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CUSTODY DECISIONS: EXPLORING TYPES OF ARRANGEMENTS AND THE FACTORS THAT MATTER

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Abstract: This article provides an in-depth examination of child custody decisions, focusing on the various types of arrangements and key factors that influence court outcomes. It explores the complexities of sole custody, joint custody, and shared parenting, highlighting the importance of prioritizing the child's best interests. The article discusses the role of parental ability, co-parenting, and the court's role in determining custody arrangements. By analysing the nuances of custody decisions, this article aims to inform and support parents, and legal professionals navigating these complex and often emotionally charged proceedings.

Keywords: Custody, Decisions, Arrangements, Factors, Children, Parents, Best interests.

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I. Introduction

When marriage breaks down the spouses would be confronted with the nagging question of custody in the case where they have children. This question never arose under the common law since the father was accepted as the rightful custodian of any children of the marriage. This right continued even after his death since he could appoint a testamentary guardian to take care of his infant children. This state of affairs continued until 1839 when the court of Chancery was bestowed with powers to give a mother the custody of her children until they were seven years old provided that she had not committed adultery[1]. This age limit was extended to 16 years by the Custody of Infants Act 1873 which also effaced the provision concerning mothers who had committed adultery. If the statute was very much acclaimed, it is because unlike the common law position it made it possible for a father to enter into an agreement with his wife relinquishing his right of custody of their children to her[2]. The issue of custody of illegitimate children posed a different type of problem since the parents did not owe them any duty in law. Today however, exclusive custody rests with the mother.[3]

The term custody may not be as easy to define as any reader would imagine. It has restricted and a wider meaning. The restricted sense would limit it to mean, having mere possession and control of the infants' movements. But Sachs L. J pointed out in *Hewer v. Bryant*[4]*:*

> *In its wider meaning the word custody is used as if it were almost the equivalent of guardianship in the fullest sense, whether the guardianship is by nature, by nurture, by testamentary disposition, or by order of a court…such guardianship embraces a bundle of rights, or to be more exact, a bundle of powers, which continue until a male infant attains 21, or a female infant marries. These include power to control education, the choice of religion, and the administration of the infant's property. They include, also both the personal power physically to control the infant until the years of discretion and the right…to apply to the courts to exercise the powers of the crown as parens patriae. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, i.e. such personal power of physical control as a parent or guardian may have.*

So physical control could be regarded simply as, one of those rights included in the wider meaning of custody. In addition to the rights mentioned by Sachs L.J. above, one can also note the right to administer reasonable corporal punishment, the right to

[1] See the Talfourd's Act 1893
[2] S. 2 Custody of Infants Act 1873
[3] Pr Ngwafor E. N., Property Rights and Financial provisions (Family Law 2) complete lecture notes, Masters I English Law, Faculty of Law and Political Sciences, University of Yaounde II, SOA, 2021.
[4] 1 Q.B. 357. 1970

determine the form of the child's secular and religious education and as the recent House of Lords case of Gillick v. West Norfolk and Wisbech Area Health Authority[5] shows, a right also to consent to the child's medical treatment. On the other hand, the parent has a duty to maintain the child, protect him and represent him in legal proceedings. It cannot be doubted that a parent can better exercise these rights or powers over a child if he has physical possession and control of the child. This explains why this part of the book will discuss mainly the criteria used by the courts in making custody orders. In the words of one English writer, physical control represents the kernel of a parent's rights[6].

Custody decisions are a pivotal aspect of family law, often emerging as a critical issue in situations involving separation, divorce, or disputes between parents or guardians. The determination of child custody can be complex and emotionally charged process, as it involves making decisions that profoundly impact the lives of children and their families. When parents part ways, they must navigate the challenging terrain of deciding who will have primary responsibility for the care, upbringing and well-being of their children[7].

The court's primary consideration in making custody decisions is typically the best interests of the child, a standard that encompasses a range of factors, including the child's physical, emotional and psychological needs. However, applying this standard can be complicated, as each family's circumstances are unique, and the court's decision must balance the rights and responsibilities of parents with the children's paramount needs.

In recent years, there has been a growing recognition of the importance of co-parenting and shared parental responsibility, with many jurisdictions moving towards a more nuanced approach to custody arrangements. This shift acknowledges that children benefit from maintaining meaningful relationships with both parents, whenever possible, and that joint custody or shared parenting arrangements can be beneficial for children's emotional and psychological well-being[8].

Despite the growing trend toward shared parenting, sole custody arrangements remain common, particularly in cases where there are concerns about aa child's safety or well-being. Ultimately, the goal of custody decisions is to ensure that children receive the care, support and stability they need to thrive.

This article aims to provide a comprehensive exploration of the various types of custody arrangements, including sole custody, joint custody and shared parenting. We will examine the key factors that influence custody decisions, including the child's best interests, parental ability, and the court's role in determining custody outcomes. By understanding the complexities of custody decisions and the various arrangements available, parents and families can better navigate this challenging process and make informed decisions about their children's futures[9].

[5] 3 All E.R. 402 H.L. 1985
[6] Bromley, Bromley's Family Law, Ibid., P. 256
[7] Pr Ngwafor E. N., Property Rights and Financial provisions (Family Law 2) complete lecture notes, Masters I English Law, Faculty of Law and Political Sciences, University of Yaounde II, SOA, 2021.
[8] Ibid.
[9] Ibid.

II. The Legal Framework Governing Child Custody

The court is obliged to make a custody order once spouses appear before it in proceedings for annulment, judicial separation or divorce. It is stated in section 41(1) of the matrimonial Causes Act 1973 that:

The court shall not make absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation unless the court, by order, has declared that it is satisfied

a) That for the purposes of this section there are no children of the family to whom this section applies, or

b) That the only children who are or may be children of the family to whom this section applies are the children named in the order and that –

i) Arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or

ii) It is impracticable for the party or parties appearing before the court to make any such arrangements; or

c) That there are circumstances making it desirable that the decree should be made absolute or should be granted, as the case may be, without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (b) above.

Indeed the court of Appeal in Bamenda in Jacob Sama Ntombi v. Mary Ndibabonga[10] went ahead to make a custody order, having discovered that the lower court had remained silent on the issue. Notwithstanding that a custody order is ancillary to a matrimonial proceeding, nothing stops the court from making the order before determining the problem raised in the main matrimonial cause considering the problems that could emanate from the provisions of section 41 (1)(c), it is further enacted that in such circumstances "the court shall not make an order declaring that it is satisfied…unless it has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangement for the children named in the order before the court within a specified time"[11].

As stipulated in section 41 such an order can be made only when there is a child of the family, and section 52 (1) (c) declares that "child of the family" means

a. A child of both of those parties; and

b. Any other child, not being a child who has been boarded out with those parties by a local authority or voluntary organization, who has been treated by both of those parties as a child of their family.

A. The Welfare Principle

The cases clearly demonstrate that when a court has to make a custody order the child's welfare is regarded as the "first and paramount consideration". This view has been inferred from the provisions of section 41 of the Matrimonial Causes Act 1973. It would appear that the popular phrase "first and paramount consideration" has been borrowed from section 1 of the

[10] Bromley, Bromley's Family law, Ibid. P. 256
[11] Appeal No BCA/50/84 (Unreported)

Guardianship of Minors Act 1971 which is inapplicable in former West Cameroon. It is therein stated that:

> …Where in any proceedings before any court…
>
> a) The legal custody or upbringing of a minor; or
>
> b) The administration of any property belonging to or held on trust for a minor, or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father

This terminology has also found favour with the judges in Anglophone Cameroon. As Monekosso J. pointed out in Atem v. Atem[12] it does not matter whether or not the proceedings are defended, since the welfare of any child of the family takes priority, and that the concern expresses itself in a prohibition against making a decree absolute of divorce or nullity or of judicial separation, unless the court is satisfied that proper arrangements have been made[13].

It is however, very difficult to define the phrase "welfare of the child". In most cases our Cameroonian judges have been very laconic in their custody orders. The practice has been simply to declare that a custody order would be made mindful of the evidence before the court. For example, in Njotsa v. Njotsa[14] Endeley J. in making such an order after pronouncing a decree of divorce, simply announced that:

> *On the evidence before me, I hold that the child of the marriage will be better off if he remains with the petitioner. I therefore grant her custody of the child but also grant the respondent an unbridled night of access to the said child at all reasonable periods*[15].

The evidence of the above case did not show that the child would be worse off staying with the respondent than with the petitioner. The facts of the case turned mainly on proving that the marriage between the parties had broken down irretrievably. There was nothing the judgment which indicated that the respondent was not in a better position to guarantee the child's welfare. Similar short judgments on custody orders can be found in Mensah v. Mensah[16], Sandjo v. Sandjo[17] and Shu v. Shu[18].

In any case, a child's welfare implies many factors. Material or physical comfort may not suffice as other elements must be taken into consideration. As one judge once pointed out every circumstance must be taken into consideration, and the court must do what under the circumstance a wise parent acting for the true interests of the child would or ought to do[19]". All in all, the vagueness in the definition persists with a result that the decision in each case will turn on its special facts. But before the court takes a decision on this issue, it usually seeks the advice of experts. And in this connection the opinions of social welfare officers have been very helpful. In Mendi v. Mendi[20] and Mbiaffie v. Mbiaffie[21] Justice Inglis ruled that he would first of all seek the advice of social welfare services before making a final order on the custody of the children of the family. In yet another case Ngaleu Jean Baptist v. Pouambe Kouaney Justine[22] the social welfare officer in Buea was asked to investigate into the living conditions of the parties. The spouses and their six children lived in a two bed-room house in Limbe in living conditions described as squalid and cramped. The children looked healthy and strong but were shabbily dressed and although they respected their father they were nervous and uneasy in his presence. When interviewed the children disclosed that, they hardly saw their father, he disturbed them when they were asleep by sending them on errands at odd hours in the night; he did not buy all their school requirements; he showed no affection towards them and was often negligent when they fell ill, while their mother showed them much love and attention. In fact the condition in the house and the children showed neglect. On these findings Justice Deba did not hesitate to grant custody to their mother[23].

The definition of child of the family given in section 52 (1) (c) of the matrimonial causes act 1973 is so broad that there is a possibility of finding step-parents and parents against each other in their prayers for a custody order. Thus in J v. C[24] the custody of a 10 years old boy born to Spanish parents was in dispute. The child was born in 1957 shortly after his parents arrived Britain to enter domestic service. Shortly after the child's birth in 1957 the mother became ill and from that time onwards he had been in the care of English foster parents, except for a short period of 17 months during which time the child lived in Spain with his parents. In 1961 the child had been returned by his parents to the foster parents because his health had deteriorated. In 1965 a warship order was made granting care and control of the child to the foster parents until a further order should be made. In May 1968 the parents applied in further warship proceedings for care and control of their child, and by this time, the mother's health had greatly improved and they were able to offer the child a good home in Spain. The child, however, had become well integrated into his English home and there was a serious doubt as to whether a child so English in his ways could adjust to life in Spain. The trial judge held that it would be wrong to return the child to his parents, a decision which was upheld at the court of appeal. The House of Lords further took the same view[25]. The House of Lords maintained that although it would be proper for a parent to ask for custody of his child such a wish take into consideration the welfare of the child. As Danckwerts L.J once remarked:

[12] Suit No. HCSW/77mc/82unreported
[13] Pr Ngwafor E. N., Property Rights and Financial provisions (Family Law 2) complete lecture notes, Masters I English Law, Faculty of Law and Political Sciences, University of Yaounde II, SOA, 2021.
[14] (1971-73) U, Y LR
[15] Ibid.
[16] (1968 – 70) U. Y. L. R. 106. See the judgment of Gordon C.J.
[17] Suit No HCSW/74mc/80 (UNREPORTED) judgment of Mbouagbaw J.
[18] Suit No. HCB/16/85 (UNREPORTED), Judgment of Monekosso J
[19] Kay L. J. in R v Gyngall (1893) 2 Q. B. 232 at P. 248
[20] Suit No. HCSW/80mc/80 (unreported)
[21] Suit No HCSW/30mc/85 (unreported)
[22] Suit No HCSW/32mc/85 (unreported)
[23] See also Foleng v. Foleng Suit No. HCSW/4/74 (Unreported)
[24] (1970) A. C. 668
[25] Facts extracted from peter Scago and Alastair Bissett – Johnson, Cases and Materials on Family Law (1976) P. 390 et Seq.

> *But I would respectfully point out that there can only be one "first and paramount consideration", and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents or of the exclusive right to the custody of their children, when the future welfare of those children is being considered by the court*[26].

Ordinarily, however, the parents of a child stand a better chance of having a custody order in their favour than a stranger[27]. In Engo v. Engo[28], the court found that if the father were granted custody of the children, he would leave them with one other woman, a lady who did not only despise the children's mother, but had actually subjected her to a most humiliating and violent assault before their very eyes, and under circumstances which forced one of them to comment aloud, that he wished he was not born. In the interest of the children therefore, custody was given to their mother. So too was the case of Doh v. Doh[29]. The parties travelled to Trinidad in 1970 where the husband had to pursue a specialist course in medicine. But because of the nagging nature of the wife, who was continuously being influenced by her parents, the parties returned to Cameroon in November 1972. At the airport the wife's father took her travel papers and passport and then took her away. The husband was left standing without his wife. He went to live with his sister in Victoria while the wife remained in Buea with her parents. The husband pleaded with the wife to return but she refused to live with him. He further testified that when he went to her parents' house 'he was coldly received, and that his father in law would call him a vagabond and assured him that his daughter could not live with him again. However, in January 1973, the wife returned to the matrimonial home but refused to resume marital relationship. She told her husband then that he had returned only as a baby nurse. About two weeks later she left for Yaoundé leaving a six week old baby in Buea with the parents.

In March 1973, the wife finally packed out of the matrimonial home and without the knowledge and consent of the husband she left for Liberia. The only child of the family was in the custody of the wife's parents and they had deprived him access to the child. In discussing the issue of custody, the judge found that the care and upbringing of the child had now been left I the hands of the wife's parents. And that since the parents had demonstrated flagrant hostility towards the child's natural father, there was the fear that the child may grow up and not be able to know his true father. In the circumstances therefore, custody of the child was given to the father.

Again in Moussi v. Moussi[30] the parties themselves agreed that since the child named in the suit was not the husband's natural child, the wife, i.e., the child's mother should be granted custody. The court did not disturb this agreement.

It should be stated here that although the child's welfare is the first and paramount consideration, the court has to bear in mind, before making a custody order, that there are also other factors which the court cannot overlook in the words of Inglis J. in Foleng v. Foleng[31]:

> *The court in deciding this question should regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from another point of view the claim of the father or any right at common law possessed by the father, in respect of such custody or upbringing is superior to that of the mother. The welfare of the infant, although the first and paramount consideration not the sole consideration.*

B. Factors Influencing Custody Decisions[32]

The following factors usually help the court in deciding cases of custody. This is especially so, when the evidence shows that both parents would provide the necessary facilities for the child which will guarantee his welfare.

1. Conduct of the Parties

It is doubted if the conduct of a spouse as disclosed in a divorce suit would affect the court when making a custody order. It had once been thought that a wife who has committed adultery should not be given custody of a young child, especially a young girl. But as Singleton L.J. disclosed in the English case of Willoughby v. Willoughby[33] it does not necessarily imply that an adulterous mother is not a good mother. And unless her conduct affects her capabilities as a mother, this factor seems to play an insignificant role. Such an occasion could arise where a mother abandons the child and father: As Lord Denning pointed out in Re L (Infans)[34] it would be most improper for a mother to go off with another man and then turn round as of right to claim from a father who had done no wrong. As was once observed by an English Judge:

> *It is not the law, and it has never been, that no consideration shall be given to the spouse who has been deserted, whose home has been blasted, whose matrimonial felicity has been ended through no fault of his. If a wife chooses to leave her husband, for no ground which she chooses to put forward, but because she has a fancy or passion for another man, as this woman has, she must be prepared to take the consequences. She is a curious woman in that she seems to have no consciousness that she has duties as well as rights*[35].

The wife's conduct, undoubtedly must have affected the court's decision in the case of Doh v. Doh[36]. In fact Inglis J. in Foleng v. Foleng[37] warned that the conduct of the guilty party has to be taken into consideration before such an order is made.

[26] In Re Adoption Application 41/61 (1963) Ch. 315 at P. 329
[27] Sec Re Thain, Thain v. Taylor (1926) Ch. 676.
[28] 1971 – 73, U. Y. L. 22
[29] Suit No. HCSW/67/73 (Unreported)
[30] Suit No. HCF/115mc/87 (unreported)
[31] Suit No. HCSW/4/74
[32] Pr Ngwafor E. N., Property Rights and Financial provisions (Family Law 2) complete lecture notes, Masters I English Law, Faculty of Law and Political Sciences, University of Yaounde II, SOA, 2021.
[33] (1951) P. 181
[34] (1962) 1 w. l. r. 886.
[35] Harman L. J. in Re L. (1962) 1 W.L. R. 886 at pg 890, 891, cited by Cretney, Principles of Family Law, Ibid at P. 332.
[36] Suit No. HCSW/67/73 (Unreported)
[37] Supra

2. Emotional Stability

As early as 1926, an English judge observed that a court would not hesitate to grant a custody order simply because to do so would cause a young child to part from an environment he is already used to, with the resultant distress. As to the distressing element, the judge pointed out that:

> *I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transit are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case*[38].

Nonetheless the tendency is to make sure that a child's stability is not unnecessarily changed. So in Fohtung v. Fohtung[39] the appellant appealed against the trial judge's order that custody of the three children of the family should be given to the respondent. He had a second wife, and it was argued in his favour that there was no evidence for the finding that the applicant's second wife, being childless, may not take kindly to the children, conduct which could trigger off all sorts of unpleasantness. But Justice Asu found that since the children had been living with their mother for a long time they had, as a result, built up affection for her which they should not be deprived of at their very tender ages. In Engo v. Engo[40], the wife, a non-Cameroonian had opted to settle in Cameroon and to look for, and secure for herself a job. All the four children of the marriage were born in Nigeria, The United States of America, England and West Germany, respectively. She lived with all of them ever since they were born. The father on the other hand was a professional diplomat who at the time this matter came to court was based in New York and attached to Cameroon's permanent mission to the UNO. This assignment kept him away from home for most days and nights. Besides, as a diplomat, he was exposed to sudden and intermittent movements from country to country to meet the exigencies peculiar to the service to which he had been integrated. And on his testimony, he would not like his children to be brought up under the influences of the American Society. For these reasons Chief Justice Endeley ordered that custody of all the children should go to their mother[41].

3. The Age, Sex and Health of the Children

The popular opinion once voiced was that young girls are better off with their mother and boys with their father. Some have even argued that generally young children, especially when they are ill, are better cared for by their mother. This may explain the view that in the event of the father not being able to find a good home for a child will lead the courts (unless other considerations disqualify the mother) to fall back on the rule of common sense that young or sickly children are probably better looked after by their mother[42] .

It would appear, however, that this does not seem to be a hard-and-fast rule, especially as other factors have to be considered. Indeed Chief Justice Gordon awarded custody of two tender children to their father in the case of Mensah v. Mensah[43]. Again in Foleng v. Foleng (An infant)[44] custody of a four year old girl was given to the father. The comprehensive and scrupulous report of the chief welfare officer favoured the father with whom the child had been living. And even when the child's nurse and teachers were later interviewed, there was confirmation that the child was doing well at school and that she was happy in her surroundings.

So Lord Denning's view in Re W V. W & C[45] that:

> *…it is right to be guided by the general principle that a boy of this age, some eight years of age, is, on the whole, other things being equal, better to be with his father,*

Is no longer as persuasive as Harman L. J.'s that:

> *I do not at all agree with the expressions of opinion that have fallen, perhaps per incuriam, from judges that a boy should as a matter of principle, be with his father, just as much as I disagree with the other principle which has altogether been abandoned that a girl under three should as a matter of principle, be with her mother. Other things being equal these may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judge when the scales are nicely balanced*[46] .

I f the welfare of the children has been secured; it now goes without saying that the order will be made either to the father or mother, the sex of the children notwithstanding. It has also been found that a court may be tempted to leave small brothers and sisters who are already used to one another to grow in the same surroundings[47].

4. Material Wealth of Either Parent

It is doubtful if a parent would be refused custody of a child for the simple reason that he or she is not as wealthy as the other party. After a divorce case, it is possible for the court to make orders concerning property adjustment and financial provisions. Emphasis should therefore rest on the care that can be afforded to the child. So in Mahop v. Mahop[48]the mother was granted custody of the five children of the marriage notwithstanding that the father was on a gross income of 420000 francs CFA a month.

However, the issue of material advantages may be considered if it is found that one party cannot find suitable accommodation. In Ojong v. Ojong and Jessie Divine[49] the parties got married in London in 1963 and had two children of the marriage. The two children returned to Cameroon with their father and remained with him until their mother returned in July 1968, barely one month before she filed a petition for divorce. She had no house of her own and earned no salary since she was still unemployed while the husband had a well paid job. He lived comfortably and according to the evidence had made adequate and commendable provisions for the children. But when the wife

[38] Eve J. in Re Thain, Thain v. Taylor (1926) Ch. 676
[39] Appeal No. CASWP6185, (Unreported)
[40] (1971-73) U. YL. R. 22.
[41] Pr Ngwafor E. N., Property Rights and Financial provisions (Family Law 2) complete lecture notes, Masters I English Law, Faculty of Law and Political Sciences, University of Yaounde II, SOA, 2021.
[42] Peter Seago & Alastair Bissett – John, Pg. 400
[43] (1968 – 70) U. Y. L. R. 106
[44] Suit No. HCSW/4/74 (Unreported)
[45] (1968) 1. W. L. R. 1310 at p. 1312
[46] Re C (A) (An Infant) (1970) 1. W. L. R. 288 at pg. 289. Both views cited by P. Seago & Alastair Bissett – Johnson, Ibid. Pg. 403
[47] (1962) I. W. L. R. 724 Where Lord Evershed M.R, refused to place but see the court of Appeal judgment to the case of Re O (infans) much weight on this factor
[48] Suit No. HCSW/21mc/78 (unreported)
[49] (1968 – 70) U. Y. L. R. 65

returned from England she took custody of the younger child, while the elder one who was attending a privileged school at Bota continued to live with the father. On these findings the court ruled that custody of the elder child, notwithstanding the fact that she was a girl, should remain with the father. The mother was given custody of the younger child.

5. Wishes of the children

Just as the wishes of a child's natural parents would be taken into consideration when making custody orders, the court may also decide to listen to the views of the child for whom such an order is sought. Usually these views can be obtained from social welfare officer's report. But nothing stops the judge from doing so personally. In any case, it does not necessarily imply that the judge is bound by the wishes so disclosed. It would appear that a judge will give more weight to the wishes of a 'big child than to a very young one who may not be able to appreciate the consequences of his statement. In Engo v. Engo[50] the court was heavily influenced by the view that one of the children would have lived had custody been given to their father[51].

There is authority for the view that a superior court may reverse a custody order if it is satisfied that a different decision would have been arrived at had the wishes of the children been made known. In Tarh v. Tarh[52] a similar problem had to be examined by the court of Appeal in Bamenda. The parties were married in 1977. They had five children, three of whom were attending primary school. For about three and a half years, the father refused taking meals in his house because he entertained the fear of being poisoned by the wife. As a result of growing tension between the spouses the wife packed out of the matrimonial home in October 1986. She took along the two younger children of the family. The husband filed an application for judicial separation. The wife did not oppose the application because she considered the allegation of her attempts to poison to poison her husband to be very serious, and so she equally harboured the fear that in revenge the husband could attempt to poison her. The decree of judicial separation was granted and custody of the children was given to the mother. The father appealed inter alia, that the trial judge erred in law in failing to seek the views of the children especially those who were seven years old and already attending primary school:

In allowing the appeal, justice Ndoping stated that:

> *…we are of the view that in cases of custody where the children are of ages like some of the children in this case the trial judge should seek the wishes and feelings of the child in determining which of the parents should be given custody*[53].

III. Understanding the Various types of Custody Orders

It had been noted earlier that before a court pronounces a decree of divorce, nullity or judicial separation it must first of all be satisfied that arrangements have been made for the custody of any children of the family[54]. However, the court's authority to make a custody order is founded in Section 42 (1) of the Matrimonial Causes act 1973. It is therein stated that:

> *The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18-*
>
> *a) In any proceedings for divorce, nullity of marriage or judicial separation, before or on granting a decree or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute);*
>
> *b) Where any such proceedings are after the beginning of the trial, either forthwith or within a reasonable period after the dismissal; and in any case in which the court has power by virtue of this subsection to make an order in respect of a child it may instead, if it thinks fit, direct that proper proceedings be taken for making the child a ward of court.*

The English cases show that the court is still being influenced by the two definitions of the term custody discussed earlier. This explains why it is usual to see a case wherein 'custody (in its wider sense) is given either to the mother or father and care and control is given to the other party. This dichotomy could be very crucial if one considers the different consequences flowing from the two meanings of the term custody[55]. This is what in law is known as a split order. There is also the possibility of making a joint order, with care and control vested in only one parent. A joint order simply implies that both parents will be given custody in its wider sense. This rationale for granting split orders was once stated by Lord Denning thus:[56]

> *Cases often arise in the divorce court where a guilty wife deserts her husband and takes the children with her, but the father has no means of bringing them up himself in such a situation, the usual order is that the father, the innocent party is given the custody of the child or children, but the care and control is left to the mother. That order is entirely realistic. By giving the father the custody, it recognises that he, the innocent party, is at least entitled to a voice in the bringing up of the child or children, and is entitled to the consideration of the court when any question arises as to what is to be done for the child*[57].

Split orders are common in the Cameroonian judgments. It would appear that the judge seem to take for granted the fact that although care and control has been given to one parent, the other parent has a voice in important issues such as consent to the child's

[50] (1971 – 73) U. Y. L. R. 22

[51] See also Allen v. Allen (1974) 3 All E. R. 385 Where two boys aged 13 and 15 respectively were transferred from their father to their mother because the children disliked the company of one lady, their father's friend, who helped him to take care of the children.

[52] Appeal No. BCA 19/87 (unreported)

[53] Ibid.

[54] S. 41 MCA 1973

[55] Bromley cites the case of Jane v. Jane (1983) 4 FLR 712 C.A. where care and control was granted to the mother, but because she was a jehovah's witness and would not therefore consent to her child having a blood transfusion, custody was granted to the father so as to enable him to consent to the child's medical treatment should the need arise. Bromley's Family law, Ibid. p. 295

[56] (1954) 1 WLR. 366 at p. 369 – 370, cited by P. Seago & Alastair Bissett Johnson Ibid. P. 376

[57] See also the views expressed in Dipper v. Dipper (1980) 2 All E. R. 722 C. A.

marriage, consent to change the child's name, consent to medical treatment, matters concerning the child's education, etc. This explains why the judgments barely declare the parent to whom custody (presumably the narrower sense) of the child has been given[58].

It is also within the court's competence to declare that either parent is unfit to have custody of the children of the family[59]. This could happen where a parent is insane or dangerously violent. Should the other spouse be granted custody the implication is that, even if he dies, custody of the children would not be transferred to the parent who has been declared unfit? One wonders what would be the fate of a child in the case where both parents have been declared unfit to have custody. The matrimonial Causes Act 1973 has made provision for custody to be granted to an independent person in exceptional circumstances[60]. In such a case the court has power to make a supervision order, in which a local authority or welfare officer would be able to oversee the manner in which the independent person would carry out his responsibilities.

Another type of order which is not common in our society for lack of the necessary structures is the committing of children to the care of a local authority[61]. Even here too, there must exist exceptional circumstances before a court would make such an order.

It is becoming more and more traditional for the court to make an access order in favour of the spouse to whom custody has been denied. In most cases the court leaves the order open, by given the parent an unbridled access to the child[62]. It is also possible for the court to state that even the friends of this parent in whose favour the access order has been made, equally have a right to access[63].

A court is usually very slow to reject an application for an access order. This is so because it would be improper for a court to keep a parent permanently away from his children unless the court is satisfied that he is not a fit and proper person to be brought into contact with the children. So although the conduct of a parent could influence a judge when making a custody order, such conduct must be very grave for a court to refuse to grant an access order. In the words of Wilmer L. J:[64]

> *Such a situation might arise, for instance, if she were a person with a criminal record, or one disposed to act with cruelty against children or something of that sort. But merely to say of a woman that she is a bad wife or mother, while it may be an excellent reason for not giving her care and control, is not, in my view, sufficient ground for depriving her of any kind of access.*

All the court can do, when one parent opposes an application for an 'access order' is to define the manner in which the order will be carried out or warn against any breaches. For example in Atem v. Atem[65]the court gave the mother free access but warned that the visists should be at reasonable hours and in such a manner and behaviour that will not cause a breach of the peace or perpetuate a brawl. In fact in Jacob Sama Ntombi v. Mary Ngiyabonga[66] Justice Arrey expressly warned that:

> *The appellant is to have access to see his children on condition that he does not harass the respondent in doing so.*

The court may decide to make an access order if it will be in the best interest of the children to do so. Hence in Agbortoko v. Agbortoko[67] the court was informed that the respondent in addition to the two children he had with the petitioner, he had six other children with other women none of whom was living with him. The court therefore preferred to give custody to the petitioner but also ordered that the respondent could have access to the two children 'without trouble'.

Custody or an access order could later be varied on application, should the circumstances under which it was granted change. Small wonder Endeley J. (as he then was) in Ojong v. Ojong[68]did point out, after making the necessary custody order that either party was free to apply to the court for a variation of this order should such an application be justified by the new circumstances. While justice Array in the court of Appeal in Bamenda warned that 'the order as to access may be uplifted if there is a genuine complaint of threat'[69].

The tendency has been for the parents to work out visiting arrangements which will not provoke any breach of the peace. A custody order will come to an end when the child becomes an adult or married under age.

IV. Custody Decisions in Traditional Settings: The Influence of Customary Law

In traditional society disputes over the custody of children rarely occur. This is understandable if one falls back to the assertion that a wife is the husband's property. So any such dispute will be settled depending on whether or not bride-price had been paid. In Shey Mbeyo v. John Gwei[70]the plaintiff got married to the daughter of the defendant. They had two children of the marriage. After several years of cohabitation the wife packed out of the matrimonial home taking along the two children to her father's residence. The plaintiff now claimed the children, and the father in law's defence was that the plaintiff had not yet paid the customary law dowry and so had no right to cohabit with the daughter or to have custody of the children. Judgment was given for the plaintiff on condition that the dowry was paid. So in Ali Ngabir v. Ese Nganong[71], the customary court in Nkambe had to examine the plaintiffs claim for the return of his wife and three children in the custody of his father in law, the defendant. Evidence was given to the effect that the plaintiff had paid the customary law dowry

[58] See generally, Mahop v. Mahop, Shu v. Shu, Mbiaffie V. Mbiaffie, Moussi v. Moussi, Fiohtung v. Fohtung, Mendi v. Mendi, Foleng v. Foleng Tre Claudia Foleng (An Infant)
[59] S. 42 (3) M. C. A. 1973
[60] S. 44 (1) M.C.A. 1973
[61] S. 43 (1) M.C.A. 1973
[62] Ojong v. Ojong (1968-70) U.Y.L.R. 65: Sandjo v. Sandjo Suit No. HCSW74mc/80 (unreported)
[63] Engo v. Engo (1971-73) U.YL.R. 22
[64] S. v. S. (1962) I W.L.R. 445
[65] Suit No. HCSW/77mc/82 (UNREPORTED)
[66] Appeal No BCA/50/84 (unreported)
[67] Suit No. HCF/60mc/89 (unreported)
[68] (1968 – 70) U.Y.L.R. 65
[69] Jacob Sama Niumvi v. Mary Ndibabonga Appeal No. BCA/50/84 (unreported)
[70] CS No 83/81 – 82 & 1/81 – 82 p. 20 (unreported)
[71] CS No. 6/82 – 83 of 20/7/82 (unreported)

twice. The court did not hesitate to give custody of the children to the plaintiff.[72]

Even when the husband dies custody of the children does not go to the wife. One of the deceased's brothers will be entitled to custody and in the case where one of the children is made next of kin and is sufficiently mature, he would have control of all his junior brothers and sisters. However, things are made simpler for a wife who remains in the compound of her deceased husband. But where she abandons the compound, taking along her children, any of the deceased's brothers could claim custody of the children. This was so in Asoh John V. Esther Monoji[73] where the plaintiff sued the defendant to hand over five children she had with the plaintiff's deceased brother because the defendant had abandoned the deceased's compound. The plaintiff succeeded in his claim.

This problem does not arise where the child is illegitimate, that is, where the child is born before the solemnization of the marriage by the payment of the bride price. Custody here is usually given to the parents of the woman. In any case any husband who is considered by the girl's parents to have been of good conduct could be given custody of the children provided that he compensates the parents for the expenses incurred in taking care of the children.

V. The Tension between Customary Law and Written Law in Child Custody Disputes

The apparently hard-and-fast rule that custody of a child would be given to the father in the event of a separation 'has gradually been watered down by modern law. In the first place there exists today a Manual which attempt to guide customary law courts[74]. The intention of the draftsman was to achieve uniformity in our customary laws and also to reject those, customs which were considered repugnant to natural justice. This explains why it is not just enough to maintain that the customary law dowry has been paid and so custody should be given to the natural father, but also that the court must take into consideration the welfare of the child. So in Kankchown Pauline v. Jean Tchuigona[75], The Tiko Customary Court granted custody to the defendant simply because the plaintiff was suffering from poor health. The court has even refused to grant a decree of divorce for no other reason but that it would be in the interest of the children if the spouses continued to live together as husband and wife[76]. In fact in Nrah Christopher Fonchingong v. Nchang Mary[77]the Mankon Customary Court granted custody to the woman because the children were very young, but nevertheless gave the respective dates in which the children would be released to the plaintiff and added that 'the plaintiff shall in accordance with native law and custom approach the defendant's family for the collection of the two children'.

So it is clear that if the father is unable to look after the child, custody will not be given to him on the simple basis that he had paid the bride price. In the Manual of Practice and procedure for customary court clerks precise directives as to whom custody should be given have been laid down. It is stipulated in its paragraph 11 that[78]

If a legitimate child's parents cease to live together then:

a) The child, whether male or female must live with its mother as long as it remains breast-fed;

b) When it ceases to be breast fed;

i) A female child must live with its mother until it is nine years old;

ii) A male child must live with its father.

As to illegitimate children, the Manual crafts that they must, whether male or female, live with their mother[79]. To guarantee the child's safety, custody will not be granted to any parent who is considered by the Manual to be unfit. Such unfitness can occur in three instances:

a) Where the parent does not look after the child properly

b) Where the parent is consistently cruel to the child;

c) Where such a parent exposes the child to unnecessary infections of harm[80].

These conditions apply to both legitimate and illegitimate children.

Another point of divergence between customary law and statutory law can be seen when a man's wife escapes with another man with whom she later bear children. Under customary law, the children belong to the first husband. But section 27(1) of the southern Cameroons high court law 1955 stipulates that the High court shall observe and enforce only those native laws and customs which are not repugnant to natural justice, equity and good conscience or incompatible either directly or by implication with any law for the time being in force. Indeed, section 72 of the 1981 ordinance stipulates that the total or partial settlement of a dowry shall under no circumstances give rise to natural paternity which can only result from the existence of blood relations between the child and his father. Small wonder that Gordon C.J. in the case of Ngeh v. Ngome[81]held that a custom which permits a husband to claim paternity of a child which his run-away wife begot with another man, simply because he has failed to pay back the bride price, was repugnant to natural justice.

It would appear that this custom is still very popular and would be upheld in most customary court trials. But some customary courts have begun to think differently. So was the reasoning in the Nkambe Customary Court of Taino Oscar v. Paulina Nsanji[82]. In this case the wife escaped from the matrimonial home and the parties lived apart for twenty one years, during which period the wife begot two children with another man. The wife testified that the children did not belong to the first

[72] The same decision was arrived at by the same court in Thomas Nkoh v. Tatoh Finya, CS No. 26/78 – 79 CRB 1/78 – 79 (Unreported) and the Bamessing Traditional Council in the case of Theresia Lung v. Nazarous Tibungo CS No. 37/74 73 crb No. 2/74 – 75 (unreported)

[73] CS No. 84/85 – 86 CRB 1/86-87 P.29 (Unreported)

[74] Manual of Practice and procedure for customary court clerks

[75] CS. No. 315/86 – 87 CRB 2/86 – 87 P. 43 (unreported) Tiko – Customary Court.

[76] This was the decision of the Buea Customary court in the case of Awa Emmanuel Benue v. Susan Kakoa, CS No. 32/87-88 CRB 2/87 – 88 P. 7 (unreported)

[77] CS. No. 53/87 – 88, CRB 1787-88 p. 213 (unreported) Mankon Customary Court

[78] Chapter 10: Custody of children

[79] Para 6

[80] Para 18

[81] (1962 – 64) WCLR 321

[82] CS No. 32/80 – 81 CRB 1/80 – 84 (unreported) Nkambe Customary Court

husband. The husband brought an action claiming 261,950 francs CFA as compensation for the un-refunded dowry and the financial benefits he had lost for not having the two children in his custody. The court declared that 'by native laws and custom of the Wimbum tribe, the plaintiff has a right over a woman and her children because of the bride-price. Since that tradition is contrary to state laws the court cannot force the woman and the children to the plaintiff.

The court ultimately ordered a financial compensation to be paid to the plaintiff in lieu of claiming a right over the children.

This same point of view was upheld in the case of Martin Bouru v. Simon Maraka[83]. Here the plaintiff's wife left him when she was pregnant. She went to live with her father.

VI. Conclusion and Recommendations

6.1. General Conclusion

In conclusion, this article has explored the complexities of custody arrangements, examining the different types of custody and the factors that influence custody decisions. custody arrangements are a vital component of family law, playing a critical role in determining the future well-being and development of children in separated or divorced families. The complexities of custody disputes require careful consideration of various factors, including the child's physical, emotional and psychological needs, the parent's ability to provide a stable and loving environment, and the potential impact of different custody arrangements on the child's relationships with each parent. By understanding the different types of custody arrangements, including sole custody, joint custody and split custody, parents and courts can make informed decisions that prioritize the best interest of the child. Ultimately, the goal of custody arrangements is to provide a stable, nurturing and supportive environment that allows children to thrive and maintain meaningful relationships with both parents. To achieve this goal, parents, courts and policy makers must work together to create custody arrangements that are tailored to the unique needs and circumstances of each family, while also promoting cooperation, communication and co-parenting.

The research problem addressed in this article was to identify the key considerations that courts and parents should take into account when making custody decisions, with focus on prioritizing the best interests of the child. Through a comprehensive review of existing literature and analysis of relevant factors, this article has provided insights into the complexities of custody disputes and the need for tailored approaches to custody arrangements. The findings highlight the importance of considering the child's physical, emotional and psychological needs, as well as the parents' ability to provide a stable and loving environment. Ultimately, the goal of custody arrangements is to provide a stable, nurturing and supportive environment that allows children to thrive and maintain meaningful relationships with both parents. To achieve this goal, parents, courts and policymakers must work together to create custody arrangements that are tailored to the unique needs and circumstances of each family, while also promoting cooperation, communication and co-parenting. The research findings suggest that by prioritizing the child's best interests, encouraging co-parenting, and considering flexible arrangements, courts and parents can make informed decisions that support the healthy development of children.

6.2 Recommendations

Recommendations for policymakers, courts and parents include:

6.1.1. Prioritize the child's best interests: Courts and parents should prioritize the child's physical, emotional and psychological needs when making custody decisions;

6.1.2. Encourage co-parenting: Parents should strive to maintain a cooperative and communicative relationship to ensure the child's needs are met;

6.1.3. Consider flexible arrangements: Courts and parents should consider flexible custody arrangements that accommodate the unique needs and circumstances of each family;

6.1.4. Provide support services: Courts and policymakers should provide access to support services, such as counselling and mediation, to help parents navigate custody disputes and co-parent effectively;

6.1.5. Monitor and adjust: Courts and parents should regularly review and adjust custody arrangements as needed to ensure they continue to serve the child's best interests.

By following these recommendations, we can create custody arrangements that prioritize the well being and development of children, while also promoting healthy relationships between parents and children.

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