

CHILD CUSTODY AND PARENTAL ABDUCTION IN NIGERIA: A MYTH OR A REALITY¹

Abstract

Most parents who live apart negotiate custody arrangements on their own or with the help of lawyers, mediators, or other professionals. However, psychologists and other mental health professionals increasingly have become involved in evaluating children and families in custody disputes, because of the large number of separated, divorced, and never-married parents and the substantial conflict that often accompanies the breakup of a family. Theoretically, the law guides and controls child custody evaluations, but the prevailing custody standard (the “best interests of the child” test) is a vague rule that directs judges to make decisions unique to individual cases according to what will be in children's future (and undefined) best interests. The aim and objective of this paper is to explore the intricacies involved in child custody and parental abduction in Nigeria. The findings of this research are

- a. the grant or refusal of custody varies on divergent circumstances though guided by legal enactments*
- b. Parental abduction though possibly carried out in Nigeria still constitutes a grey area of the law*
- c. Childs rights as per custody is still alien in Nigeria despite the Childs Rights Act being promulgated in Nigeria.*

Doctrinal research methodology was applied as enactments and books were analyzed in the course of this research work.

Keywords: Child, Custody and Abduction

1.0. Introduction

Child custody and guardianship describe the legal and practical relationship between a custodian/parent and his or her child.² In marital disputes and divorce cases, determining the child's custody is often the most difficult part of the divorce process. The mediator is responsible for guiding the parties and ensuring that the result is fair to both parties and meets the child's interests. The primary consideration is considering what is in the best interests of the child.

1.1. Types of Custody. The following are the types of custody

1. Physical Custody

This refers to the parent's right to have the child reside with the parent. It may be granted to one parent or shared between the two parents. The child may reside with one parent majorly and where this happens, that home will be considered the child's primary residence. In determining physical custody, the factors to be considered include determining which parent has historically been the primary caretaker of the child, which parent has the resources and support to best take care of the child's physical and emotional needs, which parent lives closer to the child's school, the physical and mental health status of the child etc. Physical custody grants the parent the right and obligation to take care of the child daily. One parent may be designated as the primary physical custodian while the other parent receives secondary custody. Physical custody may be further divided into:

a. Sole Physical Custody:

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² Torun Franzén, 'Mandatory Mediation in the Best Interest of the Child' (*University of Lund*, 2007) <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1557548&fileId=1564358>> accessed 8 March 2023

This is where the child lives with only one parent or guardian who is called the primary custodial parent.³ In this case, one parent has the responsibility of providing the physical home of the child while both parents may share the legal custody of the child or children

b. Split Physical Custody:

In this case, both parents share the responsibility of providing a home for the child or children. The parents in mediation may agree to divide the time spent with the children while still considering what will be in the best interests of the child. Both parents must have a suitable place to live with adequate supervision, discipline, nurturing, and affection provided

c. Joint physical custody:

This is very similar to split physical custody. It usually results from a non-hostile amicable separation of the parents. The parents may lay out a schedule for their child to see them nearly equally.⁴ This means both parents need adequate living space in an agreed-upon school area with a proper child support agreement in place.

d. Physical Custody of the Child with Visitation:

Here, one parent is granted sole custody but they both agree on scheduled visitation hours as part of the custodial agreement and the time of visitation is strict. In this case, the parents may agree for one parent to have the child most of the time, except for every other weekend and specifically listed holidays. The custody arrangements are explicitly spelt out as part of the custody agreement so that the parents are clear on what is expected of them.

Physical custody has numerous advantages. It helps give the child or children stability as they do not have to constantly move between the homes of the two parents and in many cases, they may continue living in the same location they resided in before the divorce. This reduces the disruption they may feel as their daily lives and routines will not be drastically affected. The primary physical custodian enjoys more time with the children, and this is what makes it most advantageous and attractive to the parents. Oftentimes, the parent that has physical custody is the one to receive child support. S. 69(3) and (4) of the Child's Rights Act provides that where the court grants one parent custody, the other parent may be ordered to pay such amount periodically as is considered reasonable for the upkeep of the child. It is also worthy of note that S63 of the Child's Rights Law provides that an agreement in a separation deed providing that the father will give up control of the child to the mother will not be vitiated by the presence of such a provision. furthermore, S64 of the law goes further to say that where the custody of a child or the administration of any property belonging to or held in trust for a child, or the application of the income is in question, the Court must, in deciding that question, regard the welfare of the child as the first and paramount consideration. On the other hand, the non-custodial parent will suffer a lack of quality time with the child. This is also bound to affect the child as they suffer loss of the presence of the non-custodial parent. Such a parent becomes a 'visitor' rather than a 'parent' and this may also affect their ability to instil discipline and firmness when necessary.

2. Legal Custody

Legal custody refers to the right to make important decisions regarding issues such as the education, health, and religious upbringing, among others of the child.⁵ It gives a parent the right to make long-term decisions about the raising of a child, and key aspects of the child's welfare, including the child's

³ 'Child Custody' (*Ball Morse Lowe*) <<https://www.ballmorselowe.com/blog/the-5-different-types-of-physical-custody> > accessed 8 March 2023

⁴ *ibid*

⁵ 'Physical vs. Legal Custody' (*Justia*, October 2022) <<https://www.justia.com/family/child-custody-and-support/child-custody/physical-vs-legal-custody/#:~:text=What%20is%20Physical%20Custody%3F,co%2Dparent%20to%20be%20unfit.> > accessed 8 March 2023

education, medical care, dental care, and religious instruction.⁶ In most cases, legal custody is shared by both parents as 'joint legal custody' unless one parent is unfit or incapable of making decisions about the child's upbringing e.g. a parent with a history of neglectfulness, drug abuse or any mental incapacitation. A parent with sole legal custody has the power to make all the vital decisions without consulting the other parent.

Legal custody also has its advantages. It reduces conflict between the parents when it comes to making decisions for the child because that responsibility is vested in one party. It also helps create stability and consistency for the children. Where one parent is incapacitated due to substance abuse or instability and unable to make decisions, the children are not at the mercy of such a parent. Furthermore, it reduces confusion when the parents have different beliefs on parenting styles. It however has some disadvantages. The involvement of the parent that does not have legal custody may be limited and such a parent may withdraw further from the children. It can also place a heavy burden on the parent with legal custody to make all the important decisions alone. Finally, it may serve as a source of further conflict and resentment between the parents.

3. Joint Custody:

This may encompass joint physical custody, joint legal custody or both. During a mediation session, parents may agree to have joint custody over their children, giving them the responsibility of both physical and legal custody matters. This is regarded as the most favourable type of custody because it affords the child the opportunity to still experience the love and care of both parents. In a study conducted in Sweden, where joint custody is prevalent, analysis of the data revealed that shared custody protects children's emotional well-being by reducing their stress levels because it limits the loss of parental social and financial resources that affect children after divorce.⁷

A major advantage of joint custody is that both parents play a significant role in the child's upbringing. Joint custody allows for the burden and responsibilities to be shared by the parents thus giving them equal say in the lives of the children of the marriage. However, joint custody can also result in instability for the child. The child will have to move between the homes of the parents regularly. Joint custody also requires a lot of planning and scheduling. The parents have to regularly coordinate their schedules, and this can often lead to problems. Furthermore, where the parents have an unsteady relationship, it may put the child in the middle of the parents and any arguments or rivalry that may occur.

4. Sole custody:

Sole custody is an arrangement whereby only one parent has physical and legal custody. a parent with sole custody will be in charge of determining where the child resides, and the child will reside with that parent at all times⁸. It is an arrangement whereby only one parent has physical and legal custody of a child, and the other parent has the contact rights.⁹ Additionally, a parent with sole custody will be the only one who may make major decisions regarding the child's welfare¹⁰. Where one parent has sole custody, the other parent may have visitation rights. Sole custody is usually granted to one parent when the other parent is found to be unfit in ways that may be detrimental to the child.

⁶ 'Legal Custody' (*FindLaw*, 21 November 2018) <<https://www.findlaw.com/family/child-custody/legal-custody.html>> accessed 8 March 2023

⁷ Jani Turunen, 'Shared Physical Custody and Children's Experience of Stress' (2017) 58(5) *Journal of Divorce and Remarriage* <<https://doi.org/10.1080/10502556.2017.1325648>> accessed 8 March 2023

⁸ 'Joint vs. Sole Custody' (*Justia*) <<https://www.justia.com/family/child-custody-and-support/child-custody/joint-vs-sole-custody/>> accessed 8 March 2023

⁹ Bente Öberg, Gunnar Öberg, *Divorce - But Not From The Children* (The Nature and Culture book publisher, Sweden 2000)

¹⁰ *ibid*

Sole custody results in fewer arguments and conflicting views on parenting. It may also give the child more stability. The disadvantage however is that if the sole custodian suffers a financial blow, the child will also suffer, and the parent is solely responsible for the welfare of the child. Sole custody also greatly affects the relationship the child may have with the other parent.

5. Visitation rights:

This refers to the permission granted by the court to a non-custodial parent to visit his or her children. When sole custody is granted by the court to one of the parents, the non-custodial parent maintains the right to see and visit the child, absent extraordinary circumstances—this is what is called “visitation rights.”¹¹ There must be an express prohibition on visitation to be able to deny a parent visitation rights because this right stems from the fact of parenthood.¹² Restrictions on visitation rights may however be imposed where there is reason to believe that visitation rights will be injurious to the child’s best interest.

There is also reasonable consideration given to parents seeking to repair a damaged relationship with their child. Visitation rights in such an instance could start as ‘supervised’ visitation and later be modified upon the agreement of the custodial parent.

The goal of the mediator in the family mediation clinic is to enable the parents to consider all the options of custody available and settle on the type of custody arrangement that suits the wishes of the parents and their lifestyle while ensuring the best interests of the child are met. For example, it will not be advisable for a parent who travels very frequently for work or other matters to have shared physical custody. The mediator has to study the life patterns of the parents and enable them to decide on a solution that prioritizes the welfare of the child.

Resolving a child custody dispute is often tricky because there are many factors involved and numerous considerations to make. Furthermore, ego and emotions will come into play. A parent who comes into the mediation session immediately demanding full custody might put the other parent on the defensive and this may lead to an impasse. Child custody mediations are therefore very delicate and a mediator must take great care in handling it.

1.2. Factors to Consider in Determining Custody

The family mediation clinic is set up to guide parents in the process of mediation. While ultimately the determination of custody is agreed on by the parents, the mediator may offer guides on the factors to consider. Some of these factors were highlighted in the cases of *Ayemoba V Ayemoba*¹³ and *Eziaku V Eziaku*¹⁴ and they include:

1. Emotional attachment to a particular parent.

A child may have a stronger attachment to a particular parent. This may be because the child is more familiar with that parent who may be more actively involved in the life of the child. This is a factor that may be considered as it might determine how well the child will adjust to the divorce and custody arrangements.

2. Degree of familiarity and wishes of the child.

The child may be brought into the mediation and asked what his or her preferred choice will be. This may play a role in determining the custody arrangement the parents agree on in the mediation session.

¹¹ Legal Information Institute ‘Visitation Rights’, (*Cornell Law School*)

<https://www.law.cornell.edu/wex/visitation_rights#:~:text=When%20sole%20custody%20is%20granted,to%20see%20their%20children%20after> accessed 8 March 2023

¹² *ibid*

¹³ (2018) LPELR-45385

¹⁴ (2018) LPELR-46373(CA.)

The Child's Rights Law of Lagos State in Section 68 provides for the power of the Court to consult the wishes of the child and allows for the right of the child to exercise his/her own free choice

3. Income of the parties and adequacy of facilities (educational, social, emotional)

This is one of the most important factors to consider. Oftentimes, the more financially stable parent has to bear the burden of paying child support. While better finances do not always equate to custody, it determines the financial responsibilities of the parties towards the children. It is also important to consider the presence of adequate housing and feeding facilities and the ability of each parent to provide this. Other considerations include proximity to the children's school and the ability to manage the emotional and social needs of the child.

4. If one of the parties lives with a third party

Where one of the parties seeks to remarry or is living with another party, it may also determine the custody arrangement of the parties. For example, where one of the parties remarries and wishes to relocate, the custody arrangement will have to accommodate this.

5. The age of the child

The age of the child plays a big role in determining custody. Oftentimes custody of children below 2 years of age is often given to the mother. However, in the particular case of *Ayegba V Ayegba*¹⁵ the court refused to grant custody to the mother despite the tender age of the child because the mother had left the child (1 year seven months old) with the father before returning to contest for custody.

6. The sex of the child

Custody of a female child is usually given to the mother and male children to their father. However, this is subject to the overriding best interest of the child. It is worthy of note that in *Oyelowo v Oyelowo*¹⁶, the two male children (aged 9 and 10) had been with their mother since the separation of the parents. Both parents applied for custody and the court 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". While this is not a rule of thumb, the court has the discretion to determine which parent is better-suited subject to the best interest of the child.

7. Opportunities for a proper upbringing

Parents also have to consider their differences in opinion of child upbringing as well as differences in lifestyle. In considering this, issues like type of occupation, religion, family and friends of the parents, come into play as it will determine what the child will be exposed to and ultimately affect the child's upbringing.

8. Conduct of the parties.

The conduct of the parties during mediation may give the mediator an idea of how they will relate to one another after the mediation ends and how this will play out in parenting. The behaviour of the parties towards one another and any feelings of hostility or animosity may also affect the child in the long run, and this is an important factor to consider in determining custody.

In Nigeria, the Matrimonial Causes Act provides for the factors the Court may consider in granting custody. Section 71 of the Act provides thus:

1. In proceedings concerning the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.
2. The court may adjourn any proceedings within subsection (1) of this section until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and any such report may thereafter be received in evidence.
3. In proceedings concerning the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.¹⁷
4. Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks

¹⁵ (1979) 3 LRN P. 232

¹⁶ (1987) 2 NWLR (pt. 56) 239

¹⁷ 82(2) Child's Right Act

proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

The paramount consideration by the court is always the best interest of the child. It is worthy of note however that the Court may however decide that it is in the best interest of the child for custody to be granted to someone other than the parent. Thus, in *Obahaya V. Obahaya*¹⁸, the Court of Appeal stated that:

“The principle of law is settled and which is that; in proceedings concerning the custody, guardianship, welfare, advancement or education of the children of a marriage, the Court shall regard the interests of those children as the paramount consideration and subject thereto, the Court may make such order in respect of these matters as it thinks proper. See Section 71(1) of the Matrimonial Causes Act. Thus, in awarding custody of a child, the Court will consider the care of the child’s person; morally, physically, and mentally. Hence, the welfare and the interest of the child must be accorded paramountcy where an order of custody of the child is to be made. The welfare of children of a marriage is not only of paramount consideration but a condition precedent for the award of custody. Custody is never awarded as a reward for good conduct nor is it ever denied as punishment for the guilty party’s matrimonial offences.” Per UCHECHUKWU ONYEMENAM JCA

a. The Child’s Rights Act and Custody in Mediation

For many couples, the procedure of divorce has been described as long, arduous and painful. It is difficult as two parties who pledged to build a life together split from one another. It is much like a crisis with rippling effects. This crisis, if not properly handled, can create permanent or long-term conflicts between the parents and have devastating consequences on the children, affecting their entire growth. Research has shown that children can experience severe loyalty conflicts when forced to be between two fighting parents.

The best interest of the child principle is derived from the doctrine of ‘*Parens Patriae*’. It was a doctrine, first created in 1610 by King James I, who referred to himself as *Pater Patriae*, that is, the father of the people and ‘the general guardian of all infants, idiots, and lunatics’. It applied in English common law, and it grants the state the inherent power and authority to protect persons who are legally unable to act on their behalf. The best interest of the child doctrine therefore stems from the presumption that where two parents are in dispute, the child becomes defenceless, and the State has to protect the child and ensure its welfare.

The Child’s Rights Act has numerous provisions on the custody of a child, some of which have been referred to above. In Section 69 of the Act, it provides that:

1. The Court may-

a) on the application of the father or mother of a child make such order as it may deem fit concerning the custody of the child and the right of access to the child of either parent, having regard to

i. the welfare of the child and the conduct of the parent; and

ii. the wishes of the mother and Father of the child,

b) alter, vary or discharge an order made under paragraph (a) of this subsection on the application of

i. the father or mother of the child, or

ii. the guardian of the child, after the death of the father or mother of the child; and

c) In every case, make such order with respect to costs as it may think just.

The Act provides for the payment of maintenance fees to the mother by the father where custody is granted to the mother or vice versa where custody is given to the father¹⁹. It states that in considering “the custody or upbringing of a child or the administration of property belonging to or held in trust for a child, or the application of the income”, the Court shall regard the welfare of the child as the first and paramount consideration.²⁰

The Act goes further to state that where a parent of a child has “abandoned or deserted the child; or allowed the child to be brought up by another person at the expense of that other person, for such a

¹⁸ (2022) LPELR-57141(CA)

¹⁹ S69(3) and (4) Child’s Right Act

²⁰ S71 Child’s Right Act

length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental responsibilities, the Court shall not make an order for the child to be delivered to the parent unless the parent satisfies the Court that, having regard to the welfare of the child, the parent is a fit and proper person to have the custody of the child.”²¹

The Act also recognises the right of the child to express his or her wishes and allows the court to consult the child on their wishes or preference²²

Various international statutes and conventions provide for the rights of a child. These rights are also applicable in divorce proceedings. The United Nations Convention on the Rights of the Child recognizes the rights of the parents as well as the rights of the child. The Convention upholds the doctrine that the best interest of the child is of paramount importance and the primary consideration in all actions concerning children²³. The Convention provides for the right of the child to maintain contact with both parents. Article 9(3) provides thus:

“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents regularly, except if it is contrary to the child's best interest.”

The Convention also provides for the right of the child to freely express their views on matters directly affecting them. Article 12(1) of the Convention states that:

“State Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight by the age and maturity of the child.”

This Article ensures that the child is allowed to express his or her opinion on decisions that affect them, and this would apply to all actions that concern a child including custody.

The Convention has however been criticised for not providing a specific age as this may lead to lack of clarity or legal uncertainty though it is worthy of note that there is great individual variability in how a child's abilities develop.²⁴

Another international statute worthy of mention is the International Covenant on Civil and Political Rights which provides that:

“State Parties to the International Covenant on Civil and Political Rights (ICCPR) shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”²⁵

The African Charter on the Rights and Welfare of the Child also has its contribution. The preamble to The African Charter on the Rights and Welfare of the Child provides that “for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. It also provides in Article 4 for the best interest of the child to be the primary consideration in all actions concerning the child undertaken by any person or authority. Article 4(2) provides for the participation of the child in mediation and states that:

“In all judicial and administrative proceedings affecting a child who is capable of communicating his/her views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authorities with the provisions of appropriate laws.”

²¹ S73 Child's Right Act

²² S75 ibid

²³ Article 3

²⁴ Amanda E. Boniface, ‘Resolving Disputes with Regards to Child Participation in Divorce Mediation’ Post-doctoral Research Fellow: Institute for Dispute Resolution in Africa, UNISA

²⁵ Article 23(4)

1.3. Participation of the Child in Mediation

These laws and principles mentioned above also serve as a guide in determining custody in a mediation session. In a mediation session for the determination of custody, the child or children in question may also be allowed to participate. The degree to which a child should be involved in the mediation depends on factors such as the age and level of maturity of the child.²⁶

It is advisable that in the family mediation clinic, a pre-mediation session is held to determine the level of the child's involvement, and this may be done by interviewing the adults and discussing this separately with the child²⁷.

If limited involvement is required, the child can be asked to draw a picture that sets out their fears and hopes about the possible care arrangements as "verbal expression alone is not sufficient and we need to 'decode' children's words".²⁸ While the participation of children in mediation is recommended, it is worthy of note that there are factors that contraindicate the inclusion of the child. Some of these factors include cases where both parents agree on what is best for the child, if the child is aged three or younger, or if one parent does not want custody after divorce.²⁹

A family mediator must be trained to work with children and be able to gain their perspective. Mediation has long-term benefits for children when they participate in the proceedings.³⁰ Some of these benefits include a reduction of anxiety; a better understanding of the process and an easier adjustment by the child to post-divorce conditions.³¹ Child-inclusive mediation takes care of a child's emotional well-being after parental separation and the relationship and responsiveness between the parents may also improve as a result.³² Child participation also contributes to children's development of individual identity, competence, and responsibility and gives the mediator access to essential information³³. There are also advantages for children's sense of self-esteem and confidence³⁴. A child's perception can also be used to confirm whether the adult parties are telling the truth and can help contribute to an atmosphere of cooperation.³⁵

Mediation decisions on custody may be reviewed by a family court to ensure that decisions reached are in the best interest of the welfare of the child.

²⁶ Evans and Havercamp 'An Analysis of Mediation Assumptions: Strategies to Help Mediators in Child Custody Disputes' (2007)

²⁷ Amanda E. Boniface, 'Resolving Disputes with Regards to Child Participation in Divorce Mediation' Post-doctoral Research Fellow: Institute for Dispute Resolution in Africa, UNISA

²⁸ *ibid*

²⁹ Dona T. Lansky, Leslie H. Swift, E. Elizabeth Manley, Amy Elmore, Christine Gerety, 'The Role of Children in Mediation' (1996) 14 Conflict Resolution Quarterly <<https://www.semanticscholar.org/paper/The-role-of-children-in-mediation-Lansky-Swift/3071742668f2e96d07f868efa78b1a23161d929c>> accessed 9 March 2023

³⁰ Amanda E. Boniface, 'Resolving Disputes with Regards to Child Participation in Divorce Mediation' Post-doctoral Research Fellow: Institute for Dispute Resolution in Africa, UNISA

³¹ Dona T. Lansky, Leslie H. Swift, E. Elizabeth Manley, Amy Elmore, Christine Gerety, 'The Role of Children in Mediation' (1996) 14 Conflict Resolution Quarterly <<https://www.semanticscholar.org/paper/The-role-of-children-in-mediation-Lansky-Swift/3071742668f2e96d07f868efa78b1a23161d929c>> accessed 9 March 2023

³² Jennifer E. McIntosh, Yvonne D. Wells, Bruce M. Smyth, Caroline M. Long, 'Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes From a Prospective Study of Postseparation Adjustment' (2007) 46(1) Family Court Review <<https://doi.org/10.1111/j.1744-1617.2007.00186.x>> accessed 9 March 2023

³³ Amanda E. Boniface, 'Resolving Disputes with Regards to Child Participation in Divorce Mediation' Post-doctoral Research Fellow: Institute for Dispute Resolution in Africa, UNISA

³⁴ *ibid*

³⁵ *ibid*

1.4. Customary Law and Child Custody

In many Nigerian patriarchal cultures, women bear and raise children, but the children 'belong' to the man, and this is hinged on the overarching principle of customary law that denies a mother's lineage and strongly upholds patrilineage.³⁶

A Study was conducted on 15 divorce cases in a customary court in Ekiti state. In the study, all the couples were of Yoruba origin with economically active women. Yoruba tradition regards the children as belonging to the father and a woman's right to custody of a child is limited to her union. When that union breaks her chances of success in claiming custody are limited. In the study, out of the 15 divorce cases, 12 were initiated by the wife and the plea for divorce was refused in 2 cases.

The reasons for the divorce varied from neglect of the wife's and children's welfare to poverty and domestic violence. The reasons given by the three men included insubordination, adultery, and an uncaring attitude towards the man and the children. Out of the 13 cases where divorce was granted, sole custody was granted to the man in six cases, joint custody was granted in five cases and sole custody was granted to the woman in only one case. In 4 of the 5 cases where joint custody was granted, the custody granted to the woman was temporary because the child was underage or the man had no income. The academic researchers³⁷ who conducted this study also observed that custody was granted to the man even when the grounds upon which the divorce petition was brought was a lack of proper care by the man for the children and this suggests that in customary law, the primary concern is the men's right to their children.³⁸

A review of the position of the court will also reveal that customary courts tend to favor the position that the children always belong to the man though they may make concessions where such a position will adversely affect the child. The court held in *Okwueze v. Okwueze*³⁹ that:

"under most systems of Customary Law in Nigeria, a father of a legitimate or legitimated child has absolute right to custody of the child. However, the Customary Laws recognize that such absolute right of the father will not be entered where it will be detrimental to the welfare or well-being of the child.... 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."

The Court in *Mrs. Charity Okafor v Mr. Paul Okafor*⁴⁰ affirmed the position of E. I. Nwogugu, in his book on Family Law in Nigeria, 1974, (Reprinted 1985) in dealing with custody of children under Customary law. The court restated his position when Nwogugu said:

"Under most systems of Customary Law in Nigeria, the father has the absolute right to the custody of his legitimate or legitimated children. On the death of the father, the custody of the child is vested in the male head of the father's family, though the mother has the day-to-day care of the child. However, Customary Law recognizes that the father's absolute right will not be enforced where it will be detrimental to the child's welfare. For instance, when the child is of tender age, Customary Law requires that it should be left under the care of the mother. In such a case, the father's right is merely in abeyance, and may be exercised when the child could safely be separated from the mother." Margaret C. Onokah, in her BOOK FAMILY LAW, 2002, wrote that: "Under Customary Law, a father has an exclusive custodial right over the children of his marriage. This right extends beyond custody, to "ownership" of

³⁶ Lorretta Favour Chizomam Ntoimo and Favour Chukwunonyerem Ntoimo, 'Customary law in Nigeria favours men over children in custody cases' *The Conversation* (Nigeria, 18 February 2021)

<<https://theconversation.com/customary-law-in-nigeria-favours-men-over-children-in-custody-cases-154420> > accessed 9 March 2023

³⁷ Lorretta Favour Chizomam Ntoimo and Favour Chukwunonyerem Ntoimo

³⁸ Lorretta Favour Chizomam Ntoimo and Favour Chukwunonyerem Ntoimo, 'Customary law in Nigeria favours men over children in custody cases' *The Conversation* (Nigeria, 18 February 2021)

<<https://theconversation.com/customary-law-in-nigeria-favours-men-over-children-in-custody-cases-154420> > accessed 9 March 2023

³⁹ (1989) 3 NWLR (Pt. 109) P. 321 @ 334

⁴⁰ (2016) LCN/8249(CA)

the children. Thus, his right has been described as capable of transmission to his family members. The wife has no such rights over her children. During separation or on dissolution of a marriage under Customary Law, the father has custody of the children of the marriage.

This exclusive custodial right of a father over the children of the marriage is not obtained under statutory marriage. In this latter, the Court determines which of the parents has custody of the children, ‘the paramount consideration being the welfare of the children themselves. This rule of Customary Law hinged on the fact that most Nigerian communities are patrilineal (a few being the opposite matrilineal) because of which children belong to their father’s lineage.’”

Islamic law takes a slightly different approach. It gives custody of minor children to the mother, that is, girls until they marry and boys until they reach the age of puberty and discretion.⁴¹ This is known as the doctrine of "*hizanat*" and is based on the idea that the mother is the natural caregiver and nurturer of the child. It is assumed that women are more suitable to assume custody because they are more experienced in the area of looking after children and are generally more caring and compassionate.⁴² While there is no specific verse in the Quran on the custody of minors, classical Muslim jurists have based this belief on the verse of fosterage (*Ayat al Radha'at*) which says that ‘the mother should breastfeed their infants for two complete years. Therefore, through *Iqtada al Nass*, it is inferred that in the years of infancy, the right of upbringing and fostering the child remains with the mother.’⁴³

Three basic principles have been laid down in deciding the custody of a child according to the decisions of Prophet Mohammad and hadith literature:

1. The mother possesses the priority right of child custody so long as she does not remarry.
2. In a situation where both parents profess different religions, custody of the child should go to that parent who follows the religion of Islam.
3. When the child has gone past the years of minority (7 years) he will be given the option to choose between both parents.

Muslim Jurisprudence considers the father to be the legal and natural guardian with the responsibility of *nafaqa*⁴⁴ while mothers are the custodians until the age where custody reverts to the father or the child is given the choice to choose between both parents.⁴⁵

In Islamic Law, the paramount consideration remains the best interest of the child and the court has the authority and discretion to determine what would be in the best interest of the child. As such, it is believed that it is in the best interest of pre-pubescent children to be placed with their mother while the father remains the legal guardian, providing all necessities for their upkeep.

Certain conditions must be met before the mother’s custody of the child can take effect:

⁴¹ Ridwan Anuoluwapo Imran, ‘Custody Of A Child In Islamic Law: Who And How?’ (*The Nigerian Lawyer*, 18 October 2021) <<https://thenigerialawyer.com/custody-of-a-child-in-islamic-law-who-and-how/#:~:text=Whatever%20of%20divorce%20occasions,children%20until%20they%20reach%20puberty.>> accessed 9 March 2022

⁴² Hon. Justice Mohmed Lawal Omar, ‘Custody and Guardianship Of Children: Shari'a Perspective’ in a paper Presented At The Refresher Course For Judges And Kadis Organized By The National Judicial Institute, Abuja On 11th – 15th March, 2019

⁴³ Ridwan Anuoluwapo Imran, ‘Custody Of A Child In Islamic Law: Who And How?’ (*The Nigerian Lawyer*, 18 October 2021) <<https://thenigerialawyer.com/custody-of-a-child-in-islamic-law-who-and-how/#:~:text=Whatever%20of%20divorce%20occasions,children%20until%20they%20reach%20puberty.>> accessed 9 March 2022

⁴⁴ This is the financial support provided by a husband for maintenance

⁴⁵ Ridwan Anuoluwapo Imran, ‘Custody Of A Child In Islamic Law: Who And How?’ (*The Nigerian Lawyer*, 18 October 2021) <<https://thenigerialawyer.com/custody-of-a-child-in-islamic-law-who-and-how/#:~:text=Whatever%20of%20divorce%20occasions,children%20until%20they%20reach%20puberty.>> accessed 9 March 2022

1. The mother must be of sane mind to be able to carefully guard and protect her child. She cannot take care of her child if she is in ill health
2. The mother is expected to be responsible with no track record of negligence
3. It is expected that the mother is not chronically sick or affected by contagious diseases.
4. She should live in a place where the children can be kept safe from harm or danger
5. She should be of good character with the ability to convey good qualities to her children
6. She is expected to not remarry if not she may have to give up custody of her children.

Allocation of custody may also change based on an alteration of circumstances. Some of those circumstances include:⁴⁶

- a. Where the mother refuses to breastfeed the child during its first year or two years
- b. If she remarries
- c. Where she is negligent in her responsibilities to the children
- d. Where she seeks to relocate to a place where the father may not have access to the children
- e. Where she contracts a contagious disease

If these circumstances are resolved, custody may be restored to the mother.⁴⁷

1.5. Parental Abduction

Each year, many children are subjected to parental abduction as a result of friction between spouses or the tension generated from a custody battle.⁴⁸ Parental abduction usually occurs when a parent without the consent or permission of the other parent and without the legal authority to do so, takes a child from the parent who has lawful custody. This may occur in violation of a custody agreement.

Section 27 of the Child's Rights Act provides for the abduction, removal, and transfer of a child from lawful custody. It provides thus:

1. No person shall remove or take a child out of the custody or protection of his father or mother, guardian, or such other person having lawful care or charge of the child against the will of the father, mother, guardian, or other person.
2. A person who contravenes the provisions of subsection (1) of this section commits an offense and is liable on conviction
 - a) where the child is unlawfully removed or taken out of the Federal Republic of Nigeria
 - i. to return the child to Nigeria, to imprisonment for a term of fifteen years; or
 - ii. with no intention to return the child to Nigeria, to imprisonment for a term of twenty years;
 - b) where the child is unlawfully removed or taken out of the State in which the father, mother, guardian, or such other person who has lawful care of the child is ordinarily resident, to imprisonment for a term of ten years; or
 - c) in any case, to imprisonment for a term of seven years.

The above-stated provision provides for instances of international and domestic child abduction. It suggests that a person having parental responsibility or whose custodial rights have been unlawfully interfered with can come under this provision to seek redress. The extent to which this provision may be enforceable is, however, in doubt.

Though Nigeria is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention), abduction is also a criminal offense under Section 371 of the Criminal Code

⁴⁶ Hon. Justice Mohamed Lawal Omar, 'Custody and Guardianship Of Children: Shari'a Perspective' in a paper Presented At The Refresher Course For Judges And Kadis Organized By The National Judicial Institute, Abuja On 11th – 15th March, 2019

⁴⁷ Hon. Justice Mohamed Lawal Omar, 'Custody and Guardianship Of Children: Shari'a Perspective' in a paper Presented At The Refresher Course For Judges And Kadis Organized By The National Judicial Institute, Abuja On 11th – 15th March, 2019

⁴⁸ Adedayo Debo-Akande, 'Custodial rights: Examining parental abduction under Nigerian law' *The Guardian* (Nigeria, 17 May 2022) <<https://guardian.ng/features/law/custodial-rights-examining-parental-abduction-under-nigerian-law/>> accessed 9 March 2022

. The section provides that a person who kidnaps a child is guilty of a crime and liable to a sentence of 14 years imprisonment.

Conclusion and Recommendation

The frequent prevalence of parental divorce has drawn attention from all across the world. Governmental and non-governmental organisations have both played critical roles in curbing this hazard as a result of the psychological and social problems that lead adolescents to exhibit odd and unguided behaviours. Children and teenagers have no voice in the matter but divorce affects them just as much as it does the parents. Most people who get married have the perception that they will stay married, have children, and age together. However, this is not always the case. The institution of marriage has historically faced many difficulties; many people end up in divorce which has an impact on their children's social behaviour. Thus, there is a need for increased attention on the concept relating to child custody and parental abduction.

A close examination of the focal point of the concept of child custody and parental abduction in Nigeria has shown that there is a lot to be done in the aspect of public enlightenment on the subject matter from both the angle of the child as well as the parents.