

AN APPRAISAL ON THE PARTICIPATION OF CHILDREN IN
DIVORCE AND CUSTODY PROCEEDINGS IN NIGERIA

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ABSTRACT

The alarming rate of divorce in present times is a cause for great concern as children of the said marriages are the ones mostly affected due to their vulnerable nature. This is because separation from either parents may cause psychological problems and uncertainty of the future because of the absence of a stable and healthy family relationship. This paper examined the concept of custody by identifying the parameters used by the court in awarding custody. It further evaluated the participation of a child in the divorce/custody proceedings. The paper finds that the participation of children in the divorce/custody proceedings is on a minimal level as they are the hidden party. They are usually not legally represented as they are not included as parties to the proceedings. This paper further finds out that without judges actively involving children by ascertaining their views and attaching significant weight to them, decisions on custody may be made without a huge understanding of the individual child that comes before the court. The paper therefore advocates that the best interest of a child could be achieved if the child is allowed to actively participate in the divorce/custody proceedings as enshrined in international and domestic laws.

Keywords: Custody, Participation, Best Interest Principle, Family Law.

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1. INTRODUCTION

The effects of divorce on the individuals and the society at large is such that cannot be overlooked, as it has become a social problem all over the world.² It has become endemic to the society as it disrupts the family life cycle. The records of court seems to suggest that the rate of divorce is on the high side³ which is fueled with a ghost of uncertainty of where the children of the marriage end up in the battle, depending on who proves what at the end of the day. Researches all over the world has continuously revealed that children of marriages are the ones mostly affected in the event of divorce due to their vulnerable nature.⁴ They are deprived of their right to have a stable and healthy family relationship.⁵ Parental love and support are vital keys to the physical and mental development of a child's growth⁶. The negative effect of divorce on children could result into sadness, anger and resentment. Consequently, since custody deals with the general well-being of a child involved in a divorce; will it not be important to allow such child who is the subject matter of the custody dispute to exercise his/her right to participate in the proceedings that directly affects him/her.

2. THE CONCEPT OF CUSTODY

Custody is a germane issue in divorce proceedings because it is a category of and a segment of a child's wellbeing.⁷ It is a vital tool which deals with the child's welfare.⁸ The Matrimonial Causes Act and the Child's Right Act did not define the word "custody", but it is defined in the Black's Law Dictionary as "the care, control and maintenance of a child awarded by a court to a responsible adult".⁹ Custody was further defined in *Otti v Otti*¹⁰

² Esther Archibong and Abia R.P, 'Divorce: It's Socio-Economic Consequences on Family Life in Calabar Municipality C.R.S. Nigeria' (2014) 4(3) International Journal of Physical and Social Sciences 2.

³ Emmanuel Okogba, 'Lawyers decry high rate of divorce' *Vanguard News* (Abuja 4 April 2017) <<https://www.google.com.ng/amp/s/www.vanguardngr.com/2017/04/lawyers-decry-high-rate-divorce/amp/>> accessed 28 November 2018.

⁴ Carmicheal K, 'New Directive, Divorce and Administrative Law' <<https://www.cf-cj-fcjc1999.org>> accessed 4 January 2019.

⁵ Gage-Brandon A, 'The Polygny Divorce' (2002) 54(2) Journal of Marriage and Family 285-287.

⁶ *Ibid* at 5.

⁷ Chinazor Umeobika., 'Evaluation of the rights of the child to participation in divorce/custody matters in Nigeria' (2018) 9(2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 123.

⁸ *Ibid*.

⁹ Bryan Garner., *Black's Law Dictionary*, (9th edn, West publishing 1990) 442.

¹⁰ [1992] 7 NWLR 252.

“as the essential control and the preservation and care of a child physically, mentally and morally. It also includes the responsibility for a child as regard his needs, food, clothing instruction and the likes.....”

3. PARTICIPATION

Participation as a term means more than just “taking part or being present”, it connotes having a right to be consulted and allowed to influence certain decision and actions pertaining to one’s interest.¹¹ When applied to custody proceedings, it connotes a process where all the stakeholders are involved and the child is afforded the opportunity to make an informed decision that affects his/her lives.

4. THE BEST INTEREST PRINCIPLE

The best interest principle is the standard used in awarding custody to either of the parents, and the child which is the subject matter to be determined is rarely given an opportunity to be heard on his/her wishes. Section 71(1) of the MCA requires the court in matters of custody and welfare of a child, to regard the “interests of the children as the paramount consideration”. In illustrating this, *Williams v Williams*¹² is often cited wherein the court in treating the best interests of the children held thus:

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 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.

It is worthy to state that the court in its pronouncement noted that the court is dealing with the lives of human beings. In such instance, the child should be afforded the opportunity to participate in the proceedings as this will ensure that the child’s wellbeing is met. It was observed that the court

¹¹ Kirby P and Others., ‘Building a Culture of Participation: Involving Children and Young People’s Participation in Policy, Service Planning, Delivery and Evaluation-Research Report’ (Department of Education and Skills 2003).

¹² [1987] 2 NWLR 66.

relied more on the paramount consideration which arguably implies that the overriding consideration is the wellbeing of the child.¹³ In addition, several other considerations were taken into consideration by the court in assessing custody under the welfare rule.

By providing for the best interest principle in Section 71 of the MCA an attempt is been made to shift the overriding consideration beyond the immediate wishes of the disputing parties to the more salutary and lasting needs of the offsprings.¹⁴ The principle places an obligation on the court in ensuring that the child's best interest is placed before the disputing parties. When dealing with matters of custody, the equality of the right of the parents should be the basic premise amongst other criteria which the court should consider when determining the interest of the child.¹⁵ A court is not in a position to prejudge which party will have custody before considering the interest of the child.¹⁶ Furthermore, Article 3 of the United Nations Convention and Rights of the Child (UNCRC) provides for the best interest of the child. The convention was designed to ensure that decision making for a child is not determined by the interest of others, but that such decision should be undertaken from a child-centred approach.¹⁷ The principle applies to all policies and practices that affects children and that in cases of conflicts, the resolution should reflect the best interest of the child.¹⁸

5. PARAMETERS FOR GRANTING CUSTODY

In determining questions of custody, the court besides considering the interests of the children to be paramount, pays regard to some other factors which are as follows:

¹³ Fortune Ihua-Maduenyi, 'Considering the Rights and Best Interests of a Child in a Multi-Cultural Civil Society with Special Reference to Nigeria' (2008) *Faculty of Law University of Leicester* 113.

¹⁴ Bolaji Owosanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 *Family Law Quarterly* 406.

¹⁵ Folashade Aguda-Taiwo 'Guardianship and Custody of Children; Customary Perspective' (A Paper Delivered at the Refresher Course for Judges and Kadis at the National Judicial Institute on the 11th of March 2019).

¹⁶ Ibid

¹⁷ Hadiza Okunrobo, 'Participation Rights of Adolescents in Accessing Health Care in Nigeria' (Unpublished Thesis for the award of Mphil in Obafemi Awolowo Univeristy Ile-Ife, 2017) 31.

¹⁸ Ibid.

5.1 The Age and Sex of the Children

This factor is usually taken into account by the courts when determining the child's best interest in custody matters. Often times, statements are usually made that it is best for children of tender age to remain in the care of their mothers especially the female ones.¹⁹ It is believed that the mother is imbued with the capability of taking care of the young children and to exhibit motherly care to them than the father. In *Odogwu v Odogwu*,²⁰ the court held that it is generally presumed that a child of tender years will be happier with the mother, and this presumption would only be vitiated if there is clear evidence to the contrary such as an unethical behaviour of the mother, contagious diseases, mental disorder and callousness to the child which are matters to be tried. In other words, the court is more likely to grant custody of a young child to the mother where there is no evidence of the above.

As regard the sex of the children, the importance of sex arose in the case of *Uzochukwu v Uzochukwu*²¹ where the appellate court Per Ekanem JCA held thus:

As regards the custody of the two children of the marriage, I note that the first child Victory Nwachukwu Uzochukwu a male was born on 31/5/2000 and is therefore 14 years old. The second child a female was born on 12/9/2003 and is therefore 11 years old. The paramount consideration in award of custody is the interest of the children. See section 71(1) of the Mca. Both parents appear to be equal to the task of maintaining the children and are ready to give affection and proper guidance to the children. It is my view that the interest of the male child who is 14 years old will be best served by granting custody to the father who will naturally be able to provide strong guidance for the teenage.

It has been argued that different factors influence different judges, as there are no fixed or definite guidelines as regard the factors judges may consider because everything is a question of fact.²² The courts have

¹⁹ E.I., Nwogugu, *Family Law in Nigeria* (3rd edn, Heinemann Education Books Ibadan 2001) 254.

²⁰ [1992] LPELR 2220 (SC).

²¹ [2014] LPELR 24139 (CA).

²² Owasanoye (n13) 414.

sometimes gone too far in allowing the males grow up with their father, and the females grow up with their mother without a holistic consideration of all factors²³. This is due to the fact that there is no benchmark or yardstick used in ascertaining whether the decision made by the court is actually in the best interest of the child.

5.2 The Wishes of the Child

Often times the court may take the child into confidence to ascertain his/her wishes. This usually happens when the child has attained the age of reasoning. If the child is quite younger, the court may resort to welfare reports to determine where the child's interest will be protected. In the case of *Odogwu v Odogwu*,²⁴ the Apex court was of the view that the child's wishes could be consulted by the court when determining what order should be given. It further held that the custody hearing could be postponed to the judge's chambers where in an informal proceedings the children's preferences could be assessed along with those of the parents.

Uzodike²⁵ opines that children's views are hardly sought in many traditional African systems, and that judges have exhibited that where the children are quite matured, they could be summoned into the judge's chambers to express their own wishes. However, it should be noted that the courts are not obligated to adhere with such preferences as it may be influenced by either of the parents. It was further noted that in practice, there are plethora of judicial authorities where the fathers have kicked against their offsprings for preferring to live with their mothers hence the burden of taking care of those children lies with the mother.²⁶

Where a custody proceeding is before a judge, the court should endeavor to ascertain the wishes of such a child/children irrespective of the age so long as the child understands the question put to him, and can give rational answers to it. Although, the judge is not obligated to comply with the child's desires where it would be detrimental to the long term interest of the child. However, the judge is duty bound to weigh such wishes alongside other factors in reaching its decision.

²³ Ibid

²⁴ [1992] 2 SCNJ 3575

²⁵ Nkiru Uzodike, 'Custody of Children in Nigeria: Statutory, Judicial and Customary Aspects' (1990) 39(2) *International Comparative Law Quarterly* 424.

²⁶ Nkiru Uzodike (n24).

5.3 Conduct of the Parties

This is one of the determinant factors usually considered by the courts when granting custody. Conduct in this regards means bad or immoral behaviour towards the offsprings or the other party to the union.²⁷ In *Okafor v Okafor*,²⁸ the court declined awarding custody to a mother who had not physically seen the child for nearly six years except through pictures. Likewise in *Oduneye v Oduneye*,²⁹ the petitioner sought custody of the three children of the marriage. The wife who also sought for custody of the children disclosed in her testimony that the petitioner from previous marriages had 13 other children and three of them had become pregnant between 15 and 16 years of age. The court dismissed the petitioner's application and awarded custody of the three children to the mother.

In many cases, the courts have held that the fact that a party was liable for the adultery committed does not necessarily deprive such person custody, unless the condition of the adultery makes it pleasing.³⁰ Umeobika argues that where one of the parties continues to commit acts of wrongdoing and moral depravity, these actions may be indicative of the inadequacy of that party to be trusted with the care of the child.³¹ She cited the case of *Ihonde v Ihonde*³² where both parties sought custody of the only offspring of the union. The testimony before the court was that the mother abandoned the boy when he was 10 months old, and that between that time and when the matter came up for hearing in court which was about four years, the mother saw the boy only once. The trial court in its decision observed as follows:

It was no surprise therefore that when the parties, their counsel and the child appeared before me in chambers, the child hardly recognised the petitioner as his mother, a most pathetic situation for any mother to find herself. Persistent and gentle requests by me, in the presence of all the parties, for the child to go to his mother and kiss her were turned down and the boy clung steadfastly to his father, the respondent. One could readily see from this that there is no

²⁷ *Adams v Adams* [1971] 2 All N.L.R.

²⁸ [1976] 6 CCHCJ 1927.

²⁹ [1976] 2 CCHCJ 85.

³⁰ Per Obaseki Jsc in *Williams v Williams* [1987] 2 NWLR 66.

³¹ Chinazor Umeobika (n6) 130.

³² Suit No: WD/85/70 (Unreported Judgment of the High Court of Lagos State, Delivered 17 April 1972).

iota of any filial affection towards the petitioner from her son. It is not unlikely that as the child grows up he will get to know his mother better, and, I think, more intimately. The question now is whether it would be in the paramount interest of the child that he should be committed to the care and protection of a mother who he had seen only once, perhaps cursorily, during the past four years the mother having deserted him at the tender age of ten months.

It was observed that the court granted custody to the father, and that the trial judge was proactive as he observed the conduct of the child towards the parents which helped the court in forming its decision on the award of custody.³³ The decision made by the court was in the child's best interest because the court was opportune to study the countenance of the child towards the mother. This is the essence of enabling children to participate in custody proceedings. Although the child in this instant case was of tender years, but the judge deemed it fit to invite the child, his parents and their respective counsels into his chambers before making his order of custody. The court was able to study the attachment or the bondness of the boy with his primary care giver i.e. the father before granting custody to him.

5.4 Adequacy of Arrangements made by the Parties

The provisions made for the children by the party seeking custody is also taken into cognizance by the courts. These provisions include the welfare, housing, schooling and growth of the children of the marriage. If the party fails to set out these facts, the court will be reluctant to consider the question of custody as it can only adjudicate on what is presented before it.³⁴ In *Adeparusi v Adeparusi*,³⁵ the appellate court declined to grant custody of the child to the petitioner and the respondent on the grounds that they both failed to make adequate plans and arrangement on behalf of the child. The case was therefore transferred as a de-novo to be tried by another judge.

Similarly in *Damulak v Damulak*,³⁶ the appellant in this case sought custody of the second child of the marriage who was 9 years of age. The appellate Judge Aderemi JCA declined granting custody to the appellant

³³ Chinazor Umeobika (n6) 130.

³⁴ E.I., Nwogugu, (n18) 256.

³⁵ [2014] LPELR 41111 CA.

³⁶ [2004] 8 NWLR 874.

on the ground that the arrangements made for the child by the appellant were inadequate. The court in its decision held that:

An order of custody for the child of the marriage must necessarily postulate that there is on ground adequate arrangements for the sound education as well as those for the physical and mental welfare of the said child. Custody of the child of the marriage necessarily concerns not only the control of the child but also carries along with it all-important implication of the preservation and care of the child's person, morally, physically and mentally.

The above case law revealed the importance of this factor. Furthermore, where the court is of the view that proper and suitable arrangement have not been made for the welfare and upbringing of the child, the court will not award custody to the party seeking for it as the child's interest is always of utmost consideration.

5.5 Equality of Parents

Section 71(1) of the MCA recognizes the equal rights of parents when the issue of custody arises. The court is not in a position to prejudge which party would be granted custody before considering the interest of the child.³⁷ In *Williams v Williams*,³⁸ the Apex court held that as regard the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows a father, and the rights and authority of a mother and father shall be equal and exercisable. Equality of right is a basic premise upon which a court considers custody cases.

However, in the case of *Dsd v Sera Igwalah & Bolaji Philips*,³⁹ the trial magistrate without balancing the equal rights of both parties prejudged the father with whom the girl had maintained a stable life over the years by granting custody to the mother on the basis of sex. With due respect, the trial magistrate was in error to have granted custody to the mother based on the sex of the child. It is settled that a mother can show tender love and care to a child, however in this instant case since the child had been

³⁷ <<https://churchfields-solicitors.com/wp-content/uploads/2015/06/A-RESEARCH-INTO-THE-ISSUES-OF-CHILD-CUSTODY-AND-PRACTICE-IN-OUR-COURT-SYSTEM-IN-NIGERIA.pdf>>. accessed 10 January 2021.

³⁸ *Williams v Williams* [1987] 2 NWLR 66.

³⁹ Suit No: Misc/Mcy/46/114 (Unreported Judgment of the Yaba Magistrate Court of Lagos State).

attached with the father, the trial magistrate ought to consider the interest of the child before making its decision as this change in custody could be detrimental to the said child.

5.6. Emotional and Psychological Factors

The courts usually act with caution where it is perceived that a change in the custody of a child may result into a psychological harm. This mostly occurs where the child has been emotionally attached to a parent and has been in the custody of the said parent for a considerable period of time.⁴⁰ Children who enjoy relationships of intimacy and security with their closer parent in the first three years are more likely to be adventurous than those who are not. They are usually independent, friendly and intelligent, and they relate better with their peers.⁴¹ In *H v H & C*,⁴² the court granted the father custody with visiting rights to the mother as it would be depressing to abruptly remove the child from a house with which he was acquainted with, as this may create a psychological imbalance in the child.

6. CHILDREN PARTICIPATION IN CUSTODY

Children's participation in decision making in family law is relatively a recent development.⁴³ Historically, children were seen as objects of concern who do not possess the required capacity to participate in family matters as they need protection from been involved in their parents' disputes.⁴⁴ The assumption was that if children were exempted from the post separation decision-making, they would be protected from the chaos of their parents' matrimonial breakdown.⁴⁵ It was assumed that parents were in a better position to know what it is in their child's best interests, hence the views of the child can be adequately represented by them.⁴⁶

⁴⁰ <<https://churchfields-solicitors.com/wp-content/uploads/2015/06/A-RESEARCH-INTO-THE-ISSUES-OF-CHILD-CUSTODY-AND-PRACTICE-IN-OUR-COURT-SYSTEM-IN-NIGERIA.pdf>>. accessed 10 July 2019.

⁴¹ Ibid.

⁴² [1969] 1 ALL ER 262.

⁴³ Rachel Birnbaum, 'The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review' (Family, Children and Youth Section, Department of Justice Canada 2009) 1. <<https://www.justice.gc.ca>> accessed 4 November 2019.

⁴⁴ A.,Graham, and R., Fitzgerald, 'Taking Account of the "To and Fro" of Children's Experiences in Family Law' (2005), Morrow V and Richards M, 'The Ethics of Social Research with Children: An Overview' (1996) 10 *Children and Society* 934-944.

⁴⁵ Smart Carol. 2002. 'From Children's Shoes to Children's Voices' (2002) 40(3) *Family Court Review* 307-319.

⁴⁶ O'Quigley Ann, 'Listening to Children's Views: The Findings and Recommendations of Recent Research' (York: Joseph Rowntree Foundation 2000), Timms Judith, 'The

Researches have increasingly shown that not listening to the views of the children may cause more harm than good,⁴⁷ and that meaningful participation in custody proceedings protects them when family breakdown puts them at risk.⁴⁸ It has been argued that children have much to contribute to the discussion about divorce and family change such as what it is like, how to cope and what it means to them.⁴⁹ It has been suggested that instead of excluding children, “we may have a lot to learn about divorce from children if we suspend the presumption that they are damaged goods in need of protection”.⁵⁰

Participation however does not necessary in all cases confer the child the right to be the main decider, nor do children want to exclude their parents and other adults from the process.⁵¹ Each level of participation is dependent on the decision involved as well as the capacity of the child. Participation being acknowledged as a multifaceted phenomenon may consist of a wide range of activities that differs in form and style at different ages for children. These may include seeking information, expressing the desire to learn at a very tender age, forming views and expressing ideas, taking part in activities and processes, being informed and consulted in decision-making, initiating ideas, processes, proposals and projects, analyzing situations and making choices, respecting others and being treated with dignity.⁵² Whether a child effectively participates in the proceedings is dependent on several factors which includes the child’s evolving capabilities, the openness of parents and other adults to dialogue and to learn from the children. It also depends on the social-cultural, economic and political context.⁵³

silent majority – The Position of Children Involved in the Divorce and Separation of their Parents’ (2003) 9(2) *Child Care in Practice* 162-175.

⁴⁷ Joan Kelly, ‘Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice’ (2002) 10 *Virginia Journal of Social Policy & the Law* 129–163, Lansdown Gerison, ‘Promoting Children’s Participation in Democratic Decision-Making. (UNICEF Innocenti Insight 2001) <<https://www.unicefirc.org/publications/pdf/insight6.pdf>>. accessed 20 April 2019.

⁴⁸ Amato Paul, ‘Children of Divorce in the 1990’s: An Update of the Amato & Keith Meta-Analysis’ (2001) 15 *Journal of Family Psychology* 355–365.

⁴⁹ Smart C, Wade A and Neale B, ‘Objects of concern? Children and divorce’ (1999) 11(4) *Child and Family Law Quarterly* 365-376.

⁵⁰ Ibid.

⁵¹ Hadiza Okunrobo (n16).

⁵² Ibid.

⁵³ UNICEF: The State of the World’s Children 2003 - Child’s Participation 5 <<https://www.unicef.org/publications>> accessed 4 November 2019.

Notably, the participation of children in family law decisions in many jurisdictions has been considered to be of utmost importance in the determination of decisions made on their behalf.⁵⁴ This right to participate is evidenced in policy, legislation as well as in case laws internationally.⁵⁵ At the international level, the obligation of each state in considering children's view is reflective under the United Nations Convention on the Rights of the Child. The Convention states thus:

State Parties shall assure to the child who is capable of forming his or her own views to the right to express those views freely in all matters affecting the child, the view of the child been given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedures of national law.⁵⁶

The above provision of Article 12 is in accordance with that of Article 9(2) of the UNCRC which provides that "all interested parties' shall be given an opportunity to participate and make their views known in legal proceedings pertaining to child custody".⁵⁷ This particular provision on child custody includes the children themselves. This is premised on the fact that in child custody proceedings, the child is an interested party.⁵⁸ In other words, the child has the automatic right to be a party in a case where he/she is the subject matter, the views of the child should be heard and considered by the court, and there should be an independent counsel for the child who shall be responsible in ensuring that the best interest of the child is achieved.⁵⁹

⁵⁴ Carol Smart, 'From Children's Shoes to Children's Voices' (2002) 40(3) *Family Court Review* 307-319, Nicola Taylor, 'What do we know about involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20(2) *Australian Journal of Family Law* 154-178.

⁵⁵ N Taylor and others, 'International Models of Child Participation in Family Law Proceedings following Parental Separation/Divorce' (2012) 20 *International Journal of Children Rights* 645-673.

⁵⁶ Article 12(1) of the Convention on the Rights of the Child.

⁵⁷ Chinazor Umeobika (n6).

⁵⁸ Ibid.

⁵⁹ Chinazor Umeobika (n6) 124.

Nigeria is a signatory to the UNCRC and the provisions of the UNCRC is domesticated in the Child's Right Act 2003. In the Constitution of the Federal Republic of Nigeria, matters concerning children protection is neither in the exclusive or concurrent list, hence each States is to ratify and pass the Child's Rights Law for it to be applicable.⁶⁰ However, most states in the Northern part of the country have failed to enact the law because of their religious customs and beliefs. Another challenge to this legislation is the lack of implementation even in the States where it has been domesticated.⁶¹ This is because most of the provisions of the law are documented but not complied with. This challenge limits the enhancement of child participation as enumerated in the Act.⁶²

The Child's Right Act provides that the child has the right to be represented by a legal practitioner and to free legal aid in the hearing and determination of any matter concerning the child.⁶³ It further provides that the court shall be conducive to the best interest of the child and shall be conducted in an atmosphere of understanding, allowing the child to express himself and to also participate in the proceedings.⁶⁴ The Act also provides that in every action concerning a child whether undertaken by an individual, public or private body, institutions or service, court of law or administrative or legislative authority, the best interest of the child shall be of primary consideration.⁶⁵ However, the Child's Right Act is not applicable to matrimonial proceedings.

The Matrimonial Causes Act provides that in custody proceedings, the interest of the child should be of paramount consideration. The wishes of the child is also one out of the factors to be considered by the court when dealing with custody proceedings although the court is saddled with the discretion on the weight to be given to the children's view.

In practice, the participation of a child is on a minimal level as the judge hardly consider the views/desires of the child. The court takes into account others factors such as the conduct and fitness of the parents, adequate arrangements made for the children etc. The child is not formally represented by a legal practitioner, and the view or wishes of the child is

⁶⁰ Ibid.

⁶¹ Chinazor Umeobika (n6) 125.

⁶² Ibid.

⁶³ Section 155, Child's Right Act, LFN 2004.

⁶⁴ Section 158, Child's Right Act, LFN 2004.

⁶⁵ Section 1, Child's Right Act, LFN 2004.

seldomly ascertained by the judge. Furthermore, the court hardly make use of a welfare report which would have assisted it in making its decision. This is premised on the fact that Section 71(2) of the Matrimonial Causes Act does not make it compulsory for the court to rely on it. The order of custody granted by the court is mostly derived from the evidence given by the parents, as well as the oral and written submissions canvassed by counsels representing each of the parents. The right of the child to participate by seeking the views of the child is of utmost importance as it would assist the court when making its decision without basing the decision on the sole evidence of the parents. It is submitted that children are becoming more sensitive hence can easily respond to situations going on within their environment. Affording them the opportunity to voice out their views which should be considered with other factors will help in ensuring that the child's best interest is attained.

In the case of *Buwanhot v Buwanhot*⁶⁶ the trial court in awarding custody to the respondent took into consideration the wishes of the 1st child of the marriage who testified on behalf of his other siblings as well other factors. The child in his evidence testified that his step mother and her sisters humiliate and maltreat them whenever they go to their father's house for holidays, and that they are deprive of basic items such as toiletries. He stated that he preferred to stay with his mother i.e the respondent and have peace of mind, than to stay with his father and be given all the money he needs yet experience no peace nor happiness.

From the testimony of the child, it can be said that custody does not only deal with the luxurious things of life like money, clothing, housing etc. it goes further to the happiness and peace of mind of the children concerned. In the above mentioned case, the court granted custody of the children to the mother. This case law is a good step in the right direction as it affords the court with various options to base his decision when granting an award of custody.

One of the efficient ways of encouraging the child to participate in the custody proceedings is by listening to the views of the child who is the subject of determination, examining the demeanor of the child towards the parents, appointing specialised welfare/custody personnel/legal representation/mental health expert as well as obtaining information about

⁶⁶ [2011] AFWLR 566.

the child through a welfare report.⁶⁷ Furthermore, children and parents should work together to make decisions. Children should be encouraged to express their opinions and when the parents' decision is contrary to the wishes of the child, the reasons behind it should be explained and discussed because children themselves have voiced out this principle that "having a say" is more important than "getting their own way". A child stated that a fair decision is when "everybody has a say about what they want to do even if we don't get to do it".⁶⁸

7. CONCLUSION

The participation of a child in the divorce/custody proceedings may be viewed with disdain. It may be considered degrading to seek the views of children if parents that have the required competence and capacity are present in the decision making. Children are currently marginalized and devalued by a legal system that sees their wishes and desires as incomparable with that of their parents, hence they are viewed as incapable of expressing their desires and that the parents are in a better position to convey their best interest. The participation of the child in the divorce/custody proceedings is important as it creates an avenue for a proper and adequate decision making. It has been argued by scholars that granting the child the right to express his views/desires bars the parents from exercising control over the child. This misconception has stalled the need for children to actively participate in divorce/custody disputes in Nigeria. The participation of the child does not in any way undermine parental authority or control, rather it complements it. It creates a medium for shared decision making, and provides the child with a suitable environment to express his views/desires.

8. RECOMMENDATIONS

The impediments of involving children in divorce/custody proceedings in Nigeria is due to the implementation of laws as there is a huge discrepancy in theory and what is practicable. It is therefore suggested that the 1999 Constitution, as well as the Matrimonial Causes Act should be amended to expressly incorporate Article 12 of the UNCRC. The inclusion of a child helps in promoting the best interest of the child. It gives the children a greater sense that they have a say in their lives and a freedom to contribute to the decisions that affects their well-being.

⁶⁷ Chinazor Umeobika (n6) 128.

⁶⁸ Kelly Campbell and Linda Rose-Krasnor, 'The Participation Rights of the Child', in Hadiza Okunrobo (n16) 51.

Where a child irrespective of the age understands the duty of speaking the truth, and he/she sufficiently understands the question put to him and can give rational answers to it, such child should not be excluded from the proceedings as the views of that child would go a long way in promoting the best interest of the child. The court is saddled with the responsibility to consider the views of the child and attach weight to it, and where the court is of the opinion that the preferences of that child would be detrimental to his long term interest, the court may then dispense with such views.

Judges must be trained to take measures in ensuring that the children are treated with due regard, and they must not be intimidated or humiliated. They must be trained to ensure that all proceedings are conducted in age-appropriate language and must further ensure that the physical surroundings are conducive and friendly in eliciting the views/preferences of the child. The judges must also be trained or receive education in child psychology, child development and be provided with appropriate skills in communicating with children.

The lawyers representing the children should possess the ability to communicate with young people, and must also possess skills in interviewing. They must understand the stages of child development, be able to comprehend information conveyed by the child and possess the ability to communicate information to the child in a simple and comprehensible language. They should be a code of ethics and practice that guides the lawyer's actions when representing children. To ensure that the child is independently represented without the influence of the parents, government should absorb the legal expenses of the counsel representing the child. This can be achieved by the child having an access to the legal aid department in every state of the Federation.