



Strathmore University

Law School

Child Custody Conundrum: Legal Implications, Best Interest Mandate, and the Case for Child - Inclusive Mediation

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Table of Contents

<i>ACKNOWLEDGEMENT</i>	<i>iv</i>
<i>DECLARATION</i>	<i>v</i>
<i>ABSTRACT</i>	<i>vi</i>
<i>LIST OF ABBREVIATION</i>	<i>vii</i>
<i>LIST OF LEGAL INSTRUMENTS</i>	<i>ix</i>
CHAPTER 1	1
1.1 BACKGROUND	1
1.2 STATEMENT OF THE PROBLEM	3
1.3 RESEARCH OBJECTIVE	4
1.4 RESEARCH QUESTIONS	4
1.5 HYPOTHESIS	5
1.6 JUSTIFICATION	5
1.7 CONCEPTUAL FRAMEWORK: CHILD’S PSYCHOLOGICAL NEEDS AS CRITICAL TO THEIR WELL-BEING	5
1.8 LITERATURE REVIEW	8
1.8.1 ON THE PRINCIPLE OF THE BEST INTEREST OF A CHILD	8
1.8.2 ON PARTICIPATION OF CHILDREN IN CUSTODY DISPUTES	11
1.9 CONTRIBUTION	14
1.10 METHODOLOGY	15
1.11 CHAPTER BREAKDOWN	16
CHAPTER 2: NATURE OF CUSTODY DISPUTES AND THE CONSEQUENCES IT HAS ON A CHILD	18
2.1 INTRODUCTION	18
2.2 THE NATURE OF CUSTODY DISPUTES	20
2.2.1 LEGAL CUSTODY AND ACTUAL CUSTODY	20
2.2.2 TYPES OF CUSTODY ARRANGEMENTS	21
2.3 CHILD CUSTODY LITIGATION	22
2.3.1 PRINCIPLES APPLIED IN MAKING CUSTODY ORDER	22
2.3.2 NEGATIVE CONSEQUENCES	22
2.4 CONCLUSION	24
CHAPTER 3	25
ENSURING CHILD’S WELL-BEING IN CUSTODY DISPUTES	25
3.1 INTRODUCTION	25
3.2 TRACING THE HISTORY OF CHILDREN'S BEST INTERESTS	27
3.3 THE LEGAL FRAMEWORK GOVERNING THE BEST INTEREST OF THE CHILD	28
3.3.1 THE CONSTITUTION OF KENYA (2010)	28

3.3.2 THE CHILDREN’S ACT (2001) (REPEALED)	29
3.3.3 THE CHILDREN’S ACT (2022)	30
3.3.4 THE 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)	30
3.3.5 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS	31
3.3.6 THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS	31
3.3.7 THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)	32
3.4 FACTORS TO CONSIDER WHEN DETERMINING THE CHILD’S BEST INTEREST	32
3.5 PRIORITIZING THE CHILD’S WELL-BEING IN CUSTODY MATTERS	34
3.6 CONCLUSION	34
CHAPTER 4; CHILD-INCLUSIVE MEDIATION: A PROGRESSIVE APPROACH TRANSFORMING COURT PROCESSES AND PRIVATE MEDIATION IN CUSTODY DISPUTES	35
4.1 INTRODUCTION	35
4.2 ADDRESSING ISSUES IN CUSTODY DISPUTES IN AN ADVERSARIAL SYSTEM	36
4.3 UNDERSTANDING CHILD-INCLUSIVE MEDIATION	37
4.4 HAVING AN ALTERNATIVE PROCESS TO LITIGATION	39
4.5 BRIDGING LEGAL GAPS IN KENYA’S FAMILY LAW FRAMEWORK	41
4.6 RECOMMENDATIONS FOR KENYA LEGAL FRAMEWORK	42
4.7 CONCLUSION	43
CHAPTER 5; CONCLUSION AND RECOMMENDATION	44
5.1 CONCLUSION	44
5.2 RECOMMENDATION	44

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DECLARATION

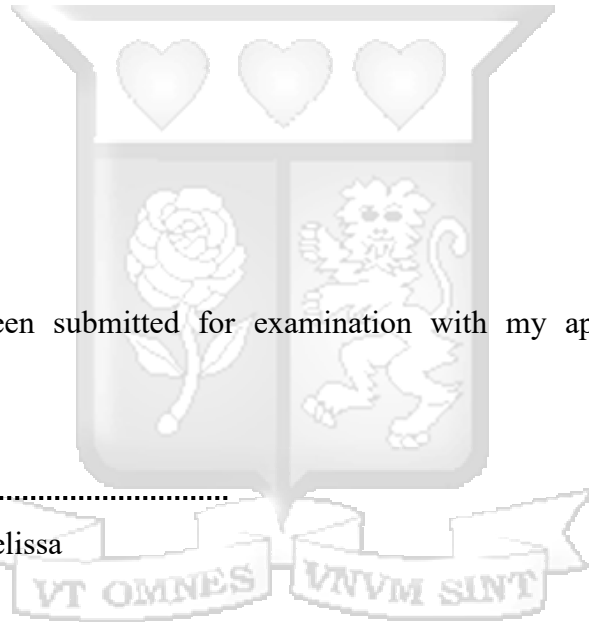
I, **HAAWA OSMAN**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed
Date: 26 February 2024



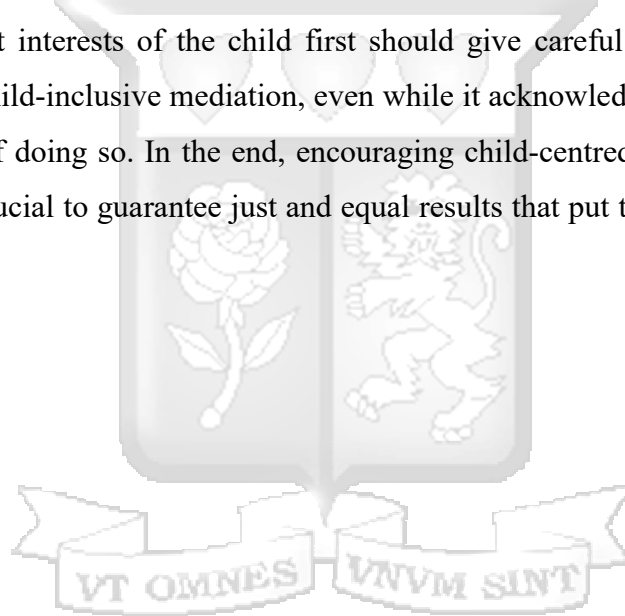
This dissertation has been submitted for examination with my approval as University Supervisor.

Signed
Supervisor name: Dr. Melissa



ABSTRACT

In divorce processes, resolving custody conflicts can be difficult, especially when considering the child's best interests. Child-inclusive mediation has gained preeminence in recent years as a way to guarantee that children's opinions and views are heard and taken into account when making custody decisions. The purpose of this study is to evaluate the viability and effectiveness of requiring child-inclusive mediation in custody disputes. There are several benefits associated with child-inclusive mediation, such as enhanced parent-child communication, a greater comprehension of the needs and preferences of the children, and a higher rate of parental adherence to custody agreements. In addition, children indicate that they want their opinions to be respected and heard during the custody process, which could have a good effect on their mental and emotional health. This dissertation makes the case that efforts to put the best interests of the child first should give careful thought to enacting a policy that requires child-inclusive mediation, even while it acknowledges the difficulties and possible drawbacks of doing so. In the end, encouraging child-centred methods of resolving custody disputes is crucial to guarantee just and equal results that put the welfare of divorced children first.



LIST OF ABBREVIATION

ADR	Alternative Dispute Resolution
CRC	Convention on the Rights of the Child
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social, and Cultural Rights



LIST OF CASES

AKHIV & another v FNK [2022] eKLR.

Githunguri v Githunguri [1979] eKLR.

JKN V HW [2019] eKLR.

MAA v ABS [2018] eKLR

MAK v RMAA & 4 others (Petition 2 (E003) of 2022)

McCall v McCall (2000), Court of Appeal of Georgia

Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad & 4 others (Petition No. E003 of 2022)

Noordin v Karim [1990] eKLR

SMM v ANK [2022] eKLR.



LIST OF LEGAL INSTRUMENTS

Children's Act South Africa (Act No 38 of 2005).

Children's Act (Act no.29 of 2022)

Constitution of Kenya

Convention on the Rights of the Child

Civil Procedure Act

Universal Declaration of Human Rights (1948)

The International Covenant on Civil and Political Rights (1966)

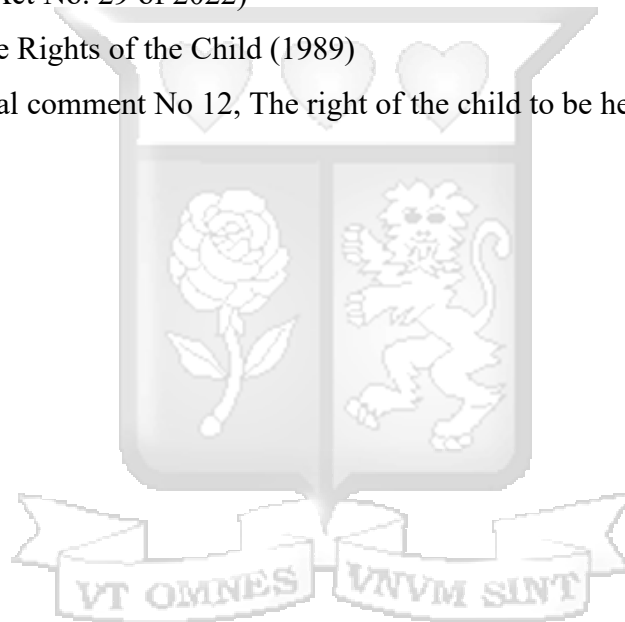
The International Covenant on Economic, Social and Cultural Rights (1966)

The Children's Act (Act No. 8 of 2001)

The Children's Act (Act No. 29 of 2022)

The Convention on the Rights of the Child (1989)

United Nations General comment No 12, The right of the child to be heard, 20 July 2009.



CHAPTER 1

GIVE CHILDREN A VOICE: CHILD- INCLUSIVE MEDIATION IN CUSTODY DISPUTES IN DETERMINING A CHILD'S WELL-BEING

1.1 BACKGROUND

Family relationships are very important and special, as families have a vast history of shared experiences in the past and the present and the experiences are expected to continue in the future.¹ Conflict in a marriage makes it impossible to advance development in families, therefore, it has to be handled quickly and effectively.² It is very normal for conflicts and disputes to arise in a family. However, conflicts in a marriage have a great impact on children and especially adolescent teenagers, it has negative effects on their mental health and well-being.³ The mental health effect of divorce and custody conflicts that affect children lasts far into adulthood rather than being a transitory divorce trauma's side effect. ⁴

The government places a keen watch on the welfare of children, especially in the process of divorce.⁵ When it comes to any matters that involve a child and may affect the child, the child should be given a chance to voice out their opinion, and that opinion should be considered in appropriate cases, having regard to the child's age and level of maturity.⁶ States are to take responsible steps to allow a child who is capable of forming his or her views the right to express those views freely in all matters that affect them and to give due consideration to the views of the child by the age and maturity of the child.⁷ Therefore, a child should be allowed to be heard in any judicial or administrative proceedings that affect them, either personally or through a representative or other appropriate authority, by the procedural laws of the country.⁸

¹ Jeffery Z, 'Third-party Intervention in Family Conflict,' Negotiation Journal volume 1 issue 3, Massachusetts, 1985,271.

² Sebayiga V, ' The Arbitration of family Disputes in Kenya; A Case Study of the Court of Appeal Decision in TSJ V SHHSR (2019) Eklr,' Strathmore Law School, 2022,1.

³ Mechanic D and Hnasell S, 'Divorce, Family Conflict and Adolescents' Well- Being' Journal on Health and Social Behaviour , American Sociological Association, 1989,106.

⁴ Gallagher M, 'What is Marriage For ? The Public Purposes of Marriage Law,' Louisiana Law Review, 2001, 783.

⁵Ngaruiya W, 'Divorce mediation in Kenya today,' Strathmore Dispute Resolution centre on 11 September 2020 <https://sdrcentre.wordpress.com/2020/09/11/divorce-mediation-in-kenya-today/> on13 January 2023.

⁶ Section 8 (3), Children's Act 2022 ([Act No. 29 of 2022](#)).

⁷ Article 12 (1), Convention on the rights of the child,1989.

⁸ Article 12 (2), Convention on the rights of the child,1989.

The child's best interest must be of primary importance in all matters involving a child.⁹ Courts should make legal decisions for the children giving the child's best interests the utmost consideration.¹⁰ Separating couples may seek to use Alternative Dispute resolution (ADR) instead of undergoing litigation, especially where children are involved. ADR has occasionally been applied in some cases and it has shown to be effective in securing the child's best interest.¹¹ One of the factors in determining the best interest of a child is the child's preference in custody cases.¹²

Courts may refer a dispute presented before it to be referred to mediation.¹³ Court Annexed Mediation was introduced in April 2016.¹⁴ This has encouraged people to use ADR which would be more appropriate than litigation. Following the establishment of Court Annexed Mediation, there has been a rapid increase in awareness of and participation in family mediation in resolving family conflicts including divorces which has resulted in a settlement rate of 55.7% in family matters.¹⁵

When it comes to custody cases, the decisions focus on the parents mostly rather than the children.¹⁶ The freedom of speech for children includes their ability to access, share, and convey information and ideas of all sorts without restriction, whether orally, in writing or print, through the arts, or any other media of their choosing.¹⁷ When establishing a child's best interests, there does not appear to be a specific age at which their preferences are more trusted or taken into consideration than in a custody dispute.¹⁸ Legislation emphasizes the importance of listening to the wishes of the child and the right to express their opinion.¹⁹

⁹ Article 53(2), Constitution of Kenya (2010).

¹⁰ Jones S, 'What does a child's best interest actually mean?' <https://www.sayerjones.com.au/blog/what-does-a-child-s-best-interests-actually-mean> on May 26th 2021.

¹¹ Válová V, 'Alternative dispute resolution in child welfare,' <https://www.arbitras.org/blog/2021/3/12/alternative-dispute-resolution-in-child-welfare> on 12th March 2021.

¹² *McCall v McCall (2000)*, *Court of Appeal of Georgia*.

¹³ Section 59 (1) (B), Civil Procedure Act, 2012.

¹⁴ Muigua K, 'Entrenching Family Mediation in the law of Kenya' <http://kmco.co.ke/wp-content/uploads/2018/08/Entrenching-Family-Mediation-in-the-Law-in-Kenya-Kariuki-Muigua-Ph.D-7TH-JULY-2018> on August 2018.

¹⁵ Ngaruiya W, 'Divorce mediation in Kenya today,' Strathmore Dispute Resolution centre on 11 September 2020 <https://sdrcentre.wordpress.com/2020/09/11/divorce-mediation-in-kenya-today/> on 13 January 2023..

¹⁶ Charlow A, 'Awarding custody the best interest of the Child and other functions,' 5 *Yale Law and Policy Review*, 1987 267.

¹⁷ Article 13 (1), Convention on the rights of the child, 1989.

¹⁸ Mahlobodwane F, 'Determining the best interest in custody battles: Should a child's voice be considered?' <https://doi.org/10.17159/obiter.v31i2.12357> *Obiter* 31, no. 2 (2021).

¹⁹ Article 12, Convention on the rights of the child, 1989.

Hence there is an emphasis that family mediation should advocate for child-inclusive mediation.²⁰

Child-inclusive mediation gives children a voice.²¹ The child-inclusive mediation is meant to comprehend the child's developmental needs while the parents are separated, to inspire and support a positive co-parenting environment, and to support the implementation of a parenting plan. Several jurisdictions have mandated the use of child-inclusive mediation like the Children's Act in South Africa mandates the use of mediation.²² Before initiating any court actions regarding child custody, all spouses in Norway must participate in mediation.²³

To address the negative effects that children undergo during custody cases after divorce there is a need to make child-inclusive mediation mandatory in determining the best interest of the child in custody cases, where their voices and opinions will be heard and taken into consideration. Involving children in decisions that directly affect their lives is important, and this strategy tries to establish more accommodating and flexible custody arrangements.

1.2 STATEMENT OF THE PROBLEM

When a divorce involves a custody dispute, the courts evaluate which parent is the best fit for the child, based on the testimony of the parents, while also attempting to ascertain what is in the child's best interest. The involvement of children in custody cases will promote the interests of parents rather than the child's interests. Concerns are tainted by personal and cultural prejudice and without a solid scientific basis, which may violate the constitutional equal protection requirements.²⁴ Historically, children were deemed incompetent to make decisions as to what is in their own best interest.²⁵ Divorce and custody cases can have a negative mental impact on a child. This is especially seen if their interests are not considered.

²⁰ Ngaruiya W, 'Divorce mediation in Kenya today,' Strathmore Dispute Resolution centre on 11 September 2020

<https://sdrcentre.wordpress.com/2020/09/11/divorce-mediation-in-kenya-today/> on 13 January 2023..

²¹ Kevins J, 'Towards Ballyhoo of Child Inclusive Mediation as An Instrument of Realizing Best Interest of a Child Principle in Kenya' SSRN on 9th August, 2022 - <https://ssrn.com/abstract=4186322> on 10th January 2022.

²² Article 33 (5), Children's Act South Africa (Act No 38 of 2005).

²³ Thornblad R and Stranbu A, 'The involvement of Children in the process of mandatory family mediation,' in Anna Nylund (eds) Nordic Mediation Research ,Springer nature, 2018,184.

²⁴ Charlow A, 'Awarding custody the best interest of the Child and other functions,' 5 Yale Law and Policy Review., 1987 267.

²⁵ Weithorn L and Campbell S, 'The Competency of Children and Adolescents to Make Informed Treatment Decisions,' Society for Research in Child Development, 1982,1589.

The problem could also affect their adulthood hence it is not a short-term problem but a long-term one. The use of mediation could help determine the child's best interest as the child will be included by hearing their voice and opinions and their views will be taken into consideration. Children who are offered a chance to get involved in custody disputes should take advantage of this. The mediation should not only be child-focused, but it will be inclusive of the child's testimony. This study seeks to assess whether child-inclusive mediation will be beneficial in determining the child's best interest in custody cases.

1.3 RESEARCH OBJECTIVE

The main objective of this dissertation is to examine the impact of custody disputes on children, analyze the concept of the 'best interest of the child,' and evaluate the potential of child-inclusive mediation to enhance the resolution process and promote the well-being of the child.

1. To examine the nature of custody disputes, the damage it has on a child and the way the custody disputes are being handled.
2. To analyze the requirement of the best interest of a child concerning how a child is being treated and how the child should be treated.
3. To examine how child-inclusive mediation is the way forward, the way it works and the change it will bring to the court process and private mediation processes in determining custody disputes.

1.4 RESEARCH QUESTIONS

- 1 . How are custody disputes handled and what are the consequences it has on a child?
2. a) What does the best interest of a child require in disputes with regard to how children are treated?
b) How should a child be treated in custody cases?
3. a) Why is child-inclusive mediation the way forward?
b) How does child-inclusive mediation work and how will it change the court process and private mediation in determining custody disputes?

1.5 HYPOTHESIS

If the Children's Act is amended to include child-inclusive mediation in custody disputes, allowing children to voice their views and needs, then it is expected that the child's best interests will be better served, reducing the negative long-term psychological effects on children, and leading to more constructive outcomes for families going through custody disputes.

1.6 JUSTIFICATION

The best interests of a child are better catered for in mediation processes that include them.²⁶ Currently, custody disputes have a psychological negative effect on children, and this kind of problem could last into adulthood.²⁷ This study will be useful in so far as it tries to address this problem by assessing whether child-inclusive mediation should be mandatory in determining the best interest of the child. Children are mostly seen as victims rather than participants in the process. Being involved helps them feel heard and understand that their views and opinions are important.

This study will be useful to adjudicators who are faced with problems of determining the best interest of the child in custody disputes. It could be useful to mediators who want to reach more effective and durable agreements that consider the preferences and needs of children.

1.7 CONCEPTUAL FRAMEWORK: CHILD'S PSYCHOLOGICAL NEEDS AS CRITICAL TO THEIR WELL-BEING

This study is premised on the concept of a child's psychological needs which are critical to their well-being. The concept emphasises the importance of considering a child's psychological needs in custody disputes, which will lead to a better outcome for them.

Child custody is an important legal decision in the context of a larger legal decision, namely divorce.²⁸ There is a link between childhood family structure and adult psychological

²⁶ Salminen K, 'Mediation and the Best Interests of the Child from the Child Law Perspective,' in Anna Nylund (eds) *Nordic Mediation Research*, Springer Nature, 2018, 210.

²⁷ D'Onofrio B, Emery R. 'Parental divorce or separation and children's mental health,' *World Psychiatry*, On 2 January 2019 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6313686/> on 10 January 2023.

²⁸ Lyman R, Roberts M, 'Mental health Testimony in Child Custody Litigation,' *Law and Psychology Review*, 1985, 19.

functioning.²⁹ Individuals with divorced parents are at an increased risk of experiencing psychological problems in their adulthood.³⁰ This is because emotional and psychological abuse can have persistent long-term effects.³¹ The dispute involves a few emotionally stressful circumstances.³² One might expect a child to recover when they become adults however they are still disadvantaged in their adulthood.³³ The children involved in high-conflict custody disputes are constantly tormented on a psychological level.³⁴ They could experience domestic abuse and suffer harm or even grow distant from a parent, as the process has been an emotional chaos for them. Hence, they suffer greatly. Therefore, in the process of determining child custody, the child's psychological well-being should be prioritized as one of the major concerns.³⁵

The most challenging and distressing disputes that the courts are asked to adjudicate are those involving child custody disputes; "a judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders," as they are directly faced with the responsibility of making decisions that will seriously affect the child's future.³⁶

The process used for family dissolution and the nature of continuing family relationships is more paramount to cater for children's mental health than considering the structure of the custody arrangement for the child.³⁷ Even if a child only indirectly observes her parents' constant disagreements in custody dispute and arguments over the best interest of the child, the child is likely to inevitably experience emotional distress, during that moment affecting the child's psychological needs.³⁸ Working together from the beginning of the divorce process on behalf of the children will help parents to be more dedicated to putting their

²⁹ Amato P and Sobolewski J,' The effects of divorce and marital discord on adult children's psychological well-being,' *American Sociological Review*, American sociological association,2001,900.

³⁰ Amato P et al,' The effects of divorce and marital discord on adult children's psychological well-being,'2001,901.

³¹ Doyne S, Bowermaster J, Meloy R and Dutton D, 'Custody disputes involving Domestic Violence: Making Children's needs a priority,' *Juvenile and Family Court Journal* ,1999,3.

³² Robert E. Emery, Randy K. Otto and William T. O'Donohue, 'A critical assessment of child custody evaluations: Limited Science and a flawed system, *psychological science in the public interest*, 2005,2.

³³ Paul R. Amato et al,' The effects of divorce and marital discord on adult children's psychological well-being,'917.

³⁴ American Bar Association, 'High- Conflict Custody Cases:Reforming the System for Children – Conference Report and Action Plan,' *Family Law Quarterly*, Winter 2001,591.

³⁵ Batt J, 'Custody disputes and the beyond the interest paradigm: A contemporary assessment of the Goldstein/ Freud / Solnit position and the Group's Painter v. Banister Jurisprudence,' *Nova law Review*,1992 627.

³⁶ Thomas R. Litwack, et al, 'The proper role of psychology in child custody disputes,' 1979, 270.

³⁷ Robert E. Emery, et al,'A critical assessment of child custody evaluation,'2.

³⁸ Riley B, 'Mental Health Professionals as Mediators: Changing the Adversarial Mindset in Child Custody Disputes,' *Resolved: Journal of Alternative Dispute Resolution*,2019,4.

children's needs first, hence children should see their parents collaborating to make sure that their interests come before their wish to win an argument.³⁹ In this way, parents would be considering the child's psychological needs which are critical to their well-being.

High-conflict custody cases drain court, family, and mental health resources. It takes more time and causes stress for everyone involved.⁴⁰ Where winners and losers are declared in an adversarial system and inadequate support mechanisms are provided, children tend to suffer.⁴¹ The adversarial mentality that is so common in divorce and custody battles is lessened by mediation.⁴² When parties cooperate in good faith during mediation, they frequently realize and steer clear of the detrimental psychological effects that adversarial proceedings bring about to children.

Cases regarding custody of children are never final and can go on throughout the child's childhood, which could have a long-term psychological effect on the child's well-being.⁴³ The availability of mediation services may help to achieve the psychological well-being of children.⁴⁴ The private settlement of custody disputes can lessen conflict, as it can encourage more cooperative, ongoing relationships between children and both their parents, which has a positive effect on the psychological needs of a child.⁴⁵

The concept of psychological needs as critical to the child's well-being is used to critique the court's approach to determining the child's best interest, by looking at whether it considers a child's psychological needs. The concept attempts to promote the child's emotional well-being and helps to prevent long-term psychological negative effects that could affect the child's adulthood. This is done by encouraging the use of child-inclusive mediation in determining the child's best interest, in custody disputes as a way of considering children's psychological needs.

Traditional legal techniques need to be reevaluated because the psychological suffering experienced by the participating children is further exacerbated by the adversarial nature of

³⁹ Riley B, 'Mental Health Professionals as Mediators,'4.

⁴⁰ American Bar Association, 'High- Conflict Custody Cases,'590.

⁴¹ American Bar Association, 'High- Conflict Custody Cases,' 591.

⁴² Riley B, 'Mental Health Professionals as Mediators,'5.

⁴³ American Bar Association, 'High- Conflict Custody Cases,'591.

⁴⁴Paul R. Amato et al' The effects of divorce and marital discord on adult children's psychological well-being,'919.

⁴⁵ Robert E. Emery, et al, 'A critical assessment of child custody evaluations,'2.

custody battles and their extended nature. This dissertation seeks to promote a legal framework that puts the best interests of the child first and lessens the long-term negative effects of custody disputes on the psychological health and future well-being of the child by introducing the imperative to address children's psychological needs into legal discourse.

1.8 LITERATURE REVIEW

In an article by Jeremiah Kevin, he discusses how crucial child-inclusive mediation is to making constitutional requirements for ADR a reality.⁴⁶ Child-inclusive mediation is a process that helps separating parents focus on the best interests of the children to voice their wishes and views. According to him, mediation is still uncharted territory that requires investigation and recommends that it could be the time for Kenyans to fully incorporate such principles into the legal system.

William Ngaruiya, in his article, discusses the advantages of having a child-inclusive and child-focused mediation as children are the most vulnerable parties in the entire divorce process.⁴⁷ The needs of the child are completely met in this process, and their safety is protected through child-inclusive mediation. The process fully ensures that the child's needs are met and protected. Doing this can help ensure that the child does not go through any emotional turmoil.⁴⁸ Adopting these principles would demonstrate a commitment to promoting a more sympathetic and child-centred approach to conflict resolution as well as aligning Kenya's legal system with worldwide best practices.

1.8.1 ON THE PRINCIPLE OF THE BEST INTEREST OF A CHILD

The "best interests of the child" principle is a cornerstone of the global movement to safeguard children's rights, and it primarily pertains to family law cases involving custody, guardianship, maintenance, adoption, and other matters.⁴⁹ According to Aron Degol and Shimelis Dinku, the principle's overarching message is that whenever choices are made that

⁴⁶ Jerameel K, Towards Ballyhoo of Child Inclusive Mediation as An Instrument of Realizing Best Interest of a Child Principle in Kenya (August 9, 2022). Available at SSRN: <https://ssrn.com/abstract=4186322> or <http://dx.doi.org/10.2139/ssrn.4186322>

⁴⁷ Ngaruiya W, 'Divorce mediation in Kenya today,' Strathmore Dispute Resolution centre on 11 September 2020 <https://sdrcentre.wordpress.com/2020/09/11/divorce-mediation-in-kenya-today/> on 13 January 2023.

⁴⁸ Ngaruiya W, 'Divorce mediation in Kenya today,' Strathmore Dispute Resolution centre on 11 September 2020 <https://sdrcentre.wordpress.com/2020/09/11/divorce-mediation-in-kenya-today/> on 13 January 2023..

⁴⁹ Degol A and Dinku S, 'The principle of best interest of the child : Meaning, history and its place under Ethiopian Law, Mizan Law Review, 2011, 319.

have an immediate or long-term impact on children, proper consideration should be given to their political, economic, and social interests.⁵⁰ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), both signed in 1966, hold an important place in the global human rights movement.⁵¹ The ICCPR expressly addresses children's rights in civil and political life in articles 23(4) and 24. Determining a child's best interests is mostly based on predicting outcomes and implications of custody outcomes that are difficult to estimate.⁵² It is a way of ensuring the interests of the child are taken into consideration in custody disputes.⁵³ A disputed custody decision ought to be settled exclusively or nearly exclusively to what is in the child's best interest.⁵⁴

According to Iona Padurariu, the application of best interest plays two traditional roles: one that attempts to control (criterion of control) and one that identifies a solution (criterion of solution). To ensure rights and obligations towards children are exercised and fulfilled, the control criterion requires the child's best interests to be taken into consideration.⁵⁵ To assist those who must decide what is best for children, the solution criterion and the idea of the child's interest itself must step in.⁵⁶

The earliest known custody awards were made based on parental sex; mothers were given access to their children after divorce.⁵⁷ The preference doctrine gave way to a rule based on fault and hence children came to be granted to the "innocent party" in divorce proceedings.⁵⁸ Currently, the best interest of the child is the determining principle in the award of custody; anything detrimental or in the best interest of the child is considered.⁵⁹ Marit Skivenes, claims

⁵⁰ Degol A and Dinku S, 'The principle of the best interest of the child,' 319.

⁵¹ Degol A and Dinku S, 'The principle of best interest of the child ,' 326.

⁵² Skivenes M, 'Judging the child's best interest; Rational reasoning or subjective presumptions?' Nordic Sociological Association,2010,340.

⁵³ Degol A and Dinku S, 'The principle of best interest of the child ,'320.

⁵⁴ Elster J,' Solomonic judgements: Against the best interest of the child;' The university of Chicago Law review, Winter 1987, 5.

⁵⁵ Padurariu I, 'The principle of the best interest of the child' Lex ET Scientia international Journal, 2020,11.

⁵⁶ Padurariu I, 'The principle of the best interest of the child', 2020,11.

⁵⁷ Pearson J and Munsun P,' The child's best interest principle: Theory and Practice,' Conciliation courts review, 1984, 1.

⁵⁸ Pearson J and Munsun P,' The child's best interest principle: Theory and Practice,' 1984, 1.

⁵⁹ Pearson J and Munsun P,' The child's best interest principle: Theory and Practice,' 1984, 1.

that the best interests of a particular child may be ambiguous.⁶⁰ Hence there is a good reason to be offended by the scope of power that is exercised by judges in custody disputes.⁶¹

Inquiries on what is best for a child frequently bring in indeterminate results. This is due to problems such as inadequate information, trying to make necessary predictions of an outcome, and identifying an integrated set of values by which to make decisions.⁶² The problem is that determining what is best for any particular child, or even for children in general, is frequently speculative and necessitates a highly individualized decision between options.⁶³

Robert H. Mnookin concludes that private dispute resolution does not offer assurance of it being superior to adjudication resolution. It also does not offer a clear decision on the indeterminate best interests principle.⁶⁴ The judicial task is to resolve the private dispute because the parties are unable to resolve the matter themselves as they cannot apply the best interest principle on their own.⁶⁵ Thus he is trying to show that the best interest of a child cannot be determined in a private dispute resolution. However, while both private and court-based procedures have advantages and disadvantages, ignoring the possibilities of private conflict resolution to address a child's best interests could be a mistake given the complexity and emotional intensity of the case.

Thus, the majority of commentators have acknowledged that the best interest standard is typically indeterminate in the setting of contested custody.⁶⁶ Despite this, the concept is regarded as one of the pillars of a child's rights and it is evident that when viewed in this way, the principle guarantees that it will be followed whenever a choice must be made involving a child or group of children.⁶⁷ The child's best interests are of paramount importance and, in all such cases, the rights of the child will take precedence over competing rights.⁶⁸

⁶⁰ Skivenes M, 'Judging the child's best interest,' 339.

⁶¹ Robert H. Mnookin, 'Child custody adjudication: Judicial functions in the face of indeterminacy,' *Law and contemporary problems*, Summer, 1975, 230.

⁶² Robert H. Mnookin, 'Child custody adjudication: Judicial functions in the face of indeterminacy,' 261.

⁶³ Skivenes M, 'Judging the child's best interest,' 339.

⁶⁴ Robert H. Mnookin, 'Child custody adjudication: Judicial functions in the face of indeterminacy,' 292.

⁶⁵ Robert H. Mnookin, 'Child custody adjudication: Judicial functions in the face of indeterminacy,' 292.

⁶⁶ Harvard Law Review, 'Developments in the Law: Constitution and the family,' *The Harvard Law Review Association*, 1980, 173.

⁶⁷ Padurariu I, 'The principle of the best interest of the child', 2020, 8.

⁶⁸ Clarke B, 'Competing custody rights: new concepts of family and the best interest of the child's,' *The comparative and international law journal of Southern Africa*, institute of Foreign and comparative law, 1998, 288.

Even though the best interest of the child principle appears to be progressive, societal and personal factors taint custody decisions and favour parents over children.⁶⁹ Both judges who apply it and parents who use it to further their interests have the potential to abuse the best interests of the child standard.⁷⁰ John Elster, however, argues that upholding the principle of the best interests of the child may be unfair to the parents and wants could theoretically also be important.⁷¹

In conclusion, there is a need to determine the principle of the child's best interest. It should be the primary concern in custody cases. It will be beneficial to parents and children, especially in solving the dispute using child-inclusive mediation as the children will be able to communicate their best interest.

1.8.2 ON PARTICIPATION OF CHILDREN IN CUSTODY DISPUTES

Children were once thought to be passive members of the family with little capacity to evaluate and comment on situations that affect them and are now understood to be active and astute observers of their family situations.⁷² The prevailing view was that children were vulnerable hence they needed to be protected from participating in decision-making during custody disputes after the separation of their parents.⁷³ Children's voices may be silenced by the more powerful uproar of adult disputes and competing rights claims thus it is hard for children to express their views and participate.⁷⁴

When children are given opportunities to participate, they often make use of this opportunity.⁷⁵ They are more likely to be satisfied with the outcome of a custody arrangement.⁷⁶ The children who may benefit the most from their discussions with a mediator are those who live in homes with a lot of conflicts, and in particular, those who have many problems

⁶⁹ Charlow A, 'Awarding custody: The best interests of the child and other fictions,' Yale law & Policy Review, 1987, 267.

⁷⁰ Charlow A, 'Awarding custody: The best interests of the child and other fictions,' 1987, 267.

⁷¹ Elster J, 'Solomonic judgements: Against the best interest of the child,' 5.

⁷² Kelly J and Kisthardt M, 'Helping parents tell their children about separation and divorce : Social science frameworks and the lawyer's counseling responsibility,' 2009, 321.

⁷³ Birbaum R, et al, 'Children experiencing with family justice professional in Ontario and Ohio,' international journal of the Law policy and the family, 2011,399.

⁷⁴ Smart C, 'Towards an understanding of family change: Gender conflict and children's citizenship,' Australian Journal of Family law, 2003, 12.

⁷⁵ Thornblad R and Stranbu A, 'The involvement of Children in the process of mandatory family mediation,' in Anna Nylund (eds) Nordic Mediation Research ,springer nature, 2018,206.

⁷⁶ Kelly J and Kisthardt M, 'Helping parents tell their children about separation and divorce,'323.

that have been accumulating.⁷⁷ Children are regarded as actors who should be allowed to be heard.⁷⁸

When a divorce involves a custody dispute, the courts should use their discretion to involve the child in every decision concerning the child rather than adopting parenting plans that are not tailored to the specific requirements of each child in promoting their best interests.⁷⁹ According to Jacqueline Clarke, custody disputes must first try to seek mediation before bringing the case before the court.⁸⁰

According to Renee Thornblad and Astrid Strandby, there are three purposes for involving children in the mediation of custody disputes.⁸¹ The first one is that it will help the children comprehend the ongoing change which the family is going through. The second purpose is that it prevent subsequent difficulties by giving children the opportunity to “express their reactions and feelings in connection with the separation”; and the last purpose aim is to fulfil the child’s democratic right to participation.

Racheal Birnbaum, in discussing children's experiences with family justice professionals makes a distinction between participation and choice.⁸² Children usually want to take part in cooperatively working with supportive adults during times of family changes, but relatively few of them want or expect to make the choices about post-separation living arrangements by themselves. As much as they would like to participate making a choice would be hard for them.

Children's involvement in decision-making on parental separation can range from having the chance to be involved directly or indirectly when parents are making decisions without the help of a professional, having input into the services that are being provided to them after the

⁷⁷ Thornblad R and Stranbu A, ‘The involvement of Children in the process of mandatory family mediation,’ 207.

⁷⁸ Thornblad R and Stranbu A, ‘The involvement of Children in the process of mandatory family mediation,’ 184.

⁷⁹ Srikison V, ‘Mandatory child-inclusive mediation – A possibility in South Africa?’ Published LLM Dissertation, University of Pretoria, 2019, 51.

⁸⁰ Clarke J, ‘Do I have a voice? An empirical analysis of children’s voices in Michigan custody litigation’ *Family Law Quarterly* Vol. 47, No. 3, Fall 2013, 473.

⁸¹ Thornblad R and Stranbu A, ‘The involvement of Children in the process of mandatory family mediation,’ 188.

⁸² Birbaum R et al, ‘Children experiencing with family justice professional in Ontario and Ohio,’ *international journal of the Law policy and the family*, 2011,400.

separation, having a role in mediation or court-based dispute resolution, or participating in discussions about more general policy and law reform issues relating to parental separation.⁸³

The level of participation, the focus of the decision-making in which children may be engaged, the type of participation action, and the involvement of children and young people are the four main dimensions for understanding participation, according to Ruth Sinclair.⁸⁴ The foundation of this paradigm is the idea that, given the diversity of children, it is crucial to begin with the fourth dimension which is, the involvement of children and young people, and take into account factors like age, gender, culture, economic and social situations, and disability. If children are to meaningfully engage in decisions that have an impact on their lives, that dimension must then be matched with all other dimensions pertaining to the nature of the activity, its purpose, and the decision-making context.⁸⁵

These dimensions play a crucial role in child-inclusive mediation because they determine how the process is conducted, how children are heard, and how their perspectives affect the final result. It is consistent with child-inclusive mediation's objective, which is to establish parenting plans and decisions that put the child's best interests first while incorporating them in a way that is appropriate for their age and developmental stage.

Harry Sheir provides five levels of participation, which may be useful in developing an action plan to enhance child participation.⁸⁶ Children are to be listened to and supported in expressing their views, their views are to be taken into account, they are to be involved in decision-making processes, and they are to share power and responsibility for the decision-making.⁸⁷ Applying the levels of participation may also force adults to check their motivations and recognise the validity of the child's involvement.⁸⁸

Children want to know what is happening and be included in important discussions that are made about them.⁸⁹ Most children's efforts to regain a sense of normality during the custody

⁸³ Birbaum R et al, 'Children experiencing with family justice professional in Ontario and Ohio,' 401.

⁸⁴ Sinclair R, 'Participation in practice: Making it meaningful, effective and sustainable,' *Children and society* Volume 18, 2004 108.

⁸⁵ Sinclair R, 'Participation in practice: Making it meaningful, effective and sustainable,' 108.

⁸⁶ Sheir H, 'Pathways to participation: Openings, opportunities and obligations, children, and society, 2001, 110.

⁸⁷ Sheir H, 'Pathways to participation: Openings, opportunities and obligations,' 110.

⁸⁸ Sinclair R, 'Participation in practice: Making it meaningful, effective and sustainable,' 111.

⁸⁹ Butler I, 'Children's involvement in their parents' divorce: Implications for practice,' *Children and society* volume 16, 2002, 99.

dispute revolve around regaining cognitive control over what is happening and being excluded from conversations tends to make them more anxious and upset.⁹⁰

The involvement of children in mediation is contested.⁹¹ Emery makes the case that keeping children out of mediation is in their best interests since it keeps them out of their parents' fight and spares them from having to make adult decisions.⁹² However, excluding children from participation in custody decisions serves and protects adults' concerns rather than children's interests, hence children should be included.⁹³

According to Frans Mashilo, a child's interest should not be conceptualized in terms of parental interests.⁹⁴ When parents decide to use mediation in custody cases, they often bring methods and expertise to mediation services, but they could also have contradicting "expert" viewpoints on a child's well-being.⁹⁵ Mandating child-inclusive mediation would enable the much-needed intervention.⁹⁶

In conclusion, custody battles are a progressive step toward advancing a child's rights and welfare. By seeing children as active participants in their own lives, it exemplifies the best interest principle in its most fundamental form. We adopt a more thorough, compassionate, and inclusive approach to family law by listening to children's voices. In the end, this strategy encourages the development of a society that upholds the rights of its youngest citizens and recognizes their capacity to contribute to their futures and the welfare of their families.

1.9 CONTRIBUTION

This study contributes to children in custody disputes by encouraging the use of child-inclusive mediation in determining the child's best interest as a way of solving the post-

⁹⁰ Butler I, 'Children's involvement in their parents' divorce: Implications for practice,' 2002 ,99.

⁹¹ Coley M, 'Children's voices in access and custody decisions: The Need to reconceptualized rights and effect transformative change,' Appeal publishing society Volume 12, 2007, 71.

⁹² Emery R, 'Children's voices: listening—and deciding—is an adult Responsibility" Arizona Law Review, Vol.45.621.

⁹³ Coley M, 'Children's voices in access and custody decisions: The Need to reconceptualized rights and effect transformative change,71.

⁹⁴ Mahlobodwane F, 'Determining the best interest in custody battles: Should a child's voice be considered?' <https://doi.org/10.17159/obiter.v31i2.12357> Obiter 31, no. 2 (2021).

⁹⁵ Smithson J, Barlow A, Hunter R, Ewing J, 'The child's best interests as an argumentative resource in family mediation sessions,' on 13th July 2015, <https://doi.org/10.1177/1461445615590722> on 5th January 2023.

⁹⁶ Srikison V, 'Mandatory child-inclusive mediation – A possibility in South Africa?' Published LLM Dissertation, University of Pretoria, 2019, 100.

separation dispute between parents. Previous studies have discussed the nature of the principle of the child's best interest being ambiguous as judges and parents decide on what is best for the child without involving the children themselves.⁹⁷ This study is unique as it makes an argument for the use of child-inclusive mediation in custody cases in Kenya. Children's voices need to be heard and they should participate in matters that affect their best interests. The use of child-inclusive mediation would encourage the focus on the needs and interests of the child rather than the interest of the parents, in the parental plans.

1.10 METHODOLOGY

This study relies on qualitative research, by relying on data from secondary sources such as books, articles, reports and journals. The study will also rely on primary sources data such as the Children's Act, and the United Nations Convention on the Rights of the Child. This will be used to emphasise a global focus on child inclusivity in matters that involve them, especially in custody cases. The study in general uses a deductive approach, where the main claim in the hypothesis is proved through the findings of the research questions.

The first chapter examines the nature of custody disputes, how they are being handled and the damage it has on a child. The study analyzes the nature of custody disputes using historical analysis. This is done to show how custody disputes are being handled. Conditions have now changed as the child's best interest is taken into consideration and the child is encouraged to have an opinion and views and be included by participating in the custody dispute. There is no reason to continue, with custody disputes that do not include children's input and participation. This will be done using scholarly articles, journals and books that discuss the history of the nature and damages of custody disputes.

The study will then discuss the principle of the child's best interest and how a child should be treated in custody disputes with regard to their best interest. The doctrinal analysis will be used to examine the legal principle of the child's best interest, by analysing the requirements of a child's best interests with regard to how children are treated. This will be done by analyzing primary sources of law such as statutes like the Children's Act and secondary

⁹⁷ Skivenes M, 'Judging the child's best interest; Rational reasoning or subjective presumptions?' Nordic Sociological Association, 2010, 340.

sources of law like decisions from judges in claiming that a child should be treated in a way that determines their best interest in custody disputes.

After this, the study will assess the advantages of having child-inclusive mediation and how it should be the way forward in determining custody dispute cases. This will be done by relying on scholarly work like articles, journals, and books, to assess what child-inclusive mediation is, how it works and how it will change the way custody disputes are being handled today with regard to determining the best interest of the child.

1.11 CHAPTER BREAKDOWN

The first chapter of the paper is the introduction. It includes a background, problem statement, research objectives, research questions, hypothesis, justification for the study, theoretical framework, literature review, and methodology. The purpose of this chapter is to provide the context and background that will serve as the foundation for the analysis that will follow in later chapters.

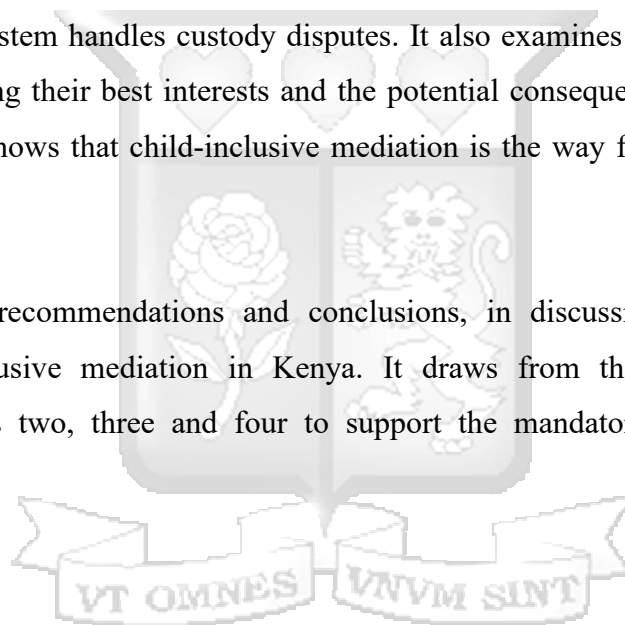
Chapter two examines the nature of custody disputes and the damage the disputes have on children, this is examined by looking at the way custody disputes are being handled, why the cases are being handled in that particular way and the consequences it has on the child. Examining these components gives the reader a solid foundation for comprehending the intricate interactions between legal procedures, emotional dynamics, and their effects on children's lives. This assessment lays the groundwork for later chapters, which might investigate potential remedies and suggestions to lessen the negative consequences of custody disputes on children.

Chapter three investigates the requirement of the best interest of a child in disputes, with regard to how children are being treated in custody disputes and considering how a child should be treated in a custody case. This is done by discussing the principle of the best interest of a child and what it entails. It explores the development of this idea in relation to sociological and legal situations. The chapter explains the fundamental justification for emphasizing the child's best interests and its moral ramifications in custody battles. The analysis of the best interests of the child premise sets the stage for later chapters, which can

explore potential areas for policy adjustments, reform, and improvement. In the end, this chapter helps achieve the overarching goal of developing a custody conflict strategy that is more child-inclusive.

Chapter four studies what child-inclusive mediation is and how it works. It looks at how child-inclusive mediation might address issues that arise in custody disputes which is done by utilizing children's active participation and giving their voices priority. The discussion focuses on particular areas, like lowering adversarial dynamics, improving communication, and encouraging cooperative decision-making, where child-inclusive mediation can result in positive change. It also discusses how child-inclusive mediation changes the way the court works by investigating how the adoption of child-inclusive mediation could fundamentally alter how the legal system handles custody disputes. It also examines how it is beneficial to children in determining their best interests and the potential consequences it would have on the court system. It shows that child-inclusive mediation is the way forward in determining custody disputes.

Chapter Five gives recommendations and conclusions, in discussing the possibility of mandatory child-inclusive mediation in Kenya. It draws from the overall research as presented in chapters two, three and four to support the mandatory inclusion of child-inclusive mediation.



CHAPTER 2: NATURE OF CUSTODY DISPUTES AND THE CONSEQUENCES IT HAS ON A CHILD

2.1 INTRODUCTION

In Kenya, parental divorce and separation are increasingly common.⁹⁸ A few decisions have led to temporary separations between children and their parents. Throughout history, children have been temporarily kept apart from one or both of their parents due to working and travelling. However, deliberate permanent separation creates a complex and emotionally distraught situation for all parties involved.⁹⁹ For families already experiencing turmoil due to separation or divorce, a child custody dispute in court may be a frightening and emotionally taxing ordeal.¹⁰⁰

Most parents and children experience upheaval during the marital breakup process, which starts well before the legal divorce and continues through a prolonged period of readjustment after the formal proceedings.¹⁰¹ Children whose parents argue custody in court experience emotional and existential limbo for months, often even years, while their case is pending.¹⁰² Unaware of the potential effects of the custody dispute on their children's lives, parents enter litigation unprepared for the resulting mental and financial turmoil. Determining custody arrangements for divorced children is important for the parents, their children, and society.¹⁰³ It is in society's best interest to ensure that children have the best possible upbringing after

⁹⁸ Mueni W, Otieno R, and Ichuloi A, 'Effect of Parental Divorce and Separation on Psychosocial Wellbeing of Adolescents in Kajiado North Sub-County, Kenya', *Scholars Journal of Arts, Humanities and Social Sciences*, 2021, 194.

⁹⁹ Siebel, Cynthia C, 'Fathers and their children; Legal and psychological issues of joint custody,' *American Bar Association*, 2006, 213.

¹⁰⁰ Wolman R and Taylor K, 'Psychological Effects of Custody Disputes on Children,' *Behavioural Sciences & the Law*, 1991, 399.

¹⁰¹ Emery, Robert E and Wyer M, 'Child custody mediation and litigation: An experimental evaluation of the experience of parents,' *Journal of Consulting and Clinical Psychology*, 1987, 179.

¹⁰² Wolman R, 'Psychological Effects of Custody Disputes on Children,' 399.

¹⁰³ Joan B. Kelly, 'The Determination of Child Custody,' *The Future of Children*, Princeton University, 1994, 121.

divorce because children's well-being depends, in large measure, on the amount and quality of parenting they receive throughout their childhood.¹⁰⁴

From a social and legal perspective, the role that parents are expected to play in raising their children during marriage and after divorce has changed significantly and is still evolving.¹⁰⁵ Fathers have enjoyed full parental control over their children since the Roman era, including the power to order their sale or execution.¹⁰⁶ The father's power, particularly his legal authority over his children and possessions, was supported by the law and political rhetoric at least as far back as the nineteenth century.¹⁰⁷ Fathers remained to have almost total control and the duty to safeguard, support, and educate their children under later English law. Mothers had very limited access to their children following divorce, and until the middle of the nineteenth century, fathers had a right to custody as well, regardless of the circumstances.¹⁰⁸ The best interests of the child and parental equality serve as the cornerstones of contemporary child custody laws.¹⁰⁹ No parent has priority over the other when it comes to custody of the children from the marriage. This is especially true where such an alleged superior right of one parent might impair a child's well-being.¹¹⁰

This chapter examines how custody disputes are normally handled by the court system, as well as the possible effects that various strategies may have on the child. The chapter investigates the numerous aspects of conflict resolution and their effects on children's emotional, psychological, and social development, from legal representation to mediation and court processes. To make decisions that emphasize the child's best interests and ultimately promote better and more stable family situations during these trying times, it is crucial to understand the dynamics and results of custody conflicts.

¹⁰⁴ Joan B. Kelly , 'The Determination of Child Custody,' 121.

¹⁰⁵ Joan B. Kelly , 'The Determination of Child Custody,' 121.

¹⁰⁶ Siebel, Cynthia C , 'Fathers and their children; Legal and psychological issues of joint custody,' 213.

¹⁰⁷ Siebel, Cynthia C , 'Fathers and their children; Legal and psychological issues of joint custody,' 213.

¹⁰⁸ Joan B. Kelly , 'The Determination of Child Custody,' 121.

¹⁰⁹ *SMM v ANK [2022] eKLR.*

¹¹⁰ *AKHIV & another v FNK [2022] eKLR.*

2.2 THE NATURE OF CUSTODY DISPUTES

The best interest of the child is the primary determining element in decisions involving children.¹¹¹ Parental rights and interests must be carefully assessed against this fundamental principle when deciding on custody arrangements. The rights and preferences of the parents should never take precedence over the welfare and well-being of the children.¹¹² The court may grant legal custody or actual custody.¹¹³ Legal custody refers to the conferral of parental rights and obligations to a person who has lawful custody of a child for a certain amount of time pursuant to an order of a court with appropriate jurisdiction. Actual custody is the possession, care, and control of a child in one's physical presence, whether such custody is exercised solely or jointly with another person.

2.2.1 LEGAL CUSTODY AND ACTUAL CUSTODY

Parents are expected to decide among themselves who will have custody, but the court is not required to uphold that decision if it determines that it is not in the child's best interests.¹¹⁴ A split order may be made between parents who are equally qualified to be the child's guardians, with one parent having physical custody and the other having legal custody. When physical custody is given to the mother, she is entitled to support from the father until the child reaches adulthood, and the parent with legal custody may be allowed to visit the child.

Mothers typically obtain legal custody of their children, particularly infants when exceptional circumstances are absent.¹¹⁵ Due to the age and needs of their children, they have been given legal custody.¹¹⁶ In such cases, the court often decides the father's level of access. Fathers will need to exert more legal effort to obtain sole physical custody.¹¹⁷ If the mother is found to be unsuitable, the father may receive legal custody of the infants.¹¹⁸

¹¹¹ Section 8 (3), Children's Act 2022 ([Act No. 29 of 2022](#)).

¹¹² *Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad & 4 others* (Petition No. E003 of 2022)

¹¹³ Section 2, Children's Act 2022 ([Act No. 29 of 2022](#)).

¹¹⁴ Mbote P, 'Custody and the Rights of children,' International Environmental Law Research Centre, 2000, 5.

¹¹⁵ *Githunguri v Githunguri* [1979] eKLR.

¹¹⁶ Nyala V, MMS advocates, on 10 February 2023, <https://mmsadvocates.co.ke/child-custody/#:~:text=In%20most%20cases%2C%20mothers%20often,of%20access%20of%20the%20father> on 22 February 2023.

¹¹⁷ Fox G, Robert K F, 'Determinants of Child Custody Arrangements at Divorce,' Journal of Marriage and the Family, National Council on Family Relations, 1995, 698.

¹¹⁸ *JKN v HWN* [2019] eKLR.

2.2.2 TYPES OF CUSTODY ARRANGEMENTS

During separation or divorce, the applicant has the option of requesting joint custody, sole custody, or sole custody with access.¹¹⁹ When only one parent is given parenting rights, this is known as sole custody. There are two types of sole custody; there is sole legal custody and sole physical custody.¹²⁰ Only the parent who has been given custody rights in this situation will make important decisions regarding the raising of the child. In sole legal custody, the custodian parent has all the legal rights, duties and powers assigned to them and the non-custodial parent has limited rights and powers. In sole physical custody, the custodial parent has primary physical custody of the child while the non-custodial parent just has visitation rights.

When one parent is deemed unsuitable to raise the child, sole custody is frequently given to the other.¹²¹ This could be due to a history of substance abuse, neglect, substance addiction, a serious sickness or mental health issue, one parent is incompetent to make decisions for their children.¹²² If one of the parents has a house that is unsuitable for the children due to conflicts in the house and lack of a source of income, the court may grant sole custody to the other parent.¹²³

Even though the parents do not live together and are not raising the child in the same household, joint custody allows two co-parents to share responsibility for a child.¹²⁴ The court can also decide to grant sole custody with access. If one parent is given exclusive custody they have the right to make decisions about the child's upbringing and the other parent has the right to visit without assuming custody of the child.¹²⁵ There are two types of joint custody; there is joint physical custody and joint legal custody.¹²⁶ The child spends time with

¹¹⁹Nyala V, MMS advocates , on 10 February 2023, <https://mmsadvocates.co.ke/child-custody/#:~:text=In%20most%20cases%2C%20mothers%20often,of%20access%20of%20the%20father> on 22 February 2023.

¹²⁰ Joan B. Kelly , 'The Determination of Child Custody,' 124.

¹²¹Nyala V, MMS advocates , on 10 February 2023, <https://mmsadvocates.co.ke/child-custody/#:~:text=In%20most%20cases%2C%20mothers%20often,of%20access%20of%20the%20father> on 22 February 2023.

¹²²Jenifer Wolf <https://www.verywellfamily.com/overview-of-sole-legal-custody-2997670> on 26 october 2022.

¹²³ Noordin v Karim [1990] eKLR.

¹²⁴Christy Bieber <https://www.forbes.com/advisor/legal/child-custody/joint-custody/> on 31 March 2023.

¹²⁵Nyala V, MMS advocates , on 10 February 2023, <https://mmsadvocates.co.ke/child-custody/#:~:text=In%20most%20cases%2C%20mothers%20often,of%20access%20of%20the%20father> on 22 February 2023.

¹²⁶ Joan B. Kelly , 'The Determination of Child Custody,' 124.

both parents when they have joint physical custody of the child.¹²⁷ The child usually divides the time equally, and it is intended that each parent will have a substantial period of time with the child.¹²⁸ With relation to a child's health and well-being, both parents maintain the right and authority to make decisions in joint legal custody.

2.3 CHILD CUSTODY LITIGATION

Depending on the kind of orders sought, a child custody suit is a litigation that is filed in court just like any other matter. Parents seeking custody will file a lawsuit in the children's court.¹²⁹ The issue will be heard, and the custody decision will be based on the Children's Officer's report. Depending on their preferences, a party may petition for the different types of custody.

2.3.1 PRINCIPLES APPLIED IN MAKING CUSTODY ORDER

To guarantee that a child's best interests are served, the court must take into account some criteria while deciding on a custody arrangement.¹³⁰ These elements consist of; the actions and preferences of the parent or guardian, and the relatives' perspectives on the matter. A child's preferences are also considered, taking into account their age and capacity. A determination on whether the child could be harmed if a custody order is not made is considered. Customs from the child's community's culture, the child's spiritual upbringing, and the current status of previous court orders. The situation of the child's siblings and other children in the home, any more relevant circumstances that the law specifies and finally the court's decision-making process always puts the child's best interests first.

2.3.2 NEGATIVE CONSEQUENCES

Divorce has both short and long-term negative impacts on children.¹³¹ Both the family conflict and the judicial system experience can be devastating for both adults and children involved in child custody battles.¹³² The method used to resolve conflicts may have a

¹²⁷ Christy Bieber, <https://www.forbes.com/advisor/legal/child-custody/joint-custody/> on 31 March 2023.

¹²⁸ Joan B. Kelly, 'The Determination of Child Custody,' 124.

¹²⁹ Mukoya J, <https://koyaadvocates.co.ke/child-custody-kenya/> on 3 September 2021.

¹³⁰ Section 103 (1), Children's Act 2022 ([Act No. 29 of 2022](#)).

¹³¹ Sol R. Rapport, 'Deconstructing the Impact of Divorce on Children,' American Bar Association, Family Law Quarterly, 2013, 353.

¹³² Wolman Richard, 'Psychological Effects of Custody Disputes on Children,' 406.

negative psychological effect on children.¹³³ Families contesting custody may suffer greatly as a result of the adversarial nature of the legal system and the resistance of many attorneys to adopt an alternate strategy to conflict settlement.¹³⁴ Factors that are associated with divorce are what cause psychological problems in children.¹³⁵ Children who observe parental disagreement are more likely to experience post-divorce adjustment problems.¹³⁶

According to the adversarial point of view, parenting is a zero-sum game in which one parent "wins," another parent "loses," and the child loses a parent as a result. The majority of the time, parents who fight custody do so with little knowledge of how stressful a custody battle will be for them personally and financially.¹³⁷ Maintaining numerous houses by paying rent and incurring the costs of regular court appearances can be financially disastrous.¹³⁸

Parents who are under a lot of stress end up resentful, emotionally spent, and in debt. Then, they might communicate to their children their confusion and fear. It has been demonstrated that a parent's mental health, particularly that of mothers, affects how well their children operate. It is well known that maternal depression is associated with an increase in both internalized and externalized problem behaviour in children.¹³⁹

The child who is the topic or target of a custody dispute has existential, interpersonal, and personal crises. The family problem at hand has the contested child's attention and emotions diverted away from developmentally appropriate pursuits.¹⁴⁰ The demands and worries of children are overshadowed by those of upset adults. Under the pressure of their losses, normally devoted, consistent mothers and fathers may regress and find themselves worn out to the point of practically being emotionally unavailable.¹⁴¹

The significance of family structure and parental engagement in shaping a child's development indicates positive impacts on social, psychological, and health outcomes when

¹³³ Sol R. Rappaport , 'Deconstructing the Impact of Divorce on Children,'361.

¹³⁴ Wolman R, 'Psychological Effects of Custody Disputes on Children,'406.

¹³⁵ Sol R. Rappaport , 'Deconstructing the Impact of Divorce on Children,'360.

¹³⁶ Sol R. Rappaport , 'Deconstructing the Impact of Divorce on Children,'361.

¹³⁷ Wolman R,'Psychological Effects of Custody Disputes on Children,'406.

¹³⁸ Sol R. Rappaport , 'Deconstructing the Impact of Divorce on Children,'370.

¹³⁹ Sol R. Rappaport , 'Deconstructing the Impact of Divorce on Children,'366.

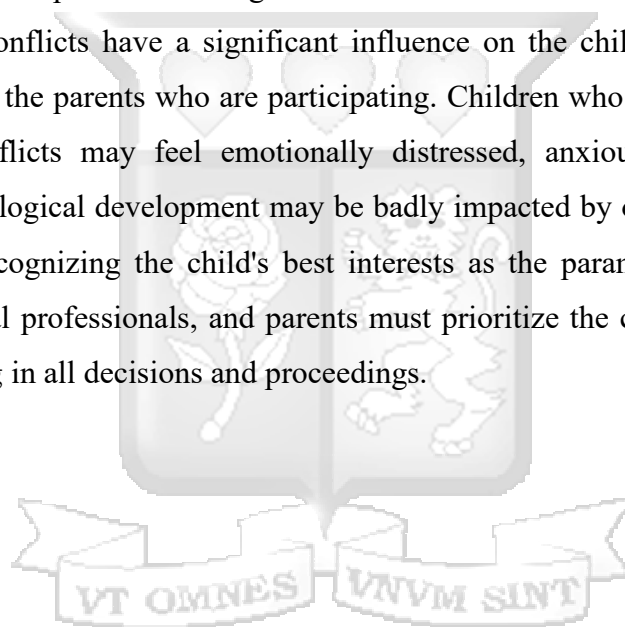
¹⁴⁰ Wolman R, 'Psychological Effects of Custody Disputes on Children,'406.

¹⁴¹ Wolman R, 'Psychological Effects of Custody Disputes on Children,'406.

both a mother and father are actively involved in a child's life.¹⁴² The notion that the Supreme Court holds a constitutional responsibility to ensure a child's access to parental care aligns with legal and ethical principles prioritizing the child's best interests. Family law often aims to protect children's well-being, considering factors like parental involvement, stability, and overall welfare. It is crucial to recognize the diversity of family dynamics and legal considerations, as court decisions are typically tailored to the unique circumstances of each family, with an overarching goal of promoting the child's best interests and overall well-being.

2.4 CONCLUSION

In conclusion, custody disputes are among the most difficult and emotionally charged family law matters. These conflicts have a significant influence on the children caught up in the conflict in addition to the parents who are participating. Children who find themselves in the middle of these conflicts may feel emotionally distressed, anxious, or unstable. Their emotional and psychological development may be badly impacted by ongoing disagreements and family strife. Recognizing the child's best interests as the paramount consideration is essential. Courts, legal professionals, and parents must prioritize the child's safety, stability, and overall well-being in all decisions and proceedings.



¹⁴² MAK v RMAA & 4 others (Petition 2 (E003) of 2022)

CHAPTER 3: ENSURING CHILD’S WELL-BEING IN CUSTODY DISPUTES

3.1 INTRODUCTION

The term "best interest of the child" refers to the set of values that prioritise the child's survival, protection, involvement, and development over all other factors.¹⁴³ The best interest approach in custody disputes has a lot of merit. It suggests that the child's interests should take precedence over those of the parents or other interested adults in these disputes, as well as above social objectives like equality and fairness.¹⁴⁴ It also offers the greatest flexibility which caters for particular circumstances and needs of a child. When the best interest of a child is considered courts assess individuals and relationships of the parent and children, anticipate future behaviours and the effects those behaviours will have on others, and estimate the worth to the child of each potential outcome.¹⁴⁵

Determining the best interests of a child is paramount in cases involving custody. Various factors are considered, including the child's age, maturity, relationships with parents and guardians, stability of living arrangements, parental cooperation, and the child's preferences, if they are old enough to express a meaningful preference.¹⁴⁶ Additionally, special needs, domestic abuse, child abuse history, and the presence of individuals with criminal records are taken into account to ensure the child's physical and psychological well-being.¹⁴⁷ These factors aim to provide a comprehensive assessment of the child's circumstances, emphasizing their safety, stability, and overall welfare in making legal decisions that prioritize their best interests.

¹⁴³ Section 2, Children’s Act ([Act No. 29 of 2022](#)).

¹⁴⁴ Katharine T. Bartlett , ‘ Prioritizing past caretaking in child- custody decision-making,’ Duke University School of Law, Law and Contemporary Problems, 2014, Vol. 77, No. 1, Child-Custody Decisionmaking, 2014, 29.

¹⁴⁵ Katharine T. Bartlett , ‘ Prioritizing past caretaking in child- custody decision-making,’ 29.

¹⁴⁶ First Schedule ,Children’s Act ([Act No. 29 of 2022](#)).

¹⁴⁷ First Schedule , Children’s Act ([Act No. 29 of 2022](#)).

While these particular criteria appear to offer more thorough evaluations, many of them are still arbitrary and subjective.¹⁴⁸ Since different legislation prioritizes certain elements differently, the weight assigned to each aspect can range from court to court. Because of the potential for differing results in custody judgments due to the focus placed on these elements, custody decisions are fundamentally context-dependent and discretionary.¹⁴⁹ With the standard being vague and its indeterminacy it promotes litigation over custody decisions, in which parents are incentivized to present damaging evidence of one another's shortcomings, perhaps negatively affecting their capacity to work together in the children's best interests in the long run.¹⁵⁰

The factors to consider when determining a child's best interest do little to guide and regulate judicial decision-making.¹⁵¹ Hence there is a need for child-inclusive mediation in determining a child's best interest. The adaptability of mediation procedures gives parties the chance to expand the conversation in a secure, non-adversarial setting. Since it is resolution-focused, various influences like children could assist parties in reaching agreements. When the conditions are right, it provides an environment in which children can also be heard.¹⁵²

The best interests of a child are a subject of paramount importance in custody disputes. This chapter navigates the multifaceted considerations that shape the determination of what is in a child's best interest in disputes related to their treatment. This is done by exploring the legal framework and the history of the legal framework, core factors in determining a child's best interest and also case law. This chapter emphasizes the child's well-being as the guiding principle and examines how the law and various stakeholders grapple with the intricate challenge of safeguarding and promoting the best interests of our most vulnerable members of society.

¹⁴⁸ Mnookin R, 'Child custody revisited,' Law and Contemporary problems, 2014, 251.

¹⁴⁹ Bartlett K, 'Prioritizing past caretaking in child- custody decisionmaking,' 30.

¹⁵⁰ Scott E and Emery R, 'Gender politics and child custody: the puzzling persistence of the best- interests standard,' Law and Contemporary Problems , 2014, Vol. 77, No. 1, Child-Custody Decisionmaking , Duke University School of Law 2014, 69.

¹⁵¹ Mnookin R, 'Child custody revisited,' Law and Contemporary problems, 2014, 251.

¹⁵² Winestone J, <https://mediate.com/best-interests-and-little-voices-child-participation-in-the-family-mediation-dialogue/> on January 17 2015

3.2 TRACING THE HISTORY OF CHILDREN'S BEST INTERESTS

The legal concept of children's rights did not receive any significant attention in the global scene until the late 1980s.¹⁵³ Even though there was international attention on children as early as the 1920s, such attention was only limited to Western nations that had organized themselves into political entities in contrast to most other nations that were still under colonial rule.

In the past, fathers were granted custody of their children in the event of a divorce.¹⁵⁴ For example, in feudal Europe, a father's claim to custody of his children was crucial since the children were seen as part of their inheritance. Similarly, fathers were accorded this paternal priority in nations such as Holland since it was believed that they were competent in raising their children well. Therefore, unless the wife could show that he is unfit, the father had a claim to custody of his children during these times. On the other hand, strict standards had to be met for the unfitness to be proven. In most jurisdictions, the woman had to prove that the father was insane or incapable of caring for the children for any other reason. The patrilineal nature of the society at the time had an impact on this.¹⁵⁵

The "tender years doctrine" was a modification of this paternal predilection made by the British parliament in 1839.¹⁵⁶ According to this theory, mothers, and children under the age of seven should always stay together. This was predicated on the idea that mothers are crucial to younger children because of the unique natural relationship between them and because mothers tend to their young charges a lot.

What was noteworthy was the shift in the fundamental reasoning behind the custody decision. The maternal presumption of the 'tender year doctrine' was based on arguments about what would be in the children's best interests, while the earlier paternal presumption was based on a kind of property right or ownership the father held in his children. The phrase "best interests" was once used as justification, but over time it became a distinct standard itself a legislative or judicial directive that custody choices must be based on what's in the children's best interests and prioritizing the well-being of the children.¹⁵⁷

¹⁵³ Mutali B, 'Demystifying the 'Best Interest of the Child' Published, Moi University, Eldoret, 2011,8.

¹⁵⁴ Degol A and Dinku S,' The principle of best interest of the child , 321.

¹⁵⁵ Mutali B namusasi, 'Demystifying the 'Best Interest of the Child,' 12.

¹⁵⁶ Degol A and Dinku S,' The principle of best interest of the child ,' 321.

¹⁵⁷ Mutali B, 'Demystifying the 'Best Interest of the Child,' 12.

The traditional view, rooted in the historical belief that a child of tender years should be with the mother, has given rise to the modern rule that acknowledges the fundamental principle of equality between parents.¹⁵⁸

3.3 THE LEGAL FRAMEWORK GOVERNING THE BEST INTEREST OF THE CHILD

One of the main pillars of international initiatives to protect and promote the welfare of the youngest and most vulnerable members of society is the legal framework defining what is in the best interests of children. There are numerous international treaties, agreements, and legal principles have been formed to direct the decision-making processes that have an impact on the lives of children.

3.3.1 THE CONSTITUTION OF KENYA (2010)

There were no particular provisions in the previous constitution for the defence and upholding of children's rights. As a result, the general provision that oversaw the citizen's fundamental rights and freedoms was left to handle children's rights and interests.¹⁵⁹ It was assumed that the term "every person" in section 70 of the repealed constitution would protect the child's rights and interests in them. Therefore, the general provisions of the fundamental rights and freedoms that were available to everyone as a matter of constitutional entitlement were to be adopted in the best interests of the child, if any. There was no differentiation whatsoever about the child's rights. Hence, it is essential to conclude that children benefited from the many rights granted to them by the [then] constitution in the same manner as they were available to every other citizen.¹⁶⁰

A child's best interests are of paramount importance in every matter concerning the child.¹⁶¹ This article of the constitution outlines the rights that each and every child should have. It can be seen that specific provisions for the rights of children have been introduced, recognizing them as an interest-specific group in the country. It demonstrates a commitment to ensuring that children are treated with the consideration and protection they deserve. The best interest

¹⁵⁸ SMM v ANK [2022] eKLR.

¹⁵⁹ Mutali B, 'Demystifying the 'Best Interest of the Child,' 18.

¹⁶⁰ Mutali B, 'Demystifying the 'Best Interest of the Child' 9.

¹⁶¹ Article 53 (2), Constitution of Kenya (2010)

principle contributes to fostering an environment where the best interests of the child are prioritized, promoting a society that values and protects the rights of children.

3.3.2 THE CHILDREN'S ACT (2001) (REPEALED)

It is clear from the Children's Act that the parliament wanted to domesticate the clauses of the international child treaties that Kenya was a signatory to. The Act was passed in accordance with Kenya's presumptive common law approach to international treaties, according to which domestic duties arising from such treaties are nullified unless they are incorporated into local legislative provisions. It has been determined that the Children Act's provisions and the Convention on the Rights of the Child are complementary in this regard.¹⁶²

The best interests of the child must always be an overriding consideration in every decision involving children, whether it is made by public or private social welfare organizations, courts of law, administrative agencies, or legislative bodies.¹⁶³ All judicial and administrative institutions, as well as individuals acting on their behalf, shall treat the best interests of the child first and foremost, to the extent that doing so is consistent with choosing a course of action calculated to: protect and advance the child's rights and welfare; conserve and advance the child's welfare; and ensure that the child receives the guidance and correction that is required for both the child's welfare and the public interest.¹⁶⁴ This section so highlights the need for all decisions and actions concerning children to be made with the child's best interest in mind.¹⁶⁵

A child must be given the chance to voice his opinions on any procedural concerns that impact him. Depending on the child's age and level of maturity, the opinion will be considered as suitable.¹⁶⁶ The court must consider several important considerations when deciding whether to give a custody order in favour of an applicant in a child custody case.¹⁶⁷ These include evaluating the conduct and preferences of the child's guardian or parent, taking into account the wishes of the child's relatives and anyone who has cared for them in the previous three years, recognizing the child's expressed wishes, assessing the risk of harm to the child should the order be denied, honouring the child's religious beliefs and community

¹⁶² Mutali B, 'Demystifying the 'Best Interest of the Child' 12.

¹⁶³ Section 4 (2), Children's Act, (Act No. 8 of 2001).

¹⁶⁴ Section 4(3), Children's Act Act No. 8 of 2001).

¹⁶⁵ Mutali B, 'Demystifying the 'Best Interest of the Child' 18.

¹⁶⁶ Section 4(4) , Children's Act (Act No. 8 of 2001)

¹⁶⁷ Section 83, Children's Act A(ct No. 8 of 2001).

customs, looking into the existence of any prior court orders involving the child, and taking into account the situation of the child's siblings and other children living in the home. In the end, the court's main goal is to reach a conclusion that ensures their safety, well-being, and overall welfare.

3.3.3 THE CHILDREN'S ACT (2022)

Section 8 of the Children's Act 2022, has the same provisions as section 4 of the Children's Act 2001, discussed above. It indicates a continuity of legal principles regarding the best interests of the child across legislative revisions and also reflects an ongoing commitment to prioritizing the welfare and well-being of children in matters of legal and social significance.

3.3.4 THE 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The United Nations Declaration of Human Rights was drafted and approved by the UN General Assembly with the primary aim of establishing a benchmark for moral and ethical accomplishments rather than imposing legal obligations on states. Additionally, it is noteworthy that this declaration does not specifically delineate rights for particular groups such as children or women; instead, it addresses human rights universally, asserting entitlement for all individuals.¹⁶⁸ Nevertheless, despite its broad language, it is possible to interpret certain overarching provisions within the declaration in the specific context of children's rights. By doing so, we can derive guidance and principles that contribute to safeguarding and promoting the rights of children within the broader framework of human rights.

Every person has the right to socio-economic rights that are important to their well-being.¹⁶⁹ Children are also entitled to get special care from the law and society.¹⁷⁰ Concerning the right to education, parents have the authority to select the type of education their children receive.¹⁷¹ This parental right stems from the belief that no one is better positioned than parents to make decisions in the best interest of their children.¹⁷² This connection underscores the principle that allowing parents to make educational choices aligns with the overarching goal of promoting the best interests and well-being of the child.

¹⁶⁸ Degol A and Dinku S,'The principle of best interest of the child,' 326.

¹⁶⁹ Section 25 (1) The 1948 Universal Declaration of Human Rights, 1948.

¹⁷⁰ Article, 25 (2) The 1948 Universal Declaration of Human Rights .

¹⁷¹ Section 26 (3) The 1948 Universal Declaration of Human Rights.

¹⁷² Degol A and Dinku S,' The principle of best interest of the child , 326.

3.3.5 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 24 introduces specific measures to ensure the protection of children's rights. Every child has the right to receive necessary protective measures, without discrimination based on race, colour, sex, language, religion, national or social origin, property, or birth. These measures are essential due to the child's status as a minor, and it is the responsibility of the family, society, and the state to provide and uphold these protections for the child's well-being.¹⁷³ This article explicitly outlines the collective responsibility of the family, society, and the state in ensuring the protection and fulfilment of the rights of the child as a whole, with a specific emphasis on prioritizing the best interests of the child.¹⁷⁴

Article 23(4) mandates that, in instances of marriage dissolution, countries must take appropriate measures to safeguard the well-being of the child. A state is legally required to establish both a legal framework and institutional structures within their domestic legal and justice systems. This obligation is aimed at ensuring the child's best interests are given precedence, particularly when addressing matters such as custody in the context of divorce.¹⁷⁵

3.3.6 THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

This legal framework places the responsibility on the state to ensure that its citizens enjoy economic, social, and cultural rights. States are therefore obligated to provide benefits like education and social security to their citizens.¹⁷⁶ The International Covenant on Economic Social and Cultural Rights (ICESCR) incorporates children's rights within the broader framework of family rights. According to Article 10, special protective measures and assistance should be extended to all children and young individuals, without discrimination based on parentage or other conditions. It also emphasizes the need to shield children from economic and social exploitation.¹⁷⁷

¹⁷³ Article 24 (1) The International Covenant on Civil and Political Rights, 1966.

¹⁷⁴ Degol A and Dinku S, 'The principle of best interest of the child', 327.

¹⁷⁵ Degol A and Dinku S, 'The principle of best interest of the child', 327.

¹⁷⁶ Mutali B, 'Demystifying the 'Best Interest of the Child' 20.

¹⁷⁷ Article 10 (3) The International Covenant on Economic Social and Cultural Rights, 1966.

3.3.7 THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Article 2 of the Convention on the Rights of the Child is particularly important for this study. This article outlines the protections and measures in place for the well-being of the child. It emphasizes that any action that involves a child should be carried out with the child's best interests in mind. In other words, decisions and activities related to children must prioritize what is best for them, ensuring their safety and overall welfare. This reflects a fundamental principle in the CRC that places the child's best interests as a top priority in all considerations and actions.

Whenever people or groups, like the government or social institutions, make laws or decisions involving children, they must always think about what is best for the child.¹⁷⁸ This is all to make sure that the children are safe and well looked after. All legislative, administrative, and judicial bodies and institutions must implement the best interests principle by methodically evaluating how their decisions and actions impact or will impact children's rights and interests.¹⁷⁹

3.4 FACTORS TO CONSIDER WHEN DETERMINING THE CHILD'S BEST INTEREST

When making decisions about a child's welfare, various factors come into play.¹⁸⁰ These encompass the child's age, maturity, gender, and background, as well as any special needs due to chronic illness or disability. The quality of the child's relationships with parents, guardians, and significant individuals is also evaluated, alongside the child's preferences if they can express them meaningfully. Factors like the stability of current living arrangements, proposed changes, and the ability of individuals involved to provide love, affection, and guidance are crucial. Other considerations include the child's adaptation to their home, school, and community, the capacity of parents to cooperate, the presence of domestic or child abuse history, and any elements impacting the child's physical and psychological well-being. In summary, these factors collectively inform decisions that prioritize the child's best interests and overall welfare.

¹⁷⁸ Article 3 The Convention on the Rights of the Child, 1989.

¹⁷⁹ Degol A and Dinku S,' The principle of best interest of the child, 328.

¹⁸⁰ First schedule Children's Act ([Act No. 29 of 2022](#)).

Considering a child's preference in custody decisions is crucial, with its significance dependent on the child's age, intelligence, and maturity. Even young children, like those aged four, may see their preferences taken into account, but the weight given to their desires varies.¹⁸¹ The decision to honour a child's preference often relies on the rationale provided, and if the child can present a reasonable basis, their preference is likely to be respected. Conversely, if a child is considered immature or unable to express a well-founded preference, it may carry less influence.

For instance, a girl wanting less discipline and more freedom did not have her preference acknowledged, and a thirteen-year-old boy expressing a desire to live with his father did not see it fulfilled when influenced by gifts.¹⁸² While there is no universal age at which a child's preference becomes binding, the Children's Act 2022, defines a child of tender years to be below 10 years.¹⁸³ A judge considered a child of seven years to be of tender years hence the judge should be the one to award custody in the child's best interest.¹⁸⁴

The parent who has primarily cared for the child, especially in the child's early years, generally forms a stronger bond with the child and becomes more adept at fulfilling the child's needs.¹⁸⁵ Stability of the environment plays a crucial role in custody cases, often intertwining with more specific factors indicating stability or its absence. Courts commonly refer to stability when dismissing a parent's request for modification, especially when a child is well-adjusted in their current setting. Courts acknowledge that disrupting a child's established environment can impact their emotional well-being, emphasizing the importance of maintaining the child's residence with one parent. In initial custody decisions, a child's more stable and secure relationship with one parent often becomes a decisive factor. Elements tied to stability, such as a child's academic performance and healthcare, are also considered, and custody tends to be granted to the parent better equipped to support the child academically or address specific health needs.

¹⁸¹Atkinson J, ' Criteria for Deciding Child Custody in the Trial and Appellate Courts,' American Bar Association, Family Law Quarterly, Vol. 18, No. 1 Spring 1984, 36.

¹⁸²Atkinson J, ' Criteria for Deciding Child Custody in the Trial and Appellate Courts,36.

¹⁸³ Section 2 childrens act 2001

¹⁸⁴ M A A v A B S [2018] eKLR

¹⁸⁵ Atkinson J, ' Criteria for Deciding Child Custody in the Trial and Appellate Courts,17.

3.5 PRIORITIZING THE CHILD'S WELL-BEING IN CUSTODY MATTERS

The existing legal system falls short of providing a meaningful platform for children to actively engage in custody and access decisions. By neglecting to promote or appreciate their perspectives, the family law system sidelines and isolates children, a departure from actions that would genuinely prioritize their well-being.¹⁸⁶ Facilitating the meaningful participation of children in legal proceedings necessitates the creation of opportunities for them to articulate their concerns, emotions, and preferences. This requires a fundamental overhaul of the family law system, ensuring that children's views are not only heard but also acknowledged and considered.¹⁸⁷

Omitting children from active involvement in custody and access decisions can adversely affect them. Research indicates that children may experience heightened distress, insecurity, feelings of rejection, and increased anger when they are excluded from such decision-making processes.¹⁸⁸

3.6 CONCLUSION

In conclusion, a comprehensive and nuanced approach is necessary to determine a child's best interest in custody disputes due to the complex landscape involved. Drawing from a history that progressed from paternal presumptions to a modern focus on equality, national and international legal frameworks emphasize how crucial it is to put the safety, welfare, and general well-being of children first. However, the subjectivity of the standards and the possibility of inconsistent outcomes highlight the necessity of continuous enhancements to the family law system. A system that truly prioritizes children's well-being must involve them in custody decisions to guarantee that their voices are heard and taken into account. To foster an atmosphere that actively advances the welfare of our most vulnerable members—the children embroiled in custody disputes—we must constantly review and modify our legal frameworks and systems as we navigate the complexities of protecting children's best interests.

¹⁸⁶Coley M, 'Children's voices in access And Custody decisions: The need to reconceptualize rights and effect transformative change,' 2007, 48.

¹⁸⁷Coley M, 'Children's voices in access And Custody decisions,' 2007,54.

¹⁸⁸Coley M, 'Children's voices in access And Custody decisions,' 2007,54.

CHAPTER 4; CHILD-INCLUSIVE MEDIATION: A PROGRESSIVE APPROACH TRANSFORMING COURT PROCESSES AND PRIVATE MEDIATION IN CUSTODY DISPUTES

4.1 INTRODUCTION

Custody mediation is defined as a non-therapeutic process wherein the parents, with the help of a neutral resource person, methodically identify areas of agreement and disagreement, investigate options, and take into account accommodations to come to a mutually agreeable decision regarding matters pertaining to their children.¹⁸⁹ The process serves as an alternative to the court process. The lack of a third-party decision-maker is what makes mediation unique. As opposed to this, the third-party neutral plays a multifaceted role in assisting the disputing party in reaching their desired conclusion by using a variety of strategies, including communication facilitation, crystallization of the underlying concerns, and assistance in developing options.¹⁹⁰ The parties must agree on a solution on their own; no solution is forced upon them. The parties' right to autonomy or self-determination is hence the fundamental feature of mediation.

Child Inclusive Mediation is a process that parents who are mediating should be aware of. Through this procedure, a child or children will meet with a mediator who has received specialized training as a child consultant, allowing them to express their opinions, feelings, and thoughts.¹⁹¹ This is done by encouraging a child to have a "voice" in discussions about issues that affect them is the goal of child-inclusive mediation.

This chapter explores the concept of child-inclusive mediation, looking at its principles, mechanisms, and potential to revolutionize custody conflicts. To solve the problems that arise from custody disputes, the chapter places a strong emphasis on the active involvement of children and the prioritizing of their views. This is done by delving into the benefits of child-inclusive mediation, its disadvantages and how to overcome the shortcomings of taking this approach. It also looks at the effects of the adversarial system and the need to have an

¹⁸⁹ Folberg, J. 'Mediation of child custody disputes,' Columbia Journal of Law and Social Problems, 1985,414.

¹⁹⁰ Anderson D, 'Litigating over mediation—how should the courts enforce mediated settlement agreements?' Singapore Journal of Legal Studies , National University of Singapore (Faculty of Law) ,2015,107.

¹⁹¹ Nevin S, 'Child Inclusive Mediation – connecting with your child's views,' kingsleynapley, 10 February 2023

< <https://www.kingsleynapley.co.uk/insights/blogs/family-law-blog/child-inclusive-mediation-connecting-with-your-childs-views>> on 15 January 2024.

alternative process. The chapter also explores the different countries that have adopted the process of child-inclusive mediation in their laws and the focus is on understanding the outcomes and improvements observed in various jurisdictions.

4.2 ADDRESSING ISSUES IN CUSTODY DISPUTES IN AN ADVERSARIAL SYSTEM

The best interests criteria have been heavily criticized in the legal literature for being imprecise, and children's attorneys have been highlighted for their roles in defending these interests. The fundamental question of whether it is reasonable to rely on the conventional legal system to resolve such disputes has received far less attention.¹⁹² The adversarial system and the minor's attorney's function within it may conflict with a finding of the child's best interests for a variety of reasons. In most civil litigation, where the exchange of money is typically the result, the adversarial process may not seem all that harmful or impactful, but litigation affecting the welfare of a child and family raises more serious issues.

Our legal system is based on the idea that, in the process of presenting their clients' best positions, two or more professional adversaries representing the disputing parties will gather all pertinent information, allowing the decision-maker to ascertain the "truth" and reach the best conclusion.¹⁹³ This procedure assumes that each party's true goal is to "win."

It is believed that the adversarial paradigm of conflict resolution might stifle parent-child cooperation and communication during a stressful period in the lives of the entire family. This is the moment when family interaction like this is most required. Therefore, the adversarial process may intensify the trauma of divorce on the children, perhaps exacerbating an already serious developmental crisis and causing a personality dislocation of much greater proportion.¹⁹⁴

The adversarial system lacks compassion. It doesn't concern itself with the participants' well-being or how the procedure might affect them. Even though there has been a lot of focus on

¹⁹² Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' *University of Miami Law Review*, 1997, 82.

¹⁹³ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 82.

¹⁹⁴ Shepard A, Melissa D. Philbrick and Dvora Wolff Rabino, 'Ground Rules for Custody Mediation and Modification,' *Albany Law Review*, 1984, 617.

trying to make the courtroom more compassionate and child-centred, fighting with family members cannot be a good experience; it is most definitely not for the children who are frequently thrust into the heart of this internal conflict. Parties to an adversarial system are not permitted to speak with one another directly; instead, they must do so through their attorneys. Instead of examining the evidence, it compels parties to present their experiences in a way that will help them "win" their case instead of examining the experiences contextually in the distinct and intricate way that experiences occur.¹⁹⁵

In essence, the adversarial process is a competition where one wins or loses. Every party makes an effort to persuade the judge that she ought to win.¹⁹⁶ The mindset that this is a zero-sum game is reinforced by the language used in the procedure itself. The parent who wins child custody views themselves as the "winner in the war." Regretfully, the child can end up losing in either scenario. By focusing the conversation on the rights of the parents, the adversary system tends to mask problems that should worry the child.¹⁹⁷

Parental rights have been the subject of increased discussion due to concerns about gender equality; many people feel that this has resulted in judicial orders that disregard family dynamics.¹⁹⁸ This emphasis on parental rights frequently happens without acknowledging the duty people have to their offspring. However, the emphasis on the child's best interests throughout these processes may put some pressure on the parents' lawyers to frame their arguments in terms of what is best for the child rather than just what is best for their clients. This could lead to issues of child protection and family court matters being seen as individual rights rather than focusing on relationships and connections.

4.3 UNDERSTANDING CHILD-INCLUSIVE MEDIATION

The foundation of the mediation's decision differs greatly from adjudication through a trial or arbitration. In mediation, private concerns between the parties weigh more heavily than

¹⁹⁵Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 83.

¹⁹⁶ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 86.

¹⁹⁷ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 88.

¹⁹⁸ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 88-89.

substantive justice as determined by current legal principles.¹⁹⁹ In child-inclusive mediation, the content of discussions will differ from one child and family to another. However, the primary goal of child-inclusive mediation is not to determine the specific ‘wishes’ of the children. Instead, a more thorough examination of their viewpoints, experiences with the current living and visiting arrangements, the parental dispute, and their aspirations for the future will be conducted.²⁰⁰

Child-inclusive mediation does not necessarily need children to express their opinions directly on the choices given by adults, although it may be how parents understand the goal of the exercise.²⁰¹ Instead, it provides children with a chance to discuss and share their feelings about the issue before them, which could be advantageous for resolving the parental conflict in a way that best suits the child’s needs and interests. In addition to changing perspectives of viewing the state of affairs, child-inclusive mediation could also bring about a change in the emotions of the situation.

There are 5 main components of child-inclusive mediation.²⁰² First, it includes consulting with children about their experiences of family separation and conflict in a supportive, developmentally appropriate manner while also ensuring the consultation avoids and removes any burden of decision-making responsibilities from the child. Secondly, it entails understanding and formulating the child’s fundamental experience within a development framework. Thirdly, it validates children’s experiences and provides basic information that may help them cope in the present and future. Fourthly it creates a strategic therapeutic loop that effectively reaches back to parents by discussing with them the essence of their child’s experience in a way that supports them to hear and reflect on their child’s needs. Lastly, the ongoing mediation process and the agreements or decisions reached reflect fundamentally the psycho-developments of the child.

¹⁹⁹Anderson D, ‘Litigating over mediation—how should the courts enforce mediated settlement agreements?’ 107.

²⁰⁰ Bell F, Judy Cashmore, Patrick Parkinson and Judi Singl , ‘Outcomes of Child-Inclusive Mediation,’ *International Journal of Law, Policy and the Family*, 2013,2.

²⁰¹ Bell F et al, ‘Outcomes of Child-Inclusive Mediation,’ 2.

²⁰² Bell F et al, ‘Outcomes of Child-Inclusive Mediation,’ 2.

4.4 HAVING AN ALTERNATIVE PROCESS TO LITIGATION

Mediation is a procedure that aids in the following areas: improving communication, maximizing the exploration of options, attending to the needs of parents and children, reaching solutions, and serving as a template for dispute resolution in the future.²⁰³ It is not so much an intrapsychic process as it is an interactive one. Goals and tasks are the focus of mediation. Rather than focusing on the underlying reasons for conflict behaviour, it examines resolution and outcomes.²⁰⁴ In addition to educating parents about one another's needs and their children's needs, mediation can offer a customized framework for resolving conflicts when a divorce is imminent or if circumstances change and disagreements emerge later.²⁰⁵

These benefits of mediation stem from the fact that it is less constrained by procedural rules, substantive law, and the assumptions and conventions that underpin the adversarial process. In mediation, the parties hold ultimate authority, allowing them to craft a customized solution that suits their needs without being constrained by previous decisions or the potential precedent they may set for others.²⁰⁶ In contrast to the adjudicatory process, the focus is on establishing a workable resolution that best suits the needs of the family, not on who is right or wrong or who wins or loses. Because mediation is done in private, private matters can be freely discussed without fear of becoming part of the public record.²⁰⁷

Regardless of the result, mediation also seems to significantly enhance the parties' understanding and communication.²⁰⁸ Children are frequently not heard in such disputes.²⁰⁹ Even while it is preferable to keep children out of custody disputes, most of the children are fully aware when their parents are involved in a dispute that affects them. When children appear in court they can be pressured by attorneys to pick a side against one or both of their parents and when they speak the legal system might not recognise their importance and their comments go unnoticed.²¹⁰

²⁰³ Folberg, J. 'Mediation of child custody disputes,' 414.

²⁰⁴ Folberg, J. 'Mediation of child custody disputes,' 414.

²⁰⁵ Folberg, J. 'Mediation of child custody disputes,' 414.

²⁰⁶ Folberg, J. 'Mediation of child custody disputes,' 414.

²⁰⁷ Folberg, J. 'Mediation of child custody disputes,' 414.

²⁰⁸ Folberg, J. 'Mediation of child custody disputes,' 414.

²⁰⁹ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 116.

²¹⁰ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 116.

However, there is an effect of child participation, since children are typically so devoted to their parents, even those who have experienced severe abuse or neglect still yearn to remain with them and feel bad for having any part in the breakup. The disagreement in a child protection process must be significant for a child who is old enough to understand what is happening. For children who are old enough and deemed capable of participating, the hearings are typically distressing.²¹¹

Mediation is intended to provide the parties with closure, ending any future legal action on the settlement.²¹² The confidentiality of the mediation process is another aspect of it. Through the mediation process, the parties can negotiate freely without fear of their words being interpreted as evidence supporting or contradicting one another, as their discussions are removed from the public eye. In this sense, the appeal of mediation is that it keeps the conflict from becoming widely known. By default, the award-related court proceedings are conducted in public, with the possibility of published verdicts pending the parties' request for confidentiality.²¹³

It has been proposed that mediation serves to safeguard a child's interest in preserving meaningful positive relationships with both of his parents after their divorce.²¹⁴ The child's interest in an environment that closely resembles the functioning of the pre-separation family is furthered by mediation to the extent that it allows for the swift, private resolution of the intensely personal emotions and issues involved in parental custody disputes and encourages both parents to continue playing a significant role in the child's life.²¹⁵

Someone who is assisting parents in creating post-divorce custody arrangements cannot categorically state that certain time splits or parental decision-making responsibilities are always in the best interests of their children because each family's circumstances are too unique and the empirical data is too preliminary.²¹⁶ The extent of child care and decision-making responsibilities each parent is willing to assume, the parent's work schedules,

²¹¹ Weinstein J, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,' 124.

²¹² Anderson D, 'Litigating over mediation—how should the courts enforce mediated settlement agreements?' 108.

²¹³ Anderson D, 'Litigating over mediation—how should the courts enforce mediated settlement agreements?' 108.

²¹⁴ Shepard A, 'Ground Rules for Custody Mediation and Modification,' 618.

²¹⁵ Shepard A, 'Ground Rules for Custody Mediation and Modification,' 618.

²¹⁶ Shepard A, 'Ground Rules for Custody Mediation and Modification,' 625- 626.

personal obligations, and plans, the size of the parents' living arrangements and their suitability for children, the parents' geographic proximity to one another, the presence or absence of siblings and stepparents in the family, and the parents' age, mental, and physical capacity should all be properly taken into account by a mediator assisting parents in creating a custody plan.²¹⁷

4.5 BRIDGING LEGAL GAPS IN KENYA'S FAMILY LAW FRAMEWORK

While the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child which Kenya has ratified, and the Kenyan Constitution all have legal provisions that uphold children's rights to be heard and have their best interests taken into account, there is currently no particular legislation in Kenya that addresses children's participation in parental divorce mediation.²¹⁸ The inclusion of children's voices in divorce mediation processes is not expressly mandated under the Children's Act 2022.

Kenya allows parental divorce mediation before court proceedings, although children's participation or opinions during the mediation process are not covered by the current Mediation Rules of 2015.²¹⁹ International standards indicated in United Nations General Comment 12 on the Rights of the Child to Be Heard, require that to effectively encourage children's engagement, professionals dealing with children need to have the necessary training, skills, and support.²²⁰ However the Kenyan Mediator Accreditation Standards do not mandate that divorce mediators receive training in child-listening skills and also the official government guide on the website of the Kenyan judiciary regarding the duties of the mediator does not acknowledge the importance of listening to children as one of their roles.

The child-inclusive mediation process involves a structured approach where the mediator conducts an initial assessment as part of the child-inclusive mediation process to evaluate whether it is appropriate to involve the child, taking into account the child's age, maturity,

²¹⁷ Schepard A, 'Ground Rules for Custody Mediation and Modification,' 625- 626.

²¹⁸ Nyaata V, Zaal FN and Peté SA, 'Including Children's Views in Divorce Mediation: A Comparative Analysis and Recommendations or Kenya,' Potchefstroom Electronic Law Journal, On 1 February 2024, 16, <https://doi.org/10.17159/1727-3781/2024/v27i0a14416> on 10 February 2024.

²¹⁹ Nyaata V, Zaal FN and Peté SA, 'Including Children's Views in Divorce Mediation: A Comparative Analysis and Recommendations or Kenya,' Potchefstroom Electronic Law Journal, On 1 February 2024, 16, <https://doi.org/10.17159/1727-3781/2024/v27i0a14416> on 10 February 2024.

²²⁰ United Nations General comment No 12, The right of the child to be heard, 20 July 2009,30.

and the nature of the disagreement.²²¹ The mediator then gets the child ready for the meeting, making sure they know what to anticipate and how their voice will be heard if that is judged suitable and approved by the parents and child. The children have a private place to talk about their feelings and ideas during different sessions with the mediator. The mediator then discusses the child's viewpoints with the parents to promote understanding and provide them with the opportunity to take the children's opinions into account when making decisions in the joint sessions that follow. These joint sessions enable continuous communication between the parents, where the child's perspectives are actively taken into account.

4.6 RECOMMENDATIONS FOR KENYA LEGAL FRAMEWORK

A multifaced strategy should be provided to increase child involvement in parental divorce mediation in Kenya.²²² First, it is proposed that domestic laws be amended to contain provisions for child involvement in the mediation process. These laws are the Mediation Rules and the Children's Act. To further encourage a child's engagement, Kenya should also implement rules from international legal instruments such as the UNCRC General Comment 12.

Family Mediation Centers should be established all around the nation to give children a secure and convenient environment in which to voice their opinions.²²³ In addition, a thorough public education effort should be enforced to increase understanding of the value of hearing children's perspectives throughout divorce procedures. Additionally, hiring and training staff members at these mediation centres is essential to guarantee they have the abilities needed to interact with children effectively. Finally, a written manual for staff members and independent mediators would be a useful tool to promote child-inclusive mediation procedures. By implementing these suggestions, an institutional and legal structure

²²¹Coulton J, On July 2023 <https://www.directmediationservices.co.uk/child-inclusive-mediation/#:~:text=The%20Child%20Inclusive%20Mediation%20process,the%20nature%20of%20the%20dispute>. On 10 February 2024.

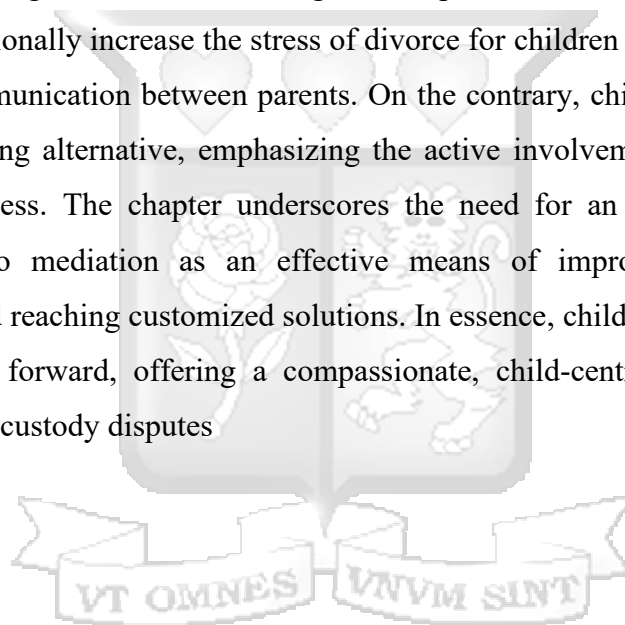
²²² Nyaata V, Zaal FN and Peté SA, 'Including Children's Views in Divorce Mediation: A Comparative Analysis and Recommendations or Kenya,' Potchefstroom Electronic Law Journal, On 1 February 2024, <https://doi.org/10.17159/1727-3781/2024/v27i0a14416> on 10 February 2024.

²²³ Nyaata V, Zaal FN and Peté SA, 'Including Children's Views in Divorce Mediation: A Comparative Analysis and Recommendations or Kenya,' Potchefstroom Electronic Law Journal, On 1 February 2024, <https://doi.org/10.17159/1727-3781/2024/v27i0a14416> on 10 February 2024.

that promotes significant child involvement in parental divorce mediation procedures in Kenya can be established.

4.7 CONCLUSION

In conclusion, the examination of child-inclusive mediation and its juxtaposition with adversarial techniques and legal proceedings illuminates the revolutionary possibilities of alternative dispute resolution within the framework of custody disputes. Child-inclusive mediation is a distinctive and forward-thinking method that puts the interests and viewpoints of the children at the centre. The adversarial procedure used in traditional litigation has come under critique for its tendency to highlight parental rights above all other important considerations pertaining to the child. Through its emphasis on a win-lose paradigm, this strategy may unintentionally increase the stress of divorce for children instead of encouraging cooperation and communication between parents. On the contrary, child-inclusive mediation emerges as a promising alternative, emphasizing the active involvement of children in the decision-making process. The chapter underscores the need for an alternative process to litigation, pointing to mediation as an effective means of improving communication, exploring options, and reaching customized solutions. In essence, child-inclusive mediation is positioned as a way forward, offering a compassionate, child-centred, and collaborative approach to resolving custody disputes



CHAPTER 5: CONCLUSION AND RECOMMENDATION

5.1 CONCLUSION

This dissertation advocates for a comprehensive approach that prioritizes the needs of the child while navigating the complex terrain of child custody battles. The need for novel solutions is highlighted by the historical development of legal viewpoints and the recognition of the drawbacks of adversarial systems. A unique, collaborative, and child-centred approach to mediation that has the power to improve legal proceedings and safeguard the welfare of the most disadvantaged elements of society is child-inclusive mediation.

The chapters emphasize the need for a coordinated effort to promote awareness, include child-inclusive mediation in judicial institutions, and continuously improve the legal framework to successfully manage the difficulties related to child custody disputes. By doing this, the legal system can provide a more sympathetic, flexible, and child-centred method of resolving custody disputes by better aligning itself with the growing body of knowledge regarding children's rights.

5.2 RECOMMENDATION

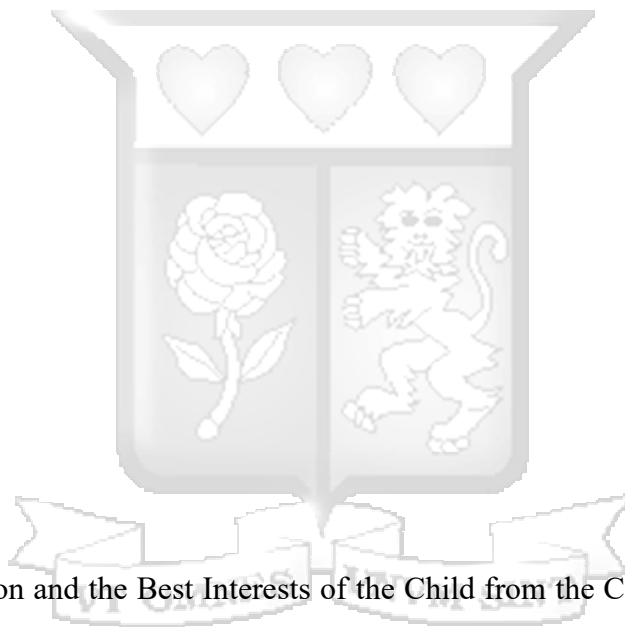
A thorough and child-centred strategy is essential given the complex issues raised by child custody disputes. Based on the knowledge obtained from examining historical settings, legal structures, and innovative mediation techniques.

The first recommendation is that the legal system should Include Child-Inclusive Mediation. Governments and law enforcement agencies ought to proactively include child-inclusive mediation in the current legal structures., which are the Children's Act and the Constitution as well. They should also prepare skilled mediators to help parents and children communicate while giving children a forum to voice their opinions and concerns.

The second recommendation is that there should be continuous Review and Improvement of Legal Standards. This is to make sure that child custody laws are in line with changing societal norms and global best practices, and that legal standards are reviewed and improved regularly. Consistent standards that put the child's best interests first while remaining adaptable to each situation should be taken into consideration.

The Third recommendation is that there should be a change in domestic laws to clearly include provisions for child engagement in mediation, such as the Children's Act and the Mediation Rules. Kenya should also abide by international legal norms, such as the UNCRC General Comment 12, in order to improve the safeguards and encouragement of children's rights throughout divorce procedures. Additionally, the creation of Family Mediation Centers around the country would give kids accessible and secure areas to voice their opinions during mediation. Campaigns for public education should be launched in order to debunk myths about children's participation in divorce mediation and to increase public knowledge of the value of doing so.

These recommendations support a legal environment that actively considers the needs and opinions of children involved in custody battles, encouraging a more flexible, caring, and child-focused approach within the larger judicial system. The goal of this holistic approach is to design a system that not only takes changing social values into account but also gives the interests and well-being of the participating children top priority. Kenya may create an institutional and legal environment that gives significant child involvement in parental divorce mediation procedures top priority by putting these recommendations into practice. In the end, this strategy seeks to advance children's welfare, encourage parent-child cooperation, and guarantee that parents' opinions are acknowledged and heard during the mediation process.



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