

“Who Is My Child?”—Implications of Judicial Rejection of *Commune-Cultural* Conceptions of the Family for Children’s Welfare in Nigeria

Michael Attah^{1*}, Elizabeth Iyamu-Ojo²

¹Department of Private and Property Law, University of Benin, Benin, Nigeria

²Department of Public Law, University of Benin, Benin, Nigeria

Email: *michael.attah@uniben.edu

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Abstract

The question of family composition remains a subjective jurisprudence in various jurisdictions. In Nigeria, legislative and judicial responses to different family forms are generally broadening under the general law in cases where there is a biological link between family members. Yet, the findings of this article indicate that family formulation under certain *commune-cultural* models is rejected by the courts. This article appraised judicial responses to five of such frameworks and drew attention to the negative implications of the dismissive judicial attitude to the realization of children’s rights and protection of their socio-economic welfare. Its thesis is that it is antithetic to the expansive national legislative direction on family conception, international socio-legal thoughts on family relations and directly questions the sincerity of the state’s proclaimed constitutional policy/goal of catering to the welfare of all children.

Keywords

Children, *Commune-Cultural*, Family Conception, Courts, Welfare, Rights

1. Introduction

The COVID-19 pandemic has further exposed the frailties of public health institutions, the insincerity of government welfarist “packages/policies” in the face of emergencies and the socio-economic vulnerabilities children in Sub-Saharan Africa. For the last part, local exchanges and news media in Nigeria, for instance, were riddled with tales of hungry children, state neglect, the worst types of child sexual abuses including incest, gang rape, defilement and molestation of inno-

cent children. On the hand, the pandemic has demonstrated the strength of the “family” in protecting children and providing necessary physical, emotional, psychological and financial care and support where government failed. Forms of abuse, neglect and abandonment (incidents of which already existed and have been cataloged before the pandemic of 2020, (Olowu, 2010) underscore the need to strengthen laws on domestic relations with the goal of protecting and realizing children’s rights (Bennet et al., 2006; Himonga, 2001). Importantly, they could result in “mixed-up” families by acceptance of such children-victims into new arrangements for their care. The complication of family make-up had been intensified by the gradual social acceptance of legal and scientific solutions to rising infertility in Nigeria. Legally, adoption has become a cornerstone. However, from the scientific/technological angle, childless couples are resorting to medical and technological processes of *in-vitro* fertilization, surrogate mothering and artificial insemination (Goodwin, 2005; Gordon-Ceresky, 1995). This is in spite of the significant challenges to inheritance (Baldyga, 1985; Hirschl, 1996) and law (Archer, 2002; D’Almaine & Zaal, 2018). Interestingly, Customary or cultural communities in Nigeria had fashioned methods of resolving family formation issues/challenges in such a way that society allows a parent to define the composition of his family internally. Over time these methods have become institutionalized and come to represent the “culture” or customary *law* of the people. One question that has confronted courts in Nigeria is whether such arrangements are sacrosanct. The significance of this question stems from the constitutionally and statutorily recognized right to family life and the gradually expanding conception of the family evident in legislation. Usually, the state does not restrict such cultural definitions of the family while parents are alive or even after death where there are no disputes. Essentially, it steps in when question of enforcement of family-related rights arises. One precipitate of such disputes is the clash of individual interests of “descendants” against group ownership rights of other family members (collaterals) who, for example, claim to be entitled to a decedent’s estate under rules of customary law. Intestacy statutes in some states (Administration of Estates Law 1976-South-West; Succession Law 1986-South-East) resolve these issues by making specific and detailed provisions regarding who is qualified in particular instances and the quantum of the residuary estate each qualified person is entitled to. However, under customary law, it is not so simple. Claims are usually founded on marriage or proven/putative paternity. On the other hand, claims may be founded on other *commune-cultural* family models that may not be rooted in biological parentage. For cases of proven *biological* link, there is indication that contemporary judicial disposition favours a child-centred, protectionist approach using the Bill of Rights in the Constitution (Onuoha & Attah, 2014) in spite of scathing condemnation of the customary structures or institutions that accommodate the unconventional procreation arrangements and practices. Yet, despite views to the contrary (Brashier, 1996) and against the tenets of the Child’s Rights Act (2003), courts reject claims of family relationship where a

biological link cannot be shown, but are based on *commune-cultural* models of family relationship or putative under community-accepted customary institutions and arrangements. They are reluctant to accommodate children of such arrangements and attach family rights to them particularly where the individual who assumed parental responsibility under the framework is deceased. Using illustrative cases, the article appraises five of such frameworks in six parts in order to draw attention to 1) the disparity in the treatment of children who are linked to family within those arrangements as against those with proven biological connection to parents; and 2) the negative implication of the dismissive judicial response (to those customary platforms for defining family ties) for the realization and protection of children's welfare rights in Nigeria. Its thesis is that the judicial attitude is antithetic to the expansive national legislative direction, international socio-legal thoughts on family relations and directly questions the sincerity of the state's proclaimed goal of catering to the welfare of all children.

In Section 2 below, we articulate progressive legislative and judicial trends in Nigeria on the interpretation of family life in different contexts. Section 3 is divided into six parts. In each we critically appraise judicial responses to five cultural models of family conception in Nigeria. Our conclusion is Section 4.

2. Trends in Family Relations: Legislative and Judicial Interpretation of the Right to Family Life

For Children in Nigeria, the right to belong to a family is a significant springboard for the realization of other rights that the state provides. This is because, until recently, children have not been the direct target of socio-legal policy by governments. Even though there have been efforts by the legislature to focus important legislation on children, (CRA, 2003; *Compulsory, Free Universal Basic Education Act 2003*; and the *Violence against Persons (Prohibition) Act 2015*) the directionality of the rights under existing child-centred legislation is the family unit, (Rivlin, 2013, Hohfeld, 1913) particularly parents. (CRA, s. 2) The state's assumed responsibility to children is minimal where it exists. Government institutions (particularly, the Ministry of Women Affairs) that implement child legislation in many states are financially disabled to care for their roles, yet hold parents and the family responsible for infractions of child welfare protection laws. Furthermore, there are no other viable state-supported child welfare avenues, structures or codes in the country through which children could realize their rights. These problems make the family a crucial institution to the protection of children's rights in Nigeria. The *Constitution of the Federal Republic of Nigeria 1999*, section 37 guarantees the right to privacy and family life even though it could be said that its wordings are not very explicit or elegant as those of the Child's Rights Act 2003 or the European Convention of Human Rights 1998. It guarantees and protects "the *privacy* of citizens, *their homes*" This right is not absolute as laws made in the interest of defence, public safety, public morality or public health or for the purpose of protecting the rights and freedom of

other persons could derogate the right. Interestingly, section 8 of the Child's Rights Act 2003 guarantees the right to private and family life for children and makes it only subject to the rights of parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards. Barring that, no other form of interference with his right (including that by state actors) is permissible under the CRA. The big question is what constitutes family in Nigeria.

Prior to 1970, socio-legal policy had centred on the traditional nucleic heterosexual marriage arrangement. Except in very limited situations, Claim family rights were virtually inaccessible to persons who were not within that arrangement. Marriage had to be established strictly (*Emeni v Emeni*, 1980); and such concepts as illegitimacy and legitimation were critical (Nwogugu, 2014). However, there is good evidence that the tight grip on the interpretation of "family" and family life is loosening and perspectives are broadening particular in legislation.

A first example is the definition of "marriage" and "children of marriage" under the *Matrimonial Causes Act 1970* for purposes of making ancillary orders in respect of maintenance, custody and settlement of property. Section 69 accommodates void marriages as capable of attracting legal rights; and in addition to direct biological children, "children of the marriage" include-

- 1) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- 2) any child of the husband wife born before the marriage, whether legitimated by the marriage or not; and
- 3) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if at the relevant time, the child was ordinarily a member of the household of the husband or wife

This is a protective framework for all children connected to a 'husband' and "wife" in the event of family disruption.

Secondly, there is now a statutory recognition to heterosexual cohabitation. Prior to 2011, it had been treated as having no legal consequences; but not in the same way as same-sex relationship was later to be treated (*Same-Sex Marriage (Prohibition) Act 2013*). In *Oghoyone v Oghoyone* (2010), the Court of Appeal ruled that while void marriage could have some legal consequences such as property rights, "living together" could not. Presently, the tide seems to have turned with the passage of section 166 of the Evidence Act 2011 which now provides that a civil or criminal court can presume the existence of a valid and subsisting customary or Islamic marriage between the two persons where evidence is given to the satisfaction of the court of *cohabitation* as husband and wife by such man and woman. It has been noted that the message of section 166 of the Act is that the law now recognizes that cohabitation could be indicative of a marriage relationship at least under customary law (Attah, 2015); a coalescence long expressed by Finlay (1980). One problem evident on the face of this provision, however, is that the provision did not specify the indices for establishing

cohabitation. Hayes (1994) notes that problem of having a universal definition of cohabiting relationships which confer legal status. Broadly speaking, however, marriage-like relationships, where a man and woman are living together as “husband and wife” usually within a shared household, often for a minimum prescribed period of time and where there is or has been sexual intimacy are recognized (Attah, 2015). Further the Cohabitation Criteria Checklist by the Irish Department for Social and Family Affairs 2004 includes co-residence, household relationship, shared social life, element of stability as well as sexual relationship. While this can be regarded as progress in the protection of children’s welfare rights, one caveat remains in Nigeria: section 35 of the Marriage Act 1914 could be used to rebut any presumption which could be made under section 166. Therefore where a party to cohabitation is a party to an earlier and subsisting statutory marriage (even though it may only exist in name) no presumption of customary law marriage will be made even where the cohabitation criteria are satisfied. The Court of Appeal took this view a year after the enactment of section 166. In *Taiga v Moses-Taiga* (2012) the appellant was married to X under the Marriage Act in 1974 but had a “chequered relationship” with the respondent from 1992 which resulted in the birth of twin daughters in 2001. In 2002, the appellant and the respondent participated in a ceremony under *Ukwuani* native law and custom which the appellant misunderstood to be an acknowledgment ceremony as the father of the children. He claimed to have been induced and pressured to participate in the ceremony. On the other hand, the respondent claimed that the ceremony amounted to marriage under native law and custom. She thus filed two petitions for dissolution of the marriage in a London court. The English court later stayed the proceedings to enable a Nigerian court determine the issue of the personal statuses of the parties. The respondent claimed that she was married to the appellant “by repute and cohabitation.” The appellant argued that such a purported marriage was null and void given the earlier statutory marriage with X. The Court of Appeal ruled that since the statutory marriage to X was subsisting, the appellant could not possibly contract a valid customary marriage with the respondent. It ruled that a finding of marriage based on the cohabitation of the parties would be illegal:

At the time the cross-appellant was demanding of the trial court to make a presumption of her customary marriage by repute or cohabitation...what the cross-appellant (was) asking the trial court to do in arguing this issue (was) to proceed on an illegality to make a pronouncement on an issue clearly contrary to the existing law of this (country). If the trial court had got persuaded and made such a pronouncement it would have amounted to an *ultra vires* declaration and therefore would be null and void in law (*Taiga v Moses-Taiga*, 2012).

Finally, the *Violence against Persons (Prohibition) Act 2015* follows on the heels of s.166 of the Evidence Act to provide a liberal interpretation of “domestic

relationship” attracting legal recognition in the context of protection from violence. Section 46 of the Act recognizes “marriage in accordance to any law, custom or religion” as well as “engagement, dating or customary relationship” among other loser relationships in which domestic violence could occur. Importantly, it mentions role of “the parents of a child or children or the persons who have or have had parental responsibility for that child or children”. Two important points may be isolated from this definition. *Religious* marriage strictly so called is not legally recognized as a form of marriage in Nigeria even though licensed places of worship could be venues for the celebration of statutory marriage. Religious marriage would include those conducted in accordance with cultural or traditional religious precepts different from the conventional customary marriage that involves a payment of bride price and a handing over of the bride to the groom or his family. Therefore the recognition of “religious” marriage is generally novel in Nigeria’s legal milieu. This is in addition to the specific recognition of “customary relationship.” Secondly, having parental responsibility for a child to whom a person has no biological or other affine relationship is an age-old practice in Nigeria. However, a common form is the “adoption” of children of distant relatives. Indeed such mixed-up families abound in Nigeria; and non-biological children therein are treated as members of the household and accorded same rights as biological children. This could be regarded as customary adoption as there is no formal/legal process of adoption. Yet the community accepts them as belonging to such households.

The progressive legislative perspectives arrived with greater liberalisation in judicial thinking on issues of family relationships and rights. Firstly, it is now possible for the courts to presume the existence of a valid statutory marriage without complying strictly with provisions of section 32 of the Marriage Act 1914. That section, together with section 86 of the *Matrimonial Causes Act 1970*, specifies the means and methods of establishing a statutory marriage in evidence. Following *Chime v Chime* (2006) and *Motoh v Motoh* (2011), such strict proof may be unnecessary where there is evidence of some compliance with the matrimonial law. Secondly, in the bid to protect children’s welfare, the bill of rights under the 1999 Constitution has become a handmaid for the courts. Consequently, family life has been recognized under certain customary procreation arrangements such as the *Nrachi* custom (daughter retention) between a child born through the arrangement and his grandfather who initiates the process, thereby enabling the children to participate in the estate of a decedent intestate (*Okoli v Okoli*, 2003; *Anode v Mmeka*, 2008). Thirdly, a beneficent application of section 42 of the 1999 Constitution (the non-discrimination right) has enhanced the position of the erstwhile illegitimate children to the extent that the Supreme Court seems to favour an abrogation of the concept and status: *Salubi v Nwariaku*, (2003) *Olaiya v Olaiya* (2002) and *Ukeje v Ukeje* (2014). Finally, the extended family system remains a critical institution which has been supported by the courts in the propagation of land rights. Family and communal land re-

gimes have practically been institutionalized by the courts. Efforts to truncate those property systems have been vehemently resisted by the courts. The general rule is that once a family is created under customary law, it is an extended family system where corporate membership is established (Olomola, 2010). This means that various related families make up the social institution and a person may have rights and obligations in the general unit thereof; and not just in his immediate nuclear family (Nwogugu, 2014). Nwogugu (2014) notes that the extended family possesses some sort of legal personality and may own and hold property, sue and be sued and be responsible for the authorized acts of its agents as a result of the corporate feature of an extended family. One primary mode of membership is by birth into the family; covering all legitimate children born into each nuclear family (Nwogugu, 2014). Another mode of membership is marriage. In patrilineal societies which is the more common, a woman, upon marriage, becomes a member of her husband's family and acquires certain rights and obligations therein.

The unfolding dispensation match international family rights jurisprudence and practices. For instance, Probert and Harding (2015) note that the changing attitudes to and expansive conceptions of different family forms in Europe have been influenced in part by the incorporation of European Convention on Human Rights into the laws of these countries. The conception of the family has gone beyond "form" and "blood ties" but has adopted an "explicitly functional approach" and the "real existence of close personal ties" (Probert and Harding, 2015). Therefore section 37 rights should include freedom to decide and determine the composition of one's family as well as the method of its assemblage. Such a dispensation can be anchored on Alstott's "liberal principle of state neutrality"—a "hands-off" policy on the part of the state (Alstott, 2009). She states that "within wide boundaries, the law should permit people to consort with those they wish; they should determine for themselves the content and expectation attending their relationships, including the terms for entry and exit into the relationship." (Alstott, 2009). Reid and Sweeney (2015) noted the critical role of such freedom in modern family ideology. However, out of caution, Monopoli (2008) suggested that more expansive family law regimes for establishing the parent-child relationship, while appropriate during life, may not be the *optimal* (not unworkable) approach for inheritance law in post-death cases since inheritance and family law have distinctly different policy concerns and goals. This may be true and be workable for the developed world that provides alternative welfare arrangements for children in that class; but not so for the African context generally; and as Rowsell (2003) correctly notes, a purpose of family formation may simply be "to mold and shape a life."

Curiously, while Nigerian courts generally have had no difficulties agreeing to the liberal view, they restrict this and appear to insist on the existence of blood/biological link for a group of persons to be regarded as family members when children's rights and welfare are in issue. This shuts out cultural models and ar-

rangements that perform utilitarian functions in protecting the welfare of children, who by these structures are regarded as members of families in the affected communities in Nigeria. As rightly stated by Wood (2010), family structures cannot all be straightforward; and while family structures have become increasingly complex, children retain the same basic needs for care and maintenance (Wood, 2010). Shutting them out could indeed have important physical and economic repercussions (Loftspring, 2007).

3. Current Judicial Attitude to Non-Conventional Family Arrangements: Illustrations from Inheritance Claims

“*Commune-Cultural*” is used in this paper to describe cultural models and structures by which customary law communities/areas in Nigeria formulate family arrangements. It underscores a liberal, subjective and function-based approach to family conception. Customary law is unique and differs from community to community. Because of this flexibility, its formulation captures and caters to the geographical, sociological, psychological and economic sensitivities, peculiarities and circumstances of the particular community. This accounts for the community differentials in the actual manifestations of general ethnic/tribal ideologies. For each community, the outcomes reflect the nuanced interpretation of such ideals as it would be beneficial and practical for the inhabitants of the said community. Such autochthony is the strongest attribute of customary law. Reflecting on the advantages of this system over provisions of statutes on customary subjects, Chianu (2019) reasons that English-type law should not claim a monopoly of sound policy, because, on a case by case basis communal institutions somehow secure something better than the cold words of statutes. This is added to the reality that social and economic progress and other prevailing circumstances affecting a community may well present a picture very different from that in the mind of the legislators when the statute was enacted (Chianu, 2019). Obatusin (2018) advocates a more autochthonous approach to human rights; and in the case of Africa, believes that customary law norms, and the principles inherent at their origin, could be used to push customary law to be more human rights compatible. Bryceson (2011) makes similar points and noted the important role of the wider family in welfare of children.

Generally, what a court should do when confronted with a *commune-cultural* conception of family is contained in Evidence Act 2011. Sections 16 - 19 and 73 disclose the following rules and procedure

- 1) Discover whether the custom alleged has previously been adjudicated upon by a superior court of record. (s. 6(3) & (5) of the 1999 Constitution) Where it has, the court would take judicial notice of it and may adopt it as part of the law governing the particular situation without need for proof.
- 2) Where it cannot take judicial notice of the custom, it would permit evidence of it to be given to establish it as a fact. This would include evidence of how the custom is understood and acted upon in particular instances by the

community to which it relates. The opinion of traditional custodians of custom is relevant and admissible to establish the custom.

3) Finally, the court has a discretion to reject a proved custom if it considers that it is contrary to public policy or it is not in accordance with natural justice, equity and good conscience

The above rules and procedure allow revisions of customs to be brought to the attention of the court through evidence. Yet, as *Diala (2014)* notes, while the *living* customary law could change, the “foundational value remains fairly stable.”

Commune-cultural conceptions of the family have been presented to Nigerian courts over time. It appears that state high courts which are closer to the communities seem to grapple better with these understandings of family conception than the higher courts on appeal. Unfortunately, these courts impugn and reject these arrangements using the indeterminate public policy, natural justice, good conscience yardsticks. Below we appraise the judicial attitude to six of such arrangements to show why the disposition of the courts in principle fails the protection of the rights and welfare of children.

3.1. Children of Posthumous “Marriage”

Patrilineal pattern of descent is the commonest among communities in Nigeria. (*Folarin & Udoh, 2014*). Due to this, there is a great emphasis on male-children whose major role in this context is to continue the family name and look after family wealth. Marriage is generally virilocal, which reduces the capacity of female members from carrying on this role. In some communities in South-eastern Nigeria, where there is no male member or the male member is deceased, female members could “marry” a woman (on behalf of their male sibling) by paying her bride price with the sole aim of giving the family male heir(s). Where this occurs, children of the woman are recognized and accepted as members of the decedent’s family entitling them to inherit and care for the family wealth according to applicable cultural rules. The Supreme Court had an opportunity to evaluate such a cultural conception of family in principle in *Okonkwo v Okagbue (1994)*. The sisters of the deceased, with the consents of members of the extended family and elders of the community, married a wife for him 30 years after his death even though he was survived by five sons. The posthumous wife had six sons and the sisters claimed that by custom, those sons were children of the decedent entitled to inherit from him. The High Court and the Court of Appeal upheld the custom. The appellant, a surviving biological son of the deceased, who instituted the action on behalf of his four other brothers sought a declaration that the children of the 3rd respondent (the purported wife) were not children of the decedent. Unfortunately, these later children were not joined as parties to the action. Therefore the Supreme held that it would not make any declaration affecting their status vis-à-vis the deceased without giving the children an opportunity of being heard. Yet in principle, based on its holding regarding the status of the pur-

ported marriage, Uwais JSC asked:

[w]hat then is the status in the present case of the children of the 3rd defendant? Are they children of the deceased? It is obvious from my finding that if there was no marriage between the deceased and the 3rd defendant, it is a fiction to talk of children of such a marriage. In reality a dead person cannot procreate 30 years after his death.

Ogundare JSC also stated

[to] claim ... that the children the 3rd defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement of promiscuity. It cannot be contested that Okonkwo (deceased) could not be the natural father of these children. Yet 1st and 2nd defendants would want to integrate them into his family. A custom that permits such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience.... It is in the interest of the 3rd defendant's children to let them know who their true fathers are (were) and not to allow them to live for the rest of their lives under the myth that they are the children of a man who had died many decades before they were born (*Okonkwo v Okagbue*, 1994).

The Supreme Court anchored its rejection of the arrangement on both the absence of a biological link to the decedent and a public policy/morality argument—projecting the view that there is one standard morality code for the country. This is fallacious. The affected “public” cannot be Nigeria but the very community where this conception of family holds sway. The apex court ought to have viewed matters from this perspective as the lower courts had done. Besides, the cultural conception aligns with the right to family life which courts in Nigeria claim to support for all children. In *Okoli v Okoli* (2003) and *Anode v Mmekka* (2008) the Court of Appeal observed that a child must belong to a family and denying the child that right could amount to deprivation or abandonment and render the child homeless over a situation he did not create. This would be the case with the six sons of the posthumous wife. In the perception of the community, she belongs to the deceased's family haven been “married” and her children are regarded and accepted by the community as the deceased's children. This conception would ordinarily protect the children's welfare.

3.2. Children by Presumption of Parentage

Another platform which may provide a basis for a claim by a child is the cultural presumption of parentage. Legislation takes cognizance of a similar biological probability under section 165 of the Evidence Act 2011. It provides that where a person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, the court shall presume that the person in question is the legitimate child of that man. It has been held that the presumption applies to

both statutory and customary law marriages and that the quality of evidence required to rebut it must be strong, distinct, satisfactory and conclusive (*Ogbole v Onah*, 1990). For instance, it has been held that the fact that a wife is living in notorious adultery is not sufficient to rebut the presumption nor is the husband's refusal to undergo medical examination (*Oduche v Oduche*, 2006). As noted, the provision codifies a strong akin rule of cultural conception of family life and that conception protects children in those circumstances because the cultural model applies indefinitely as long as the "marriage" is extant. This means that the presumption continues in favour of children born even after a husband dies because customary law marriage does not end with the death of a spouse nor does a wife's membership of her deceased husband's family. Therefore, any children born to her during this time are not illegitimate; they are legitimate children of the family. This cultural framework assures that the welfare such children are protected by the extended family. The proper means of severing the family relationship is by the woman's remarriage; and in that case any child born thereafter cannot claim a family relationship to the mother's previous nuptial family. Nonetheless, apparently because of Nigeria's legal plurality, the courts erroneously appear to use the statutory presumption to assess the cultural model. Its perspective seems to be that since the provision remains only a presumption, where there is strong evidence suggesting that a child born during the continuance of the marriage could not have been born by the married couple together, then such a child must be awarded to the putative biological parent and not to the spouse/family of its mother. The court applied this reasoning in *Ogbole v Onah* (1990). When the customary law marriage between X, the appellant's brother who later died, and the 2nd defendant broke down due to her alleged promiscuous lifestyle, X sent her away to his brother but she eventually moved to her sister's. She met the respondent at a hotel in June 1969 and thereafter cohabited with the respondent who was unaware of her married status. She became pregnant after six or four months and was delivered of the child in dispute on 11th July 1970. 2nd defendant got a divorce in 1971. The question before the Upper Area Court was whether the child belonged to X (who never claimed the child while alive) or the respondent. It awarded the paternity of the disputed child to the appellant on the grounds that the 2nd defendant was still the legal wife of X at the time of the child's birth (a subsisting marriage existed)—thus a legitimate child of the marriage upon the presumption of legitimacy under section 148 of the Evidence Act; and that under Idoma Native Law and Custom which governed the marriage, the husband of the wife is also the father of the child so long as the marriage between the parties subsists. The Court of Appeal raised the problem of the possibility of a sexual relationship between X and the 2nd defendant while she was separated from him and cohabiting with the respondent. It concluded that "the circumstances of the case clearly showed that the child belonged to the respondent as it was highly improbable that (X) would want to have sexual intercourse with the 2nd defendant after he had rejected her."

Nonetheless, it can be argued that the court's conclusion is not faultless. While

it may be true that X may not be the biological father of the child (even though the presumption of paternity covers the situation), a sexual relationship with the respondent was not established. At best, the court's conclusion was mere conjecture and one of a choice between two odds. Even if parties are cohabiting, it should be shown that there is a sexual relationship between them as mere cohabitation does not necessarily guarantee such. In *Ekrebe v Ekrebe* (1999), the appellant had claimed damages for adultery against the co-respondent. She gave evidence of the respondent's general cohabitation with the co-respondent as well as her change of name notification to the respondent's name published in a national daily. The Court of Appeal did not agree that cohabitation always results in a sexual relationship. It stated that the mere fact that the petitioner and the co-respondent were living in the same house coupled with the change of name is not enough in the absence of marriage which had been consummated, to prove adultery against the petitioner.

If this reasoning is applied to *Ogbole* then the court ought to have awarded the child to the appellant (extended family) to which the 2nd defendant was married. This view is fortified by the fact there was evidence that the 2nd defendant was "promiscuous" and not being legally married to the 1st defendant, her fancies may not have restricted to him alone. The extended family that sought for the custody of the child and its inclusion as its member could protect its welfare and rights better than a cohabitant-party who could deny both parentage and parental obligations in the future without legal consequences.

3.3. Beneficial Exclusion of Children by the Presumption of Parentage

A married woman does not automatically cease to be a member of her deceased husband's extended family; and by cultural conception, any children she gives birth to will be regarded as belonging to that family (Onuoha, 2008). As noted above, this framework protects the children's rights and welfare as members of the extended family consider them as their own. However, this family relationship ends upon the woman's remarriage since she becomes a member of another family thereby. The implication is that any children born after her remarriage will be excluded from membership of her previous nuptial family. While this may be perceived as negative, the new family may cater to the welfare of her subsequent children as a result of their acceptance. Again, the courts fail to appreciate this *commune-cultural* perspective. Disregard for this cultural conception of family could jeopardize the welfare of children as they may be rejected by both families. In *Ojukwu v Ojukwu* (2000), the appellant, head of the *Ojukwu* family, sought declarations to restrain the 1st respondent from insisting that the 2nd respondent was a son of her deceased husband who died intestate in 1987. The marriage had produced three daughters. Following his death, 1st respondent remarried G and the 2nd respondent was born in 1989 approximately two years after the death of D. Even though G acknowledged the paternity of the 2nd res-

pondent, the 1st respondent gave him D's family name at birth and paraded him as the son of D to enable him inherit from D's estate. While the court's ruling on the appellant's *locus standi* may be meritorious in principle, the court failed to appreciate the gravamen of the appellant's action, namely, that by cultural conception of family, the 2nd respondent would be viewed as a member of the *Ojukwu* family as represented by his mother. Its reasoning over-simplified this reality:

...the appellant would seem to be obsessed by the idea of giving the name "Ojukwu" to the 2nd respondent who was not a child of his late brother.... He feels that giving the 2nd respondent that name is a ploy to lay claim on Ojukwu family property. I ask, what is in a name? Is everybody not free to answer any name he likes? The appellant has no exclusive right to the name "Ojukwu". There are many Ojukwus all over the place who do not belong to the Ojukwu of the appellant. The appellant contends that the 1st respondent hav[en] remarried into the Agupusi family should no longer answer Ojukwu yet he sues her as "Louisa Chinyere Ojukwu" not Agupusi. He contends that the 2nd respondent is not Ojukwu yet he sues him as "Tobechukwu Ojukwu" and not as Tobechukwu Agupusi (*Ojukwu v Ojukwu*, 2000).

It is conventionally permissible and does not besmirch of illegality for a divorced woman or widow to continue using her husband's family name if she chooses to do so. She may have dozen documents bearing that name; and it may be officially and economically more expedient and beneficial to her. Therefore, there was no anomaly in being sued in her previous family name as the Court of Appeal apparently thought. Nonetheless, the perception of the appellant regarding the giving of its family name to the 2nd respondent in the case is contextual given the *commune-cultural* conception of family membership. The 1st respondent became a member the appellant's family by marriage and continued to be connected to that family through the children of the marriage even after her remarriage (there were four daughters of marriage). A likely socio-cultural impression will be that due to this marital connection, the child belonged to the deceased husband. Apparently, this was what the appellant endeavoured to prevent. And it was not too early in the day, as the appeal court thought, for the appellant to have brought an action. While the central issue in the case related to property inheritance, membership of a family under customary law comes with various rights and privileges beyond property or inheritance.

3.4. "Declaration" of Family Relationship through Customary/Cultural Ceremonies

In many communities, certain cultural/societal ceremonies performed by men provide roles which can only be undertaken by the recognized children of the celebrant. Therefore a man may indicate by or in his ceremony that certain persons are his children by assigning specified roles to those persons. The showcased performance is significant to the community and it will accept his repre-

sentation without question. This is true whether the man has any biological relationship with the children or not.

In *Emodi v Emodi* (2015) D, the decedent, died intestate in 2002. The appellants, who were his sister and brother claimed as plaintiffs that the he had no surviving children and as such they, the blood relations, were entitled to Letters of Administration in respect of his estate. Their evidence was a 2000 judgment of the High Court that dissolved his marriage. The court had made a finding that there were no children of marriage because the decedent was impotent. On the other hand, the 2nd to 4th respondents claimed to be the children of the decedent through the 1st respondent born in 1985, 1986 and 1989 during the pendency of the marriage between their mother and the decedent. They relied on the *Agbalanze* Society Ceremony performed by the decedent in 1993 in which he embraced the 2nd and 3rd respondents implying that they were his eldest son and daughter respectively. Further, that the he took care of them while alive and during the funeral rites, the 2nd and 3rd respondents were called out as his children to receive a purse from the *Agbalanze* Society. They tendered certificates, photographs and other documents. The court endorsed the overriding status of the Divorce judgment but laid emphasis on the crucialness of biological linkage to the existence of family relationship. Akeju JCA said

There is another finding in exhibit B... that the 1st respondent had indeed left the matrimonial home in 1982 i.e. about three years before the birth of the eldest of the respondents in 1985. There is no evidence that any sexual relationship took place between the 1st respondent and the adjudged impotent deceased thereafter. The 1st respondent was the wife of the deceased and undoubtedly the closet person to the deceased in the matter of their matrimonial affairs. The 1st respondent as a woman is to me, the most competent person when it comes to the paternity of the 2nd -4th respondents and having stated under judicial proceedings tendered as exhibit B that her marriage with the deceased produced no child, that completely eliminates any contention by the respondents about their paternity (*Emodi v Emodi*, 2015).

It held that it will be unsafe to ignore exhibit B to give preference to the customary acts asserted by the respondents and those grounds were not cogent or concrete enough to defeat exhibit B. Therefore, since they sought the grant of letters of administration on the basis that they are the decedent's children, they were not entitled in priority over the appellants who are the deceased blood relations.

Of course, the ruling of the court on the status of the judgment and the facts established in it is unimpeachable (*Evidence Act 2011, ss. 59-62*). Yet it is possible to conjecture a few intricacies. It is possible that the matrimonial petition was undefended, and the wife may have had a field day. This is common in divorce proceedings to smear a spouse. There is no indication that the claimants in the

instant case ever objected to the acceptance of the respondents by the community and society as children of the deceased either before or after his death. The court thought that biologically the respondents could not be the children of marriage, since 1st respondent had left the matrimonial home before their births, what about the presumption of paternity discussed above? Both the statutory presumption and the cultural rule evidently cover the situation in this case. How would one explain the association of the 1st respondent and the children? They were sued as respondents together. This is likely because they had apparently applied for letters of administration over the deceased's estate together. Finally, why would the appellants bother to join the 1st respondent as a party to the instant proceedings after she was divorced from their deceased brother? A simple cogent response to these observations and queries is that the cultural conception of family worked on the minds of the appellants: they knew that to the community, the respondents belonged to the family. And to the community, the judgment on dissolution would be meaningless with respect to the status of the respondents. Irrespective of the judgment, the respondents could show by scientific means that the deceased was their father. One wonders where the deceased came by the respondents who obviously participated in family affairs as his children!

3.5. Children Born within an Ostensible Customary Marriage

The familial position of children born out of wedlock has become rock solid in Nigeria's jurisprudence following the Supreme Court decisions in *Salubi v Nwariaku*, (2003) *Olaiya v Olaiya* (2002) and *Ukeje v Ukeje* (2014). Yet it appears that some judges continue to follow a restricted interpretation of the constitutional principles established in those cases. Their conception of family favours only children born within proven legal customary or statutory marriages thereby truncating opportunities to protect the economic welfare of other children born in other "marital" arrangements. An unfortunate and deprecable instance is *Motoh v Motoh* (2011), The respondent claimed to be the only or 1st son of the decedent and was therefore entitled to inherit his *Obu* or family compounds. His case was that his mother was a second wife—a claim substantiated by four witnesses. The appellants' case was that the deceased had six daughters by his statutory wife and that the respondent was a maidservant to the decedent's wife who was driven away from his home when she became pregnant. The Court ruled that the decedent was statutorily married at the time of the alleged customary marriage (which will make it illegal, null and void) (*Marriage Act 1914, s. 35*). Yet, the court insisted that the respondent was required to prove the essential ingredients of a valid customary law marriage before his membership of the decedent's family could be accepted. The court stated:

The plaintiff/respondent had claimed to be a son of the (deceased), *however being a biological father is different from being a father legally in the eyes of the law*. All the witnesses who testified on behalf of the plaintiff/respondent only gave evidence to the fact the plaintiff/respondent's mother was alle-

gedly married to the (deceased) and gave birth to the plaintiff/respondent while (the deceased) was alive. I am not unmindful of the fact that in Nigeria, children not born in wedlock (marriage ordinance) or who are not issue of a marriage under Native Law and Custom, but are issues born without marriage can also be regarded as legitimate children if paternity has been acknowledged by the putative father. There is no evidence before the court that (the deceased) acknowledged his paternity either in record or by conduct.

The court relied on old section 36 of the Marriage Act (which is no longer law in Nigeria), *Osho v Phillips* and *Cole v Akinyele* to reach its conclusions! Those cases were overruled in *Salubi v Nwariaku* (2003) as no longer representing the law with the implication that the principle of acknowledgement is no longer required in the determination of parenthood where a biological connection has been made. Yet, the court held that the respondent was not a child of the decedent “because he is a *product of an unlawful, null and a void marriage*” In the zeal to deprecate the ostensible marriage, it lost sight of the important issue, namely: whether the respondent was a *child* of the intestate. It lost the opportunity to protect his welfare in the face of a preponderance of evidence that supports his family tie to the intestate. Interestingly, the only evidence upon which the court presumed a statutory marriage in favour of the appellants was the celebration of the marriage in a church. No marriage certificate was produced nor was there any evidence that the church building was a licensed place of worship as required by the Marriage Act 1914.

3.6. Children by Customary Adoption

Under customary law, adoption could be effected formally and informally (Nwogugu, 2014). Formal adoption involves formal meetings between the families involved as well as their consents and approvals. On the other hand, the indices for informal adoption include reception and assimilation of a child into a family over a long period, some form of guardianship or fostering, maintenance and upbringing of the child. Nwogugu (2014) opines that the distinguishing feature is the length and depth of the relationship. Where all these were present, Thompson J ruled that the child was adopted under customary law in (*Akinwande v Dogbo*, 1969; *Martin v Johnson*, 1945; *Administrator General v Tuwase*, 1946; Onuoha, 2008). The Supreme Court missed an opportunity to entrench an expansive conception of family using this *commune-cultural* platform in *Olaiya v Olaiya* (2002). There were no biological children between the plaintiff and the decedent but the plaintiff claimed that they adopted two children X and Y born in 1976 and 1979. The deceased had a third child (the appellant) born by Z out of wedlock in 1977. Upon his death, his brothers, the defendants, took over his company and all his properties, initially without obtaining letters of administration. The plaintiff therefore sought a declaration that only the plaintiff and the three children of the deceased were the exclusive beneficiaries of the decedent’s estate and that the defendants did not have any such interest. This was granted.

The appellant appealed on the ground that the trial court had failed to pronounce on the issue of whether X and Y were adopted children of the deceased so as to entitle them to a beneficial interest. The trial court had upheld the validity of the adoption of X and Y. The Supreme Court, per Ejiwunmi JSC, held that the plaintiff failed to give such (documentary) evidence to show clearly when and how X and Y were adopted. It ruled that the trial court was “wrong to have referred even though obliquely, to (X and Y) as the adopted children of the (plaintiff) and the deceased husband.” According to Ogwuegbu JSC,

You cannot pick children anyhow. Since (X and Y) are not biological children of the plaintiff and her late husband evidence of adoption was material. Proof of adoption is essential both for the adopter and the adopted person or any other person for the purpose of devolution of property on the intestacy... It was strange that (the plaintiff) was unable to tender any documentary evidence establishing the adoption or offering any acceptable evidence to that effect.

Uwaifo JSC said

The issue of adoption of a child and the consequences of it cannot be so casually disposed of by a court of law.... No one will lightly permit a stranger to claim his or her family lineage and inheritance unless through entitlement by blood or genuine adoption. Since the respondent failed to discharge the burden of proving adoption, there can be no basis for including the said X and Y as beneficiaries of the estate of the (deceased)....

The Supreme Court failed to view the issue of adoption of these children from the broad cultural perspective with a desire to protect and promote the children’s economic welfare or give their best interest paramount consideration. If that had been the case, the statements by members of the panel would be uncalled for. Since the children had lived with the *parents* virtually all their lives those children were not “strangers” as described by the apex court. And what law prohibits a property owner from allowing even a *stranger* strictly so called to benefit from his estate? It is not true that the right to, or claims to inheritance can only be “through entitlement by blood or genuine adoption” as the Supreme Court says. For example, no one and no court has ever questioned the testamentary freedom of a testate! So why should such a question arise in an intestate situation if there is a manifestation of a property owner’s intention to benefit a so-called “stranger”? In intestacy statutes provide that where the claimant is regarded as a “*dependent whether kindred or not of the intestate*” or “*other persons for whom the intestate might reasonably have been expected to make provision*”; then such claimant may become a beneficiary. (s. 120 *Administration and Succession (Estate of Deceased Persons) Law 1986-Anambra*); s. 49(1)-(5) *Administration of Estates Law 1959*). In addition, the reference to adopted children under section 69 of the MCA for the welfare jurisdiction in divorce situations is not limited to statutory adoption under the various adoption laws of

states in Nigeria. Section 114 of the Act interprets “adopted” to mean “*adopted under the law of any place (whether in or out of Nigeria) relating to the adoption of children.*” Customary law is one of such “law of any place” relating to adoption of children. And there is no question that the two children in *Olaiya* were ordinarily members of the household/family of the deceased and should not have been shut out from the distribution scheme. This is in harmony with Diala’s “best interests of dependents” ideal which entails considering the overall welfare of everyone maintained by the deceased person shortly before death (Diala, 2014). Alternatively, Wright (2015) regards the *Olaiya* situation as a “functional parent-child relationship” and strongly argues that there is no good reason for exclusion of a person “who came into the decedent’s home as a minor, was cared for and treated like a child, and who, upon reaching adulthood, cared for the parent as an adult child is likely to do” even where a formal adoption could not be completed (Wright, 2015). He explains that “the decision not to adopt is more often the result of cost, fear of the loss of privacy, or insecure adult relationships.” (Wright, 2015). On the other hand, they could be included under the presumption of equitable adoption particularly where intent is evident from actual facts (Wright, 2015). Comparatively, s. 1(1ZA) of the UK’s Inheritance (Provision for Family and Dependents) Act 1975 as amended by the Inheritance and Trustees Powers Act 2014 entitle persons in the class of the *Olaiya* children to apply for reasonable financial provision from a deceased “parent’s” estate where they were excluded. Under that law, any person who was treated by the deceased as a child of the family in relation to that marriage and any person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased could access that remedial jurisdiction (Lowe & Douglas, 2015).

4. Conclusion

In Nigeria legislation is broadening the conception of family to protect individuals in various human rights situations so that relationships that had hitherto not been accepted as creating family relationship under the general law are being recognized. This has impacted on the categories of children who benefit from welfare remedies on divorce, those of cohabitant families and other loser relationships who could be protected from domestic violence. Apparently, that and the emphasis of the committee of nations on protection of vulnerable members of society using the bill of rights has seen the Nigerian judiciary take a stalwart stand in favour of children of those of ostensible statutory marriage and those born of out of wedlock including those within non-conventional cultural procreation arrangements. The protection of courts continues for children within the corporate (extended) family for *inter vivos* land rights. Nonetheless, the courts are unwilling to extend the same altruistic jurisdiction to children who become members of families under other non-biological but community-accepted structures for linking individuals as family members. This has negatively affected child-

ren of posthumous “marriages”, those by presumption of parentage, those indicated by customary ceremonies, those born under ostensible customary marriage and those by customary adoption. Simply put, the implication is that in principle, such children are rejects who deserve no protection from the state given the central role of the family to welfare protection.

The socio-economic and legal circumstances of Nigeria place the family unit at the centre of practical realization and protection of children’s rights: from survival (through provision of food, clothing, accommodation and basic health-care) to socialization (through both formal and non-formal education/training/apprenticeship at some skill acquisition). This is a fact. In cultural settings, the conception, assemblage and internal workings of families are designed to enable them perform these utilitarian functions. It is imperative for the protection of our children therefore, that the privacy of these *commune-cultural* models of family be recognized, respected and supported by the state. Otherwise, the state will be renegeing on its proclaimed goal of ensuring that children and young persons are “protected against any exploitation whatsoever, and against moral and material neglect” (1999 constitution, s. 17(3)(f)). The same outcome befalls section 16(1)(b) & (2)(b) of the 1999 Constitution: “control[ing] the national economy in such manner as to secure the *maximum welfare, freedom and happiness of every citizen* on the basis of social justice and *equality of status and opportunity*” and ensuring that suitable and adequate shelter, food, welfare are provided for all citizens.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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