

Sveriges ambassad i Abuja
Stockholm : UD, 2009-08-07

Redigerad 131127

Vårdnad av barn i Nigeria

A copy of the Child's Right Act and other Children's Laws are herewith enclosed.

[Den bifogade boken finns att låna på Migrationsverkets bibliotek:
Children an allied laws. Lawlords Publications, juli 2008. - 401 s.

Boken innehåller följande lagar:

- [Child's rights act](#) (lagen finns även i fulltext digitalt)
- Children and young persons law
- Children and young persons (harmful publication) law
- Adoption law
- Trafficking in persons act

CUSTODY RIGHTS IN NIGERIA

In this write up we shall look at the Nigerian law that has to do with the rights of parents to the custody of their

children.

The question we shall attempt to answer is, who has legal custody of the children in this following situations

- A.Children born in wedlock, both parent are alive and are still married;
- B. Children born out of wedlock, the father has recognized the children but the parents and not and have not been married.
- C.Children born in wedlock, the parent have divorced.
- D.Children born in wedlock the father dies; and
- E. Children born in wedlock the mother dies.

There are three distinct laws that are recognized under the Legal System in Nigeria. They are:

- c. Statutory Law
- a. Customary Law:
- b. Islamic Law:

Parent's right to the custody of their children is regulated by the above listed laws.

At this point it is imperative to define certain terms, phrases and acronyms used in this write up.

Definition of terms, phrases and acronyms

- The term "child" is defined in Section 277 of the Child's Right Act 2003 to means a person under the age of eighteen year.
- The Child's Right Act is an Act enacted by the Federal Government of Nigeria in 2003, to provide and protect the right of a Nigerian child and other related matters.
- The phrase "Custody of children" means the control and maintenance of children.
- The Phrase "parental responsibility" is defined in Section 277 of the Child's Right Act 2003 to means the right, duties, power, responsibilities and authority which by law a parent of a child has in relation to the child and his property.
- The term Custom is defined under Section 2(1) of the Evidence Act Cap E 14 Law of the Federation of Nigeria 2004 to mean the rule which in any particular district, has, from long usage obtained the force of law.
- The term Customary Law is defined by the Supreme Court of Nigeria in the case of Zaidan V Mohssen (1973)11S.C. 1 at 21, to mean any system of law not being the common law and not being enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.
- The term Muslim or Islamic Law is defined in Section 11 of the Sharia Court of Appeal Law cap 122 vol. III, Laws of Northern Nigeria to means Muslim law of the Maliki School.
- MCA. This is the acronym for the matrimonial causes Act.
- NWLR. This is the acronym for Nigerian Weekly Law Report.
- FNR. This is the acronym for Federation of Nigeria Law Reports.
- S.C. This is the acronym for Supreme Court Cases.

The term "marriage" is universally accepted to mean the union of a man and a woman. There are 3 recognized types of marriages: statutory marriage, customary law marriage and Islamic law marriage. A marriage may be monogamous or polygamous.

Lord Penzance defined a monogamous marriage in Hyde V. Hyde (1886) LR 1 P & D 130 to means the voluntary union for life of one man and one woman to the exclusive of all others. On the other hand, a

(ii) Islamic Law:

In the Maliki school of Islamic law the parents of a child are jointly entitled to the custody (Hadana) of the child during the subsistence of the marriage.

(iii) Statutory Law:

The rule of customary law stated in sub-paragraph (i) above has been modified by statutory law, which makes the child's interest and welfare the paramount consideration in custody cases.

Under statutory law the custody of children of a subsisting marriage is vested in both parents.

Section 14(1) of the Child's Right Act provides that "Every child has a right to parental care and protection and accordingly, no child shall be separated from his parents against the wish of the child except;

(a) for the purpose of his education and welfare, or

(b) In the exercise of a judicial determination in accordance with the provision of the act in the best interest of the child":

It is only in a situation where a Child's best interest is not guaranteed by the parents for example where the child is subjected to serious abuse by either or both parents that the custody of the child may be withdraw from either or both parents.

B. Children born out of wedlock the father has recognized the children but the parents are not and have not been married.

polygamous marriage is defined as a voluntary union for life of a man and two or more wives. Polygamous marriage is recognized by customary law and Islamic law.

Be that it may, since the crux of this work is the custody of children, and it must be highlighted here that one of the fundamental reason of marriage is for procreation.

CUSTODY OF CHILDREN

We shall take each situation and state the position of the various laws. It is important to point out here that Statutory Law is superior to Customary Law and Islamic Law. It therefore takes precedence over the other two where the provisions of Customary or Islamic Law is seen- as repugnant to natural justice, equity and good conscience.

A. A child born in wedlock, both parents are alive and are still married:

(i) Customary Law.

Under most system of customary law in Nigeria the father has an absolute right to the custody of his children born in wedlock. On the death of the father the right to custody is vested in the male head of the father's family though the mother may have the day to day care of the child.

(i) Customary Law.

Where children are born out of wedlock they become legitimate children of the father by an acknowledgement of paternity by him. Consequently, the father acquires the right of custody

of child. This position of the law may be displaced by the court giving consideration and welfare of the child. Where the child is of tender age and would require the care of the mother, the absolute right of the father would not be enforced by customary law until the child can be safely separated from the mother and returned to the father.

(ii) Islamic Law

Under Islamic Law, where children are born outside wedlock the mother has full custody of them. This is because a father is not allowed to acquire custody of such children and the children are prohibited from inheriting his estate after his death.

(iii) Statutory Law

Under statutory law, either of the parents of children born out of wedlock may acquire their custody. Section 68(1) of the Child Right Act 2003 provides that:

"Where the father and mother of a child were not married to each other at the time of the birth of the child-

(a) the family court established under section 153 of this Act may

(i) on the application of the father, order that he shall have parental responsibility for the child; or

(ii) on the application of the mother, order that she shall have parental responsibility for the child or

(b) the father and mother may by agreement have joint parental responsibility for the child.

In discharging this responsibility, the court would have regard to -

(i) the welfare of the child and conduct of the parent, and

(ii) the wishes of the mother and father of the child.

Consequently the position of Customary law or Islamic Law may be set aside by the court if it is in the interest of the children to do so or if it is the wishes of the parent of the children

C. Children born in wedlock, the parents divorce

(i) Customary Law

Under customary law the father has an absolute right custody of his children born in wedlock after divorcing their mother however, customary law recognizes that the father's absolute right will not be enforced where the child is of tender age and would require the care of the mother.

In that instance, the child is left in the care of the mother until it can safely be separated from the mother and returned to the father,

(ii) Islamic Law

In a divorce situation, the mother is entitled to the custody of the young children unless she re-marries or shows herself unfit for the responsibility. The right to custody last until, in the case of a boy the attainment of the age of puberty, or in the case of a girl until she marries.

At the end of the period of the mother's right to custody, the children has an option as to which parent they decide to live with. Nevertheless the father retains the right to overall supervision aspect of their life.

(iii) Statutory Law.

Custody of children of a broken marriage is usually raised at the presentation of a petition for the dissolution of a marriage. The Court considers the best interest of the child before awarding custody.

Section 71(1) of the Matrimonial Causes act (MCA) Cap. M7, Law of the Federation of Nigeria 2004 provided that; in proceeding with respect to the custody, guardianship, welfare, advancement or education of children of a marriage the court shall regard the interest of those children as the paramount consideration and the court shall make such order as it thinks proper.

The best interest or welfare of children of broken marriages may be the emotional attachment of the child to a particular parent, their physical and moral welfare, and adequacy of facilities such as educational, religious or opportunities for proper upbringing. These factors greatly determine who eventually gets custody of the children. The court is however not guided by any rigid formulae.

In the case of WILLIAMS V. WILLIAMS (1987) 2 NWLR 66, the appellant (former wife) and the respondent (former husband) were married in London in 1963. The marriage broke down and they had been living apart since 1975 (i.e. over 6 years).

There were 3 children of the marriage: 2 boys and a girl. The two boys had been living with the respondent in London since their separation while the daughter had been living with the appellant in Nigeria since their separation and the respondent had not seen her since then. The respondent then petitioned for the custody of the daughter while alleging that he had made several attempts to pay her school fees but the appellant had refused. That he wanted their daughter to school in England like her two brothers and the appellant, as a judicial officer, was always in court leaving their daughter in the care of friends.

In considering the interest of the daughter, the Supreme Court held that sending her abroad for studies was not in her best interest.

There OBASEKI J.S.C (as he then was) said

"For a child of tender years, education outside the proper environment i.e. country of origin is bound to give a distorted view of life and cannot, in the final analysis, be in the best of the child"

The conduct of the parents may also influence the decision of the Court in awarding custody.

In the case *EZEANI ADOLPLUS ANYASO V FIDELA UJU ANYASO* (198) 9 NWLR (PT564) 150, The court held that the father of the child in question cannot be trusted with the upbringing of a child because he has a record bordering on such turpitude as sharing his matrimonial bed with other women, insatiable appetite for drinking in beer parlour and being constantly away from his home in furtherance of his business.

Also in the case of *Ayegba V Ayegba* (1979) 2 FNR 164, the mother of a child, who was a business woman, left her matrimonial home leaving behind the only child of her marriage to the father of the child at a time when the child was one year seven year months old. The marriage was subsequently dissolved by the court, which granted the custody of the child to the father and ordered that the mother should be allowed to visit the child. The mother appealed against this decision on the ground that the child was too young to be separated from the mother. The appeal court held that notwithstanding the tender age of the child, the applicant through her conduct and the absence of any evidence that the child suffers from any physical or emotional maltreatment in the hands of the father and his new wife has failed to show that it is in the interest and welfare of the child to grant her custody.

D. Children born in wedlock, their father dies

(i) Customary Law

Where a child is born in wedlock and the father dies, a male relative of the father retains custody of the child. The mother may however be responsible for the day to day care of the child or children, if she however chooses to remarry; the male relatives of the deceased father may take absolute custody of the children.

(ii) Islamic Law

Under Islamic law children who lose their father remain under the custody of their mother. The right to custody last until, in the case of a boy the attainment of the age of puberty, or in the case of a girl until she marries.

At the end of the period of the mother's right to custody, the boy(s) have an. option to live with the male relatives of the father.

(iii) Statutory Law

Under statutory law, on the death of the father, the right to custody is vested in the mother of the children, except where it is shown that she is unfit to take care of the child.

This is provided for under section 83 of the Child's Right Act 2003.

E. Children born in wedlock, the mother dies

(iv) Customary Law

Where a child is born in wedlock and the mother dies, the father of the child retains custody of the child however where the child is of tender age, a female relatives of the mother or father may be allowed temporary custody of the child.

(v) Islamic Law

Under Islamic law children who lose their mother remain under the custody of their father.

(vi) Statutory Law

Under statutory law on the death of the mother, the father is entitled to the custody of the children, except where it is shown that he is unfit to take care of the child. This is provided for under Section 83 of the Child's Right Act 2003.

SUMMARY

The father and mother of a child both have right to custody of their children regardless of the circumstance of their birth or the circumstance they find themselves thereafter. The parents both have an equal right to apply to the court asking for custody of their children. What the court normally considers before awarding custody is;

(a) The best interest of the child;

(b) The conduct of the parents.