

GUARDIANSHIP AND THE CHILD'S RIGHT ACT: A REVIEW OF STATUTORY GUARDIANSHIP IN NIGERIA

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Abstract

This paper reviews the legislative framework on statutory guardianship in Nigerian. The Child Rights Act regulates statutory guardianship and other matters that concern the protection and rights of children in Nigeria. Guardianship is a process that grants legal authority to a person with capacity to care for another's person or property especially because of their infancy, incapacity or disability. This review focuses on how the appointment of a guardian for those children who may be in need of parental care is regulated under the Act. The review identifies the death or incapacitation of a child's parents as the circumstance under which a guardian may be appointed to provide parental care for the child. This review questions the procedure for appointing a guardian under the Act, especially for a child who has no parents, and for whom the last surviving parent may not have by deed appointed a guardian. The Act provides for a person (who the Court may in fact by order be appointed the child's guardian) to make an application for a child in this category but the Act did not provide for the person(s) who have the power to make the application. Secondly, the Act did not provide for the qualification of those who may be appointed guardian(s) in this regard. The review argues that this gap in the Act puts the children in this category at risk, and suggests a review of the Act to address the gap.

Key Words: Child, Right, Nigeria, Statutory, Guardianship, Infancy

I. Introduction

The Child's Right Act (CRA)¹ in Nigeria is 'an Act to provide and protect the rights of a Nigerian child'.² This explains why in the Act, the best interest of a child is considered paramount in every action concerning a Nigerian child.³ It is in furtherance of this objective that Part IX of the Act is dedicated to guardianship of a Nigerian child.

The Act did not define a guardian. However, according to Edwin Nwogugu, '[a] guardian is one who has authority and duty to care for another's person or property especially because of the other's infancy, incapacity or disability'.⁴ The parents of a child are the natural guardians.⁵ The CRA provides that in the event of the death of a parent, the surviving parent shall be the guardian of the child.⁶ Thus, appointment of a guardian becomes necessary only where the parents of a child are unfit to be guardian of the child jointly or severally.⁷

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³Child's Right Act 2003, Act No. 26.

⁴*Ibid.*

⁵*Ibid* s1.

⁶E. I. Nwogugu, Family Law in Nigeria (3rd edn, HEBN Publishers 2014) 320.

⁷CRA 2003 s83.

⁸CRA 2003 s83.

⁹*Ibid* s 83(2).

Death of the parents of the child is another factor that would necessitate the appointment of a guardian for the child. It is probably why the CRA provides that '[a] surviving parent who has guardianship of a child may, by deed, appoint a guardian for the child in the event of the death of that parent'.⁸ Thus, the Act provides for the appointment of a guardian where the parents are unfit on application of a member of the family, it also provides for appointment of a guardian by deed, but it did not provide for the appointment of a guardian for an orphan where there is no deed appointing one. This is the main concern that necessitated this review because the appointment of a guardian is a requirement under the Act for a child who is unavoidably missing parental care. The fact that the parents or a surviving or a single parent may not always execute a deed makes it imperative to provide for such cases under the Act. The absence of provisions in the Act that address the cases of orphans where there is no deed appointing a guardian is a major challenge for statutory guardianship in Nigeria. This is because the failure to adequately address issues concerning orphans has major implications given the powers of the guardian over the child and his estate.⁹

It is in view of the above that this review interrogates the institution of guardianship as provided in the CRA. It will also make references to the institution of guardianship under customary and Islamic law by way of comparison. This is with a view to highlighting the weaknesses that necessitated this review and thus, provide a basis to suggest amendments. This review is undertaken in four Parts including this introduction. The next Part discusses the legislative framework for guardianship under Part IX of the CRA. Part III presents a critical and comparative analysis of statutory guardianship and guardianship under customary law and Islamic law while the concluding Part suggests the changes necessary to provide effective statutory guardianship for a Nigerian child.

II. The Legislative Framework for Guardianship in Nigeria

The Child's Right Act 2003 (CRA) is the principal legislation that provides for and protects the rights of the Nigerian child. The Act provides that the best interest of the child shall be the primary consideration in every action concerning a Nigerian Child.¹⁰ In furtherance of this consideration, the Act provides in Part IX for the guardianship

⁸ *Ibid* sub-s (3).

⁹ *Ibid* CRA 2003 s87.

¹⁰ CRA 2003, s1.

of a child who may lack parental care due to death or incapacity of the parents.¹¹

The CRA did not define who a guardian is but it recognizes the parents of a child as the natural guardians.¹² The Act recognizes two types of guardians – a guardian who shall have parental responsibility (general guardian)¹³ and a guardian (*guardian ad litem*) appointed only for the purpose of representing the child and his interest in certain proceedings.¹⁴ The responsibility of a general guardian under section 82 (1) reflects on parental responsibility of a guardian and thus underscores the recognition of the parents as the natural guardians.

The CRA provides in section 83 for three ways by which a guardian may be appointed. First is that where the parents of a child are not fit to be guardians of the child jointly or severally, ‘the Court shall, on application of a member of the family or an appropriate authority, appoint a person to be a joint guardian with the parent or parents of the child’.¹⁵ Secondly, ‘[a] surviving parent who has the guardianship of a child may, by deed, appoint a guardian for the child in the event of the death of that parent’.¹⁶ Finally, a single parent may, by deed, appoint a person to be the guardian of the child upon the death of that single parent.¹⁷

The three processes of appointing a guardian discussed above appears to confer exclusive rights on the parents and family members. However, the Act provides for the order for guardianship of a child in section 84. This section introduces a new process for appointing a guardian, especially for a child who has no parent with parental responsibility for him.¹⁸ It provides that ‘where an application for the guardianship of a child is made to the Court by a person, the Court may, appoint that person to be the guardian of the child’.¹⁹ This is especially in the case of a child who has no parent with parental responsibility for him. A child in this category or even a child for whom a single or surviving parent has not appointed a guardian by deed (in accordance with s 83(3)) is left in the hands of possibly a stranger to appoint a guardian for him. The problem with this is that the Act did not provide for any specification as to who this person might be or what qualifies him to be a guardian.

¹¹ *Ibid* s 83(2.)

¹² *Ibid* sub-s (1).

¹³ *Ibid* s 82(1).

¹⁴ *Ibid* sub-s (2).

¹⁵ *Ibid* 83(2).

¹⁶ *Ibid* sub-s (3).

¹⁷ *Ibid* sub-s (4).

¹⁸ CRA 2003 para (a).

¹⁹ *Ibid* s (84) (1).

This is unlike the case of a guardian *ad litem* appointed under section 89 where the Act provides for the conditions as well as the procedure for their appointment.²⁰ It is to address this gap that a critical and comparative review of statutory guardianship is undertaken below to assess the adequacy of the CRA to protect the interest of a Nigerian child who has no parents, and who may require a guardian.

III. A Critical and Comparative Analysis of Guardianship Laws in Nigeria

The institution of guardianship in Nigeria is recognized both under the statute as well as under customary and Islamic laws. The purpose is to create a way to look after the interests of children who are unavoidably missing parental care at their tender age. Thus, whether we speak of guardianship under the Act or under customary or Islamic law, the focus is always on how to serve the best interest of a child in need of parental care, especially those whose parents are unable to provide such care for because of incapacity or those whose parents have died.

The CRA recognizes the parents of a child as the natural guardians.²¹ This is also the case under the various customary law systems, and Islamic law in Nigeria.²² Islamic Law explains the basis for the primacy of a child's parents with respect to guardianship. The terminology of guardianship in Islamic law is *Hadanah*. This is an Arabic 'word which means the side or part of the body that lies below the armpit'.²³ This word is used to express the action of mother-bird using its wings to protect its chick, thus symbolizing the protection and shielding of the young ones from the hazards of life at a tender age.²⁴ According to Ambali, while this protection involves personal care such as providing food and shelter, '[i]t does not leave out looking after the child at a tender age spiritually and intellectually so that when he or she overcomes the weakness of infancy and childhood, he will be able to stand on his own and face the challenges of life'.²⁵ This underscores the general concept and essence of guardianship, which makes a critical review of the CRA imperative to assess how the best interest of a child (outside the personal care of food and shelter) could be achieved under the Act.

²⁰ *Ibid.*

²¹ CRA 2003 s 83(1).

²² Nwogugu (n4) 323.

²³ M. A. Ambali, *The Practice of Muslim Family Law in Nigeria* (3rd edn., Princeton & Associates Publishing Co. Ltd 2014) 325.

²⁴ *Ibid.*

²⁵ *Ibid.*

The CRA recognises the guardianship responsibility of a child's parents, and the guardianship responsibility of a surviving parent in the event of the death of a parent.²⁶ It is only in the event of death or incapacity of the parents that the Act permits appointment of a guardian.²⁷ This review focuses on children who are unavoidably without care for reasons of death of their parents (orphans). In consideration of the best interest of children in this category it would be expected that the Act clearly answers the question about who may be appointed a guardian, and who has the authority to appoint such a guardian. This is not the case. It is true that the Act provides that 'the Court shall, on application of a member of the family or an appropriate authority, appoint a person to be a joint guardian with the parent or parents of the child'.²⁸ This is applicable only where the parents of a child are not fit to be guardians of the child jointly or severally.

Arguably, the appointment of a guardian in the case of an orphan could be inferred from s 84(1) which provides that 'where an application for guardianship of a child is made to the court by a person, the Court may, by order, appoint that person to be the guardian of a child'²⁹ in a case where a child has no parent with parental responsibility for him.³⁰ The problem with this is that the Act did not state who this person who may present this application might be.

Having identified this weakness in the CRA, it is perhaps necessary to look at the way the issue of guardianship for orphans is addressed under customary law, and under Islamic law to show the person(s) with responsibility and authority for the appointment of a guardian for orphans in the two systems. Under both systems the family of a child who is the subject of guardianship play major roles. For example, under customary law, the head of the family of the child is the proper person to appoint a guardian for the child.³¹ The same is applicable under Islamic law where guardianship devolves amongst the family members in the order of their succession hierarchy.³² The CRA on the other hand, provides for application for guardianship being made by a person, who may be appointed by the court to be the guardian of the child. It would appear based on this provision that the application for guardianship of an orphan may be made by a person who is not a member of the child's family.

²⁶ CRA 2003 s 283(1).

²⁷ *Ibid* 83(2).

²⁸ *Ibid*

²⁹ *Ibid*, s 84(1).

³⁰ *Ibid*, s (1) (a).

³¹ Nwogugu (n4) 323.

³² Ambali (n23) 330, citing the Qur'an 2:233.

It is probably because of this gap in the Act that there is no provision regarding who is qualified to be appointed a guardian despite the wide powers a guardian enjoys under the Act over the child and his estate. This is arguably a major gap considering that the same Act provides copiously for the conditions under which a guardian *ad litem* may be appointed and the procedure for such appointment.³³

Appointment of a potential guardian for orphans is addressed under Islamic law where blood relationship is the major qualification for such appointments. The mother is the natural guardian of a child under Islamic law subject only to capacity.³⁴ After the mother, the other members of the child's family rank in the order of their succession hierarchy. The issue of qualification for who may be a guardian of an orphan is clearly addressed both under customary law too. Customary law recognises and gives effect to close family ties which exists in a traditional society. As a result, a conscious effort is made to restrict the choice of guardians to members of the extended family of the child concerned.³⁵

In view of the weaknesses highlighted above, it is argued that the failure to provide for the appointment of a guardian for orphans (for whom no appointment has been made by deed) has grave implications because it has created a gap as to who is qualified to be a guardian for orphans in this category. Apart from the fact that a guardian as trustee of the estate of the child may abuse the trust, there are also issues of the child's personal life, especially with regard to the religious and moral upbringing of the child. This aspect of a child's life is taken very seriously under Islamic law. The view under this system is that it is desirable for a child to grow and have a good opportunity to develop under a normal home as a sure and positive way to remove the psychological agony of the child growing up among strangers under different religious and moral background.³⁶ In the case of a guardian appointed by deed, this aspect of the child's life is likely to be addressed by the parent who has made the appointment.

The need to address a child's personal life have implications for both statutory guardianship and the CRA as an Act. The Act was enacted in 2003. Its major goal is the protection of the Nigerian child. The Act has a universal application in Nigeria. However, the problem is that the Act has not been adopted by all the states in Nigeria. In fact, out of the 11 core Muslim states of the North East and North West of Nigeria,

³³ CRA 2003 s89.

³⁴ Ambali (n23) 334.

³⁵ Nwogugu (n4) 323.

³⁶ Ambali (n23) 331.

only Kaduna state has adopted the Act.³⁷ This raises concerns about how the issues addressed in the Act, such as statutory guardianship are viewed across the country. Perhaps there is the need to bring the Act in line with the way of life in Nigeria, especially when it is not repugnant to good conscience.

In view of the above, it is argued that it is imperative to provide specifically for the person(s) who are qualified to be guardian(s) of orphans. First, it will help to address issues of safety of the child's estate as well as his personal life. In this regard, the Act should prioritise the immediate family of the child as the first in line to be considered in matters of guardianship. It is only where there is no person capable of taking-up the responsibility in the immediate family that the extended family may be considered. Non-members of the child's family or other groups that look after orphans, such as non-governmental organisations (NGOs) can only be considered when there is no person in the immediate or extended family of the child.

IV. Conclusion

One of the major fallout from the growing security challenges in Nigeria is the large number of orphans that it has generated across the country. This has exacerbated the problem of children in need of parental care in Nigeria thereby making it imperative to address the issue of guardianship. The Child's Rights Act regulates guardianship in Nigeria. Guardianship is a concept that is also recognized under the customary, and the Islamic law. However, since the CRA has a universal application in the country, it is important to ensure that its provisions fulfill the main objective of the Act – to serve the best interest of the child.

Thus, a review of the provisions of CRA concerning guardianship is proposed to address the differences that currently exist between the statutory regulation of guardianship and Islamic law, and customary law regulation of the subject. This will serve the best interest of a child and thereby fulfill the main object of the CRA.

³⁷ Nike Adebawale, '11 States in Northern Nigerian yet to Pass Child's Right Law' *Premium Times* (Abuja May 11 2019)