REFLECTIONS ON CUSTODY OF A CHILD IN NIGERIA AND AUSTRALIA*

Abstract
This paper examines Child Custody in Nigeria and Australia. Developments in modern society brings social political and economic pains on Nigerians and Australians resulting in adverse effect on the life span, sustenance of marriages and children in those marriages. The paper utilizes relevant statutes, treaties, textbooks, judicial precedents/case law. The paper became imperative due to repeated cases of broken marriages, child neglect and increase in child custodian cases in these nations. The aims of this paper inter-alia is appraise determination of custody, the interest of the child, adequacy of arrangement for the child, equality of parents ,review of granting of custody of a child in Nigeria and Australia, custody options available and best interest of a child. The findings of this paper amongst others are: In the determination of the child interest in making a custody order, the court will take into account the age of child; the arrangements made for their accommodation, education, welfare and general upbringing, as well as the conduct of the relevant party applying for the child's custody. Children need stability and security. The paper concluded that, based on the plethora of judicial decisions on custody of children, the basic factor, is the best interest and welfare of the child. Courts also exercise their discretion on the issue of Child custody in accordance with the unique circumstances. The law always presents the child's welfare as the paramount principle, while for governments the overriding principle is to preserve the marriage, since family is the cornerstone of society. It was recommended that the law should consistently promote responsible parents, as providers. The various laws should be amended in line with current international best practices. Judicial decisions on child custody should be pragmatic and negative cultural influences should be jettisoned.

Keywords: Child, Custody, Parents, Nigeria, Australia

1. Introduction

The growth and development of contemporary society and the present social, political and economic pains being inflicted on most Nigerians and Australians have had grave and adverse effect on the life span and sustenance of marriages and most especially children born in some of those marriages. This is true of the dissolution regime of marriages contacted under customary law, features of which are not as rigid and formal as statutory marriages. Nigeria as a country of diverse people and culture presents a deluge of customs, usages and traditions governing marriage divorce and custody relative to each community. The diverse laws of marriage prescribe basic obligatory rules governing the creation of a valid marriage, the dissolution and custody of children. The fulcrum of this paper is to discuss both the general and statutory definition of custody of a child under the statutory laws in Nigeria and Australia, determination of custody and the best interest of a child in both jurisdiction, custody options are available upon divorce or separation.

2. Definition of Key Terms

Custody

'Custody' in general is defined as, 'the care and control of a thing or person for inspection preservation or security; more specifically. Black's Law dictionary 9th Edition defines 'legal custody as 'the authority to make significant decisions on a child's behalf including decisions about education, religious training and health care'. Custody is where the care, control and maintenance of a child is awarded by a court to a relative usually one of the parents in a divorce or separation proceeding or to a responsible adult. It could be legal custody (decision making authority) or physical custody (care giving authority). Sometimes the court grants joint custody to parents which is an arrangement by which both parents share the responsibility for and authority over the child at all times. It is also called 'shared custody'. Justice Nnaemaka-Agu J.C.A in the case of *Williams v Williams*[1] submitted as follows: 'I take the view that custody of a child essentially concerns not only control of the child but also carries with it the necessary implication of preservation and care of the child's person, physically, mentally and morally'. The court of appeal also defined, custody" in the case of *Otti v. Otti,*[2] as: 'Essentially concerning control, preservation and care of the child's person, physically, mentally; it also includes responsibility for a child in regard to his needs, food, clothing, instruction and the like…' Section 71(1) Matrimonial Causes Act provides that: 'In the proceeding with respect to the custody, guardianship, advancement or education of children of the marriage the court shall

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[1] (1981) 1 Q.L.R.N. at page 122 at part 127

[2] (1992) 7 NWLR (pt.252) 187 at 210

regard the interest of those children as the paramount consideration, and subject thereto the court may make such order in respect to these matters as it thinks proper'. It can be said from the above provision and case law that child custody pertains to the care, control, maintenance and preservation of a child in all respect and the court can grant same to any of the parties to a marriage. For the court to do this it must: 1. Consider the interests of the children, which is paramount; 2. Exercise discretion as to the proper order to make as a fallout of its discretion.

Child

Under the Nigerian law a child has a wide definition. It includes, and applies to adopted, after-born, or illegitimate child or stepchild. It can be safely said that within the purview of the Constitution of the Federal Republic of Nigeria, the circumstance of the birth of a child, in the sense of being legitimate, illegitimate or adopted is not relevant. In fact, the Child's Rights Act[3] expanded the definition by simply stating that a person under the age of eighteen years is regarded as a child. However, generally orders of custody are not usually made by the court in respect of offspring of a union who are above the age of 18 years.

Interest of Child

What constitutes the interest of the child depends on the circumstances of each case. For example, in the case of *Williams v Williams*[4] Karibi Whyte, J.S.C stated as follows: 'The determination of the welfare of a child is a composite of many factors. Consideration 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 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 being the welfare of the child. By paramount consideration, I mean pre-eminent and superior consideration.' Hence, because what constitutes the interest of a child is circumstantial the same is not limited to material provisions but a composite of issues. This includes those things that will enhance the psychological, physical and moral development of the child, as well as things that would promote the happiness and security a child in its tender years. In the case of *Odogwu v Odogwu*,[5] Belgore, J.S.C observed as follows:

> welfare of a child is not the material provisions in the house, good clothes, food, air-conditioners, television, all gadgets normally associated with the middle class, it is more of the happiness of child and his psychological development. While it is good a child is brought up by complementary care of the two parents living happily together, it is psychologically detrimental to his welfare and ultimate happiness and psychological development if material care, available, is denied him.

3. Determination of Custody and the Interest of the Child

In order to determine the interest of the child in making a custody order, the court will take into consideration the age of child; the arrangements made for their accommodation, education, welfare and general upbringing, as well as the conduct of the relevant party/parent applying for the child's custody. The court in the case of *Alabi v Alabi* [6] stated thus: Certain relevant criteria must be considered in the determination of the welfare of the child as in this case and they include: - i) The degree of familiarity of the child with each of the parents (parties); ii) The amount of affection by the child for each of the parent and vice versa; iii) The respective incomes of the parties; iv) Education of the child; v) The fact that one of the parties now lives with a third party as either man or woman; and vi) The fact that in the case of children of tender age custody should normally be awarded to the mother unless other considerations make it undesirable etc.

Age and Sex of the Child

Age

Usually, the court prefers that the mother of a child of tender age ought to be granted custody. This is usually not a rule of thumb as there are situations where custody has been granted to the father or any other person in loco parentis, if it is in the interest of the child. In the case of *Oladetohun v. Oladetohun*[7] although the court found the mother of the child to be an unsatisfactory wife, and that she was given to the practice of juju and also that she has been shown to be a bad mother, it nevertheless granted her the custody of the only

[3] Section 262 of the Child's Rights Act
[4] (1987)2NWLR (Pt.54) at 89
[5] (1992) 2NWLR (Pt 225)539
[6] (2007) LPELR-CA/IL/17/2006
[7] Suit No: HD/111/20 of 6/7/71 unreported

child of the marriage (who was three years old) on the ground that doing so, albeit temporarily, was in the best interest of the child. Even at that the court made provisions for a review of the issue of custody when the child becomes little older. However, in the case of *Lafun v. Lafun*[8], the court stated that it is generally presumed that a child of tender years will be happier with the mother, and this presumption would only be vitiated by clear evidence to the contrary, such as immorality of the mother, infectious diseases in the mother, insanity and cruelty to the child, which are matters to be tried. It was held that owing to the moral degeneracy of the respondent (mother) 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.

Sex

It is generally believed that girls should be in the care of their mothers whilst boys their fathers. There is however no rule of law which buttresses this belief hence Courts are not bound. It is believed that the best interest principle will suffice in this respect.

In *Bibilari v. Bibilari,*[9] the high court of FCT in considering the question of custody a girl child who was 7 years old followed the decision of the Supreme Court in the case of *Williams v Williams.* The Court observed as follows:

> In *Williams v Williams*, the Supreme Court grappled with a scenario not markedly dissimilar from the present. In that case, both parents were at daggers drawn over the custody of a six (6) years old girl child. His lordship, Oputa, JSC opined at p. 92 of the Report that 'there are periods in a girl's life when she is undergoing the slow advance to maturity, when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological'.

I reckon that the above observation applies with equally force to who is presently seven years old and will need her mother to discuss and answer her many questions about herself when her slow advance to maturity sets in a few years from now. In *Oyelowo v. Oyelowo,* [10] both parents applied for the custody of their two male children aged ten and nine years respectively. The children had lived with their mother for two years since the separation of their parents. The trial judge held 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.' The Court of Appeal agreed with the opinion of the trial judge. The Court per Nnaemeka-Agu drew attention to the importance of the sociological background in the interpretation of section 71 of Matrimonial Causes Act. This decision has been widely debated; however, the general concession favours the preeminence of the child's best interest.

The Wishes of the Child

At times the court may take the child into confidence to ascertain his/her wishes. This happens when the child has attained the age of reasoning which is usually between ages 6 – 17. Should the child be younger, the court may resort to welfare reports to determine where the interest of the child will be better served. The Supreme court in the case of *Odogwu v Odogwu,*[11] that the court could consult the child's wishes in considering what order to be made. It was also held that custody proceedings could be adjourned to Judge's chambers where in an informal hearing; the children's view could be assessed along with those of the parents.

Adequacy of Arrangement for the Child

A part from the considerations, implied by law and practice discussed above, the court also considers the adequacy of the arrangement proposed by the party seeking the child's custody this include the proposed arrangement for accommodation, welfare, education upbringing and other arrangements of the child. If the party fails to set out these facts, the court will be reluctant to consider the question of custody. It is to be noted that, the fact that, a spouse is more affluent does not necessarily assure that a child's best interest will be better served. Rather the fact that one parent is in a much better position to bring up the child and to provide a better accommodation is usually a decisive factor. In *Dawodu v. Dawodu,*[12] 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 to do so. However, where both parties have made equally good arrangement for the welfare of the child the court will consider the misconduct on the part of the each or

[8] (1967) NMLR 401
[9] Suit No: FCT/HC/PET/176/11
[10] (1987)2 NWLR (pt.56)239
[11] (1992) 2 NWLR (Prt.225) 539 at 560
[12] (1976) CCHCJ 1207

either of the parties. In *Alabi v Alabi* [13] the court held that 'Although misconduct on the part of the party to the suit is not the paramount consideration, where parties have made equally laudable arrangement for the welfare of the child and its upbringing, misconduct may tilt the balance in favour of the other party.

Medical and Psychological Factors

Research in developmental psychology tells us that children need stability and security. They are harmed when they lose their ongoing intimate relationships with those few adults who nurture them and provide care. Hence a stable background serves as a secure base from which the young child ventures forth into the world. Children who enjoy relationships of intimacy and security with their closest caregiver(s) in the first three years are more likely than those who do not, to be more adventurous. They are usually independent, friendly, intuitive and intelligent. They relate better with their peers and they are in a better position to succeed in life. Thus the court in most cases may order that custody remain with a parent; the child has spent considerable time with. This is to prevent psychological harm to the child. In *H v H & C,*[14] the court in this case awarded custody to the father with visiting access to the mother, since in all the circumstances it would be upsetting to remove the child suddenly from a house which he was familiar with.

Equality of Parents

In determining issues pertaining to custody and access, the court treats both parents equally. Equality of parents presupposes that either parent is entitled to the custody of the child. The court is not expected to prejudge which party will have custody before considering the interest of the child. In *Williams v. Williams***,** the Supreme Court held inter alia 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 cases. In the case of *DSD v Sera Igwalah & Bolaji Philips*[15] however, the Yaba Magistrate court fell short in this respect when without balancing the equal rights of both parties prejudged the father with whom the child had maintained a stable life over the years by promptly awarding custody to the mother on the sole ground that the child is a girl. It must be re-emphasized that courts should always have the interest of the child as paramount consideration. The conduct of the parents towards the child is a matter the court will put into consideration while determining the best interest of the child. In *Okafor v. Okafor* [16] the court refused to grant custody of a child of the marriage to a mother who had not seen the child physically for almost six years other than through photographs. In like manner the court in *Kolawole v. Kolawole* [17] refused to grant custody to a mother who had once tried to kill the child. Also where there are persistent acts of misconduct and moral depravity by one of the party this may be evidence of unsuitability of that party to be entrusted with the custody of the child. In *Lafun v. Lafun,* the court not only refused custody to a child's mother but also refused her access to visit. The court held that: 'owing to the moral depravity of the respondent (mother), it will not be to the best interest of this child (born in June, 1960) for the Respondent to have frequent access to him in his formative years when he could be influenced. When the child attains the age of 14years, the Petitioner may allow the respondent access if he so wishes'. However, a parent may not be deprived of custody merely because of his or her conduct which might have contributed to the breakdown of the marriage. The Supreme Court in *Williams v. Williams* held that the adultery of a party is not necessarily reason for depriving that party of custody unless the circumstance of the adultery make it undesirable.

4. Reviewing the Granting of Custody of a Child in Nigeria

It is necessary at this point to consider the situation where the court has had to revisit its decision on the placement and custody of the child. The cases earlier referred are replete with the decision to revisit the issue of custody at some point later on in the proceedings. Instances where the court can revisit the issue of custody are as follows: i) Where the child has become a little older; ii) Where the child is being maltreated by the parent in whose custody the child is; iii) Where the child wishes to be in custody of the non-custodial parent. The party relying on any of the above mentioned situation must establish the under mentioned to the satisfaction of the court.

[13] (2007) LPELR-CA/IL/17/2006
[14] (1969) 1 ALL E.R. 262
[15] UNREPORTED SUIT NO: MISC/MCY/46/114
[16] (1976) 6 CCHCJ 1972
[17] Suit No. HCL/45D/81/of 1/7/82 (Unreported)

Proof that the Custodial Parent is Unfit

Here the party seeking the review of award of custody on this ground must show to the court that the parent in whose custody the child is not capable. This may be where the parent having custody is shown to be abusive or careless. The court can award custody to a party though in its view an unsatisfactory candidate as seen in the case of *Oladetohun v. Oladetohun* where the wife was confirmed unsatisfactory but still awarded custody to her on the basis that the issue would be revisited when the child is a little older. The court, here considered it to be in best interest of child of very tender age. It suffices from the above mentioned case that if the husband proves that the wife's behavior remained unsatisfactory when the child became much older. The court will take away custody from the wife and give the same to the husband.

Proof that the Child is having Substantial Problems the Custodial Parent Cannot Remedy

Under this situation the party seeking for the review of custody has to show the court that the child is having problems that the parent in custody cannot handle. Instances of problem in the child's life may include physical development (in case a female child who is in her puberty stage) psychological or health, related issues. In *DSD v Sera Igwalah & Bolaji Philips,* the court relied on the argument of the non-custodial parent that a female child of puberty stage needs to be under the custody of the mother for proper directions. In the American case of *Kisling v. Allison,*[18] custody was reviewed in favour of the father, in part, because mother's chaotic living situation and behaviours was causing the child undue stress and anxiety.

Proof the Child's Preference

For a party to succeed in an action for review of custody of the child on the ground of the child's preference, the child must have attained the age of reasoning. This situation usually occurs in adolescent or teenage years where the child who desire to develop a relationship with the non-custodial parent. In determining the best interests of the child, the court must consider the child's reasonable preference for custody. The court shall place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference.

The court may have to retire to chambers in other to interrogate the child to ascertain the child's reasonable preference. This view was stated by the court in the case of *Odogwu v. Odogwu* where the Supreme Court held that the court could consult the child's wishes in considering what order to be made. Though the case law dealing with a child's preference shows that it is important, but it not necessarily a prevailing factor. In American case of *Aiken v Nelson*[19]**,** A teenage child's preference to reside with his father was one factor in changing custody. However, in *Bolding v. Bolding*,[20] the Supreme Court of America reversed a change of custody based on an eleven year old son's desire to live with his father, finding that this desire alone was not sufficient to show that the change of custody would be in the child's best interests.

What Custody Options are available upon Divorce or Separation?

The following are the various types of custody available to parents upon divorce or separation, depending on the circumstances of the case. At all times, however, the court shall have regard to the interest of the child as paramount consideration.

Legal Custody

This type of custody gives one the right and obligation to make decision about the child's upbringings such as a child's schooling, healthcare, and religious upbringing. Many states allow joint legal custody of a child to the parties involved if they have a joint normal routine. This might be granted by the court to both parties jointly or severally. In a joint legal custody these decision making are shared by both parties. This mode of custody is the most common type of custody available. It allows both parents to make decisions about the upbringing of their child. Conflicts can however often and do arise between the upbringing philosophies of the parents. This can lead to a bad environment for a child. Should a parent attempt to keep their child away from the other parent who also has legal custody, the aggrieved parent can enforce the custody agreement in court.

Physical/Divided Custody

This is the right to have a child physically live with each parent at some part of the year with reciprocal visitation privileges. At the time the child is in custody of one of the parents, such parent has complete

[18]343 S.C. 674 Ct. App 2001
[19] 292 S.C. 400, 356 S.E.2d 839, 840-41 (1987)
[20] 278 S.C. 129, 293 S.E.2d 699 (1982)

control over the child. Some states recognize joint physical custody where a child lives with each parent at equal amounts of time. This type of custody allows each parent to spend a maximum amount of time with their child. However, parents must live close to one another for this arrangement to work. Also, parents must have a workable and amicable relationship to avoid conflict for the children.

Sole Custody

In this situation, only the 'custodial' parent has custody of the child. The other parent is typically permitted only visitation rights. A parent can have either sole legal custody or sole physical custody of a child. However, in most states, courts are moving away from awarding sole custody to one parent so as to afford both the child a balanced upbringing. The only exception is where their potential danger or harm to the child. Some courts grant generous visitation rights to the other party. An advantage of this arrangement is that the same is usually least disruptive of a child's life as stability helps the mental growth of a child positive. It fosters very limited connection of one of the parents to their children and often leads to heightened animosity between parents.

Split Custody

In this case, the court grants custody to one parent whilst care and control becomes the duty of the other. The result is that the parent vested with custody has power of control over the child and to take major decisions in the child's future while the other parent controls the day-to-day physical upbringing of the child. The modern approach however, is to vest the custody in both parents (with powers to make major decisions) and grant care and control to one of them. The court may also grant care and control to one parent without making an order as to custody.

Temporary Custody

This is where custody of a child is awarded to a parent temporarily, *pendete lite*. This power can be exercised where in a matrimonial proceeding, a dispute with respect to custody, guardianship, welfare, advancement or education of the children of the marriage arises after the proceedings for the principal relief has been instituted. The petitioner or respondent may make an application for an interim order for custody pending the final determination of the petition.[21] The application may be made ex-parte in cases of extreme urgency, or on notice to the other party. In cases of extreme urgency, an oral application may be made subject to leave of court, before the ex-parte order is granted.

Joint Custody

Joint custody exists where the parents are divorced, separated, or no longer cohabiting, or even if they never cohabited. This is also called shared custody. It happens when the parents share the decision-making responsibilities and authority for, and/or physical control and custody of, their children. This type of custody occurs when parents agree, or court orders, them to share the decision-making responsibilities that affect the Childs life. Typically, the parents will agree to synchronize their schedules to make the arrangement work, or the court can compel them to. This does not translate to an equal or fifty-fifty time share, since each case depends on the Childs age, parent's availability, desires and other factors. This normally occurs where the divorce or separation is not hostile. Before an order of joint custody is made, the court must ensure that the parents would co-operate with each other otherwise, the order maybe in futility. In the case of *Williams v. Williams***,** there was a reasonable prospect that the parents would co-operate. An order of joint custody was made in respect of the daughter of the marriage with the wife/appellant given the right to exercise care and control of the child whilst the husband/respondent was given charge of education of the child. The father was to pay for the costs of the girl's education by way of settlement of bills to be prescribed by the mother. Also in the case of *Bibilari v. Bibilari***,** joint custody was granted to both parents. The court held that: 'exercising physical care and control of the child while the Petitioner takes charge of and pays all expense incurred for her education and maintenance. The Petitioner shall forthwith give up care and control of … and hand her over to her mother, the Respondent. Payment for the education and maintenance of … will be by way of settlement of bills to be presented by the Respondent to the Petitioner as and when due. The Petitioner shall have reasonable access and right to visit … in the house where she lives with the Respondent as and when necessary and upon communication of such intention by the Petitioner to the Respondent'.

5. Child Custody in Australia

Child custody has always been an important part of what we now call family law, and refers to the decisions about which parent has possession of the children post separation. The history of child custody involved

[21] (Order XIV Rules 21 & 22 Matrimonial Causes Rules).

reforms over many decades that reflect the history of gender relations which on a larger scale reflects the history of political liberalism. In Australia, men's group lobbying gained ascendancy in the 1990s, displacing that of a broad feminism which was responsible for the liberal law reforms in the 1970s. More than other areas of family law, child custody was about power. 'Custody' comprises the bundle of rights that parents have over their children. This includes the right to *'care and control'* [22] and the right to make all important decisions affecting the child, such as decisions regarding his education, religion and medical treatment.[23] The parent granted custody or even simple *'care and control'* of the child upon separation or divorce is referred to as *'the custodial parent.'* The parent not granted care and control, or custody in its wider sense, is usually granted *'access'* to the child and is referred to as *'the non-custodial parent.'* The custodial parent *'has a duty to ensure, protect and promote the best interests of the child.'* [24] The custodial parent may or may not be obliged to consult the non-custodial parent on major decisions affecting the child.[25]

In the nineteenth century, laws about child custody in both Australia and England were similar, as the colonial legislators followed English direction and precedent decisions came from English courts. After 1900 Australian influences developed as local experiences changed the significance of family, marriage and divorce, as well as the local political discourses about fatherhood, nationalism, the role of the mother and the importance of the family. In common law the father had the power, without an order of a court, to take his child from the mother and place it in the care of a female relative or staff. The rule served to protect the family because if a woman left her husband, she left her children. The origins of the rule pre-dated the early English statutes, such as the 1660 Act that gave a father power to appoint a guardian for any of his children who were under age and unmarried at the time of his death. The rules of equity worked against father-right by introducing a contrary principle concerning the welfare of the child.[26] The Australian States passed legislation between 1876 and 1935 to consolidate case-law references that assumed the welfare of the child was the 'paramount principle'.[27] The intrusion of equity into father-right principles enabled many courts to decide that the child's best interest justified awarding custody to the mother. However, under the fault-based system of matrimonial law, if the mother was guilty of adultery, she could lose not only custody but any contact with her children at all.[28] In the publicized but unreported 1875 Sydney case of Robert Strang, for example, the husband deserted his wife and child for two years without support.[29] When he returned and found his wife living with another man, he divorced her on the grounds of adultery and the court awarded the father custody of the young child. In a similar case in Sydney in 1876, William Harrison was awarded custody of his five children, even though he was a pauper. The unsuccessful 'guilty' wife was able to support the children, but was living with another man in an adulterous relationship.[30] In such cases, equity failed to overturn father-right principles while the courts still appeared to consider the welfare of the child. The courts joined both principles by explaining that it would not be in a child's interest to be placed in the care of an adulterous woman. In Australia the judicial use of the term 'father-right' appeared to end in the 1960s. Ironically, Percy Joske's apparent attempt to revive the principle in his 1952 edition was the last time the father appeared as a distinct category in a text on the law of custody.[31]

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[22] This is an aspect of custody of a child which is usually confined to *'the right to physical possession and control of the infant's movement,'* or, *'daily care and control'*:

[23] See, regarding the law of custody generally: Liu, above, at 276 to 284; P Hewitt (ed), A Liu, M McDonagh, S Melloy & S Warren, *Hong Kong Legal Practice Manuals: Family* (Sweet & Maxwell, 1998), above, at 159 to 174 and 207 to 234; E Francis & S Warren, *Divorce & Separation in Hong Kong: Your Guide to Law and Procedure* (Oxford University Press, 1995), at 74 to 80.

[24] ibid

[25] See *Dipper v Dipper* [1980] 2 All ER 722 and *Lo Chun Wing-yee v Lo Pong-hing* [1985] 2 HKC 647; but compare *Boulter v Boulter* [1977-1979] HKC 282 and *Wong Chiu Ngar-chi v Wong Hon-wai* [1987] HKLR 179.

[26] *Chetwynd v Chetwynd* (1865) LR 1 P & D 39; *R v Gyngall* [1893] 2 QB 232; (1894) 2 QB 232.

[27] Australian legislation included Judicature Act 1876 (Qld) s 5(10); Supreme Court Act 1928 (Vic) s 62; Supreme Court Civil Procedure Act (Tas) 1932 s 11(8); Supreme Court Act (WA) 1935 s 25(11).

[28] *Seddon v Seddon and Doyle* (1862) 2 Sw & Tr 640, and 164 ER 1146, 1147; *Mozley Stark v Mozley Stark and Hitchins* [1910] P 190, 193-194.

[29] *Sydney Morning Herald*, Sydney, Australia, 8 June, 26 November, 6 December 1875.

[30] *Sydney Morning Herald*, Sydney, Australia, 23 May 1876. A man could defeat his wife's petition for divorce or separation on the grounds of desertion, and also defeat her case for custody of the children, by sending her a small sum of money on a regular basis;

[31] *Re Goldsworthy* (1878) 2 QBD 75. As late as 1952 Percy Joske informed aspiring Australian jurists that the 'natural right of the father is sufficient to cast the onus of proof on those opposing it, even when he is applying to take the child out of its existing custody after a lapse of years, and it raises a presumption, albeit a rebuttable one, in favour of the father': Joske, *The Laws of Marriage and Divorce in Australia and New Zealand* (3 ed, 1952) 443-444.

Maternal Preference in Respect of Child Custody

The nineteenth century liberal reforms strengthened the 'maternal preference' doctrine, whereby both English and Australian courts favoured mothers in child custody cases, and disrupted the principle of father-right.[32] Maternal preferences was a biologically determinist idea, sometimes referred to as the 'tender-years' doctrine which seemed more prevalent after 1950.[33] The doctrine stated that the welfare of children, especially young children and more particularly young girls, was ensured by placing them in the care of the mother. It assumed that most men were neither capable nor willing to be primary caregivers for young children. Maternal preference was consistent with the theory of 'separate realms' because it accepted the sex-role notions that a woman's place was in the home and a man's function was to provide and protect. Maternal preference arose from the early liberal reforms of patriarchal English society, such as Talfourd's Act in 1839 which gave the English Court of Chancery power to grant a mother custody of her children up to the age of seven.[34] Around that time middle-class opinion had begun to acknowledge the importance of women's contribution to society through the family. An example was the publicity surrounding the case of Caroline Norton in 1854 and her subsequent article in which she argued that a mother's love was vital to the welfare of children.[35] Courts became more willing to favour women against men in disputes over young children, providing the wife was not guilty of adultery.[36] The maternal preference idea, like many rules of equity, was 'progressive' with popular appeal in both English and Australian society and continued exerting influence in courtrooms for more than a hundred years.

In 1975, the States introduced the 'equality Acts' which unsettled judicial rationales for maternal preference in child custody cases.[37] In the same year, the Federal Parliament passed Lionel Murphy's Family Law Act 1975 which formally abolished not only matrimonial fault, but any gendered considerations in custody cases, including the principles of tender years and maternal preference.[38]

The paramount principle in children's cases under the 1975 Act was the welfare of the child. Although this principle was not new, it was eventually applied differently by the new Family Court of Australia and the Family Court of Western Australia and caused a protracted, contentious and sometimes violent debate in the Australian community that would continue to the end of the century.

Section 43 of the Family Law Act 1975 contains a general statement of the principles and objectives to be applied by the courts. The section states:

> The Family Court shall, in the exercise of its jurisdiction under this Act … have regard to:
> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;

[32] Carol Smart described these assumptions in English cases as 'the ideology of motherhood': Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984)124.

[33] Constance Backhouse found little support for the notion of maternal preference in her analysis of Australian custody cases between 1900 and 1950 in Backhouse, 'The Mother Factor in Australian Child Custody Law, 1900 – 1950' (2000) 6 AJLH 51.

[34] Finlay, 'Family Courts Gimmick or Panacea?' in *Proceedings of the Family Law Interest Group of the Australasian Interest Group of the Australasian Universities Law Schools Association* (1970); 'The Battered Wife' in Deveson, *Australians at Risk* (1978); Hartin, *Divorce Dilemma: A Guide to Divorcing People* (1977); Mackinolty and Radi (eds) *In Pursuit of Justice: Australian Women and the Law 1788-1979* (1979); Windschuttle (ed) *Women, Class and History: Feminist Perspectives on Australia 1788-1978* (1980).

[35] Norton, *Caroline Norton's Defence* (1854); see also Norton, *The Natural Claim of a Mother to the Custody of her Children as affected by the Common Law Rights of the Father* (1837); Norton, *A Plain Letter to the Lord Chancellor on the Infant Custody Bill*, by 'Pearce Stevenson, Esq' (1839).

[36] After 1857 the Divorce Court found custody in favour of the wife on several occasions; *Clout v Clout* (1861) 2 Sw & Tr 391; *Seddon v Seddon and Doyle* (1862) 2 Sw & Tr 640; 164 ER 1146. A woman's adultery, but never a man's, automatically precluded her consideration for custody of her children until the end of the nineteenth century; *Re A and B* [1897] 1 Ch 786; *Mozley Stark v Mozley Stark and Hitchins* [1910] P 190.

[37] The Family Law Act 1975 (Cth) s 65 states that the best interests of the child are to be the paramount consideration. Although this was similar to s 85 of the MCA the 1975 reform contained no terms that inferred parenting expectations for the mother and maintenance obligations for the father as appeared in sections 8(3)(i) and (6), and 55(3) of the 1959 Act.

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> (c) the need to protect the rights of children and to promote their welfare; the need to ensure safety from family violence;[39]
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

Following a succession of studies and review exercises in the area of family proceedings,[40]major changes to the Act were introduced in 1995 by the Family Law Reform Act, which came into force in June 1996. The Act's provisions substantially reformed the previous law and procedure governing the children of parents undergoing separation or divorce.[41] Summarizing the scope of the 1995 Act's reforms, Bailey-Harris and Dewar comment:

> 1. This additional principle was added by the Family Law Reform Act 1995, which is discussed below.
> 2. Summarized, along with other influences on the development of the provisions in the 1995 Reform Act, in H Rhoades, R Graycar and M Harrison, The Family Law Reform Act 1995: The First Three Years (Dec 2000, University of Sydney and Family Court of Australia).

The reformed Part VII draws heavily on the language and concepts pioneered in England and Wales by the Children Act 1989 – thus the concepts of guardianship, custody, and access are replaced by those of parental responsibility, coupled with a new range of 'residence', 'contact' and 'specific issues' orders; and there is a similar emphasis on parental agreement as the primary means of settling post-divorce parenting arrangements of the child.[42] Section 65E of the Australia Family Law of 1995 provides that in deciding whether to make a particular parenting order, the court 'must regard the best interests of the child as the paramount consideration.' 'Interests' is defined in section 60D of the Australia Family Law of 1995 as including 'matters related to the care, welfare or development of the child.'

Best Interests of a Child

The historical foundations of the 'best interests of the child' standard in Anglo-Australian family law lies in two elements of the law of equity. First, the Court of Chancery's construction of its *parens patriae* jurisdiction, the prerogative right of the Crown to act as guardian of those of its subjects unable to look after themselves: idiots, lunatics and infants.[43] Second, the guardianship of children as a trust, enforceable by that Court from the passing of the *Tenures Abolition Act* 1660, beginning with testamentary guardians but eventually extended to fathers themselves.[44] The powers of the court under the *parens patriae* jurisdiction have consistently been 'theoretically limitless', and 'extend beyond the powers of a natural parent'.[45]

Since the first judicial assertion of the jurisdiction in 1696,[46] it always been understood as being both based on and limited by the protection of the child's 'welfare' or 'best interests'.[47] This was the justification for

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[39] This additional principle was added by the Family Law Reform Act 1995, which is discussed below.

[40]Summarised, along with other influences on the development of the provisions in the 1995 Reform Act, in H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years* (Dec 2000, University of Sydney and Family Court of Australia), at paras 2.1 to 2.8.

[41] For a useful analysis of the 1995 Act, see R Bailey-Harris and J Dewar, 'Variations on a theme – Child law reform in Australia' (1997) *Child and Family Law Quarterly*, Vol 9, No 2, 149 to 164, at 149. See also F Bates, The Glamour of childish days': Australian family law in 1999,' *The International Survey of Family Law 2001 Edition* (2001, Family Law), at 15 to 33.

[42] Section 64B (6), FLA

[43]William Blackstone, *Commentaries on the Laws of England* (New York: Garland, 1978 [1783]) *Vol. 1* 463; asserted at least since the abolition of the Court of Wards and Liveries in 1660, and the simultaneous passing of the *Tenures Abolition Act*. See Lawrence B. Custer, 'The origins of the doctrine of parens patriae' (1978) 27 Emory Law Journal 195; John Seymour, 'Parens patriae and wardship powers: their nature and origins' (1994) 14(2) Oxford Journal of Legal Studies 159; Sarah Abramowicz, 'English child custody law, 1660-1839: the origins of judicial intervention in paternal custody' (1999) 99(5) Columbia Law Review 1344.

[44] Abramowicz, *ibid*, 1382; *Bedell v Constable* (1668) 124 ER 1026 at 1028; *Beaufort v Berty* (1721) 24 ER 579at 579-80; *Eyre v Shaftesbury* (1722) 24 ER 659, 660, 662 (Lord Macclesfield LC).

[45] *Re W (A Minor) (medical treatment)* (1992) 4 All ER 627 at 637 (Lord Donaldson); see also *Secretary, Department of Health and Social Security v JWB and SMB* (1992) 175 CLR 218, 301-2 (Deane J).

[46] *Falkland v Bertie* (1696) 23 ER 814, 818 (Somers LC).

[47] In *R v Gyngall*, Kay LJ stated the law as follows: '....arising as it does from the power of the Crown delegated to the Court of Chancery, it is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child' (1893 2 QB 232, 248). There are also arguments that the power itself pre-dates its first exercise, latent and unrecognized. Lord Esher MR, for example, declared in this case (239) that it had been exercised by the Court of Chancery 'from time immemorial'. (See Seymour, n 10 above, 178).

interfering with the 'natural' rights of fathers over their children both in terms of the *parens patriae* powers and the equitable supervision of the relation of trust.[48] The underlying equitable principle is that the Court 'will not permit that to be done with the child which a wise, affectionate, and careful parent would not do'.[49] What has been subject to change, however, is the judicial and legislative understanding of exactly how those 'best interests' are to be understood, as well as how they are to be positioned within a nexus of other interests, of the father, the mother, 'good government', and of society more broadly.

The *parens patriae* jurisdiction was originally concerned primarily with the protection of children's property,[50] and fathers' rights over their children were only disturbed reluctantly, when their behaviour breached fundamental social norms, or when they failed to fulfil their parental duties: maintenance, protection and education.[51] The presumption was that the best interests of the child were aligned with the father's interests, the maintenance of his authority, and the stability of marriage.[52] The *Tenures Abolition Act* 1660 had granted fathers the right to appoint their children's guardians by will, and from that point onwards the custody of children under the age of 21 was described by Blackstone as 'the empire of the father'.[53] Mothers were 'entitled to no power, but only to reverence and respect',[54] and barred from applying for custody at all until one mother, Caroline Norton, was so agitated by her legal position that she appealed to Parliament and drafted the bill which was to be passed as the *Custody of Infants Act* 1839.[55] This did not mean that they would never gain custody: although mothers had no independent right of custody in direct opposition to fathers, fathers could forfeit their rights,[56] but only to the Crown, acting for the child's welfare, not to the mother, for fear of 'dreadful disputes'.[57] As Abramowicz puts it: 'Although willing to remove children from fathers, the courts were reluctant to do so where this might encourage mothers to think that they had a right to their children's custody. Where a claim to custody was cast as a dispute between mother and father, the rule was clear: The fathers' rights dominated. But the judicial process stood above both'.[58] Until the early 20th century, then, it is clear that the best interest's standard had no existence *independent* of the competition between fathers' and mothers' rights, and, indeed, emerged precisely as a means of regulating that competition. As Maidment put it, 'the very existence of the principle owes as much to the Victorian women's movement as to any child protection humanitarian philosophy',[59] functioning as a means of restricting fathers' rights over their children without having to concede overtly and explicitly the existence of any maternal rights. The best interest's standard was thus an important and crucial vehicle for a change in the balance of power between men and women, but one which still worked to keep mothers one degree removed from the legal position of both fathers and the Crown.

By the early 20th century, courts had started to accept the principle that children, particularly young children, were 'better off' with their mothers, and 'innocent' wives were now likely to obtain custody. The boundary cases were those where the wife stood accused of adultery, and Maidment identifies *Stark v Stark &*

[48] *De Manneville v de Manneville* (1804) 32 ER 762; *Wellesley v Beaufort* (1827) 38 ER 236 (Eldon LC). The roots in the *Tenures Abolition Act* 1660 are discussed in Seymour.
[49] *Goldsmith v Sands* (1907) 4 CLR 1648, 1658 (O'Connor J).
[50] *Wellesley v Beaufort* (1827) 38 ER 236, 243 (Eldon LC).
[51] William Blackstone, *Commentaries on the Laws of England* (New York: Garland, 1978 [1783]) *Vol. 1* 463; asserted at least since the abolition of the Court of Wards and Liveries in 1660, and the simultaneous passing of the *Tenures Abolition Act*. See Lawrence B. Custer, 'The origins of the doctrine of parens patriae' (1978) 27 Emory Law Journal 195; John Seymour, 'Parens patriae and wardship powers: their nature and origins' (1994) 14(2) Oxford Journal of Legal Studies 159; Sarah Abramowicz, 'English child custody law, 1660-1839: the origins of judicial intervention in paternal custody' (1999) 99(5) Columbia Law Review 1344.
[52] Susan Maidment, *Child Custody and Divorce - The Law in Social Context* (London: Croom Helm, 1984) 124.
[53] William Blackstone, *Commentaries on the Laws of England* (New York: Garland, 1978 [1783]) *Vol. 1* 463; asserted at least since the abolition of the Court of Wards and Liveries in 1660, and the simultaneous passing of the *Tenures Abolition Act*. See Lawrence B. Custer, 'The origins of the doctrine of parens patriae' (1978) 27 Emory Law Journal 195; John Seymour, 'Parens patriae and wardship powers: their nature and origins' (1994) 14(2) Oxford Journal of Legal Studies 159; Sarah Abramowicz, 'English child custody law, 1660-1839: the origins of judicial intervention in paternal custody' (1999) 99(5) Columbia Law Review 1344.
[54] ibid
[55] See the discussion in Abramowicz, n 50 above, 1346, 1360-61.
[56] *Powel v Cleaver* (1789) 29 ER 274; *De Manneville v de Manneville* (1804) 32 ER 762; *Wellesley v Beaufort* (1827) 38 ER 236 (affirmed in *Wellesley v Wellesley* (1828) 4 ER 1078 at 1083, rejecting claim that 'a man and his children ought to be allowed to go to the devil in their own way, if he pleases'.
[57] *R v Greenhill* (1836) 111 ER 922, 927 (Kings Bench).
[58] Abramowicz, n 50 above, 1359.
[59] Susan Maidment, *Child Custody and Divorce - The Law in Social Context* (London: Croom Helm, 1984) 124.

Hitchins[60] as the beginning of the end of the concept of matrimonial offence in favour of the best interest's standard: 'The matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to custody...The benefit and interest of the infant is still the paramount consideration and not the punishment of the guilty spouse'.[61] Section 68F (2) the Family Law Act 1975 therefore now provides that the court must consider in respect of the best interest of a child

'(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
(b) the nature of the relationship of the child with each of the child's parents and with other persons;
(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
(i) either of his or her parents; or
(ii) any other child, or other person, with whom he or she has been living;
(c) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to
maintain personal relations and direct contact with both parents on a regular basis;
(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait
Islanders) and any other characteristics of the child that the court thinks are relevant;
(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
(ii) being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed towards, or may affect, another person;
(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
(i) any family violence involving the child or a member of the child's family;
(j) any family violence order that applies to the child or a member of the child's family;
(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
(l) any other fact or circumstance that the court thinks are relevant.'

6. Conclusion

Generally, most customary law systems in Nigeria, will grant absolute right of custody to the father of a legitimate child, especially if the child is above five years old. Although it is now settled law, looking at the plethora of decided cases on custody of children, the only factor that can be found on which there is no dispute is that the best interest and welfare of the child which is the first and paramount consideration. This is the settled law that the court follows in exercising its discretion on the issue of custody of children. In determining the custody of children each case must be decided according to its peculiar circumstances and merit. According to Uwais, JSC in *Okwueze v Okwueze***,** 'the only proper manner in which the custody of a child under customary law can be determined is by specifically taking evidence to establish what is in the best interest and welfare of the child'. In view of the volatility of issues involving children where parents are concerned, the courts are enjoined to be dispassionate when deciding issues pertaining to the child. Whatever factor(s) the courts relied on in awarding custody to a particular parent, must be in the best interest of the child

At the beginning of the century, fathers could exercise patriarchal authority over their legitimate children before and after divorce. Although the principle of father-right influenced a court's decision, many men did not seek custody because they lacked the time, interest or the skills to provide daily care, especially if the children were young. The courts had for some time recognized the value of mothers keeping children after divorce and this 'maternal preference' gradually replaced father-right as the courts orienting principle in custody matters. Maternal preference also supported the notion of separate realms which had been a feature of patriarchy and, although it appeared to favour women in custody cases, it helped to preserve men's advantages and relative power in the public domain. However, the notion of fault complicated the effects of

[60] [1910] P 190.
[61] Susan Maidment, *Child Custody and Divorce - The Law in Social Context* (London: Croom Helm, 1984) 124.

both principles of father-right and maternal preference, because conviction of a matrimonial offence could have precluded either parent obtaining custody of a child until the divorce reforms in 1975.

Under the Family Law Act 1975 in Australia, most divorcing couples decided between themselves that the children would remain with the mother. When there was a dispute over custody, the courts applied the welfare principle by attempting to shield the children from the effects of divorce and allowed them to remain with their primary caregiver who was typically the mother at the interim stage. If the dispute over custody continued to a trial for final orders, the results were close to equally favouring the father or the mother. Despite this, some men perceived a bias towards women in the family court. The 1995 Act emphasized 'equal' responsibility of the biological parents, regardless of the actual situation of the child. The idea of shared parenting sought to recreate an ideal situation that forced separated parents together, ignoring the prevalence of domestic violence and the bulk of Australian research against imposing joint parenting arrangements. The law always presented the child's welfare as the paramount principle, and although there were historical shifts in how family law applied the welfare principle, the changes in the 1990s demonstrate the sensitivity, if not subservience of law to perceptions of popular demand and community opinion.

The law consistently promoted responsibility in fathers, although preferably as providers rather than custodial parents. Some legislation and judicial comments tended to insulate men from domesticity and encouraged them to appreciate the benefits of the public realm. On the other hand, Australian men were subjected to cultural influences that emphasized *not* conforming to the wishes of authority, finding heroism in rebelling, larrikinism, irresponsible mate ship and a cult of bachelorhood. Consequently in Australia unlike elsewhere fatherhood to most men was not as important as motherhood to most women. While for governments the overriding principle in family law was to preserve the marriage-based family as the cornerstone of society, individuals had their own ideas about parenting. The liberal inspired equality reforms obscured the gendered distinctions in parenting but failed to delete them. Men continued to be men in countless ways, but legislative support of their parenting privileges was never stable and always subject to the interests of economy and state. Finally, it is hereby recommended that the various laws should be amended in line with current international best practices. Judicial decisions on child custody should be pragmatic and negative cultural influences should be jettisoned