

A PAPER
TITLED
GUARDIANSHIP AND CUSTODY OF CHILDREN;
CUSTOMARY PERSPECTIVE

DELIVERED AT THE REFRESHER COURSE FOR JUDGES AND KADIS, ON MONDAY THE 11TH OF MARCH, 2019 AT THE NATIONAL JUDICIAL INSTITUTE, BY HON. JUSTICE FOLASHADE O. AGUDA-TAIWO THE PRESIDENT CUSTOMARY COURT OF APPEAL ONDO STATE

PROTOCOLS

INTRODUCTION

By a letter dated the 22nd of December, 2018 signed by His Lordship Hon. Justice R. P. I. Bozimo the Administrator of the National Judicial Institute I was invited to present this paper titled Guardianship and Custody of Children; Customary perspective. The theme of this year's workshop is REPOSITIONING THE JUDICIARY FOR BETTER JUSTICE DELIVERY. I am indeed humbled and full of gratitude to the Administrator of the National Judicial Institute for finding me worthy to deliver this paper to this august gathering. I am indeed very grateful.

One of the most contentious consequence or ancillary aspects of dissolution of failed customary law marriages like other forms of marriages is the issue of the custody and maintenance of children of such marriages. The growth and development of contemporary society in Nigeria and the present social political and economic pains being inflicted on most Nigerians have had grave and adverse effect on the life span and sustenance of marriages and most especially children born in some of those marriages.

This is true of the dissolution regime of marriages contracted under customary law, features of which are not as rigid and formal as statutory marriages. Nigeria being a country of diverse people and culture

presents a deluge of customs, usages and traditions governing marriage divorce and custody relative to each community. The diverse customary laws of marriage prescribe basic obligatory rules governing the creation of a valid marriage, the dissolution and custody of children. The fulcrum of this paper is the examination of various laws relating to guardianship and custody of children born under failed customary law marriages. The essay will review both case laws and statutory provisions that support legal principles with regard to the grant of custody of a child by the customary courts. Emphasis will be placed on relevant provisions of laws relating to guardianship and custody of children under customary law in Ondo State.

An attempt would be made at the interpretation and explanation of key words in this paper namely; "Customary Law", "guardianship", "custody" and "child".

1.1 DEFINITION OF TERMS

a) CUSTOMARY LAW

There have been a lot of definitions of the term Customary Law by a host of legal writers, scholars and Jurists. Customary law can be defined as "the body of unwritten norms, rules and regulations which a given community accepts and recognises as binding and having the force of law, which governs and regulates the relationship and transaction between members of that community". The above definition will imply that for a particular rule of customary law to acquire the status of law it must be recognised and adhered to by the members of the community as binding and enforceable by the courts. The Supreme Court in the case of **ZAIDEN Vs MOHSEN (1973) ALL NLR Page 740** defined Customary Law as; Any system of law, not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway".

b) THE TERMS "GUARDIAN" AND "GUARDIANSHIP"

The word 'guardian' is defined in Black's Law dictionary as one that has legal authority and duty to take care for another's person especially because of the other's infancy, incapacity or disability. A guardian is a formally placed in loco parentis to a child usually by appointment has the same rights and duties as a parent.

A guardian may be appointed either for all purposes or for specific purposes. For the purpose of this paper a guardian will be one appointed to take care and control of a minor child's wellbeing under customary law.

The word guardianship is usually used interchangeably with custody of children under customary law. Under the general law a person is made the guardian of a child who has no natural parents or has parents who are incapacitated or unable to provide for the welfare of the child. This is the most flexible and quickest legal arrangement for taking care and custody of such children. Parents are the natural and legal guardians of their children. It is only when if one or both parents are dead that that a non-parent such as a family member or an unrelated party could be appointed a sole or co-guardian. Once appointed a guardian such a person is vested with the capacity to exercise parental responsibilities over such child. Such a guardian will have all parental and incidental responsibilities over the child to the full extent permissible by law. Such guardianship order unless otherwise revoked will subsist until the child attains the age of majority.

The issues of guardianship and custody of children respectively are closely related since they are all concerned with the up-bringing and welfare of children and the maintenance of their affairs. Parents are the natural legal guardians of children. When a parent or parents are manifestly unsuitable as guardians, the court has the power to appoint other persons as guardians.

What is the difference between custody and guardianship?

Custody describes a parent's care of a child, whereas legal guardianship is granted to someone who is not the child's biological parents. Many people conflate custody with guardianship when the two terms describe different things. The key difference is the child's parentage; custody describes a parent's care of a child, whereas legal guardianship is granted to someone who is not the child's biological parents. The main role of a guardian is to act in the best interest when the child's parent cannot do so. Legal guardians are **usually** relatives such as aunt, uncle or grandparent. This may be due to death of the parents, incapacitation

or incarceration for a crime. Custody is different from guardianship because a guardian can make physical and legal decisions for the child.

c) DEFINITION OF THE TERM 'CUSTODY'

'Custody' in general is defined as, "the care and control of a thing or person for inspection preservation or security; more specifically. Black's Law dictionary 9th Edition defines "legal custody as "the authority to make significant decisions on a child's behalf including decisions about education, religious training and health care". Custody is where the care, control and maintenance of a child is awarded by a court to a relative usually one of the parents in a divorce or separation proceeding or to a responsible adult. It could be legal custody (decision making authority) or physical custody (care giving authority). Sometimes the court grants joint custody to parents which is an arrangement by which both parents share the responsibility for and authority over the child at all times. It is also called 'shared custody'. Justice Nnaemaka Agu J.C.A in the case of **WILLIAMS Vs WILLIAMS (1981) 1 Q.L.R.N. at page 122 at part 127** submitted as follows:

"I take the view that custody of a child essentially concerns not only control of the child but also carries with it the necessary implication of preservation and care of the child's person, physically, mentally and morally".

D) THE TERM "CHILD"

The word "child" is a descriptive terminology for a natural person who is an offspring of another (either by birth or adoption) and may only represent any human being from the moment of birth (in a life state) until the attainment of the age of majority. A child from the instance of birth becomes a legally recognized person owning some legal rights and entitled to make claims. Since they are physically and mentally immature they cannot be treated as capable of taking absolute responsibility over their own lives. The word "child" is not defined under the Customary Law Cap 41 Law of Ondo State Cap 41 2006. However under the Section 2 of the Children and Young Persons Cap 28 Laws of Ondo State the word 'child' is defined as a person under the age of 14 years and "young

person” means a person who has attained the age of 14 years and is under the age of 17 years.

Section 2 of the Infants Law Cap 66 (which is not applicable to children under customary law) ‘child’ is defined as a person under the age of 18 years. Statutory provisions on guardianship of children are also provided for under the Infants Law Chapter 66 Laws of Ondo State. In the case of **FEBISOLA OKWUEZE Vs PAUL OKWUEZE (1989) 3 NWLR Part 109 page 321 Uwais JSC** reviewed all the relevant provisions of the law in the definition of the word child and came to a conclusion that custody order will not be made in respect of child who has reached the age of 16. The corollary to this rule is that custody order made in respect of a child under the age of 16 will lapse or cease to be operative when that child attains the age of 16.

However, generally orders of custody are not usually made by the court in respect of offspring of a union who are above the age of 18 years.

RELEVANT CONSTITUTIONAL PROVISION

The care, custody and welfare of children (under the age of 18) in Nigeria are strict functions of an intricate regulatory framework comprising institutions and laws; beginning naturally with the Constitution of Nigeria.

Section 17(3) (f) of the 1999 Nigeria Constitution imposes a non-actionable obligation on the Nigeria Government to ensure that children are adequately protected from exploitation, moral and material neglect.

CUSTODY OF CHILDREN UNDER CUSTOMARY LAW IN NIGERIA

One of the most contentious consequential or ancillary aspects of dissolution of customary law marriages like other forms of marriages is the issue of custody of children. Under Customary Court’s Law of various States where customary courts are established, provisions made relating to custody of children in the event of dissolution of customary law marriages by customary courts. For example, Section 16 of the Customary Court Laws Cap 41 Laws of Ondo State 2006 provides that; A customary court shall have jurisdiction over all persons in Ondo State.

The second Schedule sets out the Jurisdiction of Grade B customary Court Section 17(2) as follows;

- (1) Unlimited jurisdiction in matrimonial causes and matters between persons married under customary law or arising from or connected with a union contracted under customary law (but excluding any such cause or matter relating to, or arising from or connected with a Christian Marriage as defined under the Criminal Code)
- (2) Unlimited jurisdiction in causes and matters relating to the custody of children under customary law.

Where there no valid customary law marriage the customary court will not have jurisdiction to dissolve an association of man and woman and also make an order relating to guardianship and custody or custody of children under such association. For a marriage to be subject to Customary law, the ceremonies for consecrating the marriage under that particular system of customary law must have been complied with and the bride price must have been paid. If the conditions for a valid customary law marriage have not been met the customary court will not have jurisdiction to entertain and determine the issue of custody of the children born under an association or a relationship when there is a breakdown of the association.

WHAT IS THE BEST INTEREST AND WELFARE OF A CHILD?

There exist a plethora of judicial decisions upholding the principle of best interest and welfare of a child in the award of custody. In the case of **BUWANHOT Vs BUWANHOT (2011) FWLR Part 566 page 552 at 563 paragraph A** the Court of Appeal held that the welfare of a child of a marriage, in terms of their peace of mind, happiness, education and co-existence is the prime the prime consideration in granting custody. Similarly in the Court of Appeal's decision in **ODUSOTE Vs ODUSOTE (2012) 3 NWLR Part 1288 page 478 at 487 ratio 15** the court stated that interest of the child would include the welfare, education, security and overall well being and development. Even though the cases cited above are in relation to the issue of custody in relation to custody of children under statutory marriages the principles there are applicable to customary marriages particularly in the

interpretation of similar provisions contained in the customary court rules of States where they have been created. It is necessary to now examine such provisions.

Section 22 (1) of the Customary Courts Law Cap 41, 2006 provides that; **"In any matter relating to the guardianship or custody of children, the interest and welfare of the child shall be of paramount consideration".**

Similar provisions are also contained in Section 28 of the Customary Law of Lagos State 2011 and Section 16 (1) of the Customary Court Law of Enugu State.

Similarly under Section 71 of the Matrimonial Causes Act Laws of Federation of Nigeria provides that "In proceedings with respect to the custody, guardianship, welfare and advancement or education of the children of a marriage (which applies to children born under statutory marriage) the court shall regard the **interest** of those children as the paramount consideration.....

The interest and welfare of the child therefore takes precedence over any law or custom that might confer custody of the child on anybody. E. I. Nwogugu, in his book on Family Law in Nigeria 1974 dealing with custody of Children under Customary Law put the position succinctly thus: "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".

Margaret C. Onokah, in her book Family Law 2002, wrote, that;

"Under customary law, a father has exclusive custodial right over the children of his marriage; the right extends beyond custody, to 'ownership' of the children. Thus his right has been described as capable of transmission to his family

members. The general principle of Customary Law is that the mother's lineage has no right to the child. The tendency is for the father to have exclusive custodial right of a father over the children of customary marriage. This rule of customary law hinged on the fact that most Nigerian communities are patrilineal by reason of which children belong to their father's lineage"

This exclusive custodial right of a father over the children is not applicable under statutory marriage. 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.

Under Yoruba Customary Law, mothers are granted custody of female children that are yet to be weaned. In Igbo Customary Law custody of weaned children are usually given to the father. Even where a child has been weaned and is under the age of five the court is likely to lean more in favour of granting custody of the child to the mother. One must appreciate the fact that Nigeria has numerous ethnic groups and customary laws which varies very broadly.

A good example of the patriarchal tendency on the part of the court in the exercise of its discretion is the case of **OYELOWO Vs OYELOWO (1987) 2 NWLR Part 56 page 239** where the court granted the custody of two male children to their father in spite of the fact that the children lived with their mother for two years since the separation of their parents. Counsel urged the court to set aside the judgment of the lower court and grant custody of the two children to the appellant.

If the court as a general rule holds that male children should be with their fathers this may not be in the best interest of the child. Where the father re-marries, there is no assurance that the child will have the same love and attention from the step mother. Adhering to the rule of granting custody of a child to the father means that there is no equality between the parents as to the custody of the child.

In the matter of custody of the child equality of right of parents should be the basic premise upon which the court should consider custody cases when among other factors the court is considering the interest of

the child. A court is not entitled to prejudge which party will have custody before considering the interest of the child.

Nigerian courts have consistently applied the principle of the paramountcy of child's interest and welfare in custody cases under customary law. For instance in **OLAYEMI KASEBIYE Vs ADEYEMI Appeal No JD/22D/60 (unreported) Jos High Court September 1, 1964**, the trial customary court awarded the custody of a child to the father. This decision was sustained by the immediate appellate court. On further appeal, the Jos High Court acknowledged that the decision below was in accordance with the applicable law, but awarded the custody of the child to the mother to conform with the best interest of the child.

Most judicial decisions by courts have generally upheld this principle of law. It must be said however that the strict application of this custom is fast waning. The customary law which make the father of a child to have a right to the custody of a child has been modified and watered down in the Supreme Court's decision in the case of **FEBISOLA OKWUEZE Vs PAUL OKWUEZE (SUPRA) Page 329**. The court when dealing with the right to custody of children of a dissolved marriage conducted under customary enunciated that under most systems of customary law in Nigeria, the father of a legitimate or legitimated child has absolute right of custody of the child. Though they recognized the superior rights of the father; this right will not be enforced where it will be detrimental to the welfare of the child. Fortunately, the Supreme Court held in the case of **WILLIAMS Vs WILLIAMS (SUPRA)** 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 right and authority of mother and father shall be equal and exercised by either without the other.

Apart from judicial decisions there has also been statutory intervention in cases of judicial dissolution of marriage where emphasis at a time was on the superiority of paternal rights of a father to that of a mother in the award of custody of a child in the case of judicial dissolution of marriage under customary law.

As early as 1958, there was the promulgation of the Marriage, Divorce and Custody of Children Adoptive By-Law applicable in Ogun, Oyo Ondo

and Bendel (now Edo and Delta States) which make the interest and welfare of a child to be of paramount importance in the consideration in the making of a custodial order. The provision of the Law is now contained restated for example the Ondo State Customary Court Rules 2006 Cap 41 Appendix III on Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order Section 14 thereof provides as follows;

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

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

Therefore rather than automatically granting custody of a child to the father the court shall first consider the interest and welfare of the child.

Although the best interest of the child is the first and paramount consideration, it is not the only consideration. In the case of **OBAJIMI Vs OBAJIMI (2012) ALL FWLR Part 649 page 1168** the 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 must also be taken into account. This issue shall be dealt with later.

In recent times many different factors are taken into consideration in determining to issue of custody of children of a customary marriage. The factors which have been regarded as relevant by the courts include but not limited to the following;

- 1) The arrangements made by the parties for the education of the children,
- 2) Proper care of the child,
- 3) The degree of familiarity of the child with each parent or party,
- 4) The income of each parent,
- 5) The amount of affection by the child for each parent or party,
- 6) The child’s familiarity with the environment where they have always lived,
- 7) The respective accommodation of the parties and
- 8) The fact that one of the parties now lives as man and wife with a third party who may not welcome the presence of the child.

9) The fact that custody of children of tender age will most probably be awarded to the mother unless other considerations makes it undesirable,

10) The fact that in principle children should not be separated but should as much as possible live and grow together.

These principles were highlighted in the cases of **ALABI VS ALABI (2007) 9 NWLR Part 1039 page 309, AFONJA Vs AFONJA (2000) 11 NWLR Part 677, CHARITY OKAFOR Vs PAUL OKAFOR (2016) LPELR - 40264 and ODUICHE Vs ODUICHE (2006) 5 NWLR Part 1039 page 297 C. A.**

CONDUCT OF THE PARTIES

The conduct of the parties to the marriage is also taken into consideration in deciding whether to award custody of a child to one parent or the other. In other words before making an order for custody, the trial court must also take into consideration the conduct of the father and the mother, their comportment and biodata. This point has been regularly emphasized in decided cases. Thus in the case of **AFONJA Vs AFONJA (SUPRA)** the Western State Court of Appeal observed that the welfare of the infant although the first and paramount consideration is not the sole consideration and the conduct of the 'guilty' party is a matter to be taken into account.

In the case of **OBAJIMI Vs OBAJIMI (SUPRA)** at page 1173, the Court of Appeal on page 1187 paragraphs A – C stated as follows;

"Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether, from any other point of view, the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father, 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".

In the case of **IJEOMA OKAFOR Vs MADUKE OKAFOR (1971) High Court of East Central State Onitsha Judicial Division** the petitioner's counsel had insisted on giving details of the matrimonial life of the parties to the court because he thought that by exposing the various acts of misconduct of the respondent during the marriage, his client's case in asking for custody of the child of the marriage would be enhanced. Commenting on this Oputa J. (as he then was) stated that;

"The award of custody of a child is based on considerations other than guilt, blameworthiness or innocence of the parties concerned". He also stated that **"in all cases for the custody of a child, the paramount consideration in fact the condition precedent is the welfare of the child"**.

Custody is never award as a result for good conduct nor is it ever denied as punishment for the guilty party who was responsible for the breakdown of the marriage. The child was used to the respondent and had been well looked after by him. On the other hand, he did not recognise the petitioner any longer. For those and other reasons, custody was awarded to the respondent in spite of his guilt.

If the parties have made equally laudable arrangements for the education, general well-being of the child, the misconduct of one party might tilt the balance in favour of the other. However grave or persistent misconduct, acts of moral depravity by one party may by themselves be evidence that the party concerned is not fit and proper to be entrusted with the custody of a child.

In **LAFUN Vs LAFUN 1967 NMLR page 401** the Court not only refused custody to a child's mother but also refused her access to visit him in the following words;

"Owing to the moral depravity of the respondent (mother) it will not be the best interest of this child (born in 1960) for the respondent to have frequent access to him in his formative years when he could easily be influenced. When the child attains the age of 14 years, the petitioner may allow the respondent access if he so wishes".

AWARD OF CUSTODY TO THIRD PARTIES OTHER THAN THE PARENTS OF A CHILD

The law regulating Customary Courts procedure does not specify which persons are eligible for the award of the custody of a child. It therefore follows that where the court finds that the parent or parties are unfit to take care of the child whether male or female, any third party (usually a relation) may be awarded custody of such a child.

In **OKWUEZE Vs OKWUEZE (SUPRA)** Per Uwais JSC (as he then was) opined:

“The court may refuse to grant custody to either parent, if the court is convinced that none of them is capable of giving the best care. In such a case, The Court may decide to grant custody to a guardian.”

Where the court considers it desirable to do so, it may place the child under the custody of a third party (a person other than a party to the marriage), either permanently or as an interim measure, if it considers this to be in child’s interest.

The Court will make this order:

- 1) Where it is obvious that either of the parties to the marriage is not genuinely interested in the welfare and upbringing of the child.
- 2) Where neither of the parties to the marriage has applied for the custody.
- 3) Where in the opinion of the court neither of the parties to the marriage is a fit and proper person to have custody of the child.

If custody is granted to a third party, the court may include an order as to proper access to the child by the parents. So wide is the discretion of the court that it is empowered to grant custody of a child to a third party either permanently or as an interim measure?

This power was exercised by Taylor, C.J in **HENRIETTA NWUBA Vs CYPRIAN NWUBA (1971) LAGOS JUDICIAL DIVISION SUIT NO. WD/37/72** stated in the following words;

“I am firmly convinced that the interim order which I made on the 9th August for these three children to remain with their grandmother is in their very best interest and that order is to remain in force until the determination of the petition as is the order for access and that of removing children out of the jurisdiction of this court. Custody is therefore granted to Mrs. Rosemary Inyama pending the determination of the

petition.”ⁱ See Nigerian Family Law Principles, Cases, Statutes & Commentaries Prof Itse Sagay pages 553 and 623.

If custody is granted to a third party, the court may allow the parents reasonable access to the child. It has been held that access is a basic right of the child rather than that of the parent. It is usually an important factor in the child’s emotional development.

CUSTODY OF CHILDREN BORN OUTSIDE CUSTOMARY LAW MARRIAGE

Where a child is born in an association not under a customary law marriage the Customary Court will not have jurisdiction to determine the issue of custody of such child. In some areas one will have to look at what customary law applies. In some instances the child remains under the custody and care of the mother until the man pays dowry or carries out other requirements that would entitle him to access or have custody of the child. However, under strict customary law where an unmarried daughter has child, the proper guardian of the child will be the girl’s father in his absence or on his death her mother. However where there is no opposition from the family of the child’s mother, the natural father may acquire paternal rights over the child by acknowledgment where the custom is recognised. In some jurisdictions this customary court rule may be displaced by the court giving consideration to the interest and welfare of the child. The case of **OWUMA Vs OGBODO (1976) 2 FNR Page 208** is instructive. Both the appellant (child’s natural father) and the respondent (the mother) were lovers. A boy was born as a result of their relationship. The appellant removed the child from the respondent. The respondent’s father admitted at the trial that he received compensation from the appellant according to Idoma Customary Law as his daughter was not married to the appellant. The Area Court Grade 1 Otukpo gave custody of the child to the appellant. This decision was reversed by the Upper Area Court and a further appeal was made to the High Court where the court refused to deprive the appellant of the custody of the child who had lived for years with the appellant who had sent him to primary school from where he passed the entrance examination to a secondary school.

In the case of ANODE Vs MMEKA (2008) NWLR Part 1094 page 1 at 5 ratio 3 Saulawa JCA stated as follows;

“It is not in doby, as alluded to above that the custom as applicable to Umuiyi Ndiukwu Akabo community, which permits a father to keep his daughter in the family home to procreate out of wedlock, due to lack of male child, is morally, religiously and culturally obnoxious. Such a custom is repnant to natural justice, equity and good conscience, it is antithetic to the well cherished tenets of fundamental human rights as enshrined under Chapter IV of the 1999 Constitution. The custom in question no doubt promoted sexual promiscuity in the society. And it is thus highly abominable.”

Where children are born out of either customary or statutory marriage various laws may apply. In States where the Child’s Right Act operates that Act will apply in the determining who should have custody. For example Section 162 (1) of the Ondo State Child’s Right Law, 2007 confers exclusive jurisdiction on the Family Court in respect of a situation where the parents are not married prior to the birth of such child or children. The law allows the father or the mother upon their application to have parental responsibility for the child. The father and mother may by agreement have joint parental responsibility for the child. Sections 152 and 153 of the Ondo State Child’s Right Law made provision for the establishment of Family Court at the High Court and Magistrate Court. In most States of Nigeria there are Social Welfare Departments and there is a dispute between a couple with regard to who should have custody the Social welfare may direct the matter to a family court in the state. In that situation the Family Court considers what would be best for the child. Factors such as the moral background of the parties, the nature of jobs etc are taken into consideration. Section 1 of the Child Rights Act 2003 provides that in all actions where children are concerned, whether undertaken by an individual, public or private body or administrative or legislative authority, the best interest of the child should be the primacy consideration.

Generally, where custody is granted to a party of the marriage or association, the other party will be granted right of access to the child or children. Where custody is also granted to a person other than the

persons to the marriage, the parties will be granted right of access to the child or children. While granting custody awards the court also make order for the maintenance of the children and for who should bear the expense of accommodation and feeding of the child.

MAINTENANCE OF A CHILD

Maintenance also referred to as child support in some jurisdictions such as the USA is to provide materially for the defined in Black's Dictionary as child support given by one person to another, usually paid as a result of legal separation or divorce. Generally, under the Nigerian customary law, like the English common law there is an obligation on the part of the husband to materially for or maintain members of his household. The duty subsists only as far as the children are concerned when a customary law marriage is dissolved. This is the legal basis for maintenance of children as an ancillary relief to a claim for custody. Consequently, a claim for this relief is usually made by a woman together with a request for custody. However, a customary law wife has no right of maintenance if she is separated, deserted, living apart, or divorced following a dispute unlike a wife married under the Matrimonial Causes Act may, on desertion by her husband apply to the court for an order for maintenance against the husband.

Though there are special circumstances which the husband's legal duty to maintain the wife continues to apply for instance when the wife is pregnant or when desertion takes place or where she is nursing a baby. If he fails in his duty to maintain her under these circumstances, he incurs financial liabilities for maintenance which must be discharged before he claims custody of the child.

Generally, dissolution of a marriage under customary law releases the man from the duty of maintaining the woman. Where the man has children by the woman he has divorced, he has the responsibility of maintaining such child or children. This is in accordance with the custom and tradition in Yoruba land which provides that "***baba lo lomo***" which means "**the father is the owner of the child or children**" in any *case* this confers with it the responsibility of providing for the children.

The decision whether or not to make an award for maintenance and the amount to stipulate is based on some factors which the court must take

into consideration in deciding whether or not grant the order for maintenance and the amount to award. The factors as stated in the case of **IDOWU Vs IDOWU (2016) ALL FWLR Part 863 page 1688 at 1700 ration 10** are;

- 1) The respective means of the parties,
- 2) Their stations in life and their lifestyles,
- 3) The conduct of the parties.

GUARDIANSHIP UNDER CUSTOMARY LAW

The institution of guardianship is recognised under various systems of customary law in Nigeria. Like English Law, customary law rules on guardianship involve placing a person in loco parentis in relation to the child, thereby conferring on the person most parental rights and obligations. As expressly provided for under Section 22 (1) and (2) of the Customary Court Law of Ondo State customary courts have exclusive original jurisdiction in matters connected with Customary-law guardianship. I refer to the case of **OMODION Vs FASORO (1960) W.N.L.R. page 27.**

Section 22 (1) as provides that;

“In any matter relating to the guardianship or custody of children, the interest and welfare of the child shall be of paramount consideration”.

The grant of an award of custody of a child is an ongoing exercise, as it is a day to day or revolving affair. The law provides that whenever in the future any of the spouses discover that 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 the other spouse or person he or she can apply to the court to review the custody order. Another provision allow customary courts to make orders as to custody and guardianship of children and to vary such orders either on the court’s own motion or an application if the interest of the child so demand. The court upon hearing the parties would reach a decision in the best interest of the child or children. Section 22 (2) of the Ondo State Customary Court Law which provides that;

“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 an interested party vary or discharge such order”.

The provision emphasises the significance of the interest and welfare of children in the appointment of a guardian for a child.

As with parental rights the duties of guardians are similar to those of parents. A customary-law guardian steps into the shoes of the parent of the child. Customary law does not prescribe any definite age for the termination of guardianship. The obvious reason is that family ties, such as exist between the guardians and wards endure longer in customary law than under English Law. As a result neither the attainment of age of puberty nor marriage can be said to terminate guardianship. Where customary courts have jurisdiction to entertain related matters in respect of children born in a customary law marriage the courts have power to determine guardianship if such action will be in the best interest of the child.

APPOINTMENT OF GUARDIAN

A parent has a right to appoint one or more guardians for their infant child. Under Customary law, where both parents are alive but cannot agree on the need or right person to appoint the wishes of the father prevail, for as between them, a child is regarded as being in his father's custody and under his control. Where the father is deceased, the mother has a right to appoint a guardian. In case where both parents are dead, a customary court may appoint one or more persons as guardian for the child.

BASIS OF APPEALS AGAINST ORDER OF CUSTODY

One of the consequences of the very wide discretion given to the court in custody proceedings is that an appeal against the court's order will fail, unless the appellant can establish to the satisfaction of the Court of Appeal that the trial court was wrong in the exercise of its discretion. i.e. the order made was not in the best interest of the child, in such a case the Appeal Court has a duty to interfere, reverse or modify the lower Court's order as it deems fit. In the case of **AFONJA Vs AFONJA (supra)** the trial court had wrongly excluded evidence which might

have established the fact that one of the children to whom the proceedings was brought was not happy in the home in which he or she has been placed by the husband/petitioner (respondent in the Court of Appeal). It was held by the Court of Appeal that if the allegation had been proved, it would have influenced the decision of the lower Court. The court stated thus:

"We are of the view that all evidence should have been allowed to be led which could have assisted the judge in arriving at a just decision in the interest of the children, and to shut out any such evidence, particularly a vital one such as this, was grave error."

Consequently the lower court's findings that the child concerned was happy in her place of abode was "unjustified and erroneous because the evidence which could have been given that the girl, Juliet Olushola was unhappy with Mrs. Dare and her children, was not given. It was shut out".

CUSTODY OF CHILDREN UNDER SHARIA LAW

In determining issues of custody, the Nigeria Sharia courts may take into consideration the parent's religion, place of permanent residence, income and the mother's marital status. Priority in the award of custody is usually given to the Muslim father irrespective of his nationality when the mother is a non-Muslim. In general under Sharia Law, a Muslim mother may be granted custody of girls under the age of 9 and boys under the age of 7 at which time custody may be transferred to the father. If the court finds the mother to be 'incompetent' custody of a child, regardless of the age of the child can be given to the father, or the child's grandmother on the father's side. A finding of incompetence is left fully to the discretion of the Sharia Judge. The court will find parents incompetent if they engage in behaviour that is considered to be inconsistent with the Islamic faith. Where both mother and father are found to be incompetent, custody of the child is given to the child's paternal grandparents. It is necessary to state briefly the law of custody under Sharia law because the consideration of court in awarding custody of a child is different to what obtains under customary law.

CONCLUSION

This paper has examined critically the customary laws and cases relating to custody and guardianship of children under Customary Law in Nigeria. In some instances comparative analysis has been made with custody of children in relation to statutory marriages. One can safely conclude that issues relating to custody of children born under customary law marriages and those born under statutory marriages conducted under the Act are similar and well developed.

Generally most customary law systems in Nigeria, will grant absolute right of custody to the father of a legitimate child, especially if the child is above five years old. Although it is now settled law, looking at the plethora of decided cases on custody of children, the only factor that can be found on which there is no dispute is that the best interest and welfare of the child which is the first and paramount consideration. This is the settled law that the court follows in exercising its discretion on the issue of custody of children. In determining the custody of children each case must be decided according to its peculiar circumstances and merit. According to Uwais, JSC in **OKWUEZE Vs OKWUEZE (SUPRA)** he stated that;

“The only proper manner in which the 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”.

My Lords, Kadis and other participants at this workshop I thank you for your attention.

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