DIVORCE, MAINTENANCE AND CHILD CUSTODY UNDER THE CUSTOMARY LAW A PAPER PRESENTED BY MRS OLUFUNKE DUROORIKE FIADE – ISIRAMEN CHAIRMAN CUSTOMARY COURT EDO STATE JUDICIARY AT THE INDUCTION COURSE FOR NEWLY APPOINTED JUDGES OF THE LOWER COURTS HELD IN ABUJA BY THE NATIONAL JUDICIAL INSTITUTE, ABUJA.
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ABSTRACT

This paper examines the complex relationships between child custody, maintenance, and divorce in the context of customary law. Customary law has always shown biases in favor of men on child custody, maintenance requirements, and divorce. But as legal developments and societal changes have started to question these prejudices, conventional norms and behaviors have been reexamined. Here, I attempt to explain, however limited in scope, the changing landscape of customary law in addressing divorce, maintenance, and child custody, emphasizing the need for fair and gender-neutral approaches and how crucial it is to strike a balance between modern principles and cultural traditions in order to guarantee fair and reasonable outcomes for people navigating these issues under our customary legal systems. After all, nothing remains static, which is very much the case in our field and it is with our dexterity, awareness, comprehension, and cognizance that we may be able to actually reposition the courts for better justice delivery within the times.

Keywords: Divorce, Maintenance, Child Custody, Customary Law

1. INTRODUCTION

The paper broaches the aforementioned topics to succinctly acquaint us, perhaps to intimate degrees the relevance and role of the customary courts in the subjects of 'Divorce, Maintenance and Child Custody.'

The customary law system recognizes a marriage when all requirements for recognition have been fulfilled, there is no standardized process to this. But as we must all understand nothing is sure and even still, for various reasons, this is true of marriages.

In the event that a party or parties to one such marriage, under the jurisdiction of the customary law courts moves with intent to dissolve the union, a whole litany of procedures to be considered, negotiated and executed lay at the table of the customary court. This paper will involve three major procedures on that list consequently dividing it into three main parts. These are core topics of interest for the matrimonial institution as well as the customary legal system which also presides over the family law applicable to the concerned subjects, more so considering that the customary laws are a reflection of the diversity of the Nigerian society with respect to the source ethnicities from which the native laws and customs were combed, provoking a necessity for acute awareness, comprehension, and cognizance, and not least of all, a professional dexterity of considerable levels, all owing to the fact that a positive increase in adoption of those factors shall contribute to a rise in the competence of the presiding judge and efficiency of the customary courts, elevating the potency of the customary legal system and ultimately positioning us for better court justice deliveries. Before proceeding, we must first start from the initial stage, marriage from which the matters of divorce, maintenance and child custody ascend, demonstrably within the purview of the customary courts.

1.1. MARRIAGE UNDER CUSTOMARY LAW

Firstly, custom itself is a usage or practice common to many in a particular place, class or habitual with individual which regulates their social lives. Customary laws therefore refer to the laws which are derived from the customs of the people. It has been described as the body of customs which regulates the kinds of relationship between the members of a community in a traditional setting.

Marriage is the oldest institution known to man as it is the womb that birthed the first family, the smallest and yet most important unit for the creation of members of society and so society itself.

Marriage in Nigeria is regulated by two legal systems which are statutory law and the other which exists by it, is the system of local customary law under which the Nigeria Legal Classification, puts Sharia. However, in **LEWIS vs. BANKOLE** (1908) a customary law was defined as an unwritten law of an ethnic group" therefore since Islamic law is written in the Holy Quran and other sources, it may not be classified as a customary law. In Nigeria, there is no standardized customary law applicable across all ethnic groups and this is manifest in the various unique native marriages; instead, customary laws vary significantly among the diverse ethnic communities, although certain customs may exhibit similarities.[1]

1.1.1. SO, WHAT REALLY IS MARRIAGE?

According to the Encyclopaedia Britannica[2], "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)". It is important to note that customary law distinguishes between marriage and the mere living together of a man and a woman out of wedlock. Legal rights and duties flow from the former) but not from the latter type of relationship.

Although there is diversity in customary marriages, there are four essential requirements for every customary marriage: consent, capacity, bride price, and giving away the bride.[3]

a. Consent

In traditional societies, historically, parental consent carried substantial weight in determining the legitimacy and acceptability of a marriage within tribal communities. In recent times, societal changes and the influence of modern perspectives have led to a shift in this dynamic. Young adults are increasingly asserting their autonomy and preferences when it comes to choosing their partners. This trend is reflected in a growing emphasis on the consent of the parties directly involved in the marriage.

While parental consent remains important and may still be sought out of respect for tradition and family harmony, the evolving nature of tribal societies is allowing more space for individual agency and decision-making in matters of marriage. This shift underscores broader transformations within these communities, where traditional customs are being renegotiated in response to contemporary realities and values.

b. Capacity

According to customary law, the capacity to marry is a fundamental requirement. Incapacity to marry may arise under certain circumstances, such as when a party is underage or when one party is already in a monogamous marriage with another person. This means that if one party is too young or already legally married to someone else in a monogamous union, they lack the capacity to enter into a customary marriage.

c. Bride Price

Also known as dowry, represents a third customary requirement in marriage. It involves a customary gift presented by the husband or his representatives to the parents or guardians of the bride. This practice is deeply rooted in many cultures and serves as a significant symbolic gesture within the context of marriage. The bride price traditionally symbolizes the groom's commitment, respect, and ability to support his future wife. It also acknowledges the role of the bride's family and community in the union.

d. Giving Away

The last requirement for a valid customary marriage is the ceremonial act of giving away the bride. This act, which varies from one village to another, holds significant cultural and symbolic importance within the context of the marriage ceremony. In many traditional Nigerian communities, the act of giving away the bride involves formal rituals or gestures that symbolize the transfer of responsibility and care from the bride's family or guardians to the groom. This ceremonial aspect often includes prayers, blessings, or statements affirming the union and the roles of the newlywed couple within the community.[4]

2. DIVORCE UNDER CUSTOMARY LAW

The word divorce in simple terms means, break up, separate, split up, cease to be together as one and in legal parlance a legal dissolution of a marriage, the separation between two married men and women who have decided not to be married or live together again or, formal, legal ending of a marriage or marital union by a court of law. Divorce is an act by which a valid marriage is dissolved, usually freeing the parties to remarry[5]. Basically, it is the official recognition of the end of a statutory marital relationship by a court of law[6]. It should be stated for the purpose of clarity that while "dissolution" is often used interchangeably with "divorce" and is synonymous with it, it actually refers to the process of permanently ending a marriage. It is typically quicker and less expensive than divorce when both spouses agree to end the marriage without contesting the court's decision. In a dissolution, both spouses file a joint petition asking the court to terminate the marriage based on a pre-agreed separation agreement. This process is straightforward when there is mutual agreement. In contrast, divorce is the final legal termination of a marriage resulting from unresolved issues between spouses. One spouse initiates the process by filing a petition against the other[7]. In summary, dissolution of marriage leads to divorce when both spouses agree, while divorce involves unresolved disputes and is initiated by one spouse against the other. According to the Blacks' law Dictionary, Divorce means; legal dissolution of a marriage by a court, also termed marital dissolution or dissolution of marriage. When used without qualification the term divorce imports a dissolution of the marriage relation between husband and wife, that is, a complete severance of the tie by which the parties are united. However, in its common and wider use, the term includes: the dissolution of a valid marriage, a formal separation of married persons and the annulment of a marriage, void from the beginning[8].

In former times, marriages were nearly indissoluble since the marriage not only sealed the relationship of the spouses but also signified an alliance between their respective families. There were only a few compelling reasons for dissolution of a marriage. Debates were protracted over what grounds would be compelling enough to grant a party the rights to initiate dissolution of the said marriage. Families typically, were involved at the earlier stages of these disputes, leading to reconciliations more often than not. However, today, divorces are much easier to obtain, in large part to the erosion of more rigid customs and tradition by progressive views and liberal culture. Hence, under the Customary law, divorce can simply be obtained in either judicial or non-judicial proceeding, there is no special procedure under the Customary law but couples prefer the judicial dissolution which gives the separation some legal backing.

This shall be discussed in detail as we proceed. To begin, it is imperative to underscore the legal principle that once there is evidence of *defacto* celebration of marriage either under the Marriage Act or under customary law, there is a strong presumption in favour of the validity of the marriage. Therefore, customary law marriage cannot be dissolved by mere wishful thinking or assertion. In the celebrated case of *Ezeaku v. Okonkwo*16, the deceased, a Senior Advocate of Nigeria, was married to the 1st defendant under native law and custom. They had a child and thereafter separated, and the deceased subsequently got married to the plaintiff. He thereafter deposed to an affidavit wherein he stated that the plaintiff was his only wife. After his demise intestate, the 1st defendant sought to partake of the estate of the deceased which was placed under the management of the office of the Administrator General/Public Trustee of Enugu State.

The plaintiff therefore commenced an action in the High Court of Enugu State by originating summons seeking the determination of the following issues:

- Whether the affidavit deposed to by the deceased carry the force of law
- Whether the said affidavit was not sufficient notice to the whole world with respect to the marital Status of the deceased under native law and custom.
- Whether the affidavit did not effectively determine the purported right of the 1st defendant *vis-à-vis* the estate of the deceased.

The High Court resolved these issues in favour of the plaintiff. Upon an appeal by the 1st defendant to the Court of Appeal (Enugu Division), the court in allowing the appeal held interalia that the trial court erred in holding that the marriage was dissolved because the deceased deposed to an affidavit to the fact that the plaintiff was his only wife without taking the proper step to dissolve the marriage between him and the 1st defendant. According to Oseji JCA[9] (delivering the lead judgment),

"...When there is evidence of the defacto celebration of marriage either under the marriage Act or under customary law, there is a strong presumption in favour of the validity of the marriage. In the same vein, the said marriage cannot be said to have been dissolved by mere wishful thinking or assertion..."

Accordingly, the Court held there is a standard process for the dissolution of marriage whether statutory or customary and concrete evidence that the necessary requirements were satisfied must be adduced before a court can hold that there has been a divorce and the validly contracted marriage between a couple had formally and legally come to an end. It is not enough for either party to a customary marriage to *suomotu* bring it to an end by merely deposing to an affidavit to that effect as in this case.

The Court of Appeal held further that, legal authorities have it that the proof of the dissolution of customary marriages requires a high degree of certainty.

This form of marriage and also statutory marriage is not dissolved by effluxion of time. So that living apart for 17 years, as in this case, cannot be a ground to hold the marriage between the appellant and the deceased Senior Advocate had been dissolved.

Similarly, in the case of *Lawal Osula v Lawal Osula*[10], the court held as follows:

"Living with a man and having children for him alone does not necessarily make a woman a wife of the man under native law and custom. In the same way, a woman who is a wife of a man under native law and custom does not divorce the man merely by leaving him and staying with another man for who (sic) she has children."

2.1. METHODS OF DISSOLUTION OF MARRIAGE CONTRACTED UNDER CUSTOMARY LAW.4

A popular but erroneous view held by many is that a customary law marriage can only be dissolved by a customary court. For instance, in the case of *Aabeja v Aabeja*[11], the court held that a marriage under native law and custom can only be dissolved by a court, and it is not sufficient that one of the parties to the marriage declares that he or she no longer wants the other. With respect, this is not the correct position of the law. In addition to judicial dissolution, there also exists side by side nonjudicial form of dissolution of marriage contracted under customary law[12].

a. Non-Judicial Dissolution

This form of dissolution of customary law marriage is carried out informally without the formalities of any judicial process.

It is undertaken inter parties, usually with the knowledge and participation of members of the families of the couple who at this point may be at daggers drawn or at least in an active state of animosity. Non-Judicial Dissolution may be executed unilaterally or by mutual agreement of both parties. In the case of *Ezeaku v Okonkwo*[13], the court upheld this principle and stated that a marriage under native law and custom can be dissolved either unilaterally or by mutual consent, subject to the refund of dowry.

Similarly, in the case of *Okpanum v Okpanum*[14]. the court held that:

"Unlike in English law, dissolution of marriage under native law and custom can be extra-judicial. No ground for divorce need be alleged or proved. It is sufficient for a husband to arrange a meeting where he duly informs his parents in law of his intention to bring the marriage to an end. It is not necessary for the husband to return the wife physically to her family nor is the return of the dowry necessary."

Mutual non-judicial dissolution of customary law marriage often happens after prior attempt or attempts have been made to reconcile the parties. Where both sides dig deep into their trenches in their resolve and persistence to dissolve the marriage, an agreement may then be reached on dissolution and other collateral issues such as the return of bride price and custody of children. Unilateral non-judicial dissolution by either party may be in the form of a party to the marriage opting to end cohabitation with the other party following a clear unequivocal intention to bring the marriage to an end. Thereafter the bride price is returned to the family of the man and a subsequent return of the belongings of the woman to her or her family, where necessary. The marriage is dissolved only when the bride price is refunded.

b. Judicial dissolution

Under this dispensation, customary marriage is brought to an end by the instrumentality of the judicial process. This form of formal dissolution of customary marriage is surging in popularity, relevance, and attraction.

This is largely attributable to the fact that it provides recorded evidence of divorce, provides an avenue for the return of bride price in circumstances that would otherwise have been difficult or impossible as well as presents an impartial judicial platform for the just determination of ancillary issues such as custody of the children of the marriage. Customary courts in Nigeria are vested with jurisdiction to dissolve customary marriages. Their jurisdiction in this respect is unlimited. In Edo State, under the Customary Courts law 1984 of defunct Bendel State (as applicable to Edo State)[15], the Area and District Customary Courts created under that law are vested with unlimited jurisdiction over matrimonial causes and matters under customary law, this clearly involves divorce. This dispensation must be distinguished from matrimonial causes or matters under the marriage Act over which customary courts have no jurisdiction. In such matters jurisdiction is firmly resident at the High Court. The relative or comparative ease and simplicity with which customary law marriage can be dissolved by customary courts as against the difficulties, technicalities and delay experienced in a quest to dissolve statutory marriages at the High Court, has quite clearly encouraged a greater interest in the celebration of customary law marriages by the people, even among the elites.

2.2. GROUNDS FOR DISSOLUTION OF CUSTOMARY MARRIAGES

When dissolution is sought, no grounds need be stated by the seeking party, in this regard the customs and traditions relevant to the concerned community assume a more pronounced role.

In some states (Ogun, Oyo, Ondo and Defunct Bendel State) (now Edo and Delta States), provisions for grounds for divorce under customary law by the Marriage Divorce and Custody of Children Adoptive by-laws[16] allow the customary court take the following matters into consideration.

They are:

- Betrothal under marriageable age.
- Refusal of either party to consummate the marriage.
- Harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man.
- Impotency of the husband or the sterility of the wife.
- Conviction of either party for a crime involving a sentence of imprisonment of five years or more.

- Ill-treatment, cruelty or neglect of either party by the other.
- Veneral disease contracted by either party.
- Lunacy of either party for three years or more.
- Adultery.
- Leprosy contracted by either party.
- Desertion for a period of two years or more.

2.3. VENUE TO INSTITUTE THE ACTION FOR DISSOLUTION OF CUSTOMARY MARRIAGE.

A party committed to the judicial dissolution of their shared customary marriage is usually required to determine *in limine* the question of the customary court with territorial jurisdiction to determine the case.

In other words, Customary Courts may be engaged, which by virtue of their respective customary laws that grant them the jurisdiction over an action for the dissolution of customary marriage; provided the defendant was resident in its area of jurisdiction where the cause of action arose,this however is no more the position as dissolution of customary marriage can be done in any customary court across the Nation

2.4. BRIDE PRICE

According to chambers 21st Century Dictionary, a bride price, "is a price paid to a bride's family by the bridegroom.[17]" The term bride price is often used as synonymous with "dowry "even in some statutes. This it is submitted is not proper. Dowry appropriately used, refers to "an amount of wealth (or money) handed over by the man to the woman's family to his wife on marriage.[18]" According to Chief Tom Anyafulude in his book[19], refund of bride price may follow dissolution of customary marriage. Where a customary court has made an order for dissolution, it may make an order for the refund of bride price. In making such an order, a customary court in Enugu State is bound by the provisions of customary marriage (special provisions) Law. Under this law, dowry also refers to any gift or payment in money-natural produce, cowries, or any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place. Bride price being paid to the parents or guardians of the woman and not to her therefore not proper for a court to order a refund from a woman.

a. Significance of the Return of Bride Price.

According to *Maurice O. Izunwa*[20], the return of the bride price on a bride is the critical threshold in customary divorce procedure. Once the bride price is returned by the family of the woman, all incidents of customary marriage fall apart irretrievably.

b. Quantum of Bride Price Refundable

Some local councils have made bylaws based on factors shared by J. O. Ajibola[21], for the considerations and stipulations of what amount of bride price is refundable by a woman relative to the number of years she has being married to a man. One of such bylaws is the Marriage, Divorce and Custody of children Adoptive Byelaws 1958 supra.

Under this law, the following is statutorily prescribed as refundable bride price relative to the circumstances and the period the marriage lasted.

- The amount of money to be refunded is inversely proportional to the years spent.
- Duration of wedlock.
- Number of children birthed within the marriage.
- Conduct of the parties and their blame worthiness in events leading up to the dissolution of the marriage.

An example of a prescription for amount refundables based on the first factor.

- Unconsummated marriage …… ₦70,000.00
- Marriage less than twelve months old …… ₦60,000.00
- Marriage within one and five years …… ₦50,000.00
- Marriage at least five years old …… ₦40,000.00
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c. Return of Gifts, Presents etc.

A common relief contained in a petition for dissolution of customary marriage often by a man is a claim for the return of gifts, presents or money, such as money spent on the funeral of a parent or parents of the woman. In the case of *Okoriko v. Otobo*[22], the court held that presents, gifts or other items given to the wife and/or her parents or any money spent at the funeral of ceremony of any parent of the woman are not refundable with the bride price.

2.5. DISSOLUTION BY DEATH.

In marriage under customary law, the death of a wife brings the marriage to an end. But where it is the husband that dies, this is not necessarily the case.

Justice U. Onyemenam,[23] holds the view, that in the case of the death of a husband, the widow has the following options:

- To remain in the late husband's family house as his wife. Any child she bears during such period is deemed a legitimate child of the deceased husband. This is often described as "Ghost marriage". In some parts of Igbo land, such a child may be named, "Azunna".
- To remarry a member of her late husband's family, except her own son. This is usually done to ensure the continued maintenance of the widow.
- To return to her parent's house and remarry. Where this is done, she is obliged to refund the bride price. This is so because her return and remarriage are deemed to be a form of divorce.

However, the court in the case of *Yesufu v. Okhia*[24], has held that death terminates the marriage, and it was mere fiction to suppose that the marriage was subsisting. Consequently, any custom, which restricted the widow from remarrying or having an affair until some fetish ceremonies was performed, was repugnant to natural justice, equity, and good conscience. This judicial decision is no doubt commendable.

3. MAINTENANCE UNDER CUSTOMARY LAW

Although customary law neither explicitly nor robustly provides for the concept of maintenance, statutory law through The Matrimonial Causes Act, LFN 1990 (the Act) does, recognizing the rights of the child and participants of such a marriage to an allowance paid by one spouse or the other to another by order of a court for the upkeep of the claimants or recipients. It may be a series of payments set over a determined periods or lumpsum paid off once, this may end upon death, remarriage or arrival of legal age of the receiving party.

3.1. SPOUSAL MAINTENANCE

In native law and custom, the notion of maintenance is not clearly applied. However, the husband is obligated to provide for his wife, and failure to fulfill this duty can be grounds for divorce. Customary practices in some regions of Nigeria clearly outline the husband's responsibility to support his wife. For example, in the eastern part of Nigeria, if a husband sends his wife and children, or his pregnant wife, back to her father's house and later wishes to bring them back, he is traditionally required to cover the expenses incurred while they stayed with the wife's parents. Although customary law stipulates certain duties for husbands regarding the maintenance of their wives, enforcement of these obligations often presents a challenge[25]. Unlike some modern legal systems where alimony is a recognized obligation to provide financial support to a spouse after divorce, customary law does not encompass this concept in the same way[26]. As Brown Umukoro Esq noted, despite the fact that customary law is restricted in scope and only applies to those who are subject to it, there doesn't seem to be any documentation of any specific traditional African society in which the customary law recognizes the practice of maintenance following a divorce. According to Unokah[27],

Unlike a wife married under statutory law, who has the right to seek maintenance from her husband through the court if he deserts her as provided by the MCA, a wife married under customary law generally does not have a similar legal recourse for maintenance if she and her husband separate following a dispute. Customary marriages may not provide a structured legal framework for addressing post-separation financial support in the same way as statutory marriages under the same law, the rights and obligations of spouses, particularly regarding maintenance and support after separation, are often governed by traditional practices and community norms which more than likely in nearly all cases sanctions the complete and thorough cessation of all obligations and favours as would be typically expected in marriage.

In the case of **Okafor v. Okafor**, Oputa J. [28](as he then was) once again exposed a judicial reluctance to award wife maintenance and therefore held as follows:

"*Since it is the trend under the Matrimonial Causes Decree to facilitate the dissolution of marriages, a wife/petitioner eager to have all links with her husband broken should not keep alive any financial link with a man she no longer owes any marital obligation including the obligation to maintain. Why should there not be a complete dissolution including the dissolution of all erstwhile financial bounds or obligations.*"

From the avalanche of judicial authorities, in a customary law marriage, the husband provides for and maintains the wife during the subsistence of the marriage. He no longer owes her this obligation when the marriage is dissolved. In **Adeleke. v. Adeleke[29],** the customary court refused to grant maintenance, holding that such allowance to a divorced woman *'is a practice of the white man'* and is unknown to customary law.

3.2. CHILD MAINTENANCE

Maintenance, sometimes also referred to as Child's support in some jurisdictions such as the USA, is defined by Black's law dictionary as, "financial support given by one person to another, usually paid as a result of a legal separation or divorce.[30]" A more comprehensive definition is contained in Wikipedia[31].

Here it is defined as:

"An on-going periodic payment made by a parent for the financial benefit of a child (or parent, caregiver, guardian, or state) following the end of a marriage or other relationships. Child maintenance is paid directly or indirectly by an obligor to an oblige for the care and support of children of a relationship that has been terminated or in some cases never existed. Often the obligor is a non-custodial parent. The obligee is typically a custodial parent, a guardian, or the state."

In Nigerian customary law, like English common law in this case, husbands have an obligation to provide material support and maintenance for members of their household. This duty continues even after the dissolution of the marriage. This usually forms the legal basis of a claim for maintenance of the children as an ancillary relief to a claim for custody. Resulting in women making claims alongside custody applications.

More often than not, the court's decision on whether to grant ancillary relief and the amount to stipulate is based on specific factors that are taken into consideration. These factors are crucial in determining whether to grant an order of maintenance and the appropriate amount to award.

- The respective means of the parties
- Their stations in life and their lifestyles
- The conduct of the parties[32].

4. CHILD CUSTODY UNDER CUSTOMARY LAW

Under customary law, custody of a child of a customary marriage is given to the father of the child (M C Onokah (2003) Family Law in Nigeria). However, various provisions of law render these customs invalid, particularly, if granting custody to the father will not be in the best interest of the child. In a broader sense, custody refers to the legal or physical control and responsibility over someone or something, typically for the purpose of care, management, or protection usually pending a period of time where such system outlives its necessity. Under the Customary Courts Law of the various states where customary courts have been established, provisions have been made relating to the 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 and Delta State), jurisdiction of Customary Courts in Edo State in the area of guardianship and custody of children under customary law is unlimited[33].

The custody of a child has been defined in NWOSU V. NWOSU (2012) 8 NWLR (Pt.1301)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."

Black's Law dictionary defines legal custody as*, "the authority to make significant decisions on a child's behalf including decisions about education, religious training, and health care.[34]".*

These definitions emphasize that custody of a child involves more than just physical control; it also includes the authority to make decisions for the child's well-being in all aspects. A child is not considered property to be owned, but rather a person who is legally recognized from birth and possesses rights that can be asserted.

While a child may not yet be mature enough to take on certain responsibilities, they are not objects to be manipulated or treated as mere possessions. The best interests of the child are of utmost importance when considering issues related to child custody. As we have previously noted, the Nigerian society is immensely mosaic well over two hundred ethnicities each with their various customs and traditions which reflect in the makeup of the customary courts, this being said, under some of these customs, custody of the child is awarded solely to the father by default owing to the typically patriarchy leaning societies of these ethnicities.

E.I Nwogu corroborates this in his book on the subject of family law in Nigeria 1979 wherein he articulated the following:

"Under most Customary law systems in Nigeria, the belief is that the father has absolute right to the custody of his legitimate or legitimated child.

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. However, customary law also recognizes that the father's absolute right will not be enforced where it is not solely in favour of the interest and welfare of the Child. For instance, where the child is of tender age, customary law requires that it should be left under the care of the mother. In such a case the father's right is merely in abeyance and may be exercised when the child could safely be separated from the mother"

In many customary law systems, the father typically has absolute authority over the custody of the children from the marriage. If the father passes away, this custody right often passes to the male head of the father's family. Despite this, the day-to-day care of the children often falls under the responsibility of the mother, even if she does not have primary legal custody according to customary practices[35]. While most judicial decisions by courts have generally upheld this principle in interpreting this aspect of customs there however has been an uptick in deviation from the typical deference to the father by the customs and traditions of these ethnicities, there has been precedent to establish the equality of both father and mother in the eyes of the law where in the case of **WILLIAMS V WILLIAMS (1981) 1 Q.L.R.N.** the understanding was that the law grants the same rights and authority to both the father and mother. Both parents have equal rights and authority, which can be exercised independently by either parent without the involvement or consent of the other. This principle ensures that both parents have equal standing and decision-making power when it comes to matters concerning their children's welfare and upbringing. Another factor that may deny the father the chief status for custody reception in the eye of customary law would be in the case it is deemed prejudicious to the security and health of the child in question as recalled in the court's decision in **FEBISOLA OKWUEZE Vs PAUL OKWUEZE[36] (1989) 3 NWLR Part 109 Page 329 Uwais JS**C.

Despite the chief position of the father in child custody matters under customary law, the idea that children, especially female children in their growing and developing years are better catered for and nurtured by their mother cannot be challenged from a position strength save special cases substantiated with credible evidence.4 Since their mother was usually present for them, it is assumed that these children would be happier and more content due to their proximity and connection, which fosters affection and familiarity.

"Therefore, the court in the case of Udusote v Udusote[37] has held that unless it is abundantly clear that the mother suffers from moral conduct, infections 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 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."

Upon the matter for custody granting, further factors for cogitation by the court involves the comport of the parties involved.

Lastly, child custody is not a single deal, it is subject to review by the court due to the paramount importance of children's welfare and the acknowledgment of how circumstances can change and affect this consideration, the fluidity of life circumstances underscores the need for flexibility and responsiveness in ensuring that children's needs and best interests are prioritized and protected.

Under the Customary Courts Law 1984 of defunct Bendel State as applicable to Edo State[38],

"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."

In Obajimi v Obajimi[39] (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 important to emphasize that, despite the fact that the cases mentioned above regarding child maintenance were decided in relation to statutory marriages, it is argued that the lessons learned from them apply equally to customary marriages, especially when interpreting similar provisions found in the rules of the customary courts of the states in which they have been established.

Hence, at this juncture, I feel it necessary to state the obvious here and remind us that validity for the application for child custody under the customary law holds where the child is a product of marriage under the same. In the instance where this is doubtful the Customary Court may not exercise jurisdiction.

We must understand that in matters of child custody under the customary law as provided in 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[40]. The primacy of the 'best interest and welfare' principle in custody of children contestation has become the prevailing general legal road map that customary courts in Nigeria adopt in the determination of this prime issue. The same is true of statutory marriages conducted under the Nigeria Marriage Act by the various High Courts where jurisdiction is reposed.

In OBAJIMI V OBAJIMI[41] 5, page 117

"...the welfare of the minor, although the first and paramount consideration, is not the Sole consideration, the conduct of the parties is a matter to be taken into consideration".

With regards to the age range for which the question of custody would have to be applied, were a child to be at most sixteen years of age he or she may hardly be considered a subject for the custody. Reason being the matter of custody pertains to one young child unable to fend for itself, hence equipping it legally to receive sustenance from its parents, guardians or the state. Hence, custody orders have no bearing for young persons capable of choice and responsibility for their personal welfare.

Uwais J.S.C. (as he then was) sought to address the age limit for this purpose, after referring to relevant Statutory provisions on children, young persons and matrimonial cause held in Ratio 13 of OKWUEZE's case (supra) that "the age of sixteen can be considered to be the reasonable age below which a Customary Court -----" would consider the issue of custody.

4.1. JURISDICTION OF CUSTOMARY COURTS IN MATRIMONIAL CAUSES

All Customary Courts in Nigeria have exclusive and unlimited jurisdiction to entertain matrimonial causes arising from marriage contracted under Customary Law. Such jurisdiction covers dissolution of marriages and guardianship and Custody of children. See Section 20 (1) and first Schedule of the Customary Court's Edict No. 2 of 1984 applicable in Edo and Delta States the Customary Court's Law of most of the Eastern and Western States have a similar provision.

The High Court has no jurisdiction in such matters. Its jurisdiction is excluded by the provision to section 10 (1) of the High Court law of the defunct Bendel State.

4.2. TYPES OF CUSTODY.

a. Divided Custody

This arrangement typically involves shared custody or visitation schedules where each parent has designated periods of time with the child, and during their respective time, they have sole responsibility for making decisions and caring for the child. Where the child is under the authority of a specific parent during their allocated time, that parent has exclusive rights and control over the child during that period.

b. Split Custody

This custody arrangement involves one parent having physical custody of the child, responsible for day-to-day care and upbringing while the other parent retains legal custody, making major decisions affecting the child's life. This division of responsibilities allows for a clear allocation of roles between parents.

The parent with physical custody provides daily care, while the parent with legal custody makes significant life decisions. This arrangement aims to balance the child's immediate needs with long-term welfare considerations.

c. Joint Custody

In a shared custody arrangement, each parent has equal authority over their child's upbringing and care, as well as equal physical access.

In contrast to split custody, which assigns physical custody to one parent while the other makes all significant decisions, shared custody necessitates collaboration from both parents. It is necessary to provide proof that both parents are able and willing to collaborate for the child's best interests before a shared custody order is granted. By guaranteeing the continued participation of both parents in the child's life and upbringing, this arrangement seeks to foster a cooperative approach to parenting duties promoting the child's well-being and maintaining meaningful relationships with both parents.

d. Temporary Custody

Temporary custody ensures that one parent has custody and control of the child until the court reaches a final decision or resolution regarding custody arrangements.

e. Third Party Custody

With temporary custody, one parent is guaranteed the child's custody and control while the court makes a final determination about custody arrangements. Recalling again **FEBISOLA OKWUEZE V PAUL OKWUEZE (1989) 3 NWLR Part 109 page 329.**

5. CONCLUSIONS AND RECOMMENDATIONS

The examination of divorce, maintenance, and child custody reveals a historical bias favoring men, placing women at a disadvantage from the outset of legal proceedings. This bias, once rooted in total control over familial affairs and women's agency, is diminishing as archaic worldviews lose relevance in court. Embracing factors for improvement, as discussed in the introduction, is crucial.

To foster progress, I recommend rapid and liberal adoption of these factors through workshops to equip and empower legal professionals.

Regarding maintenance, societal advancements challenge traditional views that solely position men as providers. Women increasingly achieve equal or surpassing standing compared to men in societal metrics. When adjudicating these matters, we must focus solely on case-specific parameters without succumbing to stereotypes or biases.

Some learned colleagues advocate for maintenance provisions under customary law, akin to statutory law, acknowledging the challenges and abuse women face under native customs. While adopting such provisions is beneficial, we must ensure a balanced approach that considers diverse perspectives and avoids overcompensation.

In our duties, we must uphold moral and logical sensibilities, striving to administer the law with balance and fairness, this effort requires meticulous inclusion of all pertinent facts for thoughtful consideration. For it is my belief, wielding the law within these frames will ultimately enable the improved delivery of enhanced justice in our courts.

I thank the Administrator of the National Judicial Institute for granting me the opportunity and privilege to present this paper and I also express my gratitude to the conference participants for granting me your audience, it was an honor delivering this work and congratulations on your induction.

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[9]At 180, pt. G-H

[10](1993) 2 NWLR (pt. 274) 158, at 172

[11](1985) 3 NWLR (pt. 11) 11

[12]*DISSOLUTION OF MARRIAGE AND CUSTODY OF CHILDREN UNDER CUSTOMARY LAW IN NIGERIA BY BRIGHT E. ONIHA – Edo State Judiciary*. (n.d.). *https://edojudiciary.gov.ng/legal-articles/dissolution-of-marriage-and-custody-of-children-under-customary-law-in-nigeria-by-b-oniha/*

[13]*Supra* n. 16. See also the case of *Eze v Omeke* (1977) 1 ANSLR 136

[14](1972) 2 ESCLR 561

[15]Section 20 (1st Schedule) which is *imparimateria* with section 20 (1st Schedule) of the Customary Court Law C 24 Laws of Delta State 2006 and similar to section 14 (3rd Schedule) of the Customary Court Law of Abia State.

[16]231958 WRLN 456.

[17]Chambers, 21st Century Dictionary (Revised edition, Edinburg chambers Harrap publishers Ltd, 2004) 174.

[18]*Ibid*, 398

[19]Anyafulude, T. 'Principles of Practice and Procedure of Customary Courts in Nigeria through the cases (1st Edition, Enugu: Mercele Press Nig. 2012) 297

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[29]Unreported,1976

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[32]See the case of *Idowu v Idowu* (2016) ALL FWLR PT 863 1688

48Section 20(1) of the Customary Courts Law of defunct Bendel State1984 as applicable to Edo State. And the 1st

[33]Schedule thereto which is *imparimateria* law with section 20(1) 1st schedule to the customary courts law of Delta State 1997.

[34]*Ibid*

[35]U Onyemenam; '*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

[36]Suit No: DCCA124A12001 judgment delivered on 22/12/03

[37]*ibid*

[38]Section 27(2) which is *imparimateria* with section 27(2) of the Customary Court Law 1997 of Delta State.

[40]Section 27(I) Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State which is *imparimateria* with section 27(I) of the Customary Courts Law 1997 of Delta State and section 17(I) of the Customary Court Law Abia State.

[41]Supra 39