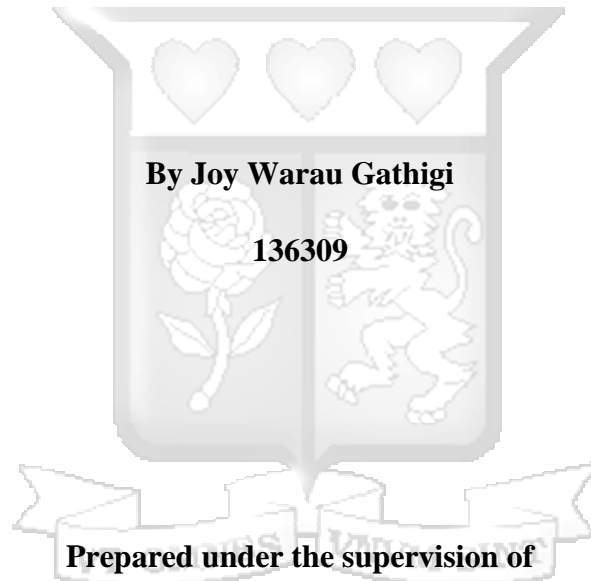


**SAFEGUARDING THE BEST INTEREST OF CHILDREN IN THE RESOLUTION OF
CUSTODY AND MAINTENANCE DISPUTES: A CASE FOR CHILD INCLUSIVE
MEDIATION**

**Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School**



[Mr. Patrick Nzomo]

August 2024

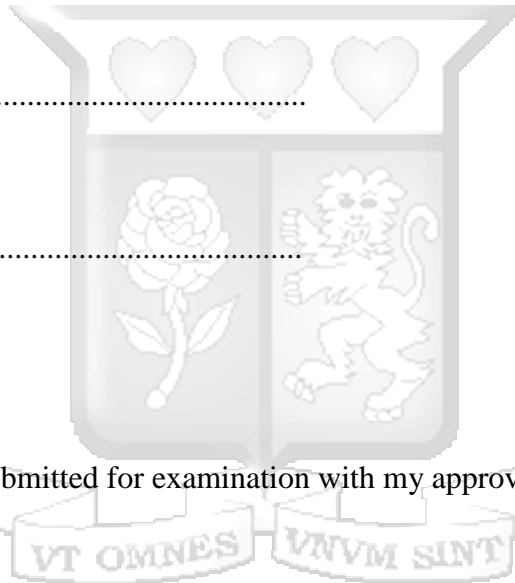
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DECLARATION

I, **JOY WARAU GATHIGI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:



This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Date:

A handwritten signature in blue ink, appearing to be "Joy Warau Gathigi".

28/03/2025

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I am profoundly grateful to God for His blessings, strength, and wisdom throughout this process. I also extend my heartfelt appreciation to my supervisor, Mr. Patrick Nzomo, for his invaluable guidance and to my family and friends for their unwavering support and encouragement.

Last but not least, this project is dedicated to the bold, for no dream is too big and no challenge too great for those who refuse to give up!



List of Legal Instruments

A) Domestic Legal Instruments

1. The Constitution of Kenya, 2010.
2. Children's Act, Cap 141, Laws of Kenya.
3. Marriage Act, Cap 150, Laws of Kenya.
4. Mediation (Pilot Project) Rules, 2015.

B) International Legal Instruments

1. African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49, 1520 UNTS 363.
2. Convention on the Rights of the Child, 2 September 1990, 1577 UNTS 3.



List of Cases

1. An NHS Foundation Trust v AN and others (2014) EWHC 1031.
2. Balaguer Santacana v Spain, Judgment of 9 July 1990, Human Rights Committee.
3. Bronda v Italy, Judgment 9 June 1998, European Court of Human Rights.
4. Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development, Judgment of 1 April 2009, Constitutional Court of South Africa.
5. Hendricks v The Netherlands, Judgment of 29 July 1988, Human Rights Committee.
6. H G G v G G G G, Judgment of 12 November 2018, Kadhi's Court, eKLR.
7. M A v R O O, Judgment of 27 June 2013, High Court of Kenya, eKLR.
8. McCall v McCall, Judgment of 14 January 1994, High Court of South Africa.
9. N M M v J O W, Judgement of 27 September 2016, High Court of Kenya, eKLR.
10. N. Ts v Georgia, the European Court of Human Rights.
11. B R O v W J N W M, Judgment of 28 February 2022, High Court of Kenya, eKLR.
12. MAK v RMAA and 4 Others, Judgment of 2 March 2022, Supreme Court of Kenya, eKLR.



List of Abbreviations

ACPF-African Child Policy Forum

ACRWC-African Charter on the Rights and Welfare of the Child 1990

CIP- Child Inclusive Practice

CRC- Convention on the Rights of the Child

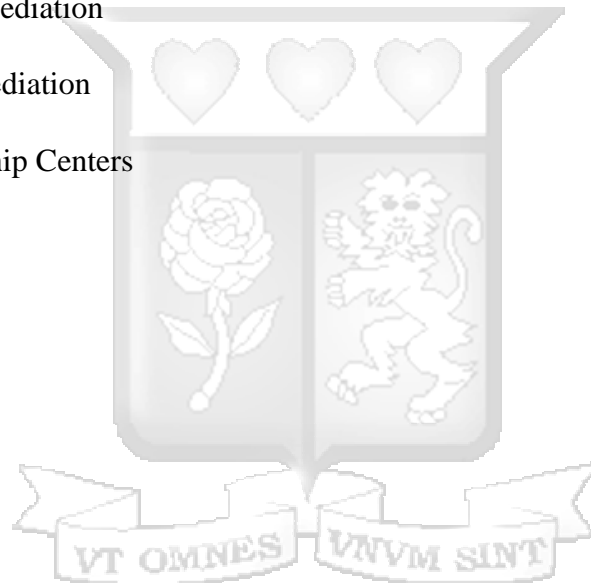
ADR- Alternative Dispute Resolution

The Constitution- The Constitution of Kenya, 2010

CAM- Court Annexed Mediation

CIM- Child Inclusive Mediation

FRCs- Family Relationship Centers



ABSTRACT

“There can be no keener revelation of a society’s soul than the way it treats its children.”- Nelson Mandela. This quote highlights the fundamental principle that children's well-being and rights reflect a nation’s values and commitment to justice.

Children are often the most affected yet the least heard participants in custody and maintenance disputes. While mediation is increasingly recognized as an effective alternative to litigation in resolving family conflicts, traditional approaches often fail to actively involve children in the decision making process, neglecting their perspectives and opinions. This study explores the concept of child-inclusive mediation, which seeks to ensure that children’s perspectives are heard and considered in a structured and developmentally appropriate manner.

The study aims to demonstrate that child-inclusive mediation enhances fairness, improves dispute resolution outcomes and ensures that decisions truly reflect the needs and welfare of the children involved. It evaluates Kenya’s legislative, policy, and institutional frameworks, identifying the gaps that hinder effective child participation in mediation. Through a comparative analysis with Australia, where structured child-inclusive mediation is more established, the study highlights the benefits of giving children a voice in matters that directly affect them. It also examines the potential challenges and considers how Kenya can develop a more inclusive, child-centered approach to custody and maintenance mediation.

Ultimately, this research advocates for a more child-centered mediation process that not only resolves disputes effectively but also ensures that children’s rights and well-being remain at the heart of the proceedings.

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CHAPTER ONE: Introduction

1.1 Background

Families play a crucial role in society as they are regarded to be its primary building block. One of the primary functions of the family is to provide a structure for both the biological and social production and reproduction of individuals.¹ In most cultures and societies, families are traditionally formed through the union of a man and a woman in marriage. However, in recent years, the institution of marriage has faced a growing number of cases of irreconcilable differences, leading to an increase in divorce rates.² Divorce often affects not only the adults involved but also has a significant impact on the lives of their children. Children, who are often seen as innocent bystanders, can find themselves entangled in the complexities of adult conflicts.³

Human conflicts are unavoidable hence making disputes equally inevitable. These conflicts arise in personal, economic and political matters, including family disputes, business disagreements, cultural obligations and governance issues.⁴ Traditionally, the strict Western conceptualization of access to justice was equated with access to courts of law. However, these days, courts have become increasingly inaccessible due to numerous barriers such as poverty, social and political disadvantages, lack of awareness and complex procedural requirements. These challenges often deter individuals from pursuing litigation, given the costly and complicated nature of the process.⁵

There is therefore a pressing need for quick and efficient methods to resolve disputes. Disputes should be resolved at the minimum possible costs in terms of both money and time, allowing

¹ Schneider D, 'A critique of the study of kinship' 1 Annual Review of Anthropology 2, 1984, 172.

² Reiter S, Hjorleifsson S, Breidablik H & Meland E, 'Impact of divorce and loss of parental contact on health complaints among adolescents', 1 Journal of Public Health 3, 2013, 54.

³ Dr Zang N, Serge A and Emmanuel M, 'The effect of divorce on the psychosocial development of adolescents in some selected secondary schools in the buea municipality' 1 Int. J. Social Science Humanities Research 7, 2014, 79.

⁴ James N, 'Access to Justice in Kenya: A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya', 2 Journal of cmsd 1, 2018, 80.

⁵ Muigua K, "Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010", 2014, 7.

resources to be directed toward more productive endeavors.⁶ Alternative dispute mechanisms (ADR) such as mediation, arbitration, reconciliation, and traditional methods have been employed to address this need. These approaches enhance access to justice, reduce case backlogs, ensure speedy dispute resolution, lower costs, foster an atmosphere of tolerance and accommodation and facilitate resolutions tailored to the parties' needs. This, in turn, promotes voluntary compliance with agreements, legal obligations and helps restore relationships.⁷

As of June 2018, the judiciary caseload report by the directorate of performance management in Kenya indicated that 549,556 cases were pending in courts nationwide.⁸ A striking factor contributing to this backlog is the adversarial nature of the judicial system, which emphasizes competition between opposing parties rather than cooperation.⁹ Court cases often involve prolonged legal battles, where each side aggressively presents arguments to win the case. This process not only consumes time and resources but also tends to strain relationships between parties. To address this issue, Article 159 (2) of the Constitution of Kenya, 2010 (the Constitution), introduced ADR mechanisms including: mediation, reconciliation, arbitration, and traditional dispute mechanisms, as a legal alternative to court proceedings, aimed at expediting dispute resolution while preserving the relationships of the parties involved in the dispute.¹⁰

In recognition of the importance of alternative justice systems, and in line with the constitutional mandate outlined in Article 159(2) of the Constitution of Kenya, the Judiciary has made substantial efforts to strengthen these systems.¹¹ Among the most significant initiatives is the development and implementation of the Alternative Justice Systems (AJS) Policy. The AJS Policy was created by the Judiciary in collaboration with various stakeholders and aims to recognize, regulate, and enhance the use of AJS in Kenya.¹² Further, it ensures that AJS operations align with the principles and values of the Constitution and international human rights standards.¹³ The AJS Policy also emphasizes the need for a pluralistic approach to justice that respects the cultural, socio-economic,

⁶ Muigua K, "Settling Disputes through Arbitration in Kenya", Glenwood Publishers, Kenya 2012, page 4.

⁷ Muigua K, "Alternative Dispute Resolution and Article 159 of the Constitution" Page 2.

⁸ <https://judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/> on 6 March 2023.

⁹ <https://judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/> on 6 March 2023.

¹⁰ <https://judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/> on 6 March 2023.

¹¹ <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> on 21 May 2023.

¹² <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> on 21 May 2023.

¹³ <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> on 21 May 2023.

and geographical diversity of the population.¹⁴ The implementation of the AJS Policy has had a measurable impact on improving access to justice, enabling the resolution of numerous disputes that would have otherwise added to the burden of formal courts.¹⁵

In recognition of the advantage of resolving disputes outside the formal court system, many jurisdictions, have employed the use of family mediation to address a variety of issues including separation and divorce cases. In Kenya, the Judiciary introduced Court Annexed Mediation (CAM) as a strategy to reduce case backlogs and in alignment with Article 159(2) of the Constitution.¹⁶ Since 2016, the Judiciary has been implementing mediation as part of its effort to promote ADR mechanisms.¹⁷ This initiative aligns with the Social Transformation through Access to Justice (STAJ) vision launched by Chief Justice Martha Koome in September 2021, which seeks to broaden access to justice.¹⁸ CAM has achieved notable success, including the reunification of families, the restoration of contractual relationships, and the resolution of long-standing court cases within a few mediation sessions.¹⁹

Key recent developments in the CAM program include the gazettment of the New Court Annexed Mediation Rules, 2022, enacted under the Civil Procedure Act.²⁰ These Rules allow parties to submit private mediation agreements for registration and enforcement without the need to file formal pleadings, as required in the adversarial proceedings.²¹ As of 1 May 2024, the CAM taskforce has successfully established 60 mediation registries across the country, achieving an average settlement rate of 57.89%, of various disputes, between January and April 2024.²²

Mediation helps manage conflicts in a responsible way, making it easier to deal with the challenges that come with divorce by promoting cooperation and understanding between parents. As a parent who has recently gone through a separation or divorce, you are probably concerned about how it

¹⁴ <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> on 21 May 2023.

¹⁵ <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> on 21 May 2023.

¹⁶ <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

¹⁷ <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

¹⁸ <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

¹⁹ <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

²⁰ <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

²¹ <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

²² <https://judiciary.go.ke/court-annexed> mediation on 20 October 2024.

might impact your children.²³ Making decisions concerning children's well-being can be challenging, especially when emotions are running high. Nonetheless, parents have a responsibility to prioritize the best interests of their children. This can be particularly difficult when separating or divorced parents disagree on custody and maintenance arrangements, a situation often experienced in the early stages of separation when strong emotions can curb cooperation.²⁴ This raises the question of whether children should play an active role in mediation sessions to ensure that decisions made by parents and mediators align with the child's best interests in line with article 53 of the Constitution. Currently, in Kenya, there are no legal guidelines or procedures mandating the inclusion of children in family mediation. Additionally, there is a need for mediators to receive training on how to engage children in family mediation.

In Australia, there has been a recent push to include children's voices in mediation processes, particularly when determining custody and maintenance arrangements for children after parental separation. This approach is known as "child inclusive mediation" and has drawn significant interest in other countries as a way to involve children more actively in decisions about parenting arrangements.²⁵ Historically, children were not seen as active members of cultural life. Instead, people believed they were shaped by their families and schools, as well as their natural growth and development, rather than as independent contributors to society. However, ethnographic research in 1970s marked a turning point, challenging these traditional perspectives.²⁶ This research recognized children as independent and interactive agents, shedding light on their subjective experiences. It highlighted that children are active participants with their own perspectives and opinions, rather than just passive receivers, even in a society that is often hesitant to give them

²³ Dakota Murphey, 'What is Child-Inclusive Mediation?', 26 October 2018
<https://www.mediate.com/what-is-child-inclusive-mediation> on 15 November 2024.

²⁴ Dakota Murphey, 'What is Child-Inclusive Mediation?', 26 October 2018
<https://www.mediate.com/what-is-child-inclusive-mediation> on 15 November 2024.

²⁵ Parkinson, Single, Bell, Cashmore, 'Outcome of child inclusive mediation', 1 International Journal of Law, policy and the Family 3, 2013, 116-120.

²⁶ Taylor, N., Tapp, P and Henaghan, M, 'Respecting children's participation in family law proceedings', 1 International Journal of Children's Rights, 2007, 15.

control over their lives.²⁷ Research started to recognize children and their voices as legitimate, articulate and insightful contributors.²⁸

In Kenya, while the value of family mediation is widely recognized, the importance of incorporating children's views and opinions in the mediation process is often overlooked. Opponents of child inclusion claim that it would make children more vulnerable and transfer responsibility from parents to them.²⁹ Although this perspective may seem valid, it overlooks the potential to explore other ways that allow children's voices to be heard without exposing them to harm or undue responsibility. The aim is to draw insights from best practices in this area to guide policy making in the Kenyan context. This study aims to demonstrate that including children in mediation upholds the obligation to prioritize the best interests of the child principle.

1.2 Statement of the Problem

Child inclusive mediation provides children with the opportunity to express their views, thoughts, needs and interests. It recognizes that children are not mere bystanders but are directly impacted parties in such situations. Despite this, children are often excluded from the resolution of child custody and maintenance disputes, based on the assumption that parents are best equipped to make decisions on their behalf. However, this assumption may not always hold true. Most importantly, including children in mediation is not about giving them control over the decisions being made but ensuring that their perspectives are taken into account.

In Kenya, children's views are often overlooked, yet involving them can significantly improve both the mediator's and parents' understanding of their needs. When children are excluded, there is a risk of making decisions that fail to address their unique perspectives, leaving them feeling unheard and marginalized in matters that profoundly impact their lives. The consequences of such oversight may manifest in strained family relationships, unresolved conflicts and adverse impacts on the child's overall development. Prioritizing children's voices in mediation is not just a legal

²⁷ Dolgopol, U. (1993). A child's right to be heard - Are we ready to listen? Paper to the First World Congress on Family Law and Children's Rights, Sydney, Australia.

²⁸ Dolgopol, U. (1993). A child's right to be heard - Are we ready to listen? Paper to the First World Congress on Family Law and Children's Rights, Sydney, Australia.

²⁹ Parkinson P and Cashmore J, 'The Voice of a Child in Family Law Disputes', Oxford University Press, 2008, 45.

or ethical obligation but a crucial step toward creating meaningful, sustainable outcomes that reflect the realities of their lives. Moreover, a child's input can prove invaluable in breaking impasses during mediation, acting as a reminder of the importance of reaching solutions that serve the child's best interests. Incorporating their views not only enriches the mediation process but also ensures outcomes are better tailored to the child's best interests.

1.3 Hypothesis

Child inclusive mediation safeguards the best interest of children in the resolution of custody and maintenance disputes in Kenya.

1.4 Research Objectives

1. Examine whether the existing legislative, policy, and regulatory frameworks in Kenya are facilitative of child inclusive mediation.
2. Evaluate whether child inclusive mediation safeguards the best interest of the child principle in the resolution of custody and maintenance disputes.
3. Offer recommendations based on a comparative study with Australia.

1.5 Research Questions

1. Are Kenya's existing legislative, policy, and regulatory frameworks facilitative of child inclusive mediation?
2. Does child inclusive mediation safeguard the best interest of the child principle in the resolution of custody and maintenance disputes?
3. What recommendations can be preferred based on a comparative study with Australia?

1.6 Justification of the Study

This study aims to inform policymakers and stakeholders on the benefits of child inclusive mediation. By demonstrating how this model has been successfully implemented in Australia, the research provides a roadmap for addressing its underutilization in Kenya. Furthermore, it addresses a gap in existing literature, contributing to the broader discourse on child welfare and family mediation in Kenya and similar contexts. This contribution can guide the development of more

effective laws, policies and practices to better serve children and families during transitional periods.

1.7 Theoretical Framework

To understand the importance of including children in custody and maintenance mediation disputes it is essential to examine some theories that give this study a foundational basis. This study is thus underpinned by John Bowlby's attachment theory.

1.7.1 The Attachment Theory

To fully understand the effects of separation on children, we must first recognize the importance of the child-parent relationship to a child's healthy development, underscored by the attachment theory. Attachment theory is deeply connected to child inclusive mediation because it highlights the importance of warm, intimate and continuous connections between children and their parents or parental figures in a way that brings about satisfaction and enjoyment.³⁰ The theory was first developed by John Bowlby, a British psychoanalyst who sought to understand the deep distress infants experienced when separated from their parents.³¹ According to Bowlby, these relationships are crucial to a child's lifelong physical and psychological well-being,³² shaping their ability to form and maintain healthy relationships throughout life.³³ When a child's caregiver is warm and responsive to their needs, the child learns to trust and depend on others.³⁴ In mediation, this understanding helps parents recognize the impact of separation on their child's emotional security and development.

Bowlby's observations on separation distress are particularly relevant to child inclusive mediation. He observed that infants who are separated from their parents' experience intense distress and go to extraordinary lengths such as crying, clinging and frantically searching to prevent separation or

³⁰ Cramer L, Goff M, Peterson B and Sandstorm H, 'Parent-child visiting practices in prisons and jails', A Synthesis of Research and Practice, Urban Institute, 2017, 6.

³¹ Fraley C, Adult attachment theory and research: A brief overview, University of Illinois -Urbana, Champaign- <<http://labs.psychology.illinois.edu/~rcfraley/attachment.htm>> on 06 March 2020.

³² Siegel D, *The developing mind: How relationships and the brain interact to shape who we are*, The Guilford Press, New York, 2015.

³³ Cramer L, Goff M, Peterson B and Sandstorm H, 'Parent-child visiting practices in prisons and jails', A Synthesis of Research and Practice, Urban Institute, 2017, 6.

³⁴ Cramer L, Goff M, Peterson B and Sandstorm H, 'Parent-child visiting practices in prisons and jails', A Synthesis of Research and Practice, Urban Institute, 2017, 6.

reestablish proximity to a missing parent.³⁵ These reactions are not merely immature defense mechanisms but rather adaptive responses designed to keep the child close to an attachment figure who provides support, protection and care.³⁶ In family mediation, children may display similar behaviors when they feel disconnected from one parent due to conflict or changes in custody arrangements. If a child perceives that their attachment figure is not nearby, accessible or attentive, they may experience anxiety and seek ways to restore physical or psychological proximity.³⁷ If prolonged separation or high conflict situations persist, the child may eventually experience despair and depression.³⁸

Child inclusive mediation takes these attachment needs into account by ensuring that children's perspectives and emotional wellbeing are central to decision making. When parents understand that maintaining secure attachments is vital for their child's development, they can work toward co-parenting solutions that provide stability and reassurance. By incorporating attachment theory, mediation helps parents recognize the significance of being consistently present and emotionally responsive, even when living apart. This approach ultimately supports the child's ability to explore their environment, interact with others and develop a sense of confidence and security in their relationships, reducing the harmful effects of separation.

1.8 Literature Review

Over the past years, there has been growing recognition of the importance of considering children's views in decisions that directly affect them. Children are increasingly seen as active participants in shaping their own experiences and as individuals with distinct perspectives and interests that may not always align with those of their parents or other decision makers.³⁹ This is especially

³⁵ Bretherton I, 'The origins of the attachment theory: John Bowlby and Mary Ainsworth' *Development Psychology*, 1992, 762.

³⁶ Bretherton I, 'The origins of the attachment theory: John Bowlby and Mary Ainsworth' *Development Psychology* 1992, 762.

³⁷ Fraley C, Adult attachment theory and research: A brief overview, University of Illinois -Urbana, Champaign- <<http://labs.psychology.illinois.edu/~rcfraley/attachment.htm> > on 06 March 2020.

³⁸ Fraley C, Adult attachment theory and research: A brief overview, University of Illinois -Urbana, Champaign- <<http://labs.psychology.illinois.edu/~rcfraley/attachment.htm> > on 06 March 2020.

³⁹ Cashmore J, Parkinson P, 'Children's and parents' perceptions on children's participation in decision making after parental separation and divorce' *1 family court review* 1, 2008, 10.

relevant in cases of child maintenance and custody disputes.⁴⁰ However, the legal system, especially in Kenya, has traditionally been hesitant to engage directly with children in such cases. Article 12 of the CRC affirms the right of children who are capable of forming their own views to express them in all matters affecting them.⁴¹ It also mandates that these views be given appropriate weight, taking into account the child's age, maturity and specific circumstances.⁴²

Owing to the profound effects of separation and divorce on children, ensuring their input in the mediation process is crucial.⁴³ Research by O'Rourke and Worzbt indicates that children from divorced families tend to experience more difficulties than those from intact families. However, studies since the 1980s show that the impact of divorce on children varies based on individual circumstances, it can have both positive and negative effects.⁴⁴ In cases where divorce allows children to escape environments of conflict, violence or abuse, it may be beneficial.⁴⁵

Schoffer states that many children are neither informed about the changes in their family nor asked for their input regarding their future living arrangements.⁴⁶ In one study, 23% of children reported that no one discussed the divorce with them, while 5% said they were fully informed and encouraged to ask questions.⁴⁷ Studies show that failing to include children in discussions about divorce can have unintended negative effects, leading to feelings of isolation, loneliness, frustration and anger, particularly among older children.⁴⁸ The lack of meaningful communication can add significant stress to a child's emotional wellbeing.⁴⁹ schoffer's work is valuable in that it provides empirical data indicating that children are often neither informed about the divorce process nor given an opportunity to express their preference regarding future living arrangements.

⁴⁰ Cashmore J, Parkinson P, 'Children's and parents' perceptions on children's participation in decision making after parental separation and divorce' 12.

⁴¹ Article 12 (1), Convention on the rights of the child, 2 September 1990, 1577, UNTS 3.

⁴² Article 12 (2), Convention on the rights of the child.

⁴³ Saposnek D, 'The Value of Children in Mediation: A Cross-Cultural Perspective', mediationq, 1991, 325.

⁴⁴ Andrew S, 'Children, Courts and Custody: Interdisciplinary Models for Divorcing Families', 2003, 28.

⁴⁵ Andrew S, 'Children, Courts and Custody: Interdisciplinary Models for Divorcing Families', 2003, 28.

⁴⁶ Schoffer M, 'Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation', Family Court Review, 2005, 323.

⁴⁷ Schoffer, M. 'Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation', 323.

⁴⁸ Schoffer, M, 'Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation' 323.

⁴⁹ Schoffer, M. (2005). Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation' 323.

There is a need for solutions on the best practices for involving children in mediation. The current study aims to bridge these gaps by recommending actionable communication strategies and legal reforms.

Lansdown contends that including children in custody and maintenance mediation brings significant advantages, provided that parents are mentally equipped to use the information in a manner that does not harm the children.⁵⁰ Research indicates that parents may not always have a complete understanding of their children's lives, which can hinder their ability to make well informed decisions on their behalf.⁵¹ Lansdown emphasizes that children have valuable insights into their family dynamics, needs and concerns, including ideas and views that they gain from their own experiences.⁵² This knowledge and experience extends beyond their individual circumstances to issues affecting them as siblings.⁵³ He asserts that custody and access decisions that incorporate children's perspectives are more likely to be relevant, effective and sustainable.⁵⁴ Lansdown's work does not address the operational or procedural aspects of how children's perspectives can be integrated into mediation sessions, a gap that this study addresses this.

Despite common belief that children lack the capacity to make informed contributions to decision making and that their involvement could be harmful to their wellbeing, evidence from child participation globally suggests otherwise.⁵⁵ Research increasingly shows that these concerns are largely unfounded and that including children in decision making has widespread positive effects. To truly act in the best interest of the children, adults must actively listen to them and give appropriate consideration to their views.⁵⁶

⁵⁰ Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

⁵¹Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

⁵² Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

⁵³Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

⁵⁴ Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

⁵⁵ Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

⁵⁶ Lansdown G, 'Every Child's Right to be Heard: A Resource Guide on the United Nations Committee on the Rights of the Child General Comment No. 12 www.unicef.org..', 2011.

Cashmore and Parkinson assert that children play a meaningful role in shaping parenting plans. They highlight a case where two siblings, aged 9 and 11, proposed a solution after discussing it among themselves when their parents were unable to reach an agreement on living agreements.⁵⁷ Acknowledging that both parents felt sad when apart from them and that they, too missed each parent, the children suggested an alternative arrangement.⁵⁸ They proposed that each child spend individual time with one parent while also having periods when they could be together.⁵⁹ This suggestion was met with deep emotion and relief from both parents, as it provided an ideal resolution.⁶⁰ The study's findings indicate that children do not necessarily need to be shielded from involvement in contested matters and that most parents are supportive of their participation in decision making.⁶¹ There is a need for systemic evidence on how such contributions can be harnessed across a variety of cases, a gap that the current study addresses by providing comparative analysis and discussing broader implementation strategies.

Emery suggests that a child's participation in mediation can help verify the accuracy of statements made by the adults involved.⁶² She further explains that incorporating the child's perspective can enhance both the mediator's and parents' understanding of the child's needs. Additionally, considering a child's wishes can be particularly useful in overcoming deadlocks during mediation.⁶³ A child's input provides valuable insight and serves as a reminder to parents of the importance of prioritizing the child's best interests.⁶⁴ Many parents struggle to communicate effectively with each other regarding custody and access arrangements.⁶⁵ They are often even less

⁵⁷ Cashmore J and Parkinson P, 'Children's and parents' perception on children's participation in decision making after parental separation', *Family court review* 7, 2008, 12.

⁵⁸ Cashmore J and Parkinson P, 'Children's and parents' perception on children's participation in decision making after parental separation', *Family court review* 7, 2008, 13.

⁵⁹ Cashmore J and Parkinson P, 'Children's and parents' perception on children's participation in decision making after parental separation', *Family court review* 7, 2008, 15.

⁶⁰ Cashmore J and Parkinson P, 'Children's and parents' perception on children's participation in decision making after parental separation', *Family court review* 7, 2008, 17.

⁶¹ Cashmore J and Parkinson P, 'Children's and parents' perception on children's participation in decision making after parental separation', *Family court review* 7, 2008, 19.

⁶² Emery, E 'Easing the pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation', 1 *Virginia Journal for Social Policy and Law* 1, 2003, 164.

⁶³ Emery, E, 'Easing the pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation', 164-172.

⁶⁴ Ato E, Gali M and Fernandes M, 'The Moderating Role of Children's Effortful Control in the Relation between Marital Adjustment and Parenting' 1. *Journal of Child and Family Studies* 2, 2015, 341-349.

⁶⁵ Emery, E, 'Easing the pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation', 1 *Virginia journal for social policy and law*, 2003, 162.

capable or willing to share crucial information with their children about significant changes in the family structure, living situation, and parent child relationships.⁶⁶ Research on parent child communication about divorce found that 23% of children reported that no one had discussed the divorce with them, while 45% recalled receiving only brief, vague explanations, such as “your dad is leaving”.⁶⁷ In contrast, only 5% of children stated that they had been fully informed and encouraged to ask questions.⁶⁸

Muigua observes that while family mediation is widely used in various jurisdictions to address issues such as separation and divorce, Kenyan family laws primarily recognize mediation as a reconciliatory process within an ongoing marriage rather than a means of facilitating divorce.⁶⁹ Family mediation offers significant advantages over litigation, particularly in fostering cooperation between parties during post-divorce transitions, especially when children are involved.⁷⁰ This is crucial given that the traditional divorce process remains adversarial in nature. Muigua further asserts that in Kenya, divorce mediation is largely confined to matters concerning property division and child custody arrangements.⁷¹

The emphasis on custody mediation stems from two key factors: first divorce does not alter parental status or responsibilities and second, resolving such disputes outside court serves the best interests of children.⁷² He advocates for the broader adoption of family mediation in Kenya, especially in light of the rising divorce rate. Additionally, he underscores that to increase the effectiveness of family mediation, it is essential for mediators who wish to specialize in this area to continually acquire skills that are specific to family mediation given the sensitive and complex nature of these disputes compared to other mediation fields.⁷³ Muigua critically examines the Kenyan mediation landscape, noting that current practices are predominantly focused on reconciliation within ongoing marriages and limited to property division and custody disputes.

⁶⁶ Emery E, ‘Easing the pain of Divorce for Children: Children’s Voices, Causes of Conflict, and Mediation’, 164.

⁶⁷ Emery E, ‘Easing the pain of Divorce for Children: Children’s Voices, Causes of Conflict, and Mediation’, 164.

⁶⁸ Emery E, ‘Easing the pain of Divorce for Children: Children’s Voices, Causes of Conflict, and Mediation’, 165.

⁶⁹ Kariuki M, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers limited, 2ed Nairobi, 2017, 97.

⁷⁰ Kariuki M, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers limited, 2ed Nairobi, 2017, 97.

⁷¹ Kariuki M, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers limited, 2ed Nairobi, 2017, 97.

⁷² Kariuki M, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers limited, 2ed Nairobi, 2017, 97.

⁷³ Kariuki M, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers limited, 2ed Nairobi, 2017, 97.

There is little discussion on how mediation could be reformed to explicitly incorporate the child's voice.

In his paper *Entrenching Family Mediation in the Law in Kenya*, Kariuki argues that mediation of family disputes in Kenya fosters self-determination.⁷⁴ He states that when parents actively participate in mediation, they can explore options in a better manner, truly listen to each other, and ultimately feel empowered to make decisions about their future.⁷⁵ Since parents have the most insight into their children's needs and their own living situations, their decisions are likely to be more holistic and considerate of all family members than those imposed by judges, often influenced by third-party recommendations or dictated by lawyers through distributive negotiations.⁷⁶ Moreover, Kariuki contends that parents who fully engage in the mediation process will experience greater satisfaction and stronger sense of ownership over the outcomes, as the agreements reached will align with their actual needs and interests, making them more sustainable in the long run.⁷⁷ Unlike standard contracts between two individuals, marriages require specialized conflict management approaches like family mediation, which recognize their unique nature and ensure that all the parties interests are considered.⁷⁸

Kariuki's work argues that mediation fosters self-determination among parents and results in more suitable family outcomes. However, his analysis largely assumes that parents inherently act in the best interest of their children and does not consider the potential benefits of directly involving the children in decision making. This represents a critical gap: the exclusion of child's voice may lead to decisions that do not fully capture the child's unique needs and experiences. This study addresses this by emphasizing the value of the child's input.

⁷⁴ Kariuki M, 'Entrenching family mediation in the law in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2018,4.

⁷⁵ Kariuki M, 'Entrenching family mediation in the law in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2018,4.

⁷⁶ Kariuki M, 'Entrenching family mediation in the law in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2018,4.

⁷⁷ Kariuki M, 'Entrenching family mediation in the law in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2018,4.

⁷⁸ Kariuki M, 'Entrenching family mediation in the law in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2018,4.

Children have shared their perspectives with researchers on what they hope for after their parents separate. A British study by Butler, Scanlon, Robinson, Douglas and Murch interviewed 104 children, aged 7 to 15, who had experienced family separation.⁷⁹ The study identified four key themes in the children's responses. First, they wanted to be informed about the separation process so they could understand what was happening. Secondly, they wished for their opinions to be considered when decisions about their living arrangements were being made. Thirdly, most children expressed a desire to maintain relationships with both parents despite the separation. Lastly, many preferred to spend equal time with each parent to maintain a sense of balance and connection.⁸⁰ The researchers emphasized that while children's perspectives should not be privileged over those of parents, they should be given equal weight.⁸¹ They also highlighted that parents may not provide an entirely accurate account of their child's experience of divorce.⁸² In critical areas, children and parents often describe events differently. As such, children are not only relevant and capable witnesses to the divorce process but also reliable witnesses to the divorce process but also the most reliable narrators of their own experiences.⁸³ This highlights the importance of involving children in child maintenance and custody disputes, as they can provide clear insight into their needs and their views regarding the situation.

Zanker asserts that mediation processes in Kenya are more likely to result in lasting peace between the parties when all domestic stakeholders contribute to the decision-making process.⁸⁴ This means that all the parties that are going to be affected by the decisions being made should be well represented. Such inclusivity enhances the legitimacy of mediation. Her empirical findings highlight the crucial role of civil society in advocating for divorce mediation in Kenya.⁸⁵ While

⁷⁹ Ian B, Lesley S, Robinson M, Gillian D, Mervyn M, 'Children's involvement in their parents' divorce: implications for practice' 16 children and society Journal 2, 2002, 98.

⁸⁰ Ian B, Lesley S, Robinson M, Gillian D, Mervyn M, 'Children's involvement in their parents' divorce: implications for practice' 16 children and society Journal 2, 2002, 98.

⁸¹ Ian B, Lesley S, Robinson M, Gillian D, Mervyn M, 'Children's involvement in their parents' divorce: implications for practice' 16 children and society Journal 2, 2002, 98.

⁸² Mitchell A, 'Children in the middle-living through divorce' Tavistock Publication, 1985, 206.

⁸³ Ian B, Lesley S, Robinson M, Gillian D, Mervyn M, 'Children's involvement in their parents' divorce: implications for practice' 16 children and society Journal 2, 2002, 98.

⁸⁴ Zanker F, 'Legitimate representation in mediation process: civil society involvement in Liberia and Kenya' research gate, 2013, 4.

⁸⁵ Zanker F, 'Legitimate representation in mediation process: civil society involvement in Liberia and Kenya' research gate, 2013, 4.

her research underscores the importance of an inclusive approach, it does not specifically address the mechanisms for incorporating children's voices into the mediation process. The absence of a detailed focus on children inclusivity leaves a gap in understanding how to operationalize this inclusivity for the youngest stakeholders. This study directly targets this gap by centering its analysis on methods for effective child participation.

Kibet contends that divorce mediation training should be incorporated into university law curricula in Kenya, from foundational to advanced levels. He emphasizes that all law graduates should be equipped with knowledge of divorce mediation, which would help expand the pool of qualified professionals to better serve clients.⁸⁶ Additionally, he stresses the importance of raising public awareness about divorce mediation as an alternative to litigation, suggesting that this could be achieved through public seminars.⁸⁷ Kibet advocates for enhanced training and public awareness regarding divorce mediation, however, his work does not examine the direct involvement of children in mediation proceedings. The current study bridges the gap by offering a comparative analysis of mediation practices in Kenya and Australia, emphasizing the need for specialized training that addresses the inclusion of children's perspectives.

In summary, while each source provides valuable insights into the dynamics of family mediation and the importance of considering children's views, significant gaps remain in terms of practical implementation, systemic integration, and policy oriented solutions. This study addresses these gaps by offering a comparative framework and targeted recommendations aimed at enhancing the inclusion of children's voices in custody and maintenance disputes.

1.9 Research Methodology

This research primarily employed a doctrinal research methodology, enabling the identification of legal principles, standards and procedures. This approach involves a critical examination of both primary and secondary sources of law. The primary sources analyzed include legislation, case law, policy documents and government reports. The secondary sources on the other hand encompass

⁸⁶ Kibet T, 'The potential role of divorce mediation in advancing access to justice in divorce cases in Kenya' Unpublished LLM Thesis, Moi University, Nairobi, 2013, 15.

⁸⁷ Kibet T, 'The potential role of divorce mediation in advancing access to justice in divorce cases in Kenya' Unpublished LLM Thesis, Moi University, Nairobi, 2013, 15.

textbooks, journal articles, institutional reports and other legal literature. The doctrinal method is particularly suitable for this study as the required information is readily accessible through these sources.

Additionally, the research incorporates a comparative analysis of Australia's approach to domesticating and implementing relevant international laws and policies that facilitate the inclusion of children's voices in custody and maintenance disputes. Australia is selected as a comparator country due to its well developed legal framework that actively promotes children's participation in family law matters. Unlike Kenya, where legal and institutional challenges often hinder the effective implementation of child inclusive policies, Australia has established structured mechanisms to ensure children's views are considered in custody and maintenance decisions. Australia's legal and institutional framework is guided by the best interests of the child principle, ensuring that decision making prioritizes the child's welfare while incorporating their voices. Comparing these two jurisdictions provides valuable insights into potential reforms that could enhance Kenya's legal framework and better safeguard children's rights in custody and maintenance proceedings.

1.10 Limitations

A key limitation of this study is its doctrinal nature, which restricts it to desktop research based on existing legal sources rather than empirical data collection. Consequently, it relies on available legislation, cases, policy documents, and academic literature to analyze child inclusive mediation.

1.11 Chapter Breakdown

1.11.1 Chapter One: Introduction

This chapter gives a general background of access to justice and the importance of ADR mechanisms, especially family mediation. It also hints on the shortcomings of the family mediation process in addressing custody and maintenance issues in Kenya for failure to consider children's views. The chapter indicates the problem statement, the research objectives, research questions, justification of the study and limitations of the research. Lastly, the chapter reviews existing literature with the aim of identifying gaps that the research can contribute to.

1.11.2 Chapter Two: Are Kenya’s Existing Legislative, Policy, and Regulatory Frameworks Facilitative of Child Inclusive Mediation?

This chapter addresses the first research question by analyzing whether the existing legal, policy, and regulatory frameworks are facilitative of child inclusive mediation. The chapter’s discussion features the Constitution of Kenya, the Children’s Act, the Mediation (Pilot Project) Rules international conventions and treaties ratified in Kenya and case law.

1.11.3 Chapter Three: Does Child Inclusive Mediation Safeguard the Best Interest of the Child Principle in the Resolution of Custody and Maintenance Disputes?

This chapter addresses the second research question by examining whether child participation in custody and maintenance mediation processes effectively upholds the child’s best interest principle. Additionally, the chapter analyzes how and when children can be incorporated into the mediation process as well as the advantages and disadvantages of such inclusion.

1.11.4 Chapter Four: Child Inclusive Mediation in Australia

This chapter addresses the last research question by examining the best practices Kenya can learn from the Australian jurisdiction in terms of how to incorporate children into the mediation process on the resolution of custody and maintenance disputes.

1.11.5 Chapter Five: Research Findings, Conclusion and Recommendations

This chapter elaborates on the research findings, conclusions and recommendations on reforms that can be implemented in Kenya based on the analysis in the previous chapters.

CHAPTER TWO: ARE KENYA’S EXISTING LEGISLATIVE, POLICY AND REGULATORY FRAMEWORKS FACILITATIVE OF CHILD INCLUSIVE MEDIATION?

2.1 Introduction

This chapter examines whether Kenya’s legislative, policy and regulatory frameworks facilitate child inclusive mediation. It explores key domestic laws, including the constitution, which prioritizes children’s welfare, the Children’s Act 2022, which guarantees their right to be heard and the mediation pilot rules, which currently limit child participation. Additionally, it evaluates international instruments including the UNCRC and the ACRWC, both of which emphasize children’s involvement in decision-making on matters that affect them. The chapter further analyzes judicial interpretations and highlights the gaps.

2.2 Domestic, Legislative, Regulatory and Policy Frameworks

2.2.1 The Constitution of Kenya, 2010

The Constitution places a strong emphasis on protecting and nurturing children from the moment they are born. It clearly defines a child as anyone who has not attained the age of eighteen years.⁸⁸ The Constitution guarantees that every child is provided with a name and nationality, and that they have access to free and compulsory basic education.⁸⁹ Beyond education, the state is committed to ensuring that children receive essential care in the form of adequate nutrition, proper shelter and accessible healthcare services.⁹⁰ In addition, the constitution mandates that children benefit from balanced parental care and protection.⁹¹ This commitment means that both parents share equal responsibility for the upbringing and well being of their children, regardless of whether they are married or not.⁹²

⁸⁸ Article 260, *Constitution of Kenya* (2010).

⁸⁹ Article 53, *Constitution of Kenya* (2010).

⁹⁰ Article 53, *Constitution of Kenya* (2010).

⁹¹ Article 53, *Constitution of Kenya* (2010).

⁹² Article 53, *Constitution of Kenya* (2010).

Central to the provisions is the principle that the child’s best interests must always be the foremost consideration in any decision affecting them.⁹³ This guiding principle ensures that all legal, social and administrative actions prioritize the overall welfare, development and protection of children. Furthermore, the constitution assigns a duty to all public institutions and state organs to address the needs of vulnerable groups within society, including children.⁹⁴ This broad mandate compels the government to actively safeguard and promote the rights and well being of children, thereby ensuring their unique needs are recognized and met alongside those of other marginalized communities.

In exercising its jurisdiction, the court is constitutionally bound to prioritize the best interests of the child in cases involving custody, guardianship and adoption.⁹⁵ This highest standard requires that every decision affecting a child’s welfare centers on their well being, with each case being evaluated individually. Yet, the application of this principle can be unpredictable. There are instances where courts have deviated from constitutional and legislative mandates, sometimes favoring the mother over the father or vice versa based solely on gender related assumptions, such as those underlying the tender years doctrine.⁹⁶ Such inconsistencies highlight the need for a deeper, case specific inquiry to ensure that every decision fully upholds the spirit of the law and genuinely serves the unique best interest of each child.⁹⁷

In *MAK v RMAA* the court states that there is no hierarchy among children’s rights under the constitution, every right in article 53 serves the child’s best interests.⁹⁸ The ‘best interest’ concept is paramount and should be the determining factor in decisions concerning the child, ensuring that parental rights are balanced against this standard and never override it.⁹⁹ This principle is intended to guarantee the full and effective enjoyment of children’s rights as recognized in the constitution,

⁹³ Article 53 (2), *Constitution of Kenya* (2010)

⁹⁴ Article 21 (3), *Constitution of Kenya* (2010)

⁹⁵ In the matter of application of guardianship of CJ and WK (2023) eKLR.

⁹⁶ In the matter of application of guardianship of CJ and WK (2023) eKLR.

⁹⁷ In the matter of application of guardianship of CJ and WK (2023) eKLR.

⁹⁸ *MAK v RMAA and 4 others* (2023) eKLR

⁹⁹ *MAK v RMAA and 4 others* (2023) eKLR

the children's act, the CRC and the ACRWC, all of which are designed to promote the child's holistic development.¹⁰⁰

In *BRO v WJNWM*, Justice Onyiego states that it is well established law that parental responsibility is a shared, joint duty, with neither parent holding superior rights over the child.¹⁰¹ Both parents are equally obligated to support their child, a task that requires cooperative effort, even if contributions differ. One parent cannot simply claim that their income is insufficient as an excuse to avoid this responsibility.¹⁰²

2.2.2 The Children's Act 2022

To give effect to this constitutional provision, the Children Act of 2022 was enacted in July 2022 and came into force on 27th July 2022. Section 8 of the Act provides that in all actions concerning the child, the best interests of the child shall be the primary consideration.¹⁰³ The first schedule of the Act has a clear outline of considerations that should be taken into account when determining the best interests of the child. It further provides that in matters concerning a child, the child must be given the opportunity to express their views, which should be considered appropriately, taking into account the child's age and level of maturity.¹⁰⁴ This new Act repealed the Children's Act of 2001 which was inadequate in aligning children's rights with the Constitution and international standards. The 2022 Act safeguards Children's rights and addresses issues such as parental responsibility, care and protection, alternative care and the best interest of the child.

2.2.3 Other Relevant Laws

Mediation Pilot Rules

The Mediation Pilot Rules restrict participation to the primary parties involved in the dispute, excluding third parties or others who might be affected by the decisions. As a result, only the main disputants have a voice in the process. However, in family mediation, children are not merely third parties, they are key stakeholders significantly impacted by the decisions made during mediation.

¹⁰⁰ *MAK v RMAA and 4 others* (2023) eKLR.

¹⁰¹ *BRO v WJNWM* (2022) eKLR.

¹⁰² *BRO v WJNWM* (2022) eKLR.

¹⁰³ Section 8, Children's Act (Act No. 146 of 2022).

¹⁰⁴ Section 8, Children's Act (Act No. 146 of 2022).

Therefore, it is essential to include them in the process to ensure that their best interests are considered.

2.2.4 International and Regional Instruments

2.2.4.1 United Nations Convention on the Rights of the Child

The evolution of the child's right to be heard in international law marks a pivotal shift towards recognizing children as autonomous individuals with unique rights and interests. A key milestone was the Declaration of the Rights of the Child, adopted by the General Assembly in 1959.¹⁰⁵ While the Declaration acknowledged children's entitlement to special care and assistance it did not explicitly reference the right to be heard. Nevertheless, it laid a crucial foundation for advancing children's rights by highlighting the importance of considering their interests and needs.¹⁰⁶ The next significant milestone in the advancement of children's rights was the adoption of the Convention on the Rights of the Child (CRC).¹⁰⁷ This Convention has been ratified by many countries including Kenya hence marked as the most universally ratified human rights treaty in history. The UNCRC recognizes children as active subjects entitled to a comprehensive range of rights, rather than merely passive recipients of care and assistance.¹⁰⁸

The CRC outlines four general principles, one of which is the right to be heard. Article 12 of the CRC explicitly affirms this right and underscores its fundamental importance in interpreting and implementing all other rights recognized within the Convention.¹⁰⁹ It recognizes the essential role of involving children in decision making processes that directly affect their lives.¹¹⁰ Article 12 of the CRC clearly places a responsibility on States to ensure that children have the opportunity to freely express their views on matters affecting them.¹¹¹ To accurately uphold this right and to avoid situations of misinterpretation, it is important to clarify the meaning of a child's ability to form their own opinion.¹¹² The European Court of Human Rights, in the case, of N.TS v Georgia, stated

¹⁰⁵ UN Declaration on the Rights of the Child (1959)

¹⁰⁶ Mariam Saneblidze, "The Child's Right to Be Heard in Civil Proceedings," *Law and World* 29 (2024): 153-176.

¹⁰⁷ Convention on the Rights of the child (1989).

¹⁰⁸ Mariam Saneblidze, "The Child's Right to Be Heard in Civil Proceedings," *Law and World* 29 (2024): 153-176.

¹⁰⁹ Convention on the Rights of the child (1989).

¹¹⁰ Convention on the Rights of the child (1989).

¹¹¹ Convention on the Rights of the child (1989).

¹¹² Mariam Saneblidze, "The Child's Right to Be Heard in Civil Proceedings," *Law and World* 29, 2024, 153-176.

that this phrase does not impose a restriction but rather an obligation on the State to assess the child's capacity within reasonable limits.¹¹³ The State must presume, in each case that the child can express their views and the child is not required to prove their ability to do so.¹¹⁴ Notably, the child has the right to freely express their desire to exercise the right to be heard.

The Committee has recognized that the principle of the best interest of the child and child participation are mutually reinforcing.¹¹⁵ The best interest principle defines the objective of ensuring the child's well-being, while child participation serves as the means to achieve this by ensuring the child's voice is heard.¹¹⁶ According to the Committee, the proper application of the best interests principle is impossible without respecting the right to participation outlined in Article 12 of the CRC.¹¹⁷ Likewise, the best interests principle in Article 3 strengthens the implementation of Article 12 by emphasizing the critical role of children in decisions that affect their lives.¹¹⁸

The UN Committee on the Rights of the Child interpretation of Article 12 of the CRC outlines five essential steps to ensure a child's right to express their right to be heard in matters affecting them. First children must be informed of their right to express their views and provided with relevant information through a representative.¹¹⁹ Second, the hearing environment should be supportive, ensuring that reasonable adults such as teachers, social workers, or specialists are receptive and take the child's views seriously.¹²⁰ Third, an assessment must be conducted to determine the child's ability to form and express independent opinions. Fourth, decision-makers must give proper weight to the child's views when making determinations.¹²¹ Finally, legislation should guarantee the right to appeal when a child's right to be heard is ignored or violated. Ensuring these procedures are followed is crucial to maintaining consistency in legal practice and preventing errors.¹²²

¹¹³ N. Ts and Others v Georgia, 2016.

¹¹⁴ Mariam Sanablidze, "The Child's Right to Be Heard in Civil Proceedings," *Law and World* 29, 2024, 153-176.

¹¹⁵ Committee, General Comment No. 12, para 74.

¹¹⁶ Committee, General Comment No. 12, para 74.

¹¹⁷ Committee, General Comment No. 12, para 74.

¹¹⁸ Committee, General Comment No. 12, para 74.

¹¹⁹ Committee on the Rights of the child (2009), general comment 12, the right of the child to be heard.

¹²⁰ General comment 12.

¹²¹ General comment 12.

¹²² General comment 12.

Recognizing and upholding a child's right to be heard not only strengthens justice but also enhances the quality and fairness of the decision-making process.

2.2.4.2 African Charter on the Rights and Welfare of the Child

Kenya, as a member of the African Union, ratified the ACRWC, demonstrating its commitment to upholding these principles in its national legal framework. Article 4 of the African Charter on the Rights and Welfare of the Child provides that in all actions concerning the child undertaken by any person, the best interest of the child shall be the primary consideration.¹²³ On the other hand, child participation is emphasized in article 7 of the ACRWC, which recognizes the child's right to freely express their opinions in all matters affecting them.¹²⁴ It obligates States to ensure that children's views are given due weight. This aligns with the broader commitment to ensuring that children are not passive recipients of decisions but active participants in matters that affect their lives.

2.2.5 Are Kenya's Existing Legislative, Policy and Regulatory Frameworks Facilitative of Child Inclusive Mediation?

Kenya's existing legislative, policy and regulatory frameworks provide a foundation for child inclusive mediation, but they fall short of fully facilitating its implementation. The Constitution, and the Children's Act, 2022, emphasize the best interest of the child as the primary consideration in all matters affecting children. The Children Act further mandates that children be given an opportunity to express their views, which should be given due weight. This aligns with the principles outlined in the CRC and the ACRWC, both of which Kenya has ratified. However, the mediation pilot rules currently restrict participation to the primary disputing parties, thereby excluding children from direct involvement in mediation.

Given that children are often the most affected in family disputes, this exclusion limits the realization of their right to be heard. Kenyan courts have acknowledged the significance of child participation. In *JO v SAO*, the High Court emphasized the need to consider the child's wishes

¹²³ Article 4, African Charter on the Rights and Welfare of the Child, 1 July 1990, UNTS 363.

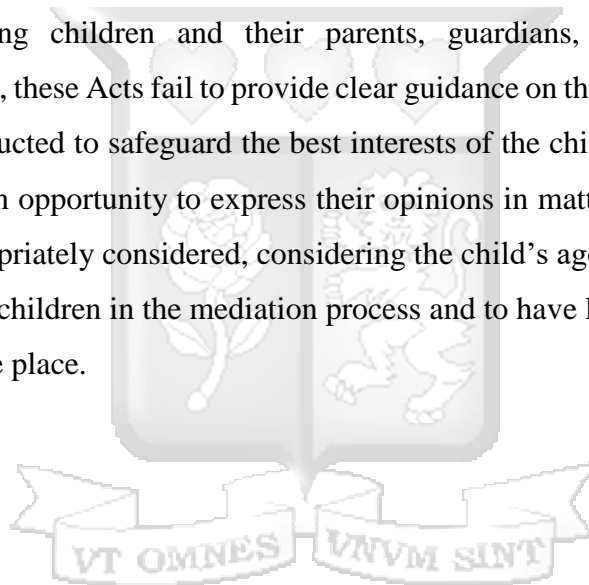
¹²⁴ Article 7, African Charter on the Rights and Welfare of the Child.

when issuing custody orders.¹²⁵ Further, in *BK v EJH*, the court linked child participation to the child's best interests, stating that the test of the best interests of the child in custody disputes should be objective, not subjective to the child's immediate desires.¹²⁶ From the foregoing, it is evident that decision-makers must hear children during the mediation process in family disputes.¹²⁷

In conclusion, while Kenya's legal framework acknowledges child participation and the best interests principle, the lack of explicit guidance on how to integrate children into mediation processes remains a gap.

2.4 Conclusion

In Kenya, while both the repealed Children Act and the 2022 Children Act emphasize mediating family disputes involving children and their parents, guardians, or those with parental responsibilities. However, these Acts fail to provide clear guidance on the nature of such mediation or how it should be conducted to safeguard the best interests of the child. The Act mandates that children must be given an opportunity to express their opinions in matters affecting them. These opinions should be appropriately considered, considering the child's age and maturity. Therefore, it is important to include children in the mediation process and to have laws that act as a guide on how the process is to take place.



¹²⁵ *JO v SAO*, Civil Appeal No 87 of 2015, Judgment of the Court of Appeal at Kisumu, 29 July 2016 (eKLR), para 14.

¹²⁶ *BK v EJH*, Civil Appeal No 13 of 2012, Ruling of the High Court at Nairobi, 23 July 2012 (eKLR).

¹²⁷ Committee, General Comment No 12, para 52.

CHAPTER THREE: DOES CHILD INCLUSIVE MEDIATION SAFEGUARD THE BEST INTEREST OF THE CHILD PRINCIPLE IN THE RESOLUTION OF CUSTODY AND MAINTENANCE DISPUTES?

3.1 Introduction

This chapter explores the research question: Does child inclusive mediation safeguard the best interests of the child principle in the resolution of custody and maintenance disputes? It examines whether involving children in dispute resolution upholds their rights and well being or whether their exclusion leads to breaches of best interest principle.

The chapter begins by discussing child inclusive mediation, its origins, key components and structured process. It then evaluates its advantages, such as empowering children and improving parental communication, alongside its disadvantages, including potential emotional burden and parental influence. The discussion then shifts to the best interest principle, its legal foundations and how courts interpret it in custody and maintenance disputes. It further analyzes how failing to involve children violates this principle, leading to uninformed decisions that overlook children's needs. Finally, the chapter explores how child inclusive mediation provides a solution, ensuring that children's voices contribute to a fairer and more effective dispute resolution.

3.2 Understanding Child Inclusive Mediation: Key Components and Benefits

The child-inclusive approach to family mediation was first developed through two pilot studies conducted by Jennifer McInosh in Melbourne Australia.¹²⁸ This approach aims to fully address children's concerns and interests by ensuring that their voices are heard directly.¹²⁹ Children are consulted about their experiences of family separation and disputes in a supportive manner with

¹²⁸ Brunilda P and Sandra V, 'Family mediation in international family conflicts: The European context', 1 Institute of Criminology, Katholieke Universiteit Leuven 2, 2012, 40.

¹²⁹ Pali B, Voet S, "Family mediation in international family conflicts: The European context" Research gate, 2018,20.

careful consideration of their level of maturity.¹³⁰ By involving children in this process, they gain a greater sense of autonomy and a more direct role in influencing decision-making.¹³¹

This approach has gained significant attention as a way to enhance children's involvement in decisions about parenting arrangements, in this process, a specially trained professional referred to as a child consultant, engages in private discussion with the children.¹³² This requires parental consent and typically, at least one child should be of school-going age.¹³³ The topics covered in these discussions vary depending on the child's experience and family situation.¹³⁴ However, the aim is not merely to determine the children's wishes but to explore their perspectives and experiences regarding their current living and visitation arrangements, parental conflict, and their hopes for the future.¹³⁵

The child consultant plays a crucial role in determining what aspects of the children's conversations can be shared with parents.¹³⁶ After meeting with the children, the consultant provides feedback to the parents, helping them reflect on their children's needs. Rather than burdening children with direct decision-making responsibilities, the process allows them to share their feelings and concerns in a safe space.¹³⁷ For instance, the consultant may inform parents that their ongoing conflict is causing deep distress for their children. Contrary to some parental assumptions, child inclusive mediation does not require children to express their opinions on adult decisions.¹³⁸ Instead, it provides valuable insights that can help resolve disputes in a way that aligns with the child's best interests.¹³⁹

¹³⁰ Hewlett B, 'Accessing the parental mind through the heart: a case study in child inclusive mediation' 13(1) *Journal of Family Studies* 2, 2007, 94.

¹³¹ Pali B, Voet S, "Family mediation in international family conflicts: The European context" Research gate, 2018,20.

¹³² Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 18(1) *Mediation Quarterly* (2002) 55.

¹³³ Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 55.

¹³⁴ Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 56.

¹³⁵ McIntosh J, 'Child inclusive divorce mediation: Report on a qualitative research study' 55.

¹³⁶ Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child-inclusive mediation' 23 (1) *International Journal of Law, Policy and the Family* 2, 2013, 117.

¹³⁷ Felicity Bell, J Cashmore, P Parkinson, and J Single, 'Outcomes of child-inclusive mediation' 23 (1) *International Journal of Law, Policy and the Family* (2013) 117.

¹³⁸ Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child-inclusive mediation', 117.

¹³⁹ McIntosh J, Long C, Moloney L, 'Child-focused and Child inclusive mediation: A comparative study of outcomes' 10(1) *Journal of Family Studies* 2, 2004, 88.

McIntosh identifies key elements of child inclusive mediation. These include consulting with children in a developmentally appropriate manner about their experiences of family separation and disputes.¹⁴⁰ The process ensures that children are not burdened with decision-making responsibilities while also helping validate their feelings and providing them with essential information to support their coping mechanisms.¹⁴¹ Another crucial element is the therapeutic feedback loop, where parents are encouraged to comprehend and reflect on their child's experiences. Additionally, the mediation or litigation process and any resulting agreements must fundamentally address the psycho-developmental needs of the child.¹⁴²

As part of a pilot study, McIntosh trained mediators to compare two approaches: child inclusive mediation and child focused mediation. In child focused mediation, children are not directly involved, and their voices are not heard.¹⁴³ However, the mediator fosters shared parental attunement and sometimes advocates for the child's interests.¹⁴⁴ The comparison aimed to examine the effectiveness of these approaches in resolving parental disputes while prioritizing children's well-being. The evaluation, conducted at one-year and four-year follow-ups revealed that child inclusive mediation offered significantly greater benefits for both parents and children compared to child focused mediation.¹⁴⁵ Parents who participated in child inclusive mediation both mothers and fathers reported higher satisfaction with their children's living and contact arrangements one year after mediation.¹⁴⁶ Furthermore, children in this group experienced greater stability and were reportedly more content with their arrangements.¹⁴⁷ They were also less likely to express a desire for a different arrangement compared to the child focused mediation group. These findings underscore the importance of ensuring children's voices are actively considered in the family

¹⁴⁰McIntosh J, 'Child inclusive divorce mediation: Report on a qualitative research study' 58.

¹⁴¹Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 58.

¹⁴²Hart A "Child Inclusive Mediation in Cases of Domestic Violence in Australia" *Conflict Resolution Quarterly*, 2009, 3-19.

¹⁴³ McIntosh J, Long C, Moloney L, 'Child-focused and Child inclusive mediation: A comparative study of outcomes' 88.

¹⁴⁴ McIntosh J, Long C, Moloney L, 'Child-focused and Child inclusive mediation: A comparative study of outcomes' 88.

¹⁴⁵ McIntosh J, Long C, Moloney L, 'Child-focused and Child inclusive mediation: A comparative study of outcomes' 10(1) *Journal of Family Studies* 2, 2004, 89.

¹⁴⁶ McIntosh J, Long C, Moloney L, 'Child-focused and Child inclusive mediation: A comparative study of outcomes' 88.

¹⁴⁷McIntosh J, Long C, Moloney L, 'Child-focused and Child inclusive mediation: A comparative study of outcomes' 10(1) *Journal of Family Studies* 2, 2004, 89.

mediation process, ultimately leading to better long-term outcomes for both children and their parents.¹⁴⁸

The question of whether children should participate in family dispute resolution remains a contentious issue among professionals, including judges, lawyers, mediators, and child advocates.¹⁴⁹ Opponents argue that involving children places them at the center of parental conflicts, pressures them to take sides and exposes them to unnecessary stress.¹⁵⁰ On the other hand, supporters emphasize the importance of giving children a voice recognizing their right to participate and acknowledging the benefits of their perspectives being heard.¹⁵¹ While both viewpoints raise valid concerns, this study argues that the benefits of including children ultimately outweigh any potential disadvantages.

Child inclusive practice focuses on “finding the child’s voice in the presence of the child.” While there is no single universal definition of CIP, the United Kingdom Voice of the Child Dispute Resolution Advisory Group provides a useful one.¹⁵² According to the group, CIP gives children and young people an opportunity to engage in a conversation whether verbal, written, through play or storytelling with professionals assisting their parents in making arrangements for their future.¹⁵³ Children who consent to participate can share their experiences of parental separation, express concerns, and have their perspectives thoughtfully considered.¹⁵⁴ This approach ensures that children’s developmental needs and worries are better understood and incorporated into the dispute resolution process.¹⁵⁵

¹⁴⁸ McIntosh J, Long C, Moloney L, ‘Child-focused and Child inclusive mediation: A comparative study of outcomes’ 10(1) *Journal of Family Studies* 2, 2004, 89.

¹⁴⁹ Hadeel A, ‘Will somebody please think of the children?!child focused and child inclusive models in family dispute resolution’ Research gate, 2018, 5.

¹⁵⁰ Hadeel A, ‘Will somebody please think of the children?!child focused and child inclusive models in family dispute resolution’ Research gate, 2018, 5.

¹⁵¹ Hadeel A, ‘Will somebody please think of the children?!child focused and child inclusive models in family dispute resolution’ Research gate, 2018, 5.

¹⁵² Hadeel A, ‘Will somebody please think of the children?!child focused and child inclusive models in family dispute resolution’ Research gate, 2018, 5.

¹⁵³ Voice of the Child Dispute Resolution Advisory Group, Final Report of the Voice of the Child Dispute Resolution Advisory Group (2015), p 6.

¹⁵⁴ Voice of the Child Dispute Resolution Advisory Group, Final Report of the Voice of the Child Dispute Resolution Advisory Group (2015), p 6.

¹⁵⁵ Voice of the Child Dispute Resolution Advisory Group, Final Report of the Voice of the Child Dispute Resolution Advisory Group (2015), p 6.

Unlike traditional mediation, CIP does not require children to face their parents in mediation sessions. Instead, they participate in a separate, secure environment, facilitated by a skilled child consultant trained in working with children.¹⁵⁶ The consultant conducts a private interview, and the children are not pressured to choose or express a specific outcome.¹⁵⁷ This ensures that the process remains supportive and child-centered, rather than creating additional stress. Involving children directly prevents parents from making assumptions or engaging in disputes about their children's needs.¹⁵⁸ Through this process, parents receive direct insights into their children's perspectives. In Australia, mediators do not typically conduct these child interviews themselves.¹⁵⁹ Instead, a child consultant meets with the child and later provides feedback to the mediator, who then relays the information to the parents. This approach ensures that trained professionals with expertise in working with children and adolescents handle the child's involvement.¹⁶⁰

In most cases, CIP mediation can only proceed if both parents consent to their child's participation.¹⁶¹ This requirement is controversial, as it makes a child's ability to express their views dependent on parental approval. Some parents may withhold consent for reasons that are not necessarily in the child's best interests.¹⁶² A small scale Australian study examined two groups of separating parents who participated in family dispute resolution at a Family Relationship Centre.¹⁶³ Among the 33 parents offered CIP mediation, only four declined, believing that involving their children was unnecessary.¹⁶⁴ These findings highlight the complexity of parental consent in CIP and the potential barriers to ensuring that children's voices are heard and considered in family dispute resolution.¹⁶⁵

¹⁵⁶Fisher L, Mieke B, *Mediating with Families*, 3ed, Lawbook Co, 97.

¹⁵⁷ Fisher L, Mieke B, *Mediating with Families*, 3ed, Lawbook Co, 97.

¹⁵⁸ Fisher L, Mieke B, *Mediating with Families*, 3ed, Lawbook Co, 97.

¹⁵⁹ Parkinson P and Cashmore J, "The Voice of a Child in Family Law Disputes" Oxford University Press, 2008 45.

¹⁶⁰ Parkinson P and Cashmore J, "The Voice of a Child in Family Law Disputes" Oxford University Press, 2008 45.

¹⁶¹Hadeel A, 'Will somebody please think of the children?!child focused and child inclusive models in family dispute resolution' Research gate, 2018, 15.

¹⁶²Hadeel A, 'Will somebody please think of the children?!child focused and child inclusive models in family dispute resolution' Research gate, 2018, 15.

¹⁶³Felicity B, "Choosing Child-Inclusive Mediation" 23 Australasian Dispute Resolution Journal 25, 2012, 20.

¹⁶⁴Felicity B, "Choosing Child-Inclusive Mediation" 23 Australasian Dispute Resolution Journal 25, 2012, 20.

¹⁶⁵ Felicity B, "Choosing Child-Inclusive Mediation" 23 Australasian Dispute Resolution Journal 25, 2012, 21.

3.3 The Process of Child Inclusive Mediation

Child inclusive mediation is a collaborative process that involves a child consultant (a specialist in children matters), a mediator, the parents and the children.¹⁶⁶ This structured approach ensures that children's perspectives are considered in a way that prioritizes their well-being.¹⁶⁷ The process unfolds in four key stages, each designed to support both parents and children through the mediation process.

The first stage focuses on helping parents prioritize their children's needs.¹⁶⁸ During the initial session, the mediator encourages parents to reflect on how their decisions may impact their children. This stage aims to create awareness about the child's emotional and psychological needs.¹⁶⁹ If both parents and mediator agree that consulting the children would be beneficial, parents may be encouraged to discuss this option with their children before proceeding further.¹⁷⁰

The second stage involves direct consultation with the children, usually during the first or second session. Before this can take place, both parents must provide consent and at least one child must be of school going age.¹⁷¹ Unlike traditional mediation, the goal is not to determine the child's "wishes." Instead, it focuses on exploring their experiences, emotions, and perspectives regarding their current living arrangements, their thoughts on parental conflict, and their hopes for the future.¹⁷² To help children express themselves, the child consultant may use drawings, play, writing, or guided discussions.¹⁷³ During this process, the child is also given the opportunity to identify any concerns or questions they want conveyed to their parents.¹⁷⁴

The third stage involves communicating the child's perspectives to the parents. At this point, the child consultant meets with the mediator and the parents to provide feedback from the children's

¹⁶⁶Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 59.

¹⁶⁷Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 59.

¹⁶⁸ Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 60.

¹⁶⁹ Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 18(1) *Mediation Quarterly* (2002) 55.

¹⁷⁰ McIntosh J, Long C and Lawrie M, 'Child-focused and child inclusive mediation: A comparative study of outcomes' 10(1) *Journal of Family Studies* 2, 2004, 88.

¹⁷¹ Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child inclusive mediation' 27(1) *International Journal of Law, Policy and the Family* (2013) 117.

¹⁷² McIntosh, 'Child inclusive divorce mediation' 57.

¹⁷³Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child inclusive mediation' 117.

¹⁷⁴ McIntosh and others, 'Child-focused and child inclusive mediation' 88.

session.¹⁷⁵ This includes a general assessment of how the separation is affecting the children, as well as any specific concerns or messages the child has requested to be conveyed.¹⁷⁶ Additionally, the child consultant plays a key role in helping parents understand their child's experiences and supporting them in creating a more stable and emotionally secure environment.¹⁷⁷ This stage provides parents with a valuable opportunity to reflect on their conflict from the child's perspective and adjust their approach accordingly.¹⁷⁸

The final stage focuses on integrating the child's views and needs into the negotiation process. In some cases, the child consultant may step back, allowing the mediator and parents to continue their discussions while keeping the child's perspectives in mind.¹⁷⁹ Alternatively, the consultant may remain involved to advocate for the child's best interests.¹⁸⁰ Once the parents reach an agreement, the resulting parenting plan should clearly outline the child's needs and specify how the parents have agreed to address them. This ensures that the child's well-being remains central to the final decisions in the mediation process.¹⁸¹

3.4 Advantages of Child Inclusive Mediation

Child inclusive mediation offers a structured platform for addressing children's needs in a formal rather than informal manner.¹⁸² This approach empowers children, giving them a greater sense of control over their lives and helping to reduce anxiety.¹⁸³ Additionally, it fosters the development of communication and negotiation skills, particularly among adolescents, strengthening their interactions with the family.¹⁸⁴

¹⁷⁵ Brianna Nelson, 'Divorce mediation and its impact on children' Unpublished Master's Degree of Social Work clinical research paper, St Catherine University, 2013, 13.

¹⁷⁶ McIntosh, 'Child inclusive divorce mediation' 58.

¹⁷⁷ McIntosh, 'Child inclusive divorce mediation' 58.

¹⁷⁸ McIntosh, 'Child inclusive divorce mediation' 58.

¹⁷⁹ McIntosh, 'Child inclusive divorce mediation' 58.

¹⁸⁰ McIntosh, 'Child inclusive divorce mediation' 59.

¹⁸¹ McIntosh and others, 'Child-focused and child-inclusive mediation' 88.

¹⁸² Ministry of Attorney General (Family Justice Services Division), The involvement of children in divorce and custody mediation: A literature review, March 2003, 7.

¹⁸³ Woolford and Ratner, Informal reckonings: Conflict resolution in mediation, restorative justice, and reparations, 6.

¹⁸⁴ Pali B, Voet S, "Family mediation in international family conflicts: The European context"38.

Second, involving children in family mediation helps strengthen their coping skills by allowing them to gain a better understanding of their parents' experiences.¹⁸⁵ This, in turn, facilitates a smoother adjustment to post-divorce arrangements.¹⁸⁶

Thirdly, including children in the mediation process creates an opportunity for them to be referred to a therapist when necessary, providing a therapeutic outlet to express their emotions and enhancing their emotional well-being after parental separation.¹⁸⁷

Fourth, involving children in mediation can enhance child-parent communication, which often deteriorates during and after divorce. When children participate in their parents' mediation, they gain a clearer understanding that their parents' primary motivation is love and concern for their well-being.¹⁸⁸ This fosters open communication between children and their parents. Additionally, addressing children's needs early in the mediation process can help reduce both the intensity and duration of parental conflict.¹⁸⁹ By prioritizing the child's perspective, parents may develop better communication strategies. This process also helps parents gain deeper insight into their children's emotions and confirms whether their understanding of their children's needs aligns with reality.¹⁹⁰

Moreover, children just want to be acknowledged in decisions that directly affect their lives.¹⁹¹ They want recognition that their experiences and feelings matter, particularly when facing significant changes such as relocating from their family home.¹⁹² In a research carried out by Cashmore and Parkinson many children expressed that being informed and having a say made them feel more in control, rather than feeling powerless under their parents' decisions.¹⁹³ They

¹⁸⁵ Botha J, 'The voice of children in divorce proceedings' 14.

¹⁸⁶ Botha J, 'The voice of children in divorce proceedings' 14.

¹⁸⁷ Mariska Botha, 'The voice of children in divorce proceedings: A critical consideration of the provisions in the Mediation in Certain Divorce Matters Act 24 of 1987 and the role of Family Advocate in divorce proceedings. Is it not time for an overhaul of this Act?' Unpublished Master's Degree in Family Law mini-dissertation, University of KwaZulu-Natal, 2021, 14. See also Bell and others, 'Outcomes of child-inclusive mediation' 137.

¹⁸⁸ Ministry of Attorney General, 'The involvement of children in divorce and custody mediation', 7.

¹⁸⁹ Pali B, Voet S, "Family mediation in international family conflicts: The European context" 38.

¹⁹⁰ Pali B, Voet S, "Family mediation in international family conflicts: The European context" 38.

¹⁹¹ Cashmore J, Parkinson P, 'Children and parents' perceptions on children's participation in decision making after Parental separation and divorce' 1 Family Court Review 1, 2008, 7.

¹⁹² Cashmore J, Parkinson P, 'Children and parents' perceptions on children's participation in decision making after Parental separation and divorce' 7.

¹⁹³ Cashmore J, Parkinson P, 'Children and parents' perceptions on children's participation in decision making after Parental separation and divorce' 8.

believed that understanding the situation and having some influence over the outcome would help them cope better and feel more secure.¹⁹⁴

3.5 Disadvantages of Child Inclusive Mediation

The first issue is loyalty conflicts, where parents compete for their child's attention. This can expose children to ongoing tension and negative interactions between parents.¹⁹⁵ As a result, children may hesitate to express their true feelings out of fear that their honesty could upset one parent, further intensifying the conflict.¹⁹⁶

Secondly, a child's opinion may be used as a strategic tool by one or both parents disrupting the decision-making process.¹⁹⁷ For instance, a parent might claim that the child is experiencing trauma during mediation to gain an advantage over the other parent.¹⁹⁸ This often occurs because children openly express their emotions and mediators may lack the necessary skills or willingness to address them properly.¹⁹⁹ Additionally, if a child is asked to share their views but later realizes their opinion did not influence the final decision, they may experience disappointment, frustration, or emotional distress.²⁰⁰

Another issue is the high conflict levels associated with divorce, which can negatively impact children. Such conflicts may weaken parent-child relationships and pressure children to mature too quickly, affecting their emotional adjustment and resilience.²⁰¹ Overburdening children with decision-making authority, rather than guiding them in coping strategies, may place undue pressure on them. Expecting children to make well-informed judgments about their best interests during a crisis is quite challenging.²⁰² However, the argument that child inclusive mediation is not in a child's best interest is weakened by the fact that child inclusive mediation is about giving

¹⁹⁴ Cashmore J, Parkinson P, 'Children and parents 'perceptions on children's participation in decision making after Parental separation and divorce' 7.

¹⁹⁵ Ministry of Attorney General, "The involvement of children in divorce and custody mediation", 8.

¹⁹⁶ Ministry of Attorney General, "The involvement of children in divorce and custody mediation", 8.

¹⁹⁷ Cashmore J, Parkinson P, 'Children and parents 'perceptions on children's participation in decision making after Parental separation and divorce' 7.

¹⁹⁸ Ministry of Attorney General, "The involvement of children in divorce and custody mediation", 8.

¹⁹⁹ Ministry of Attorney General, "The involvement of children in divorce and custody mediation", 8.

²⁰⁰ Ministry of Attorney General, "The involvement of children in divorce and custody mediation", 8.

²⁰¹ Siun Kearney, 'The voice of the child in mediation' 2(1) Journal of Mediation and Applied Conflict Analysis 2, 2014, 154.

²⁰² Pali B, Voet S, "Family mediation in international family conflicts: The European context" 35.

children a voice, not a choice, ensuring that they are heard without making them responsible for the final decision. Additionally, including children's perspectives can help parents understand their needs, ultimately leading to more informed and child-centered outcomes.²⁰³

A further concern is the uncertainty about the appropriate age for child participation in mediation. Generally, only children capable of forming informed opinions should be included. Some scholars suggest seven years as the minimum age, as younger children typically follow their parents' decisions without needing to be involved.²⁰⁴ However, adolescents are widely recognized as capable of expressing independent thoughts due to their cognitive development.²⁰⁵ Setting a rigid age limit, however, risks overlooking other ways in which younger children communicate, such as through silence, drawings, or emotions.²⁰⁶

Another major challenge is the parents' unwillingness to accept and respect their children's views. Children's direct involvement in mediation is only feasible when parents show genuine willingness to consider their interests.²⁰⁷ Successful child inclusive mediation requires parents to acknowledge their children's needs as separate from their own.²⁰⁸ Additionally, in cases where a child has experienced abuse, this approach is unsuitable, as existing fear may prevent them speaking freely.²⁰⁹

Parkinson and Cashmore highlight the dangers of involving children in disputes, as parents may manipulate them to serve their own interests. This can distort the child's true voice, especially when their opinions carry significant weight in decision making. Therefore, practitioners must carefully distinguish between a child's genuine views and those influenced by parental pressure. Despite these challenges, they should not be used as reasons to exclude children from expressing

²⁰³Pali B, Voet S, "Family mediation in international family conflicts: The European context" 35.

²⁰⁴Jay F, Ann M, Peter S, "Divorce and family mediation: Models, techniques, and applications", Guilford Press, 2004, 160.

²⁰⁵Allan W, "Divorce mediation: Today's rational alternative to litigation" 51(1) Dispute Resolution Journal 2. 1995, 40.

²⁰⁶Madelene D, "Child focused mediation" Child law in South Africa, 2009, 112, 125.

²⁰⁷McIntosh and others, 'Child-focused and child inclusive mediation' 89.

²⁰⁸Robert E Emery, Renegotiating family relationships divorce, child custody, and mediation, Guilford Press, New York, 2012, 139.

²⁰⁹Pali B, Voet S, "Family mediation in international family conflicts: The European context" 36.

their views and mediators should create a supportive environment that encourages meaningful child participation while addressing the barriers that hinder their involvement.

3.6 The Best Interests of the Child: Key Principles and Considerations

The ‘best interest of the child’ principle is a key concept in global child rights protection, primarily applied in family-related disputes such as custody, guardianship, maintenance and adoption.²¹⁰ It emphasizes prioritizing children’s political, economic and social well-being when shaping policies, enacting laws or making decisions that impact them.²¹¹ This principle is also a cornerstone of the 1989 UN Convention on the Rights of the Child and the 1990 African Charter on the Rights and Welfare of the Child.²¹² The prevailing approach considers both the child’s rights and the overall welfare in determining what serves their interests.²¹³ For instance, the African Child Policy Forum views the best interest of the child as encompassing all child rights and factors contributing to their moral, mental, physical and material well-being.²¹⁴ Similarly, the UNHCR guidelines define it as a broad framework for assessing a child’s overall well-being, while Yvonne Dausab describes it as prioritizing the child before making decisions that affect their life.²¹⁵

Originally, the doctrine of the best interest of the child had a narrow focus, primarily guiding decisions in divorce and custody cases.²¹⁶ However, it has since expanded to cover “all actions concerning children” as outlined in the UNCRC.²¹⁷ Despite its limited jurisprudential origins, the principle is now embedded in many national legal systems and resonates across various cultural, religious and traditional frameworks.²¹⁸ However, interpretations differ significantly depending on

²¹⁰ Philip Alston, ‘The best interest principle: towards a reconciliation of culture and human rights, reconciling culture and human rights’ 8(1) *International Journal of Law, Policy and the Family*, 2004, 4.

²¹¹ Degol A, Dinku S, ‘Notes on the principle “best interest of the child” meaning, history and its place under Ethiopian law’ 1 *Mizan law review* 2, 2011, 10.

²¹² John E, ‘The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children’ 23(1) *International Journal of Children's Rights*, 2015, 3.

²¹³ John E, ‘The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children’ 3.

²¹⁴ John E ‘The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children’ 5.

²¹⁵ Philip A, ‘The best interest principle: towards a reconciliation of culture and Human Rights, reconciling culture and Human Rights,’ 1 *International Journal of Law, Policy and the Family* 8, 1994, 4.

²¹⁶ Philip A, ‘The best interest principle: towards a reconciliation of culture and Human Rights, reconciling culture and Human Rights,’ 4.

²¹⁷ Degol A, Dinku S, ‘Notes on the principle “best interest of the child” meaning, history and its place under Ethiopian law’ 1 *Mizan law review* 2, 2011, 3.

²¹⁸ Degol A, Dinku S, ‘Notes on the principle “best interest of the child” meaning, history and its place under Ethiopian law’ 3.

the context.²¹⁹ Today, the best interest standard, designed to be gender-neutral is widely accepted in both common law and civil law systems.²²⁰

Despite the recognition, defining the best interests of the child remains a complex challenge. The concept is shaped by varying values and social norms across different societies, leading to diverse interpretations.²²¹ To address this challenge, some scholars suggest defining the best interest standard in relation to the broader rights of the child.²²² This approach is grounded on the idea that children's rights are inherently part of the best interest principle, guiding its implementation while ensuring that the child's well-being remains a priority.²²³

3.7 The Courts Interpretation of the Best Interests Principle

The principle of the best interest of the child is widely recognized and applied both internationally and nationally, with courts generally using similar criteria to interpret its meaning. The European Court of Human Rights has emphasized that a child's right to express their views and preferences is a crucial factor in assessing their best interests.²²⁴ In *Hendricks v The Netherlands*, the Human Rights Committee examined a father's post-divorce access rights under the International Covenant on Civil and Political Rights, affirming that in conflicts between parental rights and the child's best interests, the latter should take precedence.²²⁵ A similar position was upheld in *Santacana v Spain*, where the Committee reinforced the principle's gender-neutral nature and stressed the importance of considering a child's views, particularly for those aged 12 and older.²²⁶

²¹⁹ Degol A, Dinku S, "Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law" 3.

²²⁰ Degol A, Dinku S, 'Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law' 1 Mizan law review 2, 2011, 5.

²²¹ Degol A, Dinku S, "Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law" 1 Mizan law review 2, 2011, 5.

²²² Degol A, Dinku S, "Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law" 4.

²²³ Degol A, Dinku S, 'Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law' 7.

²²⁴ *Bronda v Italy*, Judgment 9 June 1998, European Court of Human Rights, para. 33, 60, 61.

²²⁵ *Hendricks v The Netherlands*, Judgment of 29 July 1988, Human Rights Committee, para. 9.3.

²²⁶ *Balaguer Santacana v Spain*, Judgment of 9 July 1990, Human Rights Committee, para. 8.4.

Justice Kimaru noted that defining the best interest principle is complex as its interpretation depends on the specific circumstances of each case.²²⁷ However, he identified universal factors that contribute to the standard, including the child's right to education, a supportive living environment and parental guidance.²²⁸ Courts, acknowledge that the application of the best interest standard varies in each case, as every child has unique needs.²²⁹ Factors such as individual circumstances, immediate needs, age, gender, disability and maturity level must all be carefully considered.²³⁰ The role of the judge in this case is not to determine an ideal situation but rather to find the best possible option given the circumstances. In some cases, this may mean selecting the lesser of the two unfavorable outcomes based on the surrounding factors.²³¹ Thus, referencing children's rights serves as a crucial benchmark for defining the best interest principle within a rights based framework.²³²

3.8 How Does Failure to Involve Children Violate the Best Interest Principle?

The ratification of the CRC places an obligation on countries to prioritize the best interest of the child when making decisions that affect individual children.²³³ However, the interpretation and application of the best interest principle, as outlined in Article 3 of the CRC, remain complex and ambiguous. The principle allows for broad discretion, leading to varying interpretations across different legal systems. This raises an important question about how governments have integrated the principle into their legislation whether by defining its substantive content or by providing procedural guidelines for its implementation.²³⁴ Decision makers must consider multiple factors

²²⁷ M A v R O O, Judgment of 27 June 2013, High Court of Kenya, eKLR.

²²⁸ M A v R O O, Judgment of 27 June 2013, High Court of Kenya, eKLR.

²²⁹ Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development, Judgment of 1 April 2009, Constitutional Court of South Africa.

²³⁰ Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development, Judgment of 1 April 2009, Constitutional Court of South Africa.

²³¹ Degol A, Dinku S, 'Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law' 1 Mizan law review 2, 2011, 15.

²³² Degol A, Dinku S, 'Notes on the principle "best interest of the child" meaning, history and its place under Ethiopian law' 15.

²³³ Gilbert N, Parton N and Skivenes, M, 'Child protection systems: International trends and orientations' 1 New York: Oxford University Press 2, 2011, 50.

²³⁴ Eriken A, 'The child's best interest principle across child protection jurisdictions' in Hansen E (eds) Human rights in child protection implications for professional practice and policy, Springer nature, Switzerland, 2018, 74.

when determining a child's best interests, including attachment, education, brain development as well as the cultural and normative values that contribute to a meaningful life.²³⁵

Despite these considerations, determining what is truly in the best interest of a child is often uncertain and requires an individualized evaluation of available options.²³⁶ These decisions also involve complex assessments and predictions about potential future consequences, further complicating the process.²³⁷ While the best interest principle remains the cornerstone of child related decision making, its broad and flexible nature provides little concrete guidance for decision makers. Nonetheless, it continues to be the guiding framework for decisions that significantly impact both children and their families.²³⁸

In Kenya, section 8 of the Children's Act emphasizes that in all decisions and actions concerning children, the child's best interest must be the foremost priority.²³⁹ This includes ensuring that the child's rights and welfare are safeguarded by both public and private institutions, judicial and administrative bodies, as well as persons acting on their behalf.²⁴⁰ The section mandates that the best interest of the child incorporate various considerations outlined in the first schedule of the act such as the child's age, maturity, stage of development, special needs, the stability of the current living arrangements and the nature of their relationship with parents or guardians.²⁴¹ Additionally, factors like the child's adjustment to their home, school and community, as well as the capacity of each parent to provide love, guidance and encourage contact with the other parent, are crucial.²⁴² These considerations ensure that any action taken protects and promotes the child's overall welfare.

²³⁵ Skivenes M and Pösö T (2017). 'Best interest of the child' SAGE Publications, 2017, 45.

²³⁶ Eriken A, 'The child's best interest principle across child protection jurisdictions' in Hansen E (eds) Human rights in child protection implications for professional practice and policy, Springer nature, Switzerland, 2018, 74.

²³⁷ Eriken A, 'The child's best interest principle across child protection jurisdictions' in Hansen E (eds) Human rights in child protection implications for professional practice and policy, Springer nature, Switzerland, 2018, 74.

²³⁸ Breen C, 'The standard of the best interests of the child: A western tradition in international and comparative law', The Hague: Kluwer, 2002, 32.

²³⁹ Section 8(1), *Children's Act* (Act No. 146 of 2022).

²⁴⁰ Section 8(2), *Children's Act* (Act No. 146 of 2022).

²⁴¹ First schedule, *Children's Act* (Act No. 146 of 2022).

²⁴² First schedule, *Children's Act* (Act No. 146 of 2022).

A key component of this section is the component of this provision is that the child must be given an opportunity to express their opinion in any matter that affects them, with that opinion being taken into account appropriately based on the child's age and maturity.²⁴³ When a child is not provided with the chance to express their views, it constitutes a breach of the best interests principle. This breach occurs because the child's unique perspectives essential for making informed decisions regarding their welfare is ignored, resulting in decisions made without a full understanding of the child's needs and preferences. Such oversights not only diminish the child's ability to enjoy their rights fully, but also undermine the holistic development that these constitutional protections aim to secure, thereby compromising the very purpose of these legal standards.

3.8.1 Breaches of the Best Interest Principle When a Child is not Heard

The best interest principle requires that all decisions concerning the children prioritize their welfare. The First Schedule outlines key considerations that must be taken into account to ensure that a child's physical, emotional, and psychological well-being. However, when a child is not given the opportunity to express their views, many of these factors risk being misjudged or overlooked, leading to decisions that may not fully align with their needs. Excluding children from mediation can result in custody and maintenance arrangements that disregard their unique circumstances, relationships and preferences, ultimately compromising their best interests.

One major breach occurs when a child's age, maturity and stage of development are not properly considered.²⁴⁴ Decision makers may assume that all children of a certain age have similar needs and levels of understanding, failing to recognize the individual maturity of each child. For instance, a highly articulate and emotionally aware child may have clear preferences about their living arrangements, but if they are not consulted, decisions may be made based on general assumptions rather than their actual needs. This can lead to frustration and emotional distress, as children may feel that their perspectives are ignored in matters that significantly affect their lives.

²⁴³ Section 8(3), Children's Act (Act No. 146 of 2022).

²⁴⁴ First schedule, Children's Act (Act No. 146 of 2022).

Another significant concern is the failure to consider special needs arising from chronic illnesses or disabilities.²⁴⁵ Children with special needs may require specific healthcare, emotional support or structured environments that are best understood from their own experiences. It seems relevant to assume that their parents would be well aware of their needs but they may miss some particulars that only the child is aware of. If they are not consulted, decision-makers might overlook critical aspects of their daily routine or medical care, placing them in environments that do not meet their needs. For example, a child with autism who thrives in a predictable, structured setting might struggle in a custody arrangement that frequently changes without regard for their need for consistency.

The child's relationship with parents, guardians or other key individuals is another essential factor that may be compromised when they are not heard.²⁴⁶ A child's emotional bond with a parent, sibling or extended family member can be crucial to their well-being, yet without their input, a custody arrangement might unintentionally sever or weaken these important relationships. For instance, if a child has a particularly strong attachment to one parent but is assumed to be equally close to both, the resulting decision may cause emotional distress by limiting their time with the parent they feel safest with.

Failing to consider the child's preference, if they are mature enough to express one, is a direct breach of their best interests.²⁴⁷ Children who are old enough to articulate their wishes should have their views taken into account, even if they are not the sole deciding factor. If a child prefers a specific living arrangement or expresses a desired continued contact with both parents, disregarding their input can lead to distress and resistance to the imposed arrangements. The aim is not to put the child in a position where they have to a decision but the goal is to give them a chance to be heard.

A child's stability and continuity in living arrangements is another key consideration that may be disregarded when they are excluded from the mediation process.²⁴⁸ Stability is crucial for a child's emotional and psychological development. If a child is forced to change schools, relocate to a new

²⁴⁵ First schedule, Children's Act (Act No. 146 of 2022).

²⁴⁶ First schedule, Children's Act (Act No. 146 of 2022).

²⁴⁷ First schedule, Children's Act (Act No. 146 of 2022).

²⁴⁸ First schedule, Children's Act (Act No. 146 of 2022).

home or adjust to a completely new environment without their concerns being considered, it can disrupt their sense of security. For example, if a child is well adjusted to their school and neighborhood but is suddenly moved without their input, they may experience anxiety, social difficulties and academic struggles.

Another factor is the capacity of each parent to foster and encourage a positive relationship between the child and the other parent.²⁴⁹ In high-conflict custody disputes, one parent may attempt to alienate the child from the other, creating an unhealthy dynamic that affects the child's emotional well-being. If the child is not given a chance to express their feelings, the mediator may fail to recognize cases where one parent is restricting access unfairly. Child inclusive mediation allows children to share their true experiences, helping to prevent decisions that may reinforce parental conflict rather than promote the child's best interest.

Additionally, a child's adjustment to their current home, school and community can be disrupted if they are not consulted.²⁵⁰ Major life changes, such as moving to a new home or changing schools, can have a significant impact on a child's emotional state. If a child is not given a chance to express their concerns, decision makers may assume they will adjust easily, even when the transition is distressing. Involving the child in discussions about these challenges allows for solutions that minimize disruption and provide greater emotional stability.

The existence of domestic abuse or past child abuse is another crucial consideration that may be ignored if the child is not heard.²⁵¹ If a child has witnessed or experienced abuse, their perspective is essential in assessing what living arrangement will make them feel safe. If decision makers rely only on adult testimonies, they may fail to recognize patterns of past abuse or assume that an abusive parent has reformed. Without child inclusive mediation, there is a risk that a child may be placed in a situation where they feel unsafe or emotionally distressed.

Furthermore, decisions regarding the effect of granting sole parental authority to one parent can be flawed if the child is not consulted.²⁵² In some cases, granting sole custody to one parent may

²⁴⁹ First schedule, Children's Act (Act No. 146 of 2022).

²⁵⁰ First schedule, Children's Act (Act No. 146 of 2022).

²⁵¹ First schedule, Children's Act (Act No. 146 of 2022).

²⁵² First schedule, Children's Act (Act No. 146 of 2022).

provide stability, but in others, it may create feelings of isolation or disconnection from the non-custodial parent. Without hearing from the child, it is difficult to determine how such a decision will affect their emotional and psychological well being.

3.9 How Child Inclusive Mediation Provides a Solution

Child inclusive mediation plays a crucial role in ensuring that children's perspectives are actively considered in family disputes. By incorporating children's voices into the mediation process, decision makers can gain a more accurate understanding of their needs and experiences. Often, adults make assumptions about what is best for a child without directly consulting them. However, these assumptions may not always reflect the child's true emotional, psychological and developmental needs. Child inclusive, mediation allows children to share their thoughts and concerns in a safe, structured environment, ensuring that custody and arrangements are tailored to their unique circumstances rather than being based solely on external judgments.

One of the most significant benefits of child inclusive mediation is that it promotes stability and emotional security. Children often experience significant anxiety and distress during family disputes, particularly when they are forced to move homes, change schools or adjust to new care giving arrangements. When children are excluded from the mediation process, their opinions or preferences regarding these critical aspects of their lives may be ignored, resulting in decisions that disrupt their sense of stability. Allowing children to express their views, child inclusive mediation helps ensure that living arrangements, school continuity and parental contact schedules are structured in a way that minimizes unnecessary upheaval and provides a secure and supportive environment for the child.

Additionally, child inclusive mediation serves as an important tool to safeguard children from harm. In situations where there are concerns about abuse, neglect or exposure to harmful environments, children's perspectives are essential in assessing their safety and well being. Without their input, mediators may rely solely on the accounts of parents or guardians, potentially overlooking signs of abuse or coercion. Child inclusive mediation provides children with a voice, enabling them to share any fears or discomfort they may have about their living arrangements. This ensures that decisions prioritize their protection and prevent them from being placed in situations that could compromise their physical or emotional safety.

Another key benefit of child inclusive mediation is that helps reduce parental conflict by addressing how disputes affect the child. In many custody battles, parents become deeply entrenched in their disagreements, often failing to recognize how their conflict affects their child. Mediation that includes children helps highlight these issues, as children can express their feelings about parental disagreements and how they would like their parents to cooperate. This encourages parents to prioritize their child's well being over personal grievances and work toward solutions that foster a more harmonious relationship. In turn, this reduces hostility and promotes cooperative parenting ultimately fulfilling the best interest of the child.

Furthermore, child inclusive mediation significantly enhances psychological well being by making children feel heard, respected, and involved in the decisions that shape their lives. One of the most common frustrations children experience in family disputes is the feeling of powerlessness, being affected by major life changes without having any say in them. When children are allowed to participate in mediation, they gain a sense of control over their circumstances. The empowerment helps reduce feelings of anxiety and helplessness. Moreover, when children see that views are valued and taken seriously, they are more likely to feel secure in the decisions that are made, even if the outcome is not exactly what they had hoped for. By actively listening to children and incorporating their perspectives into custody and maintenance decisions, child inclusive mediation ensures that their best interests remain central to family law proceedings.

3.10 Conclusion

Child inclusive mediation offers a balanced and structured approach to resolving family disputes while safeguarding children's best interests. By providing children with a voice rather than a decision-making burden, it ensures that their perspectives inform parental arrangements without exposing them to conflict. Despite concerns about parental influence, emotional stress and consent-related challenges, the benefits of CIM in fostering child-parent communication, emotional stability and informed decision-making outweigh its drawbacks. Legal frameworks worldwide recognize the principle of the best interests of the child, reinforcing the need to integrate children's perspectives into dispute resolution processes. Moving forward, refining mediation practices and legal guidelines can further strengthen the effectiveness of CIM in ensuring that children's welfare remains the central focus in family law proceedings.

CHAPTER FOUR: CHILD INCLUSIVE MEDIATION: A COMPARATIVE STUDY OF AUSTRALIA AND KENYA

4.1 Introduction

Child inclusive mediation has gained significant attention as a mechanism for resolving family disputes while ensuring that children's voices are considered. This chapter presents a comparative analysis of CIM practices in Australia and Kenya, exploring how each country integrates children's perspectives into mediation. While Australia has developed a structured approach, that integrates child consultants, Family Relationship Centers, legal frameworks to support child participation and is grounded in empirical research. Kenya faces challenges stemming from cultural norms, a lack of standardized guidelines and limited government support. By examining the strengths and weaknesses of each system, this chapter highlights the importance of creating a child-friendly mediation process that upholds the best interests of the child in custody and maintenance disputes.

4.2 Child Participation in Family Mediation in Australia

Over the past decade, child inclusive mediation has significantly expanded as a method of family dispute resolution across Australia.²⁵³ This approach serves multiple purposes including: ensuring that children have a voice in decisions affecting them during their parents' separation, increasing parental awareness of the impact of conflict and behavior on their children and promoting greater cooperation to resolve disputes.²⁵⁴ Australian dispute resolution practices have undergone a significant transformation, moving away from traditional models based on neutrality and empowerment toward approaches that actively address the often unspoken developmental needs of children affected by parental disputes.²⁵⁵ Guided by the UNCRC and supported by research on the effects of post-separation conflict on children, an ethical imperative has emerged for dispute

²⁵³Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child inclusive mediation' 1 *International journal of law, policy and family*, 27, 2013, 3.

²⁵⁴ McIntosh J, Wells Y, Long C, 'Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes', 2 *Journal of Family Studies* 13, 2017, 8.

²⁵⁵ Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child inclusive mediation', 3.

resolution services to go beyond merely solving legal parenting disputes.²⁵⁶ Instead, these services now also prioritize the psychological well-being and adjustment of separated families.²⁵⁷

Typically, a psychologist or other qualified professional meets separately with the child to understand their perspectives on the family situation, explore possible parenting arrangements where appropriate, and then provide feedback to the parents during a joint mediation session.²⁵⁸ Importantly, the child consultant is always separate from the mediator hence preserving the mediator's neutrality.²⁵⁹ Child inclusive mediation is conducted only with the informed consent of both parents and the child.²⁶⁰ The discussions in child inclusive mediation differs for each child and family, but the goal is not merely to determine the children's 'wishes.'²⁶¹ Instead, it aims to gain a broader understanding of their perspectives and experiences regarding their current living and visitation arrangements, the parental conflict they are exposed to, and their hopes for the future.²⁶²

4.2.1 Legislative Framework

Australia lacks specific legislation explicitly requiring that children's views and wishes be considered during family mediation. However, several federal statutes contain relevant provisions, including the Family Law Act 53 of 1975(Cth) (FLA), the Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006 and the Family Law Legislation Amendment (Family Violence and Other Measures) Act 189 of 2011.²⁶³ While section 60 CA of the Family Law Act, emphasizes that the best interests of the child should be a paramount consideration, it does not

²⁵⁶Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child inclusive mediation', 3.

²⁵⁷Bell F, Cashmore J, Parkinson P, Single J, 'Outcomes of child inclusive mediation', 4.

²⁵⁸ McIntosh J, Wells Y, Long C, 'Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes', 9.

²⁵⁹ McIntosh, J., Wells, Y. and Long, C. (2007). 'Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes', 9.

²⁶⁰ McIntosh, J., Wells, Y. and Long, C. (2007). 'Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes', 12.

²⁶¹ McIntosh, J., Wells, Y. and Long, C. (2007). 'Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes', 12.

²⁶² McIntosh, J., Wells, Y. and Long, C. (2007). 'Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes', 12.

²⁶³ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

explicitly grant children the right to have their views taken into account during mediation.²⁶⁴ However, section 10F of the FLA, defines family dispute resolution as a process facilitated by an independent consultant to assist those affected or likely to be affected.²⁶⁵ In 2003, the House of Representatives Standing Committee on Family and Community Affairs launched an inquiry into child custody arrangements following family separation, culminating in the report *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*.²⁶⁶ This report played a key role in the enactment of the Family Law Amendment (Shared Parental Responsibility) Act of 2006, which introduced two significant changes: replacing the term “child wishes” with “children’s views” in section 60CC and substituting the fixed age criterion in the Family Law Act with a more flexible standard based on a child’s maturity.²⁶⁷

In 2011, Australia enacted the Family Law Legislation Amendment (Family Violence and Other Measures) Act. Under section 60D, a family dispute resolution adviser is defined as including a consultant, counselor or family dispute resolution practitioner.²⁶⁸ This section further stipulates that such advisers are responsible for providing guidance on matters affecting children, including gathering and sharing information regarding their best interests and protection from abuse.²⁶⁹ While the Act promotes mediation as a dispute-resolution mechanism, it also acknowledges that certain cases involving family violence or abuse may be unsuitable for mediation. In such instances, families may receive a certificate under section 60 of the Family Law Act, allowing their disputes to be addressed in a family court.²⁷⁰ Although Australia does not have legislation explicitly mandating that children’s voices be heard during family mediation, the introduction of family dispute resolution consultants raised concerns about creating an appropriate environment for their work. In response, the Australian government established a network of Family

²⁶⁴Section 60CA, *Family Law Act 53 of 1975 (cth)*.

²⁶⁵Section 10F, *Family Law Act 53 of 1975 (cth)*.

²⁶⁶ Standing committee on family and community affairs every picture tells a story. Report on the inquiry into child custody arrangements in the event of family separation (parliament of the commonwealth of Australia Canberra 2003).

²⁶⁷ Section 60CC, *Family Law Act 53 of 1975 (cth)*.

²⁶⁸ Section 60D, *Family Law Amendment (family violence and other measures) Act*.

²⁶⁹ Section 60D, *Family Law Amendment (family violence and other measures) Act*.

²⁷⁰Section 60, *Family Law Act 53 of 1975 (cth)*.

Relationship Centers (FRCs) to support these professionals in effectively assisting children and families.²⁷¹

Australia's federal Government introduced FRCs as a part of a broader reform to improve the family law system. Following that the 2003 Parliamentary report *Every Picture Tells a Story*, which called for significant changes in family law, the government sought an alternative to increasing judicial complexity while addressing family breakdowns more effectively.²⁷² A key government-sponsored report emphasized the need for an integrated family law system that moved away from a court-centric approach and recognized three distinct pathways: self-help, supported resolution and litigation (Family Law Pathways Advisory Group, 2001, p. ES2).²⁷³ However, a later parliamentary report, the Family and Community Affairs Committee report, found that slow adoption of self-help and supported pathways was due to Australia's legal system remaining heavily focused on legal rights and litigation.²⁷⁴

In July 2004, a framework statement on reforms to the family law system outlined key initiatives, including establishing a network of FRCs, expanding mediation and counseling services, and reviewing child support calculations.²⁷⁵ A major shift in family law followed, with greater emphasis on shared parenting and the introduction of compulsory dispute resolution before custody matters be filed in court. These reforms positioned FRCs as a central mechanism for resolving family disputes outside the traditional court system, fostering a more cooperative and child focused approach.²⁷⁶

Family Relationship Centers have played a crucial role in supporting children during parents' divorce. Before facilitating parental mediation, family dispute resolution consultants at FRCs

²⁷¹ Henry P, Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles" *The international journal of children's rights* 1, 2012, 23.

²⁷² Pidgeon S, 'From policy to implementation- how family relationship centers became a reality' *1 Family court review* 1, 2013, 250.

²⁷³ Moloney L, 'From helping court to community based services: the 30-year evolution of Australia's family relationship centers.' *1 Family court review* 1, 2013, 200.

²⁷⁴ Moloney L, 'From helping court to community based services: the 30-year evolution of Australia's family relationship centers.' *1 Family court review* 1, 2013, 200.

²⁷⁵ Pidgeon S, 'From policy to implementation- how family relationship centers became a reality' *1 Family court review* 1, 2013, 250.

²⁷⁶ Pidgeon S, 'From policy to implementation- how family relationship centers became a reality', 250.

engage therapeutically with children who can express their views soliciting and recording their feelings and perspectives.²⁷⁷ These records serve as valuable tools in helping divorcing parents reflect on their children's needs. During mediation, this information is used to shift focus from marital conflicts to prioritizing the best interests of the children. This approach can have long term benefits by encouraging parents to consider their children's wellbeing over disputes with their spouses.²⁷⁸ FRCs utilize both child focused and child inclusive approaches to help parents properly consider their children's wishes.²⁷⁹ The child focused approach is typically used for very young children and relies primarily on observation by trained child consultants, sometimes supplemented by interviews with parents to gather additional insights.²⁸⁰ For older children, consultants employ child inclusive mediation, engaging them in conversations to understand their feelings and perspectives.²⁸¹ The approach involves trained child consultants holding structured, developmentally appropriate conversations with children in a safe environment. To facilitate these discussions, consultants use physical aids such as picture cards depicting bear families or separation story stems, helping children express themselves more effectively.²⁸²

The child inclusive and child focused approaches applied by the FRCs serve a broader purpose beyond merely recording children's wishes and feelings. The information gathered is used to educate parents and screen children for potential domestic violence aided by the Family Law Detection of Overall Risk Screen (DOORS).²⁸³ The DOORS framework is a three-part risk assessment tool designed to help family law professionals identify and respond to safety and well-being risks after separation.²⁸⁴ It applies to parents with ongoing caregiving roles and includes a version for non-parents in the family law system. Recognizing that risks evolve over time, DOORS

²⁷⁷Henry P, Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles" 23.

²⁷⁸ Madigan, Plamondon and Jenkins 2017 *Journal of Marriage and Family* 450.

²⁷⁹ Henry P, Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles" 23.

²⁸⁰ Henry P, Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles"25.

²⁸¹ Henry P, Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles"25.

²⁸²Henry P, Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles"26.

²⁸³ Fehlberg R, Smyth B, Maclean M, "Legislating for shared time parenting after separation: a research review"2 *International journal of law* 1, 2011, 38.

²⁸⁴ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', *The family law DOORS*, 2011, 70.

follows a three-step process: self-reporting screening, professional follow-up, and ongoing monitoring to ensure early detection and intervention.²⁸⁵

The framework consists of three components: DOOR 1 is a Parent self-report Form covering ten risk areas, such as parental well-being, conflict and child safety. It can be completed digitally, on paper or through an interview for complex cases.²⁸⁶ DOOR 2, the practitioner Aide Memoire, identifies flagged risks and provides structured prompts for follow-up conversations.²⁸⁷ DOOR 3, the resources for responding to risks, offers additional tools, literature and referrals for risk management and professional training.²⁸⁸ DOORS creates a unified risk screening approach across family law services, ensuring that professional can detect risks early and respond effectively.²⁸⁹ Unlike domestic violence specific assessments, it makes a broad view of risk, addressing adult and child well-being, conflict and external stressors. This coordinated system enhances intervention strategies and promotes family safety.²⁹⁰

Once sufficient contact has been established with children, consultants collaborate with parents and trained mediators to determine how best to incorporate children's needs into a suitable parenting plan.²⁹¹ Before finalizing the plan, mediators also assist parents in developing a communication plan to minimize conflict and a statement of intent to affirm their shared commitment to providing a supportive post-divorce environment for their children.²⁹² Additionally, FRCs strive to ensure that mediation agreements align with the psycho-developmental needs of the child, fostering a more child centered approach to mediation.²⁹³

Several additional factors contribute to the effectiveness of Australian FRCs, including adequate government funding, the integration of technology, and specialized training for child consultants

²⁸⁵ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', 71.

²⁸⁶ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', 71.

²⁸⁷ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', 73.

²⁸⁸ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', 73.

²⁸⁹ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', 73.

²⁹⁰ McIntosh J, Ralfs C, 'Detection of Overall Risk Screen (DOORS) Handbook', 80.

²⁹¹ McIntosh J, "Child inclusion as a principle and as evidence based practice: applications to family law services and related sectors" Australian family relationship clearinghouse, 2007, 9.

²⁹² McIntosh J, "Child inclusion as a principle and as evidence based practice: applications to family law services and related sectors" Australian family relationship clearinghouse, 2007, 9.

²⁹³ McIntosh J, "Child inclusion as a principle and as evidence based practice: applications to family law services and related sectors" Australian family relationship clearinghouse, 2007, 9.

in effective observation and communication techniques.²⁹⁴ Public education programs further promote parental cooperation and encourage parents to consider their children’s emotional well-being during and after mediation.²⁹⁵ The government also funds research to enhance methods for ensuring children’s views are heard and subsidized costs, ensuring accessibility for families across all economic backgrounds.²⁹⁶ Moreover, FRCs offer online advice centers and virtual services through phone and the zoom platform for families unable to visit in person. Through these measures, Australia is making substantial progress in fulfilling its international obligations to uphold children’s right to participate in decisions affecting them.²⁹⁷

Online education programs are available to inform parents about both child-focused and child inclusive approaches to child participation.²⁹⁸ These programs aim to help divorcing parents recognize the importance of understanding their children’s wishes and feelings and considering them. By increasing parental awareness, these initiatives enhance the effectiveness of child consultants and mediators, as parents who complete such programs are more likely to prioritize their children’s perspectives.²⁹⁹ These efforts align with children’s general right to be heard as outlined in Article 12 of the UNCRC and specifically support the recommendations in General Comment 12, which urges States to educate the public on child participation in decision making.³⁰⁰ Additionally, the Australian government has made significant investments in advertising FRCs through various advertising efforts. Another key strength of the Australian system is the requirement for child consultants to receive specialized training in observing and listening to children.³⁰¹ This enables them to work independently in straightforward cases, while more

²⁹⁴Cashmore J, Parkinson P, “Children’s and parents’ perceptions on children’s participation in decision making after parental separation and divorce” 1 Family court review 2, 2008, 15.

²⁹⁵Cashmore J, Parkinson P, “Children’s and parents’ perceptions on children’s participation in decision making after parental separation and divorce” 15.

²⁹⁶Cashmore J, Parkinson P, “Children’s and parents’ perceptions on children’s participation in decision making after parental separation and divorce” 16.

²⁹⁷ McIntosh J, Wells Y, Lee J, “Development and validation of the family law DOORS” Psychological assessment, 2017, 35.

²⁹⁸ McIntosh J, Wells Y, Lee J, “Development and validation of the family law DOORS” Psychological assessment, 2017, 35.

²⁹⁹ Parkinson P “The idea of Family Relationship centers in Australia” 1 Family court review 2, 2013, 10.

³⁰⁰General comment 12 para 49 and 83.

³⁰¹ Parkinson P “The idea of Family Relationship centers in Australia” 10.

complex mediations may involve additional experts. Parents are also encouraged to return for follow-up sessions to adapt agreements as their children's needs evolve.³⁰²

Overall, Australia's approach to ensuring that children's views and needs are recognized during divorce mediation is highly effective and serves as a valuable model for reformers in other countries. The country has established a national network of specialist professionals through its Family Relationship Centers.³⁰³ A key strength of the system is the clear distinction between the roles of child consultants, who engage with children, and mediators who work with parents.³⁰⁴ Additionally, Australia places a significant emphasis on achieving therapeutic outcomes for children and continuously refines its guidelines and procedures based on ongoing research.³⁰⁵

4.3 Hearing Children in Mediation in Kenya

In Kenya, a deeply ingrained cultural norm holds that children should be seen and not heard.³⁰⁶ This mindset significantly hinders child participation in family matters, becoming especially problematic when assessing children's needs during parental divorce.³⁰⁷ In many cases, Kenyan children's opinions are often overlooked in family mediation due to the belief that divorce is a private matter solely concerning the husband and wife.³⁰⁸ Kenya lacks established institutions and structured practical mechanisms for mediators to hear and consider children's voices. There is no clear guidance on the nature of child inclusive mediation or how it should be conducted to uphold

³⁰² Parkinson P "The idea of Family Relationship centers in Australia" 11.

³⁰³Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³⁰⁴ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³⁰⁵ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³⁰⁶<https://bettercarenetwork.org/sites/default/files/2020-10/National-Plan-of-Action-for-Children-in-Kenya-2015-2022.pdf> on 20 November 2024.

³⁰⁷ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³⁰⁸ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

the best interest of the child. There are also no mandatory training requirements for this aspect of mediation.³⁰⁹

However, what remains uncertain is whether mediators unofficially take children's views into account.³¹⁰ An empirical study was carried out in Kenya, which investigates whether accredited mediators seek out and consider children's perspectives in their daily mediation practice.³¹¹ The research involved semi-structured interviews with Kenyan divorce mediators.³¹² To identify participants, the first author obtained a complete list of accredited mediators covering family mediators and mediators in other fields from the Supreme Court of Kenya.³¹³ Each of the 47 mediators on the list was contacted and those specializing in family mediation were identified and invited to participate in the study.³¹⁴ A total of seventeen accredited mediators took part in the interviews, comprising of ten women and seven men.³¹⁵ They were based in various regions of Kenya hence their insights can provide a balanced perspective on the state of the practice. A well distributed sample ensures that findings are not limited to a single geographical or institutional context but rather capture commonalities and variations in mediation practices national wide.

³⁰⁹ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹⁰ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹¹ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹² Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹³ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹⁴ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹⁵ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

Participants were given the option to conduct their interviews via face-to-face meetings, telephone, or email.³¹⁶

One key finding from the interviews was that years of experience as a mediator did not necessarily correlate with a greater appreciation of the importance of listening to children.³¹⁷ However, all participants acknowledged that parents in mediation should consider their children's views and wishes and agreed that whenever possible, these should be ascertained and presented to the parents.³¹⁸ Although the mediators generally agreed in principle on the importance of considering children's views, the data revealed that this was rarely implemented in practice. Even in cases where efforts were made to hear and convey children's perspectives, the methods used were often inadequate.³¹⁹ A key finding was that Kenyan mediators had limited engagement with children.³²⁰

Among the seventeen participating mediators, only one routinely interacted with children capable of expressing their views. Five others occasionally sought children's input, while eleven had never done so.³²¹ When asked what criteria they applied in deciding whether to engage with children, all of them cited age but their age threshold varied significantly.³²² One mediator considered ten years old the minimum age, another set the threshold at eight, while a third reported successfully engaging with children as young as two. Given the lack of official guidelines in Kenya, it is

³¹⁶ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹⁷ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹⁸ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³¹⁹ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²⁰ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²¹ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²² Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

unsurprising that mediators adopted widely different age benchmarks.³²³ However, it is notable that no other criteria such as the child’s best interest, safety, or willingness to participate were considered. This overreliance on age alone is problematic, as International Law advocates a more individualized approach rather than rigid standards.³²⁴ For instance, in Australia, the Family Law Amendment (Shared Parental Responsibility) Act of 2006 replaced a fixed age criterion with more flexible guidelines of assessing a child’s maturity.

Regarding the primary purpose of mediators engaging with children affected by divorce, perspectives among Kenyan participants varied.³²⁵ One viewed the interaction as therapeutic, while another approached it from a forensic standpoint. Confidence levels in engaging also differed, some mediators felt capable of conducting these interactions independently, while others preferred to seek assistance.³²⁶ For instance, two participants reported listening to children directly, whereas another only did so when family dynamics were “straightforward.”³²⁷ In more complex cases, he referred the task to another professional. Two other mediators expressed a preference for joint engagement, collaborating with a child psychologist, therapist, or probation officer. This teamwork approach mirrors the multi-disciplinary model used by professionals in Australia’s FRCs. Regarding how children’s views were conveyed, two mediators reported relaying them to the parents, while another stated that he encouraged children to express their views directly. Although these findings are limited in scope, they indicate that when children’s views are

³²³ Nyaata V, Zaal F, Pete S, ‘Including children’s views in divorce mediation: a comparative analysis and recommendations for Kenya’ Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²⁴ General Comment 12 paras 21, 42 and 134.

³²⁵ Nyaata V, Zaal F, Pete S, ‘Including children’s views in divorce mediation: a comparative analysis and recommendations for Kenya’ Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²⁶ Nyaata V, Zaal F, Pete S, ‘Including children’s views in divorce mediation: a comparative analysis and recommendations for Kenya’ Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²⁷ Nyaata V, Zaal F, Pete S, ‘Including children’s views in divorce mediation: a comparative analysis and recommendations for Kenya’ Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

considered, a wide range of direct and indirect methods is employed. Given the lack of authoritative guidance in Kenya, this inconsistency is unsurprising.³²⁸

The Kenyan participants identified several key barriers to effectively eliciting the views of children who are willing and able to express them.³²⁹ These include deeply ingrained cultural norms that discourage children's involvement in making decisions, a general societal attitude that undervalues children's perspectives, and widespread uncertainty among professionals about the best ways to engage with children.³³⁰ Additionally, the lack of a clear regulatory framework and the absence of a standardized practice guide for family mediators further hinder effective child participation.³³¹ To address these challenges, all participants agreed that child engagement could significantly be improved by the development of a comprehensive handbook and specialized training for mediators.³³² They also emphasized the need for public education initiatives to raise awareness about the importance of listening to children.³³³

4.4 Australia and Kenya Compared

Both Kenya and Australia are signatories to international conventions that advocate for children's voices to be heard. However, their approaches to incorporating children's views in family mediation differ significantly. Among the two, Kenya has made less progress in ensuring that children's perspectives are considered. While the Kenyan Constitution (2010) and the Children

³²⁸ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³²⁹ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³³⁰ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³³¹ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³³² Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³³³ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

Act (2022) recognize the principle of the best interests of the child, they do not provide clear guidelines on how children's views should be incorporated in cases of parental separation or divorce. This legal ambiguity makes it difficult to guarantee that children's voices are effectively heard and their opinions are taken into account during mediation. In contrast, Australia has taken a more research-driven approach, advancing beyond Kenya in this area. Australian Family Relationship Centers (FRCs) provide services that go beyond the requirements set out in the UNCRC and the ACRWC. Notably, these services include parent education programs and child screening processes to detect signs of abuse, ensuring a more comprehensive approach to child welfare during family disputes.

Australia benefits from government-funded institutions that help ensure children's views are considered during family mediation. the country has FRCs, which operate nationwide with branches in every state and territory. These centers are largely State-funded, making many of their services accessible at little to no cost. For instance, in Australia, the first session at an FRC is free and subsequent sessions are subsidized. In contrast, Kenya lacks a similar government-supported framework. Engagement with children before family mediation is typically handled by private mediators, who charge fees at their discretion.³³⁴ The Mediation Accreditation Committee of Kenya does not regulate these charges, making it likely that financial constraints lead to the exclusion of children's perspectives in the mediation process.

Another key difference is Australia's team-based approach when listening to children. Mediation professionals work collaboratively, with child consultants and mediators combining their expertise. In Kenya, however, divorce mediators usually work alone, as the government does not provide funding for child engagement in mediation, let alone multi-disciplinary teams. Australia's experiences highlight the benefits of cross-disciplinary collaboration, ensuring that children's voices are heard more effectively in family disputes.

In Australia, children's rights and interests are safeguarded by legal provisions that ensure that their views are safeguarded by legal provisions that ensure their views are communicated to trained

³³⁴ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

professionals in a separate process from the ongoing mediation. This prevents children from being interviewed in front of their parents. Notably, the Australian approach places a strong emphasis on therapeutic intervention. Information gathered from children by child consultants is used by mediators rather than courts. Research has shown that this therapeutic model has long term positive effects by encouraging divorced or separated parents to reflect more deeply on their children's needs. In contrast, other countries adopt a forensic approach, where the responsibility for determining the best interest of the child primarily lies with the courts. This method, while legally rigorous, may disempower parents by excluding them from direct participation in key decisions affecting their children. Parental and child involvement in the process could foster stronger support for post-divorce child arrangements, leading to more sustainable and cooperative co-parenting.

Another key difference between Kenya and Australia is the stage at which meetings occur in the mediation process. In Australia, FRCs begin by educating parents about the mediation process and assessing their ability to adequately consider their children's best interests.³³⁵ Following this, a screening process is conducted using Family DOORS Software to identify potential risks to the child's safety.³³⁶ If it is determined that hearing the child's views would be beneficial, a child consultant engages with them.³³⁷ This interaction may involve one-on-one sessions between the child and the consultant or in more complex cases, may include collaboration with another specialist professional. In Kenya, on the other hand, there are no clear directives outlining how children can be included in the mediation process. The absence of a structured process means that engagement with children may be inconsistent, lacking the systematic approach seen in Australia.

Another key difference between the two jurisdictions is the age at which children's views are considered during mediation. In Australia, there is no fixed age threshold determining a child's ability to express their views.³³⁸ This allows child consultants to engage with children of all ages, including those below school-going age, when appropriate. In Kenya, however, as highlighted by previous field research, children are often not engaged at all in family mediation. When they are included, it is left entirely to the discretion of the mediator, who determines the age threshold for

³³⁵ Hoffman D, Wolman R, "The psychology of mediation" 1 Journal of conflict resolution 3, 2013, 8.

³³⁶ McIntosh J, "Child inclusion as a principle and as evidence based practice: applications to family law services and related sectors" Australian family relationship clearinghouse, 2007, 10.

³³⁷ Hoffman D, Wolman R, "The psychology of mediation" 1 Journal of conflict resolution 3, 2013, 8.

³³⁸ Hoffman D, Wolman R, "The psychology of mediation" 1 Journal of conflict resolution 3, 2013, 8.

eliciting their views. This lack of a standardized approach results in inconsistencies in how and when children's perspectives are taken into account.

The two countries analyzed in this study adopt very different approaches to determining whether children's voices should be heard during mediation. In Australia, FRCs utilize various techniques to engage children.³³⁹ In contrast, there is limited information on the specific methods used in Kenya. Field research conducted in Kenya found that, out of seventeen divorce mediators interviewed, only seven reported engaging children before mediation and just one used a method beyond oral questioning incorporating drawings and puppets.³⁴⁰ This highlights a clear need for training among Kenyan divorce mediators in child-friendly techniques. Furthermore, of the two countries examined, none have a complaints mechanism for children whose parents are undergoing mediation, nor do they have an official body to monitor and assess whether children's views were adequately considered. This falls short of the recommendation in paragraph 49(4) of General Comment No. 12, which urges State parties to regularly evaluate the effectiveness of their child participation methods.³⁴¹

4.4.1 Lessons learnt from Australia

Australia's approach to child inclusive mediation offers a clear lesson in the value of a structured, multidisciplinary system. By establishing FRCs nationwide, Australia has created dedicated spaces where specialized professionals, such as child consultants and mediators work together to ensure that children's voices are heard. This system is supported by legal frameworks that encourage child participation through structured processes, thereby enhancing the overall effectiveness of family dispute resolution.

Another important lesson is the emphasis on specialized training and clear procedural guidelines. In Australia, child consultants are specifically trained to conduct separate, developmentally appropriate sessions with children, ensuring that their views are gathered in a safe and supportive

³³⁹Madigan S, Plamondon A, Jerkins J, "Marital conflict trajectories and associations with children's disruptive behavior" 1 Journal of marriage and family 2, 2015, 50.

³⁴⁰ Nyaata V, Zaal F, Pete S, 'Including children's views in divorce mediation: a comparative analysis and recommendations for Kenya' Pioneer in peer-reviewed, open access online law publications, 1 February 2024 <file:///C:/Users/iy/Documents/DOC%209.pdf> on 8 November 2024.

³⁴¹ General Comment 12 para 49(4).

environment. This separation from parental presence not only preserves the neutrality of the mediation process but also adopts a therapeutic rather than a forensic model, which has been shown to have long term positive effects on the well being of children and the quality of post separation arrangements.

The country's research driven approach demonstrates the importance of basing mediation practices on empirical evidence. By piloting innovative models and systematically evaluating outcomes, Australia has been able to refine its processes to better serve the needs of children and families. This underscores the benefit of continuously integrating research findings into policy and practice to ensure that mediation services remain effective and responsive to emerging challenges.

Finally, Australia's integration of technology and public education initiatives demonstrates the importance of accessibility and ongoing support in mediation practices. With subsidized services, online advice centers and follow-up sessions, Australia ensures that mediation is not only available to families from diverse economic backgrounds but also continuously updated on the latest research and feedback. These efforts underline the need for a holistic, dynamic approach that combines legal reform, institutional support and public awareness to effectively safeguard the best interests of children in family dispute resolution.

4.4 Conclusion

The comparison between Australia and Kenya reveals stark differences in how children's voices are incorporated into family mediation. Australia's structured, multidisciplinary approach, supported by legal and institutional frameworks, ensures that children's views are considered in a meaningful and therapeutic manner. In contrast, Kenya, faces system barriers, including cultural perceptions, legal ambiguity and limited mediator training, which hinder effective child participation. However, Kenya can learn valuable lessons from Australia's model particularly in implementing structured guidelines, increasing mediator training and fostering public awareness of the importance of hearing children in family mediation. Moving forward, enhancing child participation in mediation requires a commitment to legal reforms, institutional support and a shift toward prioritizing children's best interests in family dispute resolution.

CHAPTER FIVE: RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter presents the key findings, recommendations and conclusion drawn from the study on child participation during family mediation in custody and maintenance disputes.

5.2 Research Findings

The research findings reveal that Kenya's current legislative, policy and regulatory frameworks are insufficient to support effective child inclusive mediation. Although key legal instruments, such as the Constitution of Kenya and the Children's Act, emphasize the best interests of the child, they lack detailed guidelines on how to integrate children's voices into family mediation processes. This results in inconsistent practices where mediators often rely solely on parental input, and when children are involved, it is typically sporadic and unstructured.

The study also found that child inclusive mediation, when implemented, offers significant benefits in safeguarding children's rights and promoting their emotional well being. In jurisdictions like Australia, structured systems supported by Family Relationship Centers, specialized child consultants and clearly defined mediation procedures, ensure that children's perspectives are gathered in a safe and appropriate manner. This structured approach not only helps tailor parenting arrangements to the child's needs but also fosters improved parent-child communication and reduces long term conflicts.

Comparatively, the research highlights that Kenya's mediation practices are hampered by cultural norms that discourage child participation and an absence of standardized protocols for including children. These gaps often lead to missed opportunities for addressing the child's best interests, underscoring the need for reforms. The findings suggest that Kenya can benefit from adapting a model similar to Australia's emphasizing structured child engagement, collaborating with trained professionals like child consultants and psychologists and clear regulatory guidelines to ensure that children's voices are consistently and effectively heard in custody and maintenance disputes.

5.3 Conclusion

The research findings support the hypothesis that child inclusive mediation safeguards the best interests of the children in the resolution of custody and maintenance disputes in Kenya. The evidence indicates that when children are meaningfully engaged in the mediation process, their perspectives contribute to more tailored and child centered outcomes. Drawing comparisons with Australia, where structured systems such as Family Relationship Centers are in place, it is clear that a more organized, approach can significantly enhance the mediation process. In conclusion, while child inclusive mediation shows strong potential to uphold the best interest of the child principle, the successful realization of this model in Kenya requires comprehensive legal reforms and the development of standardized protocols for child participation.

5.2 Recommendations

Based on the comparative study of child inclusive mediation in Australia and Kenya, several key reforms can be implemented in Kenya to enhance children's participation in family mediation while safeguarding their best interests. The following recommendations address legislative, institutional and cultural challenges that currently hinder effective child participation in Kenya.

Legislative Reforms to Mandate Child Participation in Mediation.

Kenya lacks specific legal provisions that explicitly require mediators to consider children's views in custody and maintenance disputes. While the Constitution and the Children's Act (2022) uphold the best interests of the child principle, they do not provide a clear framework on how children's perspectives should be incorporated into mediation. Additionally, child inclusive guidelines should be introduced to establish clear protocols for engaging children in mediation, ensuring their participation is developmentally appropriate and does not place undue pressure on them. Mediators should also be required to document whether and how they have considered the child's views, ensuring accountability in the mediation process. Furthermore, the Mediation (Pilot Project) Rules 2022, which are currently being implemented in the country, should be amended to include provisions on child participation, ensuring that children's perspectives are systematically considered in family mediation.

Establishing Child friendly Mediation Centers

One of the key lessons from Australia is the role played by Family Relationship Centers, in facilitating child inclusive mediation. Kenya should establish similar centers where trained professionals can work with children separately before relaying their perspectives to parents and mediators. These centers should employ trained child consultants who specialize in communicating with children through, methods such as therapy, drawings or storytelling. They should also provide a safe and neutral environment where children feel comfortable expressing their views without the fear of parental conflict. Additionally, counseling and psychological support should be offered to children undergoing mediation to help them cope with changes in their family structure.

Enhancing Mediator Training on Child Participation

Currently, mediator training in Kenya does not require expertise in child psychology or child friendly communication techniques. To ensure effective child participation in mediation, the Mediation Accreditation Committee should mandate specialized training in child inclusive mediation for family mediators. Mediators should also receive continuous professional development on techniques for eliciting children's views in a supportive manner, such as through creative expression tools.

Increasing Public Awareness and Cultural Shift.

Kenyan society often adheres to the traditional notion that children should be seen but not heard in family matters. To shift this mindset and promote child participation, public awareness campaigns should be conducted to highlight the benefits of child inclusive mediation. Additionally, education programs for parents should be developed to help them understand the psychological impact of divorce on children and the importance of incorporating their perspectives in decision-making.

Implementing Monitoring and Evaluation Mechanisms.

To assess the effectiveness of child inclusive mediation in Kenya, the Judiciary and relevant stakeholders should establish a monitoring and evaluation framework. This framework should track how often children are included in mediation and the methods used to elicit their views. It should also collect feedback from children and parents on their experiences with mediation and review mediation agreements to ensure that children's best interests are genuinely considered. Furthermore, an independent complaints mechanism should be established where children can report if they feel their voices or misrepresented in mediation outcomes.



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