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### RESEARCH ARTICLE

#### REVIEW OF THE BEST INTEREST OF A CHILD'S CUSTODY IN NIGERIA

**Ilodibe Stephen Ifenna<sup>1</sup> and Chimeziri Nneoma Gift<sup>2</sup>**

1. Southwest University, Chongqing 400715, China.
2. Nnamdi Azikiwe University, Awka 420007, Nigeria.

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#### Abstract

This 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 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.

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**Corresponding Author:- Ilodibe Stephen Ifenna**

Address:- Southwest University, Chongqing 400715, China.

**Introduction:-**

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, (1985).

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.

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* (1971), 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* (1992) 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.

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 (2006).

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.

### Statement of 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 Child's 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* (1992), *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.

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.

### Research Questions

Against the background of the problem the study has attempted to answer the following questions:

1. Who is a child for the purpose of determining custody?
2. Do children always live with their mothers on separation?
3. At what age can a child choose who to live with?
4. What happens when parents don't agree about who gets custody?
5. Who gets custody of the child when both parents are fit and capable?
6. What are the specific factors that a judge will consider before making a custody determination?
7. Are the parameters for granting custody in Nigeria adequate?

### Aims and Objectives:-

This research is conducted with the following objectives:

1. To examine child's right to custody under the applicable laws in Nigeria.
2. To compare among the applicable laws, sharia, customary and civil laws on custody of children in Nigeria.
3. To highlight problems relating to custody and to suggest ways of solving the problems.
4. Also to place at the disposal of students a clear and concise work in this area of family and child protection law in the hope and believe that it will significantly assist in minimizing the problem of arduous research in this area of law.

### Significance of the Study

This work seeks to review our Nigerian laws on custody and ascertain if our laws are adequate or if there are shortcomings with our respective laws. One major challenge is that the M.C.A which is the principal statute governing marriage proceedings in Nigeria has provided for the best interest principle of a child in case of custody also failed to state what constitutes 'best interest.' Furthermore, the Act has not said who a minor is to award custody. Although the C.R.A has proffered solutions to these shortcomings, the problem remains that people fail to take advantage of the Act to their benefit. The courts are not informed because of lack of knowledge; this would have been effective if the family courts were in place and manned by suitable persons skilled in child rights.

The researcher also recommended that custody in Nigeria be made a principle relief and not subject to a pending matrimonial proceeding in court. This will help reduce the trauma and psychological effect of divorce/separation on the child. Most times, you find out that in Nigeria because of the delay in the dispensation of justice and lack of finance to pursue court proceedings, most parents are unable to institute a petition for dissolution. Thus there is no

legal separation, consequent upon which no action for custody can be brought in court. The child is left to suffer in the hands of the parents that succeed in the struggle for the child. If indeed the interest of the child is of paramount consideration as stated under Section 71 M.C.A then I firmly believe that making custody a principal relief will save the child from all this trauma.

### **Research Methodology:-**

There are several methods for conducting research; the key amongst them is the doctrinal methodology. Doctrinal research is concerned with the formulation of legal doctrines through the analysis of legal rules, within the common law jurisdiction, legal rules are to be found within statutes and cases, but it is essential to appreciate that they cannot in themselves provide a complete statement of the law in any given situation.

The researcher also adopted the comparative method, which aims at comparing different countries and cultures. In this study, the researcher made a comparative analysis between Nigeria and California and other jurisdictions to pinpoint the loopholes under the Nigerian Matrimonial Causes Act.

### **Limitation and Scope**

This research deals with the best interest principle as a determinant for child custody in Nigeria. The focus is on the efficacy and production of the desired result by adopting the best interest principle in the award of custody. The researcher looked into the implementation of civil laws on the case of child custody and what is applicable under customary and Islamic laws. For the research to be more significant, practices in California and other jurisdictions on custody law were compared with the Nigerian system based on the applicable laws in the federal republic of Nigeria.

The limitations encountered in this study were mainly in the course of primary data collections. For the secondary sources, the experience was peculiar to the general problems with literature or processed data. Secondary data are, in some cases, distorted. Another major problem of library search is its tediousness and inaccessibility of most materials. The research is also limited by time and funds.

### **Definition of Terms**

**(a) 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 the Black's Law Dictionary, a child is a young person under the majority 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 Right 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 spelled out the fundamental human right that children everywhere should have.

The Nigerian Labour Act in Section 91 a child is 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 the 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.

**(b) Best Interest:** Although there is no standard definition of the child's best interest, it merely means the term that courts undertake when deciding custody of a child. Best interest determinations are generally made by considering several factors related to the child's circumstance and the parent's or caregivers' circumstances. The Black's Law Dictionary defines the best interest as when a party is delegated to take the best action for another party in the current situation. Child's best interest means that all custody and visitation discussions and decisions are made to foster and encourage the child's happiness, security, mental health, and emotional development until young adulthood.

Best interest or the child's best interest is a child's right principle, which derives in the U.N. Convention on Right of the Child, Article 3. Putting the child's best interest means considering the child before a decision affecting his/her life is made. There is no precise definition of the phrase 'interest of a child' either in the M.C.A or elsewhere. The fact was emphasized in the case of *Odogwu v. Odogwu* (1992), where Belgore J.S.C. opined that the phrase is not limited to material provisions but include those things that will assist the psychological, physical and moral development of the child, something that would promote the happiness and security which a child of tender years require. The interest of children envisaged under Section 71 M.C.A embodies several factors that depend on the peculiar circumstance of each case.

**(c) Custody:** Custody is an established right for the baby from the time of his/her birth. According to the Black's Law Dictionary, custody of children in the care, control, and maintenance of the child, awarded by a court to a relative, usually one of the parents, in a divorce or separation proceedings. Custody refers to the parents' right to spend time with their children and make decisions about the child's life. *Passingham and Hammer* (1985) define custody as the rights and duties of parents towards their children. The word custody is synonymous with guardianship, wardship, charge, care, safekeeping, protection, supervision, or control. Thus custody of children implies the care, inspection, and maintenance of the children awarded to a party to a statutory marriage either as an ancillary relief consequent to matrimonial proceedings or a third party if the best interest of the children would be better served by it. In the case of *Otti v. Otti* (1992), the Court of Appeal defined custody as necessarily concerning the care, control and preparation of a child physically, mentally and morally, it also includes responsibility for a child with regards to his needs like food, clothing, instruction and the likes. Custody usually means the right to decide on behalf of a child and the right to have care and control. In Canada, custody implies decision-making ability. In the case of *Hewer v. Bryant*, Lord Denning M.R said custody is a dwindling right that the court will hesitate to enforce against the child's wishes, the older he is. It starts with a right to control and ends with little more than advice. In a recent case of *Nwosu v. Nwosu* (2012), the Court of Appeal defined custody as the control, care, and maintenance of a child awarded by the court to a responsible adult.

## **Child Custody**

### **Brief History**

Historically child custody laws in the United States favored fathers as children were considered property, and women typically had fewer property rights than men in most states. During the late nineteenth century, the United States made the social transformation that changed the rights of men, women, children, and their roles in the family and society. The concept of childhood took root, and the industrial revolution brought men out of their homes to work. The right for women to vote started in 1920. As the statute of women and children grew, so did mothers' status and the protection of children. States began adopting laws based on the "tender age doctrine." This doctrine favored mothers and was based on the principle that a mother was more suited to nurture and parent a young child. This doctrine shaped state child case laws until the mid-twentieth century. Family courts based custody based on the assumption that it was in the child's best interest to be in the custody of the mother, and mothers typically were awarded custody as long as they were deemed fit. As divorce became more frequent, attitude to custody shifted. By the 1980's more men petitioned to courts for custody, courts responded by awarding joint custody or shared physical and legal responsibility for children. Over time, social trend trends evolved to not only grant mere joint custody but to grant them sole custody. Many states rejected the tender age doctrine that it was unconstitutional to allow given based on a parents' gender. Today most states have child custody laws based on the concept of equal protection, that a parent's gender should not determine both parents have a corresponding right to request custody and custody. In two states of America.

### **Types of Custody**

When a court had weighed all the evidence before it and considered all factors relevant to a particular case, it exercises discretion as to whether or not to grant custody, in whose favor to grant the custody and nature or form the

custody order should take, provided that its decisions serve the interest of the children. Although the M.C.A does not make provisions for the kind or nature of orders a court can make concerning children's custody.

**(a) Physical Custody:** The order of a court that grants the right today to daycare of a child. It means that such parents have the exclusive right to live with a child or children of the marriage permanently. The other parent is awarded rights to periodic visitation, depending on what the court deems best for the child. The other parent (the non- custodial parent) will have the right to visitation or parenting time with the child. Where the court awards both parents with physical custody, it means that the child or children would significantly spend the right amount of time with both parents during periods either mutually agreed on by parties or on a regular schedule imposed by the court where the parents are unable to agree on a plan.

**(b) Legal Custody:** This type of custody implies the right to make or participate in significant decisions affecting a child's life. This type of custody may be awarded to one or both parents depending on the case's circumstances. Joint legal custody implies that both parents shall share the right of a child. Therefore, they would necessarily consult with each other before any decision affecting the child is taken. Courts mostly award this type of custody unless in some instances where circumstances have made it impossible to share joint custody.

**(c) Sole Custody:** A sole custody is an order for care awarded to one parent of a child to the exclusion of the other, following proceedings for divorce or separation whether judicial or extrajudicial; for example, where such a parent is violent, drug addict, or one who molests a child. In the case of **Abayomi v. Abayomi**, the court awarded the child's legal custody and visitation right to the father and physical custody to the mother.

**(d) Joint or Shared Custody:** This implies that both parents would share the children's decision-making responsibilities and or take turns to have physical control of a child. Sometimes this involves spending some weeks at a time in each parent's house or alternating months, years or six months, or spending weekends and holidays with one parent while spending weekdays with the other parent, where that arrangement best suits them's schooling needs. In western countries, a joint custody arrangement is called "bird's nest custody," whereby the children remain in the original family home. The parents take turns coming to the family house and spending their out time in their private accommodation.

**(e) Split Custody:** Split custody implies awarding legal custody to one parent and physical custody to the other parent. That is, the parent with legal custody can make significant decisions affecting a child's education, religion, health, and general welfare. In contrast, the parent who has physical custody controls the daily management and training of the child. In the case of **Abayomi v. Abayomi**, the court made a split custody order granting legal custody of the 4years old to the father and care and control of the child to the mother.

**(f) Temporary Parental Custody:** Order XIV Rules 21-23 of the M.C.R provide the grant of temporary physical custody of children to either parent to the union, pending the association's dissolution, Which may be ex-parte or on notice depending on the urgency of the situation. Any request made in this circumstance must indicate the duration of the law and directions regarding the relevant court processes on the other party and further hearing of the proceedings for ancillary relief.

**(g) Third-Party Custody:** Section 71(3) M.C.A empowers the court to grant custody of a child or children to a person, not one of the parents, provided that it is satisfying that it is desirable to do so. Orders in favor of third parties are usually made when the court considers both parents unfit. The custody order, when granted, may be temporary or permanent, pending on the circumstances. In the case of **Nwuba v. Nwuba**, the court awarded custody of the three children of the marriage to their maternal grandmother temporarily pending the determination of the petition for divorce pending in court.

### **Statutes Regulating Custody in Nigeria**

Before statutory modification, the position of early English common law was that the father had full custody of children until they attained maturity. Even after the father's death, the mother's mother's claim to custody could be defeated by the father's appointment of a testamentary guardian. This absolute right to custody was founded on the fact that under old English common law, the father of an infant was regarded as the natural guardian. So complete was the father's right that he could lawfully claim from a mother possession even of a child at the breast; *P Bromley and V Nigel* (1992). The trend soon changed. The argument for custody shifted from upholding the father's right as

the legal guardian of the child to extolling the mother as the more appropriate person for possession of natural maternal tendencies, which children need, especially during their tender years. By the twentieth century, a maternal presumption had replaced the paternal preference in English law, with the enactment of various statutes by the English parliament including the Guardianship of Infant Act of 1886, the English colonial courts in Nigeria were vested with the power to grant custody to either of the parents of the children of the marriage, having regard to the paramount welfare of the infant and conduct of the parents. The various English custody statutes, including the Guardianship of Infant Act, are applicable in the old Northern and Eastern regions of Nigeria under their being statutes of general application received into Nigeria. The western states of Nigeria revised its laws in 1958, thereby excluding the implementation of the statute of general application. Therefore, relevant modification of the common law position is found in the Infants Law of 1958, which has been retained by all the states carved out of Nigeria's Nigeria's old western region. This statute incorporated provisions of both the pre-1900 English statutes and the English Guardianship of Infants Act of 1925 on the matter of custody. An example of a current state statutory provision regarding the award of custody is found in Section 25 of the Infants Law of Oyo State of Nigeria. By this provision, the monopoly granted the father at common law was directly removed in favor of the child's interest. State statutory provisions such as this one are reinforced by federal law, which is applicable in custody matters arising in lawful marriages throughout all parts of Nigeria. Thus Section 71(1) M.C.A. provisions concerning things that "in proceedings concerning child custody children's interest are paramount." By prescribing the best interest principle, Section 71 attempts to shift the overriding consideration beyond the immediate desires of the contending parties to the more wholesome and ending needs of the children of the marriage. The principle imposes a duty on the court to ensure that the child's interest is placed before that of the conflicting parents.

The C.R.A also covers issues dealing with custody of children, Section 68-81. It provides that where both parents were not married at the time of the birth of the child, either of them can apply to the court for parental responsibilities. It is, however, Section 69 of the Act that makes specific provisions on the right of custody a child. It provides access to the court to decide custody issues, and the principal consideration is the child's welfare. In Section 1 of the Act, "in every action concerning a child whether undertaken by an individual, public or private body, institution or service, court of law or administrative or legislative authority, the child's best interest shall be of primary consideration.

#### **Rights of Parents over Children under their Custody**

**(a) Right to Control and Chastise:** Although the power of a parent to control and chastise his child is co-extensive with the power to custody, it deserves separate treatment. Its importance may be seen in determining whether a parent has a defense to a criminal charge for corporal punishment imposed on a child in an attempt to correct him. A parent has the right to the reasonable chastisement of his or her child. By section 295 of the Criminal Code Act, a parent may adjust by chastisement his or her legitimate or illegitimate child under the age of 16 years for misconduct or disobedience to any lawful command. Furthermore, a parent may delegate to any person to whom the child's custody is entrusted, either permanently or temporarily, the power of correction. Such delegation of authority confers on school teachers the power to administer reasonable corporal punishment on children under their care. But the exercise of the parental right to correction must be reasonable.

Customary law confers on parents the right to reasonable chastisement in respect of their children. If its exercise is excessive in kind or degree, customary law does not provide any legal sanction—elders of the family who may impose sanctions in appropriate cases. Moreover, any child's ill-treatment under the guise of chastisement may amount to an offense under the general criminal law Section 298 of the Children and Young Persons Act.

**(b) Right to Determine Religious Upbringing:** Often, the right of the parent to determine a child's religious upbringing goes hand-in-hand with that of custody—nevertheless, there are occasions when the issue of religious upbringing arises independently. Under the common law, the father has the right to determine a child's religious upbringing. As in the case of custody, this absolute right has been abolished by statute (Section 4 of the Custody of Children Act 1891, Section 19 of Infant Law 1958). The result is that both parents have an equal right to determine the religious upbringing of their children. Section 4 of the Custody of Children Act 1891, where a court refuses to grant custody to a parent and the child is being brought up in a religion different; the court may order that the child be brought up in the religion the parent chooses. But before making an order, the court may consider the wishes of the child.

**(c) Right to Service:** The parents of a child are entitled to his services while he resides with them. Usually, the service is domestic. Where a child is under 21 years of age, he is presumed to render assistance, no matter how nominal to the parents. If the child is of the majority, the parents must prove that they make some domestic services to them. A father has the right to the services of the children residing with him under customary law. The services include both social works in the household and farm work.

### Parental Duties

**(a) Duty to Provide Necessaries:** The Criminal Code imposes a duty on the parents or guardian of a child to protect its physical wellbeing by providing its necessities of life. By Section 300 of the Criminal Code Act when a person having charge of another person, who because of age or any other cause is unable to withdraw himself from such charge as to provide necessities of life, a duty is placed on the former to provide the person under his care with the necessities of life. The person who has the charge is responsible for any eventuality to the life or health of the other person, which is caused by the failure or omission to perform the duty. It is immaterial whether the charge is undertaken under a contract or imposed by law or arises because of any act, lawful or unlawful. If the omission to provide necessities is reckless or careless and death results, the offense is manslaughter. On the other hand, where the willful neglect to supply necessities is accompanied by an intention to cause death and death, occurs the offense will be murder. A good example is the Queensland case of **R v. Macdonald**; in this case, the court convicted the parties for willful murder. Again Section 301 of the Criminal Code Act makes it obligatory for every head of the family who has the charge of a child under the age of 14 years, being a member of his household to provide such a child with the necessities of life. Necessaries in this provision include food, clothing, lodging, and medical attention. Thus, section 13 of the Child's Right Act provides a child's right to health and health services.

**(b) Abandoning or Exposing Children:** By Section 341 C.C.A., it is a felony for any person to unlawfully leave or expose a child under the age of 7 years in a manner that is likely to cause him grievous harm. Of course, the offense created by this provision may be committed by both parents of a child or by either of them.

**(c) Physical Protection:** In the Eastern and Northern states, there is a statutory duty on the parents or persons who have the custody, charge or care of a child to protect it against physical or mental injury. The Children and Young Persons Law create this duty. An instance is seen under Section 32 of the Eastern Nigeria Children and Young Persons Law. The C.R.A has made several provisions concerning the protection of a child. Section 2(1) C.R.A provides that "children shall be given protection and necessary care with regards to duties of the child's parents, legal guardian or other individuals, services, agencies, organization or bodies legally responsible for the child. Section 14 C.R.A also provides that "every child has a right to parental care and protection, and accordingly, no child shall be separated from his parent against the wish of the child."

**(d) Education:** Section 15(11) C.R.A confers on every child the right to free, compulsory, and universal primary school and obliges Nigeria to provide such training. As a result, Section 15(2) makes it mandatory for every parent or guardian to ensure that the child completes primary school education and junior secondary school education. Parents and guardians are also encouraged to send their children who have completed basic training to senior secondary school or to learn an appropriate trade failure of a parent, guardian to fulfill the obligation constitute an offense punishable in the first instance by community service and on a subsequent case by fine or imprisonment; (Section 15(6) C.R.A.).

Similar provisions are contained in sections 2 and 4 of the Compulsory Universal Basic Education Act 2004. It imposes the duty to provide free, compulsory, and universal primary education on every government in Nigeria, including Local government councils. Moreover, section 4(1) requires every parent to ensure that their child receives full-time education, which is best suited to his age, ability, and aptitude by attending school. Jurisdiction is conferred on the magistrate court or any other state court of competent jurisdiction to hear and determine cases involving offenses arising from the failure to observe this duty; (Section 6 of the Compulsory and Universal Basic Education Act, 2004).

### Principles of Best Interest of a Child

#### Overview of the Principle

The use of the best interest doctrine represents the twentieth-century shift in public policy. The best interest doctrine is an aspect of *parens patriae*. In the States, it has replaced the tender age doctrine, which rested on the basis that children are not resilient. Any change involving a child's living situation would be determined on their wellbeing.



Until the early 1900s, the father was given custody of the children in case of divorce. But then the many U.S. States shifted from this standard to one that ultimately favored the mothers as the primary caregivers. In the 1970s, the tender year's doctrine was replaced by the best interest of a child as determined by family courts. Many family courts continued to give high weight to the traditional rule of the mothers as the primary caregiver. Also, the child doctrine's best interest is sometimes used in cases of non-parents visitation with a child. But some parents who are not awarded custody say that using the best interest of the child doctrine in non-parents visitation cases fails to protect a fit parents' fundamental right to raise his/her child in the manner they deem appropriate. In the case of **Troxel v. Granville**, the supreme court of U.S. held that the custody, care, and nature of the child reside first in the parents and therefore allows parents to petition a court for child visitation right over parental obligations is unconstitutional as it infringes parent's fundamental right to rear their children.

While the principle of the child's best interest is an age-long notion in family law traceable to English law and French law, according to D. Archard (2013), the principle of the child's best interest has been featured in diverse areas of law but more pivotally in family law, particularly in a custody dispute, R.V. Krieken (2005). Also, linking the history of the child's best interest in family law has been argued that the principle is used in the sphere of child protection and child right to influence decisions relating to children. Accentuating and clarifying the policy further, Joyce considered it a method of making decisions requiring the decision-maker to think what the best course of action is or the child, T. Joyce (2005). In this opinion, the principle does not presuppose the decision-maker's personal view. Instead, it compels the decision-maker to consider both the child's current and future interest, on a balance of probability is in the best interest of the child, Therasa (2009). Elucidating further the principle outside the boundaries of family law, Parker argues that the policy of best interest of the child provides the framework for evaluating the laws and practice of states parties where positive rights do not govern the matter in the convention, S. Parker (1994). Despite its origin in family law and by extension, its incidental welfare inclination, the content, and significance of the principles of the best interest of the child has transited over the years out of the family law domain. At present, the principle has become entrenched in several areas of law but is generally more dominant in human rights. Regardless of the inherent strength of the principle of best interest, there are numerous criticisms against it, for instance, Mnookin (1975), has faulted the principle of the best interest of the child on the ground that what is best for any child or even children, in general, is often vague, speculative and requires a highly individualized choice between alternatives. He argues that determining the child's best interest is synonymous with predicting results and difficult access.

Georgia and West Virginia, children over the age of 14 years, have the right to choose the parent whom they want to have primary custody. Several state's laws reflect that both parents have the right to request custody but that both parents are encouraged to share parenting.

When parents' divorce, a judge, awards custody of the children to one or both parents. In many cases, the parents have come to an agreement about child custody before the divorce is finalized, and the judge awards custody based on their agreements. When parents cannot agree, the judge determines custody. A judge grants a charge based on a combination of factors that focus on the child's best interest. The judge may decide to consider the wishes of the parents and the child. In most states, the judge awards both physical and legal custody. Both types of custody can be awarded solely (with one parent) or jointly (with both parents).

### **The Interest of Children**

There is no precise definition of the phrase 'interest of the child'. This fact was stressed in the case of **Odogwu v. Odogwu**, where Belgore J.S.C. stated that the words are not limited to material provision but include those things that will enable the child's right upbringing something that would promote the happiness and security which a child of tender years requires. The interest of children as provided in Section 71 M.C.A embodies several factors that depend on the particular circumstances the case. Karibi Whyte J.S.C. summed up these factors in the case of **Williams v. Williams**. The learned justice also interpreted the phrase 'paramount consideration' to mean 'pre-eminent and superior consideration.' In the same situation on his part, Oputa J. (as he then was) in the unreported case of **Okafor v. Okafor** (1972) considered 'paramount consideration' as attaching to the child's welfare, which he deemed a condition precedent in determining the custody issue.

In Okafor's case cited above, the learned judge opined that the award of custody of children is based on factors apart from the guilt and innocence of either party.

### **Discretion of the Court**

The interest of the child as provided by Section 71(1) M.C.A shall be the paramount consideration when the courts decide questions of custody and subject to that, 'the court may make such order in respect of the custody, guardianship, welfare, advancement or education of the child as it thinks proper.' Although this provision gives the courts ample discretion when arriving at their decision, the power is not unlimited, for any such discretion must reflect the child's best interest as the most crucial consideration. Under Subsection (3) and (4) of Section 71, these orders may include: order to place custody of children to a third party. The power of the court also covers the situation where it can receive in evidence reports from welfare officers on matters relevant to the custody proceedings before the court, as provided in Section 71(2) M.C. .A. The court has the power to adjourn proceedings for the necessary time for preparation. The welfare officer's report is expected to cover all aspects of the child's life and welfare in question. Welfare officer is explained in Section 114(1) M.C.Anas ', a person authorized by the Attorney General of the federation by an instrument in writing to perform duties as a welfare officer. In the case of **Oladetoun v. Oladetoun**, it was held that owing to the intricacy of the question of custody; a welfare officer should assist the court.

The court has therefore held that in his exercise of discretion, the judge must do so judiciously. Where he acts arbitrarily or considers extraneous factors, an appellate court is empowered to review it. Consequently, in the case of **Afonja v. Afonja**, the court of appeal held that by basing his decision on his view without regard to the evidence before him, the trial judge was in error. His decision was set aside. It is thus relatively clear that decisions of custody must not be influenced by sentiments or the personal convictions of a judge as to what is right but should be based on the evidence before the court and with the guiding principle that the child's interest is the paramount consideration, (**Onwuzulike v. Onwuzulike, Chigbue v. Chigbue**). In conclusion, cases have shown that the court considers a variety of factors in the child's interest. These considerations help them to decide to whom between the parties' custody should be granted. Of prominence are such factors as the adequacy of arrangements respectively made by the parties, their conduct, age of the child, sex and social background of the child, and the need to keep the children together.

### **Factors Considered by the Court in Awarding Custody**

#### **Age and Sex of the Child**

In determining the best interest of children, the age and sex of the children are relevant factors. Often, very young children should be left in the custody of their mothers, especially if they are females. In the case of **Williams v. Williams**, supreme court justice, Oputa said, 'there are periods in a girl's lifetime, especially during puberty maturity when she needs her mother. This is not, however, the general rule, as each case will depend on its circumstances. Unfortunately, Nigerian courts have sometimes carried the tendency of boys growing up with fathers and girls growing up with mothers without holistic consideration of all factors. In the case of **Oyelowo v. Oyelowo**, The trial judge held that for a male child, the natural and right place is their father's home and that it did not matter how long they stayed away from it, for they would take one day long for it. On appeal, the court of appeal judge Nnaemeka Agu supported this argument, adding that in the context of Nigerian culture, boys rightly belong to the man's family. He claimed that the Marriage Act was to be interpreted by bearing in mind that it was being applied in Nigeria and that the cases decided in England should be used with caution. Opposing his learned brother's court of appeal, Judge Kutigi saw the question of a male child belonging to his father's family as an extraneous fact that valid as it may sound under Nigerian situation has no relevance in the application of the Matrimonial Causes Act. Undoubtedly, in **Oyelowo**, the court was influenced far more by the patrilineal culture of the society than by the child's best interest.

#### **Conduct of the Parents**

The conduct of the parents to the child certainly forms an important consideration in determining the child's best interest. However, the court should focus on the child's welfare rather than the conduct of the parents in the marriage, unless such manner is of a nature that would have a negative implication for the child. The behavior for this purpose refers to bad conduct towards either the children or the other party to the marriage (in the case of **Adams v. Adams**). Immoral or corrupt behavior that can adversely affect or influence a child is terrible conduct for which custody has been denied to a party. In the case of **Afonja v. Afonja**, the court held that 'the welfare of the infant, as necessary, is not the sole consideration. The guilty party's conduct is a matter to be taken into account too. In the case of **Lafin v. Lafin**, the court awarded custody of the child of the marriage to the petitioner (father). It refused to grant access to the child to the respondent (mother) until the child attained age fourteen, subject to the petitioner's consent. This is because the evidence before the court pointed to moral evil on the part of the respondent. It was against the child's best interest for the respondent to have access to him in his formative years since the

mother's immoral conduct could negatively influence him. Similarly, in the case of **Oluwa v. Oluwa**. Again there are cases where the court cannot ignore the previous conduct of a party about children in determining child custody to that party. In the case of **Kolawole v. Kolawole**, custody was denied from a mother for a previous attempt to kill the child. Also, in the case of **Okafor v. Okafor**, the court refused a mother who has abandoned the child for six years of custody, just as. In the case of **Oduneye v. Oduneye**, the petitioner asked for the custody of the three children of the marriage. The wife also applied for custody; she revealed in evidence that the petitioner had thirteen other children by previous marriages and three of them had become pregnant between the ages of fifteen and sixteen, the court rejected his application and granted custody to the wife.

Following the English decision, the court has held that the mere fact that a party had committed adultery does not necessarily provide a reason for depriving him of custody unless the adultery circumstances make it desirable.

#### **Wishes of the Child**

The child's wishes are sometimes taken into consideration by presiding judges in Nigeria, who may interview the child privately, mainly where the child has attained an age where he is capable of expressing his wishes. The child's view may also emerge from the welfare officer's report. In the case of **Odogwu v. Odogwu**, Megaw L.J. has described the practice as most desirable. He added that if it is done, it should not be in the open court, and the judge should not make a promise to the child that what was said would not be told anyone else. It must be added, however, that much as it is conceded that the child's view may be helpful, the judge must be cautious in adopting a child's perspective because a child because of his or her tender age may have an immature or distorted view of life. Moreover, every likelihood that a child's opinion could have been manipulated or influenced by the parent with whom he or she is presently residing at the time of the divorce proceeding, S.C. Ifemeje (2005).

#### **Keeping the Children Together**

Cases demonstrate the court's recognition of the importance of keeping brothers and sisters together, Oshodi J. (1975). According to the court, it is in the children's interest that they should grow up together in a brotherly and sisterly love and not as strangers. For this reason, custody of all the children has often been granted to one party. Only on rare occasions has it been suggested that boys should always be given to the father while girls go to the mother, which may result in the separation of the children.

#### **Emotional and Psychological Stability**

The court has recognized the dangers of psychological harm, which may arise from changing the child's custody. If a child has been with one parent for a considerable length of time, caution must be exercised considering a change of custody. Justice Obaseki observed in **Williams's case** that 'custody must have in view the opportunity of sound education and physical and mental welfare. A parent who will deny these to his or her child is not worthy of an order of custody from the court.' There is no developed practice in Nigeria seeking the professional help of psychiatrists and psychologists in dealing with custody matters. There is, however, a prohibition of this act by law. Therefore its application in appropriate cases will go a long way in assisting the court to reach a fair decision.

#### **Adequacy of Arrangements Made by the Parties**

Nigeria judges seem to have developed a sensitivity to the issue of arrangements made by the divorcing couples for the welfare of the children. Indeed several authoritative statements have been made indicating that the child's health is the primary concern of the court. The financial position of the parties is often considered, and according to Akingbe J in the case of **Eziashi v. Eziashi**, stated thus 'other things being equal, the fact that one party is more financially stable to bring up the child may be decisive.' The judge also stated that he would be swayed to grant custody to the party who can offer the child accommodation. In the case of **Dawodu v. Dawodu**, the court refused custody to a homeless mother to bring up the child because it was not in the child's best interest to do so. Also, the court will not consider the question of custody or make an order for custody if the parties seeking such custody have not set out the plans and arrangements for the upbringing of the children of the marriage. Thus, a high premium is put on the ability of a party to provide for the children's material wellbeing. However, it has been made significantly evident that the moral welfare of the child is not disregarded and have therefore in the appropriate case made custody orders in favor of a party who has not shown any financial ability to provide for the child and have instead ordered the morally unfit but financially better off parent to make the necessary material provisions.

### **A Review of Nigerian Laws to Protect the Interest of the Children**

The question to ask here is, is there no way our laws, as an instrument of social change, could be used to solve some devastating effects of divorce on children? Our courts pay more attention to the needs and aspirations of divorcing parents to the detriment of their children. Often, the children's wishes are manipulated, especially by the custodial parent, who tries to bias the children's minds over the other spouse. Recently, however, it would appear that social researchers, family law experts, legislators, and judges are fast becoming conscious of these children's predicaments. The researcher will consider the efforts of Nigerian judges and legislators to help alleviate the plight of these children. A review of Nigerian enactments to protect children's interest leaves no one in doubt that our judges never hesitate, whenever the occasion demands to make courageous pronouncement showing their uncompromising stand to protect the interest of children.

At this juncture, the Nigerian Matrimonial Causes Act of 1970 must be commended for the various elaborate provisions it has made to safeguard children's interest. An example of such provision could readily be found in the provisions of Section 71 M.C.A. Also in Sections 71(2) M.C.A which provides: 'the court may adjourn any proceeding within Subsection (1) of the Act until a report on such matter relevant has been obtained from the welfare officer. Section 57(1) M.C.A is also another provision aimed at protecting the interest of the children of divorce; it thus provides: "Where there are children in a union to whom this section applies, the decree nisi, shall not become absolute, unless the court by order has declared that it is satisfied that proper arrangements in all circumstances have been made for the welfare and where appropriate, the advancement and education of those children." Again the Nigerian Child's Right Act of 2003 has equally made provisions for the protection of children. Section 1 of the Act provides 'in every action concerning a child whether undertaken by an individual, public or private body, institution or service, court of law, the best interest of the child shall be a primary consideration.' The C.R.A. in Section 149 further provides for the establishment in each state of the federation and federal capital Abuja a court to be known as the family court to hear and determine matters in relation to children. Another provision under the C.R.A. that protects the interest of the child is Section 151(3) which states that: 'the court should in any matter relating to or affecting a child or family, and at all stages of any proceedings before it, be guided by the principle of conciliation of the parties involved or likely to be affected by the result of the proceedings and also encourage and facilitate the settlement of the matter before it in an amicable manner.'

It is submitted that custody matters are no doubt crucial to the children. The courts are duty-bound to ensure that custody of children in the event of divorce is granted to the parent who would be in a better position to protect the child's interest.

### **Comparative Analysis of Custody in Nigeria with Other Jurisdictions**

#### **Child Custody and Ancillary Relief in Nigeria**

Ancillary relief is a relief provided by a court when a person files a petition in the wake of another legal matter, usually divorce or judicial separation. In a simple example, a person who institutes an action for divorce can also request ancillary relief in the form of child custody. This relief is considered ancillary or secondary because it is dependent on another legal matter if the divorce were not granted, there would be no need for relief. It is essential to determine the circumstances in which an order for ancillary relief may be made. For instance, it may be necessary to ascertain if an ancillary relief action may be brought under the M.C.A. independently of proceedings for a principal relief. The key to this problem lies in Section 114(1) (c) of the Act, which defines matrimonial causes. Section 114(1) (c) is quite specific that proceedings in respect of ancillary relief must be related to concurrent, pending, or completed proceedings for the principal relief: divorce, nullity of marriage, judicial separation, restitution of conjugal right and jactitation of marriage. This view finds support in other provisions of the M.C.A., such as Section 70(3). Again Section 75 M.C.A provides that 'save as provided by this section, the court shall not make an order under this part of the Act where the petition for the principal relief has been dismissed.' This section shows that an ancillary order can only be made where there is a principal relief that is completed or pending. Consequently, ancillary relief is an independent action outside the jurisdiction of the high court, as prescribed in Section 2(1) M.C.A.

The same conclusion may be derived by examining the jurisdiction of the court regarding ancillary relief and procedure for instituting proceedings for such relief—section 1(1) M.C.A., a matrimonial cause (including ancillary relief) shall not be instituted otherwise than under this Act. Section 2(1) M.C.A confers jurisdiction on the high court to hear and determine matrimonial causes instituted under this Act. The term matrimonial causes are defined in Section 114(1) to include ancillary relief in paragraph (c). As our court jurisdiction is only to hear matrimonial cases

instituted under this Act, it seems that unless an ancillary relief has been instituted under the Act, the court will not have jurisdiction. Section 54(3) and (4) of the Act deals with the institution of proceedings.

Thus a person wishing to institute proceedings for ancillary relief concerning proceedings for principal relief brought under M.C.A may do so by the same petition or cross-petition as that by which the main relief proceedings are instituted. But a respondent to a petition for principal relief which does not cross-petition cannot initiate proceedings for ancillary relief except so far as is permitted by the rules or by leave of the court. A respondent who does not cross-petition may institute proceedings for ancillary relief as prescribed by the M.C.R. By Order XIV Rule (2)1; a respondent may by filing an answer to a petition institute proceedings for ancillary relief without the leave of court. Under Rule 2(2), ancillary relief may be instituted by application and without consent of the court if the proceedings relate to an existing court order for ancillary relief. If there is no answer or claim for ancillary relief by the respondent, then no proceedings are instituted for ancillary relief. In that case, there will be no proceedings concerning ancillary relief. This order for custody can only be made if there are proceeding under the Act, as in the case of *Whatley v. Whatley* (1966).

thus, from the above, under the Nigerian jurisdiction that an action for custody, which is an ancillary relief, cannot be brought independently of a principal relief which is pending or has been completed. Undoubtedly the position that an independent action for ancillary relief falls outside the jurisdiction of our courts may work hardship for applicants who desire to obtain such relief as child custody without seeking a principal relief. Having looked at Nigerians jurisdiction and its stands, the researcher made a comparative analysis of what is obtainable in Nigeria concerning child custody and other jurisdictions.

### **California and Child Custody**

California's first custody law was made to trace the English common law. Until the nineteenth century, the English law on child custody treated the child as the father's chattel. The common law stood in 1850 when California achieved its statehood, and in 1852 when the California Supreme Court decided its first custody cases. In *Graham v. Bennet* (1852), Tillatha and Isaac had been married and living in California as husband and wife when Talitha uncovered evidence that Isaac was a bigamist. She fled to the Oregon territory with the couple's two children. Isaac tracked them down, seized the children, and took them with him back to California. Tillatha followed to bring suit for the return of the children to her and damages. A jury found Isaac guilty of abduction on the premise that the marriage between Tillatha and Isaac was void. The children were thus illegitimate and thus did not belong to Isaac, but the California Supreme Court reversed. A California statute declared the children of a void marriage to be legitimate. The common law conferred the unquestioned right to a child's custody, control, and obedience on the father of a legitimate child. Thus, Isaac could not be guilty of abducting his children but instead was entitled to their custody. In 1872-1920 changes to the common law allocation of custody entitlement were dramatic in California's first statute. Section 197 of the 1872 Civil Code conferred second dibs to custody as well as veto power over the father's decision to transfer custody on the mother of a legitimate child, (The father of a legitimate unmarried minor is entitled to its custody, service, and earnings, but he cannot transfer such custody or service to any other person except the mother, without her written consent, if she is living and capable of consent. If the father is dead, or is unable to take custody or has abandoned his family, the mother is entitled thereto). Section 200 California Civil Code (CCC), vested mothers with outright custody of their illegitimate children. Section 198 provided that concerning married parents living separate and apart, the husband and wife had equal rights concerning the care, custody, education, and control of the children of the marriage. Section 199 provided that either the husband or wife could sue for exclusive control of the children of the marriage in which event the court was to resolve custody and support issues in accordance with the natural right of the parent's and the best interest of the children, and Section 138 opened the door at least in theory for courts to ignore the old common law doctrine in the context of the parent's divorce. Reported litigation between fathers and mothers was practically non-existent under these provisions before the turn of the nineteenth century into the twentieth. Nevertheless, new philosophies about the importance of motherhood were gaining momentum in the law, in 1913 the California legislature amended Civil Code S. 197 to provide that mothers were no longer to be considered silent partners concerning their legitimate children, but instead are equally entitled to its custody, services, and earnings with the father. Early in the 20th century, society and its lawmakers increasingly came to embrace the so-called "cult of motherhood" in which the role of women in the child-rearing process was celebrated and idealized. As courts moved away from routinely allocating custodial rights to fathers and began adopting the ostensibly neutral view that custody between divorcing parents should be awarded according to the child's best interest, a maternal preference took hold that eventually led to the doctrine known as the "tender age rule." In 1931 the California legislature unwilling to retreat entirely from father preference amended

Civil Code S. 138 to the effect that if the child is of tender age, it should be given to the mother if it is of an age to require education and preparation for labor and business to the father. The prevailing attitude during much of the twentieth century in California was that the mother must primarily be the caretaker of a young child. The mother had a natural nurturing ability, and the mother was more competent than the father to meet the needs of the children. California's maternal preference and tender age doctrine remained firmly in place in California until the early twentieth century. California's Family Law Act 1970, initiated the no-fault divorce revolution in the United States. When first enacted, the Act incorporated the tender year's resumption of the Old Civil Code S. 138. But the same right era was now well underway, and the tender year's presumption was removed from the Act in 1972 (Cal. Stats. 1972 ch.1007, amending Cal. Civil code s. 4000). Under the current version of California's statutes that supposedly govern custody determinations in divorce proceedings, not only are fathers and mothers to be equally entitled to custody as in Cal. Family Code s. 3010(a), but the court is also specifically enjoined from preferring a parent as custodian because of that parent's sex. In California, as in nearly all states, courts are to award custody in dispute between parents according, plain and simple to the child's best interest.

Having looked at California's laws on custody, there is a striking difference between California's Family Code and the Matrimonial Causes Act. Under Nigeria's Matrimonial Causes Act Section 114(1) (c) is quite specific that proceedings in respect of ancillary relief must be related to concurrent, pending or completed proceedings for the principal relief, in other words, action for child custody being an ancillary relief in Nigeria must be brought after a pending or completed principal relief. However, under the California Family Code, the reverse is the case. The California Today in California, as in nearly all states, courts are to award custody in dispute between parents according, plain and simple to the best interest of the child.

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This section clearly shows that under the California Family Code, the relief of custody is a principal relief and can be brought independently of an action for divorce or separation. The provision has been appreciated for its ability to provide an alternative to divorce for spouses whose religious belief prohibited divorce and parties who simply did not wish to divorce but did not wish to live together. Nonetheless, Section 3,120 offers to provide a valuable statutory solution to a variety of new custody issues. An exclusive custody order under S. 3,120 may vest all custodial rights concerning a minor, previously held jointly by the parents, in one parent. These are not limited to but includes the child's services and earnings, to determine the child's residence and schooling, consent to the child's marriage, or entry into the armed forces and consent to and authorize the child's medical treatment. In addition to authorizing the award of exclusive custody, S. 3,120 empowers the court to fashion an order that perhaps in some detail award partial legal or physical custody to one or each parent spouse. The court order will carry the full effect and force of any other court order, and violation of it will constitute contempt. Only married persons are, however, entitled to file a Section 3120 petition. The petition must relate to the children of the marriage in *Northcult v. Superior Court* (1924). The court held that the ex-wife's action should have been brought under the general jurisdiction of the court of equity and not under the statute. Thus it seems clear enough as the words of the law intimate that a judgment of divorce terminates a parent spouse's standing to petition under Section 3120.

### **Australia and Child Custody**

Originally custody of children was a matter legislated for exclusively by state parliament. Thus there were six different sets of Matrimonial laws. Each state had inherited English law, and the first English law was also followed. At common law, the father was the guardian and custodian of his legitimate infant children. A series of statutes eventually won the wife's right to obtain an order for custody of a child in the nineteenth century. In Western Australia, it was not until 1926, after the English Guardianship of Infants Act 1926, that the relevant statute law provided a principle upon which a court must act in custody cases, that Act provided 'wherein any proceeding before any court, the custody of a child is to be decided, the court shall regard the welfare of the infant as the first and paramount consideration, shall not take into consideration whether from any other point of view the claim by the father is superior to that of the mother or the claim of the mother is superior to that of the father.' This was the

position until 1961. Each state had a series of statutes and several courts concerned with the custody of children. In 1959 the commonwealth parliament enacted the Matrimonial Causes Act, which came into operation in 1961, for the first time Australia had a federal Matrimonial Statute. The jurisdiction under this Act was invested in the several state supreme courts. Only custody matters that were ancillary to divorce, nullity, judicial separation, restitution of conjugal rights, jactitation of marriage, or declaratory proceedings came within this Act. All other custody claims remained the province of the state law. Section 85(1) (a) of the Federal Act provided that 'the court shall regard the children's interest as the paramount consideration.'

In 1975 the federal parliament repealed the Matrimonial Causes Act 1959, substituting it with the Family Law Act 1976. The Family Law Act 1975 purported to legislate concerning proceedings concerning the custody of a child of a marriage, "a child of a marriage" was deemed to include a child of either the husband or the wife at the date of separation. In the cases of *Russell v. Russel* and *Farrelly v. Farrelly* (1978), the high court of Australia held that to be constitutional; the power to legislate concerning custody must be read down to proceedings between parties to a marriage concerning the custody of the natural and adopted children of the parties. At the end of the child's international year, and as most countries are striving to eradicate any distinction in status between children, the Australian constitution demands a Gilbertian situation. To determine custody of the several children of one family, if it includes half-brothers or half-sisters, recourse must be had to both federal and state legal systems and courts. It is even possible for two different state courts to be involved in determining custody in one family. This problem is partially overcome in theory and wholly in practice in Western Australia, where the family court is a state court invested with federal jurisdiction. The family court of Western Australia exercises both state and federal jurisdiction. In all other states, the family court is a federal court, and so the problem persists.

The Family Law Act that into operation in 1976 thus gave Australia specific significant reforms. The first is that before the Family Law Act, federal law in matrimonial matters had been administered by the state Supreme Court and state family law by either the supreme court or magistrate courts. The new legislation created a new court system. Each state was given the option of creating its family court to be invested with federal jurisdiction by the commonwealth and could have conferred upon it state jurisdiction by the state parliament. Only Western Australia took this course. All other states opted for the federal family law jurisdiction to be administered by the family court of Australia. At present, it shares jurisdiction under the Act (except in dissolution of marriage) with state magistrate courts. The Act gives the court principles to be applied concerning child custody. Another major reform of the Act is the fact that custody is a separate matrimonial cause. Under the repealed Act, proceedings for the custody of a child had to be ancillary to a divorce or like actions. The Family Law Act made custody proceedings *inter alia* a matrimonial cause on its own. Previously if there were no proceedings for principal relief, custody application had to be made under state law. Thus to provide specialist family courts and deny them jurisdiction in the bulk of custodial matter is unthinkable. The Australian Family Law Act also makes provision for conciliation and arbitration. Thus before the final adversary arbitration, there should be a conciliatory procedure. These procedures ideally will commence before an application is filled in the court. Both processes are conducted by and in the same court, albeit by different personnel. Some of the tools/factors that assist the court in the award of custody include:

- 1) Welfare still paramount: Section 64(1) Family Law Act provides that 'in proceedings concerning child's custody, the court shall consider the child's welfare as paramount to the consideration.'
- 2) Separate representation of children: Section 65 of the Act provides 'wherein proceedings concerning the custody of a child of marriage it appears to the court that the child ought to be separately represented, the court may of its motion or on the application of the child or of an organization in charge of the welfare of the children order that the child is separately represented.' Regulations 112(2) provides that where a court orders that a child be separately represented under S.65 of the Act, it may request that the Australia legal aid office arrange the representation.'
- 3) Court counselors: The apparent difference between the family court and other courts is the provision to the former of a counseling and welfare facility. Section 37(8) of the Act provides family court officers with a principal director, directors, and other court counselors. The court counselors are nearly all graduates in either social work or psychology. They are physically based in the court precincts. Their principal statutory function is provided by Section 14-16(2), 62(1), 62(4), and 64(5). I will concentrate more on the four functions of the court counselors that deals specifically with custody of children Welfare Conference: Section 62(1) of the Act provides that in cases where the issue of welfare of a child is to be deliberated, the court may direct the parties to the issue to attend a conference with a court counselor to discuss the welfare of the child and if there is any difference between the parties to endeavor to resolve those differences. This is one of the most essential and successful tasks of the counselors.

1. Family welfare report: The power to order reports from counselors is contained in Section 62(4).
2. Supervision of custody and access: This is another of the roles of a court counselor. Section 64(5) provides 'where a court makes an order; the court may direct that compliance with the order shall as far as possible be supervised by a court counselor.
3. Non-ordered counseling: Parliament intended that the court counselors be available to all who need their help. The counselors are not to operate solely within the confines of court orders. Section 15 permits a party to a marriage to file a notice in the family court seeking the assistance of the court's counseling facilities. The counselor is then empowered to arrange a conference. The opportunity for parties to confer with a counselor before legal proceedings commenced or even before separation is valuable.

### **Challenges under the Nigerian Matrimonial Causes Act**

The Matrimonial Causes Act 1970 applies to all proceedings of child custody; the child's interest shall be paramount. But how do we decide in a society of patriarchy what the child's interest is, especially when the Matrimonial Act is silent on what the interest of a child does not define the word minor? Another major challenge under the M.C.A is the fact that child custody is an ancillary relief. As above stated, ancillary reliefs are reliefs that cannot be brought independently of a principal relief. The M.C.A being the primary statute regulating matrimonial causes in Nigeria has provided under Section 114(1) (c) that ancillary reliefs must be related to concurrent, pending, or completed proceedings for the principal relief. Thus, it follows from parity of reasoning that custody proceedings can only be brought after an action for dissolution of marriage or separation has been instituted in court. This position of the M.C.A works untold hardship on couples who do not wish to divorce or whose religious belief does not allow divorce. Also one of the grounds for dissolution of marriage is that the parties must have lived apart continuously for two years before filing an action for divorce, as provided in section 15(e) Matrimonial Causes Act, cap M7, LFN, 2004 in such circumstance there can be no action for custody. The child ends up with any of the parents who succeeds in the struggle for custody; this causes a remarkable setback for the child and affects him/her psychologically. Thus Nigeria should take a clue from California and Australia; these countries have seen the need to make child custody a principal relief in order to prevent the hardship it works on couples and children.

Thirdly there should be established a court to hear and determine matters relating to children known as the family court, under the M.C.A. all matrimonial causes are brought in the high court; most times the judge may not specialize in an area that relates to children. Thus, although the court tries to make the child's interest paramount, what is in the child's best interest is sometimes subjective and personalized. Although the Child's Right Act in Section 149 provided for the establishment of the family court, yet in Nigeria, there is no such court as the family court in existence. The Australia Family Law Act created a family court; the legal practitioners were to be persons with good knowledge of family law. In such a court, when a child is brought before it, the court will better appreciate the child's peculiar nature. This court also provides a counseling and welfare facility that enables the parties, and the children have access to a counselor, this goes a long way to reducing the rate of divorce in the country.

### **Conclusion:-**

Legal disputes concerning children are of many kinds and may arise, pending a matrimonial proceeding between the parties. The dispute itself may be between the parents; its subject matter can be the question of who is best suited to bring up a child or merely a specific point of disagreement over access, education, or maintenance. Whatever the nature of the dispute, the court's decision should be made primarily in the child's best interest. It is now well noted that in proceedings concerning the custody of children, the court shall regard the child's best interest as paramount. Considerations such as the emotional attachment to a particular parent, mother or father, and the inadequacy of facilities such as educational, religious, or opportunities for proper upbringing may affect the determination of who should have custody. The court deals with 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 is the child's welfare. The cases of *Damulak v. Damulak* (2004) and *Nanna v. Nanna* (2006) are to the effect that the paramount factor for consideration in granting custody awards in statutory marriage is the welfare of the child. Therefore, if it is in the child's best interest that the mother or father should be granted custody, the court should readily do so, irrespective of the gender of the parties involved in the suit. The court may also rely on the evidence before it to grant custody, the nature of which may be physical, legal, sole, and joint or shared custody. The custody may be awarded to either parent of the children or in appropriate cases to a third party altogether. In all custody cases, the child's welfare is the predominant factor, but it seems to be a predicting process. Hence, deciding what cause of action best conforms to the child's health is often based on imprecise and speculative grounds.



**Recommendation:-**

Children need to have a stable, warm, intimate family relationship upon which to build their social behavior and relationship outside the home. Discord and quarreling interfere with the development of such family relationships, and in so far as they do, the child is likely to be harmed. It is now well settled that in proceedings concerning the custody of the child the court shall consider interest of the child as the paramount consideration as stipulated under Section 71 M.C.A. Notwithstanding the provisions of this Section, the Act is however silent as to what the interest of a child is or what constitutes such interest. This is rather left at the discretion of the judges, and what is in the best interest is sometimes subjective and personalized. It is thus recommended that the M.C.A state what the interest of the children is.

A case is also made for the establishment of family law courts in Nigeria, as is done in other countries like Australia. Although the C.R.A has made provision for the establishment of family courts in all the federation states, These courts will involve children in its proceedings and protect their interest against parental manipulation. It is hoped that this family court system, if well implemented, would be a better forum to enforce the right of children to participate in the decision-making process in divorce. This court will ensure as far as possible that the wishes of the child are considered and given the appropriate corresponding weight.

In custody cases arising from divorce, the question usually is what effect will the breakdown of the marriage on children who are subject to custody proceedings? There is some evidence that growing up in a broken home or a one-parent family resulting from divorce or separation can cause educational retardation, anti-social behavior such as delinquency or impair later parenting. Children also suffer from psychological trauma and low self-esteem. In Nigeria, there is no developed practice of seeking the professional help of psychiatrists, counselors, and psychologists in dealing with custody matters. There should be an increased role of family court counselors who will render counseling services to children. There should be some integration of psychologists and social workers as legal staff. These counselors in foreign countries conduct conferences with the parents and children involved in a divorce; it is an established practice in Australia. For the courts to *suomotu* order such meeting immediately, it appears to it that a custody application will be defended.

The researcher also recommends that the relief of child custody be made a principal relief In Nigeria. Hence Nigeria should take a clue from countries such as California and Australia. They have seen the need to make child custody a principal relief to salvage a marriage or otherwise protect spouses and their children from the emotional and psychological hang-ups associated with divorce. Finally, there should be an amendment to the Nigerian law to fill the lacuna under the M.C.A.

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