

## **EVALUATION OF THE RIGHTS OF THE CHILD TO PARTICIPATION IN DIVORCE/CUSTODY MATTERS IN NIGERIA<sup>1</sup>**

### **Abstract**

*This paper focuses on children involved in divorce/custody proceedings and their right to participation. It evaluates how and to what extent right to child participation are observed and protected in divorce and custody proceedings. This study is spurred by the increase in family instability, and the children affected; the concern that they turn out victims of divorce and subjects of custody, and their rights to participate in the proceedings. It adopts analytical approach and doctrinal methodology by relying on existing literature, relevant laws on the subject and judicial interpretations. The findings include issues such as: the minimal or insignificant level of child participation in divorce and custody matters as the child is the hidden party in a divorce proceeding and is usually not included as parties to the proceedings; the Family Courts which has less technicalities, trained welfare specialists and right based procedures for the child are not functional in many States, no independent legal representation for the child in divorce/custody matters at the high courts; the extent to which child participation right would be observed in custody proceedings is at the discretion of the court; award of custody in most cases are based on the testimony of the parents alone which may not be verified actually. In view of these findings, guidelines and measures to protect the best interest of the child and the legal right to child participation in custody matters are advocated.*

**Keywords:** *Child, Custody, Divorce, Child Participation, Court, Child Welfare, Proceedings.*

### **1. Introduction**

Children affected by divorce become subjects of custody in divorce/custody proceedings. Thus Carmichael posited that researches all over the world have consistently shown that children of failed marriages are often the worse-hit in the event of divorce. He submitted that it may be attributable to their vulnerable nature; consequently, when divorce occurs unexpectedly, they feel the impact more than their parents. Their once secured lives are literally shattered into pieces. Their divorcing parents may decide to re-marry in the near future, and put their awful marriage experiences behind them, but their children are never in a position to choose to join a more stable family. He concluded that children, no doubt, are the main or ultimate victims of divorce, and are the actual casualties<sup>2</sup>. This statement depicts the factual situation in the society today. Accordingly, if custody directly affects the welfare of the child involved in a divorce, will it not be pertinent for the affected child who is the subject of the matter to have and exercise right to participation as expounded in international and domestic laws.

### **2. Definition of Relevant Terms**

#### **Child**

A child has been defined in many ways and in different context by authors, in international and domestic laws and in judicial decisions. However, the definition in the Child Rights Act, which is to the effect that a child is a person under the age of eighteen years, is adopted in this work. This is because; it is in consonance with the definition of a child in many relevant International Conventions and Nigerian

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<sup>2</sup> K Carmichael, 'New Directive, Divorce and Administrative Law' < www.cf.cj-fcjc 1999.org/>p.2 in S.C. Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu, Nolix Educational Publications (NIG)2008) p. 125.

Constitution. In furtherance to that, the Act is the latest of relevant statutes, and elaborately addresses the rights, interests, welfare and justice measures applicable to the Nigerian child.

### **Child Custody**

Custody is an important issue in divorce proceedings because it is a category of and an aspect of child welfare. It is a vital tool relating to the welfare and best interest of the child. It has been described by several authors and by the court. For instance, the Black Laws Dictionary defined custody in family law as the care, control, and the maintenance of a child awarded by a court to a responsible adult<sup>3</sup>. In *Otti v Otti*<sup>4</sup>, custody was also defined as essentially concerning control and the preservation and care of the child's person, physically, food, clothing, instruction and the like. In *Alabi v Alabi*<sup>5</sup> it was held that custody of the child connotes not only the control of the child, but carries with it the concomitant implication of the preservation and adequate care of the child's personality, physically, mentally and morally. In other words, this responsibility includes his/her needs in terms of food, shelter, clothing and the like. Custody therefore is taking care and control of a child, which includes providing all basic amenities for the welfare of the child by a person appointed by the court. In other words, in granting custody the very interest of the child is very important, and the court will have to be bear that in mind in arriving at conclusions. To buttress this point, Ifemeje posited that custody matters are very crucial to children of failed marriage. The courts are duty bound to ensure that the custody of the children in the event of divorce is granted to the parent, who would be in a better position to play down some, if not all, the observed consequences of divorce, instead of aggravating it<sup>6</sup>. Similarly, Attah argued that any mistake made by the court in granting custody of a child to a wrong or unfit parent affects the children. The custody of children, as a legal relation, arises not from contract but by operation of law or by order of court. The obligation which the custodian of a child owes is not merely to preserve the child in life and keep him from harm but more positively, to care for him and promote his wellbeing<sup>7</sup>.

### **Participation**

According to the *Black Law Dictionary*, the word participation is the act of taking part in something, such as a partnership, a crime, or a trial<sup>8</sup>. Thus in divorce/custody proceedings, participation is the ability of a child to take part, ie to be heard, examined and have legal independent representation. The child being the subject of custody ought to participate effectively in a decision concerning his or her welfare or survival.

### **3. Right to Child Participation in Custody Matters**

Children's participation in family law decision-making processes is currently undergoing significant change in many countries. No longer objects of the law, children are increasingly considered as subjects in the determination of decisions made on their behalf. Children's participation rights are now understood as an important principle of family law decision-making, as evidenced in policy, legislation and case law internationally.<sup>9</sup> At the international level, United Nations Convention on the Rights of

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<sup>3</sup>B A Garner, *Black's Law Dictionary* (9<sup>th</sup> edn, USA, Thomas Reuters, 2009) P.441.

<sup>4</sup> (1992) 2 NWLR (pt 252) 187 at 210.

<sup>5</sup> (2008) All FWLR (Pt. 418) 245 at 257, p. 296, para.C(CA).

<sup>6</sup> S C Ifemeje, *Contemporary Issues in Nigerian Family Law*, *op cit*, p. 136.

<sup>7</sup> M Attah, *Family Welfare Law in Nigeria* (Benin City, Ambik Press Ltd, 2016)p. 26.

<sup>8</sup> P. 1229.

<sup>9</sup> N Taylor, R Fitzgerald, T Morag, A Bajpai and A Graham, 'International Models of Child Participation in Family Law Proceedings following Parental Separation / Divorce', *International Journal of Children's Rights* 20(2012) 645- 673.

the Child <sup>10</sup> deals specifically with children's participation rights by assuring children of the right to express their views as follows:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being 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 procedural rules of national law.

Accordingly, the United Nations<sup>11</sup> Committee on the Rights of the Child in the General Comment in 2009 on the above article recognised that State Parties have an obligation to implement the right of participation in divorce proceedings as follow: 'all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes'<sup>12</sup>. The above provision marked the recognition of the right of participation in custody proceedings as an independent right of the child in many countries. Thus, in Israel for instance, in the case of *Attorney General v Jane*, it was ruled as follows:<sup>13</sup> 'Derived from the perception of the child as an independent entity is his right to have, as far as possible, his will and desires taken into account. This approach comes to the fore in Article 12 of the UN Convention on the Rights of the Child'. Particularly, article 9(2)<sup>14</sup> provides that 'all interested parties' shall be given an opportunity to participate and make their views known in legal proceedings pertaining to child custody'. This particular provision on child custody obviously includes children themselves. This is because in legal proceedings pertaining to child custody, the child is an interested party. In other words, the child has a right to be a party in a matter where he or she is the subject, the views of the child ought to be heard by the court and taken into consideration, there should be an independent legal representation with a defined role for the child, as this would be responsible in showcasing the best interest of the child. Right to participation of the child in custody matters expounded in the Convention is complimentary to the child's right to human dignity and to contribute to the determination of his other accruing rights. The State and the court therefore have a duty in that respect. Taylor et al posited that participation is thus conceptualised in the UNCRC as 'a procedural right through which children can act to protect and promote the realisation of other rights'. Children's participation is postulated as something important, and which should be taken cognisance of and seriously too in the child's best interest<sup>15</sup>.

Taylor et al in their survey on the observance of participation rights of the child in custody matters across some designated countries, Nigeria inclusive reported thus: that many corresponding countries reported having specialised family court system hearing custody matters; having laws regarding children's participation in adversarial family dispute resolution processes, consistent with their UNCRC obligations; most respondents also perceived that their legal system was moving towards greater recognition of children's participation rights, including in the weight given to children's views, frequency of child participation in family law proceedings; some countries reported significant variation

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<sup>10</sup>United Nations Convention on the Rights of the Child (UNCRC) 1989 Article 12(1) and (2).

<sup>11</sup> Herein after referred to as UN.

<sup>12</sup> The General Comment on Article 12 of the Convention on the Rights of the Child by the United Nations Committee on the Rights of the child in 2009, para 52.

<sup>13</sup> Acp 7015/94, Isr SC .50(1) 48 (1995).

<sup>14</sup> UNCRC, *Op cit*, Article 9(2).

<sup>15</sup> N Taylor *et al*, *International Models Child Participation in Family Law Proceedings Following Parental Separation/Divorce*, *Op cit*, pp. 645 – 673.

between judges, but perceived similar opportunities were afforded to children from different social or cultural groups; some countries perceived that levels of child participation had changed recently, based mostly on the introduction of relevant legislation or local research about the issue. According to them, the survey showed that child participation was, however, a rare event in the few countries where religious courts adjudicated in adversarial family law disputes. In most countries, Judges and other court officials were the people most commonly responsible for seeking children's participation, although children themselves could request to participate in some countries; some countries reported the availability of some form of support services for children involved in family law disputes, primarily to support the children's emotional wellbeing, to help them understand the dispute proceedings and, where necessary, to protect their welfare; children have a right to speak directly to the court in some countries, and children could be represented by their own lawyer, who would usually have a clearly defined role in facilitating the child's participation, but may not be obliged to meet with the child in some countries; not all countries had specific criteria for appointing a lawyer for the child, but the appointment occurred most commonly in complex and/or protracted disputes or when there were conflicts between children's and/or their parents' views. The other most commonly appointed child representatives were court welfare officers and guardians' ad litem. They reported that respondents nominated a wide variety of factors that enhanced child participation, primarily relating to the culture and/or processes of their legal systems, but also acknowledging the influence of a variety of external agencies. The most commonly-cited enhancers were: legislation requiring child participation; proactive judges encouraging and/or seeking children's views in their own courts; the UNCRC and other human rights conventions; and supportive research, reviews and/or academic debate. The most commonly-cited barriers to child participation were: the considerable variation (between judges, courts, states and/or other jurisdictions) in availability of the factors that enhance children's participation; that child participation is discretionary, rather than a right; resistance from some judges, lawyers and/or families; and limited acknowledgment of the UNCRC<sup>16</sup>. An analogy of the survey is to the effect that child participation in family matters is evolving, and has gained strength through the relevant provision in the UNCRC in many countries. It is significant in some countries, while in some countries a lot of efforts need to be put in. The factors inhibiting effective child participation vary in different countries and can be addressed through effective implementation of laws and proactive procedural measures taken by the court.

The UNCRC was ratified by Nigeria and domesticated in the Child Rights Act (CRA) in 2003. However, in view of the fact that in the Nigerian Constitution, matters concerning children protection is neither in the exclusive or concurrent list, States are to ratify and pass it as law for it to become operational. The implication of which is non-acceptance of the Act in some States especially in the North due to custom and traditions. Another challenge to this legislation is lack of implementation even in States where it has been domesticated. This challenge limits the enhancement for child participation, which is expounded in the Act. The Child Rights Act provided 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 in the court<sup>17</sup> and that the proceedings in 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 participate in the proceedings<sup>18</sup>. The Act further provided 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

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<sup>16</sup> N Taylor *et al*, *Op cit*.

<sup>17</sup> Child Rights Act, 2003, s. 155.

<sup>18</sup> *Ibid*, s. 158.

consideration<sup>19</sup>. The right of the child to be represented by a legal practitioner is an issue that have raised debate since, which has now been addressed by the Act. It is logical to argue that if a child has the constitutional right to fair hearing and counsel in court, he should be represented by his own lawyer in a custody case as well. In the United States, the Alabama Supreme Court in *Powell v. Alabama* ruled that the right to be heard included the right to counsel since the ordinary layman is incompetent to defend this right in court. Certainly won't a child be also incompetent to represent his own best interests? If so, he has a right to be heard. If he has that right, shouldn't he be represented by his own attorney in a contested custody case? It was argued that counsel should be appointed for a child in all custody cases. For protection, the child needs someone to investigate his best interest and represent them in the selection process<sup>20</sup>. Goldstein et al<sup>21</sup> suggests that counsel for the child is imperative, since his needs may conflict with those of the adults. Leavell supported this position and stated that trained investigators are necessary in every case. The system would certainly allow the child's best interest to be argued on his behalf by someone representing his welfare alone<sup>22</sup>. This position is appropriate, and logical as the independent lawyer for the child will have a clearly defined role. The child ought to be represented as a party to the suit as he is the very subject of the proceedings. This right is now pronounced in the Child Rights Act. The provisions of the Act which expounded the right to child participation in custody matters can only be actualised in the Family Courts established in the Act, and the family court can only be functional if the law establishing it is implemented.

Divorce matters and custody matters are entertained in the regular high courts where family court is not in existence. The basis for custody decisions has changed significantly since ancient times. Under Roman Private Law, *patria potestas*, the father had the absolute right to control his children, including their custody. This rule was a part of English law until the 14th Century. It was followed by *parens patriae* which meant the king would protect all who had no protector. However, the father retained his control based on the customary belief that he had a superior right to their services since it was his duty to support them<sup>23</sup>. In fact, he could prevent the mother from visiting her children whenever he chose. In the U.S. in 1839, the father's dictatorial control was removed with the result that the children were always awarded to the mother<sup>24</sup>. In both instances, the parents' rights were primary. In 1881, Justice Brewer changed this emphasis on parents' rights to an emphasis on the child's rights by basing his decision in *Chapsky v. Wood* on 'the best interests of the child.' In 1925, Justice Cardozo reaffirmed this ruling and since then the 'best interests of the child' has been the legal guideline<sup>25</sup>.

The Matrimonial Causes Act<sup>26</sup> contains the powers of the court in custody proceedings thus; 'In proceedings 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 subject thereto, the court may make such order in respect to those matters as it thinks proper'. The court without doubt in the above provision is conferred with a very wide discretion and its decision will be

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<sup>19</sup>*Ibid*, s.1.

<sup>20</sup>S J Alexander, 'Protecting the Child's Right in Custody Cases', *The Family Coordinator*, vol 26, No 4, The Family and the Law (Oct, 1977) pp-377-387.

<sup>21</sup>J Goldstein, A Freud, A Solnit, 'Beyond the best Interest of the Child, New York: Free Press, 1973 in S J Alexander, Protecting the Child's Right in Custody Cases', *The Family Coordinator*, vol 26, No 4, the Family and the Law (Oct, 1977) pp-377-387.

<sup>22</sup>C Leavell, 'Custody Disputes and the Proposed Model Act', *Georgia Law Review*, 1968, 2, 162-192.

<sup>23</sup>M Inker, C.A Perretta, 'Child's Right to Counsel in Custody Cases' in S. Katz (Ed.), *The Youngest Minority*. (Chicago: American Bar Association Press, 1974).

<sup>24</sup>S Katz, *The legal rights of children*. (New York: Arno Press, 1974).

<sup>25</sup>R. Podell, H Peck, C First, 'Custody to which parent?' *Marquette Law Review*, 1972, 56, 51-68.

<sup>26</sup>Matrimonial Causes Act, Cap M7, Laws of the Federation of Nigeria, 2004, s. 7(1).

reversed only in rare cases<sup>27</sup>. The courts have interpreted this provision in various proceedings for custody of children. For instance, in *Okafor v Okafor*<sup>28</sup> Oputa J. stated that in all cases for custody of a child, 'the paramount consideration, in fact the condition precedent is the welfare of the infant'.

In *Alabi v Alabi*<sup>29</sup>, the court in examining the principles governing grant of custody of children in matrimonial causes, stated thus;

Award of custody of the children of a marriage that has broken down irretrievably is governed by section 71(1) of the Matrimonial Causes Act, 1990, which enjoins the court in proceedings relating to custody, guardianship, welfare, advancement or education of children of the marriage, to take the interest of the children as paramount consideration and the court in this regard is given wide discretionary powers which it can exercise according to the peculiar circumstances of each case. The welfare of the instance is not only the paramount consideration but a condition precedent. The award of custody should therefore not be granted as a punitive measure on a party guilty of matrimonial offences nor as a reward for the rival party.

In the case of *Williams v Williams*<sup>30</sup>, the court described the interest of children in divorce as provided for in section 71(1) of the Act as follows,

as the determination of the welfare of a child is a composite of many factors for consideration, such as the emotional attachment to a particular parent, mother or father, the adequacies of the facilities, such as educational, religious or opportunities for proper upbringing, are matters which may affect the 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.

Similarly, the court in *Hayes v Hayes*<sup>31</sup> made the following observation on the importance of the welfare of a child as follows:

I am to state that the law makers and the courts which have decreed, as in Section 71 of the MCA, interest and welfare of the children of the marriage must be paramount when determining issues which pertain to the child in matrimonial proceedings. This has been guided by the highest principles of public policy. In my respectful view, its essence is to ensure that no parent or party dares trifle with or politicises the interest and welfare of any child, no matter what personal interest or personal hurt of the parent or party; for invariably, the child is never responsible for any of the hurtful feud which leads to Matrimonial Causes. Happily, therefore, no child is ever to be allowed to be a victim of such a feud by our laws and legal systems, as typified by Section 25 of the Act.

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<sup>27</sup> *Afonja v Afonja* (1971) 1 UILR 105; Sagay, *Nigerian Family Law Principles, Cases, Statutes, and Commentries*, (Lagos: Malthouse, 1999) p.546.

<sup>28</sup> (1976) 6 CCHCJ 1927.

<sup>29</sup> (2008) All FWLR (Pt 418) 245 at 258 -2644, see also *Afonja v Afonja* (1971) 1 ULR 105, *Otti v Otti* (1992) 7 NWLR (Pt 252) 187 at 210.

<sup>30</sup> (1987) 2 NWLR (pt 54) 66 at 74.

<sup>31</sup> (2002) NWLR (pt 648) p. 276.

Also in the case of *Odogwu v Odogwu*<sup>32</sup>, the court held as follows:

In matters such as this, the paramount interests of the children constitute the golden rule. We are here, not dealing with shares in a company, or a piece of land in a dispute. We are dealing with human beings, who find themselves in a situation created by the refusal of the parents to live together as husband and wife.

On appeal, it was also held thus:

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

It can appropriately be inferred that the courts have begun to promote the rights of children in divorce proceedings through the interpretation of relevant provisions of the law in the best interest of the child, and that is a step in the right direction. The court in exercising this exclusive discretion placed by law the court should be proactive in securing ways to help the court to elaborately determine custody in the child best interest. One of those efficient ways is encouraging the child's right to participate in the proceedings, through ways such as hearing the views of the child who is actually the subject of the determination, examining the demeanour of the child towards the parents, appointing specialised welfare/ custody personnel /legal representation on behalf of the child as well as obtaining information about the child through a welfare report. Child participation is important as it helps the court to take proper decision without solely basing decisions on only the testimonies of parents. Child welfare report is a very important instrument of child participation in view of its contents. The MCA empowers the court to obtain the welfare report as provided in Section 71(2) as follows:

The court may adjourn the proceedings with respect to custody, guardianship, welfare, advancement or education of children of a marriage 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.

However, this provision is not mandatory. On this, Nwogugu posited that the undesirable part of this provision is the use of the word 'may', meaning that it is at the discretion of the court and may not be requested in every case. The court in my opinion should not dispense with this report considering the benefits, but should ensure that the right procedure is followed in obtaining the report. He argued that the child welfare report considers issues of the child welfare over which the parties may be disrupting; the options that are available to the court; and provides appropriate recommendations on a course of action. It is expected to cover all aspects of the life of the child in question. It should also deal with the relationship of the child with the parents, and other arrangements for the welfare and education of the child. The welfare report often records the child wishes<sup>33</sup>. It is indeed an aspect of child participation that will go a long way to help the judge in its decision on the welfare of the child.

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<sup>32</sup> (1992) 2 NWLR (Pt 255) 239.

<sup>33</sup> I.E Nwogugu, *Family Law in Nigeria*, (3<sup>rd</sup> ed, Ibadan, Heineman, 2014) P.268.

### 5. Guiding principles by the court in granting custody

The courts in exercising its role in the best interest of the child ought to take a number of factors into consideration in the award of custody. The Child Rights Act provides that the court can consult the wishes of the child or diminish the right which any child has to exercise on his own free choice<sup>34</sup>. In Australia, the weight to be afforded to children's views has been clearly stated by the Family Court in *H v W*<sup>35</sup>

The wishes of children are important and proper and realistic weight should be attached to any wishes expressed by children. Once a child's views are established, the next part of the exercise requires analysis of the views, including any factors such as the child's maturity or level of understanding. This is followed by a balancing exercise measured against other factors relevant to the child's welfare.

According to Ploscowe *et al*, the child's wishes are only one of the factors to be taken into account, where the child is mature, that is, of sufficient age to form an intelligent preference<sup>36</sup>. Considering the fact that the child is the subject of the matter, child wishes should be accorded importance, though certain factors such as age and adult influence might be put into consideration. The court in some cases has taken this factor into consideration. In *Davis v Davis*<sup>37</sup> the court granted custody based on the wishes of thirteen years old to live with his father and grandparents. Again, in *Commonwealth v Gregory*<sup>38</sup>, the court granted custody based on the wishes of the two boys to live with their mother. In *Buwanhot v Buwanhot*<sup>39</sup> in a custody matter, the trial court's order in favour of the respondent was essentially based on the evidence given by the first child of the marriage. He stated that he wished to live with his mother and not with his father due to the bad attitudes and behaviour of his step-mother and her sisters. He stated that they humiliate and maltreat him and his siblings whenever they went on holidays to the father's house, and that they suffered deprivation of such basic items as toiletries. In *Nwabugwu v Nwabugwu*<sup>40</sup> Custody was given to a mother on the wishes of the fifteen year old daughter to be with her mother. These examples are demonstration of where the court allowed some aspects of child participation by hearing and considering the wishes of the child. This boils down to the fact that child wishes are vital and can be sought for and encouraged by the court in ascertaining which of the parents to give custody, however the court may wish to waive that option in the best interest of the child.

There are other factors which the court ought to take into consideration, for example the Child Rights Act provides that the court will have regard to the welfare of the child, the conduct of the parents, and the wishes of the parents in granting custody<sup>41</sup>. On arrangement for the welfare of the child, the Matrimonial Causes Act<sup>42</sup> provides as follows:

Where there are children of the marriage, in relation to whom this section applies, the decree nisi shall not become absolute unless the court, by order, has declared: (a) that, it is satisfied that proper arrangements in all the circumstances have been made for the welfare, and where appropriate, the advancement and education of those children.

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<sup>34</sup> Child Rights Act, 2003, s.75.

<sup>35</sup> (1995) Fam CA 30.

<sup>36</sup> M. Ploscowe, H. H. Foster, and D. J. Freed, *Family Law Cases and Materials*, (2<sup>nd</sup> Edition, Boston: Little Brown, 1972) p. 905.

<sup>37</sup> 255 Ala. 592, 52 So. 2d 387 (1951).

<sup>38</sup> 188 Pa.Super. 350, 146 A 2d 624(1958).

<sup>39</sup> (2017) 16 NWLR (Pt. 1166)22.

<sup>40</sup> (1974) 4 UILR (Pt 11) 280.

<sup>41</sup> Child Rights Act, s. 69.

<sup>42</sup> MCA, *Op cit*, s. 57 (1).

It is argued that, the child is the hidden client in a divorce proceeding and are not included as parties to a divorce petition. This is one of the obstacles or challenges to child participation. In Matrimonial causes, a petitioner is required to state what arrangements he or she proposes towards the welfare of the child. It is thus generally assumed that it is parents that should speak on behalf of the child<sup>43</sup>. On that point, Wallerstein observed that the capacity of parents to separate their own needs and wishes from those of their children is often limited at the time of the marital rupture<sup>44</sup>. This is one of basis for advocating for independent representation of the child, as the lawyer will have a defined role to ascertain and investigate the arrangements made in line with the best interest of the child and represent them in the selection process. However the court has been able to hold in the best interest of the child. In *Onwuzulike v Onwuzulike*<sup>45</sup> where the petitioner did not present arrangements for the upbringing and welfare of the child while asking for custody of the only child of the marriage upon entering secondary school, the court declined to make this order. In *Dawodu v Dawodu*<sup>46</sup> The court refused to grant custody to a mother who had no home of her own or private means to bring up the child because it was not in the best interest of the child. In *Damulak v Damulak*<sup>47</sup> the appellant sought custody of the second child of the marriage, a boy of 9 years. The court of Appeal refused to grant him custody on the basis that the arrangements made by the appellant for the boy was insufficient. As to the importance of this factor in custody awards, Aderemi J.C.A said:

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 the all-important implication of the preservation and care of the child's person, morally, physically, and mentally.

The court also has a role to ascertain the capacity of the parents to provide the arrangements presented to the court. This is very important as some of those presentations before the court may not be verified. The misconduct on the part of the parties is another factor which the court should consider. Thus in *Alabi's* case, the court in discussing the effect of misconduct on the part of parties on grant of custody of children in matrimonial causes, held to the effect that although misconduct on the part of a party to the suit is not of the paramount consideration, where parties have made equal laudable arrangements for the welfare of the child and his/her upbringing, misconduct may tilt the balance in favour of the other party. Also, where there are persistent acts of misconduct and moral depravity by one of the parties, this may be evidence of unsuitability of that party to be entrusted with the custody of the child. Where the mother is found to be in the best interest of the child, it is proper for the said mother to have access to the child particularly when the child is in his/her formative years as the child can easily be negatively influenced. On this point, it is posited that child participation will be helpful to the court in some cases in ascertaining behaviours that affect the welfare of the child. For example, in *Ihonde v Ihonde*<sup>48</sup>, the petitioner and the respondent both claimed custody of the only child of the marriage. There was evidence that the petitioner deserted the child when he was just ten months old. Between that time

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<sup>43</sup> M Attah, *Family Welfare Law in Nigeria* (Benin City, Ambik Press Ltd, 2016) p.42.

<sup>44</sup> J S Wallerstein, 'Parent- Child Relationships Following Divorce' in E.J Anthony and G Pallock (ed), *Clinical Aspects of Parenthood* (Boston: Little Brown & Co, 1985).

<sup>45</sup> (1981) 1-3 CCHCJ 277, 280-81.

<sup>46</sup> (1976) 7-9 CCHCJ 201.

<sup>47</sup> (2004) 8 NWLR (Pt 874) 151.

<sup>48</sup> (Unreported) Judgement of the High Court of Lagos State, Delivered 17<sup>th</sup> April, 1972.

and the hearing which is a period of about four years, the petitioner saw the child only once. Accordingly, the court 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 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.

The court awarded custody to the father. It is pertinent to note that the court in this case was proactive as he observed the conduct of the child towards the parents, and that assisted in forming a decision on custody order. Similarly in *Okafor v Okafor*<sup>49</sup>, Even though the respondent was the ‘guilty’ party, it was found that the child knew him and loved him and had lived with him since her birth. With regards to the petitioner, Oputa, J, related what occurred when the child was brought to court:

There was a passionate scene in court when the child on being asked whether she knows the petitioner physically ran away as the petitioner approached and clung desperately unto her father. The child does not know the petitioner and I do not see that it will be to the emotional welfare of the child to uproot her from her familiar surroundings in her father’s house and now commit her to the charge of someone who, though mother, is to her a complete stranger.

Other factors such as age of the child, misconduct of parents are all important indicators which the court should explore. However, it is observed that these factors can be more elaborately considered if there is child participation. The welfare of the child and what elements may constitute his best interest differ with each child and his or her environments, thus the need to do custody cases at the family court where welfare staff trained in special cases concerning children are available. The specialised personnel will help in ensuring child participation and meeting the best interest of the child and assist the judge in the decision making process. The courts generally ought to be mindful of these measures and exercise its discretion towards ensuring the participation of all parties including the child, thus examining the child and his peculiarities, observing the conduct of the child in appropriate cases, obtaining welfare reports and independent professional evidence and opinion, in addition to presentations by parents and his private determinations.

#### **6. Factors inhibiting the effective implementation to child participation in custody proceedings**

The factors inhibiting effective implementation of child participation in Nigeria is not far from the problem of lack of implementation of legislation; discretionary powers of the judge in custody matters and court procedures. A cursory look at the points already examined projects these: that the Child Rights Act establishing the family court is not implemented in many States that adopted the law. Divorce and custody matters are held at the regular high courts with no independent legal representation for the child who is the subject of the matter. The Matrimonial Causes Act granted powers on the judge with respect to making custody orders; however the measures taken to arrive at the conclusion is exclusively at the

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<sup>49</sup> (1976) 6 CCHCJ 1927.

discretion of the court. The request for a welfare report, examining the child as to obtaining his wishes are at the discretion of the court, and the court can dispense with it. It is observed that if appropriate legal and procedural measures are taken to involve all parties including the child, the best interest of the child would be met. Furthermore, children are not enlightened on their rights and in some cases, cultural and procedural factors projecting children as objects that should be represented by their parents and not as subjects or parties to the suit still subsists.

## **7. Conclusions and Recommendations**

Child participation is important in determining the right parent or person to grant custody of a child. However, it is progressive that child participation in custody cases is gaining strength by the day, though much still needs to be done. This study is geared towards the progress and understanding of children's participation rights in matrimonial causes by examining the importance of the rights of the child to participate in such proceedings, what is done so far and what extent. Right to participation in matrimonial causes gives children the opportunity to be accepted like adults to act and realise other rights as well as assisting the court to arrive at proper decisions in the best interest of the child. It is thus advocated that one of the major challenges to child participation is that of implementation of laws as there is an evident discrepancy amid theory and practice. Accordingly, there is necessity to strengthen child participation in matters relating to children by ensuring implementation of the Child Rights Act. Amendment of some relevant provisions of the law and court procedures to accommodate elements of child participation is advocated, such that in custody cases, children should be treated as independent parties and be represented separately. Children should be enlightened about their rights and the appropriate procedure to go about it. Family Court which has less technicalities than the regular courts, and specialised welfare officers should be established in every State of the federation to handle all family matters including custody matters involving children. Child participation should be improved in any proceeding involving or concerning the interest or welfare of the child or where the child is the subject of the dispute. Finally, the courts should be more proactive, thus giving the best interest of the child paramount consideration in every case concerning the child, this includes encouraging and applying the examination of the child and hearing the views of the child; requesting for welfare reports and obtaining professional opinion and advise on some relevant issues.