

**CHILD CUSTODY LAWS IN NIGERIA: BALANCING PARENTAL RIGHTS AND THE  
BEST INTEREST OF THE CHILD**

**BY**

**MERIT EWOMAGHENE OVUERERIE  
LAW2103605**

**FACULTY OF LAW  
UNIVERSITY OF BENIN  
BENIN CITY**

**NOVEMBER, 2025**

**CHILD CUSTODY LAWS IN NIGERIA: BALANCING PARENTAL RIGHTS AND THE  
BEST INTEREST OF THE CHILD**

**BY**

**MERIT EWOMAGHENE OVUERERIE  
LAW2103605**

**A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW,  
UNIVERSITY OF BENIN IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR  
THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LLB) OF THE  
UNIVERSITY OF BENIN, BENIN CITY.**

**NOVEMBER, 2025**

## **CERTIFICATION**

I, **MERIT EWOMAGHENE OVUERERIE**, with Matriculation Number **LAW2103605**, hereby certify that apart from references to other persons' works which have been duly acknowledged, the entire work is a product of my research, and this project has neither in whole nor in part been presented for another degree elsewhere.

---

**MERIT EWOMAGHENE OVUERERIE**  
**LAW2103605**

**APPROVAL**

We certify that this project was written and completed by **MERIT EWOMAGHENE OVUERERIE**, with Matriculation Number **LAW2103605**, in partial fulfillment of the requirements for the award of a Bachelor of Laws (LL.B) degree.

**DR. (MRS) EDAMWEN FRANCES OGBONNA**  
**PROJECT SUPERVISOR**

\_\_\_\_\_  
**SIGNATURE AND DATE**

**DR. (MRS.) OBIAGELI FRANCISCA OSUJI**  
**PROJECT COORDINATOR**

\_\_\_\_\_  
**SIGNATURE AND DATE**

**PROF. BRIGHT BAZUAYE**  
**DEAN, FACULTY OF LAW**

\_\_\_\_\_  
**SIGNATURE AND DATE**

## **DEDICATION**

I dedicate this work, first and foremost, to the Almighty God. Thank You for Your constant presence, your grace that never runs out, and your strength that carried me through every step of this journey. Without you, none of this would have been possible.

To my amazing parents, Pastor Mrs. Beatrice Irabor and Pastor Monday Irabor-this achievement is as much yours as it is mine.

Thank you for every prayer, every sacrifice, every encouraging word, and every moment you believed in me even when I doubted myself. Your love has been my foundation.

To my dear brother Paul, thank you for your support, your understanding, and the quiet strength you bring into my life. Your presence has meant more to me than words can express, and I'm grateful to have you by my side.

To Dr. Julius Edobor and Dr. Gavin Daudu, your guidance, patience, and unwavering support have shaped my academic journey in meaningful ways. Thank you for investing your time, wisdom, and encouragement in me. I truly appreciate you both.

And to everyone who stood by me, lifted me up, or contributed to my growth in any way-this milestone belongs to all of us. From the bottom of my heart, thank you.

## **ACKNOWLEDGEMENTS**

First and foremost, I give all thanks to God, whose love, guidance, and constant presence have carried me through every moment of this journey.

To my wonderful parents, Pastor Mrs. Beatrice Irabor and Pastor Monday Irabor-there are no words strong enough to express my gratitude.

Thank you for believing in me even on the days I struggled to believe in myself. Your prayers, your encouragement, and your endless sacrifices have been the backbone of my strength. I am deeply blessed to call you my parents, and I carry your love with me everywhere I go.

To my amazing friends-Rebecca, Ivy, Racheal, Ochuwa, Osayi, and Bayo-thank you for being the kind of people who show up, who listen, who understand, and who lift my spirit when I need it most. Each of you has touched my life in a unique and beautiful way. Your laughter, your support, and even your gentle pushes have helped me grow, and I'm truly grateful for the bond we share.

From the bottom of my heart, thank you all for walking this path with me. Your love and friendship have made this journey unforgettable.

## TABLE OF CONTENTS

Title page	-	-	-	-	-	-	-	-	-	-	ii
Certification	-	-	-	-	-	-	-	-	-	-	iii
Approval	-	-	-	-	-	-	-	-	-	-	iv
Dedication	-	-	-	-	-	-	-	-	-	-	v
Acknowledgement	-	-	-	-	-	-	-	-	-	-	vi
Table of Contents	-	-	-	-	-	-	-	-	-	-	vii
Table of Statutes	-	-	-	-	-	-	-	-	-	-	viii
List of Abbreviations	-	-	-	-	-	-	-	-	-	-	ix
Table of Cases	-	-	-	-	-	-	-	-	-	-	x
Abstract	-	-	-	-	-	-	-	-	-	-	xi

### CHAPTER ONE: GENERAL INTRODUCTION

1.1. Background to the Study	-	-	-	-	-	-	-	-	-	1
1.2. Statement of the Problem	-	-	-	-	-	-	-	-	-	5
1.3. Objectives of the Study	-	-	-	-	-	-	-	-	-	7
1.4. Research Questions	-	-	-	-	-	-	-	-	-	7
1.5. Significance of the Study	-	-	-	-	-	-	-	-	-	8
1.6. Scope of the Study	-	-	-	-	-	-	-	-	-	9
1.7. Methodology	-	-	-	-	-	-	-	-	-	9
1.8. Justification for the Study	-	-	-	-	-	-	-	-	-	10
1.9. Overview of Chapters	-	-	-	-	-	-	-	-	-	10
1.10. Conclusion	-	-	-	-	-	-	-	-	-	11

**CHAPTER TWO: CONCEPTUAL, THEORETICAL FRAMEWORKS, AND  
LITERATURE REVIEW**

2.1.	Introduction -	-	-	-	-	-	-	-	-	13
2.2.	Conceptual Clarification -	-	-	-	-	-	-	-	--	13
2.3.	Theoretical Clarification -	-	-	-	-	-	-	-	-	35
2.4.	Literature Review -	-	-	-	-	-	-	-	--	38
2.5.	Conclusion	-	-	-	-	-	-	-	-	42

**CHAPTER THREE:**

**LEGAL FRAMEWORKS FOR CHILD CUSTODY IN NIGERIA**

3.1.	Introduction -	-	-	-	-	-	-	-	--	43
3.2.	Statutory Marriage and Child Custody -	-	-	-	-	-	-	-	-	44
3.3.	The Statutory frameworks -	-	-	-	-	-	-	-	-	49
3.4.	Conclusion -	-	-	-	-	-	-	-	--	58

**CHAPTER FOUR**

**CUSTODY OF CHILDREN UNDER CUSTOMARY LAW IN NIGERIA**

4.1.	Introduction -	-	-	-	-	-	-	-	-	59
4.2.	Dissolution of Customary Law Marriages. -	-	-	-	-	-	-	-	-	59
4.3.	Grounds for Dissolution of Customary Marriages -	-	-	-	-	-	-	-	-	59
4.4.	Custody of children Under Customary Law -	-	-	-	-	-	-	-	-	61
4.5.	Maintenance/Alimony -	-	-	-	-	-	-	-	-	63
4.6.	Conclusion -	-	-	-	-	-	-	-	--	65

**CHAPTER FIVE:**

**SUMMARY, RECOMMENDATIONS AND CONCLUSION**

5.1.	Summary	-	-	-	-	-	-	-	-	66
5.2.	Recommendations	-	-	-	-	-	-	-	-	69
5.3.	Conclusion	-	-	-	-	-	-	-	-	70
	Bibliography	-	-	-	-	-	-	-	-	73

## **TABLE OF STATUTES**

African Charter on the Rights and Welfare of the Child (ACRWC), 1999

Child's Right Act, 2003

Children and Young Persons Act

Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Immigration Act

Labour Act, Cap L1 Laws of the Federation of Nigeria

Matrimonial Causes Act, 1970

Marriage Act

Penal Code

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

United Nations Convention on the Rights of the Child (UNCRC), 1989

## **LIST OF ABBREVIATIONS**

ACRWC - African Charter on the Rights and Welfare of the Child

CRA - Child's Rights Act

CRC - Convention on the Rights of the Child

CYPA - Children and Young Persons Act

FRN - Federal Republic of Nigeria

LFN - Laws of the Federation of Nigeria

MCA - Matrimonial Causes Act

UN - United Nations

UNCRC - United Nations Convention on the Rights of the Child

## TABLE OF CASES

*Adeparusi v Adeparusi*

*Buwanhot v Buwanhot*

*Damulak v Damulak*

*Dsd v Sera Igwalah & Bolaji Philips*

*H v H & C*

*Ihonde v Ihonde*

*Jadesimi v Okotie-Eboh*

*Nwosu v Nwosu*

*Oduote v Oduote*

*Odogwu v Odogwu*

*Okafor v Okafor*

*Otti v Otti*

*Uzochukwu v Uzochukwu*

*Williams v Williams*

## ABSTRACT

Child custody issues are among the most sensitive and complex areas of family law, especially in Nigeria, which has a mixed legal system comprising statutory, customary, and Islamic laws. This study explores Nigeria's legal framework for child custody, focusing on how laws balance parental rights with the child's best interests. It is driven by the rising cases of divorce and separation, which have led to more custody disputes often resolved inconsistently due to conflicting legal standards, cultural expectations, and judicial discretion. The research critically examines laws such as the Children's Rights Act 2003 and the Matrimonial Causes Act, as well as relevant constitutional provisions. It also considers how customary and Islamic traditions handle custody, revealing differing philosophies about parental authority and gender roles- traditions often favouring paternal dominance and sometimes undermining mothers' nurturing roles while overlooking the child's emotional, psychological, and developmental needs. This divergence leads to tension between protecting parental rights and adopting a child-centred approach promoted by modern law and international treaties. The study emphasises the 'best interest of the child' principle, recognised internationally through instruments like the UNCRC and ACRWC, both ratified by Nigeria. It investigates how Nigerian courts interpret and apply this principle, identifying inconsistencies and instances where it is subordinated to economic, cultural, or religious factors. Using doctrinal legal research, the study reviews key judicial decisions, statutes, and secondary literature to identify strengths and gaps in Nigeria's child custody framework. Findings show that, although Nigerian law claims to prioritise the child's best interests, many decisions are shaped by patriarchal biases, parental wealth, and cultural norms. The lack of social support services, such as child welfare officers and custody evaluators, further hampers effective enforcement of court orders. The study advocates for a harmonised, reform-oriented legal system that emphasises the child's best interests while fairly considering both parents' rights. Recommendations include integrating social welfare into custody assessments, training judges on children's rights, and establishing clearer legal guidelines to limit judicial discretion that may conflict with the child's welfare. Overall, this research contributes to ongoing efforts for a more balanced, fair, and child-focused approach to custody in Nigeria. By highlighting the urgency of legal reforms and better judicial practices, it emphasises the need to protect vulnerable children in custody disputes and ensure legal outcomes truly support their well-being, development, and stability.

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1. Background to the Study

In any form of marriage performed or entered into by parties, it is expected that the marriage will last till eternity; this is based on the premise that marriage is a sacred institution created and sanctioned by God. Many, at times, people rush into marriage with big dreams for happy endings, to live with their spouses forever till death. Unfortunately, marriage is no fairy tale. Believe it or not, the rate of divorce in Nigeria and worldwide is on the increase year after year. Unions tend to break down for reasons ranging from adultery, lack of communication, intolerance, high expectations from both or either of the couples, etc. When all efforts to make the marriage work fails and the union cannot be saved, the only option is usually divorce. When it happens that the parties can no longer harmoniously live together as husband and wife, the court will have to come in between them either by settling or separating them, if either of the parties could establish that the marriage has broken down irretrievably, Nwogugu.<sup>1</sup>

When marriages stand on the brink of collapse, attention is given to the irreconcilable difference between the couples. Needless times and effort are spent on pre-litigious considerations, which is sometimes at the expense of the total wellbeing of the children of the marriage. Couples seeking a decree of order Nisi for a judicial separation, nullity or dissolution of marriage tend to be more engrossed with the legal burden of proving that the marriage has broken down irretrievably so that the children of the marriage who are often viewed as the spoils of war in the circumstance are left uncared for and inadequately given attention. In most cases, couples in separation usually do not bicker over who takes custody of the children.

---

<sup>1</sup> E. Nwogugu, *Family Law in Nigeria* (Henemann Educational Book Nigeria Ltd. Ibadan 1985) p.134.

Before the late 1800s, fathers had the sole right to child custody because of the culture of inheritance and property law; mothers had no such rights. From the nineteenth-century, courts began to award custody of young boys and girls of all ages solely to the mother on the presumption that mothers are inherently better caretakers of young children. Until 1970 most states encouraged and allowed this maternal preference called 'tender age doctrine,' and mothers almost always received custody. Eventually, many courts found this preference to be unconstitutional, and gender-neutral custody statutes have replaced maternal preference standards. A leading case on this was *Reed v. Reed*,<sup>2</sup> a non-custody case in which the U.S Supreme Court ruled that equal protection clause of 14 amendments prevents the courts from basing opinions on a generalization about either gender. It has also been held in a supreme courts case of *Odogwu v. Odogwu*<sup>3</sup> that this presumption is however rebuttable and can be impeached if, during courts proceeding it can be shown that, for example the mother is immoral, she has an infectious disease, she suffers insanity or is cruel to the child. Most states have discarded such presumption; however, mothers are still likely to get custody when parents separate despite this change.

State laws vary in determining the child's custody arrangements. Still, the general standard used today is that the custody awards must be in the child's best interest. When courts need to decide child custody, they consider what arrangements will be in the child's best interest. Determining the child's best interest requires finding the child's wishes and the child's relationship with either of the parents, siblings, or other persons who may substantially impact the child's best interest. The issue of custody is only secondary to the question of the child's wellbeing and welfare. Therefore, it guides the court in awarding custody to either of the parties before it, whether the father or mother.

---

<sup>2</sup> *Reed v. Reed* 404 US 71, 92 S. ct 251 (1971).

<sup>3</sup> *Odogwu v. Odogwu* [1992] 2 NWLR (Pt.225) 339.

This research aims to highlight and restate the law relating to custody under the Nigerian legal system and make a comparative analysis with other countries on the custody of children.

In Nigeria, the issue of custody of children is very crucial and unsettled. Although there is a provision on custody of children after divorce in customary, sharia, and civil laws, the children still face many calamities socially, psychologically, physically, and religiously. In many divorce cases in Nigeria, there is no legal separation between the couples. Therefore, it would cause a remarkable setback for the children as a right to their custody is not legally determined. The best example can be seen in an undecided case at Ajegunle Lagos state of Nigeria [April 20, 2006] where the father of a two months old baby had forcefully taken the baby from the mother and stabbed the mother to death in a dispute for the custody of the baby upon separation, Mathew.<sup>4</sup>

The study will highlight this kind of problems relating to the custody of children in Nigeria, will further investigate the adequacy of the laws to curb the problem. The focus will be on the full application and implementation of our laws on the children's custody while bearing in mind the child's best interest. A solution to the problems children encounter in Nigeria after the separation of their parents has to be given attention so that their interests will be better protected.

Child custody has emerged as one of the most contested and emotionally charged aspects of family law both globally and in Nigeria. It involves determining which parent or guardian should have legal responsibility for a child after the breakdown of a marriage or relationship. The matter often raises complex legal, cultural, psychological, and emotional questions. In Nigeria, where the legal system is pluralistic—comprising statutory, customary, and Islamic laws—these complexities are even more pronounced.

---

<sup>4</sup> Mathew Dike, (2006) “squabble for the custody of a baby leads to lady’s death”, THE SUN, 20 April, <[http://www.nigeria.gov.ng/national\\_dallies](http://www.nigeria.gov.ng/national_dallies)> accessed 2 August 2025.

Traditionally, custody arrangements were guided by patriarchal norms in customary and Islamic law, where fathers were regarded as the natural and legal custodians of their children. Mothers were generally seen as temporary caregivers, especially when the child was young, but the ultimate right to custody was often reserved for the father. However, as societal values have evolved and international human rights standards have gained prominence, especially those protecting children and women, the principle of the best interest of the child has become central to custody decisions.

The statutory framework, particularly under the Child's Rights Act 2003 and the Matrimonial Causes Act, establishes that the welfare of the child should be the paramount consideration in any custody dispute. This principle is also reflected in international treaties ratified by Nigeria, such as the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Yet, in practice, there remains a significant gap between law and reality. Judges often find themselves navigating a legal terrain filled with contradictions, especially where statutory law clashes with entrenched cultural norms or religious beliefs.

For instance, in many customary law settings in Nigeria, custody of male children is automatically awarded to the father, regardless of the child's preference or the mother's caregiving history. In some Islamic traditions, custody may be granted to the mother during the child's early years but reverts to the father when the child reaches a certain age. These practices may conflict with the best interest standard, particularly where the mother has been the primary caregiver or where the father lacks the means or disposition to provide adequate care.

Furthermore, the economic realities of Nigeria, including poverty, lack of social services, and inadequate child welfare systems, significantly affect custody outcomes. In many cases, custody is determined by the financial strength of the parents rather than by what is genuinely best for the

child. Courts may assume that a wealthier parent is more fit to take custody, which may ignore emotional bonds, psychological stability, and past caregiving roles.

Therefore, the central legal and ethical question that this study seeks to explore is: How can Nigeria's legal system effectively balance the rights of parents with the best interests of the child in custody cases, particularly in a culturally diverse and legally pluralistic society?

## **1.2. Statement of the Problem**

The percentage of divorce in Nigeria is always escalating, while problems associated with custody of children, despite the provision for their concern in our laws, is becoming compounded and unabated.

In Nigeria, many women have illegally lost possession of their children just because their marriages have ended. Although the civil and customary law may dictate that these children are better off with their mothers, does the social structure support this? The M.C.A. applies to all child custody cases and provides that the child's interest in all custody matters is paramount. This predominance of the child's rights is also echoed in the Childs Right Act 2003; this becomes even harder when the M.C.A. is silent on what the child's interest is, does not define the word minor, or considers the exclusive treatments that are necessities to minors. Situations where both parents are willing and fit, who gets custody? In Nigeria case laws, we see judgments where the court tries to make the child's interest paramount. In the case of *Odogwu v. Odogwu*<sup>5</sup>, Belgore J.S.C. stated, ' a child's welfare is synonymous with food but the child's happiness. While it is suitable for a child to be brought up by complimentary care of the two parents living happily together, psychological de mental to his welfare, happiness, and psychological if maternal care is denied.

---

<sup>5</sup> *Odogwu v. Odogwu* [1992] 2 NWLR (Pt.225) 339.

The problem with going the legal route in child custody cases is time, cost, and unenforceability of the judgments, so most women walk away with no recourse to justice or equity. Aside from patriarchy culture, the other reason women lose possession of their children is that they financially not buoyant and lack access to rights under either customary or civil law. Though the law of child custody was established to protect the child's best interest, final custody decisions are not always the best for them. Parents with the best legal representation may not necessarily be the parent who will provide the child's best care. This study thus proffered solutions to the multifaceted problems facing child custody in Nigeria.

### **1.3. Objectives of the Study**

The primary objective of this study is to conduct a comprehensive legal analysis of child custody laws in Nigeria with a particular focus on how courts balance the rights of parents with the welfare of the child. The specific objectives are:

1. To examine the legal frameworks governing child custody in Nigeria, including statutory, customary, and Islamic laws.
2. To analyze how Nigerian courts interpret and apply the principle of the best interest of the child in custody cases.
3. To assess the extent to which the rights of both parents—particularly mothers—are recognized and protected in custody decisions.
4. To identify the legal, cultural, and institutional challenges affecting the implementation of custody laws in Nigeria.
5. To recommend legal reforms and policy strategies that can strengthen child custody adjudication in Nigeria and ensure better protection of children's rights.

### **1.4. Research Questions**

This study will be guided by the following research questions:

1. What are the key legal sources regulating child custody in Nigeria?
2. How do statutory, customary, and Islamic laws differ in their treatment of child custody?
3. To what extent is the principle of the best interest of the child effectively implemented in Nigeria's family law courts?
4. How are the rights and interests of both parents—especially mothers—considered in custody decisions?
5. What are the major legal, social, and institutional challenges affecting the equitable resolution of custody disputes in Nigeria?
6. What reforms can be introduced to align Nigeria's custody laws with international best practices?

### **1.5. Significance of the Study**

This study is of immense importance both academically and practically. It contributes to legal scholarship by bridging the gap between statutory ideals and practical realities of child custody in Nigeria. While much has been written on family law generally, there remains a scarcity of focused, in-depth legal analysis on how custody disputes are handled across the different legal systems in Nigeria. From a policy perspective, the findings of this study will provide valuable insights to legislators, judges, legal practitioners, and child rights advocates on how to improve existing laws and judicial practices. The study will also help highlight the need for better enforcement mechanisms, training for judicial officers on children's rights, and the establishment of social welfare systems that prioritize child-centered outcomes. Ultimately, this research aims to contribute to the realization of a more just, equitable, and child-focused custody regime in

Nigeria—one that honors both the rights of parents and the paramount importance of the child’s well-being.

### **1.6. Scope of the Study**

This research focuses specifically on the legal principles and judicial approaches to child custody in Nigeria. It covers statutory law as enacted in the Child’s Rights Act 2003, the Matrimonial Causes Act, and other relevant statutes. It also considers the operation of customary law and Islamic law in different regions of Nigeria. The study is limited to child custody in the context of divorce, separation, or parental dispute. It does not examine related matters such as adoption, guardianship, or foster care, except where they intersect with the central issue of custody. Jurisprudence from Nigerian courts, international legal instruments, and relevant comparative perspectives will be analyzed.

### **1.7. Methodology**

The study adopts a doctrinal legal research methodology, which entails critical analysis of statutes, judicial decisions, and academic literature. Primary sources such as the Child’s Rights Act, the Matrimonial Causes Act, and constitutional provisions will be closely examined. Judicial pronouncements from Nigerian courts and applicable international treaties (e.g., UNCRC and ACRWC) will be analyzed to understand how custody principles are interpreted and applied. Secondary sources will include scholarly articles, textbooks, commentaries, and policy documents. A comparative approach will be used where necessary to highlight differences in legal standards across Nigeria’s multiple legal systems. The study will also review selected case law to assess how courts are balancing parental rights with the best interest of the child.

### **1.8. Justification for the Study**

This study is justified by the urgent need to address the inconsistencies, inadequacies, and injustices within Nigeria's child custody regime. In a society where family structures are increasingly being reshaped by divorce, migration, and economic pressures, custody disputes are becoming more frequent and more complex. Yet, the law has not evolved fast enough to address these challenges in a way that protects the rights of all parties—especially children. Moreover, Nigeria's plural legal system often produces conflicting custody outcomes that do not serve the child's welfare. There is a need to harmonize the multiple legal traditions with a singular focus on the child's best interest, while also respecting parental rights and cultural contexts. The study is especially relevant in promoting the domestication and effective application of international child rights standards in Nigeria. Additionally, given the limited academic literature focusing specifically on the intersection of parental rights and the best interest principle in Nigeria's legal system, this study fills an important scholarly gap. It will also serve as a resource for judges, lawyers, and policymakers who must regularly adjudicate or legislate on matters involving child custody.

### **1.9. Overview of Chapters**

Chapter One introduces the research topic, providing the background, problem statement, objectives, research questions, significance, scope, methodology, and justification for the study.

Chapter Two presents the conceptual and theoretical frameworks of child custody, as well as a review of existing literature on the subject. It explores key concepts such as parental rights, the best interest of the child, and the evolution of child custody laws.

Chapter Three analyzes the legal framework governing child custody in Nigeria. It examines relevant statutory provisions, that address the balance between parental rights and best interest of the child.

Chapter Four focuses on child custody under customary law in Nigeria. The main purport is to see the dynamics of how child custody issues are settled outside statutory marriages, as customary marriage is also a recognised form of marriage in Nigeria.

Chapter Five concludes the study by summarizing key findings, offering recommendations for reform, and suggesting areas for further research.

### **1.10. Conclusion**

Child custody laws in Nigeria present a complex interplay of legal doctrines, cultural practices, religious beliefs, and evolving societal values. While statutory law, particularly the Child's Rights Act 2003, has laid a progressive foundation for child welfare, its full potential is hampered by inconsistent judicial interpretation, lack of harmonization across legal systems, and insufficient institutional support. The principle of the best interest of the child has been globally accepted as the benchmark for custody decisions, and Nigeria is no exception in recognizing it. However, in practice, the application of this principle remains uneven. Cultural bias, particularly gender-based assumptions about parenting roles, continues to affect judicial outcomes. In many cases, the financial capability of a parent, rather than emotional or psychological suitability, becomes the dominant factor in determining custody, thus sidelining the true spirit of the best interest principle. Moreover, the absence of support systems such as child psychologists, social workers, and custodial monitoring frameworks means that custody arrangements are not always well-informed or adequately enforced. Children may be placed in environments that are legally sanctioned but emotionally damaging or developmentally unsuitable. The law must therefore evolve beyond legal texts and courtroom decisions. It must be responsive to the lived realities of children and families,

particularly in a country as diverse as Nigeria. There is a pressing need for judicial training, institutional reform, and legislative harmonization. This study, by critically examining how parental rights are balanced with the welfare of the child in custody disputes, aims to provoke deeper legal, ethical, and policy-oriented reflections. Ultimately, the child must not be seen as an object of property in custody battles but as a rights-bearing individual whose emotional, educational, and psychological needs must take center stage. The future of family law in Nigeria depends on whether the courts, legislators, and society at large can rise to this challenge.

## CHAPTER TWO

### CONCEPTUAL, THEORETICAL FRAMEWORKS AND LITERATURE REVIEW

#### 2.1. Introduction

This chapter focuses on establishing a conceptual and theoretical foundation for analysing child custody laws in Nigeria. It begins by clarifying core concepts such as the definition of a child, marriage, and custody. It then delves into the theoretical lenses—namely, the Best Interest of the Child Theory, the *Parens Patriae* Doctrine, and Feminist Legal Theory—through which the study evaluates Nigeria’s legal practices. The chapter also reviews existing literature to understand the current academic discourse on custody disputes, parental rights, and child welfare.

#### 2.2. Conceptual clarification

Conceptual clarity is imperative for meaningful academic discourse. All good research proceeds from a thorough exposition and elucidation of the conceptual terminologies associated with the research topic.<sup>6</sup> This research is no exception, as it comprises several concepts that must be holistic,

---

<sup>6</sup> Bhat Ishwara, *Idea and Methods of Legal Research* (Oxford Academic 2020). <<https://doi.org/10.1093/oso/9780199493098.001.0001>> accessed 6<sup>th</sup> August 2025.

albeit succinctly clarified. Thus, this section is devoted to intricately analysing the concepts embedded in this research by clarifying their meaning and purpose. To begin, we will extricate the terms in this research that are recurrently used within the breadth of this work. Thereafter, we will define these terms lexically and within the context in which they are used in this research. It is intended that this definitional framework will provide a compass for navigating the subsequent expositions in this discourse. Each concept here is examined not merely for its dictionary or legal meaning, but for its implication in this work.

### **2.2.1. Child**

The word child can be traced from the Latin word 'in fans,' which means the one who does not speak. Biologically, a child is generally between birth and puberty or in the developmental stage of childhood between infancy and adulthood. According to Black's Law Dictionary, a child is a young person under the age. According to Article 1 of Convention on the Right of the Child (C.R.C.) 1989, 'a child is a human being below the age of eighteen years ' Also, Article 3(d) of Protocol to Prevent, Suppress and Punish Trafficking in Person Especially Women and Children provide as follows, 'a child shall mean any person under eighteen years of age.' Article 2, African Charter on the Rights and Welfare of the Child (ACRWC 1999), sees a child as one below eighteen. The United Nations Declaration also described a child as anyone below the age of eighteen and spelt out the fundamental human rights that children everywhere should have.

The Nigerian Labour Act in Section 91 defines a child as one below 12 and a young person below 14. According to Section 2 of the Children and Young Person Act a child is below 14 and a young person is between age 14 and 17. For Contract, a child is one below twenty-one years. The definition of a child to grant the statutory right of occupancy under Land Law is age 21. The Immigration Act stipulates that a child is any person below the age of sixteen years. Whereas the

Matrimonial Causes Act 1970 stipulates the age of maturity as twenty-one years. According to Section 50 of the Penal Code,' no action is an offense done by a child under seven years or by a child above seven years but under twelve years who has not attained maturity of understanding to judge the nature and the consequences of such action.' According to Section 277 of the Childs Right Act 2003, a child is under age 18.

In Nigerian the constitution, one cannot find any child's definition. Still, it merely provides under section 35(1) that 'every person shall be entitled to his respect and liberty, and no person shall be deprived of such liberty save in certain circumstances.' One such exception is persons who have not attained the age of eighteen years for his education or welfare. The above section merely follows that any person under the age of eighteen years is still under the control and care of the parents or guardians. A child's definition under customary law varies from one place to another and from one community to another. The general and most acceptable description is that once the father has acknowledged the child's paternity in issue, then the child is legitimate.

### **2.2.2. Marriage**

The concept and institution of Marriage are historically as old as mankind. Traceable by Some theologians to the biblical matching order: 'therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh'<sup>7</sup>

According to the Encyclopedia Britannica<sup>8</sup>,

“Marriage is a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs and attitudes that prescribe the rights and duties of the partners and accord status to their offspring( if any)”.’

---

<sup>7</sup> Genesis 2: 24, Mathew 19: 5, Ephesians 5:31 Holy Bible (KJV).

<sup>8</sup> Encyclopedia Britannica, *Marriage*, available at [www.britannica.com](http://www.britannica.com) accessed 6 August 2025.

This general definition of marriage clearly takes cognisance of the prevailing legal regime now popular in some jurisdictions of expanding the traditional definition of marriage to include same sex marriage.

### **2.2.2.1. Types of Marriage in Nigeria**

#### **a. Statutory marriage**

This is marriage contracted under the Marriage Act<sup>9</sup>, a federal enactment designed for the celebration of a voluntary union between a man and a woman to the exclusion of all others during the continuance of the marriage. ‘*Marriage under the Act*’ as it is often referred to, by its nature, is therefore monogamous. It is a union that terminates at the death of either spouse.

A monogamous marriage has been statutorily 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 continuance of the marriage.’<sup>10</sup>

#### **a. Customary marriage**

This form of marriage also referred to as ‘traditional’ marriage is defined by Justice A.P. Anyebe<sup>11</sup> as:

‘... a union of one man and a woman or women to the exclusion of all others. The union extends even beyond the life of the man but terminates substantially at the death of the woman’

Customary marriage is essentially marriage contracted under the native laws and custom of the various communities in Nigeria. From the foregoing, it is clear that ample allowance and incentive is provided under customary law for the enjoyment of polygamy. This is so, given that there is no limit to the number of wives a man can marry under customary law. Although, it must be said that this fact discourages women desirous of exclusive right and possession of their husbands from

---

<sup>9</sup> Cap M6 LFN 2004

<sup>10</sup> The Interpretation Act cap 123 LFN 2004.

<sup>11</sup> A.P Anyebe, *Customary Law: the war without Arms* (1<sup>st</sup> ed. Enugu: fourth Dimension publishing Co. Ltd, 1985)92

undertaking marriages under customary law. When this is added to the flamboyance that accompanies the so called ‘white weddings’ and greater apparent ‘security of tenure’ that goes with it, it is not uncommon to see many women in Nigeria quietly prodding their men to undertake statutory marriages. Nonetheless, customary marriage is the commonest form of marriage and it gets statutory recognition in the Marriage Act<sup>12</sup>. This attitude of glorification of the so called ‘white weddings,’ it would appear is largely viewed as a relic of colonialism.

**b. Islamic Law Marriage**

Islamic Marriage is marriage conducted according to the tenets of Islamic law. Like customary law marriage, no certificate is issued. It is also not limited to one man and one woman. Indeed, a man can marry as many as four wives provided he is capable of meeting the requirements and conditions stipulated under Islamic Law.

A point that must be underscored is that Islamic and customary law marriages are in no way inferior in status to marriages contracted under the Act. In this regard, the Nigerian Supreme court in the case of *Jadesimi v OkotieEboh*,<sup>13</sup> has held that “the status of being married under Islamic law or customary law is well recognised in this country and as such marriages should not be accorded any status that is inferior to that of marriage under the Marriage Act.”

Since the focus of this paper as has already been stated is dissolution of customary law marriages, custody of children and other related matters, scant mention shall be made of these other forms of marriages save as it may be necessary to draw significant distinctions or similarities as may be desirable.

---

<sup>12</sup> Section 35 Marriage Act, 2004.

<sup>13</sup> (1996) 2 NWLR Part 128,142

### 2.2.3. Custody

The Black's Law Dictionary<sup>4</sup> defines custody as the care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding.<sup>14</sup> The Court of Appeal also defined custody in the case of *Otti v. Otti*,<sup>15</sup> as: essentially concerning control, preservation and care of the child's person, physically, mentally; it also includes responsibility for a child in regard to his needs, food, clothing, instruction and the like...More recently in *Nwosu v. Nwosu*,<sup>16</sup> custody was defined as the care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision making authority) and physical custody (care giving authority), and an award of custody usually grants both rights.

Irrespective of the type or form of marriage, wherein a child is born into, the custody of the child is considered as a matter of children's rights. The first and only golden principle is that any decision must be made only in the best interest of the child. Child custody procedures in Nigeria are governed by various laws, such laws include the Child's Rights Act, the Matrimonial Causes Act, and customary law etc. depending on the state and the particular circumstances of the case. The custody of a child is a sensitive and complex issue, and the primary consideration is always the best interest of the child.

Custody in its literal sense means control or possession of something or a person.<sup>17</sup> However, child custody refers to the care, control and maintenance of a child which a Court may award to either of the parents following a divorce or separation proceeding. Custody is not just physical custody of a child but includes care of a child and decision-making which has the psychological impact on such a child. When a marriage has produced children, both parents have equal responsibilities and rights

---

<sup>14</sup> The Black's Law Dictionary, 8th ed. (2004).

<sup>15</sup> (1992) 2 NWLR (Pt. 252) p. 210.

<sup>16</sup> (2012) 8 NWLR (Pt. 1301) 1 p. 32 paras F-G.

<sup>17</sup> Leslie Rutherford and Sheila Bone, *Osborne's Concise Law Dictionary*, (8th edn. Sweet and Maxwell) 104 2 Kelly, Joan.

over their children, including the right to raise, influence and make decisions for and on behalf of their children.<sup>18</sup> Important decisions about a child must be made regarding health, education, and religion. A distinction lies between custody and access. The parent the child lives with and who is legally responsible for care of the child is said to have custody while the time the child spends with the parent other than the one with the custody is referred to as access. For this present study, custody connotes both physical custody and access. The determination of custody provisions for children before and after divorce is crucial to all parties involved. This is because the future outcome of children is greatly determined by the quality of parental care they receive during their childhood.<sup>19</sup>

Any determination of child custody must be done bearing the welfare of the children in mind and must be in the best interest of the child. Any discrimination in the granting of custody that does not align with the welfare and best interest of the child is invalid, unlawful and can be challenged in Court. In *Buwanhot v. Buwanhot*,<sup>8</sup> “the welfare of a child of a marriage, in terms of their peace of mind, happiness, education and co-existence is the prime consideration in granting custody. *Oduote v. Oduote*,<sup>20</sup> “the interest of the child includes welfare, education, security and overall wellbeing and development.

### **2.2.3.1. Parameters for Granting Custody**

In determining questions of custody, the court besides considering the interests of the children to be paramount, pays regard to some other factors which are as follows:

#### **i. The Age and Sex of the Children**

This factor is usually taken into account by the courts when determining the child’s best interest in custody matters. Often times, statements are usually made that it is best for children of tender age

---

<sup>18</sup> *Nwosu v. Nwosu* (2012) 8 NWLR).

<sup>19</sup> C P Iloka and J A Eze, “Breaking the Culture of Silence on Rape: A Cry for Justice” (2022) (9) (4) *Journal of Commercial and Property Law, NAUJCLP*, 43.

<sup>20</sup> (2012) 3 NWLR pt. 1288 p. 478.

to remain in the care of their mothers especially the female ones. It is believed that the mother is imbued with the capability of taking care of the young children and to exhibit motherly care to them than the father. In *Odogwu v Odogwu*,<sup>21</sup> the court held that it is generally presumed that a child of tender years will be happier with the mother, and this presumption would only be vitiated if there is clear evidence to the contrary such as an unethical behaviour of the mother, contagious diseases, mental disorder and callousness to the child which are matters to be tried. In other words, the court is more likely to grant custody of a young child to the mother where there is no evidence of the above.

As regard the sex of the children, the importance of sex arose in the case of *Uzochukwu v Uzochukwu*<sup>22</sup> where the appellate court Per Ekanem JCA held thus:

As regards the custody of the two children of the marriage, I note that the first child Victory Nwachukwu Uzochukwu a male was born on 31/5/2000 and is therefore 14 years old. The second child a female was born on 12/9/2003 and is therefore 11 years old. The paramount consideration in the award of custody is the interest of the children. See section 71(1) of the MCA. Both parents appear to be equal to the task of maintaining the children and are ready to give affection and proper guidance to the children. It is my view that the interest of the male child who is 14 years old will be best served by granting custody to the father who will naturally be able to provide strong guidance for the teenage.

It has been argued that different factors influence different judges, as there are no fixed or definite guidelines as regard the factors judges may consider because everything is a question of fact. The courts have sometimes gone too far in allowing the males grow up with their father, and the females grow up with their mother without a holistic consideration of all factors<sup>23</sup>. This is due to the fact that there is no benchmark or yardstick used in ascertaining whether the decision made by the court is actually in the best interest of the child.

---

<sup>21</sup> [1992] LPELR 2220 (SC).

<sup>22</sup> [2014] LPELR 24139 (CA).

<sup>23</sup> Ibid.

## **ii. The Wishes of the Child**

Often times the court may take the child into confidence to ascertain his/her wishes. This usually happens when the child has attained the age of reasoning. If the child is quite younger, the court may resort to welfare reports to determine where the child's interest will be protected. In the case of *Odogwu v Odogwu*,<sup>24</sup> the Apex court was of the view that the child's wishes could be consulted by the court when determining what order should be given. It further held that the custody hearing could be postponed to the judge's chambers where in an informal proceedings the children's preferences could be assessed along with those of the parents.

Uzodike<sup>25</sup> opines that children's views are hardly sought in many traditional African systems, and that judges have exhibited that where the children are quite matured, they could be summoned into the judge's chambers to express their own wishes. However, it should be noted that the courts are not obligated to adhere with such preferences as it may be influenced by either of the parents. It was further noted that in practice, there are plethora of judicial authorities where the fathers have kicked against their offspring for preferring to live with their mothers hence the burden of taking care of those children lies with the mother.<sup>26</sup>

Where a custody proceeding is before a judge, the court should endeavor to ascertain the wishes of such a child/children irrespective of the age so long as the child understands the question put to him, and can give rational answers to it. Although, the judge is not obligated to comply with the child's desires where it would be detrimental to the long term interest of the child. However, the judge is duty-bound to weigh such wishes alongside other factors in reaching their decision.

## **iii. Conduct of the Parties**

---

<sup>24</sup> [1992] 2 SCNJ 3575.

<sup>25</sup> Nkiru Uzodike, 'Custody of Children in Nigeria: Statutory, Judicial and Customary Aspects' (1990) 39(2) *International Comparative Law Quarterly* 424.

This is one of the determinant factors usually considered by the courts when granting custody. Conduct in this regards means bad or immoral behaviour towards the offspring or the other party to the union.<sup>26</sup> In *Okafor v Okafor*,<sup>27</sup> the court declined awarding custody to a mother who had not physically seen the child for nearly six years except through pictures. Likewise in *Oduneye v Oduneye*,<sup>28</sup> the petitioner sought custody of the three children of the marriage. The wife who also sought for custody of the children disclosed in her testimony that the petitioner from previous marriages had 13 other children and three of them had become pregnant between 15 and 16 years of age. The court dismissed the petitioner's application and awarded custody of the three children to the mother.

In many cases, the courts have held that the fact that a party was liable for the adultery committed does not necessarily deprive such person custody, unless the condition of the adultery makes it pleasing.<sup>29</sup> Umeobika argues that where one of the parties continues to commit acts of wrongdoing and moral depravity, these actions may be indicative of the inadequacy of that party to be trusted with the care of the child. She cited the case of *Ihonde v Ihonde*<sup>30</sup> where both parties sought custody of the only offspring of the union. The testimony before the court was that the mother abandoned the boy when he was 10 months old, and that between that time and when the matter came up for hearing in court which was about four years, the mother saw the boy only once. The trial court in its decision observed as follows:

It was no surprise therefore that when the parties, their counsel and the child appeared before me in chambers, the child hardly recognised the petitioner as his mother, a most pathetic situation for any mother to find herself. Persistent and gentle requests by me, in the presence of all the parties, for the child to go to his mother and kiss her were turned down and the boy clung steadfastly to his father, the respondent. One could readily see from

---

<sup>26</sup> *Adams v Adams* [1971] 2 All N.L.R.

<sup>27</sup> [1976] 6 CCHCJ 1927.

<sup>28</sup> [1976] 2 CCHCJ 85.

<sup>29</sup> Per Obaseki Jsc in *Williams v Williams* [1987] 2 NWLR 66.

<sup>30</sup> Suit No: WD/85/70 (Unreported Judgment of the High Court of Lagos State, Delivered 17 April 1972).

this that there is no iota of any filial affection towards the petitioner from her son. It is not unlikely that as the child grows up he will get to know his mother better, and, I think, more intimately. The question now is whether it would be in the paramount interest of the child that he should be committed to the care and protection of a mother who he had seen only once, perhaps cursorily, during the past four years the mother having deserted him at the tender age of ten months.

It was observed that the court granted custody to the father, and that the trial judge was proactive as he observed the conduct of the child towards the parents which helped the court in forming its decision on the award of custody.<sup>31</sup> The decision made by the court was in the child's best interest because the court was opportune to study the countenance of the child towards the mother. This is the essence of enabling children to participate in custody proceedings. Although the child in this instant case was of tender years, but the judge deemed it fit to invite the child, his parents and their respective counsels into his chambers before making his order of custody. The court was able to study the attachment or the bondness of the boy with his primary care giver i.e. the father before granting custody to him.

#### **iv. Adequacy of Arrangements made by the Parties**

The provisions made for the children by the party seeking custody is also taken into cognizance by the courts. These provisions include the welfare, housing, schooling and growth of the children of the marriage. If the party fails to set out these facts, the court will be reluctant to consider the question of custody as it can only adjudicate on what is presented before it.<sup>32</sup> In *Adeparusi v Adeparusi*,<sup>33</sup> the appellate court declined to grant custody of the child to the petitioner and the respondent on the grounds that they both failed to make adequate plans and arrangement on behalf of the child. The case was therefore transferred as a de-novo to be tried by another judge.

---

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> [2014] LPELR 41111 CA.

Similarly in *Damulak v Damulak*,<sup>36</sup> the appellant in this case sought custody of the second child of the marriage who was 9 years of age. The appellate Judge Aldermen JCA declined granting custody to the appellant on the ground that the arrangements made for the child by the appellant were inadequate. The court in its decision held that:

An order of custody for the child of the marriage must necessarily postulate that there is on ground adequate arrangements for the sound education as well as those for the physical and mental welfare of the said child. Custody of the child of the marriage necessarily concerns not only the control of the child but also carries along with it all-important implication of the preservation and care of the child's person, morally, physically and mentally.

The above case law revealed the importance of this factor. Furthermore, where the court is of the view that proper and suitable arrangement have not been made for the welfare and upbringing of the child, the court will not award custody to the party seeking for it as the child's interest is always of utmost consideration.

#### **v. Equality of Parents**

Section 71(1) of the MCA recognizes the equal rights of parents when the issue of custody arises. The court is not in a position to prejudge which party would be granted custody before considering the interest of the child. In *Williams v Williams*,<sup>34</sup> the Apex court held that as regard the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows a father, and the rights and authority of a mother and father shall be equal and exercisable. Equality of right is a basic premise upon which a court considers custody cases.

However, in the case of *Dsd v Sera Igwalah & Bolaji Philips*,<sup>35</sup> the trial magistrate without balancing the equal rights of both parties prejudged the father with whom the girl had maintained a stable life over the years by granting custody to the mother on the basis of sex. With due respect, the trial magistrate was in error to have granted custody to the mother based on the sex of the child.

---

<sup>34</sup> *Williams v Williams* [1987] 2 NWLR 66.

<sup>35</sup> Suit No: Misc/Mcy/46/114 (Unreported Judgment of the Yaba Magistrate Court of Lagos State).

It is settled that a mother can show tender love and care to a child, however in this instant case since the child had been attached with the father, the trial magistrate ought to consider the interest of the child before making its decision as this change in custody could be detrimental to the said child.

#### **vi. Emotional and Psychological Factors**

The courts usually act with caution where it is perceived that a change in the custody of a child may result into a psychological harm. This mostly occurs where the child has been emotionally attached to a parent and has been in the custody of the said parent for a considerable period of time. Children who enjoy relationships of intimacy and security with their closer parent in the first three years are more likely to be adventurous than those who are not. They are usually independent, friendly and intelligent, and they relate better with their peers.<sup>36</sup> In *H v H & C*,<sup>37</sup> the court granted the father custody with visiting rights to the mother as it would be depressing to abruptly remove the child from a house with which he was acquainted with, as this may create a psychological imbalance in the child.

#### **2.2.3.2. Children Participation in Custody**

Children's participation in decision making in family law is relatively a recent development.<sup>38</sup> Historically, children were seen as objects of concern who do not possess the required capacity to participate in family matters as they need protection from been involved in their parents' disputes.<sup>39</sup> The assumption was that if children were exempted from the post separation decision-

---

<sup>36</sup> Ibid.

<sup>37</sup> [1969] 1 ALL ER 262.

<sup>38</sup> Rachel Birnbaum, 'the Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review' (Family, Children and Youth Section, Department of Justice Canada 2009) 1.

<sup>39</sup> A.,Graham, and R., Fitzgerald, 'Taking Account of the "To and Fro" of Children's Experiences in Family Law' (2005), Morrow V and Richards M, 'The Ethics of Social Research with Children: An Overview' (1996) 10 *Children and Society* 934-944. <sup>45</sup> Smart Carol. 2002. 'From Children's Shoes to Children's Voices' (2002) 40(3) *Family Court Review* 307-319.

making, they would be protected from the chaos of their parents' matrimonial breakdown. It was assumed that parents were in a better position to know what it is in their child's best interests, hence the views of the child can be adequately represented by them.<sup>40</sup> Researches have increasingly shown that not listening to the views of the children may cause more harm than good,<sup>41</sup> and that meaningful participation in custody proceedings protects them when family breakdown puts them at risk.<sup>42</sup> It has been argued that children have much to contribute to the discussion about divorce and family change such as what it is like, how to cope and what it means to them.<sup>43</sup> It has been suggested that instead of excluding children, "we may have a lot to learn about divorce from children if we suspend the presumption that they are damaged goods in need of protection".<sup>44</sup>

Participation however does not necessary in all cases confer the child the right to be the main decider, nor do children want to exclude their parents and other adults from the process.<sup>45</sup> Each level of participation is dependent on the decision involved as well as the capacity of the child. Participation being acknowledged as a multifaceted phenomenon may consist of a wide range of activities that differs in form and style at different ages for children. These may include seeking information, expressing the desire to learn at a very tender age, forming views and expressing ideas, taking part in activities and processes, being informed and consulted in decision making, initiating ideas, processes, proposals and projects, analyzing situations and making choices,

---

<sup>40</sup> O'Quigley Ann, 'Listening to Children's Views: The Findings and Recommendations of Recent Research' (York: Joseph Rowntree Foundation 2000).

<sup>41</sup> Joan Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 Virginia Journal of Social Policy & the Law 129-163, Lansdown Gerison, 'Promoting Children's Participation in Democratic Decision-Making. (UNICEF Innocenti Insight 2001)

<sup>42</sup> Amato Paul, 'Children of Divorce in the 1990's: An Update of the Amato & Keith Meta-Analysis' (2001) 15 Journal of Family Psychology 355-365.

<sup>43</sup> Smart C, Wade A and Neale B, 'Objects of concern? Children and divorce' (1999) 11(4) Child and Family Law Quarterly 365-376.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

respecting others and being treated with dignity.<sup>46</sup> Whether a child effectively participates in the proceedings is dependent on several factors which includes the child's evolving capabilities, the openness of parents and other adults to dialogue and to learn from the children. It also depends on the social-cultural, economic and political context.<sup>47</sup>

Notably, the participation of children in family law decisions in many jurisdictions has been considered to be of utmost importance in the determination of decisions made on their behalf.<sup>48</sup> This right to participate is evidenced in policy, legislation as well as in case laws internationally.<sup>49</sup> At the international level, the obligation of each state in considering children's view is reflective under the United Nations Convention on the Rights of the Child. The Convention states thus:

State Parties shall assure to the child who is capable of forming his or her own views to the right to express those views freely in all matters affecting the child, the view of the child been given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedures of national law.<sup>50</sup>

The above provision of Article 12 is in accordance with that of Article 9(2) of the UNCRC which provides that "all interested parties' shall be given an opportunity to participate and make their views known in legal proceedings pertaining to child custody".<sup>51</sup> This particular provision on child custody includes the children themselves. This is premised on the fact that in child custody proceedings, the child is an interested party.<sup>52</sup> In other words, the child has the automatic right to

---

<sup>46</sup> Ibid.

<sup>47</sup> UNICEF: The State of the World's Children 2003 - Child's Participation.

<sup>48</sup> Carol Smart, 'From Children's Shoes to Children's Voices' (2002) 40(3) *Family Court Review* 307-319, Nicola Taylor, 'What do we know about involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20(2) *Australian Journal of Family Law* 154-178.

<sup>49</sup> N Taylor and others, 'International Models of Child Participation in Family Law Proceedings following Parental Separation/Divorce' (2012) 20 *International Journal of Children Rights* 645-673.

<sup>50</sup> Article 12(1) of the Convention on the Rights of the Child.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

be a party in a case where he/she is the subject matter, the views of the child should be heard and considered by the court, and there should be an independent counsel for the child who shall be responsible in ensuring that the best interest of the child is achieved.

Nigeria is a signatory to the UNCRC and the provisions of the UNCRC is domesticated in the Child's Right Act 2003. In the Constitution of the Federal Republic of Nigeria, matters concerning children protection is neither in the exclusive or concurrent list, hence each States is to ratify and pass the Child's Rights Law for it to be applicable.<sup>53</sup> However, most states in the Northern part of the country have failed to enact the law because of their religious customs and beliefs. Another challenge to this legislation is the lack of implementation even in the States where it has been domesticated. This is because most of the provisions of the law are documented but not complied with. This challenge limits the enhancement of child participation as enumerated in the Act.<sup>54</sup>

The Child's Right Act provides that the child has the right to be represented by a legal practitioner and to free legal aid in the hearing and determination of any matter concerning the child.<sup>55</sup> It further provides that the court shall be conducive to the best interest of the child and shall be conducted in an atmosphere of understanding, allowing the child to express himself and to also participate in the proceedings.<sup>56</sup> The Act also provides that in every action concerning a child whether undertaken by an individual, public or private body, institutions or service, court of law or administrative or legislative authority, the best interest of the child shall be of primary consideration.<sup>65</sup> However, the Child's Right Act is not applicable to matrimonial proceedings.

The Matrimonial Causes Act provides that in custody proceedings, the interest of the child should be of paramount consideration. The wishes of the child is also one out of the factors to be

---

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Section 155, Child's Right Act, LFN 2004.

<sup>56</sup> Section 158, Child's Right Act, LFN 2004.

considered by the court when dealing with custody proceedings although the court is saddled with the discretion on the weight to be given to the children's view.

In practice, the participation of a child is on a minimal level as the judge hardly consider the views/desires of the child. The court takes into account others factors such as the conduct and fitness of the parents, adequate arrangements made for the children etc. The child is not formally represented by a legal practitioner, and the view or wishes of the child is seldom ascertained by the judge. Furthermore, the court hardly make use of a welfare report which would have assisted it in making its decision. This is premised on the fact that Section 71(2) of the Matrimonial Causes Act does not make it compulsory for the court to rely on it. The order of custody granted by the court is mostly derived from the evidence given by the parents, as well as the oral and written submissions canvassed by counsels representing each of the parents. The right of the child to participate by seeking the views of the child is of utmost importance as it would assist the court when making its decision without basing the decision on the sole evidence of the parents. It is submitted that children are becoming more sensitive hence can easily respond to situations going on within their environment. Affording them the opportunity to voice out their views which should be considered with other factors will help in ensuring that the child's best interest is attained.

In the case of *Buwanhot v Buwanhot*<sup>57</sup> the trial court in awarding custody to the respondent took into consideration the wishes of the 1<sup>st</sup> child of the marriage who testified on behalf of his other siblings as well other factors. The child in his evidence testified that his step mother and her sisters humiliate and maltreat them whenever they go to their father's house for holidays, and that they are deprive of basic items such as toiletries. He stated that he preferred to stay with his mother i.e. the respondent and have peace of mind, than to stay with his father and be given all the money he needs yet experience no peace nor happiness.

---

<sup>57</sup> [2011] AFWLR 566.

From the testimony of the child, it can be said that custody does not only deal with the luxurious things of life like money, clothing, housing etc. it goes further to the happiness and peace of mind of the children concerned. In the above mentioned case, the court granted custody of the children to the mother. This case law is a good step in the right direction as it affords the court with various options to base his decision when granting an award of custody.

One of the efficient ways of encouraging the child to participate in the custody proceedings is by listening to the views of the child who is the subject of determination, examining the demeanor of the child towards the parents, appointing specialised welfare/custody personnel/legal representation/mental health expert as well as obtaining information about the child through a welfare report.

### **2.2.3. The Best Interest Principle**

The best interest principle is the standard used in awarding custody to either of the parents, and the child which is the subject matter to be determined is rarely given an opportunity to be heard on his/her wishes. Section 71(1) of the MCA requires the court in matters of custody and welfare of a child, to regard the “interests of the children as the paramount consideration”. In illustrating this, *Williams v Williams* is often cited wherein the court in treating the best interests of the children held thus:

The determination of the welfare of a child is a composite of many factors. Consideration such as the emotional attachment to a particular parent, mother or father, the inadequacy of facilities such as educational, religious or opportunities for proper upbringing are matters which may affect determination of who should have custody. What the court deals with is the lives of human beings and ought not to be regulated by rigid formulae. All the relevant factors ought to be considered and the paramount consideration being the welfare of the child. By paramount consideration I mean pre-eminent and superior consideration.

It is worthy to state that the court in its pronouncement noted that the court is dealing with the lives of human beings. In such instance, the child should be afforded the opportunity to participate in the proceedings as this will ensure that the child's wellbeing is met. It was observed that the court relied more on the paramount consideration which arguably implies that the overriding consideration is the wellbeing of the child.<sup>58</sup> In addition, several other considerations were taken into consideration by the court in assessing custody under the welfare rule.

By providing for the best interest principle in Section 71 of the MCA an attempt is been made to shift the overriding consideration beyond the immediate wishes of the disputing parties to the more salutary and lasting needs of the offspring.<sup>59</sup> The principle places an obligation on the court in ensuring that the child's best interest is placed before the disputing parties. When dealing with matters of custody, the equality of the right of the parents should be the basic premise amongst other criteria which the court should consider when determining the interest of the child.<sup>60</sup> A court is not in a position to prejudge which party will have custody before considering the interest of the child.<sup>16</sup> Furthermore, Article 3 of the United Nations Convention and Rights of the Child (UNCRC) provides for the best interest of the child. The convention was designed to ensure that decision making for a child is not determined by the interest of others, but that such decision should be undertaken from a child-centered approach.<sup>61</sup> The principle applies to all policies and practices that affects children and that in cases of conflicts, the resolution should reflect the best interest of the child.<sup>18</sup>

---

<sup>58</sup> Fortune Ihua-Maduenyi, 'Considering the Rights and Best Interests of a Child in a Multi-Cultural Civil Society with Special Reference to Nigeria' (2008) *Faculty of Law University of Leicester* 113.

<sup>59</sup> Bolaji Owosanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 *Family Law Quarterly* 406.

<sup>60</sup> Folashade Aguda-Taiwo 'Guardianship and Custody of Children; Customary Perspective' (A Paper Delivered at the Refresher Course for Judges and Kadis at the National Judicial Institute on the 11<sup>th</sup> of March 2019).

<sup>61</sup> Hadiza Okunrobo, 'Participation Rights of Adolescents in Accessing Health Care in Nigeria' (Unpublished Thesis for the award of Mphil in Obafemi Awolowo Univeristy Ile-Ife, 2017) 31.

### **2.3. Theoretical Frameworks**

A sound theoretical framework is essential in grounding this research within established legal and socio-legal principles. The issue of child custody inherently involves competing interests—those of the parents and the child—and requires a value-based system to determine whose rights should prevail and why. This study adopts three key theories to guide its analysis: the Best Interest of the Child Theory, *Parens Patriae* Doctrine, and Feminist Legal Theory. Each theory provides a unique lens through which custody laws and decisions can be evaluated in the Nigerian context.

#### **1. Best Interest of the Child Theory**

This theory is the most widely accepted legal standard in custody matters. It posits that in all actions and decisions concerning a child—whether by courts, administrative authorities, or legislative bodies—the child’s well-being must be the primary consideration. The theory finds its strongest legal expression in Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) and is domesticated in Nigerian law through the Child’s Rights Act 2003. The “best interest” standard considers various factors, including the child’s emotional and physical needs, mental development, safety, stability, and continuity of care. It shifts the focus of custody disputes away from the entitlements of parents and instead prioritizes the child’s holistic welfare. This theory is particularly relevant in the Nigerian legal context, where custody decisions often oscillate between respecting parental rights and safeguarding children’s needs. By using this theory, the study evaluates whether Nigerian courts truly prioritize children’s well-being over traditional or economic biases.

#### **2. *Parens Patriae* Doctrine**

The *Parens Patriae* Doctrine is a common law principle which grants the state—or the court—the authority to act as the guardian of minors and other vulnerable individuals. Derived from Latin,

*parens patriae* means “parent of the nation.” Under this doctrine, courts assume a protective role over children, overriding parental preferences where necessary to ensure the child’s welfare. This doctrine underpins judicial discretion in child custody cases, particularly when one or both parents are deemed unfit, neglectful, or abusive. In Nigeria, although not explicitly codified, this doctrine informs many judicial interventions where the state or court steps in to protect the child. It allows the court to set aside cultural or parental claims that may be harmful or contrary to the child’s interests. In this research, the *Parens Patriae* doctrine supports the argument that the legal system has a duty to intervene in custody arrangements in favor of the child’s long-term welfare.

### **3. Feminist Legal Theory**

Feminist legal theory critiques the law’s historic bias against women and its failure to account for gendered power imbalances. In the context of child custody, this theory examines how patriarchal norms and gender roles influence judicial decisions. In Nigeria, customary and Islamic laws often place the father as the default custodian, especially for older children or male children, regardless of the mother’s caregiving history or emotional bond with the child. Feminist legal theory exposes how such legal norms marginalize women’s parental rights and undervalue their contributions to child upbringing. This theory helps interrogate whether Nigeria’s legal system genuinely promotes equality in custody decisions or whether gender bias continues to shape outcomes. By applying feminist insights, the research evaluates whether legal reforms are necessary to correct gender-based injustices in custody adjudication.

### **2.4. Literature Review**

Mosunmola<sup>62</sup> noted that the participation of a child in the divorce/custody proceedings may be viewed with disdain. It may be considered degrading to seek the views of children if parents that have the required competence and capacity are present in the decision making. Children are currently marginalized and devalued by a legal system that sees their wishes and desires as incomparable with that of their parents, hence they are viewed as incapable of expressing their desires and that the parents are in a better position to convey their best interest. The participation of the child in the divorce/custody proceedings is important as it creates an avenue for a proper and adequate decision making. It has been argued by scholars that granting the child the right to express his views/desires bars the parents from exercising control over the child. This misconception has stalled the need for children to actively participate in divorce/custody disputes in Nigeria. The participation of the child does not in any way undermine parental authority or control, rather it complements it. It creates a medium for shared decision making, and provides the child with a suitable environment to express his views/desires.

Nwakoby and others<sup>63</sup> noted in their work that in Nigeria, the legal framework governing women's rights to custody of children is primarily outlined in various statutes that aim to address parental responsibilities and child welfare. The legal framework governing child custody in Nigeria reflects a complex interplay between statutory law, customary practices, and international human rights standards. The essence of custody, as articulated in various judicial interpretations and legal definitions, revolves around the care, control, and maintenance of a child, emphasizing both physical and legal aspects of custody. The overarching principle in the consideration of child custody, is the child's best interest, which transcends the specific circumstances of the custody

---

<sup>62</sup> Mosunmola Sheirfat Ikujuni, “*An Appraisal on the Participation of Children in Divorce and Custody Proceedings in Nigeria*”, Achievers University Law Journal, AULJ Volume 1 (2021) 192.

<sup>63</sup> Chidinma Blessing Nwakoby, Okoli Ifeyinwa Esther & Chinwe Patricia Iloka, “*Rights of Women to Custody of Children in Nigeria: A Legal Appraisal*”, Nnamdi Azikiwe University, Awka Journal of Private and Property Law Volume 2(1) (2025) 138.

dispute. This paper seeks to appraise the provisions of the law and practices in consideration of child custody in Nigeria, and the impact on the welfare and development of the Nigerian child. This is in view of the fact, that the child is mentally and physically immature, and needs proper development and care. The work found that in many decisions of child custody, though factors such as conduct of parents, parental wishes, age of the child, child welfare are put into consideration, the child usually bears the brunt at the end of the day. It is recommended that custody decisions be made with a focus on the child's best interests while balancing the rights and responsibilities of both parents.

Amune<sup>64</sup> noted that Child custody arrangements during divorce proceedings in Nigeria are shaped by a complex interplay of legal frameworks and deeply rooted societal norms. The determination of child custody arrangements during divorce proceedings is a complex and sensitive issue in Nigeria, with significant legal and societal implications. This paper examines the legal and societal considerations that influence child custody decisions in Nigeria, with a focus on the tensions between the best interests of the child, cultural and religious norms, and the rights of parents. The paper also explores the role of the judiciary in navigating these conflicts, highlighting how courts attempt to balance legal mandates with cultural realities. Despite progressive legislation, enforcement remains inconsistent, particularly in rural areas where traditional practices hold significant sway. Additionally, the lack of awareness among parents about their legal rights and the best interest's principle further complicates custody arrangements. This paper argues for a more harmonized approach that respects cultural values while ensuring the protection of children's rights. It calls for increased public education on custody laws, greater sensitivity to gender equity in judicial decisions, and reforms to address gaps in the legal framework. By addressing these

---

<sup>64</sup> Majebi Samuel Amune, “*Legal and Societal Considerations in Determining Child Custody Arrangements During Divorce Proceedings in Nigeria*”, *Journal of Good Governance and Sustainable Development in Africa (JGGSDA)*, Vol. 9, No 1, (2025) 1. Available online at <<http://journals.rcmss.com/index.php/jggsda>. Covered in Scopedatabase-<https://sdbindex.com/Sourceid/00000431>> accessed 2 August 2025.

challenges, Nigeria can better safeguard the welfare of children in divorce proceedings, ensuring that custody arrangements prioritize their emotional, psychological, and physical well-being.

Wilson Diriwari and Damfebo K Derri in their work<sup>65</sup>, critically analysed child custody and divorce proceedings in Nigeria under the Child Rights Act of 2003, with a focus on protecting the best interests of children. The findings of this study shed light on several important aspects of child custody and divorce in Nigeria. Firstly, it was evident that the Child Rights Act of 2003 has provided a legal framework to safeguard the rights and interests of children involved in divorce and custody cases. The act emphasises the principle of the best interests of the child as the paramount consideration, aiming to ensure the child's wellbeing, happiness, and overall development. However, despite the existence of this legislation, practical implementation remains a challenge. Issues such as cultural norms, gender biases, inadequate legal awareness, and limited resources hinder effective enforcement of the Child Rights Act. This highlights the need for comprehensive reforms within the judicial system, including improved training for judges and legal practitioners, as well as increased public awareness campaigns to promote understanding of children's rights and the importance of prioritising their best interests.

Ifenna and Chimeziri<sup>66</sup> in their research examined the review of the best interest of a child as one of the determinants for custody of a child in Nigeria. It explored custody of children and the extent to which the welfare of children who become involved in custody litigation in Nigeria are protected. Custody dispute arises when separated parents cannot agree about how to divide the ongoing right and responsibility of parenting. While most parents resolve custody privately, a substantial number also passes through our courts. The question of whether a divorce or judicial

---

<sup>65</sup> Wilson Diriwari and Damfebo K Derri, "Protecting the Best Interests of Children: A Critical Analysis of Child Custody and Divorce Proceedings in Nigeria under the Child Rights Act 2003", *International Journal of Social Science, Management and Economics Research*, (1)(4) (2023) 52.

<sup>66</sup> Iiodibe Stephen Ifenna and Chimeziri Nneoma Gift, "*Review of the Best Interest of a Child's Custody in Nigeria*", *Int. J. Adv. Res.* 8(08), 358-376.

separation as such harms children is a controversial one, but recent research works have suggested that the divorce process itself may well have a traumatic effect on a significant number of children. When the issue of custody comes up, the court regards the child's interest as the paramount consideration. Hence section 71(1) M.C.A. 1970 provides that, in proceedings concerning the issue of custody, the court shall regard the interest of those children as the paramount consideration and subject to that the court may make such order in respect of those matter as it thinks proper. This work thus reviews the determinant factors for custody and describes a current custodial arrangement in Nigeria. The premise of this research also based that custodial right in Nigeria is only given to the father and not to the mother; as a result, the children become the victim of the circumstances. It also looks at the custody issue as ancillary relief in the sense that custody is an aftermath of divorce. Since the best interest of the child is of paramount importance, the question then is, can there be custody without divorce? The researcher also made a comparative analysis with other jurisdictions to provide a broader insight into custodial rights. This research provided a significant change in the mode of granting custody order by the Nigerian courts. Where the emphasis should be on the welfare of the child rather than paternity right, the researcher also proffered solution that custody of a child should be made a principal relief in the interest of the child and also provisions should be made for a child to bring an action by himself or herself where he/she understands the nature of such, despite his/her age or through a friend

## **2.5. Conclusion**

The analysis in this chapter has shown that child custody is not a one-dimensional legal issue but one that intersects with psychology, gender, tradition, and social justice. The theoretical frameworks employed reveal that while the "best interest" principle is widely accepted, its application is influenced by systemic biases and cultural norms. Literature on the subject

underscores the tension between parental authority and child welfare, calling for reforms that amplify the voices of children and recognize the caregiving role of mothers. This theoretical grounding informs the subsequent legal and practical analysis of custody laws in Nigeria.

## CHAPTER THREE

### LEGAL FRAMEWORKS FOR CHILD CUSTODY IN NIGERIA

#### **3.1. Introduction**

In Nigeria, the legal framework governing women's rights to custody of children is primarily outlined in various statutes that aim to address parental responsibilities and child welfare. The legal framework governing child custody in Nigeria reflects a complex interplay between statutory law, customary practices, and international human rights standards. The essence of custody, as articulated in various judicial interpretations and legal definitions, revolves around the care, control, and maintenance of a child, emphasizing both physical and legal aspects of custody. The overarching principle in the consideration of child custody, is the child's best interest, which transcends the specific circumstances of the custody dispute. This paper seeks to appraise the provisions of the law and practices in consideration of child custody in Nigeria, and the impact on the welfare and development of the Nigerian child. This is in view of the fact, that the child is mentally and physically immature, and needs proper development and care. The work found that in many decisions of child custody, though factors such as conduct of parents, parental wishes, age of the child, child welfare are put into consideration, the child usually bears the brunt at the end of the day. It is recommended that custody decisions be made with a focus on the child's best interests while balancing the rights and responsibilities of both parents.

#### **3.2. Statutory Marriage and Child Custody**

In order to determine the interest of the child in making a custody order, the court will take into consideration the age of child; the arrangements made for their accommodation, education, welfare and general upbringing, as well as the conduct of the relevant party/parent applying for the child's

custody. The court in the case of *Alabi v Alabi*<sup>67</sup> stated thus: Certain relevant criteria must be considered in the determination of the welfare of the child as in this case and they include: the degree of familiarity of the child with each of the parents (parties); the amount of affection by the child for each of the parent and vice versa; the respective incomes of the parties; education of the child; the fact that one of the parties now lives with a third party as either man or woman; and the fact that in the case of children of tender age custody should normally be awarded to the mother unless other considerations make it undesirable etc.<sup>68</sup>

Usually, the court prefers that the mother of a child of tender age ought to be granted custody. This is usually not a rule of thumb as there are situations where custody has been granted to the father or any other person in loco parentis, if it is in the interest of the child. In the case of *Oladetohun v. Oladetohun*<sup>69</sup> although the court found the mother of the child to be an unsatisfactory wife, and that she was given to the practice of juju and also that she has been shown to be a bad mother, it nevertheless granted her the custody of the only child of the marriage (who was three years old) on the ground that doing so, albeit temporarily, was in the best interest of the child. Even at that the court made provisions for a review of the issue of custody when the child becomes little older. However, in the case of *Lafun v. Lafun*<sup>70</sup>, the court stated that it is generally presumed that a child of tender years will be happier with the mother, and this presumption would only be vitiated by clear evidence to the contrary, such as immorality of the mother, infectious diseases in the mother, insanity and cruelty to the child, which are matters to be tried. It was held that owing to the moral degeneracy of the respondent (mother) it would not be in the best interest of the child for the

---

<sup>67</sup> (2007) LPELR-CA/IL/17/2006

<sup>68</sup> C P Iloka, "Affirmative Action and the Role of Lawyers in Fostering Women's Participation in Election Processes in Nigeria: A Critical Analysis" (2023) (4) (11) *African Customary and Religious Law Review*, ACARELAR, 15.

<sup>69</sup> Suit No: HD/111/20 of 6/7/71 unreported

<sup>70</sup> (1967) NMLR 401

respondent to have access to the child who was in her formative years and could easily be negatively influenced.<sup>71</sup> Furthermore, It is generally believed that girls should be in the care of their mothers whilst boys their fathers. There is however no rule of law which buttresses this belief hence Courts are not bound. It is believed that the best interest principle will suffice in this respect. In *Bibilari v. Bibilari*,<sup>72</sup> the high court of FCT in considering the question of custody a girl child who was 7 years old followed the decision of the Supreme Court in the case of *Williams v Williams*. The Court observed as follows: “In *Williams v Williams*, the Supreme Court grappled with a scenario not markedly dissimilar from the present. In that case, both parents were at daggers drawn over the custody of a six (6) years old girl child. His lordship, Oputa, JSC opined at p. 92 of the Report that ‘there are periods in a girl’s life when she is undergoing the slow advance to maturity, when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological.’”

In *Oyelowo v. Oyelowo*,<sup>73</sup> both parents applied for the custody of their two male children aged ten and nine years respectively. The children had lived with their mother for two years since the separation of their parents. The trial judge held that: ‘As male children, their rightful and natural place is their father’s home. It does not matter how long they stay away from it they will one day long for it.’ The Court of Appeal agreed with the opinion of the trial judge. The Court per Nnaemeka-Agu drew attention to the importance of the sociological background in the interpretation of section 71 of Matrimonial Causes Act. This decision has been widely debated; however, the general concession favours the pre-eminence of the child’s best interest.<sup>74</sup>

---

<sup>71</sup> C P Iloka, “Affirmative Action and the Role of the Legislature in Promoting Women Participation in Election Processes in Nigeria” (2022) (4) *International Journal of Comparative Law and Legal Philosophy, IJOCLLEP*, 8.

<sup>72</sup> Suit No: FCT/HC/PET/176/11

<sup>73</sup> (1987)2 NWLR (pt.56)239

<sup>74</sup> C P Iloka, “Analysis of Child Marriage in Nigeria and the Legal Imports” (2021) (2) *Journal LASJURE*.

Also, at times the court may take the child into confidence to ascertain his/her wishes. This happens when the child has attained the age of reasoning which is usually between ages 6 - 17 should the child be younger, the court may resort to welfare reports to determine where the interest of the child will be better served. The Supreme court in the case of *Odogwu v Odogwu*,<sup>75</sup> that the court could consult the child's wishes in considering what order to be made. It was also held that custody proceedings could be adjourned to Judge's chambers where in an informal hearing; the children's view could be assessed along with those of the parents. Apart from the considerations, implied by law and practice discussed above, the court also considers the adequacy of the arrangement proposed by the party seeking the child's custody this include the proposed arrangement for accommodation, welfare, education upbringing and other arrangements of the child. If the party fails to set out these facts, the court will be reluctant to consider the question of custody.

It is to be noted that, the fact that, a spouse is more affluent does not necessarily assure that a child's best interest will be better served.<sup>76</sup> Rather the fact that one parent is in a much better position to bring up the child and to provide a better accommodation is usually a decisive factor. In *Dawodu v. Dawodu*,<sup>77</sup> the Court refused to grant custody to a mother who had no home of her own or private means to bring up the child because it was not in the best interest of the child to do so. However, where both parties have made equally good arrangement for the welfare of the child the court will consider the misconduct on the part of the each or either of the parties. In *Alabi v Alabi*<sup>78</sup> the court held that 'Although misconduct on the part of the party to the suit is not the paramount

---

<sup>75</sup> (1992) 2 NWLR (Pt.225) 539 at 560

<sup>76</sup> C P Iloka, "Appraisal of the Legal Framework of the Sexual and Reproductive Health Rights of Women in Nigeria" (2023) (4) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*.

<sup>77</sup> (1976) CCHCJ 1207

<sup>78</sup> (2007) LPELR-CA/IL/17/2006

consideration, where parties have made equally laudable arrangement for the welfare of the child and its upbringing, misconduct may tilt the balance in favour of the other party.

In determining issues pertaining to custody and access, the court treats both parents equally. Equality of parents presupposes that either parent is entitled to the custody of the child. The court is not expected to prejudge which party will have custody before considering the interest of the child. In *Williams v. Williams*, the Supreme Court held inter alia that with regard to the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable by either without the other. Equality of right is therefore the basic premise upon which court considers custody cases. In the case of *DSD v Sera Igwalah & Bolaji Philips*,<sup>79</sup> however, the Yaba Magistrate court fell short in this respect when without balancing the equal rights of both parties prejudged the father with whom the child had maintained a stable life over the years by promptly awarding custody to the mother on the sole ground that the child is a girl. It must be re-emphasized that courts should always have the interest of the child as paramount consideration. The conduct of the parents towards the child is a matter the court will put into consideration while determining the best interest of the child.<sup>80</sup>

In *Okafor v. Okafor*<sup>81</sup> the court refused to grant custody of a child of the marriage to a mother who had not seen the child physically for almost six years other than through photographs. In like manner the court in *Kolawole v. Kolawole*<sup>82</sup> refused to grant custody to a mother who had once tried to kill the child. Also, where there are persistent acts of misconduct and moral depravity by

---

<sup>79</sup> UNREPORTED SUIT NO: MISC/MCY/46/114

<sup>80</sup> C P Iloka, "Challenges and Prospects of Child Adoption in Nigeria: A Focus on the Child's Rights Act" (2022) (6) *African Journal of Law and Human Rights, AJLHR*.

<sup>81</sup> (1976) 6 CCHCJ 1972

<sup>82</sup> Suit No. HCL/45D/81/of 1/7/82 (Unreported)

one of the parties this may be evidence of unsuitability of that party to be entrusted with the custody of the child. In *Lafun v. Lafun*, the court not only refused custody to a child's mother but also refused her access to visit. The court held that: 'owing to the moral depravity of the respondent (mother), it will not be to the best interest of this child for the Respondent to have frequent access to him in his formative years when he could be influenced. When the child attains the age of 14years, the Petitioner may allow the respondent access if he so wishes. However, a parent may not be deprived of custody merely because of his or her conduct which might have contributed to the breakdown of the marriage. The Supreme Court in *Williams v. Williams* held that the adultery of a party is not necessarily reason for depriving that party of custody unless the circumstance of the adultery makes it undesirable.

### **3.3. The Statutory Frameworks**

Custody of children under statutory law is governed by the Matrimonial Causes Act and the Child's Rights Act which provides that the custody of the children is not automatically bestowed on any person but will be determined based on the best interest of the child.<sup>83</sup>

#### ***a. Constitution:***

Chapter IV the 1999 Constitution of the Federal Republic of Nigeria (As Amended) provides for the Fundamental Human Right of every citizen of Nigeria. Section 42 of the Constitution provides for the right to freedom from discrimination of any citizen which states as follows: Section 42 (1)A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action

---

<sup>83</sup> C P Iloka, "Contemporary Issues on Reproductive and Sexual Health Vis-À-Vis the Rights of Women in Nigeria" (2022) (13) (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, NAUJILJ*, 77.

of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. (3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

The custody of a child of a customary marriage is given to the father of the child.<sup>84</sup> The provisions of the constitution now render these customs invalid, particularly, if granting custody to the father will not be in the best interest of the child as it was decided in the case of *Febisola Okwueze v. Paul Okwueze*,<sup>85</sup> where the Court held inter alia:

"Under most systems of customary law in Nigeria, the father of a legitimate or legitimized child has absolute right of custody of the child. Though the superior right of the father is recognized, this right will not be enforced where it will be detrimental to the welfare of the child. The only proper manner in which custody of a child under customary law can be determined is by specifically taking evidence to establish what is in the best interest and welfare of the child."

---

<sup>84</sup> M C Onokah (2003) Family Law in Nigeria

<sup>85</sup> (1989) 3 NWLR Pt. 109, p. 321.

Also, under Islamic law, a wife only retains custody of a child when the child is a toddler, or less than the age of seven for a male child and nine for a female child, after which custody goes to the father.

However, the welfare of children will be considered in awarding custody. In the case of *Bilyamin Bishir v. Suwaiba Mohammad*,<sup>35</sup> the Sharia Court of Appeal held that the first thing to be considered in child custody matters is the child's best interest, health, proper training, and the child's education. The interest of the child should not be considered based on the gender of the parent but what is in the best interest of the child, the court in the case of *Alabi v Alabi*<sup>86</sup> stated thus: Certain relevant criteria must be considered in the determination of the welfare of the child as in this case and they include: the degree of familiarity of the child with each of the parents (parties); the amount of affection by the child for each of the parent and vice versa; the respective incomes of the parties; education of the child; the fact that one of the parties now lives with a third party as either man or woman; and the fact that in the case of children of tender age custody should normally be awarded to the mother unless other considerations make it undesirable etc.

Child's Rights Act <sup>87</sup> section 68 (1) provides thus; where the father and mother of a child were not married to each other at the time of the birth of the child \_ the Family Court established under section 153 of this Act may \_ on the application of the father, order that he shall have parental responsibility for the child; or on the application of the mother, order that she shall have parental responsibility for the child; or the father and mother may by agreement have joint parental responsibility for the child. Section 69(1) of the Child's Right Act<sup>88</sup> provides thus; the Court may \_ on the application of the father or mother of a child make such order as it may deem fit with

---

<sup>86</sup> (2007) LPELR-CA/IL/17/2006

<sup>87</sup> Child's Right Act, 2004

<sup>88</sup> *ibid*

respect to the custody of the child and the right of access to the child of either parent, having regard to, the welfare of the child and the conduct of the parent; and the wishes of the mother and Father of the child, (2) The power of the Court under subsection (1) of this section to make an order as to the custody or a child and the right of access to the child may be exercised notwithstanding that the mother of the child is at that time not residing with the father of the child,(3) Where the Court makes an order under subsection (1) of this section giving the custody of the child to the mother the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, may, having regard to the means of the father think reasonable.

For children born to parents who were not married at the time of birth. Either parent can apply to the Family Court to be granted parental responsibility (the legal right to make decisions about the child's upbringing). The court can award parental responsibility to either the father or the mother based on their application. As regards joint custody, parents can mutually agree to share parental responsibility for the child. The court can make decisions about the custody of the child and the access rights of either parent based on, the child's welfare and the conduct of the parents the wishes of both parents. The court can make these orders even if the parents are not living together. If custody is granted to the mother, the court may also order the father to provide financial support for the child's maintenance, considering his financial capacity.<sup>89</sup>

***b. Matrimonial Causes Act<sup>90</sup>***

Section 71(1) of the Matrimonial Causes Act,<sup>91</sup> provides thus; (1)in proceedings with respect to the custody guardianship, welfare, advancement or education of children of a marriage, the court shall

---

<sup>89</sup> C P Iloka, "Discriminatory Practices and Policies Inimical to Women's Right in Nigeria" (2021) (3) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Commercial and Property Law journal*, 106.

<sup>90</sup> Matrimonial Causes Act Chapter 220, Laws of the Federation of Nigeria 1990.

<sup>91</sup> Ibid.

regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage, (4)Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

The position of the laws stipulating that before a court makes an order for a child's custody, both parents have an equal right to the custody of their children was decided by the court in the case of *Nwosu v Nwosu*,<sup>92</sup> the court of appeal held on the right of parents over custody of children of a marriage. The Court held both parties have equal rights in matters of custody of the children. In other words a mother has equal rights with the father over the children. In the instant case the appellant had equal legal interest in the children of the marriage and a right to protect that legal interest. A case for the custody of a child can be brought before a Magistrate Court or a High Court.<sup>93</sup> Furthermore, It is generally believed that girls should be in the care of their mothers whilst boys their fathers. There is however no rule of law which buttresses this belief hence Courts are not bound. It is believed that the best interest principle will suffice in this respect. In *Bibilari v. Bibilari*,<sup>94</sup> the high court of FCT in considering the question of custody a girl child who was 7 years old followed the decision of the Supreme Court in the case of *Williams v Williams*. The Court observed as follows:

---

<sup>92</sup> (2012) 8 NWLR) pt. 130.

<sup>93</sup> C P Iloka, "Domestic Violence: Cryptograms, Propellers and Repercussion" (2022) (3) *LASJURE*.

<sup>94</sup> Suit No: FCT/HC/PET/176/11

“In *Williams v Williams*, the Supreme Court grappled with a scenario not markedly dissimilar from the present. In that case, both parents were at daggers drawn over the custody of a six (6) years old girl child. His lordship, Oputa, JSC opined at p. 92 of the Report that ‘there are periods in a girl’s life when she is undergoing the slow advance to maturity, when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological’.

### **3.4. *International Frameworks***

Nigeria is also a signatory to many international, regional and sub-regional human rights instruments and has ratified some of these instruments that protect and guarantee the rights of women; amongst which are conventions touching on the rights of women and the child.

#### ***I. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979<sup>95</sup>***

Article 16(1)<sup>96</sup> States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

---

<sup>95</sup> Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) ratified by Nigeria in December 1979. CEDAW provides that the same rights and responsibilities as parents irrespective of their marital status, in matters relating to their children.

<sup>96</sup> Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.

## ***II. Universal Declaration of Human Rights (UDHR) 1948***

Article 7 of the Universal Declaration of Human Rights (UDHR) <sup>97</sup>provides thus; “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. “The Convention on the Rights of the Child adopted in 1989 and ratified by Nigeria in 1991 and steps were taken to domesticate it into national law, which is culminated in the Child Rights’ Act 2003.<sup>98</sup> Article 9<sup>99</sup> states, the child has the right not to be separated from its parents, except in its best interests and by a judicial procedure.

## ***III. Protocol to the African Charter on the Rights of Women in Africa, 2004***

There is also the Protocol to the African Charter on the Rights of Women in Africa, which was signed in 2003 and is a unique piece of legislation which takes into consideration the provisions of other international instruments on human rights that touch on women’s rights and the need for equality and freedom from discrimination.<sup>100</sup> Article 2 provides; **(1)** States parties shall combat all forms of Discrimination against women appropriate women through appropriate legislative, institutional and other measures. In this regard they shall **(a)** Include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; **(b)** Enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women. **(c)** Integrate a gender perspective in their policy decisions, legislation,

---

<sup>97</sup> Universal Declaration of Human Rights (UDHR) was adopted in 1948

<sup>98</sup> However, it is only 26 states out of 36 states in Nigeria that has adopted the Act into State laws.

<sup>99</sup> The Convention was adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

<sup>100</sup> C P Iloka, “Exposition of the Incidences of Sexual Violence against Women” (2023) (4) (1) *Journal of Commercial and Property Law, COOUJCPL*.

development plans, programs and activities and in all other sphere of life (d) Take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; (e) Support the local, national, regional and continental initiative directed at eradicating all forms of discrimination against women. 2. States parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.<sup>101</sup> Article 3; (1) every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. (2) Every woman shall have the right to respect as a person and to the free development of her personality. (3) States parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from of violence, particularly sexual and verbal violence.

Article 7 of the charter; States parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: separation, divorce or annulment of a marriage shall be effected by judicial order; women and men shall have the same rights to seek separation, divorce or annulment of a marriage; in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights, and responsibilities towards their children. In any case, the interest of the children shall be given paramount importance; in case of separation, divorce or annulment of

---

<sup>101</sup> C P Iloka, "Factors That Escalate Gender-Based Violence in Nigeria: A Critical Analysis" (2022) (4) *International Review of Law and Jurisprudence*, IRLJ, 68.

marriage, women and men shall have right to equitable sharing of the joint property deriving from the marriage.

By virtue of some of the provisions as laid down in the protocol, women are guaranteed the right to dignity;<sup>102</sup> the right to life, integrity and security of persons;<sup>103</sup> freedom from harmful practices which negatively affect the human rights of women;<sup>104</sup> equal rights in marriage;<sup>105</sup> equal rights in cases of separation, divorce and annulment;<sup>106</sup> the right to equal protection and benefit of the law;<sup>107</sup> the right to participate in political and decision making process.<sup>58</sup> Despite the provisions of the protocol recognising and guaranteeing rights and the obligation of the Nigerian government, there is still a lot to be done in the lives of such women in Africa.<sup>108</sup>

### **3.5. Conclusion**

Statutory laws, such as the Matrimonial Causes Act and the Child's Rights Act, reinforce the principle that both parents have equal rights to custody and emphasize that decisions should be made based on the child's needs rather than parental status or gender. These laws are designed to ensure that decisions are grounded in the best interests of the child, including considerations of the child's age, the quality of care, and the ability of each parent to meet the child's needs. Internationally, Nigeria's commitments under conventions like CEDAW and the Convention on the Rights of the Child further underscore the necessity of upholding the best interest of the child and gender equality in custody matters. These international frameworks call for the elimination of

---

<sup>102</sup> African Charter on the Rights of Women in Africa, article 3, *ibid*.

<sup>103</sup> *Ibid*, article 4.

<sup>104</sup> *Ibid*, article 5.

<sup>105</sup> *Ibid*, article 6.

<sup>106</sup> *Ibid*, article 7.

<sup>107</sup> *Ibid*, article 8. <sup>58</sup> *Ibid*, article 9.

<sup>108</sup> C P Iloka, "Gender Mainstreaming in Digital Legal Education" (2023) (4) *International Journal of Law and Clinical Legal Education, IJOLACLE*, 21.

discrimination and the implementation of protective measures for children's rights, reinforcing the principles enshrined in Nigerian law. While Nigeria's legal system provides a robust framework for child custody decisions, ensuring that they are made with the child's best interests at heart, challenges remain. The persistence of traditional practices and the unequal application of laws necessitate continued reform and vigilance. It is imperative for the judiciary, lawmakers, and society at large to uphold and enforce legal principles that safeguard the welfare of children, ensuring that custody decisions are fair, equitable, and truly in the best interests of the child. As Nigeria progresses towards greater gender equality and child protection, the harmonization of customary practices with statutory and international standards will be crucial in fostering a just and supportive environment for all children.

## CHAPTER FOUR

### CUSTODY OF CHILDREN UNDER CUSTOMARY LAW IN NIGERIA

#### 4.1. Introduction

This chapter explores child custody within the context of Nigeria's customary legal systems. Given the widespread practice of customary marriage in Nigeria, understanding how custody is determined outside statutory frameworks is essential. The chapter assesses how deeply entrenched patriarchal values influence custody outcomes and evaluates how these traditions align—or conflict—with the best interest of the child.

#### 4.2. Custody of children

One of the most contentious consequential or ancillary aspects of dissolution of customary law marriages like other forms of marriages is the issue of the custody of children. Under the Customary Courts Law of the various states where customary courts have been established, provisions have made relating to custody of children in the event of dissolution of customary law marriages by customary courts. For example, the customary courts law 1984 of defunct Bendel State (as applicable to Edo State), jurisdiction of Customary Courts in Edo State in the area of guardianship and custody of children under customary law is unlimited.<sup>109</sup>

Generally, in most systems of customary law the father has absolute right to custody of the children of the marriage. Upon his death, the male head of the father's family is vested with the right.

Although the day to day care of the children may be the responsibility of the mother.<sup>110</sup>

---

<sup>109</sup> Section 20(1) of the Customary Courts Law of defunct Bendel State 1984 as applicable to Edo State. And the 1<sup>st</sup> Schedule thereto which is *impair materia* law with section 20(1) 1<sup>st</sup> schedule to the customary courts law of Delta State 1997.

<sup>110</sup> Onyemenam U; '*Law Practice and Procedure Relating to Marriage, Divorce and custody of children under customary law in Nigeria*, being a paper delivered at the 2006 All Nigeria judges of the lower courts' conference, Asaba Delta State, 29.

Where however, the children are still of tender age in need of motherly care and affection, the children are kept in the custody of their mother until they can be properly and safely separated from their mother and returned to their father. There has been a host of judicial decisions by courts in Nigeria interpreting this aspect of customary. Most of them have generally upheld this principle. Although, it must be said that the strict application of this custom is fast waning. Nowadays, different factors are now taken into consideration in determining the issue of custody of the children of a customary marriage. Therefore decisions such as that in the case of *Abiakam v. Anuawu*<sup>111</sup>, where the court upheld the primary of the absolute right of a father to custody of children until they attain the age of majority and that of the Delta State Customary Court of Appeal in an unreported case of *Mbanoso v Mbanaso* in respect of custody where the court stated thus:

“We have observed earlier that in most systems of customary law in Nigeria, the father of a legitimate child or legitimated child have absolute right to custody of the child and most courts have taken judicial notice of this; so it need not be specifically proved.”

Has been modified and watered down by the Nigerian Supreme Court in the case of *Okwueze v. Okwueze*.<sup>112</sup> In this case, the Supreme Court held that whilst it recognizes the superior rights of the father, this right will not be enforced where it will be detrimental to the welfare of the children.

However, there has been statutory intervention in this area in cases of judicial dissolution of marriage. As early as 1958, the marriage, Divorce and custody of children adoptive By-law in force or applicable to the states of Ogun, Oyo, Ondo and Bendel (now Edo and Delta States) provided as follows.<sup>113</sup>

“When making an order with regard to paternal rights over a child, the court-

---

<sup>111</sup> Suit No: DCCA124A12001 judgment delivered on 22/12/03

<sup>112</sup> (1989) 3 NWLR (pt. 109) 321

<sup>113</sup> Section 14

(1) shall at the same time make an order with regard to the custody and upbringing of such child and in the making of such order the interest and welfare of the child shall be the first and permanent consideration”.

Similarly, under the Customary Courts law 1984 of defunct Bendel State (as applicable to Edo State) in any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration.<sup>114</sup> The primacy of the ‘best interest and welfare’ principle in custody of children contestation has become the prevailing general legal road map that customary court in Nigeria adopt in the determination of this prime issue. This is also true of statutory marriages conducted under the Nigeria Marriage Act by the various High Courts where jurisdiction is reposed. Therefore it is submitted, that the same meaning is attached here.

### **4.3 Best interest and welfare of a child.**

What is the best interest and welfare of a child? There exist a plethora of judicial decision upholding this principle and defining the best interest and welfare of a child. In the case of *Buwanhot v. Buwanhot*<sup>115</sup> the Nigerian Court of Appeal held that the welfare of the children of the marriage, in terms of their peace of mind, happiness, education and co-existence is the prime consideration in granting custody. Also in the regard, Belgore JSC in the case of *Odogwu v Odogwu*<sup>116</sup> stated that.

Welfare of a child is not the material provisions in the house - good clothes, food, air-conditioners, television, all gadgets normally associated with middle class, it is more of the happiness of the child and his psychological development..... While it is good for a child to be brought up by the complimentary care of the two parties living together. It is psychologically detrimental to his welfare and ultimate

---

<sup>114</sup> Section 27(I) Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State which is *impair materia* with section 27(I) of the Customary Courts Law 1997 of Delta State and section 17(I) of the Customary Court Law Abia State.

<sup>115</sup> (2011) All FWLR pt. 566; 552

<sup>116</sup> (1997) 2 NWLR pt. (225) 239

happiness and psychological development if the maternal care available is denied him.

Similarly, in the case of *Udusote v Udusote*<sup>117</sup> the court defined interests of the children to include their welfare, education, security and overall wellbeing and development.

It is apposite here to underscore the following points in relation to the issue of custody. Firstly, although the best interest of the child is the first and paramount consideration, it is certainly not the only consideration. In the case of *Obajimi v Obajimi*<sup>118</sup> the Nigerian Court of Appeal, held *inter alia* that although the welfare of the minor is the first and paramount consideration, it is not the sole consideration. The conduct of the parties is a matter to also be taken into account. In other words, according to the court, before making an order for custody, the trial court must take into consideration, the interest and welfare of the children as well as the conduct of the father and the mother and their respective resources, comportment and total biodata. Secondly, although there is no rule of law which says that a female child or a child of tender age should remain in the custody of the mother when the marriage is dissolved, however, it cannot also be seriously disputed that children who are female and in their growing or formative years are better cared for and looked after by their mother, except the contrary is shown by credible evidence. It is generally presumed that such children would be happier and more at peace because of the closeness and intimacy which breed affection and familiarity with the mother who most of the time was there for them.<sup>119</sup>

Therefore, the court in the case of *Udusote v Udusote*<sup>120</sup> has held that unless it is abundantly clear that the mother suffers from moral conduct, infectious disease, insanity, lack of reasonable means or is cruel to the children etc., children of tender age, male or female are ordinarily better off in terms of welfare and upbringing with their mother. Of course, there may be exceptions where the

---

<sup>117</sup> (2012) 3 NWLR t 478

<sup>118</sup> (2012) All FWLR (pt. 649) 1168

<sup>119</sup> *Udusote v Udusote*

<sup>120</sup> *Ibid.*

father may be better off than some mothers in the upbringing of the children. There is always however, that rebuttable presumption in favour of the mother in the consideration of broken down marriages.

Thirdly, custody of children is not a once and for all thing. Under the Customary Courts Law 1984 of defunct Bendel State as applicable to Edo State,<sup>121</sup>

Whenever it shall appear to a customary court that an order made by such court shall in the interest of a child be reviewed, the court may of its own motion or upon the application of any interested person vary or discharge such order.

This is clearly because of the significance of the welfare of children and recognition of the fluidity of circumstances that may influence this consideration. In *Obajimi v Obajimi*<sup>122</sup>(Ikyegh JSA in respect of this stated that:

Custody of children is an on-going exercise akin to recurrent decimal. It is a day to day or revolving affair. Whenever any of the spouses discovers conditions have changed or altered for the worse in respect of the interest, benefit and welfare of the children or child in the custody of another person or spouse, he or she can apply to the court to review the custody order. The court upon hearing the parties would reach a decision in the best interest of the child or children as the case may be.

It is imperative to underscore the point that although the above cases cited in relation to the issue of maintenance of children were decided in relation to statutory marriages, it is submitted that the principles distilled from them are also germane and hold true in respect of customary marriages, particularly in the interpretation of similar provisions contain in the Customary Courts rules of states where they have been created.

### **4.3 Conclusion**

---

<sup>121</sup> Section 27(2) which is *impair materia* with section 27(2) of the Customary Court Law 1997 of Delta State.

<sup>122</sup> *Ibid.*

This paper has critically examined customary marriages from the perspective of dissolution, the ancillary thorny issue of custody of children (if any) between the separating/separated couples and maintenance. From the above discourse, we have seen that the legal principles governing dissolution customary marriages and custody of children under customary law and under statutory marriages conducted under the Act are significantly similar and well developed. Where differences exist, there have been statutory interventions. These statutory interventions are, for instance, evident in the provisions of the Marriage, Divorce, and Custody of Children Adoptive Bye laws 1958 and the Customary Courts Laws of the many states in Nigeria where customary courts exist. As a result of this, customary marriages and customary courts conferred with unlimited jurisdictions over matrimonial causes and matters have become increasingly popular and protective of women and children's rights. At the same time, unlike in the past, the principles guiding these aspects of customary marriages examined in this paper have become well defined and equitable. This has effectively laid to rest the bias of superiority of statutory marriages over customary marriages generally and in the area of divorce and custody of children in particular.

## BIBLIOGRAPHY

### Books

- A.P Anyebe, *Customary Law: the war without Arms* (1<sup>st</sup> ed. Enugu: fourth Dimension publishing Co. Ltd, 1985)92
- Bhat Ishwara, *Idea and Methods of Legal Research* (Oxford Academic 2020).  
<<https://doi.org/10.1093/oso/9780199493098.001.0001>> accessed 6<sup>th</sup> August 2025.
- E. Nwogugu, *Family Law in Nigeria* (Henemann Educational Book Nigeria Ltd. Ibadan 1985) p.134.
- Leslie Rutherford and Sheila Bone, *Osborne's Concise Law Dictionary*, (8th edn. Sweet and Maxwell) 104 2 Kelly, Joan.
- The Black's Law Dictionary, 8th ed. (2004).

### Articles

- A.,Graham, and R., Fitzgerald, 'Taking Account of the "To and Fro" of Children's Experiences in Family Law' (2005), Morrow V and Richards M, 'The Ethics of Social Research with Children: An Overview' (1996) 10 *Children and Society* 934-944.
- Amato Paul, 'Children of Divorce in the 1990's: An Update of the Amato & Keith Meta-Analysis' (2001) 15 *Journal of Family Psychology* 355-365.
- Bolaji Owosanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 *Family Law Quarterly* 406.
- C P Iloka and J A Eze, "Breaking the Culture of Silence on Rape: A Cry for Justice" (2022) (9) (4) *Journal of Commercial and Property Law, NAUJCPL*, 43.
- C P Iloka, "Affirmative Action and the Role of Lawyers in Fostering Women's Participation in Election Processes in Nigeria: A Critical Analysis" (2023) (4) (11) *African Customary and Religious Law Review, ACARELAR*, 15.
- C P Iloka, "Affirmative Action and the Role of the Legislature in Promoting Women Participation in Election Processes in Nigeria" (2022) (4) *International Journal of Comparative Law and Legal Philosophy, IJOCLLEP*, 8.
- C P Iloka, "Analysis of Child Marriage in Nigeria and the Legal Imports" (2021) (2) *Journal LASJURE*.
- C P Iloka, "Appraisal of the Legal Framework of the Sexual and Reproductive Health Rights of Women in Nigeria" (2023) (4) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*.

- C P Iloka, “Challenges and Prospects of Child Adoption in Nigeria: A Focus on the Child's Rights Act” (2022) (6) *African Journal of Law and Human Rights, AJLHR*.
- C P Iloka, “Contemporary Issues on Reproductive and Sexual Health Vis-À-Vis the Rights of Women in Nigeria” (2022) (13) (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, NAUJILJ*, 77.
- C P Iloka, “Discriminatory Practices and Policies Inimical to Women’s Right in Nigeria” (2021) (3) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Commercial and Property Law journal*, 106.
- C P Iloka, “Exposition of the Incidences of Sexual Violence against Women” (2023) (4) (1) *Journal of Commercial and Property Law, COOUJCPL*.
- C P Iloka, “Factors That Escalate Gender-Based Violence in Nigeria: A Critical Analysis” (2022) (4) *International Review of Law and Jurisprudence, IRLJ*, 68.
- Carol Smart, ‘From Children’s Shoes to Children’s Voices’ (2002) 40(3) *Family Court Review* 307-319, Nicola Taylor, ‘What do we know about involving Children and Young People in Family Law Decision Making? A Research Update’ (2006) 20(2) *Australian Journal of Family Law* 154-178.
- Chidinma Blessing Nwakoby, Okoli Ifeyinwa Esther & Chinwe Patricia Iloka, “*Rights of Women to Custody of Children in Nigeria: A Legal Appraisal*”, Nnamdi Azikiwe University, Awka *Journal of Private and Property Law* Volume 2(1) (2025) 138.
- Folashade Aguda-Taiwo ‘Guardianship and Custody of Children; Customary Perspective’ (A Paper Delivered at the Refresher Course for Judges and Kadis at the National Judicial Institute on the 11<sup>th</sup> of March 2019).
- Fortune Ihua-Maduenyi, ‘Considering the Rights and Best Interests of a Child in a Multi-Cultural Civil Society with Special Reference to Nigeria’ (2008) *Faculty of Law University of Leicester*’ 113.
- Hadiza Okunrobo, ‘Participation Rights of Adolescents in Accessing Health Care in Nigeria’ (Unpublished Thesis for the award of Mphil in Obafemi Awolowo Univeristy Ile-Ife, 2017) 31.
- Ilodibe Stephen Ifenna and Chimeziri Nneoma Gift, “*Review of the Best Interest of a Child’s Custody in Nigeria*”, *Int. J. Adv. Res.* 8(08), 358-376.
- Joan Kelly, ‘Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice’ (2002) 10 *Virginia Journal of Social Policy & the Law* 129–163,
- Lansdown Gerison, ‘Promoting Children’s Participation in Democratic Decision-Making. (UNICEF Innocenti Insight 2001)

- Majebi Samuel Amune, “*Legal and Societal Considerations in Determining Child Custody Arrangements During Divorce Proceedings in Nigeria*”, *Journal of Good Governance and Sustainable Development in Africa (JGGSDA)*, Vol. 9, No 1, (2025) 1. Available online at <<http://journals.rcmss.com/index.php/jggstda>. Covered in Scopedatabase-<https://sdbindex.com/Sourceid/00000431>> accessed 2 August 2025.
- Mosunmola Sheirfat Ikujuni, “*An Appraisal on the Participation of Children in Divorce and Custody Proceedings in Nigeria*”, *Achievers University Law Journal, AULJ Volume 1 (2021)* 192.
- N Taylor and others, ‘International Models of Child Participation in Family Law Proceedings following Parental Separation/Divorce’ (2012) 20 *International Journal of Children Rights* 645-673.
- Nkiru Uzodike, ‘Custody of Children in Nigeria: Statutory, Judicial and Customary Aspects’ (1990) 39(2) *International Comparative Law Quarterly* 424.
- O’Quigley Ann, ‘Listening to Children’s Views: The Findings and Recommendations of Recent Research’ (York: Joseph Rowntree Foundation 2000).
- Onyemenam U; ‘*Law Practice and Procedure Relating to Marriage, Divorce and custody of children under customary law in Nigeria*, being a paper delivered at the 2006 All Nigeria judges of the lower courts’ conference, Asaba Delta State, 29.
- Smart C, Wade A and Neale B, ‘Objects of concern? Children and divorce’ (1999) 11(4) *Child and Family Law Quarterly* 365-376.
- Smart Carol. 2002. ‘From Children’s Shoes to Children’s Voices’ (2002) 40(3) *Family Court Review* 307-319.
- Wilson Diriwari and Damfebo K Derri, “Protecting the Best Interests of Children: A Critical Analysis of Child Custody and Divorce Proceedings in Nigeria under the Child Rights Act 2003”, *International Journal of Social Science, Management and Economics Research*, (1)(4) (2023) 52.

## **Papers and Reports**

- Encyclopedia Britannica, *Marriage*, available at [www.britannica.com](http://www.britannica.com) accessed 6 August 2025.
- Lansdown Gerison, ‘Promoting Children’s Participation in Democratic Decision-Making. (UNICEF Innocenti Insight 2001).
- Mathew Dike, (2006) “squabble for the custody of a baby leads to lady’s death”, *THE SUN*, 20 April, <[http://www.nigeria.gov.ng/national\\_dallies](http://www.nigeria.gov.ng/national_dallies)> accessed 2 August 2025.

Rachel Birnbaum, 'the Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review' (Family, Children and Youth Section, Department of Justice Canada 2009) 1.

UNICEF: The State of the World's Children 2003 - Child's Participation.