

**AFE BABALOLA UNIVERSITY ADO EKITI,
EKITI NIGERIA**

College of Law

Course Title: **Family Law in Nigeria**

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Topic 7: CUSTODY OF CHILDREN

Module: 2

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OUTCOME

At the end of module 2 you will be able to:

- Understand **the duty of the court in determination of the best interest of the child**
- Explain and discuss the **main types of custody orders** the court may make

1. The duty of the court in determination of the best interest of the child

In the determination of the interest of the child in making a custody order, the court will take into consideration a variety of facts such as, but not limited to:

- the ages/gender of the children;
- The arrangements made for their
 - Accommodation,
 - education,
 - Welfare,
 - general upbringing,
- The conduct of the applicants.

a. Age and gender of the Child

a. **Age** : the fact that a child is of a tender age does not necessarily mean that its custody will always be granted to the mother, the court will do so **only if it is in the best interest of the child.** (**Nanna v. Nanna (2006) 3 NWLR (Pt. 966) 1 at 37 -38**)

The Law does not lay down any rule or principles which the courts are bound to observe. However, whether a court will follow the general belief that it is better that the custody of very young children are left for their mother will depend on the circumstance of each case (**in Re: S(1958) 1 WLR 391; see also Re: F (1969) 2 Ch. 238**)

b. Gender of the Child

- It is generally believed that girls should be in the care of their mothers and boys with their fathers (**W. v. W & C(1968)1 WLR 1310**).

Note:

- that there is no rule of law in this respect which the Courts are bound to observe.
 - It will depend on the circumstance of the case.
- In **Oyewolo V. Oyewolo (1987)2 NWLR(Pt. 56) 239**, both parents applied for the custody of the two male children of the marriage aged ten and nine years. The children had lived with their mother for two years since their separation. 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 him they will one day long for it”*.

b. Gender of the Child contd

On appeal Nnaermeka-Agu, J.C.A. (as he then was) agreed with the opinion of the trial Judge that boys should be left to their father because in the Nigerian context they rightly belong to his family.

- If the Court us a general rule considers that male children should be with their fathers, this may not be in the interest of the child.
- Assuming the father re-marries, there is no assurances that the child will have the same love, care and attention from the stepmother and even the father.
- Irrespective of the sociological background, **the interest of the child must be paramount.**
- adhering to the rule means that there is no equality between the parents as to custody.

c. The wishes of the Child

- The judge in a custody proceeding, may interview the child, whose custody is in question, privately, particularly if the child has attained an age when he/she is capable of expressing his/her **wishes (Adu v. Adu(1978)4 CCHCJ569)**
- The child's view may also emerge from welfare reports and will be taken into account. The court usually treats the wishes of the child with caution as this may be influenced either by his age or the parents (**Re:A(an infant)(1955)1 all E.R 202;(1955) 1 WLR 465.**)
- In the case of **Odogwu v. Odogwu (1992)2 NWLR (Pt.225) 539 at 560; Ojo v. Ojo (1969)1 All NLR 434**), the Supreme Court held 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 informal hearing, the children's view could be assessed along with those of the parents.

d. Education and Religion

- The Court usually gives consideration to the advantages and disadvantages of any arrangement for the education and religion of the child. Matters of religion affect the welfare of the child, hence courts are concerned to ensure that whatever decision is reached in this respect reflects the **child's best interest**.
- **If a parent shows that he is able to afford overseas education for the child, could this be in his favour in the court considering custody?**
- This would seem to depend on the facts of each case. In Williams v. Williams (Oputa, J.S.C. at page 91-92: and Section 76 of the Child Rights Act 2003), the court held that an education (abroad) that alienates a child from his roots, its soundness notwithstanding, is to be viewed with a suspicious eye by the court in custody cases. A Nigerian should be trained to live in Nigeria and not to become an expatriate in his own country”

d. Education and Religion continue

‘Education or the opportunity for education is in the best interest of a child if it is in a proper environment. For a child of tender years, education outside the proper environment, that is country of origin, is bound to give distorted view of life and cannot, in the final analysis, be in the best interest of the child’.
(Hon Just. Obaseki, J.S.C)

e. Conduct of the parties

- The conduct of the parents to the child is a matter to be taken into account in determining what the best interest of the child is. However, a parent may not be deprived of custody merely because of his or her conduct which might have contributed to the break down of the marriage.

Remember: **The Court's discretion must not be exercised as a punishment for one party or a reward for the other party.**

In ***Williams v. Williams* ((1987) 2 NWLR(Pt 54) 66; *Brewer v. Brewer* (1953)8 CLR2)** , the Supreme Court held that the adultery of a party is not necessarily a reason for depriving that party of custody unless the circumstances of the adultery make it undesirable. The court further held that, although the welfare of the infant is the first and paramount consideration, it is not the sole consideration as the conduct of the parties is a matter to be taken into consideration too.

e. Conduct of the parties continue 1

- In ***Okafor v. Okafor* ((1976)6 CCHCJ 1927)** the court refused to grant custody of the child of the marriage to a mother who had not seen the child physically for almost six years (saw the child only through photographs')
- Also in ***Kolawole v. Kolawole* (Suit No. HCL/45D/81 of 1/7/82 (Unreported))** , the court refused to grant custody to a mother who had once tried to kill the child.

Thus, conduct of a party may not be totally irrelevant although the welfare of the child is the paramount consideration. This is particularly so if the parties have made equally good arrangements for the education, general well-being and upbringing of the child. In such a case, the misconduct of one party might tilt the balance in favour of the other.

f. Adequacy of arrangement for the child

- Where a party seeks the custody of a child of the marriage, he is required to set out the proposed arrangement for accommodation, welfare, education upbringing and other arrangement of the child. Unless the party set out these facts, the court may be reluctant to consider the question of custody.
- NOTE: that the mere fact that a spouse has material wealth cannot *per se* be regarded as being in the best interest of a child and to provide him a better accommodation may also be decisive. (The party who is in a better position to offer the child good accommodation could be preferred but this is NOT the overriding consideration.)
- In ***Dawodu v. Dawodu ((1976) CCHCJ 1207 and in Oduyoye v. Oduyoye (1979)7-9 CCHCJ 209)*** , the court refused to grant custody to a mother who had no home of her own private means to bring up the child because it was not in the best interest of the child to do so.

g. Medical and psychological factors

- If custody of a child has been with a parent, for a considerable period of time, care must be exercised in change of the custody as this may result in psychological harm to the child. In such a case, the court may order that the custody remains in the parent.

In *H v H and C*(1969)1 All E.R. 262, the court awarded custody to the father with visiting access to the mother, The court held that it would be very upsetting to remove the child suddenly from a house which he was used to.

h. Nationality of parent

The courts would not discriminate between a Nigerian or non-Nigerian parent in award of custody. The primary consideration is the welfare of the child. In *Oloyede v. Oloyede (1975) 1 NMLR 181*, the court held that the fact of the mother being a non-Nigerian (Irish) does not justify awarding custody to the father whom the court found unfit.

i. Equality of parents

- Equality of parents presuppose that either parent may be entitled to custody of the child. The Court is not entitled to prejudge which party will have custody. It must consider all relevant circumstances that best serve the interest of the child.
- **The paramount consideration of the courts must always be the best interest of the children.**

2. Main types of custody orders

There are various custody orders which the court may make depending on the circumstances of the case.

The court shall always have regard to the best interests of the child as the paramount consideration.

a. Divided custody:

This is a situation where the child lives with each parent part of the year with reciprocal visitation privileges. At the time the child is in custody of one of the parents, he has complete control over the child.

b. Split custody:

- In the case of a split custody the court grants custody to one parent and care and control to the other. The result is that the parent vested with custody has power to control major decisions of the child's future while the other parent controls the day-to-day physical bringing 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 (physical custody) to one of them.
- In ***Abayomi v. Abayomi* ((1974) 12 CCHCJ 1877)** the court made a split order granting legal custody of a little girl aged to the father (petitioner) and care and control to the mother.

c. Joint custody

- Joint custody involves both parents sharing responsibility and authority with respect to the children. This may involve joint 'physical' custody. The effect of this is that both parents are involved in the physical sharing of the child's life such as education, medical care, entrainment arrangements etc.
- This is in contrast with split custody. It should be noted that "joint" custody does not necessarily mean equal or fifty-fifty sharing of time since each case depends on the child's age, parent's availability and desires and other factors are taking into consideration by the courts.

c. Joint custody continue

- Before an order of joint custody is made, the court must ensure that the parents would co-operate with each other otherwise, it will be an order in futility.
- In the case of **Williams v. Williams ((1987)2 NWLR (Pt. 54)66)** , there was a reasonable prospect that the parents would cooperate. 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 cost of the girl's education by way of settlement of bills.

d. Temporary custody

- This is where custody of a child is awarded to a parent temporarily pending the outcome of a separation or divorce proceedings.
- This power can be exercised where in a matrimonial proceeding, a dispute with respect to the 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 .(**Order XIV Rules 21&22 Matrimonial Causes Rules**).
- 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. . (**Order XIV Rules 20(1), 21, 23 Matrimonial Causes Rules**)

e. Third party custody

Where the Court considers it desirable to do so, it may place the child under the custody of a third part –a person other than a party to the marriage (**section 71(3) matrimonial causes Act**) either permanently or as an interim measure, if it considers this to be in the child's best interest.

The court will make this order:

- Where it is obvious that neither of the parties to the marriage is genuinely interested in the welfare and upbringing of the child.
- Where neither of the parties to the marriage have applied for the custody.
- Where in the opinion of the court neither of the parties to the marriage is a fit and proper person to have custody of the child.

QUESTIONS AND ANSWERS