



Strathmore University

Law School

**THE RIGHT OF KINSHIP ADOPTEES IN KENYA TO INHERIT FROM THEIR
BIOLOGICAL PARENTS**

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By

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Declaration

I, EVA MUTHONI GICHUKI, do hereby declare that this dissertation 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 referenced in this paper have been duly acknowledged.

Signed: 

Date: 5th March 2024

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

Signed: 13-03-2024.....

DR JANE WATHUTA

Abstract

Child adoption is an essential tool for protecting and caring for children who are at risk, satisfying the need to form a family, maintaining cultural and religious values, and defending children's rights to a caring and nurturing home. In Kenya, kinship adoption has long been a prevalent form of alternative care, reflecting the society's strong emphasis on family and community bonds. When parents face challenges such as illness, death, or poverty, extended families often step in to provide essential support and care for children, underscoring a cultural tradition of collective responsibility for family welfare. Kenya very recently acknowledged kinship adoption as a separate type of adoption in the Children's Act 2022. However, the absence of specific legislation addressing kinship adoption in Kenya leads to a reliance on general adoption laws, which may not be sufficient to account for the subtleties of kinship care. This reliance runs the risk of going against the child's best interest principle as the laws pertaining to non-relative adoptions might not completely take into account the particular dynamics and requirements of kinship placements. One of the vital areas in which there is a legal void is the severance of the relationship between kinship adoptees and their biological parents and the legal implications of the completion of the adoption process.

This study explores the nuances of kinship adoption and succession laws by examining legislative frameworks, historical developments, and international instruments. The results draw attention to the shortcomings in the law as it stands, especially with regard to kinship adoptees' rights to inherit from their biological parents. The paper proposes legislative changes to protect these rights, such as introducing clauses to the Children's Act as well as modifications to the Law of Succession Act. Furthermore, the paper suggests the need to resolve the ambiguity surrounding kinship adoption procedures and increase public knowledge by means of educational initiatives. Overall, the study highlights how crucial it is to respect the best interests of the child principle within Kenya's legal system and guarantee fair treatment for kinship adoptees.

List of abbreviations

UNCRC	United Nations Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
HCCH	Hague Convention on the Protection of Children and the Co-operation in respect of Inter-country Adoption
UDHR	Universal Declaration of Human Rights
EU	European Union
UK	United Kingdom
USA	United States of America
UN	United Nations
ECtHR	European Court of Human Rights
BIC	Best Interests of the Child

List of cases

In the Matter of Baby M A2013 (eKLR)

In the Matter of the Estate of Thareki Wangunyu (No. 19966 of 1999)

Re Adoption of J A (Baby) (2021) eKLR

In the matter of the Adoption of Baby DM alias Baby Unknown African Baby Girl

Peter K. Waweru v Republic (2006) eKLR

Andrews v Law Society of British Columbia (1989) 1 SCR 321.

In the Estate of Simon Njehia Mundia HC Succession Cause No. 2079 of 2015.

M O v C A O & another [2017] eKLR.

In re Estate of CCBH (Deceased) [2017] eKLR

Johansen v Norway (1970), European Court of Human Rights.

List of Legal Instruments

List of International instruments

United Nations Convention on the Rights of the Child (20 November 1989)

African Charter on the Rights and Welfare of the Child (1 July 1990)

Hague Convention on the Protection of Children and the Co-operation in respect of Intercountry Adoption (1993)

Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (1986).

List of National instruments

Children's Act (No. 22 of 2022).

Constitution of Kenya (2010)

Children Adoption Regulations of 2020

Law of Succession Act 1972

Adoption Act (Cap 143) 1959 repealed.

Guardianship of Infants Act repealed

Young Persons Act repealed

English Children Act 1989

Matrimonial Causes Act 1973

CHAPTER 1: INTRODUCTION

1.1 Background

Legal adoption of children in Kenya would be considered a relatively new phenomenon.¹ This could be attributed to the societal cultural and social realities where matters to do with fertility and conformity to inheritance along blood lines underlie the perception of adoption.² These are in addition to the consideration of legal adoption as ‘unAfrican’. Historically, parenthood via biological means was highly revered whereas childlessness was disparaged.³ Even so, this attitude still lives on. There are various types of adoption including step-parent adoption, child adoption, kinship adoption, foster-care adoption, independent adoption, open adoption and closed adoption.⁴ Within most Kenyan communities existed systems of de facto adoption and fostering where orphans would be taken in and brought up by members of their extended family.⁵ This is formally referred to as kinship adoption today. More Kenyans have gradually been willing to pursue the domestic adoption route of parenthood for various reasons other than infertility, including for charitable motives and formalizing kinship care.⁶

Section 2 of the Children’s Act defines adoption as the process through which a child is permanently placed with a legal parent or parents.⁷ Kenya ratified the Convention on the Rights of the Child which expressly regards the principle of the best interests of the child as a primary consideration under Article 3.⁸ In addition, Kenya ratified the African Charter on the Rights and Welfare of the Child.⁹ The charter requires state parties that recognize the adoption process to uphold the principle by setting elaborate systems in place so as to safeguard the rights of the children involved.¹⁰ In adherence to the requirements as per the international instruments, the

¹ Stuckenbruck D and Roby J, ‘Navigating uncharted terrain: Domestic adoptions in Kenya’ *Oxford Policy Management*, 2016, 1.

² Stuckenbruck D and Roby J, ‘Navigating uncharted terrain: Domestic adoptions in Kenya,’ 1.

³ Stuckenbruck D and Roby J, ‘Navigating uncharted terrain: Domestic adoptions in Kenya’ 1.

⁴ Kunde R, ‘What are the types of adoption’, 2022, <

<https://www.webmd.com/parenting/what-are-types-of-adoption>> on 19th September 2023.

⁵ ‘Child adoption: Trends and policies’, *Department of Economic and Social Affairs*, 2009, 28.

⁶ Stuckenbruck D and Roby J, ‘Navigating uncharted terrain: Domestic adoptions in Kenya,’ 4.

⁷ Section 2, *Children’s Act* (No. 22 of 2022).

⁸ Article 3, *Convention on the Rights of the Child*, 20 November 1989, 1577, 3.

⁹ Alubala I, *The Children Bill 2021: A journey towards promoting and protecting human rights in Kenya*, Save the Children, 21 January 2022- <<https://kenya.savethechildren.net/news/children-bill-2021-journey-towards-promoting-and-protecting-child-rights-kenya>> on 7 January 2023.

¹⁰ Article 24, *African Charter on the Rights and Welfare of the Child*, 1 July 1990.

Children's Act 2001 was enacted with its objective being to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children as well as to make provision for the administration of children's institutions.¹¹ Furthermore, in all matters concerning the child, the Kenyan Constitution in Article 53(2), establishes the best interests of the child to be of paramount importance.¹² Other principles that guide adoption in Kenya as per The Children Adoption Regulations of 2020 include: that of placing the child in their own socio-cultural environment when considering who can adopt the child and the principle of confidentiality of the adoption process.¹³

In Kenya, as in many jurisdictions, once a child has been formally adopted and the adoption process is concluded, it is considered to be final. In the Matter of Baby M A, the court opined that once an adoption order is made, it is final and is considered binding to the parties.¹⁴ This means that the applicants shall not be allowed to give up the child owing to any subsequent unforeseen behavior or other changes in the child.¹⁵ In addition, upon the granting of an adoption order, all rights, duties, obligations and liabilities of the biological parents in relation to the future custody, maintenance and education of the child are extinguished. Conversely, these rights, duties, obligations and liabilities vest in and are enforceable against the adopter as if the child were their biological child.¹⁶ Among these rights is the right to inherit property upon death, therefore, the adopted person ceases to have the right to inherit their biological parents' inheritance intestate but can instead inherit from their adopted parents as though they were their own biological parents.¹⁷

Succession, as a concept, refers to the process by which the property and assets of a deceased person are transferred to their heirs or beneficiaries upon their death. The Law of Succession Act 1972 is the regime that governs the transfer of the movable and immovable property of a deceased person in Kenya.¹⁸ Testate and intestate succession are the various ways of succession

¹¹ *Children's Act* (No. 141 of 2001).

¹² Article 53(2), *Constitution of Kenya* (2010).

¹³ Rule 3, *The Children Adoption Regulations* (2020).

¹⁴ 2013 (eKLR).

¹⁵ *In Re H.R (Baby)* [2015] eKLR.

¹⁶ Section 202(1), *Children's Act* (No. 29 of 2022).

¹⁷ Section 202(1), *Children's Act* (No. 29 of 2022).

¹⁸ Section 4, *Law of Succession* (Cap. 160 of 1972).

recognised under Kenyan law. The former applies when the deceased had a will while the latter if there was no will left by the deceased. In instances of intestacy, the government, using its discretion under the guidance of the law, distributes the assets and property of the deceased. However, even in cases of testacy, court ensures that in the bequeathing of property according to the wishes of the deceased, equity is upheld. The court does so by considering justifiable reasons for beneficiaries being excluded from the will, potentially granting them a share of the inheritance in case they have been left out of the deceased's will.¹⁹

Section 17 of the Children's Act (2022)²⁰ grants children the right to inherit property under the Law of Succession Act in Kenya, ensuring their entitlement to a share of their parents' estate regardless of any other factors. It also prohibits discrimination or disinheriting based on factors such as age, origin, sex, or religion, emphasizing equal treatment and protection for all children.²¹ The provision has been set in pursuit of the best interests of the child in that it accommodates and recognises the inclusion of the child in the family of the individuals that have adopted them. The law safeguards the interests of the child with regards to inheriting from their newfound family in intestacy considering the severance of the relationship between the adoptee and their birth parents.²²

Section 17(1) of the Children's Act (2022) draws inference from the Law of Succession Act. Section 29 of the Law of Succession Act (Cap. 160) defines a dependent to include, the wife or wives, former wife or wives and children of the deceased whether or not they were maintained by the deceased prior to his death.²³ For purposes of intestacy, the property of the deceased ought to be bequeathed to their spouse or spouses and/or the child or children of the deceased as provided for in Sections 35-40 of the Law of Succession Act (Cap.160).²⁴

1.2. Problem Statement

Section 202(1) of the Children's Act explicitly extinguishes the rights, duties, obligations and

¹⁹ In the Matter of the Estate of Thareki Wangunyu (No. 19966 of 1999).

²⁰ Section 17(1), *Children's Act* (No. 29 of 2022).

²¹ Section 17(2), *Children's Act* (No. 29 of 2022).

²² Stuckenbruck D and Roby J, 'Navigating uncharted terrain: Domestic adoptions in Kenya,' 3.

²³ Section 29, *Law of Succession* (Cap. 160 of 1972).

²⁴ Sections 35-40, *Law of Succession* (Cap. 160 of 1972).

liabilities of biological parents in instances of adoption and vests these rights, including that to inherit, in the adoptive parents. However, what is the inheritance status of children who are relinquished to relatives for adoption due to parental incapacity or inability to care for them? This is in consideration of the probable continuance of the pre-existing ties between the adoptee and their biological parent. The study therefore will seek to evaluate whether adoptees under kinship adoption have the right to inherit from their biological parents in a bid to uphold the principle of the best interests of the child.

1.3. Research Objectives

1. To examine the Kenyan approach to post-adoption relationships between biological parents and adopted children, including the severance of these relationships in kinship adoption cases.
2. To analyze the Kenyan approach to post-adoption relationships between biological parents and adopted children, including the severance of these relationships in kinship adoption cases.
3. To investigate whether the current approach to intestate succession under adoption contravenes the right of adoptees under kinship adoption not to be disinherited thus undermines the principle of the child's best interests.
4. To determine ways in which the inheritance rights of kinship adoptees can be recognised in Kenya.

1.4. Research Questions

1. A) What is the approach to the relationship between biological parents and that of the adopted children once the adoption procedure is concluded in Kenya?
B) Is the relationship between the biological parents and that of the adopted child severed in kinship adoption in the Kenyan context?
2. A) What is the legal Kenyan approach on intestate succession with regard to the parties to an adoption?
B) What happens to adoptees under kinship adoption? Can they inherit from their biological parents?

3. Does the current approach to intestate succession under adoption contravene the right of adoptees under kinship adoption not to be disinherited as per Section 17(2) of the Children's Act (2022) thus contravening the principle of the child's best interests as highlighted in Article 53(2) of the Kenyan Constitution 2010?
4. What are the potential methods through which the inheritance rights of kinship adoptees can be acknowledged and protected within the legal framework of Kenya?

1.5. Hypothesis

In the context of adoption laws in Kenya, where the termination of parental rights is considered final and adoptive parents assume all rights, duties, and responsibilities for the child, including the right to inherit property, there is a gap in addressing special circumstances such as kinship adoption. My hypothesis posits that an exception should be introduced in Section 202(1) of the Children's Act to allow for kinship adoptees to maintain a legal relationship with their biological parents. This recognizes the unique nature of kinship adoption scenarios and ensures that the adopted child retains the right to inherit from their biological parents despite going through the formal adoption process.²⁵

1.6. Justification

The practice of informal adoption within Kenyan communities has deep cultural roots and has been prevalent for generations. However, it was not until the recent enactment of the Children's Act in 2021 that kinship adoption received formal recognition under Section 183(4).²⁶ This legal acknowledgment represents a significant shift in policy, providing a framework for the understanding and regulation of kinship adoption practices. Beyond cultural considerations, practicality also plays a crucial role in informal adoptions. Instances where a relative has been the primary caregiver for an extended period, and for the child's access to necessary services, formal intervention and consent become imperative. However, the absence of clear legal requirements and legislation governing kinship adoption, particularly in matters related to succession, has resulted in confusion and posed challenges for adoptees.

²⁵ Section 202(1), *Children's Act* (No. 29 of 2022).

²⁶ Section 183(4), *Children's Act* (No. 29 of 2022).

This confusion is exacerbated by the lack of formalized procedures. The lack of legal clarity and societal reservations potentially jeopardizes the best interests of children under kinship adoption, particularly in cases of intestacy.²⁷ We hope that this research will address these challenges and promote the best interests of children under kinship adoption, particularly in matters of intestacy. The proposed amendment to Section 202(1) of the Children's Act seeks to provide a comprehensive legal framework that addresses the complexities of kinship adoption, focusing on succession rights. By targeting lawmakers, this study aspires to contribute to the enhancement of legal provisions, fostering a more inclusive and protective environment for children under kinship adoption, thus bridging the gap between cultural practices and legal recognition.

1.7. Theoretical Framework

1.7.1. Attachment Theory

The attachment theory developed by John Bowlby and further elaborated by Mary Ainsworth, is a psychological framework that describes an emotional bond between an infant and their caregiver.²⁸ The theory posits that a child's attachment to their caregiver serves as a foundation for the child's social, emotional and cognitive development. In the context of child adoption, attachment theory is highly relevant because it provides a framework for understanding how the disruption of early attachments can affect the well-being of adopted children.²⁹ As per the attachment theory, infants develop an attachment bond with the caregiver, usually the mother, based on their need for safety and security. The quality of this attachment bond is influenced by the caregiver's responsiveness and sensitivity to the infant's needs. A secure attachment bond forms when the caregiver consistently responds to the infant's needs and provides a sense of safety and security.

In contrast, an insecure attachment bond develops when the caregiver is inconsistent and unresponsive leading the infant to feel anxious and uncertain.³⁰ The attachment theory has been applied to understanding the experiences of children who were adopted, especially those who have experienced early disruptions and the attachment relationships. According to Bowlby and

²⁷ Stuckenbruck D and Roby J, 'Navigating uncharted terrain: Domestic adoptions in Kenya,' 3.

²⁸ <<https://www.verywellmind.com/what-is-attachment-theory-2795337>> on 4th February 2023.

²⁹ <<https://www.verywellmind.com/what-is-attachment-theory-2795337>> on 4th February 2023.

³⁰ <<https://www.verywellmind.com/what-is-attachment-theory-2795337>> on 4th February 2023.

Ainsworth's seminal research, adoption should take place within the first year of life in order to foster a strong bond between the adoptee and adoptive parents.³¹

Other studies have shown through widespread research that there is a high prevalence of learning and developmental difficulties experienced by children that have been adopted.³² According to research done, in the United Kingdom, adoptive children are at higher risk of mental health issues in care and children in post-adoption services more likely to receive counseling and support for mental health issues compared to children who have not undergone the adoption process.³³ In her thesis, Campbell concludes that the outcomes that have been most frequently mentioned in her research are attachment, identity, and emotional/behavioral issues with regard to children that have been adopted.³⁴

Following these findings from the attachment theory it can be deduced that the separation of children from their biological parents in more ways than one, negatively affects the adopted child. This is the case because the law provides for severance of the relationship between the adoptee and their biological parents. In kinship adoption, these effects can be mitigated through the continuance of the relationship between the adopted child and their biological parents and by extension their extended family hence not only preventing physical separation but also emotional bonds.

1.7.2. Conceptual Framework: The Stepparent Exception

Fuller L., in her article, argues that adopted children should be entitled to inherit from their biological parents and that the stepparent exception, denying them this right, ought to be

³¹ Campbell T, 'Factors Associated with Attachment in International Adoption,' Virginia Polytechnic Institute and State University, 2005, 38- <<https://core.ac.uk/download/pdf/5164229.pdf> > on 1st March 2023.

³² Shira J, Creating an attachment theory and adoption psychology based training programme for parents and school staff, The University of Manchester, 2014, 26-<
<https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:232123&datastreamId=FULL-TEXT.PDF>> on 26th February 2023.

³³ Shira J, Creating an attachment theory and adoption psychology based training programme for parents and school staff, The University of Manchester, 2014, 26-<
<https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:232123&datastreamId=FULL-TEXT.PDF>> on 26th February 2023.

³⁴ Campbell T, 'Factors Associated with Attachment in International Adoption,' Virginia Polytechnic Institute and State University, 2005, 38- <<https://core.ac.uk/download/pdf/5164229.pdf> > on 1st March 2023.

extended.³⁵ This extension to include adopted children should be provided in order to provide them with the same intestate succession rights as biological children.

The stepparent exception is a legal doctrine that allows stepchildren to inherit from their stepparents but not from their biological parents. The author argues that this exception is unjust and discriminates against adopted children who have been legally recognised as children of their adoptive parents.³⁶ She proposes that the stepparent exception should be extended to include adopted children so that they can inherit from both their biological and adoptive parents. Fuller L. supports the argument by examining the history and evolution of adoption laws and the legal principles of intestate succession. The author contends that the newly adopted children's right to inherit from their biological parents is inconsistent with the principles of fairness and equality that underlie these laws.³⁷

In the same way, the law under relative kinship adoption ought to provide for the inheritance of adoptees from their biological parents. This is because, just like under stepparent adoption the relationship between the adopted persons and their biological parents could be ongoing hence taking away the right of the children to inherit would be a contravention of their rights and discriminatory based on origin and in fact against the best interests of the children.

1.8. Literature Review

Several studies in Kenya have addressed the procedure of adoption in Kenya, others focusing on the factors that influence child adoption in Kenya³⁸ and few have touched on the right of inheritance owed to adopted children from the angle of the adopted parents. These matters have further been handled in Kenyan courts as well as by the law. A study touching on adoption in Kenya by Akoth was on the constitutionality of Section 3(2) of the Law of Succession Act 1972 on the definition of a child in relation to both female and male persons. The paper sought to examine whether the provision is discriminatory considering it does not formally recognise

³⁵ Fuller L, 'Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended', 46.

³⁶ Fuller L, 'Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended', 46.

³⁷ Fuller L, 'Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended', 47.

³⁸ Malagon J, 'The Social and Cultural Factors that Influence Legal Child Adoption in Nairobi, Kenya' unpublished, The University of Nairobi, Nairobi, 2012.

children adopted by female persons but it does for male persons.³⁹ The paper addresses some similar elements as this study such as the principle of the best interests of the child and the law on informal adoption.

Nevertheless, none of the approaches covered have been through the lens of the right to inherit owed to children adopted under kinship adoption from their biological parents. This could be due to the novelty of the legal enforcement of kinship adoption giving it legal implications.⁴⁰ My study shall in this regard, be a unique contribution to the fields of family law and succession law through its approach to kinship adoption and the proposition that I shall make.

1.8.1. On the relationship between the biological parents and the adopted child

There are two approaches to the relationship between biological parents and their children who have been given up for adoption depending on the laws of the jurisdiction. The first is that of severance. This entails ending the relationship between the biological parents and the adopted children for good. On the other hand, the other approach is that where this relationship is not severed, in some states, it is referred to as open adoption. Here, the child has the freedom to contact and interact with their biological parents. In the Kenyan jurisdiction, the former approach is taken as prescribed in Section 202 of the Children's Act where upon an adoption order being made, all rights, duties, obligations and liabilities of the biological parents in case of a first adoption or adoptive parents in case of subsequent adoption or guardians of the child in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian, to inherit property and to consent or give notice of dissent to marriage, are to be extinguished.⁴¹

Bjertness was in agreement on this approach as he was of the opinion that once a child is adopted, the biological parents of the child should be deprived of all parental responsibility and all legal rights concerning the child, including that of inheritance.⁴² Authors such as Keifer

³⁹ Akoth L, 'A critique of the constitutionality of Section 3(2) of the Law of Succession Act of Kenya' 2020, 9 <file:///C:/Users/user/Downloads/A%20critique%20of%20the%20constitutionality%20of%20section%203(2)%20of%20the%20law%20of%20succession%20act%20of%20Kenya.pdf> on 3rd January 2023.

⁴⁰ Section 183(4)(a), Children's Act (No. 29 of 2022)

⁴¹ Section 202(1), *Children's Act* (No. 29 of 2022).

⁴² Bjertness, D, 'Domestic Relations - Inheritance by Adopted Children - Right of Adopted Child to Inherit from Its Natural Parents' 33(2) North Dakota Law Review, 1657, 241.

further support this approach as he states in his article, 'Intestate Succession, Sociology and the Adopted Child.'⁴³ Reasons given by Byrd in support of the approach include the adoptive parents might lose their parenting abilities as a result of overdependence on the biological parents, the lack of detachment may also prolong the period of separation grief and also lead to the confusion of the adoptees by them having two sets of parents.⁴⁴

Furthermore, in traditions practiced by communities such as the Maasai, there was deliberate intent for adopted children to 'forget their first home.' This was done through rituals that were specifically carried out to recreate kinship and replace the natal parents.⁴⁵ Some of these rituals were the sacrificing of a heifer, drinking of special herbs for the adoptive mothers and even the circumcision of the child to complete the adoption procedure through creating new ties. The children, after that, ought to settle seamlessly into the⁴⁶ new family and when the child was very young, the adoption would be kept a secret.

On the other hand, proponents for the latter approach on preserving the relationships cite various advantages to taking the approach. Baran states that benefits of open adoption include the availability of both a permanent home and reliable parental care for the adopted child.⁴⁷ Moreover, the emotional frustration and psychological issues that may arise from the separation of the children and their biological parents because of feelings of rejection, are done away with. This could go both ways including for the biological parents as they do not encounter the fear of losing their child.⁴⁸ Berry also points out that open adoptions prevent the adoptees from identity confusion.⁴⁹ This approach would be the most practical one in instances where the adoption is a kinship adoption. This is because, the child shall more likely than not interact with their

⁴³ Kiefer P, 'Intestate Succession, Sociology and the Adopted Child' 11(2) Villinova Law Review, 1966, 5.

⁴⁴ Berry M, 'Risks and Benefits of Open Adoption', Princeton University, Vol 3, 1, 1993, 129.

⁴⁵ Archambault C, 'Fixing families of mobile children: Recreating kinship and belonging among Maasai adoptees in Kenya' *Sage*, 2010, 233,
<https://journals.sagepub.com/doi/pdf/10.1177/0907568210365672?casa_token=D8QuzBGzPnYAAAAA:ZYp3XEMiTEXhM5q4C6fw0UCZUVwdj8RBWi9VqgiFEinrctJhTGIN9nkzK-llqAc84jVHMpaDRqZ> on 28th February 2023.

⁴⁶ Archambault C,
<https://journals.sagepub.com/doi/pdf/10.1177/0907568210365672?casa_token=D8QuzBGzPnYAAAAA:ZYp3XEMiTEXhM5q4C6fw0UCZUVwdj8RBWi9VqgiFEinrctJhTGIN9nkzK-llqAc84jVHMpaDRqZ> on 28th February 2023.

⁴⁷ Baran A, 'Open Adoption' Oxford University Press, Vol 21, 2, 100.

⁴⁸ Baran A, 'Open Adoption' Oxford University Press, Vol 21, 2, 100.

⁴⁹ Berry M, 'Risks and Benefits of Open Adoption', Princeton University, Vol 3, 1, 1993, 128.

biological parents if their adoptive parents were their aunt, uncle, grandparent, cousin among others.

1.8.2. On the principle of the best interests of the child

In 1959 the United Nations adopted a Declaration on the Rights of the Child which affirmed the principles laid out in the 1924 declaration. In addition, in 1989, the Convention on the Rights of the Child provided for these principles, the best interest of a child being one of them. It may be defined as the combination of factors a child requires to sustain their development at all times. In the year 30th July 1990, Kenya ratified the Convention on the Rights of the Child which expressly regards the principle of the best interests of the child as a primary consideration under Article 3.⁵⁰ In addition, Kenya ratified the African Charter on the Rights and Welfare of the Child.⁵¹ The charter requires state parties that recognize the adoption process, to uphold the principle by setting elaborate systems in place so as to safeguard the rights of the children involved.⁵²

In adherence to the requirements as per the international instruments, the Children's Act 2001 was enacted with its objective being to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children as well as to make provision for the administration of children's institutions. Additionally, the Kenyan Constitution, in Article 53(2), declares that the best interests of the child must be paramount in all matters affecting the child.⁵³

Even in resolving matters to do with succession, Section 3 (2) of Cap 160 defines a child for the purposes of succession. In all matters concerning a child, it is paramount to offer them the best mankind has to offer. Whenever children are involved, their best interests have to be considered as a primary consideration, separate from those of their parents.⁵⁴

⁵⁰ Article 3, Convention on the Rights of the Child, 20 November 1989, 1577, 3.

⁵¹ Alubala I, The Children Bill 2021: A journey towards promoting and protecting human rights in Kenya, Save the Children, 21 January 2022- on 7 January 2023.

⁵² Article 24, African Charter on the Rights and Welfare of the Child, 1 July 1990.

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

⁵⁴ Section 3, *Law of Succession* (Cap. 160 of 1972)

Contribution

This study will contribute greatly to the proper formalization and regulation of kinship adoption, to be precise, in matters of intestate succession by the adoptees from their biological parents. The study will initiate discussions on the area of kinship adoption which is practiced widely in an informal manner in our Kenyan context yet very little literary works are available on the same as well as in addressing matters of formalization of the same. It shall create this impact through making an analysis of the current regime governing adoption and succession relating to parties to an adoption. The dominant principle that shall be applied in arriving at the recommendations shall be that of the child's best interests as highlighted in Article 53(2) of the Kenyan Constitution 2010.

1.9. Methodology

This study will be of a qualitative nature. This includes the use of secondary research materials such as books, journals, articles, case law, reports as well as published and unpublished dissertations for reference. I shall also utilize primary sources such as the Constitution of Kenya 2010, the Children's Act 2021 and the Law of Succession Act 1972. The study through the first two chapters shall prevalently employ a deductive approach, the first addressing the approach to adoption, issuing of orders and the severance of biological parents' rights and the second focusing on the Kenyan approach to intestate succession in kinship adoption. This shall provide a basis for the primary claim of the study. It then shall analyze these approaches and assess them in relation to the principle of the child's best interests. In addressing these approaches, the study shall use the doctrinal analysis through making reference to the statutory law, case law, articles and adjudicatory decisions.

In examining what the Kenyan approach to the relationship between biological parents and that of their adopted children is after adoption and whether the relationship is severed in cases of kinship adoption, the doctrinal approach shall be used by looking at the legal approach through the statutory provisions and through studying the same on a case to case basis. Moreover, a historical approach will be used to address the approach as per the previous legal regimes on the same with regards to the provisions of the previous Children's Act and Adoption Guidelines.

The study will then discuss the legal approach on intestate succession in instances relating to parties to an adoption and whether adoptees under kinship adoption can inherit from their biological parents. This shall constitute the use of the doctrinal analysis through studying case law and the statute, books as well as scholarly articles.

In determining whether the current approach to intestate succession under adoption contravenes the right of adoptees under kinship adoption not to be disinherited as per Section 17(2) of the Children's Act (2022) thus contravening the principle of the child's best interests as highlighted in Article 53(2) of the Kenyan Constitution 2010, the doctrinal approach shall be dominantly used. This is through the use of statute, international laws, scholarly work and journal articles on the interpretation of the principle of the best interests of the child and how the principle applies in enforcing the right to inherit of adoptees as per Section 17(1), *Children's Act*.

The study shall be prescriptive in so far as proposing how Section 29 of the Law of Succession Act (Cap. 160) should be amended in a manner that includes adoptees whose biological parents had given them up for kinship adoption and whose relationship had been maintained with the deceased during their lifetime. This shall be deductive in so far as it shall put together the claims from all the prior questions and make recommendations from the conclusive claim formed.

1.10. Chapter Breakdown

This research proposal will form the first chapter of the study. It details important aspects of the study. For instance, the research objectives, conceptual framework, as well as the justification of the study, providing the background as well as a frame of reference that will form the basis of the subsequent chapters.

Chapter 2 will entail an outline of what the Kenyan approach to the relationship between biological parents and that of their adopted children is after adoption and whether the relationship is severed in cases of kinship adoption. This will lay the foundation for the following chapter.

Chapter 3 of the study will then discuss the legal approach on intestate succession in instances relating to parties to an adoption and whether adoptees under kinship adoption can inherit from their biological parents.

In chapter 4, the study will be determining whether the current approach to intestate succession under adoption contravenes the right of adoptees under kinship adoption not to be disinherited as

per Section 17(2) of the Children's Act (2022) thus contravening the principle of the child's best interests as highlighted in Article 53(2) of the Kenyan Constitution 2010.

Chapter 5 shall be a proposition on how Section 29 of the Law of Succession Act (Cap. 160) can be amended in a manner that includes adoptees whose biological parents had given them up for kinship adoption and whose relationship had been maintained with the deceased during their lifetime.

CHAPTER 2: EXPLORING THE RELATIONSHIP BETWEEN KINSHIP ADOPTEES AND THEIR BIOLOGICAL PARENTS

2.1. Introduction

This chapter entails the history of child adoption, the adoption process in Kenya and an outline of the Kenyan approach to the relationship between biological parents and that of their adopted children after legal adoption proceedings are completed. It shall discuss whether these relationships are severed legally in Kenya. Further, it will discuss whether in cases of kinship adoption, the same approach is taken.

2.2. Legal Adoption

2.2.1. The History of Legal Adoption

Child adoption is the legal process of permanently placing a child and vesting their parental rights and responsibilities on an eligible adult who is not the biological parent of the child.⁵⁵ In the African context, children were typically raised not only by their parents, but also by their extended family and the community at large. However, in the present day, these units are not as functional as they used to be in that capacity and issues relating to poverty, financial strain, HIV/AIDS, wars, teenage pregnancies, sicknesses and contemporary lifestyles gave impetus to legal adoption in a bid to protect children.⁵⁶

The origin of child adoption dates back to early civilization and was discovered in the writings of Romans, Egyptians and Greeks.⁵⁷ These ancient civilizations considered the family unit, marriage and procreation to be of great significance. In addition to taking care of orphaned children, adoption was practiced to strengthen bloodlines and preserve domestic deities through the acquisition of an heir⁵⁸. Another purpose that adoption served was the preservation of wealth within few desirable families, hence for a family that had many sons they would ensure

⁵⁵ Mwaniki M, 'Child adoption process in Kenya' *MMTK Law*, 16th February 2023- <<https://mmtklaw.com/child-adoption-process-in-kenya/>> on 21st December 2023.

⁵⁶ Ngugi J, 'Factors influencing child adoption process in Kenya: The case of Children's Homes in Nairobi County' Unpublished M.A., University of Nairobi, Nairobi, 2014, 8.

⁵⁷ Walt G, 'The History of the Law of Adoption in South Africa' *Obiter*, 2014, 423.

⁵⁸ Walt G, 'The History of the Law of Adoption in South Africa' 424.

distribution of wealth through giving up some of their sons to other noble families for adoption⁵⁹. These extents of adoption were sought by son-less families because if a family had no male heir, the wealth could regress to the state. The primary role of adoption then was to serve the interests of the family by ensuring that there was a successor in the family and the family name was maintained.⁶⁰

In the Middle Ages, adoption became less frequent as inheritance was considered to be a right for only people that were blood related with the intention of maintaining the status quo of the royal families with regards to power and financial influence.⁶¹ Practices such as ‘exposio’ and ‘oblatio’ were carried out in medieval societies. Exposio involved the abandoning of children in public places in an attempt to regulate family sizes whereas oblatio referred to the practice of parents giving up their children to monasteries.⁶² Other institutions such as orphanages were established during this era as the number of abandoned children increased. Soon after, orphanages also started becoming swamped giving rise to the notion of indentured servitude. This entailed the exploitation of children for free child labor, initially with the intent that they would acquire new skills through apprenticeship in the new families that took them in.⁶³

In the mid-19th century, there was a shift in solely the law of the protection of legitimate families against the claims of illegitimate children in Western Europe, to the recognition of the children’s rights and protection against abusive families and child labor.⁶⁴ The notion of adoption as just a means to provide an heir or as a form of servitude began to be discounted and the welfare of the children started being appraised.⁶⁵ The first western country to pass child adoption laws was the United States in the state of Massachusetts.⁶⁶ States like Minnesota followed by passing a law that ensured that the welfare of the child was paramount in adoptions through

⁵⁹ Jones J, ‘What Is the History of Adoption?’ *Gladney Center for Adoption*, 2019, 1 - <<https://adoption.org/what-is-the-history-of-adoption>> on 3rd January 2024.

⁶⁰ Walt G, ‘The History of the Law of Adoption in South Africa’ 423.

⁶¹ Jones J, ‘What Is the History of Adoption?’ 1.

⁶² Boswell J, ‘Expositio and Oblatio: The Abandonment of Children and the Ancient and Medieval Family’ 89(1) *Oxford University Press*, 1984, 12.

⁶³ Jones J, ‘What Is the History of Adoption?’ *Gladney Center for Adoption*, 2019.

⁶⁴ Mignot J, ‘Child Adoption in Western Europe, 1900-2015,’ *Cliometrics of the Family*, 2019, 4.

⁶⁵ Jones J, ‘What Is the History of Adoption?’ *Gladney Center for Adoption*, 2019.

⁶⁶ Mignot J, ‘Child Adoption in Western Europe, 1900-2015,’ 4.

requiring both children and adults to be investigated prior to the granting of orders and that the process remains confidential.⁶⁷

Nonetheless, the denouement of the World Wars I and II, resulted in an increase in the number of orphans and in turn the augmentation of adoption as well as foster care in the United States. There was also an emergence of the need to adopt infants, which was not the case prior. It is during this time that international adoptions including transracial ones rose.⁶⁸ The repercussions of World War II also commenced Kenya's work on children's rights through a number of women who formed the East African Women's League.⁶⁹ These women believed that there ought to be laws passed so as to protect the children that had been orphaned, abandoned and neglected as a result of the war. The group applied pressure to the colonial government, demanding the formation of a special committee to examine and recommend ways to strengthen child-related legislation and foster volunteerism for children in need of care and protection.⁷⁰

2.2.2. International Instruments on adoption

The international legal framework for child adoption consists of the United Nations Conventions of the Rights of the Child (UNCRC) and the 1993 Hague Convention on the Protection of Children and the Co-operation in respect of Intercountry Adoption (HCCH). Both of these instruments set the minimum standards for adoption placing emphasis on the consideration of the best interests of the child.⁷¹ They also stipulate the requirement of the authorization of adoption by competent authorities, need for the consent of the parties involved and the prohibition of adoption with the intention of financial gain. The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally also provides for the paramount consideration of the child's best interests and it also acknowledges the need for a child to know their background in adoption and foster procedures unless it is contrary to their best interests.⁷²

⁶⁷ Herman E, 'Adoption history in brief' *The Adoption History Project*, 2012,1.

⁶⁸ Jones J, 'What Is the History of Adoption?' *Gladney Center for Adoption*, 2019.

⁶⁹ - <<https://www.cwsk.go.ke/about-us/who-we-are/historical-background/>> on 3rd January 2024.

⁷⁰ - <<https://www.cwsk.go.ke/about-us/who-we-are/historical-background/>> on 3rd January 2024.

⁷¹ Article 21, *United Nations Conventions of the Rights of the Child* (1989).

⁷² Article 9, *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally* (1986).

2.2.3. The Legal framework on Child Adoption in Kenya

In Kenya, the first legal framework that was solely created for child adoption was the Adoption Act 1933, which was a depiction of the English Adoption of Children Act 1927. This Act was particularly designed for the adoption of children who were not of African descent.⁷³ This piece of legislation was then replaced by the Adoption Act (Cap 143) in 1959 though the alterations were not substantive.⁷⁴ A commission was established by the then president in the year 1973 with the aim of appraising the law on adoption that was in existence. Principally, the commission was to assess the law in existence and whether traditional customs were inculcated in the law.⁷⁵

The recommendations suggested by the commission were received and the Act was amended breeding the Adoption Act of 1978. The objective of this law was to facilitate adoption orders, regulate adoption societies and related activities, and restrict payments associated with child adoption.⁷⁶ In 2001, the Children's Act repealed the Adoptions Act, the Guardianship of Infants Act and Young Persons Act in order to harmonize the laws regarding children and have them in one legislation.⁷⁷ Some of the repealed laws from the Adoption Act include the restriction of polygamous individuals from child adoption as well as the prohibition of inter-racial adoption.⁷⁸ The Children's Act No. 8 of 2001, was coherent with the laws stipulated in the United Nations Convention on the Rights of the Child (CRC), and the African Charter on the Rights and Welfare of the child.⁷⁹ Nonetheless, the Act was repealed by the Children's Act 2022 which is the current legal framework that exists in Kenya on matters concerning children.

2.2.4. The process of Legal Adoption

The Children's Act 2022 in Part XIV sets out specific legal requirements and processes that are aimed at ensuring that the welfare of children is safeguarded during the adoption process and that they are adopted by responsible and suitable adoptive parents. The process of adoption is a two-stepped one. The steps are the obtaining of clearance from a certified adoption society and

⁷³ S'lade H, 'The Law of Adoption in Kenya' in Gutto S, *Children and the Law in Kenya*, Institute for Development Studies, Nairobi, 1979, 55.

⁷⁴ S'lade H, 'The Law of Adoption in Kenya', 56.

⁷⁵ S'lade H, 'The Law of Adoption in Kenya', 56.

⁷⁶ Ngaira W, 'The Law on Child Adoption in Kenya' 8(1) *Wajibu*, 1993, 18.

⁷⁷ Lalinde J, 'The Social and Cultural Factors that Influence Legal Child Adoption in Nairobi Kenya' unpublished, University of Nairobi, Nairobi, 2012, 7.

⁷⁸ Ngaira W, 'The Law on Child Adoption in Kenya', 19.

⁷⁹ Lalinde J, 'The Social and Cultural Factors that Influence Legal Child Adoption in Nairobi Kenya', 8.

thereafter, the acquiring of an adoption order from the High Court of Kenya.⁸⁰ Adoption processes and outcomes are confidential, and attempting to solicit adoption in advertisements or receiving consideration for adoption is prohibited⁸¹. In addition, it is imperative that the process of adoption is generally conducted in the best interests of the child.⁸²

The prerequisites for the consideration of child adoption in Kenya include that a child has to be at least six weeks old.⁸³ Also, they ought to be cleared by the National Council for Children's Services so that they can be adopted, this includes ensuring that all the necessary and reasonable steps have been taken if they are not related to the child to inform the child's relatives of the proposed adoption and that a relative has expressed willingness to take care of the child.⁸⁴ The adoption society verifies that the person offering up the child for adoption is aware of its consequences and obtains approval from them before approving the adoption of the child⁸⁵. It also looks into the eligibility of the child and the applicant for adoption. There is no specific requirement for the child being adopted to be a Kenyan citizen or to have been born in Kenya. Article 14(4) of the Constitution of Kenya stipulates that a child who is found in Kenya whose nationality and parents are not known and is or appears to be less than the age of eight, is presumed to be a Kenyan citizen.⁸⁶ However, it is imperative that the child resides in Kenya at the time and has been under the care of the applicant(s) for at least three months before the application of an adoption order.⁸⁷

The law allows for the application by both a sole applicant or joint application by spouses.⁸⁸ For sole applicants, the law is against the adoption of a female child by a sole male applicant whether foreign or not as well as the adoption of a male child by a sole female applicant.⁸⁹ The exception to this law is if the child and the applicant are biologically related. Additionally, eligibility for

⁸⁰ Goitom H, 'Kenya Adoption Law' *Law Library*, 2008, 1 - [https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?public=true&handle=hein.llcr/locaetk0001&div=2&start_page=\[i\]&collection=llcr&set_as_cursor=0&men_tab=srchresults](https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?public=true&handle=hein.llcr/locaetk0001&div=2&start_page=[i]&collection=llcr&set_as_cursor=0&men_tab=srchresults) on 24th December 2023.

⁸¹ Goitom H, 'Kenya Adoption Law' *Law Library*, 2.

⁸² *Re Adoption of J A (Baby)* (2021) eKLR.

⁸³ Section 184(1), *Children's Act* 2022.

⁸⁴ In the matter of the Adoption of Baby DM alias Baby Unknown African Baby Girl

⁸⁵ Goitom H, 'Kenya Adoption Law' *Law Library*, 2.

⁸⁶ Article 14(4), *Constitution of Kenya* (2010).

⁸⁷ Goitom H, 'Kenya Adoption Law' *Law Library*, 2.

⁸⁸ Section 186(1), *Children's Act* (2022).

⁸⁹ Section 186(6), *Children's Act* (2022).

adoption involves meeting the age criteria which is the applicant(s) being at least 26 years of age but not exceeding 65 years old and having an age gap of at least 21 years between them and the child they wish to adopt.⁹⁰ The Children's Act prohibits adoption for those incapable of caring for a child or with criminal records related to sexual crimes, indecent assault, human trafficking, arms smuggling, or corruption.⁹¹

2.2.5. Procedure once the adoption process is concluded in Kenya

Even upon the clearance by the children's society, the High Court may choose to impose a number of further requirements. The court may also set restrictions on the adopter's ability to remove the child from its custody, mandate that the adopter make preparations for the child in ways the court sees suitable, and mandate that the adopter be under the supervision of an adoption organization. If the adopter's consent was conditional, the court could order them to give security to guarantee that the terms are followed, as well as to submit regular reports if they are not citizens or residents of Kenya.⁹²

A guardian ad litem is appointed upon the filing of the adoption application with the court, either at the request of the applicants or at the court's initiative.⁹³ Throughout the adoption process, this guardian looks into and informs the court of pertinent circumstances in order to safeguard the child's best interests. They are accountable for providing the child's care in the event that permission is withheld, advocating for the child, and recommending temporary or adoption orders. Unless an extension is granted, the guardian ad litem's appointment expires upon the court's final order.⁹⁴

The court can decide whether to approve or reject the adoption order after considering the application. When an adoption is approved, the Registrar-General is directed by the court to enter

⁹⁰ Nyathira A, 'Things You Need To Know About Children Adoption In Kenya' *Citizen Digital*, 19th May 2023- <<https://www.citizen.digital/lifestyle/things-you-need-to-know-about-children-adoption-in-kenya-n320025>> on 2nd January 2024.

⁹¹ Nyathira A, 'Things You Need To Know About Children Adoption In Kenya', 1.

⁹² Goitom H, 'Kenya Adoption Law' *Law Library*, 2.

⁹³ Section 188(1), *Children's Act* (2022).

⁹⁴ Nimble P, 'Requirements and Process of Adoption in Kenya' *Ameli Inyangu & Partners Advocates* <<https://aip-advocates.com/wp-content/uploads/2017/11/Requirements-and-Process-of-Adoption-in-Kenya.pdf>> on 15th December 2023.

the adoption in the Adopted Children Register.⁹⁵ All of the applicants' rights, responsibilities, obligations, and liabilities regarding the kid are transferred to them as a result of the adoption order; they are treated as though the child were their biological child.⁹⁶

2.2.6. The severance of the relationship between the natural parents and the adopted children

After an adoption order is made, all of the biological parents', adoptive parents', and guardians' rights regarding the child's future custody, maintenance, and education including the right to name a guardian, inherit property, and consent to or dissent from marriage are extinguished. All of these rights, duties, obligations, and liabilities transfer to the adopter and become exercisable by them, as well as enforceable against them. With regard to the aforementioned matters, the child will be treated as a child born of the adopter.⁹⁷

2.3. Kinship adoption

2.3.1. History of Kinship Adoption and International Instruments

Kinship adoption, otherwise, mainly referred to as kinship care in the United States and the United Kingdom jurisdictions, refers to the placement and bringing up of children by relatives mostly when their parents are incapable of catering for their children's primary needs including safety.⁹⁸ These relatives could be grandparents, aunts, uncles, older siblings or even first cousins.⁹⁹ Kinship adoption has long been a part of Kenya's customary kinship structures. Traditionally, Kenyan and other African communities have relied on networks of extended families for assistance and childrearing. These systems have provided a safety net for orphaned, abandoned and vulnerable children through providing familial care within their extended families.¹⁰⁰ Value was placed on the role of the community in the bringing up of children hence

⁹⁵ Nimble P, 'Requirements and Process of Adoption in Kenya', 1.

⁹⁶ Section 202(1), *Children's Act* (2022).

⁹⁷ Section 202(1), *Children's Act* (2022).

⁹⁸ Littlechild, B.; Housman, C. 'Applying Universal Principles of 'Best Interest': Practice Challenges across Transnational Jurisdictions, Cultural Norms, and Values' *Children*, 2023, 10, 537- <<https://doi.org/10.3390/children10030537>> on 3rd January 2024.

⁹⁹ 'A summary of Kinship Care in Kenya', *Better Care Network*, 2022, 1 -< https://bettercarenetwork.org/sites/default/files/2022-04/case_sudy_kv_design_v2.pdf> on 27th December 2023.

¹⁰⁰ 'A summary of Kinship Care in Kenya', *Better Care Network*, 2022, 1.

kinship care was considered quite conventional. This is the basis for the peculiarity of the formalization of kinship adoption and the prevalence of informal kinship care.¹⁰¹

Informal kinship arrangements refer to instances whereby a child is looked out for temporarily or for a long period by their relatives, either maternal or paternal, without a judicial order. Formal kinship arrangements, on the other hand, presupposes the involvement of an administrative authority, usually the court, to issue a legal order.¹⁰² The Kenyan government is aiming to create a society in which all children are brought up in families and communities. Kinship care must be incorporated in order to promote a society where families are caring, communities are inclusive, and care is provided continuously in areas that support a child's culture.¹⁰³ This is following the research and the corroboration of the negative results associated with the placing of children in residential care institutions such as homes and orphanages.¹⁰⁴ Nonetheless, for the fruition of this goal, there is the need to formalize kinship adoption so that the adoptive parents can access these benefits.

The United Nations Convention on the Rights of the Child (UNCRC) provides for kinship adoption through recognizing the role of the extended family in caring for children.¹⁰⁵ Kinship is further acknowledged as an alternative care option for children lacking parental care in the United Nations Guidelines. Before the enactment of the Children's Act 2021, Kenya had no legal framework that acknowledged kinship care aside from guidelines which supported it as an informal alternative of childcare such as the Standard Operating Procedures for Alternative Family Care and the Guidelines for the Alternative Family Care of Children in Kenya.¹⁰⁶ Be as it may, the Children's Act 2022 formally recognizes kinship adoption in Section 183.¹⁰⁷

¹⁰¹ 'A summary of Kinship Care in Kenya, Better Care Network', 2022, 1.

¹⁰² Littlechild, B.; Housman, C. 'Applying Universal Principles of 'Best Interest': Practice Challenges across Transnational Jurisdictions, Cultural Norms, and Values '2.

¹⁰³ 'A summary of Kinship Care in Kenya', *Better Care Network*, 2022, 2.

¹⁰⁴ 'A summary of Kinship Care in Kenya', *Better Care Network*, 2022, 5.

¹⁰⁵ Article 5, *United Nations Convention on the Rights of the Child* (1989).

¹⁰⁶ 'A summary of Kinship Care in Kenya', *Better Care Network*, 2022, 4.

¹⁰⁷ Section 183(4), *Children's Act* (2022).

2.3.2. The Kinship Adoption Process in Kenya

The legal process of kinship adoption in Kenya is quite similar to the other adoptions, particularly the local adoptions. What is distinctive to this particular adoption is that the requirements of age or of a sole male or female adopter may not apply if they are able to verify that they are indeed related to the child. However, the adopters still have to go through the procedure of seeking an adoption society and meet the conditions of living with the child concerned continuously for a period of three consecutive months and have the support of a report by the adoption society approving the adoption order to be made by the high court.¹⁰⁸ In addition, the necessary consents ought to be sought from the relevant parties such as the child's parents if they are still in the child's life.¹⁰⁹

2.3.3. What is the approach to the relationship between natural parents and that of the adopted children once the adoption procedure is concluded in Kenya?

The legal procedure usually involves the biological parents' parental rights being terminated in both kinship and non-kinship adoptions. All parties have the chance to talk about their goals for the child during the assessment process. Depending on the situation and the adoptive parent's desires, keeping the adopted child in contact with their biological relatives may be considered.¹¹⁰ As opposed to other adoptions, kinship adoptions may occasionally include greater transparency about the adopted child's continued communication with their birth family. The degree of openness and continued relationships that are permitted in familial adoptions depends largely on cultural factors. Standards on confidentiality and privacy of the adoption procedure are also maintained in kinship adoptions so as to guarantee that the best interests of the child are adhered to.¹¹¹

2.4. Conclusion

In conclusion, this chapter provides a comprehensive understanding of the history of adoption, the process of child adoption and post-adoption dynamics in Kenya, including the legal

¹⁰⁸ Section 185 (2) *Children's Act*, (2022).

¹⁰⁹ Section 185 (4) *Children's Act*, (2022).

¹¹⁰ 'The Adoption Process in Kenya' -

<https://www.linkedin.com/pulse/adoption-process-kenya-ruth-rotich-company-advocates-mcpcf/> on 3rd January 2023.

¹¹¹ Goitom H, 'Kenya Adoption Law' 1.

framework surrounding adoption and the severance of relationships between adopted children and their biological parents. By examining the legal nuances of intestate adoption in the next chapter, the chapter will pave the way for a discussion on whether kinship adoptees should inherit from their biological parents, thus expanding our understanding of inheritance rights in the context of adoption law.

CHAPTER 3: INHERITANCE RIGHTS OF KINSHIP ADOPTEES IN KENYA

3.1. Introduction

This chapter will examine the right of children to inherit and more specifically, the right adoptees have to inherit from their biological parents as it delves into the legal nuances of intestate succession. This will lay the foundation for the discussion on whether kinship adoptees ought to inherit from their biological parents.

3.2. The right of children to inherit

3.2.1. Introduction and the International Legal Framework on the right to inherit

Inheritance rights of children denote the entitlement children have to be bequeathed with a share of the estate of their parents upon passing on. Principles such as equity, best interests of the child, non-discrimination and protection of the family are incorporated significantly in deliberations of inheritance rights of children.¹¹² International law does not explicitly provide for the right of children to inherit, however, Article 27 of the United Nations Convention on the Rights of the Child indirectly imposes this right by providing that every child has the right to an adequate standard of living for their holistic development within the parents' financial abilities. Also, the instrument further issues that states ought to facilitate the securing of maintenance payments for children from their parents whether they live with the child or not.¹¹³ The Universal Declaration of Human Rights, Article 16(3), acknowledges the fundamentality of the family unit in the society and champions for its protection.¹¹⁴ One of the ways in which the family is protected is through safeguarding assets and resources belonging to the family, the modus operandi of which is governed by inheritance laws on testacy and intestacy.

3.2.2. Comparative perspectives on children's inheritance rights in other National Legal Systems

When one dies testate, it is common practice in the vast majority of jurisdictions that their will is respected and their assets are distributed by their executor as they had wished in a bid to uphold

¹¹² Viglione F, 'The Influence of Fundamental Rights on the Law of Succession' *European Business Law Review*, 2018, 789.

¹¹³ Article 27, *United Nations Convention on the Rights of the Child* (1989).

¹¹⁴ Article 16(3), *United Nations Universal Declaration of Human Rights* (1949).

testamentary freedom.¹¹⁵ In instances where the deceased dies intestate, the modes of distribution of the deceased's estate are prescribed by the national succession laws. These laws are nuanced depending on the various jurisdictions as a result of cultural or religious influences.

Even with the respecting of testamentary freedom as a principle, there are states that accord children significant protection against discrimination in matters of inheritance.¹¹⁶ In these states, despite the freedom that the deceased has to distribute their estate as per their wishes, there is an obligation on their part to acknowledge their children and include them in the will as disinheriting them is considered unlawful and even barbaric in some cultures.¹¹⁷ Therefore, if a will is scrutinized and a portion of the estate is not assigned to any of the children, the will can be contested by the child and they can still inherit from the deceased as the national courts deem fit.

For the majority of the European Union states, a substantial portion of the estate in question is reserved equally for the remaining children.¹¹⁸ For instance, French Inheritance Law stipulates that children have a right to inherit as they are the natural heirs to a deceased's estate regardless of the existence of a will or not hence are protected by law. As a consequence, in the case of one surviving child, they are entitled to half of the estate whilst for two children, each child has a right to a third of the estate and so on.¹¹⁹ Notably, in French law, a surviving spouse is not considered to be a protected heir hence if steps are taken to disinherit them, the law has no provisions to mitigate such an occurrence.¹²⁰

In Germany, children, spouses and parents are considered to be the recognized heirs to a deceased's estate thus the law allows them to claim half of what they would have received if the

¹¹⁵ 'Dying Intestate vs Dying Testate. What's the Difference?' *Cape Fear Law* - <<https://capefearlaw.com/testate-definition/>> on 28th December 2023.

¹¹⁶ Viglione F, 'The Influence of Fundamental Rights on the Law of Succession' 774.

¹¹⁷ Singer J, 'European Union dispute about inheritance rights of children' *Harvard University*, 2009,1- <<https://scholar.harvard.edu/jsinger/130>> on 3rd January 2024.

¹¹⁸ Singer J, 'European Union dispute about inheritance rights of children' 1.

¹¹⁹ Darie C, 'French Inheritance Law - Assisting Foreigners, Dedicated Services' *LawyersFrance*, 2024, 1 -<<https://www.lawyersfrance.eu/inheritance-in-france#:~:text=According%20to%20the%20French%20Inheritance%20Law%2C%20the%20children%20are%20first,2%2F3%20of%20the%20properties>> on 3rd January 2024..

¹²⁰ 'Guide to French Inheritance Laws and Taxes'

French-Property.com-<<https://www.french-property.com/guides/france/finance-taxation/inheritance/rights>> on 2nd January 2024.

deceased had not left a will within three years of being notified on their entitlement to inheritance in law.¹²¹ Conversely, in Ireland, in cases of testacy, children do not have a legal right equal to that of spouse's to share. Instead, they have the right to apply to the court for provision from the estate, which is only awarded in situations where the court determines that the deceased parent did not fulfill their moral duty to provide for the child to the best of their ability.¹²²

When a person dies without a valid will, the laws of intestate succession come into play. In most jurisdictions, these laws typically prioritize the deceased person's immediate family members, including children, as heirs. In the United Kingdom, the legal right of children to inherit is recognized.¹²³ Nonetheless, the share to be received varies depending on other factors such as other existing relatives. In cases where there is a surviving spouse, the children will inherit the assets left after fulfilling the spouse's inheritance.¹²⁴ If there is no surviving spouse, the children will inherit the entire estate and it will be divided equally among them depending on their number.¹²⁵

In nearly all of the US states and in some Canadian provinces, the deceased's testamentary freedom is fully respected hence they would be justified to disinherit a child.¹²⁶ Some states in the US go ahead and provide no protection of the right to inherit, especially insofar as the child in question is an adult child. In states such as Florida, minimum protection is given to children who are minors.¹²⁷ This denotes that if a child fails to be included in the deceased's will they

¹²¹ Rossel M, 'Inheritance in Germany' *Liesegang & Partner*, 2022,1-
<<https://www.lawyersgermany.com/inheritance-in-germany#:~:text=The%20statutory%20share%20in%20inheritance.is%20called%20a%20statutory%20share>> on 14th January 2024.

¹²² 'Spouses and Children: Know Your Inheritance Rights' *Lynchsolicitors*
-<https://www.lynchsolicitors.ie/wp-content/uploads/2018/02/Spouses-and-Children_Know-Your-Inheritance-Rights-1.pdf> on 3rd January 2024.

¹²³ 'Inheritance Rights of Children and Spouses' *LegalDocuments.co.uk*,
1-<<https://www.legaldocuments.co.uk/making-a-will/inheritance-rights-of-children-and-spouses/#default>> on 27th December 2023.

¹²⁴ 'Inheritance Rights of Children and Spouses' *LegalDocuments.co.uk*,1.

¹²⁵ 'Who can inherit if there is no will – the rules of intestacy' *Citizens Advice*,
1-<<https://www.citizensadvice.org.uk/family/death-and-wills/who-can-inherit-if-there-is-no-will-the-rules-of-intestacy/#:~:text=Children%20%2D%20if%20there%20is%20no.be%20divided%20equally%20between%20them>> on 23rd December 2023.

¹²⁶ Oldham T, 'What Does the U.S. System Regarding Inheritance Rights of Children Reveal about American Families?' *Family Law Quarterly*, 33(1), 1999, 265.

¹²⁷ Success A, 'Inheritance Law and Your Rights' *FindLaw*, 2023,1
-<<https://www.findlaw.com/estate/wills/inheritance-law-and-your-rights.html>> on 3rd January 2024.

would not be able to contest the will.¹²⁸ Be as it may, laws in these jurisdictions are provided to protect children from accidental disinheritance.¹²⁹ These laws typically come into effect if a child is born subsequent to the parent drafting a will that distributes property to the child's siblings, and the parent fails to update the will to include the additional child. The law assumes that the parent did not intend to exclude the recently born child but simply neglected to update the will. In such circumstances, the overlooked child may be entitled to a substantial portion of the parent's assets.¹³⁰

3.2.3. The Kenyan approach to the right to inherit

In the Kenyan context, the laws on succession are majorly influenced by culture. Different ethnic groups in Kenya have distinct succession norms and practices which were accentuated further during the colonial period.¹³¹ However, upon attaining independence, the need to have more standardized laws arose especially because the fifth chapter of the constitution guaranteed equal rights for all citizens irrespective of their cultures.¹³² It was out of the push for equality that the Law of Succession Act (1972) was drafted and enacted on 1st July 1981 as a consolidation of all succession laws applicable to individuals from all cultural, ethnic and religious backgrounds.¹³³ As a result of contradictions which may arise inherently because of the multicultural society that Kenya is, there has been difference in opinion in the implementation of the Law of Succession Act. Consequently, exceptions have had to be made so as to accommodate the application of alternative laws for exempted individuals.¹³⁴

Section 29 of the Act provides for who exactly is considered a dependent as per inheritance law. This definition includes any child or spouse of the deceased who was being wholly or substantially maintained or supported immediately before their death, and or was either fully or

¹²⁸ 'What You Need To Know About Inheritance Rights' *Everplans*, 1
-<<https://www.everplans.com/articles/what-you-need-to-know-about-inheritance-rights>> on 3rd January 2024.

¹²⁹ 'Inheritance Rights' *Nolo*,
1-<<https://www.nolo.com/legal-encyclopedia/inheritance-rights-29607.html#:~:text=Children's%20Right%20to%20Inherit.of%20a%20deceased%20parent's%20property>> on 4th January 2024.

¹³⁰ 'Inheritance Rights' *Nolo*, 1.

¹³¹ Musyoka W, 'Law of Succession', *LawAfrica Publishing Ltd*, 2006, 3.

¹³² Chapter V, *Constitution of Kenya* (2010).

¹³³ Musyoka W, 'Law of Succession' 4.

¹³⁴ Musyoka W, 'Law of Succession' 18.

partially dependent on the deceased's financial resources for their maintenance or support.¹³⁵ Testacy in the Kenyan law jurisdiction is subject to Part II of the Law of Succession Act (1972) which provides for the formalities that ought to be met for an oral or written will to be considered valid.¹³⁶ Nonetheless, Part III outlines the provision for dependents stipulating that the court, upon application by or on behalf of a dependent, can order reasonable provision from the deceased's estate if the disposition of assets through will, gifts, or intestacy laws fails to adequately provide for the dependent.¹³⁷ In having this provision, Kenyan law fortuitously acknowledges the inheritance rights of children. Even so, section 17 of the Children's Act (2022) explicitly provides for the right of children to inherit. The section asserts that the entitlement of children to inheritance is subject to the laws as provided for in the Law of Succession Act.¹³⁸ This provision champions for equal treatment and protection of all children.¹³⁹ Anyone who deprives a child of any property or benefits that are due to them under the Law of Succession Act regarding inheritance is a crime for which a person faces up to two years in prison or a fine of up to five million shillings.¹⁴⁰

Kenya's intestate succession laws present an established structure for allocating a deceased person's estate, weighing the needs of living family members, and guaranteeing that inheritance rights are upheld even when a will is not present. These rules take into account the family structure of the deceased at the time of distribution, ensuring fairness and clarity in the absence of explicit instructions from the deceased. A common circumstance is when the deceased had children and a surviving spouse. In these situations, the spouse receives a life interest in the remaining estate in addition to absolute rights to certain assets, such as household and personal belongings.¹⁴¹ The spouse is given the right to use the property while they are alive, but they are not permitted to dispose of it.¹⁴² In the event of the spouse's death or remarriage, the children receive an equal share of the remaining estate, guaranteeing their right to inherit.¹⁴³

¹³⁵ Section 29, *Law of Succession Act* (1972).

¹³⁶ Part II, *Law of Succession Act* (1972).

¹³⁷ Section 26, *Law of Succession Act* (1972).

¹³⁸ Section 17(1), *Children's Act* (2022).

¹³⁹ Section 17(2), *Children's Act* (2022).

¹⁴⁰ Section 17(3), *Children's Act* (2022).

¹⁴¹ Section 35, *Law of Succession Act* (1972).

¹⁴² Section 35(2), *Law of Succession Act* (1972).

¹⁴³ Section 35(5), *Law of Succession Act* (1972).

The estate is split equally among the children in the event that the deceased had children but no surviving spouse.¹⁴⁴ If there are minor children, special arrangements may be made, and the estate will be held in trust until the children grow up. This guarantees that the children's inheritance will be safeguarded and appropriately managed until they reach adulthood. When polygamous families are involved, the division of assets takes into account the number of children in each household, taking into account any surviving spouses as additional units in order to ensure a fair distribution among the different family units.¹⁴⁵

3.3. The right to equality and freedom from discrimination with regards to inheritance

Despite the enactment of the Law of Succession Act, challenges persist in ensuring its uniform application due to contradictions that may arise inherently because of Kenya's multicultural society. One of the most significant challenges stems from the clash between customary laws and statutory laws, particularly concerning discrimination based on gender, children born out of wedlock, and adopted children. In the case of *Peter K. Waweru v Republic*, discrimination was defined as the evident contrast in treating different people the basis being their description where individuals that fall under a specific description are accorded better treatment as opposed to another category.¹⁴⁶ It further stated that the denial of the conventional privileges to a group of people owing to the fact that they are of a certain race, gender or age among other distinguishing features was considered discriminatory.¹⁴⁷ In the 1989 case of *Andrews v Law Society of British Columbia*, the judge was of the opinion that so long as the manifest effect is the imposition of disadvantages or limitations of access to opportunities available to the general public on grounds of one's personal characteristics whether they intended to or not, then the action is considered to be discriminatory.¹⁴⁸

The Constitution of Kenya in Article 27, imposes the right of every citizen to equality and freedom from discrimination. Courts therefore have a mandate to ensure that they probe into any equality claim so as to ascertain that fairness is upheld in the practice in question.¹⁴⁹ Furthermore,

¹⁴⁴ Section 38, *Law of Succession Act* (1972).

¹⁴⁵ Section 40, *Law of Succession Act* (1972).

¹⁴⁶ *Peter K. Waweru v Republic* (2006) eKLR.

¹⁴⁷ *Peter K. Waweru v Republic* (2006) eKLR.

¹⁴⁸ *Andrews v Law Society of British Columbia* (1989) 1 SCR 321.

¹⁴⁹ Article 27, *Constitution of Kenya* (2010).

Section 9 of the Children's Act provides for non-discrimination against children as mandated by law, prohibiting any form of bias based on various factors including age, origin, gender, religion, race, disability, or socioeconomic status, among others.¹⁵⁰ Any individual found to discriminate against a child according to these criteria is subject to legal repercussions, facing potential imprisonment for up to twelve months, a fine not exceeding two hundred thousand shillings, or both, upon conviction for the offense.¹⁵¹ In addition, the Children's Act precisely provides for non-discrimination in the allocation of property of the deceased. Particularly, the Act prohibits any person from disinheriting or causing a child to be disinherited on any grounds the contravention of which penal sanctions are imposed.¹⁵²

In most patriarchal societies in Kenya, traditional customs have seen female children being discriminated against through being disinherited because of their sex while their male counterparts are given larger or even all the shares owed to the children.¹⁵³ Therefore, children ought not to be discriminated against in matters of inheritance and consequently disinherited because of their gender, as a result of being born out of wedlock or for the reason that they were adopted. The Law of Succession Act, calls for equal distribution of the shares among the children.¹⁵⁴

3.4. The right of adopted children to inherit from their biological parents

The entitlement of adopted children to inherit has significantly transformed from the conventional Common Law principle, which primarily based inheritance on biological lineage.¹⁵⁵ With the introduction of adoption laws and the establishment of family units transcending genetic ties, this principle has undergone necessary adaptations and revisions. In Kenya, courts have established that an adopted child will have the right to inherit their property after the adoption order is made, and it will be final and binding for the duration of the child's life.¹⁵⁶ As

¹⁵⁰ Section 9(1), *Children's Act* (2022).

¹⁵¹ Section 9(2), *Children's Act* (2022).

¹⁵² Section 17(3), *Children's Act* (2022).

¹⁵³ Mogute M, 'Investigating Female Children's Rights,' *Interdisciplinary Journal on the African Child Special edition*, 2019, 1, 4.

¹⁵⁴ Section 38, *Law of Succession Act* (1981).

¹⁵⁵ Kiefer P, 'Intestate Succession, Sociology and the Adopted Child' 11(2) *Villanova Law Review*, 1966, 5.

¹⁵⁶ Kwamboka E, 'Adopted children granted right to inherit property,' *The Standard*, January 2018,

<<<https://www.standardmedia.co.ke/counties/article/2001239478/adopted-children-granted-right-to-inherit-property>>> on 22nd December 2023.

soon as the court approves their adoption, the adoptive parents, who are expected to care for the adopted children as if they were their own, also take on parental responsibilities.¹⁵⁷ The administrators, as well as their legal representatives, should be aware that, upon the issuance of an adoption order, a child gains all the rights to inheritance and succession to their adoptive parents' estate, just as they would have if they were their biological parents¹⁵⁸. In the event that the child exhibits unexpected behavior or undergoes other changes, the applicants will not be permitted to give up the child.¹⁵⁹ The adopted child has the same rights as a child born out of wedlock because of the adoption order that grants the adopter the minor parental rights and obligations.¹⁶⁰

The severance of the relationship between adopted children and their biological parents following the adoption process varies depending on jurisdictional laws. One approach is severance, which permanently ends the relationship between biological parents and adopted children. Conversely, in other jurisdictions, the relationship may not be severed, as seen in open adoption, where children are allowed to maintain contact and interact with their biological parents. In Kenya, the former approach is adopted, as outlined in Section 202 of the Children's Act.¹⁶¹ Upon the issuance of an adoption order, all rights, duties, obligations, and liabilities of the biological parents (in cases of initial adoption), adoptive parents (in cases of subsequent adoptions), or guardians of the child concerning the child's future custody, maintenance, and education are extinguished. This entails the loss of rights such as inheriting property from the child's biological parents.

3.5. The right of kinship adoptees to inherit from their biological parents

There is no particular framework or provision in Kenyan law that speaks particularly to the right of kinship adoptees to inherit. Considering that kinship adoption is a category of child adoption, it would naturally be expected that the laws governing the right of adoptees to inherit shall be applicable to the right of kinship adoptees to inherit. These include the provision on the

¹⁵⁷ Section 174, *Children's Act* (No. 29 of 2022).

¹⁵⁸ *In the Estate of Simon Njehia Mundia HC* Succession Cause No. 2079 of 2015.

¹⁵⁹ *MO v CAO & another* [2017] eKLR.

¹⁶⁰ *MO v CAO & another* [2017] eKLR.

¹⁶¹ Section 202(1), *Children's Act* (No. 29 of 2022).

definition of a child¹⁶² as well as the meaning of a dependent¹⁶³ as per the Law of Succession Act. Furthermore, the entitlement of children to inherit according to Section 17 of the Children's Act also ought to be granted to the kinship adoptees.¹⁶⁴ In the case of adopted children in Kenya, the Law of Succession Act ensures their right to inherit from their adoptive parents' estate as upon the issuance of an adoption order, all rights and obligations of the biological parents or guardians are extinguished, granting the adopted child full inheritance rights from their adoptive parents.¹⁶⁵ This provision would correspondingly apply to kinship adoptees following the doctrine of severance.

While this approach ensures clarity and certainty in the legal framework surrounding adoption, it raises questions about the rights of the kinship adoptee in the maintenance of a connection with their biological heritage and inheritance from their biological parents. This severance can be seen as a form of discrimination against kinship adoptees, where the adoption is an open adoption, allowing for continued contact between the child and their biological parents.¹⁶⁶ The severance may also conflict with constitutional principles of equality and non-discrimination, as well as international standards recognizing the importance of preserving a child's identity and connections to their biological family.¹⁶⁷ Therefore, there is a need for reevaluating the practice of severing the relationship between adopted children and their biological parents in kinship adoption to ensure that the inheritance rights and cultural heritage of adopted children are adequately protected and respected.

3.6. Conclusion

The chapter underscores the need to evaluate whether the current approach to intestate succession under adoption aligns with the rights of kinship adoptees not to be disinherited, as mandated by the Children's Act. It emphasizes constitutional principles of equality and non-discrimination, alongside international standards advocating for the preservation of a child's

¹⁶² Section 3(2), *Law of Succession Act* (1981).

¹⁶³ Section 29, *Law of Succession Act* (1972).

¹⁶⁴ Section 17, *Children's Act* (No. 29 of 2022).

¹⁶⁵ Section 202(1), *Children's Act* (No. 29 of 2022).

¹⁶⁶ Baran A, 'Open Adoption' Oxford University Press, Vol 21, 2, 100.

¹⁶⁷ 'Child Identity Protection launches signature publication – Preserving "family relations": an essential feature of the child's right to identity' *Child Identity Protection*, 2022, 7-

<<https://bettercarenetwork.org/sites/default/files/2022-07/chip-preserving-family-relations-en.pdf>> on 2nd January 2024.

identity and connections to their biological family which shall be delved into deeper in the following chapter.

CHAPTER 4: INHERITANCE RIGHTS AND THE BEST INTERESTS PRINCIPLE IN KENYAN KINSHIP ADOPTION

4.1. Introduction

This chapter looks into how well the current kinship adoption procedures align with the child's inheritance rights and best interests, as stated in Article 53(2) of the Kenyan Constitution 2010 and Section 17(2) of the Children's Act (2022), respectively. It attempts to clarify the intricacies of kinship adoption in relation to cultural sensitivities, inheritance rights, and the general objective of fostering the holistic development of children in Kenya through a thorough analysis. Additionally, this chapter analyzes whether the way in which the current adoption law handles intestate succession respects kinship adoptees' right not to be disinherited and whether these actions are consistent with the core value of ensuring the welfare of children.

4.2. Motivations for Pursuing Kinship Adoption

It is of paramount importance to understand the motivations behind the pursuit of kinship care and its formalization in order to comprehend the need to ensure that the rights of the children involved are safeguarded and their welfare prioritized. Throughout history, parents have frequently looked to their relatives for help in caring for their children when they faced difficulties in raising them or guaranteeing their safety.¹⁶⁸ Though kinship care was mostly practiced informally, it was always preferred to foster care or institutional placement.¹⁶⁹ Up to date, international guidelines on the alternative care of children further assert that taking away a child from their family's custody ought to be considered a final resort.¹⁷⁰ There are diverse reasons behind the decision by parents to give up their children for adoption by their relatives including inability to provide or care for their child owing to parental substance abuse, mental illness, physical illness, homelessness, young age and inexperience, incarceration among other reasons.¹⁷¹ Further, reasons given by caregivers and relatives for raising their kin and taking responsibility range from having a sense of obligation, spiritual motivation, need to keep the

¹⁶⁸ Tangel C, 'The Hidden Hurdles and Benefits of Kinship Care and Adoption,' 164, 2022, 2.

¹⁶⁹ Tangel C, 'The Hidden Hurdles and Benefits of Kinship Care and Adoption,' 2.

¹⁷⁰ United Nations Guidelines for the Alternative Care of Children

¹⁷¹ Gleeson J, 'Becoming involved in raising a relative's child: reasons, caregiver motivations and pathways to informal kinship care.' *Child & Family Social Work*, 2009, 304-

https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1365-2206.2008.00596.x?casa_token=m8KDxDMAGx0AAAAA;jByghbEj08k2LLenTeE8Y0YKT34kaReIUxHuDfSqd5EHgwf10HDo72wMExiYyTzryldng8dgCGXBhd8 on 2nd January 2024.

children safe and provide a sense of belonging or keeping the children away from the foster care system.¹⁷² The advantages of kinship care encompass, reducing the trauma of parental separation, sparing children in state custody the needless stress of adjusting to foster care with unfamiliar adults, and providing both temporary and permanent safe, stable, and nurturing care when parental incapacity calls for it. Kinship care also preserves familial and community connections, fostering stability, identity, and belonging for children in times of crisis.¹⁷³

Nonetheless, it is important to note that kinship care is typically provided informally; yet, because it is informal, it frequently fails to provide caregivers with sufficient support, leaving a gap in the complex requirements of children who have experienced trauma and hardship.¹⁷⁴ Also, kinship caregivers fail to have much of the basic legal authority to decide what is best for the children under their care hence the need for formalization, particularly through kinship adoption.¹⁷⁵ Formalizing kinship adoption yields positive benefits for both the adopted child and the adoptive parents including gaining the authority to access medical records and make critical healthcare decisions independently, facilitating prompt emergency care and potentially safeguarding the child's life.¹⁷⁶ Furthermore, kinship adoption improves the child's holistic welfare by granting them the opportunity to inherit from their adopted parents and access to important advantages such as social security and healthcare coverage.¹⁷⁷ Moreover, as the legal parent through kinship adoption, one possesses the authority to enroll the child in school, ensure their safe transportation, and establish their parental status with educational institutions, while

¹⁷² Gleeson J, 'Becoming involved in raising a relative's child: reasons, caregiver motivations and pathways to informal kinship care,' 307.

¹⁷³ Annie E, 'Casey Foundation. (2012). Stepping up for kids: What government and communities should do to support kinship families' *Annie E Casey Foundation*, 2012, 2- <<https://assets.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>> on 29th December 2023.

¹⁷⁴ Tangel C, 'The Hidden Hurdles and Benefits of Kinship Care and Adoption,' 2.

¹⁷⁵ Annie E, 'Casey Foundation. (2012). Stepping up for kids: What government and communities should do to support kinship families,' 5.

¹⁷⁶ 'Kinship Adoptions'-

<<https://www.petrellilaw.com/adoption-lawyer/kinship-adoptions/#:~:text=Some%20of%20the%20reasons%20to%20ad%20not%20from%20their%20parents>> on 2nd February 2024.

¹⁷⁷ 'Kinship Adoptions'-

<<https://www.petrellilaw.com/adoption-lawyer/kinship-adoptions/#:~:text=Some%20of%20the%20reasons%20to%20ad%20not%20from%20their%20parents>> on 2nd February 2024.

also providing the child with a stable and nurturing home environment, fostering their growth and well-being under the parent's guidance.¹⁷⁸

A full separation of the child from his biological family and a complete transplantation of the child into his adoptive family are the objectives in nonrelative adoption instances.¹⁷⁹ This is not the case in kinship care and adoption as the numerous benefits accrued are in view of the fact that the child's biological parents can continue to play an active role in the life of the child.¹⁸⁰ The limitation placed on this relationship, even so, is that the legal rights of the biological parents over the child are permanently terminated.¹⁸¹ This includes the right of the kinship adoptees to inherit from their biological parents which is the matter in contention in this paper.

4.3. Current Legal Framework on Kinship Adoption and Potential Disinheritance Risks

As discussed in the previous chapters the legal framework governing kinship adoption in Kenya follows a process similar to other adoptions, with distinctive features such as exemptions from age or gender requirements if the adopter can prove kinship with the child.¹⁸² The procedure involves obtaining approval from an adoption society, living with the child continuously for three months, and securing consent from relevant parties, including the child's parents if involved.¹⁸³ Once the adoption is finalized, biological parents' parental rights are typically terminated, although arrangements for ongoing contact between the child and their birth family may be considered, especially in kinship adoptions, which may allow for greater transparency regarding such relationships.¹⁸⁴

¹⁷⁸ 'Kinship Adoptions' -

<https://www.petrellilaw.com/adoption-lawyer/kinship-adoptions/#:~:text=Some%20of%20the%20reasons%20to,an,d%20not%20from%20their%20parents> on 2nd February 2024.

¹⁷⁹ Rein J, 'Relatives by Blood, Adoption, and Association: Who Should Get What and Why' *Vanderbilt Law Review*, 37, 4, 719.

¹⁸⁰ 'Relative/Kinship Adoption Services in Maryland, Virginia and Washington, DC, *Modern Family Formation* - <https://www.modernfamilyformation.com/kinship-adoption> on 15th January 2024.

¹⁸¹ 'Placing Your Child for Adoption with a Family Member' *Considering Adoption* - <https://consideringadoption.com/pregnant/people-involved-in-your-adoption/should-i-place-my-baby-for-adoption-with-a-family-member/> on 15th January 2024.

¹⁸² Section 185 (2) Children's Act (2022).

¹⁸³ Section 185 (4) Children's Act (2022).

¹⁸⁴ Rotich R, 'The Adoption Process In Kenya' *Ruth Rotich & Co. Advocates*, 2023, 1

<https://www.linkedin.com/pulse/adoption-process-kenya-ruth-rotich-company-advocates-mcpcf/> on 15th January 2024.

Section 17 of the Children’s Act 2022 grants every child the unequivocal right to inherit property as per the Law of Succession Act (Cap. 160) in Kenya, ensuring their entitlement to a portion of their parents' estate upon their demise, irrespective of any other considerations.¹⁸⁵ Additionally, it emphasizes the principle of equal treatment and protection for all children, expressly forbidding any discriminatory actions or disinheriting based on various grounds such as age, origin, sex, or religion.¹⁸⁶ Subsequently, it imposes severe penal sanctions on individuals who contravene these anti-discrimination provisions, including imprisonment for up to two years, fines of up to five million shillings, or both.¹⁸⁷ Furthermore, the provision mandates full restitution or the rightful entitlement to the property or benefits denied to the child, ensuring that children are not only safeguarded by law but also compensated for any unjust deprivation of their inheritance rights.¹⁸⁸ The implications of the provision, as interpreted judicially and analyzed by legal scholars, underscore its crucial role in safeguarding children's inheritance rights and protecting them from arbitrary deprivation. Courts may broadly interpret these provisions to uphold children's rights to inherit and shield them from unjust actions. In cases such as *In re Estate of CCBH (Deceased)* [2017] eKLR, the court emphasized that denial of inheritance rights constitutes punishment and discrimination against children, contradicting constitutional and international guarantees against such treatment.¹⁸⁹ Legal experts offer commentary on the provision's significance in advancing social justice, equality, and children's rights protection in Kenya.

In spite of this provision, Kenyan law lacks specific provisions addressing the inheritance rights of kinship adoptees, with general laws governing inheritance rights for adopted children typically being applied. While this approach provides a standard in adoption laws, it raises concerns about the rights of kinship adoptees to maintain connections with their biological heritage and inherit from their biological parents.¹⁹⁰ This is because in general adoptions, the relationship between the biological parent and their child is severed hence the deprivation of all their legal rights including those of inheritance. However, the approach is different in kinship adoption as more often than not these familial ties are not broken. This discrepancy creates the risk of inadequacies

¹⁸⁵ Section 17 (1) Children’s Act (2022).

¹⁸⁶ Section 17 (2) Children’s Act (2022).

¹⁸⁷ Section 17 (3) Children’s Act (2022).

¹⁸⁸ Section 17 (4) Children’s Act (2022).

¹⁸⁹ *In re Estate of CCBH (Deceased)* [2017] eKLR.

¹⁹⁰ Baglietto C, Bordier L, Dambach M and Jeannin C, 'Preserving “family relations”: an essential feature of the child's right to identity' *Child Identity Protection*, 2022, 7.

within the legal framework arising due to various factors including the ambiguity and inconsistency in implementation due to the lack of clarity regarding specific procedures and requirements for kinship adoption, as well as inadequate enforcement mechanisms which could result in non-compliance with adoption and inheritance laws, leaving room for the exploitation of kinship adoptees' rights. Furthermore, it may be difficult to protect familial adoptees' rights due to inconsistencies between legal requirements and customary cultural norms, especially when it comes to inheritance.¹⁹¹

4.4. The Best Interests Principle in Kinship Adoption

Article 53(2) of the Kenyan Constitution declares that the best interests of the child must be paramount in all matters affecting the child.¹⁹² The Children's Act advances this provision by highlighting that in all decisions involving children, the child's best interests come before anything else.¹⁹³ This entails defending their rights and welfare, advancing their wellbeing, and offering the required direction and correction in the interests of both the general public and themselves. It requires that the child's interests be given first priority and that their opinions be taken into consideration, taking into account their age and maturity level, in all judicial and administrative settings.

In the context of kinship adoption, the principle of the child's best interests holds profound implications especially owing to the fact that this arrangement is rooted in the belief that maintaining familial connections fosters a sense of identity, belonging, and stability, which are essential for the child's holistic development.¹⁹⁴ Furthermore, the child's best interests principle aligns with inheritance rights, especially in cases where kinship adoptees maintain ongoing connections with their biological parents, as kinship adoption legally recognizes the adoptive family while potentially allowing for continued ties with the biological family. In such cases, the child's best interests mandate a delicate balance between preserving familial connections and ensuring equitable inheritance rights for the child.¹⁹⁵

¹⁹¹ Rein J, 'Relatives by Blood, Adoption, and Association: Who Should Get What and Why' *Vanderbilt Law Review*, 37, 4, 719.

¹⁹² Article 53(2), *Constitution of Kenya* (2010).

¹⁹³ Section 8, *Children's Act* (2022).

¹⁹⁴ Littlechild B and Housman C, 'Applying Universal Principles of 'Best Interest': Practice Challenges across Transnational Jurisdictions, Cultural Norms, and Values' *Children*, 2023, 10, 537.

¹⁹⁵ *Johansen v Norway* (1970), European Court of Human Rights.

The principle underlying kinship adoption and inheritance rights is aligned with international standards, emphasizing the importance of placing the child's well-being as the primary consideration.¹⁹⁶ No matter what the cultural and socio-economic context, the overarching goal remains consistent: promoting the child's welfare, preserving family bonds, and providing a nurturing environment.¹⁹⁷

However, consideration for unique situations and peculiarities of culture is required when applying the best interest's principle to kinship adoption and inheritance rights. Diverse cultural perspectives must be understood and respected when evaluating and making plans for the welfare of children, as evidenced by the various ways that different cultures interpret what is in their best interests.¹⁹⁸ This paves way to the use of the 'special case' principle in matters to do with inheritance in kinship adoption because of its distinctiveness.

4.5. The Special Case Principle and its Relevance to Kinship Adoption

The special case principle is a modification of the principle of the best interests of the child in that it highlights the distinctiveness that children possess in society and how important it is to put their greatest needs first when making decisions regarding the law, especially when it comes to adoption, custody conflicts, and child welfare interventions.¹⁹⁹ It emphasizes the idea that children deserve special consideration and rights as individuals with particular needs and vulnerabilities, rather than just being the beneficiaries of adult protections and decisions. Several legal contexts, including Section 1 of the English Children Act 1989 and Matrimonial Causes Act 1973 and international agreements like the United Nations Convention on the Rights of the Child (UNCRC), provide support for the "special case" principle.²⁰⁰ These legal frameworks underscore the need to give children greater legal protection because of their vulnerability, dependence, and limited ability to advocate for themselves. They also acknowledge the special

¹⁹⁶ Article 3, *Convention on the Rights of the Child*, 20 November 1989, 1577, 3.

¹⁹⁷ 'The Best Interest of the Child' *International Federation of Social Workers*, 2009-
<<https://www.ifsw.org/the-best-interest-of-the-child/>> on 1th January 2024.

¹⁹⁸ Njane C, 'Safeguarding the Best Interests of The Child In Surrogacy Arrangements In Kenya' unpublished, Strathmore University, Nairobi, 2022, 11.

¹⁹⁹ Diduk A, Peleg N and Reece H, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in Ferguson L (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy Essays in Honour of Michael Freeman*, Koninklijke Brill, 2015, 143.

²⁰⁰ Article 3, *Convention on the Rights of the Child*, 20 November 1989, 1577, 3.

status of children and emphasize putting their welfare and interests ahead of those of other parties.²⁰¹

Judicial interpretations and rulings further support this recognition, especially when there is a conflict between the rights of adults and children.²⁰² In these situations, courts frequently recognize the need to prioritize the child's best interests, highlighting the unique consideration that children should receive in court cases and decision-making processes.²⁰³ Kenya acknowledges the special status of children through various legal measures designed to safeguard their welfare and rights. One key aspect of this recognition is enshrined in the enactment of the Children's Act and its repeal in 2022. With provisions for the care, protection, and rehabilitation of children in need of special protection, the Act aligns closely with the special case principle.²⁰⁴ Furthermore, through establishing child protection mechanisms, including the Department of Children's Services, Kenya demonstrates adherence to the special consideration given to children's rights and well-being in addressing issues related to child welfare and protection.²⁰⁵

Examples of instances where the 'special case' principle has been endorsed include in the countering of the stepparent exception and in virtual adoptions. In her article, Fuller L, contends that the legal provision allowing stepchildren to inherit from their stepparents, while excluding inheritance from their biological parents, is discriminatory and unjust toward adopted children, advocating for an extension of this provision to include adopted children, thus granting them inheritance rights from both their biological and adoptive parents.²⁰⁶ On the other hand, virtual adoptions, an equitable solution, allows virtually adopted children to inherit from adoptive parents who die intestate, addressing the gap in inheritance rights resulting from the death of a parent without a will without changing the child's legal status.²⁰⁷ As an alternative to intestacy laws, this is primarily used in equity courts to prevent unfair results. It is based on the principle that children destined for legal adoption should still be entitled to inheritance rights.

²⁰¹ Diduk A, Peleg N and Reece H, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare', 143.

²⁰² Ferguson L, 'An Argument for Treating Children as a 'Special Case'' *University of Oxford*, 2016, 3.

²⁰³ Ferguson L, 'An Argument for Treating Children as a 'Special Case'', 3.

²⁰⁴ *Children's Act* (2022).

²⁰⁵ Part IV, *Children's Act* (2022).

²⁰⁶ Fuller L, 'Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended', 46.

²⁰⁷ Weisser J, 'Virtual Adoption: The Inequities of the Equitable Doctrine' *Nova Law Review*, 35, 2, 2011, 3.

In light of the ‘special case’ principle which emphasizes prioritizing children's welfare and interests in legal matters it is imperative that the law on kinship adoption extends provisions for the inheritance of adoptees from their biological parents as a special case just as is the case in stepparent adoption and virtual adoptions. This is particularly as the kinship adoptees are vulnerable and are in need of protection of their rights. The special case principle, when applied to kinship adoption, guarantees that the child's welfare is given top priority during the decision-making process. This is achieved by considering all pertinent factors, including the child's emotional health, relationship with their biological family, and future prospects within the adoptive family.

4.6. Conclusion

This chapter has underscored the importance of aligning kinship adoption procedures with the best interests of the child and inheritance rights, emphasizing the need to recognize children as a ‘special case’ in legal matters. By extending provisions for inheritance rights to kinship adoptees from their biological parents, societies can better safeguard the welfare of vulnerable children and ensure equitable treatment under the law.

CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. Introduction

The purpose of this chapter is to synthesize and present the study findings that have been provided in previous chapters, and to present recommendations that will enhance the laws regarding inheritance rights of kinship adoptees in the future.

5.2. Findings from the research

The overall objective of this study was to address the gap in Kenyan adoption law concerning the right of adoptees under kinship adoption to inherit from their biological parents. Chapter one formed the basis of the research as it provided an overview of adoption in Kenya, examining societal attitudes, legal frameworks, and the importance of the best interests of the child. It highlighted the historical context, various types of adoption, and the legal principles governing adoption and succession. The chapter also introduced the research problem, objectives, questions, hypothesis, and justification for the study, along with the theoretical and conceptual frameworks. Additionally, it outlined the methodology and chapter breakdown for the research.

Chapter two then delved into the historical evolution of child adoption, tracing its roots from ancient civilizations to modern-day practices. It discussed the shift from adoption as a means of inheritance and servitude to a focus on the welfare of the child. The chapter outlined the legal adoption process in Kenya, highlighting the key legislation and procedures governing adoption, including the Children's Act 2022 and it explored the international legal instruments which have influenced adoption practices. Moreover, it delineated the distinct legal framework for kinship adoption, recognizing the role of extended family networks in caring for children. The chapter examined the process of kinship adoption and the approach to maintaining relationships between adopted children and their biological parents post-adoption. Through a comprehensive analysis, this chapter set the stage for further exploration of inheritance rights in kinship adoption in subsequent chapters, contributing to a deeper understanding of adoption law in Kenya.

The dissertation in chapter three investigated the inheritance rights of kinship adoptees in Kenya. It examined international legal frameworks and comparative perspectives on children's inheritance rights before delving into the Kenyan legal landscape. The chapter explored the

evolving status of adopted children under Kenyan succession laws. Highlighting the absence of specific provisions for kinship adoptees, it raised concerns about the adequacy of current frameworks in protecting their rights. The chapter underscored the need for reevaluation to ensure equality and non-discrimination in inheritance practices, setting the stage for further exploration in subsequent chapters.

Chapter four examined the alignment of kinship adoption procedures in Kenya with children's inheritance rights and best interests. It discussed the historical roots and benefits of kinship adoption, highlighting the need for formalization to protect children's rights. However, gaps in the legal framework raise concerns about potential disinheritance risks. The chapter advocated for the extending of inheritance rights to kinship adoptees as a "special case" to prioritize children's welfare in legal matters and ensure equitable treatment under the law.

After examining the legal framework surrounding adoption and succession, while assessing its alignment with the best interests of the child principle, this chapter looks into recommendations and possible amendments of the law that could be made to ensure equitable treatment for kinship adoptees.

5.3. Recommendations

Given the special circumstances of kinship adoptions, it is critical to address the current legal gaps pertaining to adoptees' inheritance rights under kinship adoption in Kenya. In contrast to conventional adoptions, in-family adoptions frequently preserve the adoptee's emotional ties and continuous interactions with their birth family. The results of the study lead to a number of recommendations that address the shortcomings and problems in Kenya's succession and adoption laws, especially as they relate to adoptees under kinship adoption.

My first recommendation is that a proviso should be included by lawmakers within Section 202(1) of the Children's Act²⁰⁸ stipulating that in cases of kinship adoption, the rights, obligations, duties, and liabilities of biological parents in kinship adoptions, resulting from justifiable reasons for the inability of the parents to care for the child, will only be terminated to the extent required to enable the legal transfer of parental rights to the adoptive relatives. The

²⁰⁸ Section 202(1), *Children's Act* (No. 29 of 2022).

provision should, nonetheless, state that the adoptee's rights to inherit from their biological parents will be upheld, provided that it is decided that doing so will serve the child's best interests. The aim of this proviso would be to recognize the long-lasting relationships that may arise within kinship adoption arrangements while defending the adoptee's right to inherit from their biological parents and upholding the best interests of the child principle.

My second recommendation involves an amendment to Section 29 of the Law of Succession Act.²⁰⁹ The intention of this amendment is to clearly incorporate provisions that acknowledge and protect adoptees' inheritance rights under kinship adoption. This would entail making certain that, even after being adopted by family members, these adoptees had the legal right to inherit from their biological parents. The introduction of another section under Part III of the Law of Succession Act which outlines precise rules and processes for determining inheritance rights in kinship adoption situations would be crucial. This includes defining the parameters for determining which adoptees are qualified, describing the scope of their inheritance rights, and detailing any potential restrictions or conditions.

Another important proposal would be addressing the ambiguity surrounding the process of kinship adoption in Kenya and the legal rights of the parties involved. Kinship adoption in Kenya has only recently gained recognition in the Children's Act 2022, resulting in limited legislative development on the matter. This is despite the expansive practice of informal kinship care and adoption in the country. Adoption laws and regulations are shaped in large part by legislators and legal professionals. Through providing education about the unique requirements and worries of kinship adoptees, interested parties can effectively push for legislative changes that more effectively tackle these problems. To guarantee that kinship adoptees receive the same rights and protections as other adoptees, this involves pointing out legal loopholes and proposing changes.

Furthermore, the public should all be made aware of the difficulties associated with kinship adoption through awareness campaigns and educational programs that can enhance stakeholders' understanding of the unique dynamics and challenges of kinship adoption. This includes inheritance rights and familial relationships.

²⁰⁹ Section 29, *Law of Succession* (Cap. 160 of 1972).

5.4. Conclusion

This chapter has synthesized the findings of the study, which aimed to address the gap in Kenyan adoption law regarding the inheritance rights of kinship adoptees. The study's findings underscored the need for legislative amendments to ensure equitable treatment for kinship adoptees. These recommendations aim to safeguard the rights of kinship adoptees to inherit from their biological parents while upholding the best interests of the child principle within Kenya's legal framework.

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