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CUSTODY OF CHILDREN IN NIGERIA: A COMPARATIVE ANALYSIS OF THE RELEVANT LAWS

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INTRODUCTION

In any form of marriages performed or entered into by parties it is expected that the marriage will last till eternity: this is based on the premise that a marriage is a sacred institution created sanctioned by God¹, however, if it happens that the parties can no longer live together harmoniously as husband and wife, the court will have to come in between them either by setting them or separating them if either of parties could establish that the marriage has broken than irretrievably.²

Note that the courts determine the dispute between the parties or decision as to who will have the custody of children depends on the type of marriages contracted by the parties. If the marriage is under the English Law or Act the matter will be decided by the High Court of the State where the parties are resident. If the marriage was conducted under the Islamic Law, the matter will be decided by the Area Court of Shariah Court of Appeal as the case may be. If it is under the Customary Law the matter will be decided by the Customary Court depending on the area or place where the cause of action arose.

The primary focus of this work is to highlight and restate the law practice relating to custody under the Nigerian Legal System and make a comparative analysis as to Islamic point on custody of children. The paper will also consider the Customary Law aspect of custody, all with the aim of proffering suggestions and recommendations that will assist the court in reconciling the conflicting interests of couples to the custody of children of the marriage without compromising the interest of the child which is the paramount consideration.

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1. Quran 4 V3

2. see generally E.I. Nwagugu family law in Nigeria (Hemmann educational Book series, Lagos, 1985) 134

THE CONCEPT OF CHILD UNDER THE LAW

WHO IS A CHILD?

According to Black Law Dictionary it defines child as "a progeny, offspring of parentage. Unborn or recently born human being". In other words, a child is a person who has not reached the age of 14.³

The term child may include or apply to adopted, after-born, or illegitimate child or stepchild. It can be safely said that in the context of the constitution, no circumstance of the birth of the child, in the sense of being legitimate, illegitimate or adopted are irrelevant.⁴

Other laws, which define an infant which falls under the definition of a child is Infant Relief Act, 1874 which is a statute of the general application states thus:

"An infant is a person under the age of 21 years".

However the definition of a child differs under the Islamic Law, for the purpose of this work, that is custody, a child that will be subject of decision must be a child born in a lawful wedlock. As Islamic Law does not recognize a child born outside wedlock to claim form the father or inherit but he entitled to claim or inherit the mother.⁵

For definition of a child under the Customary Law varies from one place to another and from one community to another. The general and most accepted definition is that once the father has acknowledge the paternity of the child in issue, then the child is legitimate.

Having done with the introduction and a brief definition of child under each sub-topic we will now go to the body of the paper.

WHAT IS CUSTODY?

Custody is an established right for the baby from the time of its birth. Custody of Children according to Black Law Dictionary⁶ is

3. See Bryan A. Garner, *Black's Law Dictionary*, (West Group st. Paul, Minn, 1999) 232

4. Chap 4 of the 1999 constitution

5. Ambali, *The Practice of Muslim family law in Nigeria*, Tamaza Publishing Co. Ltd c 272

6. Bryan A. Garner n.3) 390

"The care, control, and maintenance of child awarded by a court to a relative, usually one of the parents, in a divorce or separation proceedings"

We will now go on and discuss custody of children under each heading MATRIMONIAL CAUSE ACT: Under the Common Law, a father has an absolute right to custody of his child until or she attained the age of majority. The court now has the power to make an order regarding the right of either parent to the custody of a child under 21 years regard to the welfare of the child and conduct of the parties. S. 71 (1) of the M.C.A.⁷ provides

In proceeding with respect to the custody, guardianship, welfare, advancement or education of children of a marriage that the court shall regard the interest of these children as the paramount consideration, and subject hereto the court may make such order in respect of those matters as it thinks proper.

The Court based on the provision earlier cited are left with the enormous task of deciding in whose custody the best interest of the child will be protected. The in whose custody the best interest of the child will be protected. The whole essence of custody matter in divorce suit is first and foremost the interest of the child.

The United Nations Convention on the interest of a child in 1989 declared that the interest of child should be placed more to the forefront in decision making.⁸

Although under Section 69 of Matrimonial Cause Act stipulates that children of the marriage to whom the Act applies to include adopted, legitimate and illegitimate child of the parties. That is why the position under the statutes differs from that of Islamic Law and Customary Law. Once a child is adopted or legitimate forms part of the family and custody proceeding can be instituted on the child.

⁷ Cap 220 laws of the federation 1990

⁸ Bloy, Duncan Child Law Notes (Cavan Dish publishing Ltd.) (1996) Page 5

What we intend to emphasize on in this heading is how the attitude of the Court has been considering the principles of "paramount interest of the child" is enunciated in S-71 of MCA. This obligation is no doubt an easy task and this must have promoted Singleton L.J. to conclude that:

I do not suppose that there is any difficult or more anxious task of a judge than the question of custody

To buttress this point, we will consider the case of ODOGWU V ODOGWU⁹. The parties in this case were married in 1982 and had three children aged 9, 8, and 6 years. On the 17th December 1990, Adeyinka J. sitting in Lagos State High Court pronounced a decree of dissolution of the marriage upon the petition of the husband alleging adultery against his wife Odumeoku Odogwu. Among other things considered on an appeal to Supreme Court from Court of Appeal, is relevant consideration in grant of custody.

JSC Belgore held that the interest of children which are required to be taken into consideration in custody matters by virtue of S.71 (1) M.C.A. 1970 cannot be quantified in terms of materials such as money or food but they must of necessity promote the happiness and security that a tender age requires. The learned J.S.C. also said and I quote at page 559 – 560.

"Welfare of child is not the material possession in the house – good clothes, food, Air-Conditioner, television, all gadgets normally associated with the middle class. It is more of Psychological developments. While it is good that a child is brought up by complimenting care of the two parents living happily together, it is psychologically detrimental to his welfare if material care available is denied him"

However going by the decision in this case, it is evident that courts in award of custody should exercise serious caution. The fact being that a lot is happening in our larger society nowadays. A child if not taken care of, not the aspect of monetary care of luxury items but someone who will have time to monitor the child may affect the child in future.

Although in this work we did not really distinguish between custody of a minor and a grown up child. But most cases of custody refer to a child of tender age.

Under the English Law, there is a settle rule that a child of tender years should remain in the custody of the mother¹⁰.

⁹ See Willoughby v Willoughby (1951) 1 PD at page 191

¹⁰ (1992) 2 N.W.L. R. Part 225 page 539 Act 54

¹¹ Inesagay Nigerian Family Law, Mathouse Press Ltd. (1999) Page 550

Under the Nigerian Statutes, it is the fact that circumstances of the case, that will determine to whom the custody will be granted. Even the court can exercise its discretion by granting custody of a child to a third party either permanently or as an interim measure, if it considers this to be in the child's interest. This is contend in S-71 (3) M.C.A 1970 which states that

A court may, if is satisfied that it is desirable to do so make an order placing the children or some as it deem fit, in a custody of a person other than a party to the marriage.

Justice Nnameka held in the William V William¹² expressed that:

Custody of a child essentially concerns not only control of the child but also carries with it the necessary implication of the child person physically, mentally and morally.

In deciding the question of the custody of the child, there are some fundamental factors that the court considers which will guide them as to best interest and welfare of the child in question.

The factors are:

- (a) Age and sex of the children
- (b) Welfare and material needs
- (c) Conduct of parties
- (d) Proper educational and religious upbringing
- (e) Brothers and sisters living together

We will now take them one after the other.

- A. Age and Sex of the Children:** The fact that a child is of a tender age does not necessarily means that custody will be granted to the mother, but the Court will readily do so if it in the best interest of the child. Although a child of tender age will be more comfortable with the mother. It depends on the age of the child, for a child still breastfeeding will be in the best interest of a girl child. This is because if a child is growing the mother needs to play some major role in her day-to-day activities in life. As per Oputa Jsc in William Vs

12. (1987) 4SCNJ22

William¹³. "There are periods in a girl's life when she is undergoing the slow advance maturity when she needs her mother to discuss and answer her many questions about herself, her development both physiological and psychological".

- B Welfare and material needs:** Another very important factor that a Court will consider is the welfare of the child in question. This is a very important factor, because if the Court is taking into consideration the paramount factors, it is good to grant custody to the party who will provide adequate welfare and material need of the child. This principles was handed down in the case of William Vs William¹⁴. "A child is entitled to enjoy care and attention the parents can offer provided that a parent is in a position and willing to provide them, the child should not be denied them by the action of either parents".

- C Conduct of Parties:** Also to be considered by the court in following the rules of best interest of the child is the conduct of parties to the suit. Thus a parent may not be deprived of custody merely because of his or her conduct, which might have contributed to the break down of the marriage. But in a situation.

Where the conduct of the claimant party is such that it will adversely affect the upbringing of the child, the court may however tend to look at that side, this is because grave or persistent misconduct or act of moral depravity, by one party may, by themselves be evidence that the party concerned is not fit and proper person to be entrusted with the custody of a child. In LASUN V LASUN¹⁵, the court not only refused custody to a child's mother but also refused her access to visit him.

- D Proper educational and religious upbringing¹⁶:** Education and religion of the children play a vital role in their upbringing. The arrangement either of the party made for the education of the child is very important William V William Supra.

On the other leg, religious upbringing matters in a child because if the wife and the husband do not belong to the same faith, the court might consider that in granting custody.

13. *Olanwole Ajai & Toyin Ipaye Rights of woman and (Lagos, franked publishers, 1997 Children in Divorce*

14. *Supra*

15. *Opit at page 122*

16. (1967) NWLR page 101

Under the Common Law, the father has an absolute right to determine a child's religious upbringing. This fact should be considered.

- F Brother and Sisters living together:** when the court is considering the interest of the child, it is good for the court to consider the issue of brothers and sisters to live together so that they can be brought up together in a good and conducive atmosphere. Another aspect, which the court should consider is the wishes of a child, so that the child can be called to give evidence of place that will best suit. The child may be emotionally attached to one of the parent.

CUSTODY UNDER THE ISLAMIC LAW

Custody under Sharia which is otherwise known as Hadanah is defined as the caring for the infact during the period when it cannot do without the woman of prohibited degree.

According to Maliki Law by F.H. Puxton¹⁷ is defined as "seeing that children are properly housed, fed and clothed"

The concept of hadana originated from the Holy Quran, which provides and says "My Lord Bestowed on thou (mother and father) thy mercy even as they cherished me in childhood."¹⁸

There is another verse of the Holy Quran which the basis of custody is derived from and I quote "Mothers shall give suck to the child for two full years for, the fathers who desires the time of giving suck to be completed"¹⁹

Beside the Quran, custody has an origin from the Sunnah of the Holy Prophet. The Prophet was said to have told a woman who was the wife of Ibn Dufail when the woman complained that her husband, Ibn Dufail has divorced her and was planning to separate her with her child. I quote

You are the rightful person to have custody of the boy so long as you don't wean him or re-married²⁰

However, when Caliph Umar Ibn Khattab (R.A.T) tried to take his son Asim from his grandmother, she complained to Caliph Abubakar (R.A.T) who gave her the child and addressed Umar saying that:

17. Nwogugu page 344

18. Page 155

19. Quran 17 v 24

20. Quran 2 v 232

Her smell, her touch and her kiss to that child is better to him than the best thing you have.²¹

As we have said before in our introduction, the principle behind custody under the Islamic law is the legitimacy of the child unlike under statutes that is Matrimonial Cause Act as illegitimate child issue can be entertained in the court of law.

Like under the Matrimonial Causes Act custody is vested on both parents when they are living together, but when they are separated under Islamic Law it lies on the mother.

Unlike the situation under the statutes, Islamic Law places order of precedence in respect of custody. The material relatives have priority over the paternal relatives of the child. This is because the child needs love and care, which he can only receive from material side. Although mother is the first and foremost but if she loses the right then it passes to the following people: The child's material grandmother

The mother's material grandmother

- (a) The child's material aunt
- (b) The mother's material aunt
- (c) The child's paternal grandmother
- (d) The child's father
- (e) The child's sister
- (f) The child's paternal aunt
- (g) The father's material aunt

Islamic law is the most perfect law. We can see that female relative are given priority over the male. Because women by their nature show love and affection to those children and takes adequate and proper care of them while the fathers provide all that are necessary for the upkeep of the children.

Like under the Nigeria Law, there are some factors to be considered before a court while exercising its discretionary power can custody to a party. The position under the Islamic Law differs.

For a person to be qualified to have custody of the child, she must possess these qualities. That is she must be of sound mind, trustworthy and of suitable character. She should be of age, which will qualify her to bestow on the child the care he / she needed and she should be living a place where the child may not undergo any risk morally or physically.

21. Khah - Fiqhul-l-sunnat page 289

Furthermore, the right of custody may be lost involuntarily, e.g. when the custodian is suffering from a disease, but she can restore it back when she is healed.

Religion can also make the custodian to lose her right especially when there is a difference of religion. It is necessary that the child should be brought up in a healthy religious atmosphere (Islam)

On the Principles of Hadanah, different duration is provided in respect of female and male and children. There is no uniform opinion of duration among the various school of Jurisprudence. We shall give these divergent opinions.

The Hamablis do not distinguish between a boy and girl. They hold that the duration of custody of female child will run parri-passu from birth till the seventh year of age of which a child shall be given the right to choose between either parents and its choice shall be respected.

The Malikis observe that the female children will remain under custody until she get married, while a boy will continue until he is matured.

According to Hanafi School, custody terminates at the age of seven for boys and nine for girls.

The aforementioned explanation is the procedure under the Islamic Law, which must be followed by the Sharia Court of Appeal or Area Court where the parties before them are Muslim in a matter relating to custody of a child.

The next step is to take a look at Customary Law. On this heading no specific mention will be made on a particular customary law. We will however generalize the issue of Customary aspect.

Customary Law give the father exclusive right over the children of the marriage. This right extends beyond custody to ownership of the children. The wife has no such right over the children. During separation or dissolution of the marriage, under the Customary Law, the father has custody of the children of the marriage. This exclusive custodian.

Right of a father over the children does not obtain under the Statutory marriage. As under the statutes, the court will determine where the welfare of the children will be best protected and taken care of.

Customary Law is discriminating and largely against women. Although Nigeria bearing a patrilineal community by reason of which children belong to their fathers. Although under the customary law child of tender years will be given to the mothers.

Customary Law does not differentiate between legitimate and illegitimate child, once the child has been acknowledge he enjoys the rights and privileges. The court however has been given consideration to the interest and welfare of the child.

For instance in *OWUNA V OGBODO*²² both the appellant and respondent were lovers. As a result of their relationship, the respondent gave birth to a baby boy. The appellant claimed and removed the child from the respondent. The respondent's father who testified at the trial admitted 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 I Otukpo gave the custody of the child to the appellant. The upper area court reversed this and a further appeal was made to High court. The court refused to deprive the appellant of as the child had lived for some years with the appellant who had sent him to a primary school from where he passed the entrance exam to secondary school.

CONCLUSION

We have examined the basic principles guiding the issue of custody under the matrimonial causes Act; we have equally dwell on Islamic Law aspect of custody and customary Law in brief.

Although under the Nigerian Law, Islamic Law form part of customary Law which the writer does not agree with, Islamic Law is a divine and most perfect of laws.

Under the Act that is s.71 of M.C.A., there is no provision that in custody matters priority should be female relations. What the court only consider under the Nigerian Law is the paramount interest of the child. How does court determine that?

Because what the court may think is good for the child may not please the child in question.

Recommendations:

- * From all the aforesaid, the paper recommends that a child should be asked by the court to make a choice of who he wanted to stay with if the child is a bit wise. It is further submitted that for the court to be able to accurately determine the particular needs of an infant in custody cases, it is pertinent that they should seek the expert opinion

of Child Psychiatrist and welfare officer. This aspect of a child making a choice is well taken care of under Islamic Law, which the writer agrees with in toto.

- * Another aspect of comparison is on the issue of child of tender age, I think the basic principle which the Matrimonial Cause Act has left a lacuna is that, at this stage a child still needs the love, affection, care and cuddling of his mother or female relations.

I therefore submit that as provided under the Islamic Law, if the mother has failed the paramouncy test of interest of child as determined by the court, the next person which the court should consider is the third party in person of the mother's mother and any female relation in that line.

My views as regard the Customary Law aspect is that modification should be made in their approach to this matter, as father should not be granted solely the custody right because the child was born by both parent. Customary Law on custody matter still discriminate against women.

- * I want to submit the where parties are Muslim, the matter should be decided in accordance with Islamic Law as it is the most perfect.
- * Custody matter under the three Laws is very sensitive and touching. I believe the only solution to avoid this matter is when husband and wife live in peace and harmony. We should try to avoid divorce.
- * There should be an amendment of Nigerian law so as to fill the lacuna under the Matrimonial Cause Act.
- * Finally, it is submitted in determining this matter that Islamic Law aspect should be considered without being bias, because it is the law that favours both women and children in recognition of the significant role of women in the family.

CONSTITUTIONALITY OF THE TAX APPEAL TRIBUNAL IN NIGERIA

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INTRODUCTION

The Tax Appeal Tribunal was established by the Federal Inland Revenue Service (Establishment) Act No. 13 of 2007 to adjudicate on disputes and controversies arising from the following tax laws as specified in the Fifth Schedule to the Act¹:

- (i) Companies Income Tax Act CAP 60 LFN 1990
- (ii) Personal Income Tax Act No. 104 of 1993
- (iii) Petroleum Profits Tax Act CAP 354 LFN 1990
- (iv) Value Added Tax Act No. 102 of 1993
- (v) Capital Gains Tax Act CAP 42 LFN 1990, and
- (vii) Any other law contained in or specified in the First Schedule to this Act or other laws made or to be made from time to time by the National Assembly

All the tax laws mentioned above are administered by the Federal Inland Revenue Service.² Members of the Tax Appeal Tribunal are appointed by the Minister.³ Each member is known as a Tax Appeal Commissioner.⁴ The Tribunal has a chairman for each zone who must be a legal practitioner with cognate experience in tax laws and tax matters.⁵ A person aggrieved by an assessment or demand notice made on him by the Federal Inland Revenue Service or who is aggrieved by any action or decision of Federal Inland Revenue Service (FIRS) may appeal against such decision or assessment or demand notice to the Tax Appeal Tribunal.⁶ Where FIRS is aggrieved by the non-compliance by a person in respect of any provision of the tax laws, it may appeal to the Tribunal

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1. Federal Inland Revenue Service (Establishment) Act No. 13 of 2007
2. Section 2 of the Federal Inland Revenue Service (Establishment) Act No. 13 of 2007
3. Paragraph 2, of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007
4. Paragraph 2, of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007
5. Paragraph 2, of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007
6. Paragraph 13, of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007