

# DISSOLUTION OF MARRIAGE AND CUSTODY OF CHILDREN UNDER CUSTOMARY LAW IN NIGERIA

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## 1.0 Introduction

According to Lord Westbury in *Shaw v Gould*<sup>1</sup>

Marriage is the foundation of the civil society and no part of the laws and institutions of a country can be of more vital importance to its subject than those which regulate the manner, and condition of forming, and if necessary of dissolving the marriage contract.

The growth and development of contemporary society in Nigeria and present social, political and economic pains (particularly in an economy in recession), being inflicted on per second dosage on most Nigerians have had grave or adverse effect on the life span and sustenance of marriages in general and customary law marriages in particular. The consequential hardship and challenges existing in many marriages today violently push the edges of the enclosing envelope of survival of most marriages, leading to greater number of cases of separations or outright divorce. Invariably, issues relating to the dissolution of marriage generally, and the ancillary reliefs of custody and maintenance of the children (if any) of such failed marriages have once again been pushed to the front burner of legal discourse. This is particularly true of the dissolution regime of marriages contracted under customary law, features of which are not as rigid and formal as statutory marriages. Nigeria, being a country of diverse people and culture, presents a deluge of customs, usages and traditions governing marriage, divorce and custody relative to each community. Within this diversity, unity is evident. So that there can be distilled some rules of customary law of marriage in the areas under consideration that are common to or similar in most of these communities.

According to Dr. Akinola Aguda,

There is no doubt that the rules governing customary marriage vary from place to place, if one may say so from time to time, like all other rules of customary law, anywhere, but one can hardly subscribe to the suggestion that in spite of that, we cannot find basic requirements of a valid customary marriage.

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<sup>1</sup> (1869) L.R. 3 H.L 82

To that extent, we may say that what we have is a customary Law of marriage which varies from place to place according to the customs of the people<sup>2</sup>

These diverse customary laws of marriage prescribe basic and obligatory rules governing the creation of valid customary marriages, dissolution and custody of children etc. The fulcrum of this paper therefore, is to critically examine the law relating to customary law marriages from the perspective of dissolution, custody of children, maintenance and other issues relating thereto. In this regard, it is good business to begin this discourse with the definition of some key words in this paper. These are Customary Law, Marriage, Dissolution, Custody and Maintenance.

### 1.1 Definition of Terms.

#### (a) Customary Law

There has been an avalanche of definitions of the term customary law by a host of legal writers, scholars and Jurists. Perhaps, one of the most popular definitions out of the definition pool is the time worn and cerebral dictum of Andrew Obaseki JSC (as he then was) in the landmark case of *Oyewunmi v. Ogunesan*<sup>3</sup>. According to His Lordship in this case:

Customary law is the organic or living law of the indigenous people in Nigeria, regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.

Under the customary Court Law of Abia State,<sup>4</sup> customary law is defined to as: "A rule or body of customary rules relating to rights & imposing correlative duties being customary rule or body of customary rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause or matter, dispute or questions."

Along the same stream of thought, the Nigerian Supreme court in the case of *Zaiden v Mohssen*<sup>5</sup> defined customary law as: "Any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway"

#### (b) Marriages

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<sup>2</sup>Aguda A; *Selected Law Lectures and papers* (Associated publishers, Nigeria Ltd, Ibadan) 67

<sup>3</sup>(1990) NWLR (pt. 137) 182 (at 207) see also: *Bijja v Jime* (2017) All FWLR (pt. 866) 323 (Court of Appeal)

<sup>4</sup>Section 2, Customary Court Law 1998 of Abia state.

<sup>5</sup>(1973) All NLR 740

The concept and institution of Marriage is historically as old as mankind. Traceable by Some theologians to the biblical matching order: "therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh"<sup>6</sup>

According to the Encyclopaedia Britannica<sup>7</sup>, "Marriage is a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs and attitudes that prescribe the rights and duties of the partners and accord status to their offspring( if any)"

This general definition of marriage clearly takes cognisance of the prevailing legal regime now popular in some jurisdictions of expanding the traditional definition of marriage to include same sex marriage. But this issue is outside the purview of this paper and needs be left for another day.

#### (c) Dissolution

Black's Law Dictionary<sup>8</sup> defines Dissolution as, "the act of bringing to an end; termination. It is the cancellation or abrogation of a contract, with the effect of annulling the contracts binding force and restoring the parties to their original positions" In relation to marriage, dissolution is the end point of a failed marriage irrespective of the form of marriage entered into by the parties. The pursuit of dissolution of marriage and custody of children drags with it a host of other legal handbags. Some of these include the rights and obligations of the parties, the mode of dissolution, procedure, incidence and even venue for contestation of the divorce and custody proceedings. Generally, dissolution of marriage under customary law is perceived as easier, less cumbersome, technical and protracted than say for example, statutory marriages.

#### (d) Custody

Custody in general is defined as, "the care and control of a thing or person for inspection, preservation or security."<sup>9</sup> More specifically, Black's Law dictionary defines legal custody as, "the authority to make significant decisions on a child's behalf including decisions about education, religious training and health care."<sup>10</sup> In all of these, the issue of custody is, perhaps one of the most vital of what loosely may be referred to as "posthumous" issues of a "deceased" marriage.

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<sup>6</sup> Genesis 2: 24, Mathew 19: 5, Ephesians 5:31 Holy Bible (kiv).

<sup>7</sup> Encyclopaedia Britannica, *Marriage*, available at [www.britannica.com](http://www.britannica.com) accessed on 15/7/17 at 4.23pm

<sup>8</sup> B A Garner, Black's Law Dictionary Ninth Edition, ( Texas, Law Prose Inc. 2009) 541

<sup>9</sup> *Ibid* 441

<sup>10</sup> *Ibid*

## 2.0 Types of Marriage in Nigeria

Basically, there are three different types of marriages in Nigeria. These are:

- A. Statutory marriage
- B. Customary marriage
- C. Islamic marriage

### A. Statutory marriage

This is marriage contracted under the Marriage Act<sup>11</sup>, a federal enactment designed for the celebration of a voluntary union between a man and a woman to the exclusion of all others during the continuance of the marriage. Marriage under the Act<sup>11</sup> as it is often referred to, by its nature, is therefore monogamous. A monogamous marriage has been statutorily defined as, "a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage."<sup>12</sup> It is a union that terminates at the death of either spouse.

B. Customary marriage: This form of marriage also referred to as "traditional" marriage is defined by Justice A.P. Anyebe<sup>13</sup> as "a union of one man and a woman or women to the exclusion of all others. The union extends even beyond the life of the man but terminates substantially at the death of the woman"

Customary marriage is essentially marriage contracted under the native laws and custom of the various communities in Nigeria. From the foregoing, it is clear that ample allowance and incentive is provided under customary law for the enjoyment of polygamy. This is so, given that there is no limit to the number of wives a man can marry under customary law. Although, it must be said that this fact discourages women desirous of exclusive right and possession of their husbands from undertaking marriages under customary law. When this is added to the flamboyance that accompanies the so called "white weddings" and greater apparent "security of tenure" that goes with it, it is not uncommon to see many women in Nigeria quietly prodding their men to undertake statutory marriages. Nonetheless, customary marriage is the commonest form of marriage and it gets

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<sup>11</sup> Cap m6 LFN 2004

<sup>12</sup> The Interpretation Act cap 123 LFN 2004.

<sup>13</sup> A.P Anyebe, *Customary Law: the war without Arms* (1<sup>st</sup> ed. Enugu: fourth Dimension publishing Co. Ltd, 1985)92

statutory recognition in the Marriage Act<sup>14</sup>. This attitude of glorification of the so called "white weddings," it would appear is largely viewed as a relic of colonialism.

### C. Islamic Law

Islamic Marriage is marriage conducted according to the tenets of Islamic law. Like customary law marriage, no certificate is issued. It is also not limited to one man and one woman. Indeed, a man can marry as many as four wives provided he is capable of meeting the requirements and conditions stipulated under Islamic Law.

A point that must be underscored is that Islamic and customary law marriages are in no way inferior in status to marriages contracted under the Act. In this regard, the Nigerian Supreme court in the case of *Jadesimi v OkotieEboh*,<sup>15</sup> has held that "the status of being married under Islamic law or customary law is well recognised in this country and as such marriages should not be accorded any status that is inferior to that of marriage under the Marriage Act."

Since the focus of this paper as has already been stated is dissolution of customary law marriages, custody of children and other related matters, scant mention shall be made of these other forms of marriages save as it may be necessary to draw significant distinctions or similarities as may be desirable.

### 3.0 Dissolution of Customary Law Marriages.

There are two ways in which a customary law marriage can be dissolved. These are by non-Judicial and Judicial methods.

Before considering these two methods in greater detail, it is imperative to underscore the legal principle that once there is evidence of *de facto* celebration of marriage either under the Marriage Act or under customary law, there is a strong presumption in favour of the validity of the marriage. Therefore customary law marriage cannot be dissolved by mere wishful thinking or assertion. In the celebrated case of *Ezeaku v. Okonkwo*<sup>16</sup>, the deceased, a Senior Advocate of Nigeria, was married to the 1<sup>st</sup> defendant under native law and custom. They had a child and thereafter separated and the

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<sup>14</sup> Section 35 Marriage Act cap m6 LFN 2004

<sup>15</sup> (1996) 2 NWLR Part 128, 142

<sup>16</sup> (2012) All FWLR Part 654, 159

deceased subsequently got married to the plaintiff. He thereafter deposed to an affidavit wherein he stated that the plaintiff was his only wife. After his demise intestate, the 1<sup>st</sup> defendant sought to partake of the estate of the deceased which was placed under the management of the office of the Administrator General/Public Trustee of Enugu State. The plaintiff therefore commenced an action in the High Court of Enugu State by originating summons seeking the determination of the following issues:

- (a) Whether the affidavit deposed to by the deceased carry the force of law.
- (b) Whether the said affidavit was not sufficient notice to the whole world with respect to the marital Status of the deceased under native law and custom.
- (c) Whether the affidavit did not determine effectively the purported right of the 1<sup>st</sup> defendant *vis-à-vis* the estate of the deceased.

The High Court resolved these issues in favour of the plaintiff. Upon an appeal by the 1<sup>st</sup> defendant to the Court of Appeal (Enugu Division), the court in allowing the appeal held *inter alia* that the trial court erred in holding that the marriage was dissolved because the deceased deposed to an affidavit to the fact that the plaintiff was his only wife without taking the proper step to dissolve the marriage between him and the 1<sup>st</sup> defendant. According to Oseji JCA<sup>17</sup> (delivering the lead judgment),

í . When there is evidence of the *defacto* celebration of marriage either under the marriage Act or under customary law, there is a strong presumption in favour of the validity of the marriage. In the same vein, the said marriage cannot be said to have been dissolved by mere wishful thinking or assertioní .ö

Accordingly, the Court held there is a standard process for the dissolution of marriage whether statutory or customary and concrete evidence that the necessary requirement were satisfied must be adduced before a court can hold that there has been a divorce and the validly contracted marriage between a couple had formally and legally come to an end. It is not enough for either party to a customary marriage to *suomotu* bring it to an end by merely deposing to an affidavit to that effect as in this case.

The Court of Appeal held further that, legal authorities have it that the proof of the dissolution of customary marriages requires a high degree of certainty. This form of marriage and also statutory marriage is not dissolved by effluxion of time. So that living apart for 17 years, as in this case,

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<sup>17</sup> At 180, pt. G-H

cannot be a ground to hold the marriage between the appellant and the deceased Senior Advocate had been dissolved.

Similarly, in the case of *LawalOsula v LawalOsula*<sup>18</sup>, the court held as follows:

Living with a man and having children for him alone does not necessary make a woman a wife of the man under native law and custom. In the same way, a woman who is a wife of a man under native law and custom does not divorce the man merely by leaving him and staying with another man for who (sic) she has children.

### 3.1 Methods of Dissolution of Marriage Contracted Under Customary Law.

A popular but erroneous view held by many is that a customary law marriage can only be dissolved by a customary court. For instance, in the case of *Abeja v Abeja*<sup>19</sup>, the court held that a marriage under native law and custom can only be dissolved by a court and it is not sufficient that one of the parties to the marriage declares that he or she no longer wants the other. With respect, this is not the correct position of the law. In addition to judicial dissolution, there also exists side by side non-judicial form of dissolution of marriage contracted under customary law.

#### (a) Non-Judicial Dissolution

This form of dissolution of customary law marriage is carried out informally without the formalities of any judicial process. It is undertaken inter parties, usually with the knowledge and participation of members of the families of the couple who at this point may be at daggers drawn or at least in an active state of animosity. Non Judicial Dissolution may be executed unilaterally or by mutual agreement of both parties. In the case of *Ezeaku v Okonkwo*<sup>20</sup>, the court upheld this principle and stated that a marriage under native law and custom can be dissolved either unilaterally or by mutual consent, subject to the refund of dowry.

Similarly, in the case of *Okpanum v Okpanum*<sup>21</sup> the court held that:

Unlike in English law, dissolution of marriage under native law and custom can be extra-judicial. No ground for divorce need be alleged or proved. It is sufficient for a husband to arrange a meeting where he duly informs his parents in law of his intention

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<sup>18</sup> (1993) 2 NWLR (pt. 274) 158, at 172

<sup>19</sup> (1985) 3 NWLR (pt. 11) 11

<sup>20</sup> *Supra* n. 16. See also the case of *Eze v Omeke* (1977) 1 ANSLR 136.

<sup>21</sup> (1972) 2 ESCLR 561

to bring the marriage to an end. It is not necessary for the husband to return the wife physically to her family nor is the return of the dowry necessary.

As we shall see shortly, this latter part of this diction relating to the lack of necessity to return the bride price is with respect, not supported by a host of other judicial authorities.

Mutual non-judicial dissolution of customary law marriage often happens after prior attempt or attempts have been made to reconcile the parties. Where both sides dig deep into their trenches in their resolve and persistence to dissolve the marriage, an agreement may then be reached on dissolution and other collateral issues such as the return of bride price and custody of children.

Unilateral non-judicial dissolution by either party may be in the form of a party to the marriage opting to end cohabitation with the other party following a clear unequivocal intention to bring the marriage to an end. Thereafter the bride price is returned to the family of the man and a subsequent return of the belongings of the woman to her or her family, where necessary. The marriage is dissolved only when the bride price is refunded.

(b) Judicial dissolution

Under this dispensation, customary marriage is brought to an end by the instrumentality of the judicial process. This form of formal dissolution of customary marriage is surging in popularity, relevance and attraction. This is largely attributable to the fact that it provides recorded evidence of divorce, provides an avenue for the return of bride price in circumstances that would otherwise have been difficult or impossible as well as presents an impartial judicial platform for the just determination of ancillary issues such as custody of the children of the marriage.

Customary courts in Nigeria are vested with jurisdiction to dissolve customary marriages. Their jurisdiction in this respect is unlimited. In Edo State, under the Customary Courts law 1984 of defunct Bendel State (as applicable to Edo State)<sup>22</sup>, the Area and District Customary Courts created under that law are vested with unlimited jurisdiction over matrimonial causes and matters under customary law, this clearly involves divorce. This dispensation must be distinguished from matrimonial causes or matters under the marriage Act over which customary courts have no jurisdiction. In such matters jurisdiction is firmly resident at the High Court.

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<sup>22</sup> Section 20 (1<sup>st</sup> Schedule) which is *imparimateria* with section 20 (1<sup>st</sup> Schedule) of the Customary Court Law C 24 Laws of Delta State 2006 and similar to section 14 (3<sup>rd</sup> Schedule) of the Customary Court Law of Abia State.

The relative or comparative ease and simplicity with which customary law marriage can be dissolved by customary courts as against the difficulties, technicalities and delay experienced in a quest to dissolve statutory marriages at the High Court, has quite clearly encouraged a greater interest in the celebration of customary law marriages by the people, even among the elites.

#### 4.0 Grounds for Dissolution of Customary Marriages.

Generally, whether dissolution of customary marriage is sought judicially or extra-Judicially, no reason or ground need be stated or given by the party seeking dissolution. In this respect, a lot depends on the prevailing customs and tradition of each community. There is therefore no uniformity in this area. In practice however, some grounds for dissolution are quite common to a host of communities. These include, ill-treatment of either party, impotence or sterility, insanity, leprosy or other life threatening diseases, failure or inability to consummate the marriage, lack of respect, fetish practices or witchcraft etc. Apart from this, in some states in Nigeria, the Marriage Divorce and Custody of Children Adoptive by-laws<sup>23</sup>(applicable to the states of Ogun, Oyo, Ondo and Defunct BendelState)(now Edo and Delta States) make elaborate provisions for grounds for dissolution of marriage under customary law. Under this law, the following matters shall be taken into consideration by a customary court when making an order for the dissolution of any marriage.<sup>24</sup>

These are:

- (a) Betrothal under marriageable age.
- (b) Refusal of either party to consummate the marriage.
- (c) Harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man
- (d) Impotency of the husband or the sterility of the wife
- (e) Conviction of either party for a crime involving a sentence of imprisonment of five years or more
- (f) Ill-treatment, cruelty or neglect of either party by the other,
- (g) Veneral disease contracted by either party
- (h) Lunacy of either party for three years or more,
- (i) Adultery

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<sup>23</sup>1958 WRLN 456.

<sup>24</sup>*Ibid* section 7

- (j) Leprosy contracted by either party.
- (k) Desertion for a period of two years or more.

The section also contains a proviso that no order for divorce shall be made in respect of an application made by a wife who is nursing a child under three years of age or who has three children or more by the husband unless the court is satisfied that there are special ground for making the order, where upon the reasons shall be recorded in the record of proceedings.

Under the by-laws, all other claims or debts other than dowry, by one spouse against the other shall only be recoverable in a separate suit as debts when supported by valid documents. Also related to this is a claim for a refund of money spent on items such as clothes for a spouse. In the case of *Okaludo v Omama*<sup>25</sup> a man instituted an action in a customary court claiming (a) the refund of bride price on his former wife who had indeed remarried (b) the return of money he spent buying clothes for her. The court ordered the repayment of the sum of E10 out of the bride price by the woman but dismissed other claims. On appeal, it was held *interalia* that expenses related to clothing do not form part of the bride price and is therefore not refundable.

A very common and volatile ground for dissolution of customary law marriage is the ground of Adultery. It is therefore imperative to dwell on it in a little more detail. What is Adultery? The answer to this question has been provided by a host of judicial authorities. One of such authorities is the case of *Isaac Atansuyi v YakubuGbadamosi*<sup>26</sup> where the court held in relation to adultery as follows:

Adultery is defined as consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse during the subsistence of the marriage:

In the case, *Adeyemi v. Adeyemi*<sup>27</sup>, the court held on the issue of adultery that the general rule is that the burden of proof lies on the person who alleged adultery and that the same strict rule, as in criminal cases applies. Adultery must therefore be established beyond reasonable doubt. In order to succeed however, it is not necessary to prove the direct fact and even an act of adultery in time and place. In nearly every case, the fact of adultery is inferred from the circumstances which lead to it.

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<sup>25</sup> (1960) WNLR 149

<sup>26</sup> (1969) ANLR 665

<sup>27</sup> (1969) ANLR 629

Judicial decisions of acts that sufficiently meet this standard of proof have really not been that simple, consistent or straight forward. For example, in the case *Adeyemi v Adeyemi*<sup>28</sup> the petitioner and the respondent were an estranged couple and they lived apart at all times material to the petition. One night the petitioner paid a surprise visit to the respondent. He found the door locked. He knocked but there was no response. His continuous banging on the door eventually forced the door open where he met the respondent and co-respondent. The respondent was sitting on the bed with her wrapper carelessly thrown around her body and the co-respondent's shirt was not properly tucked into his trousers. The petitioner contended that the respondent committed adultery with the co-respondent. The court held that the circumstances in which the respondent and the co-respondent were found were sufficient to infer adultery. However, in the face of more vivid and lurid evidence and circumstances, the court in the case of *Erhahon v. Erhahon*,<sup>29</sup> Arrived at a different finding and consequently refused a petition on the ground that adultery was not proved by the petitioner. In this case, the petitioner in trying to prove the adultery of the respondent, produced some pictures taken by the respondent with the co-respondent in compromising positions including nude pictures taken in several positions; standing, sitting and lying down together inclusive. In reading its decision, refusing to infer adultery, the Court of Appeal held that the photographs by itself do not constitute proof of active sexual intercourse actually going on like what one sees in video films. Per Akpabio JCA.<sup>30</sup>

#### 5.0 Venue to Institute the Action for Dissolution of Customary Marriage.

A party that is desirous of walking down the path of judicial dissolution of customary marriage is usually required to determine *in limine* the question of the customary court with territorial jurisdiction to determine the case. Is the appropriate customary court located in a place where the marriage was celebrated? Or where the custom under which the marriage was celebrated is observed or prevalent? For example, where the marriage is contracted under Esan customary law, is the appropriate customary court one with territorial jurisdiction in any or the entire Edo Central senatorial zone where the Esanspeaking people of Edo state are housed? The answer to this question is quite simple. Like all other civil causes or matters, customary courts in any part of Edo and Delta states by virtue of their respective Customary Courts Law, exercise jurisdiction over an action for the dissolution of customary marriage; provided the defendant was resident in its area of jurisdiction

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<sup>28</sup> *ibid*

<sup>29</sup> (1997) 6 NWLR (pt. 510) 688

<sup>30</sup> *ibid* at 681-682

where the cause of action arose. Under these Customary Courts Laws; "Civil causes other than land causes shall be tried and determined by a customary court having jurisdiction over the areas in which the defendant was at the time the cause of action arose."<sup>31</sup>

This clearly means that an action for the dissolution of a customary marriage in any part of Nigeria can be instituted in any customary court in Edo and Delta States, provided the defendant was at the time the cause of action arose within the jurisdiction of the court at the time the cause of action arose. In the case of *Aiyelabagan v. Local Government Service Commission*,<sup>32</sup>, A cause of action is defined as:

A set of facts which establish or give rise to the right to sue and or the factual situation which gives a party a right to judicial relief. The cause of action in a suit incorporate every fact which would support a party's right to succeed or to have the judgment of the court in his favour.

In Abia state, under the Customary Courts Law of Abia, part 4 thereof, a customary court shall have and exercise jurisdiction overall causes and matters arising from marriage under native law and custom whether or not the marriage is contracted in Abia state if-

- (a) Both parties are indigenes of Abia state
- (b) Both parties are resident in Abia state
- (c) The defendant is resident in Abia state
- (d) The goods and chattels being claimed are lying in Abia state,
- (e) The immovable properties being the subject matter of the suit situated in Abia state.

Provided that where the customary marriage in issue was contracted in a state other than Abia State, except the contrary is proved, the customary law of the marriage shall be deemed to be identical with customary law operating within the jurisdiction of the court hearing the cause or matter.

Similar to the Edo and Delta State Laws, the Customary Court Law Abia State further provide that all civil causes or matters other than land causes or matter shall be tried and determined by a Customary Court in the area where the defendant was at the time the cause of action arose.

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<sup>31</sup>Section 26(6) of the Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State) which is *imparimateria* with section 26(6) of the Delta State Customary Courts Law 1997.

<sup>32</sup> (2015) All FWLR pt. 802 1697

## 6.0 Bride price

According to Chambers 21<sup>st</sup> Century Dictionary, a bride price, is a price paid to a bride's family by the bridegroom.<sup>33</sup> The term bride price is often used as synonymous with dowry even in some statutes. This it is submitted is not proper. Dowry appropriately used, refers to an amount of wealth (or money) handed over by a woman's family to her husband on marriage.<sup>34</sup> According to Chief Tom Anyafulude in his book,<sup>35</sup> refund of bride price may follow dissolution of customary marriage. Where a customary court has made an order for dissolution, it may make an order for the refund of bride price. In making such an order, a customary court in Enugu State is bound by the provisions of customary marriage (special provisions) Law.<sup>36</sup> Under this law, dowry does not mean only money. Dowry means any gift or payment in money-natural produce, brass rods, cowries or any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place. A bride price is paid to the parents or guardian of a woman and not to her it is therefore not proper for a court to order a refund from a woman.

### (a) Significance of the Return of Bride Price.

According to *Maurice O. Izunwa*<sup>37</sup> the return of the bride price on a bride is the critical threshold in customary divorce procedure. Once the bride price is returned by the family of the woman, all incidents of customary marriage falls apart irretrievably. Even where a customary marriage is dissolved by order of court, a consequential order for a return of the bride price by the family of the woman ought to be made by the customary court even when it is not expressly asked for, unless a husband expressly renounces same.

In the case of *Ezeaku v. Okonkwo*<sup>38</sup> the court of Appeal adopted the views of Professor E. I. Nwogwugwu in his book family Law in Nigeria thus:

Usually the dissolution of customary law marriage is effected or accompanied by the refund of the bride price paid in respect of the marriage. . the refund of the bride price is one of the important subjects to be settled by the family group that unsuccessfully attempts to reconcile the parties it is

<sup>33</sup> Chambers, 21<sup>st</sup> Century Dictionary (Revised edition, Edinburgh Chambers Harrap publishers Ltd, 2004) 174.

<sup>34</sup> *Ibid*, 398

<sup>35</sup> Anyafulude, T. 'Principles of Practice and Procedure of Customary Courts in Nigeria through the cases (1<sup>st</sup> Edition, Enugu: Mercele Press Nig. 2012) 297

<sup>36</sup> Cap 33 laws of Enugu State 2004

<sup>37</sup> M.O. Izunwa, 'A critique of certain Aspects of the grounds procedure and reliefs attaching to Customary Divorce Law in Southern Nigeria, available at [www.academicjournals.org](http://www.academicjournals.org) accessed on 5/6/017 at 12.15pm. See also the case of *Ezeaku v Okonkwo Supra* n. 16

<sup>38</sup> *Ibid*

however open to a husband to exercise or renounce his right to claim a refund of the bride price. Any renunciation of that right must be (done) formally and equivocally. In that case, the marriage will be regarded as dissolved from the time of renunciation and there will be no need for the bride price to be actually refunded.

Similarly, in the case of *Eze v. Omeke*<sup>39</sup>, the court held inter alia, that it is the refund of the bride price or dowry that puts to an end all incidents of customary law marriage and not an order of any court dissolving the marriage. It held further that any dissolving customary order without the refund or acceptance of the bride price or dowry is meaningless. In spite of the foregoing, there are many instances where the refund of bride price loses its significance in the context of the dissolution of customary marriage.

These include:

- (1) Where a husband renounces his right to a refund of the bride price formally and equivocally as discussed above.
- (2) Where a husband divorces his wife, same customs dictate that the refund shall not take effect until the wife remarries. This custom is common among the Igbos, South East Nigeria.
- (3) Where the husband or members of his family evade receipt of the bride price.

In this case, a woman may include in her petition for dissolution of marriage, an order for the bride price to be paid into court.

#### (b) Quantum of Bride Price Refundable

According to J. O. Ajibola,<sup>40</sup> some salient points in this regard must be underscored.

These include:

- (1) In some communities, the amount of bride price to be refunded diminishes in proportion to the number of years that the woman has lived with the man. For instance, in relation to the quantum of refundable bride price, the following factors are taken into consideration:
  - (a) Duration of the marriage.

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<sup>39</sup> (1977) 1 ANLR 136

<sup>40</sup> Ajibola J.O. *Administration of Justice in the Customary Courts of Yoruba land* (1<sup>st</sup> Edition Ibadan. University press Limited, 1982) 35

- (b) The number of children in the marriage.
- (c) The conduct of the parties and their blame worthiness in the events leading up to the dissolution of the marriage.

Also in this area, some local councils have made bylaws stipulating what amount of bride price is refundable by a woman relative to the number of years she has being married to a man. One of such bylaws is the Marriage, Divorce and Custody of children Adoptive Byelaws 1958 supra. Under this law, the following is statutorily prescribed as refundable bride price relative to the circumstances and the length of time the marriage lasted<sup>41</sup>

- (i) Where a marriage has not been consummated í í í í í í í í N70,000.00
- (ii) Where a marriage has existed for less than one yearí í í í í í .N60,000.00
- (iii) Where a marriage has existed for one year or more (but less than 5 years) í í í N50,000.00
- (iv) Where a marriage has existed for five years or more í í í í .. N40,000.00

In the case of *OssaiOkaluda v Omema*<sup>42</sup> the court held that the refundable bride price diminishes according to the duration of the marriage. There is little doubt that this law is very difficult to enforce in practical terms and is now largely obsolete. Firstly, the law presupposes uniformity in the amount of bride price payable which is more than the statutorily prescribed amount stipulated as refundable above. This of course, is not the case. There is no uniformity in the amount of bride price payable when customary marriage is being entered into. Some communities actually prescribe less than the above amount. Secondly, many families nowadays receive only a token amount as bride price. When the marriage subsequently fails, little or no thought is given to this area in view of the insignificant amount previously paid as bride price.

- (c) Return of Gifts, presents etc.

A common relief contained in a petition for dissolution of customary marriage often by a man is a claim for the return of gifts, presents or money, such as money spent on the funeral of a parent or parents of the woman. In the case of *Okoriko v. Otobo*<sup>43</sup> the court held that presents, gifts or other

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<sup>41</sup> Part B, schedule to the bye laws.

<sup>42</sup> (1960) W. NOLOR 149

<sup>43</sup> (1962) W.N.L.R 48

items given to the wife and/or her parents or any money spent at the funeral of ceremony of any parent of the woman are not refundable with the bride price.

## 7.0 Dissolution by Death.

In marriage under customary law, the death of a wife brings the marriage to an end. But where it is the husband that dies, this is not necessarily the case. Justice U. Onyemenam,<sup>44</sup> holds the view, that in the case of the death of a husband, the widow has the following options:

- (i) To remain in the late husband's family house as his wife. Any child she bears during such period is deemed a legitimate child of the deceased husband. This is often described as "Ghost marriage". In some parts of Igbo land, such a child may be named, "Azunna".
- (ii) To remarry a member of her late husband's family, except her own son. This is usually done to ensure the continued maintenance of the widow.
- (iii) To return to her parent's house and remarry. Where this is done, she is obliged to refund the bride price. This is so because her return and remarriage is deemed to be a form of divorce. However, the court in the case of *Yesufu v. Okhia*<sup>45</sup> has held that death terminates the marriage and it was mere fiction to suppose that the marriage was subsisting. Consequently any custom, which restricted the widow from remarrying or having an affair until some fetish ceremonies was performed, was repugnant to natural justice, equity and good conscience. This judicial decision is no doubt commendable.

## 8.0 Dissolution of "Marriage by Cohabitation".

It is very common to see a petition filed in a customary court seeking dissolution of what is sometimes referred to as "marriage by cohabitation". By this expression, it is meant a relationship whereby a man and a woman or his mistress come together in cohabitation and often times start having children without the fulfilment of any of the requirements of a valid customary marriage or indeed any marriage at all. This category of a woman falls into that which Lord Denning referred to

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<sup>44</sup> U Onyemenam; 'Law Practice and Procedure Relating to Marriage, Divorce and custody of children under customary law in Nigeria', being a paper delivered at the 2006 All Nigeria judges of the lower courts' conference, Asaba Delta State, 29

<sup>45</sup> 919760 ECLSR 96

under English law as common law wife.<sup>46</sup> According to Denning, the common law never recognized such a person. In the same vein, customary law does not also accord recognition to her. The law is settled that cohabitation, no matter how long cannot crystallize into a valid marriage under customary law. As we have seen, this was the decision of the court in *Ezeaku v. Okonkwo*.<sup>47</sup> Consequently, customary courts have no jurisdiction over such cases not been matters falling into the class of matrimonial causes and matters over which jurisdiction is conferred on the court.

Finally, on a general note the point must be made, as is obtainable in other forms of marriages, that once dissolved a customary marriage cannot be brought back to life. Where the parties are desirous of coming back together as man and wife under customary law, a fresh marriage must be contracted by the parties.

## 9.0 Custody of children

One of the most contentious consequential or ancillary aspects of dissolution of customary law marriages like other forms of marriages is the issue of the custody of children. Under the Customary Courts Law of the various states where customary courts have been established, provisions have made relating to custody of children in the event of dissolution of customary law marriages by customary courts. For example, the Customary courts law 1984 of defunct Bendel State (as applicable to Edo State), jurisdiction of Customary Courts in Edo State in the area of guardianship and custody of children under customary law is unlimited.<sup>48</sup>

Generally, in most systems of customary law the father has absolute right to custody of the children of the marriage. Upon his death, the male head of the father's family is vested with the right. Although the day to day care of the children may be the responsibility of the mother.<sup>49</sup>

Where however, the children are still of tender age in need of motherly care and affection, the children are kept in the custody of their mother until they can be properly and safely separated from their mother and returned to their father. There has been a host of judicial decisions by courts in Nigeria interpreting this aspect of customary. Most of them have generally upheld this principle..Although, it must be said that the strict application of this custom is fast waning. Nowadays, different factors are now taken into consideration in determining the issue of custody of

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<sup>46</sup> Lord Denning, *The Due process of law* (south Asia Edition, New York, Oxford University press, 1980) 224

<sup>47</sup>*Supra* n. 16 See also the case of *LawalOsula v LawaOsula*,*Supra* n. 18

<sup>48</sup>Section 20(1) of the Customary Courts Law of defunct Bendel State1984 as applicable to Edo State. And the 1<sup>st</sup> Schedule thereto which is *imparimateria* law with section 20(1) 1<sup>st</sup> schedule to the customary courts law of Delta State 1997.

<sup>49</sup>U Onyemenam.*Supra* n. 44, 31

the children of a customary marriage. Therefore decisions such as that in the case of *Abiakam v. Anuawu*<sup>50</sup>, where the court upheld the primary of the absolute right of a father to custody of children until they attain the age of majority and that of the Delta State Customary Court of Appeal in an unreported case of *Mbanoso v Mbanaso* in respect of custody where the court stated thus:

“We have observed earlier that in most systems of customary law in Nigeria, the father of a legitimate child or legitimated child have absolute right to custody of the child and most courts have taken judicial notice of this; so it need not be specifically proved.”

Has been modified and watered down by the Nigerian Supreme Court in the case of *Okwueze v. Okwueze*.<sup>51</sup> In this case, the Supreme Court held that whilst it recognizes the superior rights of the father, this right will not be enforced where it will be detrimental to the welfare of the children.

However, there has been statutory intervention in this area in cases of judicial dissolution of marriage. As early as 1958, the marriage, Divorce and custody of children adoptive By-law in force or applicable to the states of Ogun, Oyo, Ondo and Bendel (now Edo and Delta States) provided as follows.<sup>52</sup>

“When making an order with regard to paternal rights over a child, the court-

- (1) Shall at the same time make an order with regard to the custody and upbringing of such child and in the making of such order the interest and welfare of the child shall be the first and permanent consideration.”

Similarly, under the Customary Courts law 1984 of defunct Bendel State (as applicable to Edo State) in any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration.<sup>53</sup> The primacy of the “best interest and welfare” principle in custody of children contestation has become the prevailing general legal road map that customary court in Nigeria adopt in the determination of this prime issue. This is also true of statutory marriages conducted under the Nigeria Marriage Act by the various High Courts where jurisdiction is reposed. Therefore it is submitted, that the same meaning is attached here.

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<sup>50</sup> Suit No: DCCA124A12001 judgment delivered on 22/12/03

<sup>51</sup> (1989) 3 NWLR (pt. 109) 321

<sup>52</sup> Section 14

<sup>53</sup> Section 27(l) Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State which is *imparimateria* with section 27(l) of the Customary Courts Law 1997 of Delta State and section 17(l) of the Customary Court Law Abia State.

## 9.1 Best interest and welfare of a child.

What is the best interest and welfare of a child? There exist a plethora of judicial decision upholding this principle and defining the best interest and welfare of a child. In the case of *Buwanhot v. Buwanhot*<sup>54</sup> the Nigerian Court of Appeal held that the welfare of the children of the marriage, in terms of their peace of mind, happiness, education and co-existence is the prime consideration in granting custody. Also in the regard, Belgore JSC in the case of *Odogwu v Odogwu*<sup>55</sup> stated that.

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

Similarly, in the case of *Udusote v Udusote*<sup>56</sup> the court defined interests of the children to include their welfare, education, security and overall wellbeing and development.

It is apposite here to underscore the following points in relation to the issue of custody. Firstly, although the best interest of the child is the first and paramount consideration, it is certainly not the only consideration. In the case of *Obajimi v Obajimi*<sup>57</sup> the Nigerian Court of Appeal, held inter alia that although the welfare of the minor is the first and paramount consideration, it is not the sole consideration. The conduct of the parties is a matter to also be taken into account. In other words, according to the court, before making an order for custody, the trial court must take into consideration, the interest and welfare of the children as well as the conduct of the father and the mother and their respective resources, comportment and total biodata. Secondly, although there is no rule of law which says that a female child or a child of tender age should remain in the custody of the mother when the marriage is dissolved, however, it cannot also be seriously disputed that children who are female and in their growing or formative years are better cared for and looked after by their mother, except the contrary is shown by credible evidence. It is generally presumed that such children would be happier and more at peace because of the closeness and intimacy which breed affection and familiarity with the mother who most of the time was there for them.<sup>58</sup>

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<sup>54</sup> (2011) All FWLR pt. 566; 552

<sup>55</sup> (1997) 2 NWLR pt. (225) 239

<sup>56</sup> (2012) 3 NWLR t 478

<sup>57</sup> (2012) All FWLR (pt 649) 1168

<sup>58</sup> *Udusote v Udusote Supra* n. 56.

Therefore, the court in the case of *Udusote v Udusote*<sup>59</sup> has held that unless it is abundantly clear that the mother suffers from moral conduct, infectious disease, insanity, lack of reasonable means or is cruel to the children etc, children of tender age, male or female are ordinarily better off in terms of welfare and upbringing with their mother. Of course, there may be exceptions where the father may be better off than some mothers in the upbringing of the children. There is always however, that rebuttable presumption in favour of the mother in the consideration of broken down marriages.

Thirdly, custody of children is not a once and for all thing. Under the Customary Courts Law 1984 of defunct Bendel State as applicable to Edo State,<sup>60</sup>

Whenever it shall appear to a customary court that an order made by such court shall in the interest of a child be reviewed, the court may of its own motion or upon the application of any interested person vary or discharge such order.

This is clearly because of the significance of the welfare of children and recognition of the fluidity of circumstances that may influence this consideration. In *Obajimi v Obajimi*<sup>61</sup> (Ikyegh JSA in respect of this stated that:

Custody of children is an on-going exercise akin to recurrent decimal. It is a day to day or revolving affair. Whenever any of the spouses discovers conditions have changed or altered for the worse in respect of the interest, benefit and welfare of the children or child in the custody of another person or spouse, he or she can apply to the court to review the custody order. The court upon hearing the parties would reach a decision in the best interest of the child or children as the case may be.

It is imperative to underscore the point that although the above cases cited in relation to the issue of maintenance of children were decided in relation to statutory marriages, it is submitted that the principles distilled from them are also germane and hold true in respect of customary marriages, particularly in the interpretation of similar provisions contained in the Customary Courts rules of states where they have been created.

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<sup>59</sup>*ibid*

<sup>60</sup>Section 27(2) which is *imparimateria* with section 27(2) of the Customary Court Law 1997 of Delta State.

<sup>61</sup>*Supra* n. 52

## 10. Maintenance/Alimony.

### (a) Children

Maintenance, sometimes also referred to as Child support in some jurisdictions such as the USA, is defined by Black's law dictionary as, "financial support given by one person to another, usually paid as a result of a legal separation or divorce."<sup>62</sup> A more comprehensive definition is contained in Wikipedia<sup>63</sup>. Here it is defined as:

An on-going periodic payment made by a parent for the financial benefit of a child (or parent, caregiver, guardian, or state) following the end of a marriage or other relationships. Child maintenance is paid directly or indirectly by an obligor to an obligee for the care and support of children of a relationship that has been terminated or in some cases never existed. Often the obligor is a non-custodial parent. The obligee is typically a custodial parent, a guardian or the state.

Generally, under the Nigerian customary law, like the English common law there is an obligation on the part of a husband to provide materially for or maintain members of his household. The duty subsists even where the marriage is dissolved. This usually forms the legal basis of a claim for maintenance of the children as an ancillary relief to a claim for custody. Consequently, a claim for this relief is usually made by a woman together with a request for custody. Generally, a decision on whether or not to grant this relief and the amount to stipulate is premised on some factors which the court must take into consideration in deciding a question of whether or not to grant an order of maintenance and the amount to award. These factors include the following:

- (a) The respective means of the parties
- (b) Their stations in life and their life styles
- (c) The conduct of the parties.<sup>64</sup>

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<sup>62</sup> *Supra* n. 8

<sup>63</sup> Wikipedia, *Child Support* available at <https://en.m.wikipedia.org> accessed on 7/7/17 at 9.21am.

<sup>64</sup> See the case of *Idowu v idowu* (2016) ALL FWLR PT 863 1688

(b) Wife

As has been stated above, under customary law a duty to maintain a wife is imposed on a husband. There is however no clear practice of the payment to a wife of post-divorce maintenance under customary law otherwise called alimony. According to Brown Umukoro Esq<sup>65</sup>, though customary law is limited in its application and applies to only those who are subject to it, there appears to be no record of any particular traditional African society where the practice of wife maintenance after divorce is widely recognised under customary law. The idea of maintenance of an ex-wife is indeed seen as in direct conflict with African custom. Even in consideration of the provisions of section 70 of the Matrimonial Causes Act which provides for maintenance in statutory marriages, Nigerian Judges have often been reluctant to grant alimony. In the case of *Akinsemoyin v Akinsemoyin*,<sup>66</sup> Thompson J made the following observation:

∴ the history of maintenance in England is different from the history here. We have merely inherited a statutory provision based on the custom of the people of England, which are not only unknown in this country but is in contradiction to our own.

This decision was recently followed by the Etsako West Area Customary Court, Auchu Edo state in the case of *Elugbe v. Elugbe*<sup>67</sup> presided over by Bright E. Oniha Esq. The court in that case refused to grant post-divorce maintenance sought by the respondent/cross petitioner for the above reasons. Similarly, in the case of *Okafor v. Okafor*, Oputa<sup>68</sup> J (as he then was) once again exposed a judicial reluctance to award wife maintenance and therefore held as follows:

Since it is the trend under the Matrimonial Causes Decree to facilitate the dissolution of marriages, a wife/petitioner eager to have all links with her husband broken should not keep alive any financial link with a man she no longer owes any

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<sup>65</sup>Umukoro B, *A Case for the Recognition of the Right Of Spouses under Customary Law to Maintenance*, available at [www.academia.edu](http://www.academia.edu). accessed on 10/7/2017 at 3.03am.

<sup>66</sup>1971) N.M.R 272 at 275

<sup>67</sup>Unreported Suit No EWACC/25 /2016

<sup>68</sup>Unreported Suit No 0/6D/71

marital obligation including the obligation to maintain. Why should there not be a complete dissolution including the dissolution of all erstwhile financial bounds or obligations.

## 11. Conclusion.

This paper has critically examined customary marriages from the perspective of dissolution, the ancillary thorny issue of custody of children (if any) between the separating/separated couples and maintenance. From the above discourse, we have seen that the legal principles governing dissolution customary marriages and custody of children under customary law and under statutory marriages conducted under the Act are significantly similar and well developed. Where differences exist, there have been statutory interventions. These statutory interventions are, for instance, evident in the provisions of the Marriage, Divorce, and Custody of Children Adoptive Bye laws 1958 and the Customary Courts Laws of the many states in Nigeria where customary courts exist. As a result of this, customary marriages and customary courts conferred with unlimited jurisdictions over matrimonial causes and matters have become increasingly popular and protective of women and children's rights. At the same time, unlike in the past, the principles guiding these aspects of customary marriages examined in this paper have become well defined and equitable. This has effectively laid to rest the bias of superiority of statutory marriages over customary marriages generally and in the area of divorce and custody of children in particular.

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