

**ADOPTION OF CHILDREN IN NIGERIA UNDER THE
CHILD'S RIGHTS ACT 2003**

By

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ABSTRACT

The Child's Rights Act 2003 was enacted by the National Assembly with a commencement date of 31st July, 2003. As stated in the Explanatory Memorandum annexed to the Act, it "sets out the rights and responsibilities of a child in Nigeria and provides for a system of child justice administration and the care and supervision of a child, among other things". The Act places on the three-tiered Implementation Committee established in Part XXIII the responsibility to initiate actions that shall ensure the observance and popularization of the rights and welfare of the child as provided for in the Act and in the various international conventions to which the country is a signatory. Specifically, Part XII makes far-reaching provisions regulating adoption throughout Nigeria.

Prior to the enactment of the Act, adoption had been (and is still) regulated by enactments made by some States of the Federation. By section 274 of the Act, its provisions supersede those of any other enactments on the same subject matter and where the latter are inconsistent with any provisions of the Act, they shall be void *pro tanto*. However, although the Act is deemed to have come into force since 2003, the Adoption Laws enacted by the States are

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still extant. The reason is that

adoption, in particular, and the rights and welfare of children, in general, are matters within the legislative competence of the States under the Constitution of the Federal Republic of Nigeria 1999.¹ Hence, the National Assembly has no constitutional power to foist the Act on the States. The Act is enforceable as such only in the Federal Capital Territory, Abuja for which the National Assembly has the powers to make laws. Regrettably, however, even in the Federal Capital Territory, the implementation of the Act has been stalled by the absence of the requisite institutional and regulatory framework, two years after the date of commencement of the Act.

Apparently, the underpinning objective of the Act is to provide for the entire country comprehensive and uniform legislation on the rights and welfare of children and an efficient system of child justice administration that meet international standards. Cognizant of this noble objective, therefore, the various States seem to be generally inclined to replicate the Act and implement its provisions. Indeed, some States Houses of Assembly have already passed the Child's Rights Bill into law while others are in the process of doing so.

Prominent features of the adoption provisions of the Act include mandating State and Federal Governments to establish and maintain within their respective territories adoption services and facilities, harmonizing the procedure and criteria of eligibility for adoption as well as setting up a uniform institutional framework for adoption throughout the country. Apparently as a means of checking child trafficking under the guise of adoption, the Act prohibits inter-country adoption as well as the giving and receiving of any payment or reward as a consideration for or to facilitate adoption. It also makes

¹ Except such matters as arise in matrimonial proceedings relating to statutory law marriages: see item 61 in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999.

provisions for inter-state adoption within the country and recognition of foreign adoption.

This paper presents a critical overview of these provisions from the practical, theoretical and cultural perspectives against the backdrop of pre-existing Adoption Laws of the various States of Nigeria. It equally brings to the fore the inadequacies of the adoption provisions of the Act, especially the drafting infelicities and errors that are all too obvious in the Act. Appropriate recommendations for reform of the provisions are made in a piecemeal fashion, the paper concluding with a call upon –

- (a) the appropriate authorities to set up forthwith the institutional and regulatory framework for the implementation of the Act, and
- (b) the States that are yet to re-enact the provisions of the Act to do so as a matter of urgency.

PART I: INTRODUCTION

Meaning and purpose of adoption

Adoption is the legal process whereby a person obtains judicial or administrative authorization to take (usually but not invariably) the child of another person as his own and parental rights and obligations are permanently transferred from the child's natural parents to the adopter. Under the United Nations Convention on the Rights of the Child 1989, adoption is recognized as one of the forms of alternative care for children who have been temporarily or permanently deprived of their family environment, and also for children who are unable to remain in their family environment.² The factors that necessitate the adoption of a child range from the mere fact of being childless to the desire

² See Art. 20 (1)&(2). Other alternative child-care devices include fostering, *kafalah* (both recognized by Art. 20(3) of the Convention), guardianship and custodianship.

to replace a dead child, to acquire a companion for an only child, to stabilize a marriage, to legitimate an illegitimate child, to sustain a particular line of descent, to rescue a child who is in an irreversible situation of abandonment or to relieve parents who are unable to take care of their child. Adoption touches upon the adopted child's status; hence it affects his legal rights, welfare and obligations.³ Thus, adoption confers on the child all the rights vis-à-vis his adoptive parent(s) as if the child had been born to them in lawful wedlock as well as imposes on the adoptive parent(s) parental responsibility equivalent to that of the natural parents of the child.

Source of adoption law

In most legal systems of the world, adoption is a statutory creation. Thus, for example, it was unknown to the English common law. Under the old Roman law, adoption was only allowed strictly as a means of sustaining the male line of descent, and the adoption of children who had not reached puberty was originally prohibited.⁴ Likewise the practice is not recognized under Islamic law.⁵

In Nigeria, although some learned writers⁶ posit that adoption is practised under native law and custom, it would appear that what they describe as

³ See Nwogugu, E.I., *Family Law in Nigeria*, (Ibadan: Heinemann, 1990), p.312.

⁴ Van Bueren, G., *The International Law on the Rights of the Child* (The Hague: Kluwer Law International, 1998), p.95.

⁵ See the *Holy Koran*, Sura Ahzab XXXIII vs. 4-5. Cf. the *Holy Bible*, Genesis 15 vs. 3-4. Islam has developed its own concept known as *kafalah* under which a child who cannot be cared for by his biological parents may be taken by another family to live with them permanently but the child is not entitled to adopt the family name nor to inherit from the family: see Van Bueren, *ibid*.

⁶ E.g., Nwogugu, *op.cit.*, 322-329; Obi, S.N.C., *Modern Family Law in Southern Nigeria*, (London: Sweet & Maxwell, 1966), pp.344-346; Okojie, C.G., *Ishan Native Laws and Customs* (Lagos: John Okwesa & Co. 1960), p.90; Forde, D., *Yako Studies* (London: International African Institute, 1964), pp.72-73; Partridge, C., "Native Law and Custom in Egbaland" (1911) 10 *J.A.S.*, 422.

adoption is, upon a careful analysis, either guardianship or fostering⁷ or some other peculiar indigenous concept. None of those writers seems to have clearly identified any system of customary law in Nigeria which recognizes adoption as a concept that entails a permanent and irreversible severance of the parent-child relationship existing between a child and his biological parents and the extinction of the consanguineous relationship between the child and his original family.⁸ This is the singular hallmark of adoption that distinguishes it from the other alternative child care devices. Accordingly, any institution that does not produce such a legal effect is certainly not adoption in the strict legal sense.

Indeed, it is a trite principle of most systems of native law and custom in Nigeria that no matter how long and under what circumstances a child (not being a slave) may reside with and be nurtured by any person other than his biological parents, when the child grows up, he is entitled to and will most likely go back to his roots, if he happens to trace them. Thus, the traditional social stigmatization of a person who is known not to be the biological offspring of his acclaimed parents is a major factor in contributing to the unpopularity of adoption in Nigeria.⁹ It is, therefore, safe to conclude that, strictly speaking, adoption is not a customary law concept and that the only source of adoption law in Nigeria is legislation.

⁷ See Uzodike, E.N.U., "Law and Procedure for Adoption in Nigeria" (1991) *Nig. J. Contemp. Law*, 1, 6, citing Kasunmu, A.B. & Salacuse, J.W., *Nigerian Family Law*, (London: Butterworths, 1966), p.249; Oyebanji, M.B., "Adoption Law in Nigeria" 18 *N.B.J.*, 18.

⁸ Indeed, the *ipse dixit* of the same writers, for the most part, point to the contrary: see e.g. Forde, *op.cit.*, 72; Partridge, *op.cit.*, 423; Nwogugu, *op.cit.*, 329; Obi, *op.cit.*, 346. Obi, for instance, states that under customary law, "the [adopted] child's link with his family of birth survives...."

⁹ For other factors, see Uzodike, *op.cit.*, 2-4.

History of adoption legislation in Nigeria

The earliest statute on adoption in Nigeria was the Adoption Law 1965 of the defunct Eastern Region of Nigeria.¹⁰ It was followed by the Adoption Edict 1968 of Lagos State.¹¹ Today, virtually all the States of the southern part of Nigeria have adoption statutes. By contrast, none of the States of the northern part of the country (which are in the majority) has any legislation on adoption.¹² The reason for the non-existence of adoption legislation in the northern States is that the States are predominantly inhabited and controlled by Moslems, whose religious beliefs do not favour adoption. Commenting on this situation way back in 1991, Uzodike¹³ remarked that adoption might never be a subject for federal legislation in Nigeria. Her remark was apparently predicated on the assumption that the Moslems would oppose it.

Such was the state of the law on adoption in Nigeria until 2003 when the National Assembly enacted the Child's Rights Act, Part XII of which makes copious provisions regulating adoption in Nigeria. The Act aims to provide comprehensive and uniform legislation on the rights and welfare of children throughout the country and also declares that its provisions supersede any other statutory provisions on the same subject matters.¹⁴ However, it appears that

¹⁰ Hereinafter referred to as "A.L. Eastern States", which was inherited by all the States that were later created out of Eastern Region namely: Abia, Akwa-Ibom, Anambra, Cross-River, Ebonyi, Enugu and Rivers States.

¹¹ Which has been revised and republished in subsequent editions of the Laws of Lagos State and has now metamorphosed into the Adoption Law, Cap. A5 Laws of Lagos State 2003, hereinafter referred to as "A.L. Lagos State".

¹² Ironically the largest number of adoptable children, *i.e.*, children in dire need of care and protection, come from that part of the country. They are commonly found all over the country as street urchins and beggars being exposed to all kinds of abuse, danger and criminal influences.

¹³ *Op.cit.*, 2.

¹⁴ See s.274.

such an objective, as lofty as it may be, cannot be directly accomplished by the instrumentality of the Act. For, as earlier observed, the Act is enforceable as such only in the Federal Capital Territory, Abuja, but not in the component States of the Federation. Be that as it may, most of the States have already put in motion the machinery for the re-enactment and implementation of the provisions of the Act in their respective territories. At the time of writing, four States, namely Anambra, Ebonyi, Imo and Ogun, have passed their respective Child's Rights Bill into Law.

PART II: ADOPTION PROVISIONS OF THE ACT

Establishment of adoption services

The adoption provisions of the Act begin with the establishment of adoption services of a kind that is novel in the history of adoption legislation in Nigeria. Specifically, section 125(1) provides that State Governments and the Federal Government shall, for the purpose of adoption, establish and maintain within each State and the Federal Capital Territory, Abuja, respectively, a service designed to meet the needs of -

- (a) a child who has been or may be adopted;
- (b) parents and guardians of such a child; and
- (c) persons who have adopted or who may adopt a child.

For this purpose, every Government shall provide such facilities as may be prescribed by the appropriate authority or ensure that such facilities are provided by approved adoption services. Such facilities and services include –

- (a) temporary board and lodging, where needed by a child and, in exceptional circumstances, the mother of a child;
- (b) arrangements for assessing a child and prospective adopters and placing of the child for adoption; and
- (c) counseling for persons with problems relating to adoption.¹⁵

However, the prescribed adoption services and indeed the entire institutional framework for adoption under the Act are yet to be put in place. In the States that already have adoption legislation, it is the ministry responsible for social welfare and youth development that is in charge of adoption. There is no parallel provision in any of the pre-existing state legislation requiring the ministry or government agency to provide such facilities and services as are prescribed in section 125 of the Act. Moreover, no Nigerian statute (whether federal or state) has ever provided for the setting up of approved adoption services and, as far as official records can support, none is in place anywhere in this country. The absence of such approved adoption services in Nigeria has created a yawning gap which private maternities and orphanages exploit by indulging in the illicit acts of child trafficking and facilitating unauthorized adoption.¹⁶

Children who may be adopted

From the definition of “child” in section 277 of the Act, any child to be adopted must be under the age of eighteen years. The Act provides for two categories of children who may be adopted. In the first category are children whose parents or, where there is no surviving parent, the guardians, consent to their adoption.¹⁷ Thus, where a child’s parents are ill-equipped economically, socially, psychologically or otherwise to take care of the child, they may voluntarily give up the child for adoption. For example, a teenage girl who

¹⁵ S.125(2).

¹⁶ A recent example is the case involving one Good Shepherd Orphanage in Lagos which was exposed when the Lagos State Commissioner for Youths, Sports and Social Development, acting on a tip-off, raided the orphanage with law enforcement agents. The proprietress of the orphanage was arrested, detained and, as at the time of writing, she is standing trial jointly with four other accused persons on a sixteen-count charge including child trafficking and abduction at the High Court of Lagos State.

¹⁷ S.128(a).

becomes a single parent while in school or learning a trade and cannot at the same time cope with the responsibilities of child-rearing may give up the child for adoption. One must not, however, lose sight of the risks inherent in separating a less-than-one-year-old child outright from his biological mother. For this reason, it is suggested that there should be a proviso to the effect that, unless exceptional circumstances are shown, a child must be at least one year old before the parent(s) can voluntarily offer him for adoption.¹⁸

In the second category is a child who is abandoned, neglected or persistently abused or ill-treated and there are compelling reasons in the interest of the child why he should be adopted.¹⁹ Adoption of a child under this category does not require parental consent. This poses no problem in the case of an orphaned or otherwise abandoned child. However, in the case of a child who has been neglected or persistently abused or ill-treated by his parents, one wonders what compelling reasons could justify the adoption of the child willy-nilly without seeking his parents' consent. Rather than authorize the adoption of such a child without the parents' consent, the Court can as well take care of his interests by invoking the provisions of Parts IV and V of the Act, which deal with protection of children and children in need of care and protection, respectively.²⁰ Similarly, the Court may make an order for any of the other forms of alternative child care provided for in the Act, such as guardianship,²¹ wardship,²² fostering,²³ *etc.* These alternative solutions do not entail a permanent severance of the parent-child relationship between the child and his

¹⁸ *Cf.* s.2(3) A.L. Lagos State.

¹⁹ S.128(b).

²⁰ See also s.27(2)(a) of the Children and Young Persons Law, Cap. C10 Laws of Lagos State 2003.

²¹ See Part IX.

²² See Part X.

²³ See Part XI.

natural parents. It is therefore recommended that the provision of section 128(b) of the Act should be amended so as to specifically restrict its application to orphans and children who are abandoned and whose parents and other relatives are unknown or cannot be traced.²⁴

Persons who may adopt

By the provisions of section 129 of the Act, the following persons may apply for an adoption order, namely:

- (a) a married couple where -
 - (i) each of them has attained the age of twenty-five years, and
 - (ii) there is an order authorizing them jointly to adopt a child;²⁵ or
- (b) a married person, if he has obtained the consent of his spouse; or
- (c) a single person, if he has attained the age of thirty-five years, provided that the child to be adopted is of the same sex as the person adopting.

In all cases, the adopter or joint adopters shall be persons found to be suitable to adopt the child by the appropriate investigating officers.²⁶

A single person (whether male or female) is not allowed to adopt a child of the opposite sex. Apart from the obvious need to avoid sexual exploitation of the child, another justification for the prohibition is that a single adopter will better appreciate and take care of the needs of a child of the same sex than one of the opposite sex. Under the pre-existing state legislation, there is a discriminatory prohibition to the effect that whereas a sole male applicant cannot (unless exceptional circumstances are shown) adopt a female child, a

²⁴ Cf. s.1(1) A.L. Lagos State.

²⁵ This paragraph (ii), in our view, seems to be as otiose as it is meaningless. *Quaere*: whether a couple intending to adopt a child will first obtain an order before applying for an adoption order?

²⁶ S.129(d).

sole female applicant can adopt a male child.²⁷ Happily enough, the Act has redressed the imbalance by extending the prohibition to both male and female applicants alike. It is, however, suggested that the proviso to section 129(c) be amended so as to make an exception for a single applicant wishing to adopt his or her biological child of the opposite sex.²⁸ There seems no justifiable policy consideration for not allowing, for instance, a man to adopt his illegitimate daughter.²⁹

The provisions of the Act pertaining to the age of the applicant(s) for adoption are rather incoherent. Whilst section 129(a)(i) states that where a married couple are joint applicants for adoption, *each of them* must have attained the age of twenty-five years, section 131(1)(a) requires only *one of them* to have attained that age who, in addition, must be at least twenty-one years older than the child. The indiscriminate interchange of the expressions “each of them” and “one of them” in those two sections is attended with a practical, not merely semantic, problem. As an illustration: H (aged twenty-five) and W (aged twenty-three) jointly apply for the adoption of C (aged two). Going by section 129 of the Act, the couple are not eligible to adopt jointly, as W has not attained the age of twenty-five, but by virtue of section 131, they can adopt, as one of them (H) has attained the requisite age. Besides, a strict interpretation of the provisions of section 129 will result in absurdity in the sense that whereas H and W cannot adopt jointly under section 129(a) because

²⁷ See *e.g.* s.3(2) A.L. Lagos State; s.4(2) A.L. Eastern States.

²⁸ It seems that such a case would come under the rubric of “exceptional circumstances” which will justify the making of an adoption order under the other adoption statutes: *ibid.*

²⁹ Under customary law, such a daughter belongs to her mother’s maiden family. However, under some systems of customary law (notably Yoruba and Kwale customary laws), she can become a legitimate child of her putative father by a process known as legitimation by acknowledgement of paternity: see *e.g.* *Alake v. Pratt* (1955) 15 W.A.C.A. 20; *Jirigho v. Anamali* (1958) W.R.N.L.R. 195; *Taylor v. Taylor* (1960) L.L.R. 286; *Cole v. Akinyele* (1960) 5 F.S.C. 84.

W is under-aged, H alone can adopt with the consent of W by virtue of section 129(b).

Similarly, whilst section 129(c) provides that a single person applying for adoption must have attained the age of thirty-five years, by section 131(1)(a) such an applicant merely needs to attain the age of twenty-five years, provided he is twenty-one years older than the child to be adopted. Inasmuch as it seems to us that the word “thirty-five” contained in section 131(1)(a) must have been a mistake,³⁰ the law is well settled that where a word used in a statute is clear and unambiguous, it should be given its natural meaning. For, as was established in the old English case of *Crawford v. Spooner*³¹: “We cannot aid the legislature’s defective phrasing of an Act; we cannot add and amend, and, by construction, make up deficiencies which are left there”.

From the foregoing, there is need to harmonize the provisions of sections 129 and 131 of the Act so as to clarify the precise age requirement for an applicant or joint applicants for an adoption order. In our view, the provisions of section 131(1)³² sufficiently take care of the age requirement and, therefore, the age prescriptions contained in section 129 should be expunged.

It is enlightening to note that, except for a joint adoption by husband and wife, there is no other provision for joint adoption under the Act. Not even both parents of an illegitimate child can jointly adopt him unless they are

³⁰ There seems no justification for raising the age so high. The requirement for joint adopters under s.129(a)(i) is twenty-five years. Likewise, the age prescription in all the other adoption statutes has been consistently twenty-five: see *e.g.* s.3(1)(a) A.L. Lagos State; s.4(1) A.L. Eastern States.

³¹ (1846) 6 Moore P.C. 1, 8, 9; 13 E.R. 585. See also *Magor & St. Mellons R.D.C. v. Newport Corporation* (1952) A.C. 189.

³² *In pari materia* with s.3(1)(a) A.L. Lagos State; s.4(1) A.L. Eastern States.

subsequently married to each other, in which case, they can, at least in theory,³³ bring an application for an adoption order as a married couple. However, subject to the proviso contained in section 129(c), there is no provision in the Act prohibiting a person from adopting his biological child.³⁴

Residence and nationality required for adoption

For an adoption order to be made, both the child and the applicant must be resident in the State where the application is made and the applicant must have been so resident for at least five years.³⁵ However, in the case of joint applicants, there is confusion in that whilst paragraph (a) of section 131(1) prescribes that “both or, at least, one of them” must be resident in the same State where the child resides, paragraph (b) requires “both of them” to have been so resident for a period of at least five years. Again, this is one of those inconsistencies contained in the Act, which need to be remedied by an amending statute. However, since a joint application for adoption can only be made by a couple, who ordinarily should have a joint residence at the place of their matrimonial home, it stands to reason that the requirement of residence in the State of adoption should apply to both of them.

It is noteworthy that the term used in the Act is simply “residence” as opposed to “habitual residence” that is used in adoption legislation in some other jurisdictions as well as in international conventions.³⁶ This is a decent

³³ In practice, if the marriage is celebrated under the Marriage Act, the child is legitimated by the marriage, thus obviating the need for his adoption: see *e.g.* s.3 of the Legitimacy Law, Cap. L65 Laws of Lagos State 2003.

³⁴ This is expressly allowed under s.4(1)(b) and (c) A.L. Eastern States. It is also allowed under some international conventions: see *e.g.* Art. 12 European Convention on the Adoption of Children 1967.

³⁵ S.131(1)(b) and (c).

³⁶ See *e.g.* the English Adoption Act 1976, s.17(2); Arts. 2 & 14, of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993; Art. 1, Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors 1984.

way of avoiding the needless controversy regarding the relationship between habitual residence and ordinary residence.³⁷ In England, it has been held that, *prima facie*, residence involves some degree of permanence.³⁸ Moreover, it is well settled in English case law that a person could be resident in two or more places.³⁹

In Nigeria, it happens most often that a citizen leaves his State of origin and moves to another State or city where he takes up employment or practices his profession or trade. Whilst he resides most of the time in the State where he earns his living, he occasionally visits his country home (which he usually states in official records as his “permanent address”), intending to retire ultimately to the latter residence. He pays taxes, rates, community development levies, church dues and tithes in both States, registers and participates in general elections and discharges other civic responsibilities in either State. In this scenario, it is submitted that such a Nigerian is resident in two States and may therefore apply for an adoption order either in his State of origin or in the State where he resides and works.

As regards nationality, an adoption order shall not be made in respect of a child unless the applicant is a citizen or, in the case of a joint application, both applicants are citizens of Nigeria.⁴⁰ There is no ambiguity in this provision. A non-Nigerian cannot apply for an adoption order under the Act whether solely or jointly with a citizen of Nigeria. In effect, this is one way of prohibiting inter-country adoption in Nigeria. The Act is, however, silent on the nationality of

³⁷ See Dicey & Morris, *The Conflict of Laws*, 12th edn. (London: Sweet & Maxwell, 1993), p.163.

³⁸ *Brokelmann v. Barr* (1971) 2 Q.B. 602, 611-612; *Re Adoption Application No. 52 of 1951* (1952) Ch. 16. Contrast *Matalon v. Matalon* (1952) P.233.

³⁹ *I.R.C. v. Lysaght* (1928) A.C. 234; *Sinclair v. Sinclair* (1968) P. 189, 232.

⁴⁰ S.131(1)(d).

the child to be adopted. Accordingly, it is submitted that an eligible Nigerian who resides in the same State as the child may adopt a child who is not a citizen of Nigeria but resides in this country.

Consents required for adoption

There are three types of consent that may be required for an adoption order to be made under the Act, depending on the circumstances of each case. The first is the consent of the parents of the child or, where there is no surviving parent, the guardian of the child.⁴¹ This becomes necessary only where such a parent or guardian is known and can be traced. No such consent is, however, required where the child to be adopted is abandoned, neglected or persistently abused or ill-treated, and there are compelling reasons in the interest of the child why he should be adopted.⁴²

The second type of consent is spousal consent. Section 132(1) states that where a married person⁴³ is the sole applicant for an adoption order, the Court may, if it thinks fit, refuse to make the order if the consent of the spouse⁴⁴ of the applicant is not first obtained. The use of the words “the Court may, if it thinks fit”⁴⁵ in that sub-section tends to suggest that the requirement of spousal consent is discretionary rather than mandatory. However, section 129 sets out the persons who may apply for an adoption order among whom is “a married person, *if he has obtained consent of his spouse,*⁴⁶ as required under section 132

⁴¹ S.128(a).

⁴² S.128(b).

⁴³ This includes both a person married monogamously under the Marriage Act and one married polygamously under customary law, as both variants of marriage are recognized under our law.

⁴⁴ For a polygamist, it is submitted that he need not obtain the consents of all his wives. If only one of his wives consents, that one will stand in the position of a surrogate mother to the child.

⁴⁵ This is identical with the pre-existing statutory provisions: see *e.g.* s.4(1) A.L. Lagos State; s.6(2) A.L. Eastern States.

of this Act”. The wording of the latter provision shows that spousal consent is a condition precedent. A combined reading of both sections, therefore, would lead to the inescapable conclusion that spousal consent is a mandatory requirement where a married person is a sole applicant for an adoption order.

Where a child is to be adopted solely by one married person, it is very necessary to obtain the consent of his or her spouse so as to ensure that the child is acceptable to both spouses and will be fully integrated into their family. More significantly, where one party to a marriage adopted a child, the issue whether the other party consented to the adoption is critical in any matrimonial proceedings with respect to the maintenance, custody, guardianship, welfare or settlement of property for the benefit of the child. Thus, under the Matrimonial Causes Act,⁴⁷ a child adopted since the marriage by either the husband or wife will come within the definition of “children of the marriage” in either of two circumstances –

- (a) if he was adopted with the consent of the other spouse or
- (b) if, at the relevant time, he was ordinarily a member of the household of the husband and wife.

Lastly, where it appears to the Court that a person other than the parents or relative of a child has any right or obligation in respect of the child under an order of the court or any agreement or under customary law, the Court may, if it thinks fit, refuse to make the adoption order if the consent of that person is not first obtained.⁴⁸ Clearly, this type of consent is discretionary. In determining

⁴⁶ Emphasis supplied.

⁴⁷ Cap. M7 Laws of the Federation of Nigeria 2004, s.69. Note, however, that s.277 of the Child’s Rights Act defines “child of the family” in relation to the parties to a marriage as “(a) a child of both of those parties; (b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organization, who has been treated by both of those parties as a child of their family”.

⁴⁸ S.132(2).

whether or not it is necessary, the Court shall be assisted by the report of a child development officer.⁴⁹ Instances of situations that may make such consent necessary include where -

- (a) there is a subsisting corrective order committing the child to the care of a person other than his relative;⁵⁰
- (b) the child is an apprentice or a domestic servant under a person other than his relative, if the agreement under which he is serving so requires; or
- (c) being a female, the child has been betrothed under customary law.⁵¹

The consents required under section 132 may be given either unconditionally or subject to conditions with respect to the religious persuasion in which the child is to be brought up.⁵² In giving consent under this section, it may not be necessary for the person giving the consent to know the identity of the applicant for the adoption order.⁵³ Furthermore, the Court may dispense with any consent required under this section if it is satisfied that the person whose consent is required cannot be found, is incapable of giving his consent or is withholding his consent unreasonably.⁵⁴

It is pertinent to note that all the rules applicable to consent, which are set out in the various sub-sections of section 132, apply specifically to “consent required under this section”. The requirement of parental consent does not

⁴⁹ S.132(3).

⁵⁰ See s.139 of the Act, which provides for the adoption of a child while a corrective order is in force in respect of him.

⁵¹ S.21 & s.22 of the Act prohibit child marriage and betrothal, respectively. It is however submitted that these provisions are inapplicable to a marriage or betrothal under customary law, as these lie outside the legislative powers of the National Assembly: see item 61 in Part I of the Second Schedule to the 1999 Constitution.

⁵² S.132(4). Under our law, the parents or guardians of a child have the right to determine the religious upbringing of the child: see s.7 & s.127 of the Act; s.38(2) of the 1999 Constitution.

⁵³ S.132(5).

⁵⁴ S.132(6).

derive from section 132, rather it is provided for in section 128. By a literal interpretation of those rules stated in section 132, therefore, it can be safely asserted that they do not apply to parental consent. Whether this assertion accords with the intention of the lawmakers or merely arises from sheer drafting inadvertence is a matter of conjecture. However, there seems no justification for the non-applicability of the said rules to parental consent.⁵⁵ Thus, for instance, the Court should dispense with parental consent where the parent or guardian cannot be found or is incapable of giving his consent (*e.g.* as a result of unsoundness of mind) or is withholding his consent unreasonably.

The question whether parental consent has been unreasonably withheld is a question of fact depending on the circumstances of each case.⁵⁶ The test, as proposed by Diplock, L.J. in the English case of *Re C*,⁵⁷ is "... would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?" In that case, it was held that it was an unreasonable withholding of consent where a parent withdrew his consent after the child had settled down with the applicant for an adoption order.

Although not expressly stated in the Act, taking a cue from other adoption legislation in force in Nigeria,⁵⁸ it would amount to an unreasonable withholding of consent if the person whose consent is required withholds it or, having given consent, subsequently withdraws it on the sole ground that he does not know the identity of the applicant.

⁵⁵ A similar provision in s.5 A.L. Eastern States encompasses parental consent as well as all other consents required therein.

⁵⁶ See Nwogugu, *op.cit.*, 318.

⁵⁷ (1964) 3 All E.R. 483, 495.

⁵⁸ See *e.g.* s.4(4) A.L. Lagos State; s.5(4) A.L. Eastern States.

To underscore the importance of obtaining the requisite consents, section 133 of the Act stipulates that the Court shall, before making an adoption order, satisfy itself, *inter alia*, that –

- (a) every consent required under section 132 which has not been dispensed with has been obtained; and
- (b) every person who has given his consent understands the nature and effect of the adoption order for which the application is made and for this purpose the relevant adoption service shall provide adequate counseling for the parties involved in the adoption.

Again, by specifically referring to “consent required under section 132 of this Act”, the lawmakers have, perhaps inadvertently, excluded parental consent (which is required under section 128) from the operation of section 133 of the Act. It is therefore suggested that section 133 should be amended by substituting the words “under section 132 of” with the word “in” so as to give effect to the intention of the legislature, which presumably is to capture all the consents required for adoption under the Act.

Procedure for adoption and jurisdiction of the Court

Under the Act,⁵⁹ the Court that has exclusive jurisdiction to deal with an application for an adoption order is the Family Court⁶⁰ established by section 149 for the purposes of hearing and determining matters relating to children. The Court shall have a two-tiered structure namely, the Court at the High Court level and the Court at the Magistrate’s Court level.⁶¹ An appeal shall lie to the Court at the High Court level from the Court at the Magisterial level in respect of a decision on any application for an adoption order.⁶² However, a decision of

⁵⁹ S.136 & s.162(1).

⁶⁰ In the Act as well as in this work referred to as “the Court”.

⁶¹ S.150.

⁶² S.138(1).

the Court postponing the determination of an application for an adoption order and making an interim order is non-appealable.⁶³ Where the Court at the High Court level exercises original or appellate jurisdiction, an appeal shall lie to the Court of Appeal.⁶⁴

Section 126(1) of the Act stipulates that application for an adoption order shall be made to the Court in such form as may be prescribed and shall be accompanied with –

- (a) where the applicant is a married couple, their marriage certificate or a sworn declaration of marriage;
- (b) the birth certificate or sworn declaration of age of each applicant;
- (c) two passport photographs of each applicant;
- (d) a medical certificate of the fitness of the applicant from a Government hospital; and
- (e) such other documents and information as the Court may require for the purposes of the adoption.

Upon receiving the application, the Court shall order an investigation to be conducted by a child development officer; a supervision officer and such other persons as the Court may determine to enable it to assess the suitability of the applicant as an adopter and of the child to be adopted.⁶⁵

Under the existing rules of court regulating adoption in some States⁶⁶, a guardian *ad litem* is appointed to safeguard the interests of the child in the

⁶³ *Ibid.*

⁶⁴ S.138(2).

⁶⁵ S.126(2).

⁶⁶ See *e.g.* Rule 3 of the Adoption (Juvenile Court) Rules of Lagos State, which is listed as Subsidiary Legislation in Cap. A5 Laws of Lagos State 2003. S.137 of the Act empowers the Chief Justice of Nigeria to make rules for regulating generally the practice and procedure of the Court in respect of adoption. However, no such rules have as yet been made.

adoption proceedings. Although not expressly stated, it is submitted that the expression “such other persons as the Court may determine”, as contained in section 126(2)(c) of the Act, is wide enough to accommodate the appointment of a guardian *ad litem* in adoption proceedings. Besides, by virtue of section 89 of the Act, the Court may, for the purpose of any specified proceedings, appoint a guardian *ad litem* for the child concerned to safeguard the interests of the child.

The Court shall, in reaching a decision relating to the adoption of a child, have regard to all the circumstances, first consideration being given to –

- (a) the need to safeguard and promote the welfare and best interest of the child, and
- (b) ascertaining, as far as practicable, the wishes and feelings of the child regarding the decision and giving due consideration to those wishes and feelings, having regard to the age and understanding of the child⁶⁷.

Furthermore, the Court may, in making an adoption order, impose such terms and conditions as it may think fit and, in particular, may require the adopter, by bond or otherwise, to make for the child such provisions as in its opinion are just and expedient.⁶⁸

It is a condition precedent to the making of an adoption order that the child must have been in the care of the applicant for at least three consecutive months immediately preceding the date on which the order is made.⁶⁹ While an application for an adoption order is pending in the Court, no person who has given his consent to the adoption shall withdraw the child from the care and possession of the applicant without the leave of the Court.⁷⁰ Also the applicant

⁶⁷ S.126(3).

⁶⁸ S.134.

⁶⁹ S.131(1)(e).

must have, at least twelve months before the making of the order, informed the social welfare officer of his intention to adopt the child.⁷¹

Clearly, these provisions reflect the current state of international human rights law, which is that adoption should be regarded as principally a child care device rather than as a means of providing succour to childless persons or relief to incapable parents, as it was conceived under the old international legal order.⁷² Thus, the Act duly recognizes the paramountcy of the welfare and best interests of the child in adoption proceedings, as indeed in “every action concerning a child”.⁷³

Interim adoption order

By virtue of section 135 of the Act,⁷⁴ the Court may, on an application for an adoption order, postpone the determination of the application and make an interim order giving the custody of the child to the applicant for a period not exceeding two years. An interim order may be made on such terms and conditions as the Court thinks fit as regards provision for the maintenance, education and supervision of the welfare of the child or otherwise. In any event, the Court shall impose as conditions for making an interim order that the child shall be under the supervision of a child development officer and shall not be taken out of the State without the consent of the Court.

Furthermore, section 135(3) provides:

“The consents to the making of an adoption order *which are required under section 132 of this Act*⁷⁵ shall be required to the making of an interim order, and the power of the Court

⁷⁰ S.132(7).

⁷¹ S.131(1)(f).

⁷² See Van Bueren, *op.cit.*, 95.

⁷³ See s.1. See also art. 21 of the UN Convention on the Rights of the Child.

⁷⁴ *In pari materia* with s.6 A.L. Lagos State.

⁷⁵ Italics supplied.

to dispense with any such consent shall also apply in the case of an interim order”.

The italicized words reinforce the observation earlier made that the lawmakers failed to take cognizance of the provision for parental consent contained in section 128 of the Act in making the subsequent provisions relating to consent for adoption. In our view, however, the words quoted in italics are not only superfluous but also misleading. They should therefore be expunged in order to make the provision of section 135(3) applicable to all the consents required for adoption under the Act.

It is further provided that an interim order shall not be made in any case where the making of an adoption order would be unlawful under the provisions of the Act.⁷⁶ What this means, in effect, is that all the conditions precedent and restrictions to the making of an adoption order apply with equal force to an interim order. Despite all the similarities in the conditions for granting an adoption order and interim order, it is clearly stated that an interim order shall not be deemed to be an adoption order within the meaning of the Act.⁷⁷ Thus, an interim order, being a merely probationary order, does not have the same legal effects as an adoption order. However, there are certain pertinent questions that are begging for answers. First, what circumstances would justify the postponement of the determination of an application for adoption order so as to warrant the making of an interim order?⁷⁸ Secondly, what happens after the expiration of the interim order if the Court has not yet determined the substantive application for an adoption order? Thirdly, what is the status of the

⁷⁶ S.135(4).

⁷⁷ S.135(5).

⁷⁸ Under s.7 A.L. Lagos State, one occasion that is specifically provided for is where the applicant for an adoption order or, in the case of a joint application, one of the applicants, is not a citizen of Nigeria. However, such an occasion cannot arise under the Act, which absolutely prohibits adoption by non-Nigerians: see s.131(1)(d).

child whilst an interim order lasts?

Prohibition of certain payments for adoption

The Court shall, before making an adoption order, satisfy itself that the applicant has not received or agreed to receive, and no person has made, given or agreed to make or give to the applicant any payment or other reward in consideration of the adoption other than what the Court may approve.⁷⁹ Giving, receiving or agreeing to give or receive such payment or reward, whether by the adopter or by any other person, is not only prohibited but also constitutes an offence punishable with a fine not exceeding thirty thousand naira or imprisonment for a term not exceeding three years or both.⁸⁰ All the same, an adoption order affected by such prohibited payment may be allowed to continue or otherwise resolved at the discretion of the Court having regard to all the circumstances of the case particularly the best interest of the child.⁸¹

No doubt, the prohibition of certain payments for adoption is aimed at checking the obnoxious practice of child trafficking under the guise of adoption. It is pertinent, however, to observe that the provision of section 133(d) is restricted to payment or reward to the applicant for an adoption order. This must have been as a result of drafting inadvertence, as there seems no justification for not extending the provision to payment or reward given to any other person. Indeed, of greater concern is the receipt of payment or reward by the parent or guardian of the child to be adopted or by any other person who facilitates the adoption. It is suggested that the provision of that sub-section be

⁷⁹ S.133(d).

⁸⁰ S.143(1)&(2).

⁸¹ S.143(3).

amended accordingly so as to capture these other persons.

Adopted children register

By section 142 of the Act,⁸² the Chief Registrar is mandated to establish and maintain an Adopted Children Register in which shall be made only such entries as may be directed by an adoption order. It is further provided that an adoption order shall contain a direction to the Chief Registrar and the National Population Commission⁸³ to make in the Adopted Children Register entries in the form specified in the Fifth Schedule to the Act. Such entries include serial number and date of entry, name and sex of adopted child, name, surname, address and occupation of adopter(s), date of birth of child (if any was directed by the adoption order), date of adoption order and description of the court that made it and signature of the officer who attests the entry. Where it is established to the satisfaction of the Court that the date of birth and identity of the child to be adopted are identical to those of a child to whom any entry in the Register of Births relates, the adoption order shall contain a further direction to the Chief Registrar to cause the entry in the Register of Births to be marked “Adopted” and to include in the entry in the Adopted Children Register the date of birth of the child. Where an adoption order is made in respect of a child who had been previously adopted under the Act,⁸⁴ the order shall contain a direction that the previous entry in the Adopted Children Register be marked “Re-adopted”. A certified copy of an entry in the Adopted Children Register

⁸² *In pari materia* with s.16 A.L. Lagos State.

⁸³ Which keeps the Register of Births and Deaths.

⁸⁴ The words “or any other statute in force in any part of Nigeria” ought to be appended hereto, so as to encompass adoption orders previously made under the state legislation. However, the same rule applies under the pre-existing state adoption legislation: see *e.g.* s.16(4) A.L. Lagos State.

purporting to be stamped or sealed by the Chief Registrar's office shall be proof of such adoption as therein specified, and where the entry includes the date of birth of the child, it shall be proof also of that date. In this context, the recent decision of the Supreme Court of Nigeria in *Olaiya v. Olaiya*⁸⁵ is quite illuminating.

In that case, the 1st respondent, Mrs. Cornelia Olaiya, married Solomon Kayode Olaiya in 1963 under the Marriage Act in England. The couple lived together in England and later returned to Nigeria where they cohabited until the husband died intestate in 1981. There was no biological child of the marriage. Upon the death of the husband, the 2nd and 3rd respondents (his brothers) took over the deceased's estate and continued to manage the same without any reference to the deceased's widow. She sued them claiming, among other reliefs, a declaration that the plaintiff and the children of the deceased namely Emmanuel Olaiya, Sarah Olaiya and Remilekun Olaiya were the exclusive beneficiaries of the intestate estate of the deceased. In her pleadings, the plaintiff claimed that the first two children "were both children of the deceased by legal and valid adoption under the applicable law and were brought up and recognized as such prior to the deceased's death in 1981". However, the defendants denied the averment that their deceased brother ever adopted the children. The trial court accepted the plaintiff's oral evidence that she and her deceased husband adopted the two children. Accordingly, it held that the children were entitled to share in the intestate estate of the deceased and the Court of Appeal upheld the decision. On further appeal to the Supreme Court, it was held that the mere *ipse dixit* of the plaintiff/1st respondent was insufficient proof of the alleged adoption. The apex court held that where a child is alleged to have been adopted under an Adoption Law, the best evidence of the adoption

⁸⁵ (2002) 8 N.W.L.R. (Pt. 782) 652.

should come from the Adopted Children Register established under the Law. Since the adoption of the two children in question had not been proved in the manner required by the Law, the Supreme Court held, and rightly so, in our view, that they were not entitled to share in the intestate estate of the deceased.

Where an adoption order is revoked, the Court shall transmit the revocation order to the Chief Registrar who shall cause to be cancelled the entries relating to the adoption of the child in the Adopted Children Register and (if applicable) the Register of Births. For the avoidance of doubt, it is expressly provided that the Adopted Children Register and the index thereof as well as any other registers and books kept by the Chief Registrar in connection with the adoption of children shall not be liable to searches by members of the public and the Chief Registrar shall not make a certified copy thereof or furnish any information contained therein to any person except in pursuance of an order made by the Court.⁸⁶ This provision and other similar provisions⁸⁷ are designed to ensure the confidentiality of adoption records and non-disclosure of the identity of both the adoptive and biological parents of the child.⁸⁸

Inter-state adoption and recognition of foreign adoption

Except under a licence issued by the Minister charged with the responsibility for matters relating to children, no person shall permit, cause or procure the care and possession of a child to be given to any person outside the State⁸⁹ in which the adoption order was made with a view to getting the child

⁸⁶ S.142(9).

⁸⁷ See *e.g.* s. 132(5) & s. 157(1).

⁸⁸ For the arguments for and against disclosure of identifying information relating to an adopted child's biological parents, see Rains, R.E., "The Clash of the Right to Identity of Adoptive Children vs. The Right of Privacy of Biological Parents" in Lodrup, P. & Modvar, E., (eds) *Family Life and Human Rights* (Oslo: Gyldendal Akademisk, 2004), p.581.

⁸⁹ The term "State" as used in the Act means one of the federating units in the Federation of Nigeria.

adopted by any person.⁹⁰ A contravention of this provision is an offence punishable with a fine of thirty thousand naira or imprisonment for a term not exceeding one year or both.⁹¹ However, section 145(1) of the Act provides as follows:

“Subject to this section, the Minister may grant a licence for a child to be transferred to a person, subject to such conditions and restrictions as he may think fit, authorizing the care and protection of a child to whom inter-state adoption arrangements have been made”.

This provision is so inarticulately worded as to render its full implications uncertain. That notwithstanding, a careful analysis of the provision reveals that whereas inter-state adoption within the country is allowed it gives no room for inter-country adoption. This is a radical departure from the pre-existing legislation in some States in Nigeria under which inter-country adoption is allowed.⁹² Thus, a combined reading of the provisions of sections 145(1) and 131(1)(b), (c) and (d) of the Act⁹³ puts it beyond doubt that inter-country adoption is not allowed under the scheme of the Act. By these provisions, therefore, it can be safely asserted that Nigeria has joined such countries as Bangladesh and Sri Lanka⁹⁴ in prohibiting inter-country adoption.⁹⁵ This, in our view, is a welcome development. Allowing inter-country adoption in Nigeria would undermine the current efforts by the government⁹⁶ as well as non-governmental organizations⁹⁷ to combat the rising spate of child trafficking

⁹⁰ S.144(1) of the Act, which is identical with s.18(1) A.L. Lagos State.

⁹¹ S.144(3).

⁹² See *e.g.* s.19 A.L. Lagos State; s.21 Adoption Laws of Edo and Delta States.

⁹³ The latter section stipulates that an applicant for an adoption order must be a Nigerian citizen who, together with the child to be adopted, must be resident within the State where the application is made.

⁹⁴ See Van Bueren, *op.cit.*, 96.

⁹⁵ At any rate, Nigeria is not a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.

⁹⁶ Recently, the Federal Government set up the National Agency for the Prohibition of Trafficking in Persons.

⁹⁷ *E.g.*, Women Trafficking and Child Labour Eradication Foundation (WOTCLEF) founded

in Nigeria.

By section 146,⁹⁸ where a person has been adopted under any law in force in any part of Nigeria, or under the law of any country other than Nigeria, the adoption shall have the like validity and effect as if the adoption order had been made under the Act. Thus, this provision recognizes an adoption order made under the laws of any State of the federation or another country as having the same validity and legal effects as one made pursuant to the Act.⁹⁹

Visits to adopted child by child development officers

Section 148 of the Act¹⁰⁰ imposes a duty on the Director of Child Development in each State to keep himself informed from time to time of the condition and welfare of a child adopted in the State. The Director also has a duty to arrange for officers of his Department to pay periodic visits to every child adopted under the Act within the State and to enter any premises for the purpose of ascertaining whether there is a contravention of any condition imposed by an adoption order or any provision of the Act in relation to an adopted child. The officer paying any such visit may require the production of the adopted child or that information be given regarding his condition. It is an offence to fail, without reasonable excuse, to comply with a requirement imposed by a child development officer or obstruct him in the exercise of the powers conferred by this section. Such an offence attracts a penalty of five hundred naira or a term of imprisonment not exceeding three months or both.

In our view, however, the punishment prescribed is not sufficiently

by the wife of the Vice-President of Nigeria and the Child Care Trust founded by the First Lady of Nigeria.

⁹⁸ Which is identical with s.20 A.L. Lagos State.

⁹⁹ For an excellent analysis of the rules of private international law on the recognition of foreign adoption orders: see Nwogugu, *op.cit.*, 324-325.

¹⁰⁰ Which is substantially similar to s.23 A.L. Lagos State.

severe to reflect the seriousness of the offence. It should be appreciated that the purpose of this provision is to establish a monitoring machinery that will guarantee strict compliance with any conditions stipulated in the Act or in an adoption order with a view to safeguarding the welfare and interests of the adopted child. Thus, failure to produce the child during the visit of a child development officer or withholding from him vital information regarding the condition of the child or obstructing him in the performance of his monitoring duty will render nugatory all the lofty provisions designed to safeguard the best interests of the adopted child. It is, therefore, recommended that the punishment should be harsher.¹⁰¹ Indeed, to achieve a sufficiently deterrent effect, it will not be out of place to stipulate a fairly long term of imprisonment without an option of fine, as in the case of, for example, marrying an adopted child contrary to section 147(2) of the Act.

Legal effects of adoption

The legal effects of adoption are generally stated in sections 140(2), 141 and 147 of the Act. The key principles deducible from those provisions can be summarized as follows:-

(a) **Rights and duties of biological parents and adopter(s) of a child**

The most critical and far-reaching implication of an adoption order is that it extinguishes all parental rights, obligations and liabilities as between the adopted child and his biological parents. At the same time, it establishes the legal relationship of parent and legitimate child between the adopted child and the adopter(s), transferring those parental rights, obligations and liabilities to the latter. This is one essential characteristic of adoption that distinguishes it from other forms of alternative child care and makes it only suitable for

¹⁰¹ Under the state adoption legislation, which came into force several decades ago, the punishment is severer: see *e.g.* s.23 A.L. Lagos State; s.25 Adoption Laws of Edo and Delta States.

children who are in irreversible situations of abandonment.

From the moment an adoption order is made, the adopted child stands to the adopter exclusively in the relationship of a child born in lawful wedlock. As provided in the Act, there shall vest in and be exercisable by and enforceable against the adopter –

- (i) all rights, duties and liabilities in respect of the future custody, maintenance, supervision and education of the child, and
- (ii) all rights to appoint a guardian and to consent or give notice of dissent to marriage of the child, as would vest in the adopter as if the child were a natural child of the adopter.¹⁰²

Where a child is jointly adopted by a husband and wife, in respect of the custody, maintenance, supervision and education of the child and for the purpose of the jurisdiction of the Court to make any orders relating thereto, they shall stand to each other and to the child in the same relationship as they would have stood if the child were their natural child.¹⁰³

It is instructive to observe that the expression “born in lawful wedlock”, which appears in identical provisions of the state adoption statutes,¹⁰⁴ is omitted from the above-cited provisions of section 141(1)(b) and (2) of the Act. This omission has unfortunately diluted the potency of those statutory provisions. In law, to say that A is a natural child of B is not a complete answer to a question as to the status of A in relation to B. That statement leaves a gap as to whether A is a legitimate or an illegitimate child of B. The addition of the phrase “born in lawful wedlock” completes the story, leaving no doubt that A is a legitimate child of B. Such clarity of expression is even more critical in the context of

¹⁰² S.141(1)(b).

¹⁰³ S.141(2).

¹⁰⁴ See *e.g.* s.12(1)(b) & (2) A.L. Lagos State; s.13(1) & (2) A.L. Eastern States.

adoption law. This is because whilst it is possible under some legislation¹⁰⁵ (the Act inclusive, in our view) for a person to adopt his natural child born out of wedlock, it is a legal impossibility for a person to adopt his child born in lawful wedlock. Indeed, the essence of adopting one's illegitimate child is to remove the disabilities attaching to the status of illegitimacy¹⁰⁶ and confer on the child and the parent all the rights and impose on them the corresponding obligations arising from a parent-child relationship. By omitting the phrase "born in lawful wedlock", the lawmakers inadvertently failed to achieve their set goal. It will therefore be fitting to insert those critical words in any subsequent amendment of the Act.

(b) **Intestate succession**

According to section 141(3), "[f]or the purposes of the devolution of the property on the intestacy of the adopter, an adopted child shall be treated as a child born to the adopter." This means in effect that if the adopter dies intestate after obtaining an adoption order, his estate shall devolve as if the adopted child were his natural child. However, there are some pertinent issues that have not been addressed by the legislature.

Firstly, the sub-section makes no provision regarding intestate succession to the estate of the adopted child, his biological parents and others related to him by consanguinity or by virtue of his adoption. This is a very serious omission. It is obvious that the drafters of the Act unadvisedly expurgated the provisions of the state adoption legislation from which they copied the provision contained in the Act. By so doing, they unfortunately excised from the chunk the greater part of the flesh-meat, leaving only sparsely fleshed bone.

¹⁰⁵ See *supra*, n.34.

¹⁰⁶ See, however, s.42(2) of the Constitution of the Federal Republic of Nigeria 1999, which prohibits discrimination on the basis of the circumstances of one's birth.

To drive home our point, it is perhaps worthwhile to reproduce the provision of section 13 of the Adoption Law of Lagos State¹⁰⁷, which reads:

For the purpose of the devolution of property on intestacy of an adopter, an adopted person or any other person, the adopted person shall be treated as the lawful child of the adopter and not as the child of any other person.

It can be seen that this provision is all-encompassing, covering all the other aspects of intestate succession omitted from the Act. It is therefore difficult to rationalize the expurgation of the pre-existing legislative provision in the manner done by the makers of the Act.

Secondly, the provision of the Act under consideration says nothing about the position of an adopted child where intestate succession to the adopter's estate is governed by customary law. For, the mere fact that a person has adopted a child under the Act does not by itself alter his personal law if he is otherwise subject to customary law. Thus, where the adopter is subject to Islamic law¹⁰⁸ or any system of native law and custom¹⁰⁹ under which an adopted child has no intestate succession rights, the said provision of the Act may be of little or no comfort to the adoptee.

Thirdly, the wording of the sub-section is ambiguous in the sense that if an adopted child is treated as "a child born to the adopter", he could be treated as born to the adopter either legitimately or illegitimately. And if he is treated as an illegitimate child of the adopter, it is also possible, especially under customary law,¹¹⁰ for another person(s) to claim the child.

¹⁰⁷ *In pari materia* with s.14(1) A.L. Eastern States.

¹⁰⁸ See *supra*, note 5.

¹⁰⁹ *E.g.*, among the Egbas of Yoruba, an adopted child has no succession rights in his adoptive parents' intestate estate: see Partridge, *op.cit.*, 423. See also Elias, T.O., *The Nigerian Legal System* (London: Routledge & Kegan Paul Ltd., 1963), 311.

The ambiguous wording of the provision, therefore, leaves open the chances (even if remote) of the child claiming the right of intestate succession to the estates of both his natural and adoptive parents.¹¹¹ To remove the ambiguity, it is suggested that there should be appended to the provision such words as “in lawful wedlock and not as the child of any other person”, which are contained in similar provisions of other adoption statutes.¹¹²

(c) **Construction of settlements and wills**

In any disposition of property made after the date of an adoption order, any reference (whether express or implied) to the child or children of the adopter shall, unless a contrary intention appears, be considered as, or as including, a reference to the adopted child.¹¹³ Such a disposition of property may be made by either an instrument *inter vivos* or a will. Under the law, a will is ambulatory, in that it takes effect only from the death of the testator. Accordingly, if, having made a disposition of property by will, a testator subsequently adopts a child, any reference to the children of the testator in the will shall be construed to include the adopted child even though he had not been adopted at the time when the will was made.

Furthermore, any reference to a person related to the adopted child in any degree shall, unless a contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the natural child of the adopter and were not the child of any other person.¹¹⁴ As adoption

¹¹⁰ See *supra*, note 29.

¹¹¹ A situation that is incompatible with statutory adoption, though possible in the so-called customary law adoption, as has been observed: see Uzodike, *op.cit.*, 6.

¹¹² See *e.g.* s.13 A.L. Lagos State; s.14(1) A.L. Eastern States.

¹¹³ S.141(4)(a). The words “as, or” are omitted by the Act. It is however submitted that the omission is unjustifiable in both law and syntax. *Cf.* s.14(a) A.L. Lagos State.

establishes a legal relationship of parent and legitimate child between the adopter and adoptee, it equally encompasses all other relationships of consanguinity and affinity emanating from parent-child relationship. On the other hand, since adoption extinguishes parent-child relationship between the child and his genetic parents, it also terminates all other relationships hitherto existing between the child and other members of his birth family. So, for example, in any instrument of disposition of property made after the adoption, if a reference is made to the adopted child's brother or sister, that would mean another child of his adoptive parents (whether natural or adopted) and not a child of his natural parents.

(d) Effect of adoption on maintenance order

An adoption order made in respect of a child automatically revokes any subsisting order requiring a person to contribute towards the maintenance of the child under the Act or any other law.¹¹⁵ The need for making a maintenance order in respect of a child arises usually as a result of the parents' failure to take adequate care of the child. Thus, whenever a child is committed to the care of an individual or an approved institution and the Court is satisfied that the need for the committal order has arisen from neglect on the part of a parent or guardian of the child, the Court may order the parent or guardian to contribute towards the maintenance of the child.¹¹⁶ Similarly, the Court may make an order requiring either parent or both parents of a ward of Court to pay to any other person having the care and control of the ward, such weekly or other periodical sums towards the maintenance and education of the ward as the Court thinks reasonable.¹¹⁷

¹¹⁴ S.141(4)(b).

¹¹⁵ S.140(2).

¹¹⁶ See s.52 of the Act; s.31 of the Children and Young Persons Law, Cap. C10 Laws of Lagos State 2003.

¹¹⁷ S.95(1) of the Act.

The rationale behind the provision to the effect that an adoption order cancels out an earlier maintenance order can be seen from two perspectives. First, since adoption severs the relationship hitherto existing between the adopted child and his birth parents, the latter are no longer obliged to maintain the child.¹¹⁸ Secondly, upon the making of an adoption order, the adopter forthwith takes over custody of the adopted child from the person or institution that hitherto had care and custody of the child. Consequently, the obligation to maintain the child henceforth devolves upon and is enforceable against the adopter.¹¹⁹ In law, rights and responsibilities operate in tandem. Indeed, before making an adoption order, the Court has to be satisfied by the report of the appropriate investigating officers that the adopter is “suitable” to adopt the child.¹²⁰ Suitability, in this context, connotes ability to take adequate care of the child. It is for this reason that section 134 of the Act provides that the Court may require the adopter, by bond or otherwise, to make for the child such provisions as in its opinion are just and expedient.

(e) Prohibition of marriage on ground of deemed consanguinity

There is a deemed relationship of consanguinity between the adopter and the adopted child. Such a relationship is equally created between an adoptee and a natural child of the adopter. Accordingly, marriage between the adopter or between his natural child and the adoptee is absolutely prohibited and rendered null and void by the Act.¹²¹ It seems that the prohibition of marriage between the adopter and the adoptee continues even if another person subsequently adopts the adoptee. It is further provided that any person who

¹¹⁸ See s.141(1)(a).

¹¹⁹ See s.141(1)(b).

¹²⁰ See s.129(d).

¹²¹ S.147(1).

marries an adopted child in violation of the statutory prohibition commits an offence punishable with a term of imprisonment not exceeding fourteen years.¹²²

It is perhaps pertinent to make a few comments regarding the statutory prohibition and criminalization of marriage of an adopted child by the adopter or his natural child. First, inasmuch as the provision renders such a marriage null and void, this does not affect a marriage entered into under customary law or Islamic law, as such a marriage lies outside the purview of the legislative competence of the National Assembly.¹²³ The drafters of the Act should have taken a cue from a parallel provision of the Adoption Law of Lagos State¹²⁴, which begins with the phrase “To the extent to which marriage is a matter within the legislative competence of Lagos State”. This phraseology is a clear recognition of the division of legislative powers between the Federal and State legislatures under our Constitution. Secondly, the prohibition is not extended to a marriage between two persons adopted by the same person(s).

Thirdly, a critical analysis of the provision of section 147(2) reveals that the offence of marrying an adopted child created thereby can only be committed by the adopter or his natural child but not by the adoptee. To be precise, the wording of the provision reads: “A person who marries an adopted child ... commits an offence....” By contrast, a parallel provision of the state adoption legislation¹²⁵ reads: “Any person who acts in contravention of the provisions of subsection (1)¹²⁶ shall be guilty of an offence....” A comparative analysis of the two statutory provisions leads to the irresistible conclusion that whereas the

¹²² S.147(2).

¹²³ See item 61 in Part I of the Second Schedule to the 1999 Constitution.

¹²⁴ S.22(1).

¹²⁵ See *e.g.* s.22(2) A.L. Lagos State; s.13(4) A.L. Eastern States.

¹²⁶ Similar to s.147(1) of the Act.

state adoption legislation captures any party to the prohibited marriage (the adoptee inclusive), the provision of the Act does not encompass the adoptee. Indeed, there seems no justification for exonerating an adopted person who marries his adopter or a natural child of the adopter contrary to the statutory prohibition.

PART III: CONCLUSION

Although, this paper focuses on the adoption provisions of the Child's Rights Act 2003, however, reading the paper right through presents the reader with a conspectus of the Nigerian law of adoption. This is because, except for a few innovative provisions, which have been highlighted, the adoption provisions of the Act are substantially similar to the pre-existing statutory provisions in force in Nigeria. For a better appreciation of this fact, copious cross-references between the former and the latter have been made throughout the work.

This writer has attempted to do a critical analysis of the adoption provisions of the Act on a root-and-branch basis. Most of the observed errors, imperfections, contradictions and lacunae in the Act have been highlighted in the text of the paper and suggestions for improvement have been made. Indeed, there is an urgent need to review and amend the Act generally and the adoption provisions particularly. Equally important and urgent is the need to set up the institutional framework for the implementation of the Act at least in the Federal Capital Territory, Abuja and in the few States that have enacted the Child's Rights Law. This includes setting up the Family Court, the Implementation Committee at the three tiers of government and adoption services and facilities at both the state and federal levels. Furthermore, the Chief Justice of Nigeria and the Chief Judges of the States that have already enacted the Child's Rights Law should, as a matter of urgency,

exercise their statutory powers¹²⁷ to make the rules regulating the practice and procedure of the Court in respect of adoption.

The States that have not yet enacted the Child's Rights Law should do so without further delay so that the noble objectives of the Act, as earlier stated, could be accomplished. Indeed, in a secular nation such as Nigeria, it is totally unacceptable that some of the federating States have, out of sheer religious bigotry, refused to embrace such a necessary and civilized institution as adoption. It is enlightening to note that even predominantly Moslem countries, such as Tunisia and Somalia, have adoption legislation. Moreover, when it is realized that a substantial proportion of the inhabitants of the States concerned are non-Moslems, the need for the States to enact adoption legislation becomes even more compelling so as to afford those non-Moslems who wish to adopt children the opportunity to do so. By so doing, they will reduce the ever-growing number of abandoned and homeless children from those States who ubiquitously loiter the streets all over the country begging for alms.

It is only when the above recommendations are duly implemented that we can genuinely lay claim to having the much-desired uniform legal framework for adoption throughout the Federation of Nigeria. For now, the provisions of the Child's Rights Act are a good scheme on paper only.

¹²⁷ See *e.g.* s.137 of the Act; s.138 of the Child's Rights Law 2005 of Anambra State.