

# Child Custody & Guardianship



BAOBAB - FOR WOMEN'S HUMAN RIGHTS  
LEGAL LITERACY SERIES



# **CHILD CUSTODY AND GUARDIANSHIP**

**In Muslim Personal Law in Nigeria**

**Baobab Legal Literacy Leaflet No. 3**

Baobab is a not-for-profit, non-governmental organisation working on women's human and legal rights in religious laws; statutory laws; and customary laws.

Baobab works with women, legal professionals and paralegals, policy makers, women's and human rights groups, other NGOs, and members of the general public:

- to promote human rights education, particularly regarding women's human rights,
- to sponsor training and education programs that further the appreciation and observance of women's human rights, and
- to enhance the knowledge and understanding of women's and human rights with a view to determining policies which can best promote all human rights.

This is one of a series of leaflets aimed at enabling people to know what their rights are and how to protect them.

The topics of the leaflets include: Divorce; Child Custody and Guardianship; Against Violence Against Women; Early Marriage; Inheritance; Maintenance; Rights and Responsibilities of Spouses; Rights of Widows; Economic Rights; Female Genital Mutilation; Citizenship; Voting and Politics; Marriage.

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### **Acknowledgement**

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# CHILD CUSTODY AND GUARDIANSHIP

(Baobab Legal Literacy Leaflet No. 3)

## INTRODUCTION

This leaflet sets out the conditions of custody or guardianship available under Muslim Personal laws in Nigeria, where the Maliki school of law is followed. Muslim Personal laws in Nigeria are often referred to as Sharia. The leaflet also discusses how to enforce your rights to custody or guardianship.

There are also other systems of law. Statutory law is applied to persons who marry under the Marriage Act of 1914<sup>1</sup> (i.e. in a registry office, although some Christian priests may also perform this kind of marriage). Different systems of 'customary' laws may be applied to people from different ethnic groups.

## APPLICABILITY OF MUSLIM PERSONAL LAW

The 1999 Constitution of Nigeria empowers Sharia Courts (i.e Courts of Muslim Personal Laws) to decide issues relating to guardianship and custody in cases where marriages are made under Muslim laws, or all parties are Muslims, or the infant in question is a Muslim.

### The meaning of Custody and Guardianship

**Child Custody** or *Hadanah* has been defined as, the upbringing of a child or idiot person who cannot distinguish between what is useful and otherwise, and who cannot take care of himself or herself independently. The main objective of *Hadanah* is to protect and safeguard the child and to ensure his or her physical, spiritual, and mental well-being. For

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<sup>1</sup> CAP 218 Laws of the Federation of Nigeria 1990

custody - the physical care of the child - there is a presumption in favour of the mother.



**Guardianship** or *Hijr* is the responsibility to ensure proper care, maintenance and up bringing of a child. This includes expenses for the child's upbringing from infancy to maturity. The guardian has responsibility for the major life decisions of the child and to prevent his or her exploitation. The general rule holds the father as guardian except where he is incapable or not a proper person (a drug addict, an alcoholic, or mentally ill) to undertake this responsibility.

The custodian of the child and the guardian of the child need not be the same person.



## **Qualities of a Custodian or a Guardian**

The mother ordinarily is the custodian of her child in conjunction with her husband.

Where there is a separation the mother is the first person in the hierarchy unless she forfeits her right then the custodian or guardian must meet the following conditions:

The person taking custody or guardianship of a child must:

- be sane and mature
- have the physical ability to take care of the child
- be free from infectious diseases
- be trustworthy and morally upright
- be intelligent
- A non-Muslim mother has the same right of custody to her child as her Muslim counterpart

## **Who can be the Custodian or Guardian of a child?**

The proper custodians of a child are many. Preference is always given to the mother and the mother's female relatives before that of the father. The order of preference for custody of a child is the mother, then the mother's mother, then mother's sister (maternal aunt), then mother's mother's sister (mother's maternal aunt). This is followed by mother's sister (first her full sister, then half-sister on the mother's side, then half-sister on the father's side) and paternal grandmother.

Next in order is the child's father, the child's sister, the paternal aunt or great aunt. If there is no ascendancy to custody a guardian may be

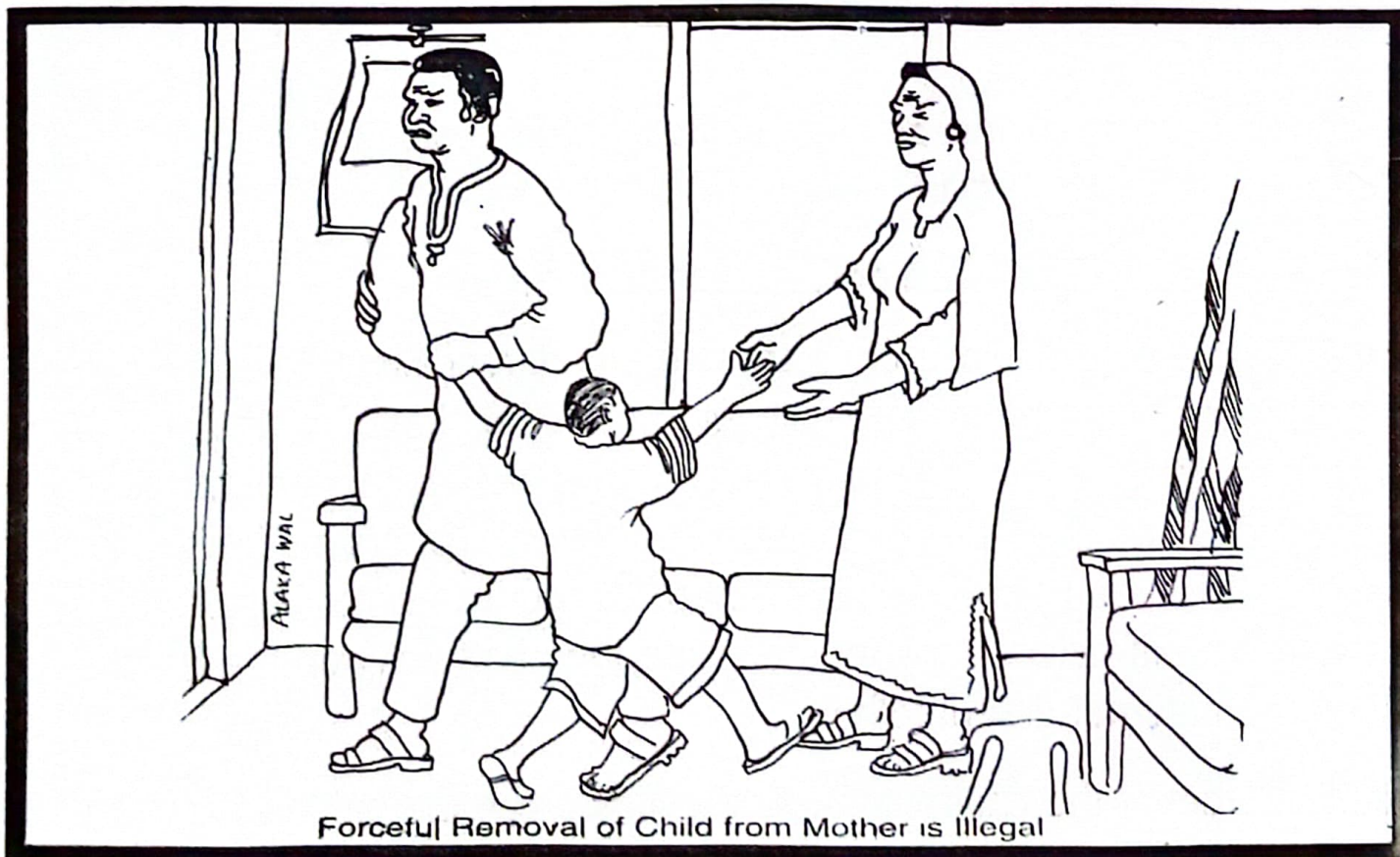
appointed.

The child's guardian is usually the father, one of his male relatives, or his agent. An older child may also choose the mother or some other qualified person as the custodian and guardian.

On the death of the father, custody of the child remains with the mother. For instance, in the case of *Idrisu v. Hadiza*<sup>2</sup>, the Sharia Court of Appeal Abuja decided that children of the deceased husband must stay with their mothers, the wives of the deceased.

### How Long does Custody or Guardianship last?

- A girl remains in custody or guardianship until she is married and the marriage is consummated. However *Tarshid* applies where the father



<sup>2</sup> Court of Appeal, Kaduna 80 Sharia case no. 80 of the 11<sup>th</sup> December 1985



grants his female child the right to manage her own affairs and this right can never be rescinded. As decided in *Karumatu Yakubu v Yakubu Paiko and Anor*<sup>3</sup> where it was held that a father telling his daughter to choose a husband had granted the right of *Tarshid*.

A boy remains in custody or guardianship until he reaches the age of maturity and is capable of earning a living.

### **Conditions of Child Custody or Guardianship**

Generally, a child born as a result of a legal marriage, and whose parents remain married to each other, is in the custody of both parents with the father as the guardian.

At divorce, a child remains in the custody of the mother. In the case of *Taibatu v. Mustapha*<sup>4</sup> the mother was granted the custody of the children of her marriage with her former husband. She had not remarried and also lived near where her husband lived.

If the mother is unable to take custody of her child, the child passes to the custody of the next preferred person (see above).

Generally, the guardian remains the father and he continues to be responsible for the costs of maintenance of the child, including education until university level. Where the mother pays, maintenance must be just and fair, and is recoverable from the father in a court of law.

In Nigeria where Muslim Maliki law applies, the common practice of taking children from the mother once the child is weaned, or at any time before the age of maturity (adulthood) as well as the marriage of such child is not sanctioned.

On remarriage of the mother, especially to someone who is not related to the child, the mother often loses custody of the child to the next preferred

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3. *Sharia Court of Appeal Abuja case no 5 of 1998*

4. *Kwara State Sharia Court of Appeal case no 10 of 1985*



person. The mother may also lose custody if she resides at a distance of 48 or more kilometers from the father's place of residence.

If the mother is considered to live an immoral life, or neglects to take proper care of the child, she may also lose custody.

**However, a woman may successfully gain custody of her child if she seeks for it.** For example, in *Jatau v. Mamman Hajiya*<sup>5</sup>, the mother sued her divorced husband for the custody of their 4-year-old daughter, taken away from her and given to another wife of the husband. The two lower courts granted custody to the mother although she had remarried, on the grounds that in the circumstances of this case, the mother is the most entitled and better qualified. This was upheld by the Sharia Court of Appeal Bauchi State.

Guardianship both in law and practice goes to the person who will best protect and serve the best interest of the child.

- If a man deserts his wife and children, the mother retains custody and may have guardianship of the children.
- If the woman deserts her husband and child, custody of the child goes to the next preferred person according to Muslim law. Guardianship remains with the father.
- The mother keeps custody and guardianship of a child not born within a marriage.
- Custody of a child living with relatives who are not the child's parents is with the relatives who are looking after the child. Guardianship may remain with the father.

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5. *Bauchi State, Sharia court of Appeal case no 211 of 1992*



### **What to do if you are seeking Custody/Guardianship of a child**

- Inform yourself of your rights under the law by asking a sympathetic legal representative.
- Try to convince the husband, husband's family to allow the mother's family to keep the child, or to pass custody to the mother. You could use an intermediary.
- Ask religious leaders or the village or ward head for assistance.
- Seek assistance from a child welfare organisation or women's rights organisation.
- Go to a court of law.
- Do not give up your right to custody.

### **What to do if your child's maintenance is not being paid by the Guardian**

- Request the following people to intervene:
  - Husband's parents
  - The person who represented you during the marriage
  - Wife's parents
  - Other relatives of the child
  - Religious, community or 'traditional' leaders
- Go to court and request the court to enforce maintenance payments