

LEGAL PROTECTION OF CHILDREN WHEN PARENTS DIVORCE

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1.1 Table of Contents

Acknowledgement	ii
Declaration.....	iii
Abstract.....	iv
List of Cases	v
List of Legal Instruments.....	vi
CHAPTER 1	7
1.1 Background of the study.....	7
1.2 Statement of problem.....	9
1.3 Objectives of the study	10
1.4 Hypothesis	10
1.5 Research questions	11
1.6 Justification of study.....	11
1.7 Significance of study	11
1.8 Conceptual Framework.....	12
1.9 Literature review.....	14
1.10 Research methodology	18
1.11 Limitations of Study	18
1.12 Chapter Breakdown	19
CHAPTER 2	20
2.1 Introduction	20
2.2 The Children’s Act	20
2.3 The International Human Rights Instruments	22
2.4 Conclusion.....	23
CHAPTER 3	24
3.1 Introduction	24
3.2 Best Interest of the Child Principle Versus Maternal Preference Rule	24
3.3 Conclusion.....	26
CHAPTER 4	27
4.1 Introduction	27
4.2 Implications of the maternal preference rule on the best interest of the child.....	27
4.3 Conclusion.....	29
CHAPTER 5	30
5.1 Introduction	30
5.2 Findings	30
5.3 Recommendations	31
5.4 Conclusion.....	33
Bibliography	34

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Declaration

I, NATALIE OTIENO, 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:28/07/2021.....

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

Signed:  13th October 2021

Dr. Jennifer Gitahi

Abstract

Article 45 of the Constitution of Kenya states that the family is a fundamental unit of the society and is therefore entitled to protection by the state. The Preamble of the Convention on the Rights of Child acknowledges that for the full and harmonious development of a child, they should grow up in a family environment, in an atmosphere of happiness, love, and understanding. One way family disruption can occur is through divorce. Divorce is the legal dissolution of a marriage. Over the years the frequency of divorce in the home has increased. As this increases more children are being impacted. Article 53(2) of the Constitution of Kenya states that in every matter concerning children, “a child’s best interest” is of paramount importance. The same is affirmed in Article 3 of the Convention of the Rights of the Child. This study investigated how Kenyan courts attempt to promote the best interest of the child. Further the study reviewed if by following the maternal preference rule in child custody decisions, justice is served and find solutions thereto. This study found that the Kenyan legal framework safeguards the rights of children from divorced homes by ensuring the primacy of importance is accorded to the welfare of the child. The maternal preference rule is still being applied in Kenyan courts, with children of most ages, but especially when children of the tender years are involved. Lastly, the application of the maternal preference rule may not serve the best interest of the child. This study recommended that the common law ‘maternal preference rule’ should not be used as a primary guide to decision making about custody matters, and in appropriate circumstances, an award of joint custody of their child to parents who are divorcing would serve the best interest of the child concerned. The study concluded that there exists a comprehensive legal framework at the local and international level that protects the rights of children in divorce. The Kenyan courts have developed jurisprudence to promote the best interest of the child. However the blanket application of ‘maternal preference rule’ has not always been in the best interest of the child as the custody of the child is at times influenced by the economic benefit to the mother rather than the best interest of the child.

List of Cases

E N W v T B N (2019) eKLR.

E K M v E B O (2019) eKLR.

E N W v T B N (2019) eKLR.

J O v S A O (2016) eKLR.

K M M v J I L (2016) eKLR

M A A v A B S (2017) eKLR.

M A v R O O (2013) eKLR.

S O v L A M (2009) eKLR.

Sospeter Ojaamong v Lynette Amondi Otieno (2006) eKLR.

List of Legal Instruments

Children's Act, Act No. 8 of 2001 Laws of Kenya

Marriage Act No. 4 of 2014 Laws of Kenya

The Constitution of Kenya 2010

International instruments

African Charter on the Rights and Welfare of the Child 1990

United Nations Convention on the Rights of the Child 1989

United Nations Convention on the Elimination of all forms of Discrimination against Women
1979

Chapter 1

1.1 Background of the study

According to the Marriage Act of Kenya, marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this act.¹ In most countries' marriage is a vital institution because it is a sanctuary for childbearing, a refuge for adversity and the basis of a successful culture². "Healthy marriages are good for children, as growing up in a happy home protects children from mental, physical, educational, and social problems"³. However, not all marriages are healthy, therefore detrimental to children's wellbeing as a result couples may choose divorce as the best option. Statistics in Kenya show the number of marriages per 1000 persons has decreased, while the number of divorces has increased⁴.

Divorce is the legal ending of a marriage⁵. According to the Marriage Act of Kenya, a party to a marriage may petition the court for the dissolution of the marriage on the grounds of; adultery by the other spouse as well as cruelty, desertion by either party for at least three years, irretrievable breakdown of the marriage, and exceptional depravity by either party⁶. In high conflict divorces parents may fail to agree on the custody of the children.

According to section 4 (2) of the Children's Act, the best interest of a child must guide decisions on any matters touching on the life of a child.⁷ Section 4 (3), in turn states that all institutions shall treat the interest of a child as the first and paramount consideration to the extent that it is consistent of action, calculated to safeguard and promote the rights and welfare of the child.

¹ Section 65, *Marriage Act* (Act 4 of 2014).

² Aneesh T and Sujata S, 'Divorce, families and adolescents in India' 61 *Journal of Divorce and Remarriage* 1, 2019,1.

³ American Physiological Association, 'Marriage and Divorce' *Journal of Family Psychology*, 2020_<<https://www.apa.org/topics/divorce/>> on 24th September 2020.

⁴ Consumer Insight, 'Marriage in Kenya-Breaking up does not seem so hard to do these days' 2012_<www.kenyaforum.net> on 24th September 2020.

⁵ Oxford Dictionary, 8th ed.

⁶ Section 65, *Marriage Act* (Act 4 of 2014).

⁷ Section 4(2), *Children's Act* (Act No 8 of 2001).

⁸Finally, section 4(4) states t with adopting a course that, in any matter of procedure affecting a child, the child shall be accorded an opportunity to express his or her opinion. ⁹The best interest of the child principle is also provided in the article 53(2) of the Constitution of Kenya,¹⁰ and article 3 of the Convention on the Rights of the child.¹¹

Section 81(1) of the Children's Act defines custody concerning a child to mean so much of the parental rights and duties relating to the possession of the child. Actual custody means actual possession of a child.¹² The mere fact of having actual custody of a child deems the custodian to have the care, control and the charge of the child and creates a duty on him or her to safeguard the interests and welfare of the child.¹³ Parents caught up in the conflict of divorce often disagree on the actual custody of the child.

The custody order is often determined by the court where parents fail to reach an amicable solution.¹⁴ Both parents have equal rights to apply to the court for custody of the children, but the court is guided by the following principles listed in section 83 of the Children's Act among others which include: wishes of the parents, wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the custody order is not made and the best interest of the child.¹⁵ It follows that if the father can provide what is in the best interest of the child, he is the proper person to be awarded the custody of the child. Similarly, if the mother is better equipped to provide what the child needs, then she has the better claim.¹⁶

Kenyan courts have sometimes failed to uphold the law by following the maternal preference rule, where custody dispute begins with the presumption that maternal custody is best for the child, unless special and peculiar circumstances exist to disqualify her from being awarded custody. The mother's disgraceful conduct, say her immoral behaviour, drunken habit, bad company are some of the factors which disqualify her from being awarded custody of the

⁸ Section 4(3), *Children's Act* (Act No 8 of 2001).

⁹ Section 4(4), *Children's Act* (Act No 8 of 2001).

¹⁰ Article 53 (2), *Constitution of Kenya* (2010).

¹¹ Article 3, *Convention on the rights of the child*, 20 November 1989,1577 UNTS 3.

¹² Section 81(1), *Children's Act* (Act No 8 of 2001).

¹³ Kiage P, *Family law in Kenya: Marriage, divorce and children*, Law Africa Publishing, Nairobi ,2016,296.

¹⁴ Kiage, *Family law in Kenya*, 296.

¹⁵ Section 83, *Children's Act* (Act No 8 of 2001).

¹⁶ South Africa Law Commission, *Review of the Child Care Act*,2002,651.

child.¹⁷ In the case of *M A A v A B S*, the High Court held that physical custody, care, and control of the Muslim children should have been awarded to the mother as it would be in the best interest of the children.¹⁸ In the case of *E N W v T B N*, the court granted actual custody, care, and control of the children to the mother and restricted access to the father. The mother was however unemployed and on numerous occasions abandoned the children and took them out of school thus destabilizing their academic performance.¹⁹

The unfitness standard is insufficiently child protective and therefore indefensible under the best interest principle.²⁰ Under the unfitness standard, the child's placement would turn not on the child's need for continuity, but on whether the mother was at fault in the separation. This would require a court to focus on the wrong issue instead of the child's best interest.²¹ As Kenyan courts tend to apply the maternal preference rule, they may fail to address the best interest of the child, by placing children with a parent who abuses the child rather than the non-offending parent.²² Maternal preference presumption does not serve the best interests of the children, because gender is irrelevant to the capacity and willingness to perform the mothering function and to the child's experience of mothering.²³ Lastly, the rule violates the equal protection clause, as provided in article 27 of the Constitution of Kenya,²⁴ by providing dissimilar treatment for men and women similarly situated.²⁵

1.2 Statement of problem

According to section 83 of the Children's Act, the court is guided by the following principles in awarding custody of the children: wishes of the parents, wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the custody order is not made and the best interest of the child.²⁶ Article 53(2) of the constitution requires court to treat the best

¹⁷ *Sospeter Ojaamong v Lynette Amondi Otieno* (2006) eKLR.

¹⁸ *M A A v A B S* (2017) eKLR.

¹⁹ *E N W v T B N* (2019) eKLR.

²⁰ Ramsay L, 'The tender years doctrine: A defense' 70 *California Law Review* 2,2009,343.

²¹ Ramsay L, 'The tender years doctrine,'349.

²² Allen M, 'Prioritizing child safety as the prime best factor interest' 47 *Family Law Quarterly* 1,2013,44.

²³ Ramsay L, 'The tender years doctrine,'361.

²⁴ Article 27, *Constitution of Kenya* (2010).

²⁵ Samuel N, 'Maternal preference and the double burden: Best interest of whom?' 38 *Louisiana Law Review* 4,2010,1100.

²⁶ Section 83, *Children's Act* (Act No 8 of 2001).

interest of the child as of paramount in every matter concerning them. Section 4(3) of the Children Act requires all judicial and administrative institutions , and all persons acting in the name of these institutions, when they are exercising power conferred by this act to treat the interest of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child ,conserve and promote the welfare of the child , and secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

However, in the Kenyan jurisdictions, “the best interest of the child standard” is simply another name for the “maternal preference rule” since most courts still hold that maternal custody is best suited for the welfare and comfort of the child.²⁷In the case of *J O v S A O*, the judge stated that in determining matters of disputed parental custody, the custody of such children should be awarded to the mother, because the mothers are best suited to exercise care and control of the children.²⁸ The maternal preference rule is insufficiently child protective and therefore indefensible under the best interest principle. ²⁹

In response to this problem, the study will investigate how Kenyan courts attempt to promote the best interest of the child. Further the study will critique, if by following the maternal preference rule in child custody decisions, justice is served and find solutions thereto.

1.3 Objectives of the study

1. To examine the extent to which the Kenyan legal framework safeguards the rights of children in the divorce of their parents.
2. To examine Kenyan case law, and particularly the jurisprudence emanating from courts concerning paramount considerations in matters of child custody.
3. To examine the negative implications on the interest and welfare of the child as a result of the courts following the maternal preference rule in child custody disputes.

1.4 Hypothesis

According to section 4(2) of the Children’s Act, the best interest of a child must guide decisions on any matters touching on the life of a child.³⁰The court is guided by this principle when

²⁷ Kiage, Family law in Kenya,283.

²⁸ *J O v S A O* (2016) eKLR.

²⁹ Ramsay L, ‘The tender years doctrine,’343.

³⁰ Section 4(2), *Children’s Act* (Act No 8 of 2001).

awarding actual custody of a child when parents fail to reach an amicable solution.³¹ This study hypothesizes that Kenyan courts apply the maternal preference rule instead of the best interest principle in child custody disputes. This study also hypothesizes that there are negative implications on the interest and welfare of the child as a result of the courts following the maternal preference rule.

1.5 Research questions

1. How the Kenyan legal framework safeguards the rights of children in the divorce of their parents?
2. What jurisprudence is emanating from Kenyan courts concerning paramount considerations in matters of child custody?
3. What are the negative implications on the interest and welfare of the child as a result of the courts following the maternal preference rule in child custody disputes?

1.6 Justification of study

The growth of society is dependent on the growth of the children. Children of today are the leaders of tomorrow, the creators, and shapers of a nation's tomorrow³². The Constitution of Kenya stipulates that in every matter concerning children their best interests are of paramount importance³³. Despite this, Kenyan courts in some instances may fail to uphold the standards required of them by the law, on protection of children's rights in divorce.

1.7 Significance of study

Although existing law in Kenya safeguards the rights of children when parents' divorce, courts by applying the maternal preference rule instead of the best interest of the child principle in child custody disputes, may not best serve the welfare of the child. This study will be significant to legislators as it will add to the existing law by focusing on an acceptable standard and test to determine what is best for a child in custody disputes. The study will be significant to judges as it will stipulate very fundamental principles that must inform the court when awarding custody of children. The study will also enlighten judges on the negative implications on a child's interest as a result of courts applying the maternal preference rule.

³¹ Section 83, *Children's Act* (Act No 8 of 2001).

³² Rhona T, *Attachment theory*, 1st edition, Karnac books, London, 2017,15.

³³ Article 53 (2), *Constitution of Kenya* (2010).

1.8 Conceptual Framework

Maternal preference rule

The maternal preference rule has been articulated in many ways, but generally stated the rule is that the best interest and welfare of the child is served by granting custody to the mother.³⁴ In matters of custody the mother had an automatic primacy of a child unless there were exceptional reasons to dictate otherwise. This would take the form of proof that the mother is an unfit mother for a variety of reasons, sufficient to dislodge the initial presumption that the children should naturally have been nurtured by the mother.³⁵ The rule was intended to serve as an aid to courts in determining the best interest and welfare of the child, a factor which Kenyan courts and other jurisdictions have long recognized as the paramount consideration in awarding child custody.³⁶

Despite its strong judicial acceptance, the rule has been the object of severe criticism. One of the strongest criticisms levelled against the rule is that although its premise may have been valid at one time, it is no longer supportable in light of the changing roles of married couples.³⁷ Generally, on divorce, the interest and welfare of the child were best served by awarding custody to the mother, because few mothers were required to work and thus were able to spend more time at home with their children.³⁸ In addition, many writers agree that the rule was always based more on traditional prejudices than on scientific evidence.³⁹ If these criticisms are valid, then the maternal preference rule does not protect the best interest of the child.

One of the most recent and perhaps most serious criticisms of the rule is that it may be unconstitutional.⁴⁰ The rule violates the equal protection clause, as provided in Article 27 of the Constitution of Kenya,⁴¹ by providing dissimilar treatment for men and women similarly situated.⁴²

³⁴ Samuel N, 'Maternal preference and the double burden,' 1097.

³⁵ Kiage, *Family law in Kenya*, 280.

³⁶ Samuel N, 'Maternal preference and the double burden,' 1097.

³⁷ Samuel N, 'Maternal preference and the double burden,' 1098.

³⁸ Samuel N, 'Maternal preference and the double burden,' 1099.

³⁹ Samuel N, 'Maternal preference and the double burden,' 1100.

⁴⁰ Samuel N, 'Maternal preference and the double burden,' 1102.

⁴¹ Article 27, *Constitution of Kenya* (2010).

⁴² Samuel N, 'Maternal preference and the double burden,' 1100.

This study will utilize the maternal preference rule to show that although serving the best interest of the child is without a doubt an important objective of the Kenyan courts, application of the rule may not safeguard the interest and welfare of the child.

Best interest of the child principle

As a principle of law, the best interest standard means only the welfare of the child is paramount to the interests of the parents.⁴³ According to section 4(2) of the Children's Act, the best interest of a child must guide decisions on any matters touching on the life of a child.⁴⁴ Section 4(3), in turn, states that, all institutions shall treat the interest of a child as the first and paramount consideration to the extent that it is consistent with adopting a course of action, calculated to safeguard and promote the rights and welfare of the child.⁴⁵ Finally, section 4(4) states that, in any matter of procedure affecting a child, the child shall be accorded an opportunity to express his or her opinion.⁴⁶ The best interest of the child principle is also provided in article 53(2) of the Constitution of Kenya.⁴⁷

The Kenyan legal framework also includes the Convention on the Rights of the Child, to which Kenya is a signatory. According to article 3.1 of the Convention on the Rights of the Child, the best interests of the child shall be a primary consideration in all actions directly or indirectly concerning them, both in the public and the private sphere.⁴⁸ Article 3.2, in turn, obliges States to undertake all legislative and administrative measures to ensure the protection and care necessary for children's wellbeing.⁴⁹ Finally, according to article 3.3, States shall ensure that those responsible for children's protection and care conform to quality standards established by competent authorities and that mechanisms are put in place to ensure that these standards are respected.⁵⁰

According to section 83 of the Children's Act, the court is guided by the following principles when awarding custody of the children: wishes of the parents, wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the custody order is not made and

⁴³ Ramsay L, 'The tender years doctrine,' 357

⁴⁴ Section 4(2), *Children's Act* (Act No 8 of 2001).

⁴⁵ Section 4(3), *Children's Act* (Act No 8 of 2001).

⁴⁶ Section 4(4), *Children's Act* (Act No 8 of 2001).

⁴⁷ Article 53(2), *Constitution of Kenya* (2010).

⁴⁸ Article 3.1, *Convention on the rights of the child*.

⁴⁹ Article 3.2, *Convention on the rights of the child*.

⁵⁰ Article 3.3, *Convention on the rights of the child*.

the best interest of the child.⁵¹ Under the best interest principle, the deciding judge determines what is best for a particular judge on the facts of the case without reference to any presumptive rules.⁵²

In determining the best interest of the child, the court considers the following matters:

1. The relationship between the child and his or her parents;
2. The manner in which parents have exercised their parental responsibilities over the child and their attitudes towards him or her;
3. The ability of the parents to provide for the child's needs, including emotional and intellectual;
4. The likely effect a change of circumstances would have on the child;
5. The age, maturity, and stage of development of the child; and
6. The need to take such action or make such decision as would eliminate or minimize further legal proceedings.⁵³

One of the strongest criticisms levelled against the rule, is that it generally lacks an acceptable standard definition.⁵⁴ If defining standards are not provided, the test is simply a grant of broad discretion to trial judges to exercise their own views on what is best for children.⁵⁵ If every judge were at liberty to determine what would be best for the child, then no case would have precedential value. Cases could be decided differently, not only in different courts, but in the same court, and parents would have no notice of the standards used to judge them.⁵⁶

This study will utilize the best interest of the child principle to analyze what courts can consider in awarding actual custody of the child, to safeguard their welfare and interest.

1.9 Literature review

The South African Law Commission, in Review of the Child Care Act, focuses on the care and protection of children who are, or who have been caught up in the conflict surrounding the

⁵¹ Section 83, *Children's Act* (Act No 8 of 2001).

⁵² Ramsay L, 'The tender years doctrine,' 356.

⁵³ Kiage, *Family law in Kenya*, 281.

⁵⁴ J Roger, 'Best Interest of the Child' *Indiana University*, 383.

⁵⁵ Ramsay L, 'The tender years doctrine,' 357.

⁵⁶ Ramsay L, 'The tender years doctrine,' 358.

divorce of their parents, as a category of children in need of special protection. The commission in the mentioned article is convinced of the need to reject the maternal preference rule as a guide to decision making in matters of disputed parental custody.⁵⁷ This will help establish measures that can be put in place to protect children when parents' divorce.

The South African Law Commission, in *Review of the Child Care Act*, gives an overview of the best interests of Children standard. The article gives the provisions of section 28(2) and section 7 of the Children's Act of South Africa. The commission in the mentioned article is convinced of the need to include guidance to the courts as to what exactly it means when it said that a particular decision must be in the interest of a particular child.⁵⁸ This will help establish provisions to be included in the Children's Act.

The Parliamentary Assembly, in *Promoting the Participation by Children in Decisions Affecting them*, gives an overview of a child's right to participate in decisions affecting them. This article gives the provisions of Article 12 of the United Conventions on the Rights of the Child, which largely affects children in divorce. The Parliamentary Assembly in the mentioned article is convinced that the wishes, and feelings of children should be considered in judicial and administrative proceedings, in matters affecting them.⁵⁹ This will help establish legal safeguards in place to protect children when parents' divorce.

Kelly Kanavy, in *The State and the Psycho Ex Wife*, discusses what the best interest of the child means in custody disputes. She argues that the best interest statute subordinates all outside interest to that of the child at the center of the custody case. She provides factors that judges should consider in determining the best interest of the child in custody disputes. This includes the wishes of the parents, the intimacy of the relationship between a child and each parent, the capacity, and the disposition of the parents to give the child love, affection, and guidance, and to continue educating and raising the child in culture and religion.⁶⁰ This article will help establish factors which the court can consider in awarding custody of children.

Ramsay Laing, in *The Tender Years Doctrine* criticizes the best interest of the child as a standard to be used in awarding custody. He argues that the rule generally lacks an acceptable standard

⁵⁷ South Africa Law Commission, *Review of the Child Care Act*, 2002, 642-669.

⁵⁸ South Africa Law Commission, *Review of the Child Care Act*, 2002, 72-98.

⁵⁹ Parliamentary Assembly, 13 March 2009, 1-3.

⁶⁰ Kanavy K, 'The State and the "psycho ex-wife": Parents' rights, children's - interests, and the first amendment' 161 *University of Pennsylvania Law Review* 4, 2013, 1081-1123.

definition. If defining standards are not provided, the test is simply a grant of broad discretion to trial judges to exercise their own views on what is best for children. The discretionary best interests test would increase the risk of decisions inconsistent with current knowledge of the development needs of children. It also could lead to more decisions based on value biases.⁶¹

Leighton Stamps, in *Maternal Preference in Child Custody Decisions*, discusses the maternal preference rule. He argues that the best interest and welfare of the child is served by granting custody to the mother, unless there are exceptional reasons to dictate otherwise. The exceptional circumstances include; the inability of the mother to provide appropriate care due to mental illness or moral depravity such as mother disgraceful conduct, drunken habit, and bad company.⁶² This article will help analyze Kenyan courts application of the rule.

Samuel Poole, in *Maternal Preference and the Double Burden* criticizes the maternal preference rule. He argues that the rule is no longer supportable in light of the changing roles of married couples. He also argues that the rule is unconstitutional as it violates the equal protection clause, as provided in Article 27 of the Constitution of Kenya, by providing dissimilar treatment for men and women similarly situated. Furthermore, he argues that the maternal preference presumption does not serve the best interests of the children, because gender is irrelevant to the capacity and willingness to perform the mothering function and to the child's experience of mothering.⁶³ This article will help analyze how courts applications of the rule does not serve the interest and welfare of the child.

Patrick Kiage, in *Family Law in Kenya* compares the best interest of the child standard and the maternal preference rule. He argues that the application of the best interest principle does not necessarily produce different results, for in most cases there is a confluence of considerations.⁶⁴ This article will help establish that "the best interest of the child standard" is simply another name for the "maternal preference rule" in the Kenyan jurisdictions since most courts still hold that maternal custody is best suited for the welfare and comfort of the child.

⁶¹ Ramsay L, 'The tender years doctrine: A defense' 70 *California Law Review* 2,2009,335-372.

⁶² Stamps L, 'Maternal preference rule in child custody decisions' 37 *Journal of Divorce & Remarriage* 2,2009,1-11.

⁶³ Samuel N, 'Maternal preference and the double burden: Best interest of whom?' 38 *Louisiana Law Review* 4,2010,1096-1108.

⁶⁴ Kiage P, *Family law in Kenya: Marriage, divorce and children*, Law Africa Publishing, Nairobi ,2016,280-296.

Stephanie Dallam and Joyanna Silberg, in *Abusers Gaining Custody in Family Courts*, discusses the possibility of courts placing children in the hands of the abusive parent. They argue that by following presumptive rules in favor of awarding custody to the mother may result in courts granting custody, care, and control of the children to abusive mothers.⁶⁵ This article will help establish how Kenyan courts fail to safeguard the best interest of the child by following the maternal preference rule in child custody decisions.

Allen Bailey, in *Prioritizing Child Safety as the Prime Best-Interest Factor*, explores the issue of domestic violence in the context of child custody proceedings and discusses abusers and victims. He argues that application of the maternal preference rule could result in courts granting custody to a parent who abuses the child rather than the non-offending parent.⁶⁶ This article will help establish how Kenyan courts fail to safeguard the best interest of the child by following the maternal preference rule in child custody decisions.

Although divorce is a well-researched topic, authors have failed to address adequately how Kenyan Courts sometimes fail to enforce the law when it comes to protecting the rights of children in divorce. Furthermore, authors have also failed to address adequately how Kenyan courts have sometimes failed to safeguard the best interest of the child in custody disputes by following the maternal preference rule and its implications. This study will add to existing literature by providing a holistic picture on the adoption of the maternal preference rule in child custody disputes in Kenyan courts and its implications.

The legal basis of this study will be based on the Constitution of Kenya, the Children's Act, and international instruments. Article 53(2) of the Constitution of Kenya provides that in every matter concerning children their best interests are of paramount importance.⁶⁷ The best interest of the child principle is also provided in section 4 of the Children's Act.⁶⁸ Section 81(1) of the Children's Act defines custody concerning a child to mean so much of the parental rights and duties relating to the possession of the child. Actual custody means actual possession of a child.⁶⁹ Section 83 provides principles guiding courts in awarding custody of children. This

⁶⁵ Silberg J and Stephanie D, 'Abusers gaining custody in family courts: A Case Series of overturned decisions' 16 *Journal of Child Custody* 2,2019,140-163.

⁶⁶ Allen M, 'Prioritizing child safety as the prime best factor interest' 47 *Family Law Quarterly* 1,2013,35-64.

⁶⁷ Article 53(2), *Constitution of Kenya* (2010).

⁶⁸ Section 4, *Children's Act* (Act No 8 of 2001).

⁶⁹ Section 81, *Children's Act* (Act No 8 of 2001).

include wishes of the parents, wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the custody order is not made and the best interest of the child.⁷⁰

International instruments include the Convention on the Rights of Children. According to article 3.1 of the Convention on the Rights of the Child, the best interests of the child shall be a primary consideration in all actions directly or indirectly concerning them, both in the public and the private sphere.⁷¹ Article 3.2, in turn, obliges States to undertake all legislative and administrative measures to ensure the protection and care necessary for children's wellbeing.⁷² Finally, according to article 3.3, States shall ensure that those responsible for children's protection and care conform to quality standards established by competent authorities and that mechanisms are put in place to ensure that these standards are respected.⁷³ The best interest of the child standard is also enshrined in article 4 of the African Charter on the Rights and Welfare of the Child,⁷⁴ and article 16(1)(d), and (f) of the UN Convention on the Elimination of All Forms of Discrimination against Women.⁷⁵

1.10 Research methodology

The overall methodological approach for this study is qualitative. The research adopts a doctrinal research methodology. It seeks to analyze the Kenyan legal framework with a view to understand the extent to which the framework safeguards the rights of children caught up in the conflict surrounding the divorce of their parents. On primary sources of data, the study reviews Kenya's local statutes, subsidiary legislation, and case law. On secondary source of data, the study reviews published journal articles, textbooks, online internet sources, conference papers and reports.

1.11 Limitations of Study

Although divorce is a well-researched topic, authors have failed to address adequately how Kenyan Courts sometimes fail to enforce the law when it comes to protecting the rights of children in divorce. Furthermore, authors have also failed to address adequately how Kenyan

⁷⁰ Section 83, *Children's Act* (Act No 8 of 2001).

⁷¹ Article 3.1, *Convention on the rights of the child*.

⁷² Article 3.2, *Convention on the rights of the child*.

⁷³ Article 3.1, *Convention on the rights of the child*.

⁷⁴ Article 4, *African charter on the rights and welfare of the child*, 26 July 1990, 1520 UNTS 217.

⁷⁵ Article 16, *UN Convention on the elimination of all forms of discrimination against women*, 18 December 1979, 1249 UNTS 13.

courts have sometimes failed to safeguard the best interest of the child in custody disputes by following the maternal preference rule and its implications. In an attempt to address the aforementioned gaps in literature, this study aims at providing a holistic picture on the adoption of the maternal preference rule in child custody disputes in Kenyan courts and its implications.

1.12 Chapter Breakdown

The first chapter outlines the background of the study and a statement of the problem under the study. It constitutes a literature review and theoretical framework. Also, the chapter comprises an outline of the objectives of the study and its hypothesis. The chapter also includes a discussion on the research methodology as well as the limitations, justification, and significance of the study.

The second chapter outlines the Kenyan legal framework on the rights of children caught up in the conflict surrounding the divorce of their parents. The discussion features the Constitution of Kenya 2010, the Children's Act, and international conventions ratified by Kenya.

The third chapter outlines Kenyan case law, and particularly the jurisprudence emanating from courts concerning paramount considerations in matters of child custody.

The fourth chapter outlines the negative implications on the interest and welfare of the child as a result of the courts following the maternal preference rule in child custody decisions.

The fifth chapter contains a conclusion of the study and a summary of its findings. Alongside this the chapter explains reforms that can be put in place to ensure the rights of children caught up in the conflict surrounding the divorce of their parents are enforced by the courts in Kenya.

Chapter 2

2.1 Introduction

This chapter analyzes the extent to which the Kenyan legal framework safeguards the rights of children caught up in the conflict surrounding the divorce of their parents. The discussion features the Constitution of Kenya 2010, the Children's Act and international conventions ratified by Kenya. The international conventions include; the African Charter on the Rights and Welfare of the Child, and the UN Convention on the Elimination of All Forms of Discrimination against Women.

2.2 The Children's Act

The best interest of the child principle is the most celebrated constitutional right of a child. According to section 4(2) of the Children's Act, the best interest of a child must guide decisions on any matters touching on the life of a child.⁷⁶ Section 4 (3), in turn states that, all institutions shall treat the interest of a child as the first and paramount consideration to the extent that it is consistent with adopting a course of action, calculated to safeguard and promote the rights and welfare of the child.⁷⁷ Finally, according to section 4(4), in any matter of procedure affecting a child, the child shall be accorded an opportunity to express his or her opinion.⁷⁸ The best interest of the child principle is also provided in article 53(2) of the Constitution of Kenya.⁷⁹

Despite its being a very widely used standard, the best interest of the child generally lacks an acceptable standard definition.⁸⁰ As a result, courts are permitted to take different factors into account therefore the outcomes are often not assured and not reasonably determinable in advance.⁸¹ Courts in various cases have interpreted the best interest of the child to mean safeguarding and promoting the welfare of the child.⁸²

Appreciating the potential for disruption and greater vulnerability of the children of the marriage in proceedings for divorce, the Children's Act empowers the court to make provisions

⁷⁶ Section 4(2), *Children's Act* (Act No 8 of 2001).

⁷⁷ Section 4(3), *Children's Act* (Act No 8 of 2001).

⁷⁸ Section 4(4), *Children's Act* (Act No 8 of 2001).

⁷⁹ Article 53(2), *Constitution of Kenya* (2010).

⁸⁰ J Roger, 'Best Interest of the Child,' 382.

⁸¹ J Roger, 'Best Interest of the Child,' 383.

⁸² *M A v R O O* (2013) eKLR.

as to their custody, whenever parents disagree on their care and control. ⁸³Section 81(1) of the Children's Act defines custody concerning a child to mean so much of the parental rights and duties relating to the possession of the child. Actual custody means actual possession of a child.⁸⁴ The mere fact of having actual custody of a child deems the custodian to have the care, control and the charge of the child and creates a duty on him or her to safeguard the interests and welfare of the child.⁸⁵ Parents caught up in the conflict of divorce often disagree on the actual custody of the child.

The custody order is often determined by the court where parents fail to reach an amicable solution.⁸⁶ Both parents have equal rights to apply to the court for custody of the children, but the court is guided by the following principles listed in section 83 of the Children's Act among others which include: wishes of the parents, wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the custody order is not made and the best interest of the child.⁸⁷

To establish what is in the best interest of the children involved in *M A v R O O*, a matter of disputed parental custody, the court relied on certain guidelines set out in earlier case law. These were:

- The suitability of the custodian parent, involving an examination of the character of the custodial parent, with particular reference to the ability to the parent to guide the moral, cultural, and religious development;
- The relative strength, nature, and stability of the relationship between the child and each person claiming a parental order concerning the child;
- The views of the child, where such views can reasonably be ascertained;
- Material considerations relating to the wellbeing of the child;
- The sense of security of the children, involving an examination of the extent to which a parent makes the children feel wanted and loved; and

⁸³ Kiage, Family law in Kenya, 296.

⁸⁴ Section 81(1), *Children's Act* (Act No 8 of 2001).

⁸⁵ Kiage, Family law in Kenya, 296.

⁸⁶ Kiage, Family law in Kenya, 296.

⁸⁷ Section 83, *Children's Act* (Act No 8 of 2001).

- The manner in which parents have exercised their parental responsibilities over the child and their attitudes towards him or her.⁸⁸

Based on this framework, children caught up in the conflict surrounding the divorce of their parents, have the right to have their rights and welfare safeguarded and promoted.

2.3 The International Human Rights Instruments

The Kenyan legal framework also includes the Convention on the Rights of the Child, to which Kenya is a signatory. According to article 3.1 of the Convention on the Rights of the Child, the best interests of the child shall be a primary consideration in all actions directly or indirectly concerning them, both in the public and the private sphere.⁸⁹ Article 3.2, in turn, obliges States to undertake all legislative and administrative measures to ensure the protection and care necessary for children's wellbeing.⁹⁰ Finally, according to article 3.3, States shall ensure that those responsible for children's protection and care conform to quality standards established by competent authorities and that mechanisms are put in place to ensure that these standards are respected.⁹¹ The best interest of the child standard is also enshrined in article 4 of the African Charter on the Rights and Welfare of the Child and article 16(1)(d),⁹² and (f) of the UN Convention on the Elimination of All Forms of Discrimination against Women.⁹³

The child's right to participate in decisions about his or her life is enshrined in article 12 of the Convention on the Rights of the Child. Whenever a decision which affects a child is taken, his or her opinions have to be considered, having due regard to his age and degree of maturity.⁹⁴ Age and maturity must be considered together, and these two factors do not solely concern the child's intellectual capacity.⁹⁵ The child shall, in particular, be provided with an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.⁹⁶ In the case of *M A A v A B S*, a matter of disputed parental custody, the court took into consideration the foregoing wishes and feelings

⁸⁸ *M A v R O O* (2013) eKLR.

⁸⁹ Article 3.1, *Convention on the rights of the child*.

⁹⁰ Article 3.2, *Convention on the rights of the child*.

⁹¹ Article 3.3, *Convention on the rights of the child*.

⁹² Article 4, *African charter on the rights and welfare of the child*.

⁹³ Article 16, *UN Convention on the elimination of all forms of discrimination against women*.

⁹⁴ Article 12(1), *Convention on the rights of the child*.

⁹⁵ Parliamentary Assembly Report, 13 March 2009, 1.

⁹⁶ Article 12(2), *Convention on the rights of the child*.

expressed by the child to the court. In matters of disputed parental custody, the wishes and feelings of the child are treated with a lot of caution as they may have been coached by one parent or their wish to stay with one parent may be contrary to their long-term interest.⁹⁷

Based on this framework, a child caught up in the conflict surrounding the divorce of their parents, has the right to have his or her opinions considered in judicial and administrative proceedings concerning their custody.

2.4 Conclusion

The Kenyan legal framework safeguards the rights of children from divorced homes by ensuring the primacy of importance is accorded to the welfare of the child and by providing an opportunity for the child to express his or her views in matters of disputed parental custody.

⁹⁷ M A A v A B S (2012) eKLR.

Chapter 3

3.1 Introduction

This chapter analyses the relevant case law, and particularly the jurisprudence emanating from Kenyan courts concerning paramount considerations in matters of child custody.

3.2 Best Interest of the Child Principle Versus Maternal Preference Rule

Whenever the family circle gets broken or the parents of a child disagree and part ways, one of the biggest areas of conflict relates to who will have physical custody of the child.⁹⁸ The Children's Court, in which jurisdiction over these matters is reposed, is called upon to adjudicate over these disputes where parents fail to reach an amicable solution.⁹⁹

Under article 53(2) of the Constitution of Kenya as well as section 4 and 83, of the Children's Act, there has been a dynamic change in the paramount consideration in matters of child custody. This change is consistent with provisions of international law, concerning children, specifically section 3 of the Convention on the Rights of the Child.¹⁰⁰ That principal consideration, that must be borne in mind in all decisions and actions relating to a child, is the best interest of the child.¹⁰¹

This principle has replaced the previous doctrine of maternal preference rule, where in matters of custody the best interest and welfare of the child were served by awarding custody to the mother, unless there were exceptional reasons to dictate otherwise.¹⁰² The exceptional circumstances include; the inability of the mother to provide appropriate care due to mental illness or moral depravity such as mother disgraceful conduct, drunken habit, and bad company.¹⁰³ That formal approach meant that rarely did fathers have the duty or right of initial nurture of their children by way of custody.¹⁰⁴

In *Kerindo v Ndeke*, the High Court stated in awarding actual custody courts are guided by certain principles; firstly, that where the child is so young, in the absence of good reasons to disentitle the mother the child should remain in her custody, because mothers are best suited to

⁹⁸ Silberg J and Stephanie D, 'Abusers gaining custody in family courts,' 140.

⁹⁹ Section 82, *Children's Act* (Act No 8 of 2001).

¹⁰⁰ Section 3, *Convention on the rights of the child*.

¹⁰¹ Article 53(2), *Constitution of Kenya* (2010), and Section 83, *Children's Act* (Act No 8 of 2001).

¹⁰² Stamps L, 'Maternal preference in child custody decisions,' 2.

¹⁰³ *J O v S A O* (2016) eKLR.

¹⁰⁴ Stamps L, 'Maternal preference in child custody decisions,' 3.

exercise care and control over the children. As a rule, female children should be committed to the custody of the mother.¹⁰⁵ In the case of *N v K*, the High Court stated that in cases involving young female children, there was a rule in favour of the mother for custody in absence of exceptional circumstances.¹⁰⁶

The operation of exceptional circumstances denying the mother custody was demonstrated in *Noordin v Karim*, where the ex-wife had applied for the custody of her two children aged nine and five. Both parties had remarried. The applicant had no source of income and her new husband and five children from his previous marriage and lived with his parents and sister. The High Court held that the applicant's house was not a suitable place for the two children to live. Furthermore, the respondent was a more suitable parent and was possessed of sufficient means to guarantee the children a good life, better education, and a sense of belonging.¹⁰⁷

According to Patrick Kiage, "the best interest of the child standard" is simply another name for the "maternal preference rule" in the Kenyan jurisdiction, since most courts still hold that maternal custody is best suited for the welfare and comfort of the child.¹⁰⁸ In the case of *M A A v A B S*, the High Court held that physical custody, care, and control of the Muslim children should have been awarded to the mother as it would be in the best interest of the children.¹⁰⁹ In the case of *S O v L A M*, the Children's Court had ordered a father who was a member of parliament earning a monthly income of Kshs 485,000 to pay for upkeep and housing and granted custody to the mother. He appealed against the award to the High Court and lost. The Court of Appeal upheld the lower court ruling and held that it was right to award actual custody to an unemployed mother and make provisions of accommodation as it was in the best interest of the child.¹¹⁰

The prima facie rule as established by Kenyan courts as seen in the case of *K M M v J I L*,¹¹¹ and *Geoffrey Waruru Kinyua v Susan Wambui Waruru*, is that it is in the best interest of a child to award actual custody of children of tender years to the mother, except where there are

¹⁰⁵ Kiage, Family law in Kenya,280.

¹⁰⁶ Kiage, Family law in Kenya,281.

¹⁰⁷ Kiage, Family law in Kenya,282.

¹⁰⁸ Kiage, Family law in Kenya,283.

¹⁰⁹ *M A A v A B S* (2017) eKLR.

¹¹⁰ *S O v L A M* (2009) eKLR.

¹¹¹ *K M M v J I L* (2016) eKLR.

exceptional circumstances.¹¹² A child of tender years is a child under the age of ten years according to section 2 of the Children's Act.¹¹³

In the case of *M A A v A B S*, the substantial question in this appeal was whether or not the judge was right in granting actual custody of the child to the father. At the time the application was heard, the son of the parties was seven years old. The judge stated it would be in the best interest of children of tender age to be with their mother and where the court gives custody otherwise it is incumbent on it to make sure that there are sufficient reasons to exclude the prima facie rule.¹¹⁴ The same ruling was upheld in the case of *E K M v E B O*, where the judge stated that the trial court was in error when it removed the actual custody from the mother and handed the child to the father, as this was not best suited for the welfare and comfort of the child.¹¹⁵

In the case of *E N W v T B N*, the court granted actual custody, care, and control of the children to the mother and restricted access to the father. The mother was however unemployed and on numerous occasions abandoned the children and took them out of school thus destabilizing their academic performance.¹¹⁶

3.3 Conclusion

The maternal preference rule is still being applied in Kenyan courts, with children of most ages, but especially when children of the tender years are involved, despite the Children's Act providing for the best interest of the child standard when it comes to determining custody of the child.

¹¹² Geoffrey Waruru Kinyua v Susan Wambui Waruru (2010) eKLR.

¹¹³ Section 2, *Children's Act* (Act No 8 of 2001).

¹¹⁴ *M A A v A B S* (2017) eKLR.

¹¹⁵ *E K M v E B O* (2019) eKLR.

¹¹⁶ *E N W v T B N* (2019) eKLR.

Chapter 4

4.1 Introduction

This chapter analyzes how Kenyan courts may sometimes fail to safeguard the best interest of the child by following the maternal preference rule in child custody decisions.

4.2 Implications of the maternal preference rule on the best interest of the child

According to the Children's Act, in matters of disputed parental custody courts will exercise their discretion in a manner best suited for the protection and comfort of the child.¹¹⁷ It follows that if the father can provide what is in the best interest of the child, he is the proper person to be awarded the custody of the child. Similarly, if the mother is better equipped to provide what the child needs, then she has the better claim.¹¹⁸ However, there is a plethora of decisions by the Court of Appeal as well as the High Court that in determining matters of custody of children, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because the mothers are best suited to exercise care and control of the children.¹¹⁹

Under Kenyan case law every custody dispute begins with the presumption that maternal custody is best for the child. The father then has the burden of disproving the presumption by meeting the prevailing standard of rebuttal. Traditionally, fathers have been required to prove the mother unfit for custodianship in order to rebut the presumption. If he fails, which typically happens, the mother is awarded custody. If he succeeds, he is awarded custody.¹²⁰

The maternal preference rule violates the equal protection clause, as provided in article 27 of the Constitution of Kenya,¹²¹ by providing dissimilar treatment for men and women similarly situated.¹²² The unfitness standard is insufficiently child protective and therefore indefensible under the best interest principle.¹²³ Under the unfitness standard, the child's placement would turn not on the child's need for continuity, but on whether the mother was at fault in the

¹¹⁷ Section 83, *Children's Act* (Act No 8 of 2001).

¹¹⁸ South Africa Law Commission, *Review of the Child Care Act*, 651.

¹¹⁹ *J O v S A O* (2016) eKLR.

¹²⁰ Ramsay L, 'The tender years doctrine,' 342.

¹²¹ Article 27, *Constitution of Kenya* (2010).

¹²² Samuel N, 'Maternal preference and the double burden,' 1100.

¹²³ Ramsay L, 'The tender years doctrine,' 343.

separation. This would require a court to focus on the wrong issue instead of the child's best interest.¹²⁴ Paternal custody sometimes may be better for child even though the mother is not unfit in any way. For instance, a child may have a demonstrably closer and stronger relationship with its father.¹²⁵

As Kenyan courts tend to apply the maternal preference rule, they may fail to address the best interest of the child, by placing children with a parent who abuses the child rather than the nonoffending parent.¹²⁶ While courts usually do not award custody to a parent where circumstances show actual physical abuse of the child, a judge may award custody to a parent who has abused a spouse. The courts may not understand that a parent who abuses his or her spouse cannot at the same time be a good parent.¹²⁷ The judge is often convinced that the child is more appropriately placed in the custody of the abuser because of the inability of the victim to concentrate on questions, formulate answers in a cogent manner and recall past traumatic events, as a result of terrorism inflicted by physical abuse and the added stress of having the abuser sitting in the same courtroom during the hearings.¹²⁸ In the case of *E N W v T B N*, the court granted actual custody, care, and control of the children to the mother despite allegations that she had been abusive to her children and husband.¹²⁹

Maternal preference presumption does not serve the best interests of the children, because gender is irrelevant to the capacity and willingness to perform the mothering function and to the child's experience of mothering.¹³⁰ Furthermore, the simple fact of being a mother does not, by itself, indicate a willingness to render a quality of care different from that which the father can provide.¹³¹ The best interest of the child would be served, when every custody dispute begins with the presumption that both parents are fit.¹³²

Maternal preference rule, is simply no longer supportable in light of the changing roles of married couples. In the past, few mothers were required to work in order to meet the needs of

¹²⁴ Ramsay L, 'The tender years doctrine,' 349.

¹²⁵ Ramsay L, 'The tender years doctrine,' 353.

¹²⁶ Allen M, 'Prioritizing child safety as the prime best factor interest,' 44.

¹²⁷ Allen M, 'Prioritizing child safety as the prime best factor interest,' 46.

¹²⁸ Allen M, 'Prioritizing child safety as the prime best factor interest,' 47.

¹²⁹ *E N W v T B N* (2019) eKLR.

¹³⁰ Ramsay L, 'The tender years doctrine,' 361.

¹³¹ Ramsay L, 'The tender years doctrine,' 360.

¹³² Ramsay L, 'The tender years doctrine,' 362.

their family, and thus were able to spend more time at home with their children. ¹³³Therefore, on divorce, the welfare and interest of the child were best served by granting custody to the mother. However, in a society where more and more young mothers find it necessary to work to supplement the husband's income, the mother may have no more time to spend with the child than the father. Applying the maternal preference rule under these circumstances deprives the father of his right to custody without serving the ostensible purpose of the rule.¹³⁴

4.3 Conclusion

Courts often seem to give more consideration to the maternal preference rule in child custody decisions. Maternal preference rule may not serve the best interest of the child as it forces the court to focus on the faults of the mother instead of the child's best interest, courts may also place the child in the custody of the abusive parent and lastly it is based on gender and is simply no longer supportable in light of the changing roles of married couples.

¹³³ Samuel N, 'Maternal preference and the double burden,' 1099.

¹³⁴ Samuel N, 'Maternal preference and the double burden,' 1100.

Chapter 5

5.1 Introduction

This chapter aims to conclude the research undertaken. It shall outline the findings, recommendations, and conclusions of the study. The main aim of this study was to analyze how Kenyan courts may sometimes fail to safeguard the best interest of the child by following the maternal preference rule in child custody decisions.

5.2 Findings

This research paper is premised on three research questions namely: How the Kenyan legal framework safeguards the rights of children in the divorce of their parents? Secondly, what jurisprudence is emanating from Kenyan courts concerning paramount considerations in matters of child custody? Lastly, what are the negative implications on the interest and welfare of the child as a result of the courts following the maternal preference rule in child custody disputes?

The first research question which is how the Kenyan legal framework safeguards the rights of children in the divorce of their parents focused on highlighting provisions in the Constitution of Kenya 2010, the Children's Act, and international conventions ratified by Kenya, that promote the rights of children in the divorce of their parents. This research paper found that the Kenyan legal framework safeguards the rights of children from divorced homes by ensuring the primacy of importance is accorded to the best interest of the child,¹³⁵ and by providing an opportunity for the child to express his or her views in matters of disputed parental custody.¹³⁶

The second research question which is what jurisprudence is emanating from Kenyan courts concerning paramount considerations in matters of child custody focused on highlighting relevant case law, and particularly the jurisprudence emanating from Kenyan courts concerning paramount considerations in matters of child custody. This research paper found that the maternal preference rule is still being applied in Kenyan courts, with children of most ages,

¹³⁵Article 53(2), *Constitution of Kenya* (2010), and Section 4(2), *Children's Act* (Act No 8 of 2001).

¹³⁶ Article 12(1), *Convention on the rights of the child*.

¹³⁷despite the Children's Act providing for the best interest of the child standard when it comes to determining custody of the child.¹³⁸

The third research question which is what are the negative implications on the interest and welfare of the child as a result of the courts are following the maternal preference rule in child custody disputes focused on highlighting how Kenyan courts may sometimes fail to safeguard the best interest of the child by following the maternal preference rule in child custody decisions. This research paper found that the maternal preference rule may not serve the best interest of the child as it forces the court to focus on the faults of the mother instead of the child's best interest,¹³⁹ courts may also place the child in the custody of the abusive parent,¹⁴⁰ it is also based on gender and is simply no longer supportable in light of the changing roles of married couples,¹⁴¹ and lastly it is unconstitutional as it violates the equal protection clause, as provided in article 27 of the Constitution of Kenya,¹⁴² by providing dissimilar treatment for men and women similarly situated.¹⁴³

5.3 Recommendations

Based on the finding that Kenyan courts still apply the maternal preference rule in matters of disputed parental custody despite Section 83 of the Children's Act providing for the best interest of the child standard, I recommend that the common law 'maternal preference rule' should not be used as a primary guide to decision making about custody matters.¹⁴⁴ Furthermore, custody dispute should begin with the presumption that both parents are fit.¹⁴⁵

Based on the finding that the application of the maternal preference rule by Kenyan courts may sometimes fail to safeguard the best interest of the child, I recommend in appropriate circumstances, an award of joint custody of their child to parents who are divorcing would serve the best interest of the child concerned. This involves an arrangement by which actual physical care of the child in question is shared between the parents, with the child spending

¹³⁷ Kiage, Family law in Kenya, 283.

¹³⁸ Section 83, *Children's Act* (Act No 8 of 2001).

¹³⁹ Ramsay L, 'The tender years doctrine,' 349.

¹⁴⁰ Allen M, 'Prioritizing child safety as the prime best factor interest,' 44.

¹⁴¹ Samuel N, 'Maternal preference and the double burden,' 1099.

¹⁴² Article 27, *Constitution of Kenya* (2010).

¹⁴³ Samuel N, 'Maternal preference and the double burden,' 1100.

¹⁴⁴ South Africa Law Commission, Review of the Child Care Act, 662.

¹⁴⁵ Ramsay L, 'The tender years doctrine,' 362.

substantial amounts of time living with each parent. ¹⁴⁶Both parents share responsibility for major decision making concerning the child, each having an equal voice in the child's education, upbringing, religious training, medical care and general welfare and the right to be consulted over all major decisions in respect of the list. ¹⁴⁷

Joint physical custody should only be granted for parents with the emotional and financial resources to make a joint physical custody arrangement work. To avoid perceived danger of instability in the child's life, caused by frequent moves and inconsistency in living arrangements, joint physical custody should only be granted where parents are able to live within the same locality. ¹⁴⁸

Further this study recommends that where courts are unable to grant joint physical custody, the need to include guidance to the courts in the Children's Act as to what exactly it means when it is said that a particular decision or action must be made in the best interest of a child. ¹⁴⁹A list of criteria can be adopted to determine which parent would be more suitable in enhancing the welfare and interest of the child. In determining which parent should be awarded actual custody, the court can consider the following matters;

- a. The nature of the relationship of the child with each of the child's parents;
- b. The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation form:
 - i) Either of his or her parents; or
 - ii) Any other child, or other person, with whom he or she has been living;
- c. The practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- d. The capacity of each parent, to provide for needs of the child, including emotional and intellectual needs;
- e. The child's maturity, sex, and background (including any need to maintain a connection with the lifestyle, culture, and traditions);

¹⁴⁶ South Africa Law Commission, Review of the Child Care Act ,664.

¹⁴⁷South Africa Law Commission, Review of the Child Care Act ,665.

¹⁴⁸ South Africa Law Commission, Review of the Child Care Act ,666.

¹⁴⁹ South Africa Law Commission, Review of the Child Care Act ,87.

- f. The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- g. Any other factor or circumstance that the court thinks is relevant.¹⁵⁰

5.4 Conclusion

There exists a comprehensive legal framework at the local and international level that protects the rights of children in divorce. The Kenyan courts have developed jurisprudence to promote the best interest of the child. Application of the maternal preference rule by Kenyan courts may sometimes fail to safeguard the best interest of the child. In my opinion, the maternal preference rule should not be used as a primary guide to decision-making about custody matters, as it may not enhance the welfare of the child.

¹⁵⁰ South Africa Law Commission, Review of the Child Care Act ,88.

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