

CUSTOMARY LAW ADOPTION IN NIGERIA

The allegations contained in the request on Nigerian adoption raise the question as to the nature of the so-called adoption, if (a) it is not recorded by the court as a statutory adoption; (b) it is against the tribal custom; and (c) it is nevertheless effected in "the traditional way".

From the statements made by the applicant one can only conclude that "the traditional way" represents a custom in accordance with unwritten principles of law practiced in a certain region. The applicant fails, however, to indicate the exact place and time of ceremony, nor does he establish the existence of a custom recognized and adhered to by the community of which the parties must have been members, nor does he show that the observance of this custom was a matter of obligation which could be enforced by the courts. These are the main characteristics of customary law recognized by the higher courts of Nigeria.^{1/} Consequently, the applicant should show evidence to prove these facts.

Since the applicant's statement indicates that the alleged adoption is considered legal, a commentary on the principles of

^{1/} A. E. W. Park, The Sources of Nigerian Law 65-84 (1963).

customary law applicable in Nigeria could be of relevance:

Customary or native law and custom control the family lives of the vast majority of people in Nigeria. . . Customary law is composed of hundreds of sets of laws, each of which was developed by and applies to a particular ethnic or tribal group. . . Indeed, the customary law of a particular group may itself vary from area to area and even from village to village. . . Nevertheless, . . . the various systems of customary law prevailing in Nigeria do have many principles and concepts in common.

Customary law is unwritten, indigenous law, the law which existed in the land now known as Nigeria before the coming of the British. It is "a mirror of accepted usage", a reflection of the habits and social attitudes of the various ethnic groups, and it derives its validity from the consent of the community which it governs.

. . .

The various court laws of the regions and the Federal Territory of Lagos direct the judiciary to observe and enforce every law and custom so long as (i) it is not inconsistent with any written law, and (ii) it is not repugnant to "natural justice, equity, and good conscience."

. . .

A third limitation . . . is found in the various regional native and customary court laws. It is there provided that: "In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration."^{2/}

^{2/} Alfred B. Kasunmu & Jeswald W. Salacuse, Nigerian Family Law 16-19 (1966).

In regard to guardianship, the following principles and concepts apply in the Nigerian legal system:

Owing to the desire of most parents to rear and nurture their own children themselves, guardianship is not a popular institution. But weak or impoverished parents sometimes put their children under the care of neighbors who can bring them up properly. . . The ward is by law to be treated for all practical purposes as the guardian's own child, though not entitled to demand as of right all the paternal amorosness and largess that he can legally demand from his own parents. Some guardians virtually adopt their wards into their families, educating them and setting them up in life by assisting them to get stable occupations and good wives.

. . .

But by far the commonest cases of guardianship occur among relatives. Adoption may result from the unequal economic positions of the parties and the consequent desire of one to relieve the burden of the other. Or it may stem from the spiritual affinity felt by a relative with the child of another, especially if they are said to bear the characteristics of a common progenitor. The procedure of adoption is as simple as this generalization suggests: "The adoption of a son under native law and custom is a ceremony to be performed to which the family are bidden. The adopter nominates his or her adoptee to the family and the ceremony is over": *Re Martin v. Johnson and Henshaw* (1936), 3. W. A. C. A. 91, at p. 92. The rights and duties as between adopter and adoptee are as stated above for ordinary guardianship. It only remains to add that a guardian or adopter must be a responsible and upright man in the community or the family as the case may be. He has to be someone who has had

experience in bringing up children properly or who can cause his ward to be so brought up. 3/

With respect to the laws and customs controlling adoption in Nigeria, the following should be noted:

There was no statutory enactment governing the institution of adoption in Nigeria until 1965. There is however, evidence . . . of the institution being recognized under the customary law of certain areas of Nigeria.

. . .

Despite the absence until 1965, of any law regulating adoption in Nigeria, there are instances of people "adopting" children as a result of agreement with the parents of the children and of institutions taking care of orphans. It is submitted that these so-called adoptions will not create the same status as a statutory adoption. For instance, the natural parents can reclaim such a child anytime they want and furthermore, the child has no succession rights in the family of the "adopting" parents in the non-statutory cases of adoption.

. . .

. . . Excepting the Eastern Region, there is no statute governing adoption. The only form of adoption which can be effected in Nigeria (apart from the Eastern Region) is one recognized under customary law. This form of adoption is extra-judicial and the incidents differ from a statutory adoption. 4/

The principles and concepts governing adoption under customary law are summarized by the following commentary:

3/ T. Olawe Elias, The Nigerian Legal System 311-312 (1963).

4/ Supra note 2, at 242-244.

. . . A common mistake usually made when discussing adoption under customary law is to confuse it with guardianship since they both deal with the exercise of parental rights and duties. Adoption is very rare under customary law while guardianship is of common occurrence. . . Most of the examples of adoption given by some writers under customary law are instances of guardianship and not adoption. A person can exercise parental control over another without necessarily adopting that other person.

The distinction between adoption and guardianship is very difficult to draw under customary law, since unlike statutory adoption, it is not compulsory in some areas to effect it through the courts.

. . .

. . . In some areas the approval of the court or of the district head must be obtained especially if the child has no known relatives.

There is unanimity among the writers that it is usually a child that can be adopted though there is no law against the adoption of an adult person. The adopted child and the adopter are usually of the same family.

The adopted child is expected to bear the name of the adopter. Unlike the statutory adoption, it appears that there is nothing preventing such a child from going back to his natural parents any-time he wishes. An adopted child is treated as the natural child of the person adopting him, and can therefore succeed to property along with the other children of the adopter. It would appear that such a child can also succeed to property on the death of his natural parents. 5/

The development of Nigerian family law in recent years has been effected through court decisions. A relevant judgment

5/ Id. at 249-250.

in Akinwande and Others v. Dogbo and Others given in 1969^{6/} by the Supreme Court of Nigeria refers to a case originating in the Western State, one of the 19 subdivisions of the Nigerian Federation. The following text represents an abstract of the findings:

The second issue arising out of Akinwande v. Dogbo is as to who is an adopted child in the Western State for the purpose of Section 5 of the Tort Law. One of the children claiming as plaintiffs was not a natural child of the deceased, but a child of a deceased's sister who had been staying with the deceased and for whom she was responsible for the maintenance and upbringing. Counsel for the child argued that the child should be regarded as a child adopted under customary law and so coming within the ambit of Section 5 especially as there are no laws for the statutory adoption in Nigeria with the exception of Lagos State and the then Eastern Nigeria. Upholding this submission, the learned judge remarked that under customary law, children of relatives in need of care and protection are regarded as adopted children and made to enjoy the privileges of parenthood without discrimination.

The statements of the applicant referred to in this request do not appear to fully comply with all the requirements cited above for the recognition of customary adoption in Nigeria. Supporting evidence has not been shown regarding (1) the age and name of both of the parties and the approval given by the parents of the child, (2) the time and place of the adoption, (3) a description of the ceremonies, and (4) the existence of such ceremonies at the relevant time and place. Neither has it been shown that such

^{6/} N. N. Rubin & E. Cotran, eds., Annual Survey of African Law, Vol. III, 1969 36-37 (1973).

a custom was recognized and adhered to by the community of which the parties had been members, nor that the observance of this custom was a matter of obligation which could be enforced by the courts. Only after the clarification of these questions will it be possible to render an opinion on the validity of the alleged adoption effected in the "traditional way".

Prepared by Dr. Anton Wekerle *AW*
Senior Legal Specialist
Near Eastern and African Law Division
Law Library, Library of Congress
April 1976
AW/at

4-19-76

369