of an income to them for their lifetime. Judge Orr J noted that 'even the richest father sought not to be regarded as under financial obligations and responsibilities ...for children who are not under disability and whose maintenance and education are secure.'²²

Also in *Kiely v Kiely*, a father living in more modest circumstances had been ordered to pay a lump sum to each of his children when the younger child reached the age of 18. In allowing the

²² CA [1979] 1 WLR 78

father's appeal, the court of appeal reaffirmed that a parent's obligation ends when the child reaches 18 years.²³

The relevance of these two cases is to highlight the fact that when couples are involved in the negotiation, they are free to agree on their terms of an agreement. Moreover, this agreement can only be rubber-stamped in light of the current legislation. If the divorcing mother, for instance, in their private ordering were to waive her rights, he is under obligation to give his consent to such agreement.

CUSTODY PREROGATIVES

Theoretically, custody prerogatives are said to be the 'right or privilege belonging to a particular person.'²⁴ It has been argued that there are three basic standpoints from which the dimension of custody prerogatives could be approached which are as follows:

MATERNAL-PREFERENCE RULE

The maternal-preference rule is one that creates a strong presumption in favour of custody to the mother, with the father having visitation rights. Until recently, this was the dominant standard in the past.

BEST INTEREST OF THE CHILD APPROACHES

This recent view has emerged to challenge the above viewpoint. This approach considers what should be in the best interest of the child. The best interest of the child was deemed to have

²³ [1988] 1 FLR 248.106

²⁴ Oxford Dictionary

been put into the test by the court by conferring broad discretion on the judge. Thus, it gives no automatic preference to either parent solely based on the parents or the child's sex. This takes us straight from the past to date, in other words, the argument would be that this single factor would take at least a vast majority of chips that were rightly due to the mother and placed squarely in the hands of the father. The negotiation dynamics stated above becomes a swinging pendulum that does not have regard to gender issues but plays on the facts on the table. In recent years, wives can no longer threaten their divorcing husbands with limited visitation rights to win more financial rewards. The recent case in the Court of Appeal judgment in *Waggott v Waggott* where a wife claimed that she should be entitled to maintenance from her husband's future income bonuses long after their divorce as a result of the support she gave to him in establishing his business during their marriage.²⁵ The decision of the Court of Appeal rejecting this request (thus, affirmed that earning capacity is not capable of being a matrimonial 'asset' to which the sharing principle applies). This decision by the Court of Appeal lends credence to the above-stated position in recent years.

JOINT-CUSTODY RULES

The rules in joint-custody provide that in disputed cases, each parent will have care and control for half the time. Interestingly, Mnookin et al. have noted that no jurisdiction either in the United States or England has adopted this strategy.²⁶ Therefore in light of the present-day rule of law, this would have limited relevance except in cases of academic debate.

It was noted by, Mnookin et al., that 'if the legal standard changed from a maternal-preference rule to a standard that gave no preference based on parental sex, then a father's chances of

²⁵ *Waggot v Waggot* [2018] EWCA Civ 727.

²⁶ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Best Law*, *The Case of Divorce*, 1978-79, 88 Yale LJ 950.)977-978.

winning custody in a contested case could be improved.²⁷ This, in turn, would affect the outcomes reached through negotiation, since it would generally increase the bargaining power of the fathers as a class and decrease the bargaining powers of mothers.²⁸

One can conclude that this can be termed as negotiating in the shadows of the law. Hence, the negotiating power of parents is fully endorsed by judicial processes.²⁹ It is apt to note that the courts have increasingly realised that parents are in a better position to make agreements about their children than the courts.³⁰ The thinking behind this approach is that parents are able to agree about the child's upbringing through private ordering or mediation, they are more likely to abide by their agreement, and therefore an agreed outcome will promote the child's welfare than a solution imposed by the court, and the relationship will remain cordial, unlike litigation.³¹

It is clear that as the law develops or changes, it is usually reflected in the way divorcing couples bargain for a more substantial chunk of family fortunes, custody or visitation prerogatives that comes with separation.³²

BARGAINING IN A VACUUM/UNLAWFUL BARGAIN

It would be taken that whenever a divorcing couple is not negotiating in the shadows of the law, then they would be negotiating in a 'vacuum'.³³ Settling in a vacuum could happen where the

²⁷Ibid 978

²⁸ ibid 978

²⁹Mary Hayes and Catherine Williams, *Family Law, Principles, Policy and Practice* (2nd edn, Butterworths 1999)240

³⁰Ibid240

³¹Jana B. Singer, *Bargaining in the Shadow of the best Interest Standard: The Close Connection between substance and process in resolving divorce-related Parenting Disputes*. (University of Maryland, Frances King Carey School of law 2013) 1444-1456.

³²[2013]UKSC 34.

³³Robert H. Mnookin ,&Lewis Kornhauser

bargain is unlawful or vitiated by other vitiating elements of a contract, such as fraud, mistake, misrepresentation, etc.

In *Edgar v Edgar* it was held, that the court must take account of the circumstances surrounding the making of the agreement, for example, the questions to find out would be:

‘Had there been undue pressure by one party on the other? Had one party exploited a dominant position?’ Did one party have inadequate knowledge? ‘were there any unforeseen or overlooked changes in the circumstances existing at the date of the agreement?’³⁴

Also, in *B v B*, a consent order was set aside because the wife was in a depressed and confused state when agreeing to it and was also given bad legal advice.³⁵

The main question here is whether a party who have unequal bargaining power in private ordering, for example, if the woman was exploited by the wealthy husband who had a stronger influence of negotiation. That is to say, was the negotiation unfair to the disadvantage of the wife or the adverse party as the case may be.³⁶ If there was no evidence of pressure by the husband to force the wife to accept the terms of the deed, and if the wife had received advice from her lawyers and probably refused to take it, then the agreement had to stand because of *Volenti non-fit Injuria*.³⁷ That is to say; a party deliberating gives consent without any vitiating element cannot complain.

In the United States, and the English position it would appear that in both jurisdictions that private ordering would be allowed to the extent that if there were nothing done the court would regard as being untoward.³⁸

The approach of the English court here is much comprehensive and intrusive; this further illustrates another occasion where the liberty by private ordering is in essence only autonomy

³⁴[1980]3 ALL ER 887.

³⁵[1995]1 FLR 9.

³⁶Lisa Parkinson, *Family Mediation: Appropriate Dispute in a new family justice System (2nd edn ,Family Law)* p.44.

³⁷Blacks law Dictionary, 8thedn,2004.

³⁸Mary Hayes ,Catherine Williams, *Family law, Principles, Policy and Practice (2ndedn, Butterworths 1999)*p.672.

granted by courts to divorcing couples to come to their agreements as long as it is equitable; thus all bargaining adopted must satisfy the rule of equity.

However, where parents can agree over child maintenance they may wish to involve the agency or recognised external process in the regulation of their financial circumstances.³⁹ In furtherance, the agency in charge has extensive powers to obtain information from a variety of sources including employers, local authorities and the Inland Revenue.⁴⁰ It is pertinent to note that parents usually do not take the risk in such inquiries being made. This fear alone can also make a party more compliant to the agreement reached by the parties. However, every law has a jurisprudential philosophy or mischief for which it is targeted to correct or address in the society. Public policy demands that laws should be for support of virtues and condemnation of vices and not vice versa. For instance in Nigeria, critics of ADR are of the belief that if party autonomy is allowed in divorce, then almost every marriage will end in divorce. This means every serious conflict in marriage would cause one of the parties to start a divorce in the heat of the passion and successfully complete the same before the anger goes down because such would likely be unchanged by the other party. This type of speed is not needed in divorce proceedings. The matrimonial causes act is specific as to the procedure for divorce. The law is clear under section 15(1) of Matrimonial causes⁴¹ that only marriage that has broken down irretrievably would be allowed to divorce. Anything outside it, it will render it null and void. However, when it comes to parents negotiating for child maintenance etc; ADR is encouraged but most times parties come into the mediation session with a lawyer because they have this belief that the lawyer is well-grounded in law than the mediator.

THE ROLE OF MEDIATORS

³⁹Ibid 672.

⁴⁰Child Support Act[1999]S14

⁴¹Matrimonial causes Act Laws of the Federation of Nigeria 1990

It has been argued that mediators have no authority to determine if a resolution is fair or just. This role is for the juries, judges, and arbitrators to decide.⁴²By doing so, they cannot be seen as impartial and neutral to the parties because they will be imposing their opinion on the parties.⁴³ However, Jonathan Hyman has argued in favour of the fact that a mediator should develop their skill at using justice which enriches mediation and as well as protect the parties' autonomy and choice.⁴⁴ For example, a mediator can achieve this by using the joint session to ask the parties 'you have brought up the issue of fairness?'⁴⁵ Do both of you want to talk a bit more about that? Additionally, a mediator might also suggest that parties consider truth and justice regarding a possible resolution by saying, "that demand seems much too big for the harm you said you have suffered."⁴⁶ Can a mediator do all this? We will suggest in the affirmative that this can be achieved by mixing both the models facilitative and evaluative to achieve this.

It is also crucial that there are private sessions, each party can have equal time, and the mediator will be able to manage dominant parties so that both parties will be properly heard. It is apt to point out that before parties come to family mediation for divorce, they must have seen a lawyer or a solicitor because of the complexity of family mediation hence they do not bargain in a vacuum, they negotiate in the shadow of the law.⁴⁷

Besides, for mediators to engage in mediation on the backdrop of equity, justice, and fairness, it would be challenging to predict results before negotiation if the mediator is impartial and neutral.⁴⁸

This is important because the mediation process does not have the bite of the law or a standardized procedure. In mediation, it is evident that during the process of divorce that

⁴²Jonathan. M Hyman, *Swimming in the Deep end: Dealing with Justice in Mediation* (Cardozo J. of Conflict Resolution) Vol.6:19. 19

⁴³Ibid19

⁴⁴Ibid19

⁴⁵Ibid21

⁴⁶Ibid21

⁴⁷Robert H. Mnookin, & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*.(88 Yale LJ 950,1979).

⁴⁸Alison Taylor, Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process (Mediation Quarterly, vol 14 no 3, 1997) 215

mediation has become more of an avenue to bring sensible and wise outcomes to conflicts between couples as well as also maintaining a cordial relationship and protect the child's best interest, unlike the court system.⁴⁹ Hence, it has been argued that the court system is often not the most appropriate system for resolving conflict with regards to the upbringing of children. The court in recent years encourages parents to make use of conciliation and mediation services before the legal system.⁵⁰

It has been argued that in 'in recent years the relevance of the process whereby mediators who may be a lawyer, helps to mediate a settlement between the parties have become increasingly used, and mediation is a central feature of the changes brought about by the family law act 1996, this view is still prevalent today.⁵¹ Therefore, using mediation during the negotiation process has the advantages of reducing acrimony. This is amongst the reasons why couples in recent years and beyond would be more inclined to go through the process of mediation than resort to the adversarial process of litigation. Further, nothing more than those chips handed over to the divorcing couples would come into play in the process of negotiation over the share of family fortunes than if they were negotiating without third parties.⁵²

THE ROLE OF LAWYERS

Indeed it has been said that the role of lawyers is such that many observers are very critical of the way some lawyers behave in divorce negotiations. Lawyers may make negotiations more adversarial and painful, and thereby making it difficult and costly for the spouses to reach an agreement.⁵³ However, where the talk of family wealth and custody prerogatives are complicated

⁴⁹Ibid 215.

⁵⁰Mary Hayes , Catherine Williams, *Family Law, Principles, Policy and Practice* (2nd edn, Butterworths 1999)241.

⁵¹Ibid 241.

⁵²Robert H. Mnookin, Lewis Kornhauser ,*Bargaining in the Shadow of the Law: The Case of Divorce* (88 Yale LJ 950)968

⁵³Ibid 241.

perhaps it may need the skill of lawyers to work out the details of these complexities and reduce them to understandable agreements that parties can sign to give effect to their contract.⁵⁴

The focal point here is that lawyers should look beyond their fees and go for justice. Where it is possible lawyers should try hard to discourage divorce until the last minute when it becomes evident that nothing more could have been done in the circumstance.⁵⁵

THE RELEVANCY OF BARGAINING IN THE SHADOW OF THE LAW TODAY

LUMP SUM PAYMENTS

In recent years, the courts are more willing for couples to have a clean break from periodic payments to lump-sum payments, which in some cases may last for 15 years. The view is supported by the decision reached by the court in the case of *Mcfarlane v Mcfarlane*.⁵⁶

PRE-NUPTIAL AGREEMENTS

The traditional prenuptial agreement usually is where one party is exceptionally affluent, and the other is not. However, this is not always the case in this millennium, the report from CNBC news channel, surveyed in 2016 where it was observed that millennials might not be attracted to prenuptial agreements because it protects their wealth, instead, they are more concerned about debts than wealth.⁵⁷

Thus in *Hyman v Hyman* that considered the enforceability of agreements between husband and wife to the Supreme Court decision in *Radmacher v Granatino*, the area of law had changed significantly in recent years.⁵⁸ Consequently, an agreement made after marriage or civil partnership that provides for financial consequences for the future termination of the

⁵⁴Ibid241.

⁵⁵Ibid241.

⁵⁶*Mcfarlane v Mcfarlane* [2009] EWHC 891(Fam)

⁵⁷ John Bolch; Are Prenuptial agreements no longer just for the Wealthy? (Stowe Law Aug 21st 2018)

⁵⁸*Radmacher v Granatino* [2010] UKSC 42

relationship at a time when it is intended to continue was considered unlawful on the grounds of public policy.⁵⁹

It is stated that the prevalence of divorce in society paved the way for the change in the authority of *Radmacher v Granatino*, wherein pre-nuptial agreements reached voluntarily by the parties will not be void provided that they had the full knowledge of its implication, except it would not be fair to hold the parties to their agreement.⁶⁰

Also, in *Luckwell v Limata*, it was held that the preparation of any nuptial agreement involves a careful consideration from the current and likely future law. Hence, it appears that family solicitors will continue to work in the shadows of the law for some time now.⁶¹

GENDER: The customary view in the past, is that the wife will have custody, and then-husband will pay for child support. However, in recent years, the court will take into consideration the best interest of a child. In the instant case, the High Court concluded that contact was better than abandonment. It should, however, be pointed out that the child involved in this case began to resist contact at a very early stage and the court was of the view that the child had not been unduly influenced by the mother.⁶² It is this issue that makes this case unique and may not have universal application. All the same, it reflects the thinking of the court in this millennium, to the issue of contact or arrangement especially where the mother has custody.

⁵⁹Martial property agreement: A consultation paper (The law commission, consultation Paper 2012) No198.

⁶⁰Rebecca Fairbaion, Pre-nuptial Agreements(news @ one, one paper buildings2014)<<http://www.onepaper.co.uk>>accessed 9th April 2018.

⁶¹*Luckwell v Limata* [2014] EWHC562 (Fam)

⁶²*Re E (A child)* 2011 EWHC 3521(Fam).

CONCLUSION

It is noted that marriages or civil contracts are binding between parties and when divorce or dissolution of marriage occurs between parties, there are intricacies and complexities that the mediation process may not be able to resolve fully.

In divorce proceedings, each party wants to get what is fair to them by considering several factors that involve the duration of marriage or contract, the number of children involved, the assets and liabilities of both parties and their relevant contributions to the family.

One considers whether parties can get what is due to them without the assistance, guidance or strict enforcement of the law. However, in modern settlements, it is noted that the adversarial process is the preferred method as a party to a divorce may have the feeling that they may not get what is equitable and fair to them especially if there are discrepancies or volatile disagreements between both parties. The law is firm and rigid; there are repercussions for its breach and the consequences thereof which can be addressed promptly irrespective of its deficiencies.

Parties to a divorce proceeding in recent times prefer a streamlined approach of dealing with the complexities surrounding their wealth and custody arrangements and in most cases end up in court. Hence, the law is the only means to accomplish this. Negotiation and Mediation can be used as a means to arrive at an accord as to the preliminary stages in order to avoid a dragged out exaggerated settlement. Nevertheless, whether parties have negotiated, agreed or disagreed or even in dispute as to who gets what, when and how, the ambit of the law is the final process that streamlines all their entitlements and guides the process to fruition.

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