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## **Safeguarding the Rights of women and children upon divorce under Customary Law in Nigeria**

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### **Abstract**

The rights of women and children are often trampled upon when there is a divorce under customary law. The customary law wife is responsible for taking care of her husband and children sometimes without assistance and she basically has no life of her own without her husband. Her identity is subsumed in those of her husband she is basically entitled to what her husband allows. Her children also suffer when there is a divorce as they are usually given to their father who may not have any means of taking care of them. The right of a father over children is one of ownership so it is irrelevant whether he can care for the children as much as their mother would have done. There is apparently no equity for the customary wife when there is a divorce, regardless of how long she had been married to her husband, except with few exceptions she is generally not entitled to the ancillary reliefs of maintenance, custody and settlement of property. The scope of this work is limited to the rights a woman and her children have when she is divorced under customary law and how these right should be protected. This work found out that unless positive laws provide for the protection of the customary wife, she will continue to be in a disadvantaged and unfair position when there is a divorce. The research methodology adopted is the doctrinal research methodology. This work also proffers solution to the plight of the customary law wife.

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**Key words:** Rights, Customary, wife, Divorce, Children

## **1.1 INTRODUCTION**

The rights of women are grossly abridged under customary law and that without reprieve, because a woman graduates from the control of her father to those of her husband. A divorce under customary law is the termination of marital relationship between a husband and his customary law wife. A customary law wife would in most cases have no life of her own because she is saddled with the responsibility of taking care of her husband and children and in some cases members of the extended family residing with her or residing close by.

A customary law wife is expected to keep her marriage at all cost and where there is a divorce she is mostly seen as the failure and stigmatised by society. A divorce is usually frowned at in an African society of which Nigeria is a subset, therefore issues of divorce are usually treated as delicate. A man may divorce his wife for her rudeness, or barrenness or for just the fact that he no longer loves her but a woman cannot do the same. Adultery by a wife is usually unpardonable, a mortal sin, but the adultery of the man is seen as normal as he has the right to marry as many wives as he wishes under customary law. A wife may divorce her husband, but the fear of incurring the odium of society is always a limiting factor for her therefore most times she stays on even if the marriage is an abusive one. It should be noted that a customary husband even has a right to chastise his wife. The ancillary reliefs of maintenance, custody and settlement of property are not fully available to the customary wife when there is a divorce

In Nigeria no marriage is deemed superior to the other as long as they meet the requirements for the celebration of such marriages. People are free to decide on any type of marriage they wish to contract which is mostly coloured by their religious beliefs and the constitution accords due recognition to these various forms of marriage in Nigeria. Predominantly, there are three easily recognisable types of marriages in Nigeria; to wit, statutory marriage, customary law marriage and Islamic marriage. Unfortunately, these marriages do not bring equal rights to women when there is a divorce.

The major objective of this paper is to address the plight of the customary wife and her children when there is a divorce with the view of proffering solutions that would protect and safeguard their rights when there is a divorce and at least put them in the same pedestal as their statutory marriage counterpart.

## **1.2 Divorce under Customary Law and the Rights of women and children**

Divorce under Customary Law is the termination of marital relationship between a husband and wife in which the procedure for such termination is governed by Customary Law.

The procedure and requirements for obtaining a divorce under Customary Law is different in many significant respects from that under the Marriage Act<sup>753</sup> and Matrimonial causes Act in Nigeria<sup>754</sup>.

### **Who may initiate Divorce under Customary Law**

It should be noted that under Customary Law, marriage goes beyond the parties involved. It involves the families of the parties. It is an aphorism that the parties may by themselves initiate a divorce, beyond that the family of the wife can initiate divorce proceedings<sup>755</sup>. This can happen where they feel their daughter's health, life or wellbeing is seriously threatened. Usually, the family would withdraw their daughter from the marriage and return the marriage symbol which is the bride price. Meek C.K.<sup>756</sup> has said, "A wife can leave her husband at will and would be removed by her relatives from a husband who has consistently ill-treated her."

The issue of who may divorce has slight variations from one culture area to another but the fore going is a more general position. Among the calabaris in the Niger Delta of Nigeria, a woman may only divorce her husband with his consent had and obtained. However, this custom has been jettisoned by the court in the case of *Solomon v Gbobo*,<sup>757</sup>

It is obvious that unlike marriage under the Acts where it is only the parties that can institute divorce proceedings, under customary law, the family of the wife with the compliance of the wife may terminate a marriage.

### **1.3 Divorce Proceedings**

A party to a marriage under customary law can institute proceedings for divorce against the other spouse usually by approaching the customary court. "A man can ... divorce his wife by bringing her before the courts and giving sufficient reasons. A woman cannot divorce herself, but she can bring her husband before the courts, and obtain release from him if the courts decide his guilt<sup>758</sup>. Where the divorce is granted the party seeking it, usually the wife's family will have to return the bride price they collected with respect to the said marriage.

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<sup>753</sup> Marriage Act, Laws of the Federation of Nigeria, CAP M6, 2004

<sup>754</sup> Matrimonial Causes Act, Laws of the Federation of Nigeria, CAP M7, 2004

<sup>755</sup>M.C Onokah op.cit p.165

<sup>756</sup>"Law and authority in a Nigerian Tribe, 202, cited in M.C Onokah

<sup>757</sup>(1975) E.C.S.N.L.R 457

<sup>758</sup>Cotton J.C the Calabari Marriage Law and Custom (1905) 4 J.R.A s.427 p.430, cited in M.C Onokah op.cit. p.169

#### **1.4 Grounds for Divorce under Customary Law**

There are no hard and fast rules or a general consensus with regards to grounds for the dissolution of marriage<sup>759</sup> under customary law. However, there are a few grounds that have been identifiable as capable of swaying the courts to grant a divorce. Some of them are, "adultery, loose character, impotency of the husband or sterility of the wife, laziness, ill treatment and cruelty, leprosy or other harmful diseases which may affect the procreation of children, witchcraft, addiction, poisoning, theft and desertion".<sup>760</sup> In the case of *Ezeaku v Okonkwo*<sup>761</sup> the court held that a marriage contracted under customary law can only be dissolved by the courts and it is not sufficient that one of the parties to the marriage declares that he or she is no longer interested in continuing with the marriage. The court held further that a marriage under native law and custom can be dissolved unilaterally or by mutual consent of the parties accompanied by the refund of bride price. It is clear from the decision of the court that where parties approach the Court for dissolution of marriage under customary law and both parties give their consent that may be sufficient to grant the order for dissolution of the marriage unlike under statute where at least one ground as provided for in the Matrimonial Causes Act, 2004 must be proved. It is submitted that this is a better position as a woman can walk away from a marriage where her existence and wellbeing is threatened without much trouble except from the mores of the society.

#### **1.5 When a Customary Law marriage is deemed dissolved**

A marriage under native law and custom is deemed dissolved upon refund of bride price by the wife's family. In *Ezeaku v Okonkwo*<sup>762</sup> the court held that, "usually, the dissolution of customary law marriage is effected or accompanied by the refund of the bride price paid in respect of that marriage". It held further that even in cases of non-judicial dissolution of marriage under native law and custom, the bride price still needs to be returned.

A situation may arise in which the husband and his family decide to waive their right to the refund of the bride price. This may be for reasons of the duration of the marriage. Where parties have been married for a long time or where there are worthy children as products of the marriage; or for any other reason, reasonable enough in the opinion of the husband and his family to refuse the bride price they may validly

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<sup>759</sup>E.I Nwogugu op.cit. p.217

<sup>760</sup>ibid

<sup>761</sup> [2012] All F.W.L.R (PT. 657), P.159 at 162, 163, 164

<sup>762</sup>*Ezeaku v Okonkwo*(supra) p.163, ratio 4, *Eze v Omeke* (1977) I ANSLR 136, *Agbeja v Agbeja*(1985)3 NWLR ( PT 11)

do so. In such a case it is open to the husband to renounce his right to claim refund of that bride price. Such renunciation must be done formally and unequivocally before the joint family. In such a case the marriage is deemed dissolved from the time of renunciation and there will be no need to refund the bride price.

It should be noted that a customary law marriage like a marriage under the Act cannot be deemed dissolved by effluxion of time, neither can a marriage under native law and custom be determined by assertion of the mere deposition of same by affidavit.<sup>763</sup>

### **1.5.1 Statutory grounds for divorce under Customary Law**

In some states of the country (Nigeria) there are statutory provision spelling out the grounds for divorce. The bye-laws of Lagos and the Western States,<sup>764</sup> the Marriage, Divorce and custody of children Adoptive Bye-laws order<sup>765</sup> expressly specify matters the courts can take into consideration in granting a dissolution of marriage under native law and custom. They are as follows;

- i. Refusal by either party to consummate the marriage.
- ii. Harmful diseases of a permanent nature which may impair the fertility of a man.
- iii. Impotence of the husband or sterility of the woman.
- iv. Ill treatment, cruelty or neglect of one party by the other, Conviction of either party for a crime involving a sentence of imprisonment for five years or more.
- v. Venereal diseases contracted by either party.
- vi. Lunacy of either party for three years or more.
- vii. Adultery.
- viii. Leprosy contracted by either party, and;
- ix. Desertion for two years or more

In the case of *Adigun v Adigun*,<sup>766</sup> this bye law was relied upon.

### **1.6 The Rights of children under Customary Law upon divorce of their parents**

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<sup>763</sup> *Ezeaku v Okonkwo* (supra)

<sup>764</sup> Delta, Edo, Lagos, Ogun, Ondo, Osun, and Oyo

<sup>765</sup> W.R.N.L 456 of 1958

<sup>766</sup> Customary court, Agosasa-Ogun state, in Lagos weekend, 14/4/1989, p.16 cited in M.C Onokah op.cit. p.174

Children have no part to play in the divorce of their parents under customary law. Divorce is between their parents, but evidently they suffer from the fall outs of the broken marriage. They will most usually remain with their fathers who lack the capacity to cater for all their emotional, psychological and domestic needs because it is an aphorism that women are better care givers than men. They may then be thrust on a step mum or aunt or other family member of their fathers who apart from grappling with their own responsibilities may not be interested in being saddled with some more responsibilities. Under customary law children have no right to settlement of property upon divorce of their parents, but they are entitled to maintenance from their father irrespective of who has custody of them. The only way to safeguard the rights of children in the event of a divorce under customary law is to ensure that the rights to custody and maintenance are dispensed with justice bearing in mind the peculiar needs of children from a broken home.

### **1.6.1 Maintenance under Customary Law**

The province of maintenance under customary law is another area where the rights of women and children need urgent protection and safeguard. The relief of maintenance for a divorced wife is alien to customary law except in certain exceptional cases.<sup>767</sup> Maintenance for the customary law wife while her marriage still subsists and when she is divorced must be distinguished.

A Customary law wife is entitled to maintenance as long as she is still married to her husband. In some cases it is a statutory requirement. The Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order<sup>768</sup>, Section.8 (2) (2) provides that a wife has a right to maintenance by her husband as long as she is married to him. Here maintenance refers to food, clothing and housing and giving her a standard of life commensurate with his means. This is only as long as she stays married to her husband and is not divorced. A wife's right to maintenance under customary law only avails her as long as she is still cohabiting with her husband<sup>769</sup>. Cohabitation here includes constructive cohabitation where although they are married they do not necessarily live under the same roof. In some cases the husband has more than one wife and they live in different locations, at other times it is the husband who is unavoidably absent due to work or other compulsory commitments and so cannot be in constant cohabitation with his wife or wives. In such cases the duty to maintain the wife continues to subsist. It is clear that a child under customary

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<sup>767</sup> Brown Umukoro, Academia, "A case for the recognition of the rights of spouses under customary law to maintenance" retrieved from [www.academia.edu/12330363/A-CASE-FOR-THE-RECOGNITION-OF-THE-RIGHT-OF-SPOUSES-UNDER-CUSTOMARY-LAW-TO-MAINTENANCE](http://www.academia.edu/12330363/A-CASE-FOR-THE-RECOGNITION-OF-THE-RIGHT-OF-SPOUSES-UNDER-CUSTOMARY-LAW-TO-MAINTENANCE)

<sup>768</sup>1961

<sup>769</sup>E.LNwogugu op.cit.p.282

law has a right of maintenance with or without the marriage or divorce of his or her parents. In *Adeleke v Yinka*,<sup>770</sup> the court had no problem with maintenance for the only child of the marriage but with respect to the wife, in reaching a decision with regards to maintenance, held that “payment of such an allowance to a divorced wife is contrary to native law and custom. It is against natural justice, as a divorced wife is at liberty to remarry another man immediately the marriage is dissolved in the court” In this case, the court apparently presumed that it is an automatic process; that as soon as a woman is divorced by her husband she automatically falls into a subsequent marriage with another man so it would be inequitable to allow her to be married to her new husband and still get maintenance from her previous husband. It is submitted that in practice this is rarely the case as there are cases that the divorced wife never remarries. In such cases what is the value of this kind of judgment?

It is obvious that if a woman married under the marriage Act in Nigeria is not having a good day with regards to maintenance after divorce then one can safely say the position of the customary wife with regards to maintenance is a nightmare. The customary law wife is disadvantaged; while she is married, her husband has an almost absolute control over her entire life, including her property and the means by which she may have attained financial independence and she has no right to testamentary disposition from her husband. Her husband even has a right of chastisement over her and she could never refuse her husband sexual intercourse<sup>771</sup>. Despite all these and more if her marriage breaks down irrespective of the cause or who is responsible she goes away from her husband’s house without maintenance and with only what her husband permits her to go with which would usually not be more than a few of her personal belongings like clothes and cooking utensils which are actually useless to her husband. Furthermore, under most customary systems, a woman is not entitled to real estate upon the demise of her father, so she has no real inheritance. Among the Igbo’s in Nigeria it is general knowledge that by customary law of most Igbo communities, a married woman’s place and where she derives privileges is her husband’s family. In fact, in most cases even when she dies her corpse is not returned back to her family but buried in her husband’s family land<sup>772</sup>. Therefore, a woman who has all those odds stacked against her should at least be entitled to maintenance, but under customary law she is not. However, under certain restricted circumstances a woman may be entitled to maintenance when there is a divorce. A woman divorced by her husband while she is pregnant for him or while she just put to bed a baby for him is entitled to maintenance in case of pregnancy

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<sup>770</sup> Suit no. M/559/76 of 5/11/76

<sup>771</sup> Freeman, Sandra Discrimination Law(Oxford: Oxford University, 2002), cited in Brown Umukoro .Op.cit (foot note 77)

<sup>772</sup> This is very evident among the Igbo’s of Nnewi in Anambra State (from personal observation)

until she puts to bed and weans her baby. This is also the case where she has a baby as at the time of her divorce. A husband cannot claim custody of his child in the circumstances afore-mentioned unless he pays and settles all the wife's bills flowing from such pregnancy. The divorced wife can also sue such a husband for the money spent on her maintenance during the period of her pregnancy and confinement and for the nursing of the baby. It is submitted that the position under customary law that a divorced wife is not ordinarily entitled to maintenance is something that has been long entrenched in Nigerian culture and would definitely take a strong legislative will to change the status quo.

### **1.6.2 Enforcement of Maintenance of a Customary Law wife and her children**

Where a right does not exist, it is a misnomer to talk about the enforcement of such right. It has been said that generally the customary law wife has no right of maintenance. However, in the exceptional cases as discussed above where she may be entitled to maintenance, can such Maintenance be enforced on her behalf and on behalf of her children? It is said<sup>773</sup> that the first step a wife needs to take when there is failure of maintenance from her husband is to report the erring husband to his family. The husband's family may graciously intervene and ensure that maintenance is paid. It should be noted however, that a wife can maintain an action for maintenance in a customary court where she can pigeon hole her claim under the few exceptions or conditions under which she can get maintenance under customary law like where she's pregnant for the husband . Usually, maintenance of children are not as difficult to secure as maintenance of a divorced wife. This is probably because children are seen as life members of the family who cannot easily loose such membership whereas a wife in the real sense does not enjoy that kind of exalted position because in some cases she is seen as a chattel.

In the case of *A. Taakpee v E. Gipy*<sup>774</sup> The court expressed the view that a wife should be entitled to maintenance even if she is a customary wife. In that case the petitioner petitioned for dissolution of marriage on the ground of his wife's childlessness and the court was of the view that the petitioner should have provided the wife with maintenance till she dies. It is submitted that the court viewed the plight of the divorced wife correctly and the view of the court is laudable especially in cases where the divorced customary wife is unable to remarry. Unfortunately, this does not represent the rights of women under customary law and so it cannot be followed.

## **1.7 Custody under Customary Law and the Rights of women and children**

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<sup>773</sup>M.C. Onokah op.cit. p. 238

<sup>774</sup> Suit no. MD/15A/82 of 4/2/83 cited in M.C.Onokah op. cit. p. 237

The area of custody of children is an area where there is a huge infraction on the rights of women and children under customary law. Customary law barely recognises the rights of women to custody of children. It is obviously misunderstood that the right to custody is more a right of the parents rather than the child. The paramount interest of the child or children is mostly secondary. Most times taking the children away from their mother when there is a divorce is also obviously perceived as some form of punishment for the misdeeds of an errant wife. In many cases once the children are taken away from their mothers, the mothers are no longer allowed to see or interface with them. This situation derogates from the physical, psychological and emotional wellbeing of the children and even their mothers. Therefore, it is imperative that the rights of the child or children as well as those of their mothers be protected and safe guarded at all cost. There are so many cultures in Nigeria each having their distinct customary laws. On issues of custody of children of a marriage under customary law, it would appear that there seem to be some uniformity as it is usually the father/husband that gets custody of children when there's a divorce under customary law<sup>775</sup>. The right a father has over his children under customary law has been described as a right that extends beyond custody to 'ownership' of the children, to the extent that this right is capable of being transmitted to his family members<sup>776</sup>. Therefore, in cases where it is obvious that the putative father lacks capacity to take care of the child or children of the marriage, the right of the mother to custody still does not take precedence over those of the family of the putative father of the child.<sup>777</sup> In *Adigun v Adigun*<sup>778</sup> the court awarded custody of a child of a marriage to the child's paternal uncle who represented the child's father in court for the divorce proceedings. In this case, the grounds relied upon by the Petitioner/wife was the insanity of the Respondent/husband. Under customary law a woman/mother may get custody of a child or children of the marriage when they are of tender years, but that is usually only a temporary measure because as soon as they are weaned custody reverts back to the father or his family. However, between the times the child is weaned and when the father takes actual custody, it is the father that remains responsible for the upkeep and maintenance of the child<sup>779</sup>. In *Mesike v. Mesike*<sup>780</sup> the court granted custody of four of the five children of the marriage to the husband/

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<sup>775</sup> M.C.Onokah op.cit p.178, see also MzAGAMS, '*violence against women and 16 days of activism: prosecuting rape in Nigeria*',(2011) <https://mzagams.wordpress.com/2011/11/18/child-custody-in-nigeria/>, accessed 11/09/2017

<sup>776</sup> Per Obi-Okoye J, in *Abiakam & ors v. Anyanwu* (1975) 5 E.C.S.L.R 305 cited in M.C.Onokah ibid

<sup>777</sup> Ibid. p.179

<sup>778</sup> Customary court, Agosasa-Ogun State, in Lagos Weekend Newspaper, 14/4/89, cited in M.C. Onokah ibid

<sup>779</sup> M.C.Onokah op cit p.179

<sup>780</sup> Suit no.82/67, of 2<sup>nd</sup> February, 1968, Onicha Olona, Delta state. Cited in M.C.Onokah ibid p.180

petitioner and temporarily granted custody of the last child who was just one year and six months old to the wife /Respondent with a proviso that as soon as the child turns three years old, custody should be transferred to the husband /Petitioner. In *Olaiya v. Olaiya*<sup>781</sup> the court awarded custody of the two younger children to their mother. In *Eborah v. Eborah*<sup>782</sup> the court also dissolving the marriage between the parties granted custody of the youngest child of the marriage to the respondent/mother until she is three years of age<sup>783</sup>.

It is worthy of note however, that in some cases there are guidelines provided by state Edicts which makes the welfare of the child of paramount consideration in deciding issues of custody between parties under customary law<sup>784</sup>. The guiding principle as to the right of custody under customary law is determined by specifically taking evidence to establish what is in the best interest and welfare of the child<sup>785</sup>. Unfortunately, these provisions are not available in most culture areas.

It is usually a totally different scenario under most customary Laws when a child is born out of wedlock to an unmarried daughter, such a child would belong to the family of the unmarried mother with the father of the unmarried girl assuming the position of father to the child. In the absence or death of the maternal grandfather of the child, the mother of the child automatically assumes full responsibility for the child. There are instances where the family of the unmarried girl are not interested in taking over the full custody or parental rights over the child born out of wedlock, in such cases the natural or biological father may assume parental right over the illegitimate child by acknowledging the paternity of that child where the custom recognizes such waiver of right by the maternal grandfather of the illegitimate child<sup>786</sup>. It should be noted that any customary law that deprives natural parents of their rights as natural parents of a child is held by the courts as contrary to natural justice, equity and good conscience<sup>787</sup>. It does not therefore seem like such a custom that automatically transforms a child's maternal grandfather to his father will pass

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<sup>781</sup> Customary court Mushin Lagos of 6<sup>th</sup> June 1989, cited in M.C.Onokah ibid

<sup>782</sup> Suit no. 10/68 of 5<sup>th</sup> March., 1968. Onicha- Olona, cited in M.C.Onokah ibid

<sup>783</sup> Other cases that are illustrative are *Oluwasegun v. Oluwasegun*, customary court, Lagos, in Lagos Weekend Newspaper of 16<sup>th</sup> June, 1989 at p.16, *Adejoke v. Adejoke* customary court, Ikeja, Lagos, in Lagos weekend Newspaper of 10<sup>th</sup> May, 1989( both cited in M.C.Onokah ibid)

<sup>784</sup> Area courts Edict, 1967, Laws of Kwara State; Area courts Edict 1968, Laws of Benue State, Customary Courts Edict, 1978, Laws of Anambra State, Customary Courts Edict, 1981, Laws of Imo State(cited in M.C. Onokah ibid)

<sup>785</sup> *Okwueze v. Okwueze* (1989) 3 NWLR (PT.109) P.321 @335, where issues of custody of children appears before a superior court, the court is bound to ascertain what is in the best interest of the child even where the marriage of the parents is under customary law.

<sup>786</sup> Asknigeria, 'Child custody in Nigeria' retrieved from, <http://asknigeria.com.ng/topic/278/child-custody-in-nigeria>, accessed 11/09/2017

<sup>787</sup> *Edet v. Essien* (1932)11 N.L.R.47

the validity test to make it applicable in a court of law in Nigeria. Customary law is unfavourable to women and children in the aspect of divorce and custody of children. It would be better if the same rules that apply to wives married under the Marriage Act in Nigeria applies to the customary law wives, and with regards to custody the paramount interest of the child should remain the preeminent.

### **1.8 The Rights of women to settlement of property under Customary Law marriages upon divorce in Nigeria**

Settlement of property is also one of the reliefs available to a divorced wife and her children, but under customary law it would appear that this right can never be realized or actualized in favor of women and children. Therefore, the right of women and children to settlement of property needs to be developed and protected/safeguarded under customary law. Women and children stand a better chance with the reliefs of maintenance and custody much more than in the area of settlement of property. Settlement of property upon divorce under customary law is different from settlement of property upon divorce under the Matrimonial Causes Act. As a matter of fact, the law applicable under the Matrimonial Causes Act with regard to settlement of property upon divorce cannot be applied to settlement of property upon divorce under customary law. The Matrimonial Causes Act<sup>788</sup> provides thus, ‘Marriage includes a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law...’

It is clear from the provisions of S. 69 MCA that separate rules apply to a customary law wife and her children. It is obvious that the position will vary depending on the culture area. However there are some general features which seem to transcend the boundaries of most culture areas, for instance women are never entitled to share from real estate with her husband where such property was acquired during the subsistence of the marriage when there is a dissolution of marriage.

E.N.U. Uzodike<sup>789</sup> has stated that among the Ibos, upon divorce, a wife has the right to remove all her own properties where they are her personal properties which she brought into the matrimonial home. The real issue however is whether she can go with any portion of joint marital property in the event of a divorce from her husband.

#### **1.8.1 Personal Property**

Where the customary law husband acquires property in his name, the wife would usually not be entitled to a settlement of such property in her favor. It is of no

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<sup>788</sup> Section 69, Laws of the federation of Nigeria, cap M7, 2004

<sup>789</sup> E.N.U Uzodike, “Whether Divorce Proceedings are different for marriages traditionally, under Islam or under Christianity” retrieved from <http://www.ecoi.net/local-link/188546/306583-de.html>. accessed on the 27/4/17

consequence that she by her conduct of keeping the home or other contributions created the enabling environment for the husband to acquire such property especially where they are immovable properties like houses or land. There is no evidence that even if the customary wife goes ahead to seek relief from the family of the husband or to court that such property will be settled in her favor.<sup>790</sup> On the question of ownership of immovable property upon divorce Obi S.N.C<sup>791</sup> wrote that the determination of this is not an easy adventure. It is settled that where the immovable property belongs to her husband she does not share from it upon divorce. Where however, the immovable properties in question belong to her, she is entitled to own them after the divorce. He however pointed out that if she is married into another community and upon divorce she has to leave the community to which she has been married into, she may lose her landed property in that community since she then becomes a stranger.

It is submitted that this situation may no longer arise even under customary law as the fact that a person is non-resident in a locality does not affect the person's property rights. The fact that a woman is a stranger and leaves the community cannot be a reason to lose her real property in contemporary Nigeria. This is because if it is her property and she has title, she can sell the property, or give it out as a gift, or even allow it devolve on her offspring. Therefore, this position as espoused by Obi S.N.C<sup>792</sup> can no longer be tenable. It should be noted that the case is different where it is the husband<sup>793</sup> that gave the wife the money to buy the land in question. In such a case she cannot continue to have title to the land upon divorce from her husband. In cases where the customary wife acquires a right to use her husband's family land partitioned to him, she loses such title upon divorce from her customary husband<sup>794</sup> Where the property in issue is a moveable property such as pots, bicycles, clothes and other personal effects, different rules apply to the customary wife. Basden<sup>795</sup> wrote that among the Igbo's, if the husband is the offended party in the matter that led to the divorce, he promptly drives his wife out, throwing her cooking pot and a few of her personal belongings to her. Where this happens it is only the things the husband throws at her when he drives her away from their matrimonial home she gets. She also loses the right to custody of her children. Bowen<sup>796</sup> takes the position further when he said that if the customary wife gets divorced without a cause,

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<sup>790</sup> M.C. Onokah op. cit p.256

<sup>791</sup> Cited in M.C. Onokah op.cit p.258, 259

<sup>792</sup> Ibid

<sup>793</sup> ibid

<sup>794</sup> ibid

<sup>795</sup> Basden G.T, Among the Ibos of Nigeria, p.77 cited in M.C. Onokah ibid

<sup>796</sup> Bowen T.J, central Africa: Adventures and missionary labours in several countries in the inferior of Africa 1849-1856 p.305 cited in M.C. Onokah op.cit 256

perhaps for her inability to give birth to children or because her husband suddenly loses affection for her for no just cause, such a wife is entitled to take away all that is hers and return back home to her family. In cases where she is accused of adultery the husband is as usual entitled to a refund of the bride price he paid to the divorced wife's family. Although, it is the discretion of the family of the husband to collect or refuse to collect their bride price if the custom allows such discretion.

From the literature and judicial precedent available it would appear that settlement of property is not usually done in favor of children under customary law the rationale seems to be that at the point of divorce, maintenance is sufficient for a child of the marriage. It is submitted that this does not adequately safeguard the rights of the child upon divorce. It is an aphorism that upon the demise of parents, property will devolve on the children. It is submitted that this may not be a serious derogation from the right of the customary child where he or she has adequate maintenance. It has been said on a general note that Nigerian women suffer from deprivation of their property rights<sup>797</sup>.

From the foregoing, it is abundantly clear that the rights of women to the ancillary reliefs of Maintenance, custody and settlement of property are seriously infringed upon. They are actually nonexistent in some cases, for example a woman cannot be entitled to settlement of property with her husband, neither is she entitled to maintenance except in few exceptional cases where she is pregnant for the man or weaning their child. In both circumstances, it is not the wife that is the real object of care, but the child and that is why as soon as the child is taken away all provision to the divorced wife ceases immediately. In the area of custody, the right of the child and mother are also not protected, everything revolves around the father/husband. It is important that as a starting point the customary wife and her children get equal rights as her statutory wife counterpart since it is already established that no one marriage is superior to the other. This will better safeguard the rights of women and children upon divorce in customary marriages.

## **1.9 Conclusion**

Divorce is an ill wind that blows no good, it affect all parties especially women and children adversely and can mar people for life. It leads to loss of love, bitterness and hatred but there are times that it is the only way to preserve a party's sanity and wellbeing. Women and children are usually more affected when there is a

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<sup>797</sup> Famiyide Olufunke-Aje and Aare Folashade Folake, 'Women's Right to Property In Nigeria(2016)' Vol. 7, Ekiti State University, Law Journal, 465

divorce<sup>798</sup>. The law as it stands today in the area of matrimonial cause is deleterious to the rights of women and children. Husbands have too much unbridled powers under customary law and the level of inequality between a husband and wife married under customary law is unfairly prejudicial to the rights of women and children. The customary law wife is subjugated and when there is a divorce no matter her input she leaves almost empty handed.

Although the law does not directly say one form of marriage is superior to the other, by the incidence and consequences flowing from the various forms of marriage it is clear that some are superior to some. For instance, a wife from a statutory marriage is entitled to maintenance for both her and her children whereas a wife married under customary law is not entitled to maintenance in the real sense of the word. She is only entitled to maintenance when she is pregnant and is still weaning the child of her husband. It is clear in both circumstances that she is not of any interest to her husband it is just the child that is the object of care.

Society and religion play a very active role in the lives of the customary wife and she would rather stay in an abusive relationship than stand the risk of losing her husband and children and attracting the odium of society in the process.

Customary law provisions are largely not codified in this area and this allows for various customary areas to determine the lot of the customary wife and her children according to their whims and caprices when there is a divorce, it is difficult to enforce maintenance for the children where their father fails to readily make maintenance available. All the customary wife can do is to appeal to the family of her divorced husband to come to her aid and if they do not she has to find a way to raise her children.

It is recommended that uniform rules apply to divorce in Nigeria and the granting of the ancillary reliefs of maintenance, custody and settlement of marital property and this should be the same rules as provided for in the Matrimonial Causes Act, 2004.

It is hoped that as society evolves, the perception of people about divorce would change for the better and divorce would no longer be seen as the fault of the wife and a divorced wife and her children would not be discriminated against whether in religious or in social circles

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<sup>798</sup> Thomas Leopold, 'Gender Differences in the Consequences of Divorce: A study of multiple Outcomes' (2018) retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5992251/> accessed 19/04/2022