

CUSTODY AND MAINTENANCE OF CHILDREN: A SIAMESE TWIN*

Abstract

Custody and Maintenance of children are salient aspect of matrimonial proceedings. It is pertinent to note that they both act in conjoined way; one cannot be devoid of another particularly as it relates to children. The court cannot award one without the other. This paper will address the issue of custody as it goes together with maintenance, the main purpose is to continually sensitive the teeming public of the importance of this unique topic in matrimonial proceedings. The paper discusses the key issues ranging from who a child is under the law and the best interest of a child. It will also take a look at the general understanding of these words, custody and maintenance through the introductory part of the paper and discuss the problems leading to the issue of custody and maintenance of children. This paper delves into the important aspects of family arrangements surrounding custody under the Nigerian law, the conditions available for the award of maintenance and custody of the children. Conclusively, suggestions are proffered to solve the salient dynamics of the family and the generality of the society.

Keywords: Custody, Maintenance, Children, Siamese Twins

1. Introduction

Dissolution of marriage in most legal systems (at least in the common law countries) is as prominently held as the conduct of marriage itself, the process of dissolution of marriage is equally provided in law just as the process of conducting the marriage is provided.¹ Meanwhile, the foundation of any marriage is predicated upon a contractual agreement between a man and a woman as seen in the aged-long dictum of Lord Penzance where marriage was described as the voluntary union for life between a man and a woman to the exclusion of all others² (this is true in every kind of marriage as even in customary marriage where the family members are actively involved, the union is still brought about by the man and the woman), it is however, noteworthy to state that even though only two persons enter into a marriage, the situation is always that at the time the marriage is being dissolved and the parties are taking their leave, they would in most cases, have added to themselves, appendage(s),³ this is to say that parties are not expected to enter into a marriage and come out the same way they entered. The paramount issue which is however, capable of setting the world ablaze and flooding the world with the plague of nuisance is: ‘while parties take the option of walking away after an irretrievably broken-down relationship, what happens to the appendage(s) which parties have created within themselves?’⁴ In another sense, it would be stated that not all children are born of a celebrated marriage (customary or statutory), some of the children are born outside wedlock mostly through teenage pregnancy. The issue of custody and maintenance of the child of the relationship is also of paramount importance in every sane society.

It is undisputable that nobody can be forced to remain in an unwilling relationship, therefore, when the court is convinced that a union has broken down irretrievably, the court would do well to assist the parties in dissolving same. However, the children of the marriage are also the children of the court and as such, the court shall make sure that they are properly taken care of by providing a safe custody and ensuring that they remain maintained by their estranged biological parents. Hence, the issue of child

* **By Adefowoke Olubusola AYO-PONLE, LLB (Hons) Ogun, LLM (Lagos), BL, ACI Arb (UK)**, Head, Regulatory Compliance, Firstrose Solicitors, a member of International Federation of Women Lawyers (FIDA) Nigeria, Lagos State Branch

* **Foluke Olayemi DADA, LLB (Ife), LLM & PhD (Loyola College) Chicago, United State of America**. Immediate Past 2nd Vice President, Nigerian Bar Association (2018-2020) a former Law Lecturer, Ekiti State University, Ado-Ekiti.

¹ In Nigeria, for example, the Matrimonial Causes Act makes copious provisions for the dissolution of marriage while the Marriage Act makes provisions for the conduct of same. See CAP M7, Laws of the Federation of Nigeria (LFN), 2004 and CAP M6, LFN, 2004 respectively.

² See *Hyde v. Hyde* [1861-1873] All ER Rep. 175

³ The appendage becomes more important since procreation or reproduction of children is almost the foremost aim of every kind of marriage at least in Africa, the bible further provides that ‘And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it...’ see Genesis Ch. 1 vs. 28, The Holy Bible, **King James Version (KJV)**

⁴ As shall soon be revealed, the effect of not making provision for the offspring of a dissolved marriage is overreaching.

custody and maintenance are so entwined that they are best described as Siamese twins! It will then be stated that when the custody of a child and his financial maintenance is not taken seriously, the child becomes abandoned leaving him to be a menace to the society. It would also be added that Child abandonment can create conditions for negative patterns of social behavior in children and thus affect personality development. Children who were abandoned are more likely to engage in delinquent and criminal behavior and for younger children, failure to establish a parent/child bond has a negative impact on self-esteem, emotional attachment, and confidence later in life.⁵

Due to the increased and incessant rise in dissolution of marriages which has become a scourge in the society, abandonment of parental responsibilities is on the increase on a daily basis as well as teenage pregnancy - a major blight that contributes immensely to the issue of custody and maintenance of children. The growth and development of contemporary society in Nigeria and the present social, political and economic pains being inflicted on most Nigerians have had grave and adverse effect on the life span and sustenance of marriages, the foremost effect is especially on the children.

2. Who Is a Child?

The word 'child' is a descriptive terminology for a natural person who is an offspring of another (either by birth or adoption) and may only represent any human being from the moment of birth (in a life state) until the attainment of the age of majority.⁶ It is characterized principally by the 'undeveloped' state of mind of a person, which accounts for the readiness of the society to accept and tolerate the excesses, failures and inadequacies of the person.⁷ Reliance here will be placed on statutory provisions in order to reach a working definition of a child. The Convention on the Right of the Child, which was adopted and was opened for signature on 20 November 1989, is the first legally-binding international instrument that deals with a full range of human rights issues pertaining to children. Due to the range of children's rights protected, ranging from civil to political rights. Article 1 of the said convention provides that 'for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.⁸ While the Convention defines a child as a person under the age of 18, the provision 'unless under the law applicable to the child, majority is attained earlier', is a provision which allows the local laws to vary the convention. Regionally, the African Charter on the Rights and Welfare of the Child has a more water-tight provision relating to the age of children, unlike Convention on the Right of the Child, the African Charter on the Rights and Welfare of the Child in Article 2 sets the age of childhood below 18 years, without affording states the opportunity to prescribe otherwise. It will further be stated here that this definition is more applicable at least in the Sub-Saharan Africa as the Convention has been ratified by all the African Countries except Tunisia, South Sudan, Somalia, Morocco, DR Congo and Sahrawi Arab Democratic Republic (as of 2020). It will also be stated that the range of age of majority across Africa is between 15 and 21 years. Although, it is observed that the age of capacity differs based on the different subject matter, for instance, the minimum age requirement in countries like South Africa is fixed depending on each subject matter, the legal age to enter into a contract is different from that required for a marriage and that required for the freedom to choose domicile of one's choice.⁹ Also, in Nigeria, by virtue of Section 29 (4) (1) of the Child Rights Act, 2003, 'full age' means the age of eighteen years and above' while the Child Rights Act states that the age of marriage shall be 18 years, the Immigration Act states that any person below 16 years is a minor. Section 3(1) (e) of the Matrimonial Causes Act, 2004, states a marriage is null and void if either of the parties is not of a marriageable age. The Nigerian Electoral Act 2010 under Section 12 (1) states that a person shall be qualified to be registered as a voter if such a

⁵ See Jessica Therivel and Laura McLuckey (2017), *Abandoned Children*, Cinahl Information Systems.

⁶ See F.O. Aguda-Taiwo, *Guardianship and Custody of Children; Customary Perspective Unpublished Paper Delivered at the Refresher Course for Judges and Kadis on 11th March, 2019 at the National Judicial Institute, Ondo State. P. 4.* Meanwhile, it will be stated here that the problem faced when defining a child is the problem of fixing the majority age.

⁷ M. A Nwachukwu, *A Legal Analysis of the Nebulous Concept of Childhood in Nigeria. Beijing Law Review*, 2016, vol. 7, p. 123

⁸ emphasis ours

⁹ For instance, South Africa's Section 1 of the Domicile Act 3 of 1992 fixes the minimum age for a person to decide his domicile as 18, this is the same with the right to sue and be sued under Constitution of the Republic of South Africa Act 108 of 1996, Section 28(1) (h), 34 and 38.

person is a citizen of Nigeria and has attained the age of 18 years. Nwachukwu¹⁰ explains that Nigeria already has several enactments on the rights of children (including, Infants Relief Act,¹¹ Children and Young Persons Ordinance,¹² Children and Young Persons Laws,¹³ Compulsory, Free Universal Basic Education Act, Matrimonial Causes Act, Trafficking in Persons (Prohibition) Law Enforcement and Administration Act,¹⁴ the Criminal Code Act, the Penal Code Law, Labour Act Under statutory law, childhood is variously constituted depending on the focus of the particular law and the circumstances of each case.

Meanwhile, the Nigerian legal system is characterized by the application of both statutory and customary law, which makes it a legal pluralist system. Thus, under customary laws in Nigeria,¹⁵ the informal system of social control renders the determination of childhood by age almost ineffective; age is not generally, a symbol of capacity in the customary setting. Childhood under the different customary laws in Nigeria is determined by circumstance rather than age.¹⁶ This makes childhood under Nigerian customary laws at best, an amorphous concept. Different criteria are utilized to determine childhood under customary law. Mental capacity is one of such criteria, which relates to sanctions for customary crimes and civil wrongs. This is determined by the ability of the concerned person to confront and solve problems directly without the supervision of an adult.¹⁷ A person is presumed to have attained adulthood if he is mentally and socially able to solve problem pertaining to issues of life without supervision. Such a person can be held responsible for violation of customary norms or commission of crimes. Other criteria for adjudging a person a child under customary law relates specifically to issues of devolution of property and symbol of authority other than determination of wrongful conduct. Different criteria such as financial independence, marriage, and initiation into age grade¹⁸ may determine childhood in majority of these circumstances under customary law in Nigeria. In most parts of the South Eastern Nigeria for instance, the first male child of the family is deemed to remain in childhood under customary law notwithstanding his age until the death of his father. Such persons are treated as children as long as their fathers are alive.¹⁹

In all, it would be seen from the above that in Nigeria and a majority of African countries, for the purpose of custody, care and maintenance, it is safe in this study to adopt the age of 18 as the age of childhood.

3. Custody of Children

The term custody is defined in Black's Law Dictionary as 'The care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision making authority and physical custody (care giving authority), and an award of custody usually grants both rights...'²⁰

¹⁰ M.A Nwachukwu, The Nigerian Child and the Right to Participation: A Peep through the Window of 'The Best Interest' Clause of the Child's Rights Act, *Beijing Law Review*, 2017, vol. 8 (2), p. 162

¹¹ CAP 19, Laws of Eastern Nigeria, 1963

¹² CAP C52, LFN 2004

¹³ CAP M7, LFN, 2004

¹⁴ CAP T23, LFN, 2004

¹⁵ Customary Law embodies customs as practiced by the people which they regard as binding on them, see R. Kerridge, Parry & Kerry, *The Law of Succession*, 12th Ed. London: Sweet & Maxwell, (2009) Pg.1. It is any system of law different from Common Law and a Law enacted by legislation, but which is enforceable and binding within Nigeria as between the parties subject to its sway, see *Kharie Zaiden v. Fatima Mohassen* UILR 1974,283 at 284; Section 258 of the Evidence Act, 2011 did not define the term customary law but it defines the word, custom as a rule which, in a particular district, has from long usage, obtained the force of law, Section 16 (1) therefore, provides that 'a custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence'. In the same vein, Customary Court Law Cap 49, Revised Laws of Anambra State of Nigeria, 1979 defined customary law as: 'A rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage which is appropriate and applicable to any particular cause, matter, dispute, issue or question'; see also *Oyewumi Agunbiade III v Ogunsesan* (1990) 3 NWLR 182 at 207

¹⁶ A. O. Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1979) pp. 69-81

¹⁷ Nwachukwu Op. cit, p. 124

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *Black's Law Dictionary* (2004) 8th Edition

The word custody is not defined in the statute book, the matrimonial Causes Act. However, In Section 71 (1) of the Act²¹ only provides that:

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

We have earlier extensively considered what is meant by a child but in relation to matrimonial causes, the concept of children which may also be seen as the subject of custody is explained by the Matrimonial Causes Act²² which provides in Section 69 that children of a marriage are as follows:

- a. Any child adopted since the marriage by the husband and wife or by either of them with the consent of the other.
- b. Any child of the husband and wife born before the marriage, legitimated by the marriage or not.
- c. Any child of either the husband or wife (including an illegitimate child of either of them) if at the relevant time the child was ordinarily a member of the household of the husband and wife.

Custody Options Available

There are various options available when a court is considering the grant of custody of a child to either of the parent or even a third party in custodial proceeding of a child. However, at all required times the interest of the child is the paramount consideration in granting same. Child custody is often a main legal issue that must be resolved in matrimonial proceedings.

Legal Custody

Legal custody is the right awarded to the parents to make significant decisions regarding the child's life after the parent's divorce. Legal custody can either be sole or joint, it is at the discretion of the court with due consideration of the interest of the child.

Legal custody is about a parent making decisions for his/her child regarding the underlisted:

1. Academic Training
2. Healthcare
3. Psychological Counselling
4. Religious discipline
5. Extracurricular Activities
6. Cultural activities.

Sole Custody

This is the kind of custody awarded to either of the parent with only visitation right to the other parent. In this instance the parent with the sole custody makes all salient decisions pertaining to the life and upbringing of the child, with the best interest of the child in mind. Courts are beginning to move away from sole legal custody in order to afford the child a balanced upbringing. However, it allows for balanced and give room for stability for the child and helps its mental growth. In *Lafun v. Lafun*²³, where the court granted sole custody to the Petitioner (father) and no visitation right to the Respondent (mother) owing to the moral degeneracy of the Respondent (mother). The court held that it would not be in the best interest of the child for the respondent to have access to the child who was in her formative years and could easily be negatively influenced.

Joint /Shared Custody

It is a kind of custody awarded by the court to both parents on agreed terms, it could be legal or physical or both. The best interest of the child must always be considered. The court in this instance grants either of the parent custody during school period and the other during holiday and or may be one parent week days and the other weekend. And the holidays are shared accordingly. It involves both parents sharing

²¹ Matrimonial Causes Act Cap M7 (LFN) 2004

²² Section 69 of the Act

²³ (1967) NMLR 401

physical custody as well as participating in the decisions affecting the child's life generally. In *Alabi v. Alabi*²⁴, in this instant case the joint custody of the only child of the marriage, Elizabeth Oyeronke Alabi, was granted to the appellant and the respondent.²⁵

Third Party Custody

Third party custody is a kind of custody awarded at the discretion of the court for the best interest of the child to a third party that is a party other than the parents of the child. The order can either be permanent or interim.

There are certain criteria's to be considered before custody of a child can be awarded to a third party;

1. Where it is clear that neither of the parties to the marriage is genuinely interested in the welfare and upbringing of the child
2. Where neither of the parties has applied for the custody of the child.
3. Where in the opinion of the court neither parents are fit to have custody of the child.

In *Nwube v. Nwube*,²⁶ while a divorce suit was pending between the two parties, the court held that awarding the custody of the children was best awarded to their grandmother, as this was in the best interest of the children. The order was in force pending the determination of the suit.

Temporary Custody

it is a kind of custody awarded to either of the parties pending the determination of the suit, it usually occurs where there is dispute in relation to that. An order can be made in relation to Order XIV Rules 21 & 22 of the Matrimonial Causes Rules 1983 for the court to award temporary custody to either of the parties; the application can be *ex parte* or on notice to the other party.

Bird's Nest Custody

Bird's nest custody is not often common, and regarded as unusual type of custody that the court award. In this instance the children remain in the family house while both parents get a separate accommodation and they take turns moving in and out for the care of the children. It gives the children stability both mentally and physically, it is common in developed jurisdictions.

4. Maintenance of Children

Maintenance of children is an essential aspect of Matrimonial Causes Act that goes hand in hand with the award of custody in the best interest of the child. Section 70 (2) of the Matrimonial Causes Act states that the court may in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage pending the disposal of proceedings make such order as it thinks proper, having regard to the means, earning capacity, the conduct of the parties to the marriage and all other relevant circumstances. It can be said that maintenance pertains to the care, control, welfare and preservation of the child of a marriage in all respect.²⁷ Thus it will be stated that the subject of maintenance is primarily, the children of the marriage although, children who have attained the age of 21 years cannot be under maintenance order, unless the court is of the opinion that there are special circumstances that justify the making of such an order for the benefit of that child.²⁸ It must be added that a party to the marriage may also be entitled to maintenance.²⁹

5. Relationship between Custody and Maintenance

We would be quick to state that whenever the court is faced with the determination of any matter which affects the right or welfare of the child the court will always prioritize the interest of such child. It would

²⁴ Supra

²⁵ In *Bibilari v. Bibilari* (Supra) Joint custody was granted to both parents. 'the Respondent and the Petitioner shall have Joint custody of their daughter,with the Respondent exercising physical care and control of the child while the Petitioner takes charge of and pays all expense incurred for her education and maintenance....'

²⁶ Unreported suit No. WD/37/21 of 16/8/1971, per Taylor C.J.

²⁷ See for example, the definition of custody in *Otti v. Otti* (1992) 7 NWLR (Pt. 252,) 187 at 210; *Hewer v. Bryant* (1970) 1 QB 357.

²⁸ Section 70 (4) MCA

²⁹ See *Tabansi v. Tabansi* (2018) 18 NWLR (Pt. 1651) p. 279

then be stated that everything relating to a child is decided by the law according to the best interest of the child as has been demonstrated by the Supreme Court of Nigeria although, in a case that relates to the life of the child, in *Esabunor & Anor v. Faweya & Ors*³⁰, Okoro JSC held as follows;

Where it appears to the Court in proceedings in which a question arises as to the welfare of a child, that it may be appropriate for a care supervision order to be made with respect to that child, the Court may direct the appropriate authority to undertake an investigation of the child's circumstances. In the light of the above provisions, I hold the view that it could have amounted to a great injustice to the child if the Court had stood by and watched the child being denied of basic treatment to save his life on the basis of the religious conviction of his parent. He probably would not be alive today. ... in a life-threatening situation, ... the consideration to save his life (the life of a child) ... greatly outweighs whatever religious beliefs one may hold, especially where the patient is a child.

It would then be stated that upon the order of custody of a child it becomes also expedient on the court to order the maintenance of the child since the child will require all necessities of life wherever or whoever he stays or abide with. Therefore the main claim after the dissolution of a marriage which the court will bother itself with is where the child will stay for the purpose of his welfare (custody) but this custody does not become reasonable if the child is not maintained therein, the order of maintenance is therefore, an ancillary order in a matrimonial cause as stated in *Tabansi v. Tabansi*.³¹ Since we stated earlier that the maintenance of a child of the marriage has to do with taking financial responsibilities by the party who is in the position to do so, it will then be added that the amount to be paid or advanced for maintenance of a child is not fixed in every case it will depend on certain factors which are deducible from Section 70(2) of the matrimonial Causes Act and which are means, earning capacity, the conduct of the parties and other relevant circumstances.³² The said limbs are as follows;

Means of the Parties

In the discretionary power of the court in award of maintenance, the court must take a cursory look at the means of the parties. This is largely referring to the respective capital assets of the parties, including contingents and prospective assets.³³ In *Nanna v. Nanna*³⁴, here the appellant presented his pay slip to the court, and the court in its discretionary power varied the monthly maintenance from N75, 000.00 (Seventy-Five Thousand Naira) to N50, 000.00 (Fifty Thousand Naira) looking closely at the earnings of the appellant in arriving at this.

The Earning Capacity of the Parties

Essentially, the court is saddled with the responsibility to look at the earning capacity of both parties in exercising its discretionary power to award maintenance. In *Rogers v. Rogers*³⁵ where the court per Wallace, J said at page 401-402 thus: 'there are cases where the husband's earning capacity is subject to severe fluctuations. The court will take this into consideration from the evidence before it'.

The Conduct of the Parties

It is important to put into consideration some salient issues particularly during the cause of the marriage. The court further reiterate in *Rogers v. Rogers*³⁶, took some points into consideration under this head.

- a. That if the wife's conduct borders on depravity this may result in the reduction or even total elimination of a proper maintenance
- b. If the husband conduct is immoral or perfidious, which conduct is objectionable, the wife must be given full maintenance but must not be enriched by the sole reason of that condemnable conduct.

³⁰ (2019) LPELR-46961(SC), Pp. 36-38, Paras. F-C

³¹ Supra

³² see *Rogers v. Rogers* (1962) 3 FLR 398; *Damulak v. Damulak* (2004) 8 NWLR (Pt 874) 151

³³ *Damulak v. Damulak* (Supra), *Rogers v. Rogers* (Supra).

³⁴ (Supra)

³⁵ Supra

³⁶ Supra

- c. Punitive damages in the form of maintenance on the ground of the depravity of the husband should not be awarded.
- d. However, where the immoral conduct of the husband or his marital behaviour has adversely affected the financial status or the standard of living of the parties, this is a factor to be taken into consideration.
- e. Where the Petitioner is adjudged guilty of misconduct evidence may be given with a view to persuading the court to take a lenient view of the petitioner's misconduct.³⁷

All other relevant circumstance

This is the last limb of section 70 (2) of the Act and under this head, the court will consider issues like the standard of living to which the parties were accustomed, the existence or non-existence of children of the marriage, the requirements of the wife, these some of the things that must engage the court in taking a decision here.

6. Determinant of Custody of a Child

it is important to state that custody of children is not awarded as a punitive measure on a party guilty of matrimonial offence or as a reward for the other party.³⁸ It is however, awarded in the best interest of the child.³⁹ In consideration of custody of children of a marriage, there are salient issues to be considered by the court. The most important of all these is the best Interest of the child. Various factors determine the decision of the court on the award of the custody of the child, this may relate to whether the child is born out of wedlock or of a celebrated marriage.

Best Interest of the Child

The interest of the child is the prominent attribute in granting custody of a child. It is important that the best interest of a child plays a significant consideration in custody decision. Article 3 (1) of the Convention on the Right of the Child 1989⁴⁰ states that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The African Union Charter on the Rights and Welfare of the Child also talks about the best interest of the child, it states that: 'In all actions concerning the child undertaken by any person or authority, the best interest of the child shall be the primary consideration'.⁴¹ Section 71 (1)⁴² specifically talks about the interest of the children as the paramount consideration. From the postulation of the Act, it is well written law that the interest of the child will form the major decision of the court in deciding who it will award the custody of the child to. In *Eluwa v. Eluwa*⁴³ where the court per Garba JCA, stated that: 'the welfare of the children is of paramount importance and a vital factor in consideration of custody.'

It is important to note that what constitute the interest of the child depends on the circumstances of each given case. The MCA⁴⁴ has given the courts wide discretionary powers which must be exercised judicially and judiciously according to the peculiar circumstances of each case.⁴⁵

In *Williams v. Williams*⁴⁶, per Karibi Whyte, JSC stated as follows:

The determination of the welfare of a child is a composite of many factors. Considering such as the emotional attachment to a particular parent, mother or father; the inadequacy of the facilities such as educational, religious or opportunities for proper upbringing are matters which may affect determination of who should have custody. What the court deals with is then lives of human beings and ought not be

³⁷ *Damulak v. Damulak* (Supra)

³⁸ *Afonja v. Afonja* (1971)1 UILR 105.

³⁹ *Ojeniran v. Ojeniran* (2018) JELR 38371

⁴⁰ The Rights of the Child (United Nations) 1989, the instrument was ratified by General Ibrahim Babangida on 21st March 1991.

⁴¹ Article IV (1) of the Charter.

⁴² MCA (LFN) 2004

⁴³ (2013) LPELR-22120 (CA).

⁴⁴ Matrimonial Causes Act (LFN) 2004

⁴⁵ Section 71(1) MCA

⁴⁶ (1987) 2 NWLR (Pt. 54) 89.

regulated by rigid formulae. All the relevant factors ought to be considered and the paramount consideration being the welfare of the child. By paramount consideration, I mean pre-eminent and superior consideration.

In determining the best interest of a child in granting custody of the child to any of the demanding parties or parent, the court is obligated to consider several issues in that regard and some of the conditions include the age and sex of the child, arrangement for accommodation, education, welfare and general upbringing, as well as the conduct of the relevant party or parent applying for the child's custody.⁴⁷

It is also important to note further that the safety of the child should also be prioritise amongst the interest of the child especially in a scourged society of defilement, molestation and all sorts of abuse and trauma-based environment. Custody arrangements are always tailored to the child's needs and best interests; therefore, parties' custody arrangements will reflect their family's unique circumstances and requirements and the following conditions will be considered and they include but not limited to the following:

Age and Sex of the child

In consideration of granting custody of a child to either of the parents or a trusted adult, the age and the sex of the child is one of the major issues considered by the court. In *Alabi v. Alabi*⁴⁸ one of the factors enunciated by the court is 'the fact that in the case of children of tender ages. Custody should normally be awarded to the mother unless other considerations makes it undesirable etc. In *Oduote v. Oduote*⁴⁹ it was further expatiated that where a mother does not suffer from moral misconduct, infectious diseases, insanity, lack of reasonable means or is not cruel to the children, custody of children of tender age and female children should be granted to the mother.⁵⁰ It is also pertinent to take cognisance of the sex of the child whose custody is to be awarded. In *Oyelowo v. Oyelowo*⁵¹ the court stated that 'as male children, their rightful and natural place is their Father's home. It does not matter how long they stay away from it; they will one day long for it'. In general, the consensus favours the pre-eminence of the child's best interest. The child's best interest is the ultimate determinant in determining the custody of the child.⁵²

Wishes of the Child

The court in some instances considers the wishes of the child or children at the fore front of the custodial issue, especially where they are old enough and the court regards it as attainment of age of reasoning. In the case of *Oduche v. Oduche*⁵³, the court held that the first child of the marriage, 14years of age should now be able to have a mind of his own. He should know the difference between what is good and what is bad.⁵⁴ In other cases, the child's view may emerge from the welfare reports and will be taken into account.

Adequacy of Arrangement for the Child

Arrangements for the stability of a child are an important aspect of granting of custody of a child to a party. Proper arrangements including but not limited to accommodation for that child is a salient aspect in the grant of custody. The courts also consider the adequacy of the arrangements proposed by the party seeking the child's custody, if the party fails to set out these facts, the court may be reluctant to

⁴⁷ *Alabi v. Alabi* (2007) 9 NWLR (Pt. 1039) 305

⁴⁸ *Supra*

⁴⁹ (2012) 3 NWLR Pt 1288, 478

⁵⁰ *Olowofoyeku v. Olowofoyeku* (2011) 1 NWLR Pt 1227, 177. See also *Tabansi v. Tabansi* (2009) 12 NWLR Pt. 115, Per Alagao, JCA where the court stated that 'Except the conduct of the wife is morally reprehensible, it is better in an estranged marriage for the child of the marriage, more so if that child is a girl of tender age to be left in the care and custody of the wife.'

⁵¹ (1987) 2 NWLR (Pt 57) 239

⁵² *Damulak v. Damulak* (2004) 8 NWLR (Pt. 874) 154, *Bibilari v. Bibilari*, Suit No: FCT/HC/PET/176/11

⁵³ (2005) LPELR-5976 (CA)

⁵⁴ *Odogwu v. Odogwu* (1992) 2NWLR (Pt.225) 539 @560, where it was held that the court could consult the child's wishes in considering what order to be made.

consider the question of custody. In *Dawodu v. Dawodu*⁵⁵, here the court refused to grant custody to a mother who had no home of her own or private means to bring up the child because it was not in the best interest of the child.⁵⁶

Educational and Psychological Factor

A stable background serves as a secure base from which children ventures forth into the world. Research in developmental psychology tells us that children need stability and security. The degree of familiarity of the child with each of the parents (parties) is also an important factor in the grant of custody. In *Ayemoba v. Ayemoba* (2018) JELR 38483 (CA) where the court per Obande Festus Ogbuinya (JCA)⁵⁷ stated that the Appellant on footing of the conjugal friction between the parties, became alienated from the only son child of the marriage, Joseph Odaloje Ayemoba for a very long time. In this instance case putting the child in the custody of the Appellant will be detrimental to the psychological wellbeing of the only child of the marriage. The arrangement for the education of the child is a salient feature in this regard and it is also part of the stability a child requires. It is important to note that in most cases, the court may order that custody remains with a parent; the child has spent considerable time with, this is to prevent psychological harm to the child⁵⁸ and also daunt the child's educationally progression.⁵⁹

Equality of Parents and Conduct of Parties

The court is not expected to prejudice which party will have custody before considering the interest of the child. In *Williams v. Williams*⁶⁰ the Supreme Court held that with regard to the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable be either without the other. Equality of right is therefore the basic premise upon which court considers custody case. Let me also state that the conduct of the parents towards the child is a matter the court will put into consideration as well, while determining the best interest of the child. In *Okafor v. Okafor*⁶¹, the court refused to grant custody of a child of the marriage to the mother who had not seen the child physically for almost Six years other than through photographs.⁶² It is salient to note that conduct of the parties towards the child whose custody is in issues is paramount in granting same, in *Kolawole v. Kolawole*⁶³ the court refused to grant custody to a mother who had once tried to kill the child.

7. Custody of Children born out of wedlock

It is pertinent to state that children born out of wedlock also have rights like the children born in either a statutory or customary marriage, hence the need for their custody to be awarded. In *Okoli v. Okoli*⁶⁴ where the court held that the custody of a child born out of wedlock follows that of the mother in the absence of any person claiming custody of the child on the basis of being the natural father. The custody of the child must be awarded since the child must belong to a family. Custody of children generally is a major issue in matrimonial proceedings the court must play a significant role in thoroughly looking at the best interest of the child.

⁵⁵ 1976 CCHCJ 1207

⁵⁶ The Court held in *Hayes v. Hayes* (2000) 3 NWLR (Pt 648) 276 per Aderemi, JCA where it held that 'throughout the gamut of matrimonial proceedings, the interest of the child of the marriage, as to custody and welfare, is held paramount. See also *Anyaso v. Anyaso* (1998) 9 NWLR (Pt 564)

⁵⁷ *Alabi v. Alabi*, Supra.

⁵⁸ *Otti v. Otti*, (Supra), per Agube, JCA where the court held that even though the appellant purports to be a man of means he cannot be in a better position to give this little girl the moral, psychological and mental supervision, which she richly deserves. He further stated that he has not shown adequate love and care for the child so as to warrant his being given absolute custody of that child who is growing up.

⁵⁹ *Ayemoba v. Ayemoba* (Supra)

⁶⁰ Supra

⁶¹ (1976) 6 CCHCJ 1972

⁶² *Lafun v. Lafun* (1967) NMLR 401. The court in this instance case refused a mother the custody of the child as well as access to visit, owing to the moral depravity of the respondent (mother).

⁶³ HCL/45D/81 of July 1, 1982(unreported) High Court, Ogun State.

⁶⁴ (2003) 8 NWLR (Pt 823) 570

8. Conclusion

It is pertinent to state that an order of custody of the child (ren) of a marriage must necessarily postulate that there is on ground general maintenance which include but not limited to adequate arrangements for the sound education as well as those for physical and mental welfare of the said child.⁶⁵ It is important that the party seeking custody of the child or the children of the marriage as the case may be must show that he or she is capable of taking care of the children of the marriage.⁶⁶ In *Hayes v. Hayes*,⁶⁷ where the court held that a decree for dissolution of marriage shall not be made absolute until the court is satisfied as to arrangements made for the care and upbringing of the child of the marriage; and a decree absolute made on an inadvertent non-compliance with the custody and maintenance of the child shall be declared void.⁶⁸ In awarding custody of children, the court is saddled with the responsibility of ensuring a good maintenance plan is in place and not a cosmetic arrangement.⁶⁹ Let me state in clear and unequivocal terms that the award of custody of a child and the maintenance order as regards to that child are Siamese twin and are inseparable, as the order for dissolution of marriage cannot be absolute, if no adequate arrangement is in place concerning the maintenance of the children of the marriage.

⁶⁵ *Damulak v. Damulak* (Supra)

⁶⁶ *Nzelu v. Nzelu* (1997) 3 NWLR (Pt. 494) at 472.

⁶⁷ (Supra)

⁶⁸ *Oyelowo v. Oyelowo* (1987) 2 NWLR (Pt. 56) 239, *Anyaso v. Anyaso* (Supra)

⁶⁹ *Nanna v. Nanna* (Supra)