

The Best Interest of the Child Principle in Child Custody Cases in Nigeria

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Abstract

One of the cardinal principles in international law is the best interest of the child principle enshrined in Article 3 of the UNCRC. The broad scope and general wording of the provision of the Article 3 makes it relevant and important in all aspects of human society ranging from education, juvenile justice to health care. The “best interest of the child principle” is a universal principle of international law that is recognized globally and nationally. It has been incorporated into several regional, national instruments and legislation. Over the years, the principle has also found itself into the sphere of migration law and has impacted many different aspects, including the practice of detaining families with children, detention facilities and means of subsistence. It must be noted, however, that notwithstanding the existence of international, regional and national legal instruments and or frameworks that recognise the existence of this cardinal principle of law, its implementation is faced with challenges and difficulties in some countries in the world, Nigeria inclusive. These challenges are multifaceted in nature. This paper attempts to examine the implementation of the “best interest of the child principle under the United Nations Convention on the Rights of Child, 1989 in Nigeria with a view to knowing whether its implementation is a reality or a mirage.

Keywords: *UNCRC, best interest of the child principle, international law, Child Rights Act*

1. Introduction

One of the cardinal principles in international law is the best interest of the child principle enshrined in Article 3 of the UNCRC. The broad scope and general wording of the provision of the Article 3 makes it relevant and important in all aspects of human society ranging from education, juvenile justice to health care. The “best interest of the child principle” is a universal principle of international law that is recognized globally and nationally. It has been incorporated into several regional, national instruments and legislation. Over the years, the principle has also found itself into the sphere of migration law and has impacted many different aspects, including the practice of detaining families with children,¹ detention facilities² and means of subsistence. It must be noted, however, that notwithstanding the existence of international, regional and national legal instruments and or frameworks that recognise the existence of this cardinal principle of law, its implementation is faced with challenges and difficulties in some countries in the world, Nigeria inclusive. These challenges are multifaceted in nature. Nigerian children face myriad of challenges such as prostitution as predicate offence

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¹ A.B. v. France App no 11593/12 (ECtHR, 12 July 2016).

² Muskhadzhiyeva and others v. Belgium App no 41442/07 (ECtHR, 19 January 2010).

for money laundering,³ child marriage, child labour to mention but a few which put to test the principle of the best interest of the child at all times. This paper attempts to examine the implementation of the “best interest of the child principle under the United Nations Convention on the Rights of Child, 1989 in Nigeria with a view to knowing whether its implementation is a reality or a mirage. The question begging for an answer is: what is the best interest of the child principle?

2. Conceptualizing the Best Interest of the Child Principle

Several definitions have been given by scholars and researchers on the definition and meaning of the phrase ‘best interest of the child principle’. This tends to establish the fact that no definition is globally and universally acceptable to end all definitions of the phrase.

Archard⁴ submits that the “best interest of the child principle” is an ancient principle that is as old as the earth itself in family law on the one hand, and which is traceable to English law and French law on the other hand. Krieken on his part argues that the principle under examination is being used in several areas of law but of greater usage in family law, as it relates to the child custody in divorce proceedings particularly.⁵

Alston & Gilmour Walsh on their part submit that the “best interest of the child principle” is not a new one as its significance has been the focus of researched and learned analyses by researchers and scholars as it relates to family law principles in notable countries of Canada, the United Kingdom, France, India, the United States and Zimbabwe.⁶ They argue further that the inclusion of the principle in the UNCRC opened a whole new era and dispensation for the recognition and application of the principle.⁷ They however submitted that the most commonly voiced criticism against the principle is that it is open-ended or indeterminate.⁸ Its application in a given situation will not necessarily lead to any particular outcome.

Davel⁹ submits that the best interest of the child principle has over the years been an established principle of the common law manifested in a quite number of private law disputes. He submits further that the principle has been termed “the golden thread principle” that covers virtually matters revolving around the law relating to children.¹⁰ However, as time goes on, the use of

³ Bukola Oyaleke, ‘A critical analysis of trade-based money laundering activities in Nigeria’ (2024) 1(1), Kwasu Business and Private Law Journal, <https://kwasuspace.kwasu.edu.ng/handle/123456789/2907> accessed 11 September, 2025; ISSN: 0795-7408
<http://aidc.org.za/what-are-illicit-financial-flows-and-base-erosion-and-profit-shifting/> accessed 11 September, 2025

⁴ D. Archard, ‘Children’s Right’ (2013) 1 IEE, 24

⁵ R. V. Krieken, ‘The best Interest of the Child and parental separation: On the Civilizing of Parents’ (2005) MLR, 68

⁶ Philip Alston & Bridget Gilmour Walsh, ‘The best interests of the child: towards a synthesis of children’s rights and cultural values’ (1996) *Innocenti Studies*, 1-2

⁷ Ibid 1-2

⁸ Ibid 1-2

⁹ Trynie Davel, *In the best interests of the child: Conceptualisation and guidelines in the context of education* (Commonwealth Education Partnerships 2007) 222

¹⁰ CF Clark “A ‘Golden thread?’ Some aspects of the application of the standard of the best interest of the child in South African Law” (2000)3 SLR 3

the principle was extended to other areas of law other than private law through judicial decisions.¹¹

He argues further that under the South Africa's Constitution, the best interest right of a child is a fundamental right of every child as provided in the Constitution.¹² He submits finally that the right is not an absolute right as the South Africa's Constitution like other rights, provide for its limitations.¹³

AjaNwachuku on his part submits that the provisions of the current Nigerian Child's Rights Act emanate from the provisions of both the African Charter on the Rights and Welfare of the Child 1989 on the one hand, and the UN Convention on the Rights of the Child 1990 on the other hand which are yet to be domesticated in Nigeria.¹⁴ He argues further that both the Charter and the Convention failed to pass the litmus test for same to be domesticated into the Nigerian law as Nigerian Child's Rights Act have been criticized for failing to meet up with the peculiar circumstances and challenges serving as clogs in the wheel of protecting the rights of the children in Nigeria such as child marriage; child betrothal; child street hawking of goods and services on the streets to mention but a few. According to him, the Child Rights Act was enacted to address peculiar circumstances that revolve round the protection of children's rights in Nigeria¹⁵.

What constitutes "best interest of the child principle" was statutorily stated in Section 71 of the Nigerian Matrimonial Causes Act,¹⁶ as follows:

In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, *the court shall regard the interests of those children as the paramount consideration;* and subject thereto, the court may make such order in respect of those matters as it thinks proper

From the above section, the interest of the child will be of the utmost and paramount priority of the court in the proceedings that involve the welfare of a child such as the issue that borders on the custody of a child.¹⁷

In furtherance to the above, the Court laid down the additional conditions that must be considered in granting or refusing custody of a child in *Alabi v Alabi*¹⁸ to wit:

Thus, certain relevant criteria must be considered in the determination of the welfare of the child as in this case and they include:

¹¹ Müller and Tait "The best interest of children: A criminal law concept" (1999) *De Jure* 322, 329

¹² Constitution of the Republic of South Africa, 1996

¹³ Constitution of the Republic of South Africa 1996, section 36; see *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2004] 1 SA 406 (CC) par 55.

S v Solberg [1997] 10 BCLR 1348 (CC) paras 142 165 and 166

¹⁴ Michael Akpa AjaNwachuku, 'The Nigerian Child and the Right to Participation: A Peep through the window of "the best interest" Clause of the Child's Rights Act' (2017) *BLR* 8, 162

¹⁵ *Ibid* 163

¹⁶ Cap M7 LFN, 2004

¹⁷ African Charter on the Rights and Welfare of the Child 1990, article 4(1)

¹⁸ [2007] 9 NWLR (Part 1039) 297 at pages 347-348 paragraphs G-A

1. The degree of familiarity of the child with each of the parents (parties)
2. The amount of affection by the child for each of the parent and vice versa
3. The respective incomes of the parties
4. Education of the Child.
5. The fact that one of the parties now lives with a third party as either man or woman and
6. The fact that in the case of children of tender ages custody should normally be awarded to the mother unless other considerations make it undesirable etc.”

Using the third criterion as an example, if a parent can prove that he/she is in a better financial position than the other parent that will be a major factor the court will consider in granting custody in matrimonial disputes on custody of child of a marriage.¹⁹ This is because the court will be of the opinion that the welfare or interest of the child will be better protected if the financial needs of the child can be met. Nevertheless, as illustrated by the decision of *Alabi v Alabi (Supra)*, the income of the parties is not the only condition. Therefore, the court must be mindful when considering the evidence placed before it so as to utilize its discretion judiciously and judicially.

Therefore, it is settled law that the primary consideration in issues that borders on the need to protect children globally such as the issue that borders on child's custody is the interest of such a child. Therefore, if a party to a proceeding can establish through credible evidence that the interest of a child will not be better served, the courts will take this into consideration in reaching its decision. This often occurs in custody of child proceedings, especially where evidence is adduced that the outmost best interest of the child would not be served if a party is given the custody of the child. Nigerian decided cases are replete wherein the court considered this principle in granting or refusing custody of a child.²⁰

In the celebrated case of *Williams's v. Williams*,²¹ the Supreme Court of Nigeria held that:

It seems to me that order for custody must have in view the opportunity of sound education as well as physical and mental welfare. A parent who will deny these to his or her child is not worthy of an order for custody from the court.

This simply means that a party that seeks custody of a child must be able to prove through credible evidence that the best interest of such a child will be better served if he or she is granted the custody of such a child physically and mentally.

¹⁹Bukola Oyaleke 'From Botswana to Nigeria: A comparative analysis of the legal status of non-tribesmen and non-natives under Customary Arbitration in Botswana and Nigeria' (2021) 1(1) Africa Journal of Law, Ethics and Education, <https://ajleejournal.com/index.php/ajlee/article/view/124> accessed 18th September, 2025 [ISSN 2756-6870]

²⁰M.O. Idam,'Understanding divorce Proceedings and Right to Child's Custody under the Nigerian Legal System' <https://barristerng.com/understanding-divorce-proceedings-and-righ-to-childs-custody-under-the-nigerian-legal-system/> accessed 12th September, 2025

²¹ [1987] 2 NWLR (Part 54) 66-page 74 paragraph G

3. Overview of the United Nations Convention on the Rights of Child, 1989

3.1 The Best Interest of the Child Principle under the United Nations Convention on the Rights of Child, 1989

The best interest of the child principle is one of the cardinal principles under the UNCRC, 1989. The principle is geared towards promoting the best interest of every child at all times. The principle is termed the “golden thread” that permeates through the body of laws on children.²² The principle has also been extended to other areas of law apart from private law disputes.²³ The principle was originally devised to guide judges’ decisions on custody disputes as a result of divorce or petitions for adoptions.²⁴ The Convention on the Right of a Child provides in Article 3 (1) specifically that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legal bodies, *the best interests of the child shall be primary consideration.*

Several statutes have been enacted for the furtherance of the principle aside the UNCRC, 1989. Section 2(a) of the Swedish Legislation on The Children and Parents Code states that;

The best interests of the child shall be the *primary consideration in the determination under the provisions of this chapter of all questions concerning custody*²⁵

It must be stated here that decisions about which parent to reside with after the parents' divorce have an enormous impact on children. These decisions are important not only in the short term, but also in the long term, as they may impact on the children's future prospects.²⁶

In Africa the *locus classicus* that set the pace for determining the custody of a child while putting much consideration was in the celebrated case of *Fletcher v Fletcher*²⁷ whereby the Appellate Division confirmed that the interest of a child and not that of the parents should be of paramount importance in issues such as custody and access.

The guidelines setting out what lies as the interest of the child are not easy to determine therefore in the *locus classicus* case of *McCall v McCall*²⁸, the laid down the guiding factors which the court must consider when granting an application for custody as follows:²⁹

In determining the best interests of the child, the Court must decide which of the parent is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance.

²²Kaiser v Chambers 1969 4 SA 224 (C) 228F; Cf Clark (n. 14) 3.

²³In Lovell v Lovell 1980 4 SA 90 (T); Müller and Tait ‘The best interest of children: A criminal law concept’ (1999) *De Jure* 322, 329

²⁴ *UNHCR Guidelines on the Formal Determination of the Best Interests of the Child, Page 7.*

²⁵Swedish Legislation, Children and Parents Code 1998, s 2a

²⁶A Barrat, ‘The best interests of the child" where is the child's voice?' in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2002) 145 157.

²⁷ [1948] (1) SA 130 (A),

²⁸ [1994] (3) SA 201 (C) at 204J 205G.

²⁹Mahlobogwane Frans, *South African courts and the 'best interests of the child' in custody* (Department of Jurisprudence, UNISA, 2005) 43

(a) Emotional ties/bonds that tends to exist between parent and child in terms of love and care

In the *McCall's case*,³⁰ the custody of the 12-year-old son of two separated parents who competed to have the custody of the child was examined. The custody of the child was awarded to the father because the child preferred to stay in his father's care. It was held that a child's preference should be given consideration in custody matters especially when such child possess the requisite intellectual and emotional maturity which allows him or her express his or her preference accordingly to make to an informed and intelligent judgment. Therefore, what should be considered, therefore, is what is in the best interests of the child.

(b) the character and temperament of the parent and the extent to which they have impact thereof on the child's desires and needs

In the case of *Noble v. Noble*³¹ the court held *inter-alia* that because of acute heart infection that the child has, the child's physical condition required the rest and quiet of country life, which her mother could not give her. The court, without any finding as to the mother's unfitness, held that, "We do not feel that the mother's offering better schools and amusements is of vital importance here where the child's health and life itself is such that she mostly needs quiet and rest, which surely she will best find in the home of her grandparents."

In the instant case, the mother was found to have been incapable of providing a quiet environment for her daughter that was needed to provide a conducive environment for the health well-being of her child.

(c) the communication between the child and the parent in understanding of and sensitivity to the child's feelings

In the case, *Re B*³² following divorce and a father's release from prison, a boy aged 11 and a girl aged 7 went to live with the father while the two other boys aged 5 and 4 remained with the mother. The mother subsequently applied for custody of all four children, but admitted she had never really got on with the boy aged 11 (who wanted to stay with the father). As a matter of fact, even though not expressly stated by the judge, custody of the boy aged 11 would not go to the mother because the lack of a bond was an indication that there would be no understanding between the boy and the mother and the boy would grow up without someone to communicate his feelings to.

(d) the capacity and disposition of the parent to give the child the guidance which He/she requires

A parent should be in a position to understand a child's guidance needs and create time for nurturing a child especially during their formative years. In the case of *Allington v Allington*,³³ after divorce, a girl of 18 months was initially left with the father, but because the father was often away evangelizing the girl spent two or three days a week in the mother's home too. After

³⁰ [1994] (3) SA 201 (C) at 204J 205G.

³¹ [1942] 292 KY. 433. 166 S.W. (2nd 991)

³² [1991] 1 FLR 137, CA

³³ [1985] FLR 586, CA

some ten weeks the mother sought care and control; the judge refused, but the mother's appeal succeeded. It was held that the girl needed the continuity of care that her mother could provide, especially given her age. This requirement also looks into the future of the child, thus the sporadic nature of the father's care so far, and its uncertainty for the future, were considered as factors by the court.

(e) the parent's ability to provide for the basic and essential needs of the child

In the U.S Case of *State v. Anderson*³⁴ it was found that the father was financially unable to give the children physical care or the medical care which they needed and that the grandparents had been supplying their needs and desired to continue doing so. It was held by the court that the interest of the child should be outmost necessity than the right of the parent.

(f) the ability of the parent to provide for the educational wellbeing and security of the child, both religious and secular

Another important criterion that the court often times consider in granting or refusing times where the parents differ in religious affiliations, where there is a custody dispute the court looks at the parent who professes the religion that would best suit the development of a child in a positive way. Hence in *Re B & G*,³⁵ a mother and a father were Scientologists but later divorced and married new partners. The mother left the sect and sought custody of their children (aged 10 and 8), arguing they should not be brought up in the sect. The judge agreed and awarded care and control to the mother with access to the father. The judge, Latey J, was of opinion that Scientology is immoral, socially obnoxious, corrupt, sinister and dangerous, aiming to capture and brainwash impressionable young people. The children had been with the father for the past five years, but the risks presented by the religious environment outweighed the advantages of leaving them where they were.

Furthermore, in the case of in *Hewison v Hewison*³⁶ the father and mother were 'exclusive brethren' forced to marry in their teens; twelve years later they had three children. The mother left the sect and the children remained with the father in his parents' home. The father was granted a divorce because of the mother's adultery, but the mother was subsequently granted custody and the father's appeal failed. The judge said the disruption caused by the change in lifestyle would be outweighed by the greater social and educational freedom the children would have in the mother's Baptist environment.

The latter case is clear that education of a child in a free environment and the growing up of the child in a well secured society solely for the interest of the child is paramount in determining custody.

(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development

In *Mahaney v. Johnston*³⁷, the court held that findings regarding a child's "best interests" may rely on consideration of emotional damage to the children due to prior unfitness of the parent, regardless of evidence of the parent's current parental fitness. It was held by the court that the

³⁴ *State ex rel. Lund v. Anderson* (1928) 175 Minn. 518

³⁵ [1985] 6 FLR 134

³⁶ [1977] 7 Fam Law 207, CA

³⁷ *Re Mahaney*, 146 Wash. 2d 878, 894, 51 P.3d 776 (2002)

best interest's standard did not require a finding of *present* parental unfitness because (1) the children were not presently in the physical custody of the parents; and (2) there was evidence that due to their prior emotional or physical abuse, the children would be emotionally traumatized if they were removed from their current placement in order to be placed with the parent who previously abused them³⁸.

(h) The mental and physical health and moral fitness of the parent

Custody of a child includes the parents' responsibility of ensuring that the child is well taken care of and the morality of the parents would be vital in maintaining discipline and morality in the child. In *May v May*,³⁹ on divorce the father and the mother were awarded joint custody of their two sons (8 and 6), but care and control were given to the father (with generous access to the mother). The mother's appeal failed: although the judge had not said expressly that he felt that the father's slightly stricter regime more appropriate in terms of morality and other aspects than the mother's very liberal approach (which was not in itself unreasonable), he had clearly taken into account the parties' respective capacity to provide the boys with discipline, and was certainly not "blatantly wrong" in the decision he had reached.

(i) the child's environment and the need to maintain the status quo

The law and the courts have at all times put into consideration the maintenance of a child's status quo while determining custody. The law has strived into making sure that a child's social status is not disrupted tremendously because the child might suffer emotionally if moved from one walk of life to another.

In the Case of *Cummins v. Bird*,⁴⁰ the father brought an action to obtain the custody of his child, a girl of twelve from her grandparents. Upon a finding that the father would not be able to offer the child as good a home as the one with her grandparents, and that his occupation would necessitate his being away from home while travelling, and that the future home of the child would be with his parents, the court stated, "He is unmarried, and his future domestic relations are unsettled and uncertain. He is not prepared to provide the child with the home, the surroundings, the companionship, or the training she now enjoys..."⁴¹

(j) the need to keep the bond of love among the siblings

Emotional needs are a matter of more interest. The court usually tries to keep siblings together, thus in *C v C*,⁴² on divorce, custody of B (aged 4) was initially awarded to the father and custody of the girl (aged 7) to the mother, with access to the other in each case. The mother appealed against the decision of the court successfully and was awarded custody of both children. The appellate court held *inter-alia* that young brothers and sisters should where practicable, be brought up together under the same environment for the sake of the emotional support they can give one another.

³⁸ Morisset, Schlosser, Jozwiak & McGaw, *The Best interests of the Indian Child; Federal Gloss on a State Law Concept* (First Annual Washington State Indian Child Welfare Summit: Exercising Sovereignty Through Protection of Our Children, May 25th 2004) 3

³⁹ [1986] 1 FLR 325, CA

⁴⁰ [1929] 230 Ky. 296, 19 S.W. (2d) 959.

⁴¹ *Ibid*

⁴² [1988] 2 FLR 291, CA

(k) the need to take child's preference into consideration

In the celebrated case of *M v M*,⁴³ following divorce, a 12-year-old girl went to stay with her father and then expressed a wish to remain with him permanently, resisting even the suggestion that her mother should have access. Mother was granted interim custody, care and control, but the father's appeal succeeded. The judge had failed to take account of girl's adamant opposition to such an order, which was significant in spite of the girl's youth, and had been "plainly wrong" to order a handover within four weeks. Interim custody, care and control were awarded to the father.⁴⁴

(l) the need to apply the doctrine of same sex matching

Oftentimes, the courts are of the view that young children and girls should remain with their mothers, and that boys over a certain age should be with their fathers. Social and judicial attitudes have gradually changed, however, and although small babies are usually left with their mothers each case nowadays are considered on its merits.

In *Re S*⁴⁵ the mother walked out leaving the father with a girl, aged 2. The father was subsequently awarded custody, but the mother kept the girl after an access visit and subsequently obtained from a judge a custody order in her favour. Allowing the father's appeal and remitting the case to the family proceedings court for a new hearing, the Court of Appeal said the girl's welfare was the first and paramount consideration: there is no legal presumption in favour of one parent over another, even though in practice a small child is usually better off with its mother, and the judge was wrong to prefer his discretion over the magistrates'.

(m) Any other relevant factor(s)

The courts often times consider any other factor in arriving at its decision. For example, it is a common knowledge that where the mental illness of a parent poses a threat to a child's over all well-being, such a parent would ordinarily be denied custody of the child. But what of a situation wherein the mentally ill parent has access to medication that would improve his capacity to interact with the child? What if the mental illness does not pose a threat to the child? The circumstances dictate the judgement in such a scenario.⁴⁶

3.2 Application of the Best Interest of the Child Principle in Nigeria

The application of the best interest of the child principle is manifested in various ways in Nigeria. However, this paper will examine the implementation of the principle as it relates divorce and child custody in Nigeria.

Section 1 of the Child Right's Act provides as follows:

⁴³ [1987] 1 WLR 404, CA

⁴⁴ [1987] 1 WLR 404, CA

⁴⁵ [1991] 2 FLR 388, CA

⁴⁶Geva Anat S, 'Judicial Determination of Child Custody When a Parent is Mentally Ill: A Little Bit of Law, A Little Bit of Pop Psychology, and A Little Bit of Common Sense' (2012) 16 *U.C. Davis J. Juv. L. & Poly*

In every action concerning the 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 the primary consideration.*

This establishes the fact that the principle is recognized under the Nigerian jurisprudence and child laws such the Child Rights Act, 2003. However, notwithstanding the fact that the Act protects the children from all manner of human rights violation, the Child Rights Act, 2003 does not *stricto sensu* provide for the best interest of the child on the issue of determination of paternity or maternity of a child.⁴⁷

3.2.1 Who is a Nigerian Child?

Who is a Nigerian Child is a question of law and judicial interpretation by the courts of law.⁴⁸

In the celebrated case of *Labinjo v. Abake*⁴⁹ a child is someone who has not reached puberty. It must be noted that under customary law, the definition of who is a child varies from one custom, locality or community to the other, and it depends on the native law and custom where the business emanates from.

Generally, under the relevant Penal Code,⁵⁰ a child is a person below the age of 7 while under section 30 of the Criminal Code Act,⁵¹ a child, for the purpose of conviction for unlawful carnal knowledge, is a person below the age of 12 as he is declared incapable of having carnal knowledge.⁵²

The Child Rights Act however defined as a person below the age of 18 years,⁵³ and this paper will adopt as a working definition, the provision of section 277 of the Act, that a child is a person below the age of 18 years which represents the settled definition of a child in Nigeria, especially in the states where Child Rights Law has been enacted.

3.3 The Best Interest of the Child Principle and Divorce/Child Custody in Nigeria

Upon the dissolution of marriage between parties to either statutory or customary marriage, the thumb and general rule is that both parties have equal responsibilities and rights over the child/children of the marriage in Nigeria which includes, but not limited to, right to train, raise, influence and make decision for and on behalf of the child/children of the marriage.⁵⁴

However, the court has the discretionary power to make pronouncement subject to the provision of section 1 of the Child Rights Act taking into consideration the best interest of the child/children of the marriage in divorce/child custody proceedings.⁵⁵

⁴⁷Michael Akpa AjaNwachuku (n. 18) 165

⁴⁸M.A. AjaNwachuku, 'The Legal Analysis of the Nebulous Concept of Childhood in Nigeria' (2015d) 7 *BLR* June 2015, 122, 126; Shuaibu v. Muazu [2014] 8 NWLR (Pt. 1409) 207 ratio 33.

⁴⁹ [1924] 5 NLR 33.

⁵⁰ Cap 89, Laws of Northern Nigeria, 1963, s 50(a),

⁵¹ Cap C38, Laws of the Federation of Nigeria 2010, s 30

⁵² *Ibid*, section 357.

⁵³ section 277.

⁵⁴ *Mrs. Helen Nwosu v. Hon. Dr. Chima Nwosu* [2012] 8 NWLR Pt. 1301

⁵⁵M.O. Idam, 'Understanding divorce Proceedings and Right to Child's Custody under the Nigerian Legal System' <https://barristerng.com/understanding-divorce-proceedings-and-right-to-childs-custody-under-the-nigerian-legal-system/> accessed 19th September, 2025

Over the years, the cardinal rule and standard, in determining any matter regarding guardianship, custody or access to the child/children of the marriage has been the best interests of the child.⁵⁶ What amounts to the “best interest of the child” is however a question of fact which depends on the circumstances and peculiarity of each case.⁵⁷ In *Van Deijl v Van Deijl*⁵⁸, the court held that:

The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be taken into account and in the case of older children their wishes in the matter cannot be ignored.

The best interest of the child is the cardinal principle that is considered in divorce proceedings and specifically when it comes to the grant of child custody in Nigeria

Custody was judicially defined in the case of *Nwosu v Nwosu*⁵⁹ as:

The care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision making authority) and physical custody (care giving authority), and an award of custody usually grants both rights.

Furthermore, Justice Nnaemaka Agu J.C.A in the case of *Williams Vs Williams*⁶⁰ submitted as follows:

I take the view that custody of a child essentially concerns not only control of the child but also carries with it the necessary implication of preservation and care of the child's person, physically, mentally and morally.

Section 71 of the Matrimonial Causes Act provides that:

(1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.

(2) The court may adjourn any proceedings within subsection (1) of this section 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.

(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

⁵⁶Davel, T, *In the best interests of the child: Conceptualisation and guidelines in the context of education* (Commonwealth Education Partnerships 2007) 222

⁵⁷ *Van Oudenhove v Gruber* [1981] 4 SA 857 (A) 868C

⁵⁸ 976 (WLD) 981I. 43 1966 4 SA 260 (R)

⁵⁹ [2012] 8 NWLR (Pt.1301) 1 at 32 paragraphs F-G

⁶⁰ [1981] 1 Q.L.R.N. at page 122 at part 127

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

In matters not based on matrimonial causes, the Child's Right Act empowers the Family Court to make orders for child custody.

Section 69 of the Act provides that the relevant court has power to make orders granting child custody. The above quoted sections also provide the legal framework upon which the legal principles of child custody are built. It is on this framework that applications for child custody can be brought and granted.

It has also become a trite principle of law that the conduct of a party claiming for custody is a major consideration. The Supreme Court lent their ultimately binding voice to this position in the case of *Williams v Williams*,⁶¹ it was held by Obaseki JSC that:

The Welfare of an infant although the first and paramount consideration is not the sole consideration and the conduct of the parties is a matter to be taken into account.

In the case of *Alabi v Alabi*,⁶² the Court of Appeal also upheld this groundbreaking principle and held that:

Although misconduct on the part of the party to the suit is not the paramount consideration, where parties have made equally laudable arrangement for the welfare of the child and its 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 this party may be evidence of unsuitability of that party to be entrusted with the custody of the child. See *Lafun v Lafun (1967) NMLR 401*, where it was held that owing to the moral degeneracy of the respondent (mother) it would not be in the best interest of the child for the respondent to have access to the child who was in her formative years and could easily be negatively influenced.

Hence, the above-cited authorities will strengthen the claim of a party if it can prove evidence of misconduct on the part of the opposing party. The Supreme Court has also held that, in considering the conduct of both parties, if a party can provide evidence and proof that his/her character has been of unimpeachable or flawless, then his wishes and request concerning the custody will stand first. In *Williams v Williams*,⁶³ it was held by Obaseki JSC that "The wishes of an unimpeachable parent stand first."

This authority goes on to illustrate that although bad character of the opposing party will suffice, a party will be much better off if he/she can prove that he/she has been of unimpeachable character.

Furthermore, it must be noted that a father or male person seeking custody must be aware that there is no settled rule in law that insofar the child is of tender age or female gender that the

⁶¹ [1981] 1 Q.L.R.N, page 75 paragraph G

⁶² [2008] ALL FWLR (Pt. 418) 245 at 248

⁶³ Supra pages 76 paragraph B

child must be left in the custody of the mother. The law will not support the mother based on those considerations. This position was set out in *Alabi v. Alabi* (Supra)

The court below agreed with the submission of the appellants counsel that there is no settled rule that a child of tender age should remain in the custody of the mother. See *Otti v Ottu* (1992) 7 NWLR (Pt.252) 187 at 210 where the Court of Appeal, Jos Decision quoted with approval the dictum of Nnamani JSC that: *“In according the child’s interest paramount, there are a number of well settled considerations. For Instance, there is no settled rule that a child of tender years should remain in the custody of the mother. (See Re. B (An Infant) (1962) All ER 872) although obviously the care and supervision that a mother who is not out of work can give to little children is an important factor. In W.V.N and C (1968) 3 All ER P 408, the Court of England held that it was right for the court to be guided by the general principle that a boy of eight years was on the whole, other things being equal was better off with his father.”*

The above-cited authority is clear and unequivocal and there is no need to over emphasize and belabour this issue. However, the outcome of child custody disputes depends on the facts of each case as well as the evidence placed before the Court. This is perhaps why the Supreme Court, *albeit* in a much older decision than *Alabi v. Alabi* (Supra) held otherwise. In *Odogwu v Odogwu*,⁶⁴ there is a very strong authority, which the mother may want to rely on especially considering the fact that, the child is a 2-year-old girl. In that case, it was also held by Belgore JSC at 560 at paragraphs D-E that:

If the parents are separated and the child is of tender age, it is presumed that the child will be happier with the mother and no order will be made against this presumption unless it is abundantly clear the contrary is the situation – e.g. immorality of the mother, infectious diseases on the mother, insanity or cruelty to the child. These are the matters to be tried *Ojo v Ojo* (1969) 1 All NLR 434; *Apara v Apara* (1968) 1 All NLR 241.

This authority will support the mother especially if she can prove all the elements above and the father cannot provide any evidence to rebut her position.

When it comes to a child born out of wedlock, the Courts have also pronounced on the guiding principles and considerations. In *Muojekwu v. Ejikeme*,⁶⁵ it was held that:

The custody of any child born out of wedlock follows that of the mother in the absence of any person claiming custody of the child on the basis of being the natural father. This must be so since the child must belong to a family and should not be rendered homeless for a situation he did not create.

It must also be noted that in a situation where there is nothing before the court to disqualify any of the parties the custody of the child, then joint custody will be granted. In *Williams v Williams*,⁶⁶ it was held by Obaseki JSC:

The position therefore is that there is no evidence before the Court to disqualify either parent from being awarded the custody of Kafialat Abimbola their daughter....In the circumstances, an order for joint custody with care and control to the appellant and

⁶⁴ [1992] 2 NWLR (Pt. 225) 539

⁶⁵ [2000] 5 NWLR (Pt. 657) 402 at page 426 paragraphs A-B

⁶⁶ [1981] 1 Q.L.R.N. at page 77 paragraphs F-H

responsibility for education to the respondent will be most appropriate. It will meet the justice of the case and take care of the welfare of the child.

The Supreme Court and Court of Appeal in the cases of *Williams v. Williams (Supra)* and *Alabi v. Alabi (Supra)* respectively, granted joint custody. Therefore, this illustrates that joint custody is a practical and a somewhat regular occurrence in Nigeria. This position is not as bad as it looks especially if both parents play their roles well.

Under the MCA, in the event that a party is denied custody, the Courts may grant the party visitation rights to the child. Section 71(4) of the Matrimonial Causes Act provides that:

Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

Lastly, where the Court is of the opinion that neither parent is fit to retain the custody of a child, the Court may place the child in custody of a person other than a party to the marriage.⁶⁷

It must be stated at this juncture that despite the advantages that this principle posits, it has been criticized on many grounds especially as it relates to child custody⁶⁸.

4. Challenges of the Implementation of the best interest of the child principle under the United Nations Convention on the Rights of Child, 1989 in Nigeria

4.1 Weak Enforcement

One of the challenges militating the implementation of the best interest of the child principle in Nigeria under the UNCRC is weak enforcement that could be traced to lack of political will on the part of the government.⁶⁹ There is a notable and significant gap between the theory and the fanciful provisions of the convention and the actual practice of the convention in Nigeria particularly regarding child labour and trafficking due to inconsistent enforcement of the existing legal frameworks.⁷⁰ The government at all levels in Nigeria must put the necessary machineries in place for the purpose of ensuring enforcement of the provisions of the Convention. Though several governments in Africa have initiated policies and legislations on child protection, this has not been accompanied with a commitment to enforcement.⁷¹

4.2 Socio-Cultural Factors

Nigeria is a multi-ethnic society within about 250 ethnic groups with deep-rooted cultural practices and beliefs such as child marriage in some communities directly contradicting the best interests of the child principle as contained under the UNCRC. Religion is another clog

⁶⁷ MCA, LFN, 2004, s.71(3)

⁶⁸ JC, Huefner & F, Ainsworth, 'Reconsidering the best interests of the child construct' (2024) 158 Children and Youth Services Review, <https://doi.org/10.1016/j.childyouth.2024.107493> assessed 8th November 2025

⁶⁹ EC Cox, 'The Implementation of the United Nations Convention on the Rights of the Child: Global Commitments and Local Realities,' (2000) 43(1-2) P N G Med J, 2023

⁷⁰ Ibid

⁷¹ Olorunwa Towolwi & Victor Ayeni, 'Legal Protection of Child's Rights in Nigeria' (2025) 21(2) Unizik Law Journal, 129

in the wheel of the implementation of this principle. In the Northern part of Nigeria wherein Islam is predominantly practiced, child marriage is rampant coupled with widespread poverty in the area, the implementation of the principle is often hampered.

4.3 Inadequate Funding

Resources scarcity also impedes the implementation of the best interest of the child principle in most states in Africa and Nigeria. The governments of some of these states lack the resources and strong institutions required to achieve these goals.⁷² For this and other reasons, child rights violation and violence against children have gotten worse in Africa, Nigeria inclusive. It has been reported that about half of all children in Africa have experienced some forms of physical abuse and in some parts of the African continent sex abuse of female children has been on the rise as up to four in ten female children are victims of sexual violence before they turn.⁷³

4.4 Non-full domestication of the Child Rights Act

The Child Rights Act, 2003 is yet to be fully domesticated in some states in the country, thereby leading to inconsistencies in the implementation of the provisions of the UNCRC particularly as it relates to the best interest of the child principle. There is also dichotomy in the definition of who is a child in the Child Rights Law of some of the states which domesticated the Child Rights Act. This, constitutes an interpretation challenge on who is a child and to the general implementation of the principle.

4.5 Lack of awareness

Lack of timely awareness about the provisions of the convention among families and the general population consists another important clog in the wheel of the implementation of the Convention.⁷⁴ Not quite large number of persons are aware and familiar with the contents and provisions of the Convention. This, goes a long way in affecting the level of its implementation among the citizens, especially in the northern part of Nigeria where there is high level of illiteracy.

5. Recommendations

The following are suggested as recommendations:

(a) The States of the federation should have necessary political will in the full implementation of the provisions of the UNCRC via the Child Rights Act. It is not enough to have an existing legal framework without its implementation and enforcement.

(b) The government should fund the activities of agencies involved in child protection such as NGOs and government parastatals to enhance their effectiveness and efficiency.

⁷² Ibid. 51

⁷³ APEVAC, 'New Data Shows Violence Against Children Is Rising Across The African Continent' (African Partnership to End Violence Against Children, July 21, 2021) <https://www.end-violence.org/articles/new-data-shows-violence-againstchildren-rising-across-african-continent> accessed 23 October, 2025

⁷⁴ Ibid

(c) The government should remove all manner of bottlenecks which create a significant gap between the theory of the Nigerian laws on the protection of children on the one hand, and its practice in Nigeria on the other hand.

6. Conclusion

It was found out from the above that decisions about which parent to reside with after the parents' divorce have an enormous impact on children. These decisions are important not only in the short term, but also in the long term, as they may impact on the children's future prospects. Furthermore, it was clear through this chapter that notwithstanding the fact that the Child Rights Act, 2003 Act protects the children from all manner of human rights violation, the Act does not *stricto sensu* provide for the best interest of the child on the issue of determination of paternity or maternity of a child.

In addition, it was discovered that who is a Nigerian Child is a question of law and judicial interpretation by the courts of law; the Child Rights Act however defined as a person below the age of 18 years. It was discovered that the principle of the best interests of the child was originally devised to guide judges' decisions on custody disputes as a result of divorce or petitions for adoptions. In addition, it must be noted that a father or male person seeking custody must be aware that there is no settled rule in law that insofar the child is of tender age of or female gender that the child must be left in the custody of the mother.

It was also observed that despite the advantages that this principle posits, it has been criticized on many grounds especially as it relates to child custody.

Lastly, where the Court is of the opinion that neither parent is fit to retain the custody of a child, the Court may place the child in custody of a person other than a party to the marriage.⁷⁵

⁷⁵ MCA, LFN, 2004, s. 71(3)