

**Ensuring Equal Parental Responsibility: A Study on the Retrospective Application of
Section 32 of the Children Act 2022 in Kenya in line with the Child's best interests standard**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,

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By

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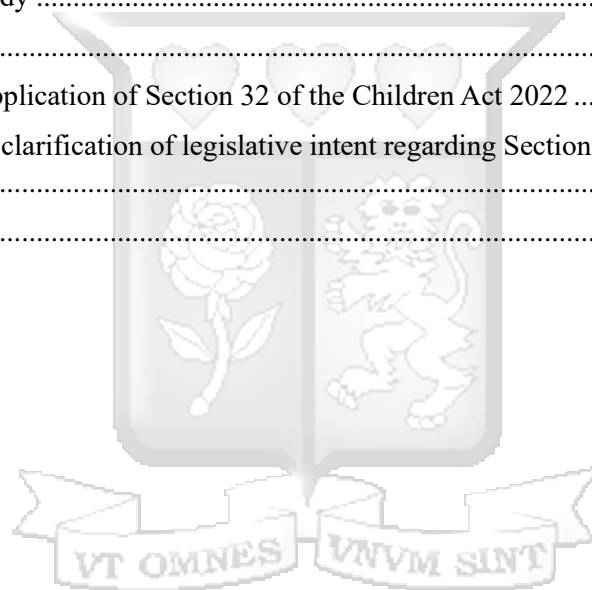
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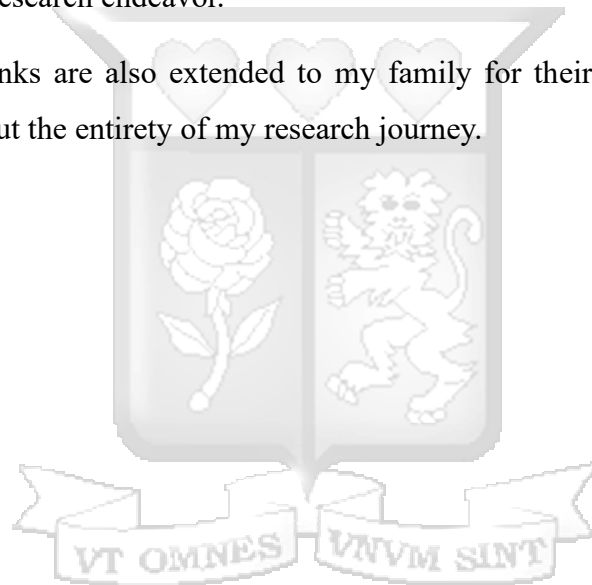
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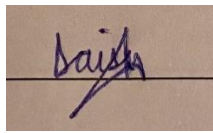


DECLARATION

I, DAISY MBUVI do hereby declare that the work submitted herein to Strathmore

University is my original work and has not been previously to my best knowledge, been submitted to any other institution for the award of a degree or a diploma. All work relied on hereunder has been accordingly referenced.

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This dissertation has been submitted with my approval as Supervisor.

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Dr.. Jennifer Gitahi

ABSTRACT

The enactment of the Children Act No. 29 of 2022 marked a significant legal shift, replacing the outdated Children Act of 2001. The primary objective of the new Act is to align with Article 53 of the Constitution, which provides for the paramount consideration of a child's best interests in all matters concerning children. In line with the best interests of the child, the Children Act 2022 introduces the concept of equal parental responsibility regardless of whether children were born in wedlock or not. This amended the provisions of the Children Act 2001 where fathers had to undergo specific legal processes to acquire parental rights.

The primary concern explored in this research is the potential retrospective application of Section 32 of the Children Act 2022 to past cases involving fathers who, under the 2001 Act, were considered 'unqualified fathers.' Unqualified fathers in this context means fathers who were not granted parental responsibility in the first instance under the 2001 Children Act. The research engages the doctrine of necessary implication, a rule of statutory construction, to analyse whether the Act can be interpreted as having retrospective effects. While the Act lacks an express provision on retrospective application, the study contends that the doctrine of necessary implication suggests a retroactive intent by the legislators. The research primarily bases its arguments on the child's best interest standard.

The paper argues that this retrospective application will contribute to the well-being of children by ensuring equal parental responsibility in the first instance. The overarching goal is to align Section 32 of the Children Act with the constitutional mandate under Article 53 to safeguard the best interests of the child. By scrutinizing the Children Act 2022 and advocating for its retrospective interpretation, the study aims to provide valuable insights and recommendations for the legal community, policymakers, and stakeholders involved in child welfare and family law.

LIST OF ABBREVIATIONS, CASES AND LEGAL INSTRUMENTS

I. Abbreviations

Universal Declaration of Human Rights (UDHR)

Vienna Convention on the Law of Treaties (VCLT)

II. Cases

1. Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited (2018) eKLR.
2. Department of Environment and Natural Resources v. United Planners Consultants, Inc. (2020)
3. G.Z.B v V.P (2006) eKLR.
4. John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014) eKLR.
5. Kenya Bankers Association v Attorney General and another (2020) eKLR.
6. Minister of Public Works v Haffejee (1996)
7. OGM v FG and another (2017) eKLR.
8. SMM v ANK (2022) eKLR.
9. Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others (2022)
10. S.O v L.A.M (2009) eKLR.
11. Sunshine Porcelain Potteries Pty Ltd v Nash (1961)
12. Zak and another v Ma and another (2013) eKLR.

III. Legal instruments

1. Constitution of Kenya (2010)
2. Children Act (2001)
3. Children Act (2022)
4. Finance Act (No 3 of 2000).
5. Income Tax Act (No 8 of 2009).
6. Interpretation and General Provisions Act (No. 7 of 1952)

7. Kiambu County Alcoholic Drinks Act (2013)
8. Marriage Act (Act No 4 of 2014)
9. Matrimonial Property Act (Act No 49 of 2013)
10. Universal Declaration of Human Rights (1990)
11. Vienna Convention on the Law of Treaties (1969)



1.0 CHAPTER ONE: INTRODUCTION

1.1 Background

In Kenya, the new Children Act No. 29 of 2022 (2022 Act hereafter) commenced on 26th July 2022¹ replacing the Children Act 2001² (2001 Act hereafter). The Children Act 2022 has addressed the identified shortcomings in the 2001 Children Act, which underwent a review by Parliament through the Children Bill 2021.³ The main aim of this Act was to give effect to Article 53 of the Constitution⁴ which entails upholding the child's best interests in every matter concerning the child.⁵ This has been an important step towards better protection of children in the country.⁶

Some of the additions to the law include new definitions capturing the emerging trends in society,⁷ provisions for children's rights, child maintenance, and parental responsibility.⁸ Article 53 (1) (e) of the Constitution grants every child the right to equal parental responsibility, regardless of whether the child's parents are married to each other or not.⁹ In the same vein, parental responsibility is defined similarly by both section 23 of the Children Act 2001¹⁰ and section 31(1) of the 2022 Act¹¹ to mean the responsibilities, rights, powers, and authority that a parent has legally over a child and the child's property in a consistent way with the evolving capacities of the child.

More importantly, under section 24 (3) of the 2001 Children Act where the father and mother were not married to each other at the time of the child's birth, the mother had parental responsibility at the first instance and the father acquired parental responsibility for the child in accordance with

¹ Children Act (Act No 9 of 2022).

² Dejongh F, Kenya's new Children Act takes effect', End violence against children, 29 July 2022, <- <https://www.end-violence.org/articles/kenyas-new-children-act-takes-effect> >- on 7th January 2023.

³ Alubala I, The children bill 2021: A journey towards promoting and protecting child rights in Kenya', Save the child, 21 January 2022, <- <https://kenya.savethechildren.net/news/children-bill-2021-journey-towards-promoting-and-protecting-child-rights-kenya> >- on 7th January 2023

⁴ Kithinji K, Mulevu M, Ogolla E, A commentary on the Children Act, 2022: A panacean 'enclave' to children, 26 September 2022, <- <file:///C:/Users/Admin/Downloads/61st-Legal-Update-A-Commentary-on-the-Children-Act-2022.pdf> >-, on 16th December 2022.

⁵ Article 52, Constitution of Kenya (2010)

⁶ Dejongh F, Kenya's new Children Act takes effect', End violence against children, 29 July 2022, <- <https://www.end-violence.org/articles/kenyas-new-children-act-takes-effect> >- on 7th January 2023.

⁷ Kamau M, 'The Children Act 2022 replaces the Children Act 2001', 11th July 2022, <- <https://www.liftthechildren.org/children-act-2021-replaces-children-act-2001/> >- on 5th January 2023.

⁸ Children Act (Act No 9 of 2022).

⁹ Constitution of Kenya (2010), Article 53 (1) (e).

¹⁰ Section 23 Children Act (Act No. 8 of 2001).

¹¹ Section 31(1) Children Act (Act No 9 of 2022).

the provisions of section 25 of the same Act.¹² Consequently, based on section 25, a father acquired parental responsibility through either a court order or entering into a parental responsibility agreement with the mother.¹³ However, in the case of *Zak and another v Ma and another* (2013)¹⁴ section 25 of the 2001 Children Act was declared unconstitutional because it contravenes article 53 of the Constitution.¹⁵

For purposes of my research, these fathers who did not acquire parental responsibility automatically (in the first instance), under the 2001 Act, will be referred to as ‘unqualified fathers’. On the other hand, section 32 of the Children Act 2022 sought to remedy this by providing for equal parental responsibility.¹⁶

In common law, there exists the rule that legislation applies prospectively.¹⁷ On the contrary, a retrospective statute is one that looks backward and creates new obligations on past acts or a law that starts from a date in the past.¹⁸ This rule is mirrored in Kenyan criminal law. Specifically, Article 50 of the Constitution of Kenya stipulates that every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time the act was committed or omitted was not an offense in Kenya.¹⁹ However, the Constitution is silent on the retrospective application of non-criminal laws. Furthermore, Article 116(2) of the Constitution of Kenya states that a statute comes into force on the fourteenth day after its publication in the Kenya gazette, unless the statute stipulates a different date.²⁰ This suggests that the law typically operates prospectively, rather than retroactively.

In *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* (2012)²¹ the court held that for non-criminal legislation, the general rule is that all statutes other than those

¹² Section 24, Children Act (Act No 8 of 2001).

¹³ Section 25, Children Act (Act No. 8 of 2001).

¹⁴ *Zak and another v Ma and another* (2013) eKLR

¹⁵ Article 53, The Constitution of Kenya (2010).

¹⁶ Section 32, Children Act (Act No 9 of 2022).

¹⁷ Devenish G, ‘Some reflections on the presumption that legislation applies prospectively, and its significance for a contemporary theory on interpretation’, 37 (3) *Obiter*, 2016, 643.

¹⁸ *Black’s Law Dictionary*, 2nd ed.

¹⁹ Article 50 (2) (n) (i), Constitution of Kenya (2010)

²⁰ Article 116(2), Constitution of Kenya (2010)

²¹ *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* (2012) eKLR.

which are merely declaratory, or which relate only to matters of procedure or evidence are prospective, and they can only be retrospective through express words or if by necessary implication it appears that this was the intention of the legislature. The 2022 Children Act does not have an express provision on its retrospective application. Therefore, the absence of an express provision for retrospective application in the Children Act implies that the doctrine of necessary implication can be applied in interpreting whether the Children Act 2022 can be applied retrospectively.

The doctrine of necessary implication is a rule of statutory construction that stipulates that whatever is implied by a statute is as much a part of it as what has been expressly stated. It is used to fill gaps in the law since no statute can provide for all the details required in its application. Every statute is understood, by implication, to contain all such provisions as may be necessary to effectuate its object and purpose.²² The Children Act 2022 does not contain any express words indicating that it can be applied retrospectively. This research paper aims to undertake a comprehensive analysis to ascertain the viability of the application of the doctrine of necessary implication to the Children Act 2022.

The retrospective application of Section 32 of the Children Act 2022 will alleviate challenges faced by single mothers in Kenya. In Kenya, single motherhood has various challenges such as poverty which affects the well-being of children.²³ Single mothers are forced to bear the responsibilities of absentee fathers and as a result, they strain in accessing education for their children and may not afford to meet their basic needs.²⁴ These single-mother households have the greatest need for alternative child care.²⁵ This entails the child being taken care of by other caregivers, specifically

²² Department of environment and natural resources v. United planners consultants Inc., (2020), Supreme Court, Republic of Phillipines.

²³ Ndirangu N, Single motherhood and poverty level in Kenya, November 2019 -<
[²⁴ Kagendo P, Single mothers and parenting in Kenya: The case of Zimmerman, Nairobi county, University of Nairobi, , 2015, 52, -<
\[>- on 1st February 2023.\]\(http://erepository.uonbi.ac.ke/bitstream/handle/11295/101970/Njau,Purity%20K_Single%20Mothers%20and%20Parenting%20in%20Kenya-%20the%20Case%20of%20Zimmerman,%20Nairobi%20County.pdf?sequence=1\)](https://www.researchgate.net/publication/337782244_SINGLE_MOTHERHOOD_AND_POVERTY_LEVEL_IN_KENYA#:~:text=The%20challenges%20facing%20single%20mothers,well%2Dbeing%20of%20their%20children.>- on 25th December 2022.</p></div><div data-bbox=)

²⁵ Kabiru M , Njengam A and Swadener B. 'Early childhood development in Kenya: Empowering young mothers, mobilizing a community', 79 (6) Childhood education, 2003, 359.

their fathers. Therefore, the law must strive to promote shared parental responsibility to support single-mother households and ensure the best interests of the child are met, as these households often face challenges.

Therefore, my research is going to look into the extent to which Section 32 of the Children Act 2022 can apply to past cases to grant parental responsibilities to previously unqualified fathers. In the same vein the main aim of this is to secure the best interests of children in line with Article 53 of the Constitution.

1.2 Statement of the problem

According to Article 53 of the Constitution, all matters concerning the child should be determined in the child's best interest. This is the basis on which the Children Act 2001 and 2022 were drafted. Previously, under section 24 as read with section 25 of the Children Act 2001, fathers to children born out of wedlock, did not acquire equal parental responsibility in the first instance. However, these two sections were declared unconstitutional in the case of *Zak and another v MA and another* (2013). Although they were declared unconstitutional these provisions have been one of the contributors to single-parent households by not granting fathers parental responsibility in the first instance. This is evidenced in the pre-2022 Kenyan jurisprudence such as the case of *G.Z.B v V.P* (2006)²⁶ and *S.O v L.A.M* (2009).²⁷ In these cases, there is evidence of maternal preference by the courts when granting parental responsibility and this has contributed to single-mother households. This maternal preference was influenced by the Section 24²⁸ as read with 25 of the Children Act 2001.²⁹

The author argues that despite this situation, no law has been enacted to remedy this. This is on the basis that although Section 32 of the Children Act 2022 grants equal parental responsibility to both parents whether or not the child is born within or outside wedlock

²⁶ *G.Z.B v V.P* (2006) eKLR

²⁷ *S.O v L.A.M* (2009) eKLR

²⁸ Section 24, Children Act (Act No 8 of 2001).

²⁹ Section 24, Children Act (Act No 8 of 2001).

at face value, its application is limited to future cases. This is because the Children Act 2022 does not have an express provision on its retrospective application, hence Section 32 only applies to future cases. As to the rule of necessary implication, this study will analyse whether it can be applied in making a case for the retrospective application of Section 32 of the Children Act 2022. Therefore, the overarching research problem is whether Section 32 of the Children Act 2022 can be applied retrospectively to grant parental responsibility to previously unqualified fathers under the Children Act 2001.

1.3 Research objectives

1. To investigate what is the interpretation of the principle of the Child's best interest in the Kenyan context.
2. To analyse how Kenyan courts have interpreted the doctrine of necessary implication in statutory interpretation.
3. To analyse the impact of the retrospective application of Section 32 of the Children Act 2022 on the family.

1.4 Research questions

1. What is the interpretation of the best interest of the child in the Kenyan context?
2. How have Kenyan courts interpreted and applied the doctrine of necessary implication to statutory interpretation?
3. What is the impact of the retrospective application of Section 32 of the Children Act 2022 on the family?

1.5 Hypothesis

My hypothesis is that Section 32 of the Children Act 2022 should be applied retrospectively to grant parental responsibility to previously unqualified fathers. By doing this, the Act will be

applied consistently with its main objective which is to give effect to Article 53 of the Constitution, which entails upholding the best interests of the child in matters concerning the child. Parental care is of paramount importance to the overall well-being of a child and it would be in the best interest of the child if they were to be able to benefit equally from both parents. As such my hypothesis claims that the Children Act 2022 should be applied retroactively

1.6 Justification

Wrongful statutory interpretation by courts can lead to the violation or denial of fundamental rights. This is because it takes away from the main object or purpose of a statute. Due to the doctrine of stare decisis in common law jurisdictions such as Kenya, wrongful interpretation has a ripple effect that leads to the misleading of other courts, hence affecting even more people. To ensure that justice is served, it is essential for judges to be guided correctly when interpreting laws, statutes and regulations.

My study will be useful insofar as it will serve as a guide to Kenyan judges who are faced with the question of interpreting the Children Act 2022, more specifically section 32. It seeks to offer judges an understanding of the best way forward in interpreting the Act in a manner that enables the fulfillment of its main objective.

Additionally, my study will be of significance as it seeks to grant parental responsibility to previously unqualified fathers, under the 2001 Act. In doing this it will uphold the best interests of the child's principle, as enshrined in the Constitution of Kenya and the Children Act of 2022.

1.7 Theoretical framework: The rule of necessary implication as a guide for statutory interpretation.

The rule of necessary implication rule is expressed in the legal maxim *ex necessitate legis*. The rule of necessary implication stipulates that whatever is implied in a certain statute is as much a part of the statute as what has been expressly stated. This rule is used to fill gaps in the law since what is thought to be an all-embracing legislation at the time of enactment may be inadequate.

This is because legislators may fail to contemplate future situations in which the law is applicable and may leave out details required in its application.³⁰

According to some academics such as Andrew Mitchell, necessary implication is often a result of applying other rules of interpretation, such as those outlined in the Vienna Convention on the Law of Treaties (VCLT) Articles 31³¹ and 32³². Such rules of interpretation include the general rule of interpretation, which emphasizes on the importance of interpreting treaty provisions in good faith in accordance with the ordinary meaning of the terms, their context, and the object and purpose of the treaty³³. Necessary implication according to Andrew Mitchell is not particularly obvious on the treaty's face but may be implied.³⁴ Andrew Mitchell's view of the doctrine is similar to Christian Djeffal who views necessary implication as an interpretative result rather than an interpretative method. Interpretive results refer to the outcomes or conclusions reached when interpreting a legal text, such as a treaty. These results indicate how the text should be understood and applied. On the other hand, the interpretative method entails a means or technique to establish a certain meaning. An example of an interpretive means that Christian Djeffal gives is the principle of effectiveness or the object and purpose of the treaty as part of the interpretative method.³⁵ Christian Djeffal points out that necessary implication entails that because of other stipulations, the law necessarily implies a certain meaning that is not obvious from the text.³⁶ Both scholars see necessary implication as an outcome of the interpretative process rather than a specific technique or means used to establish meaning.

For the purposes of this study, the rule of necessary implication will be viewed both as an interpretative result and an interpretative method. This dual approach is taken since the study aims to determine the outcome of the prospective interpretation of Section 32 of the Children Act 2022,

³⁰ Department of Environment and Natural Resources v. United Planners Consultants, Inc. (2020) Supreme Court, Republic of Phillipines.

³¹ Article 31, Vienna convention on the law of treaties, 23 May 1969, 1155 UNTS 331.

³² Article 32, Vienna convention on the law of the sea.

³³ Article 31, Vienna convention on the law of the sea.

³⁴ Mitchell D, Voon T., The rule of necessary implication, in Joseph K, Yuri P and Constantinos S 'Canons of construction and other interpretive principles in public international law', Wolters Kluwer, 2018, 2.

³⁵ Djeffal C, Static and evolutive treaty interpretation: A functional reconstruction, 1st edition, Cambridge University Press, London, 2016, 22.

³⁶ Djeffal C, Static and evolutive treaty interpretation: A functional reconstruction, 24.

rendering it an interpretive result. Furthermore, the necessary implication principle will be applied as an interpretive technique to establish a certain meaning of section 32 of the Children Act 2022.

There are various reasons for applying this doctrine. Firstly it is used to ensure that the intentions of the legislators or the parties to a certain treaty are fulfilled.³⁷ Secondly, it is used to avoid an absurd result after applying the law to certain cases because statutory interpretation is guided by the omitted case canon which entails that nothing is to be added to what the text states or reasonably implies (*casus omissus pro omissis habendus est*).³⁸

It is also important to note that what is implied should be in the language of the statute to avoid absurd results.³⁹ Lastly, it is used to give effect to the rule of effectiveness which entails giving effect to the purpose and object of the law.⁴⁰

The rule of necessary implication will be useful in this study as in the case of *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* (2013), the learned judge ruled that in determining whether a statute can be applied retrospectively the rule of necessary implication may be applied. The study will determine whether this rule can be applied in determining whether section 32 of the Children Act 2022 can be applied retrospectively.

1.8 Literature review

So far most of the existing Kenyan literature on parental responsibility recommends amendments that were to be done to the 2001 Children Act and have been reflected in the 2022 Act. Scholars such as Maria Walusala suggested the amending the Children Act 2001 to reflect the non-discriminatory provisions of the 2010 Constitution through the granting of parental responsibility to parents of children who were considered illegitimate⁴¹. Additionally, Natalie Otieno suggests the need for courts to consider the best interest of the child principle in determining parental

³⁷ Grotius H, *On the law of war and peace*, A. C. Campbell, Batoche Books, Canada, 2001, 144.

³⁸ Scalia A and Garner S, *Reading Law: The Interpretation of legal texts*, 1st edition, West Group, Minnesota, 89.

³⁹ *City of Manila and treasurer v Judge Gomez* (1981) Supreme court republic of Philipines.

⁴⁰ Gerald F, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points', 33 *British Year Book of International Law*, 1957, 234.

⁴¹ Walusala M., *The plight of the bastards: A look into the protection of 'illegitimate' children in Kenya*, unpublished LLB, Strathmore University Law School, Nairobi, 2020, 25.

responsibility in custody disputes, rather than the maternal preference rule. This is based on the 2001 Act.⁴² Furthermore, Sherry Waweru recommends the introduction of equal parental responsibility to the then-2001 Children Act.⁴³ Specifically, she suggests that equal parental responsibility should be introduced through the passing of the Proposed Children Bill of 2016 as law; the bill has now been passed as the 2022 Act. Similarly to Sherry Waweru and Natalie Otieno my study will be based on the principle of the child's best interest⁴⁴. However, my study serves to fill the identified research gap in Kenyan literature, which is the lack of analysis of parental responsibility in the 2022 Children Act. Furthermore, this study is unique in that it applies the child's best interest principle in regard to parental responsibility as provided for in the Children Act 2022. In doing this my study will determine whether interpreting section 32 of the Children Act 2022 retrospectively is in line with the best interests of the child.

1.8.1 On the definition of the best interests of a child

The 'best interest of the child' is a standard used in cases such as divorce to solve child custody issues,⁴⁵ death of a parent to deal with child placement and all forms of child protective services.⁴⁶ The focus of the standard is to put the child's interests over the parents' rights or other external factors in these cases.⁴⁷ The foundations of this standard should serve as a guide on which judges base their legal rulings regarding children and should try as much as possible to not be blinded by their own values and biases. It has been described as a standard that most accurately protects the child's emotional, psychological and physical needs.⁴⁸

⁴² Natalie O, The legal protection of children when parents divorce, Unpublished LLB, Strathmore University Law School, Nairobi, 2021.

⁴³ Waweru S, The Import of Declaration of Sections 24(3) and 25 of The Children Act as unconstitutional on the Protection of The Right to Parental Responsibility, unpublished LLB, Strathmore University Law School, Nairobi, 2021, 25.

⁴⁴ Waweru S, The Import of Declaration of Sections 24(3) and 25 of The Children Act as Unconstitutional on The Protection of The Right to Parental Responsibility, unpublished, Strathmore University Law School, Nairobi, 2021, 26

⁴⁵ Grossberg M, 'How to give the present a past?', Cross currents: Family law in the United States, Oxford, 2000, .8 <https://doi.org/10.1093/acprof:oso/9780198268208.003.0001> on 23rd November 2023.

⁴⁶ Marie L, 'Tracing the foundations of the best interests of the child standard in American jurisprudence' , 10(2) Journal of law and family studies, 2008, 337.

⁴⁷ Andrea C, 'Awarding custody: The best interests of the child and other fictions, 5(2) Yale law and policy review, 1987, 268.

⁴⁸ Bajackson E, 'Best interests of the child - A legislative journey still in motion' 25 (2), Journal of the American Academy of matrimonial lawyers, 2012, 311.

There has been a legal debate as to what the best interest of a child entails and judicial confusion as to how to objectively determine with precision what is in a child's best interest. This debate is reflected by scholars such as Carl Schneider,⁴⁹ Steven Peskind⁵⁰ Leighton Stamps and Samuel Poole.⁵¹

Carl Schneider denies the existence of a specific definition of the best interest of a child. He views the child as a complex being with various emotional, physical, and psychological needs making it difficult to come up with one definition. Carl Schneider posits that children grow up in a wide range of complex, unpredictable environments, making it impossible to create a set standard that would properly guide courts or other organizations in making decisions regarding children. Additionally, he shines a light on the fact that in a pluralistic society such as ours, there are differing opinions on what kind of adults we want children to become⁵². Therefore, the definition of the child's best interest is one that entails a variety of factors relevant to today's society and on a case-by-case basis.

Steven Peskind heavily advocates for the use of the best interest standard. In his article, he analyses alternative methods or standards that the courts have attempted to use and is able to show the many flaws in them. He concludes that what defines the best interest of the child is to be looked at on a case-by-case basis and recommends that the courts should embrace this since there is no one solution to the problems facing courts in this task.⁵³

Other scholarly work exemplifies the input of alternative standards to interpret the rule of the child's best interest. Leighton Stamps and Samuel Poole's work have shown the input of the maternal preference rule in interpreting the principle of the child's best interest. Leighton Stamps conducts a study that proves that maternal preference may exist among American judges when deciding child custody issues, despite the existence of gender-neutral custody laws.⁵⁴ Additionally,

⁴⁹ Schneider C, 'On the duties and rights of parents', 8(8) *Virginia law review*, 1995, 2485.

⁵⁰ Peskind S, "Determining the undeterminable: The best interest of the child standard as an imperfect but necessary guidepost to determine child custody," *Northern Illinois*, 25 (3), *University law review* , 2005, 482.

⁵¹ Poole S, 'Maternal preference and the double burden: Best interest of whom? 38(4) , *Louisiana law review* 2010.

⁵² Schneider, C. On the duties and rights of parents, (8) *Virginia law review*, 1995, 2485.

⁵³ Peskind S, 'Determining the undeterminable: The best interest of the child standard as an imperfect but necessary guidepost to determine child custody," 25 (3) *Northern Illinois University law review*, 2005, 482.

⁵⁴ Stamps L, 'Maternal preference rule in child custody decisions' 37 *Journal of Divorce and Remarriage* 2,2009,1-11.

Samuel Poole criticizes the maternal preference rule. He argues that the rule is no longer applicable to the changing nature of marriages and that the maternal preference presumption is not in line with the best interests of the children since gender is irrelevant to the capacity and willingness to perform the mothering function and to the child's experience of mothering.⁵⁵

1.8.2 On the legality of retrospective application of statutory law

South African Scholar, Wet de Villiers, looks into the retroactive application of South African legislation and whether it is permitted. His focus is on fiscal legislation.⁵⁶ He analyses the rule of retrospectivity based on common law, statute law and the Constitution. In doing this he is able to analyse the impact of the presumption against retrospectivity and determine what will constitute acceptable 'retroactive legislation' under the common law and statute law. He concludes that there needs to be more certainty as to what types of retroactive fiscal legislation are permissible and in which circumstances retrospectivity is permitted. Additionally, he suggests that instances of acceptable retroactive legislation include where a retroactive provision clarifies the existing law, deals with procedural matters and benefits the subject.⁵⁷

Additionally, Devenish discusses the retrospective application of legislation in South Africa. However, he looks at it from an interpretation point of view. He acknowledges a new approach of statutory interpretation that is creative and requires the use of rules that must give expression to the values in the Constitution and its Bill of Rights. He determines that legislation can be retrospective if that was the intention of the legislature when coming up with the law. Additionally, based on the case of *Minister of Public Works v Haffeejee*⁵⁸ he concludes that if substantive rights were not prejudicially affected, the retrospective procedure can be condoned⁵⁹

⁵⁵ Samuel N, 'Maternal preference and the double burden: Best interest of whom?' 38(4), *Louisiana law review* 4, 2010.

⁵⁶ Villiers W, *A critical analysis of the legality of retroactive fiscal legislation and the remedies available to taxpayers*, University of Cape Town, 2021, 61.

⁵⁷ Villiers W, *A critical analysis of the legality of retroactive fiscal legislation and the remedies available to taxpayers*, University of Cape Town, 2021, 61.

⁵⁸ *Minister of Public Works v Haffeejee*, (1996) South Africa.

⁵⁹ Devenish G, 'Some reflections on the presumption that legislation applies prospectively, and its significance for a contemporary theory on interpretation', *Obiter*, 2016, 643 -< <https://hdl.handle.net/10520/EJC-7e4a04c88> >- on 2nd January 2023.

1.8.3 Contribution

In the existing Kenyan literature on parental responsibility, scholars such as Maria Walusala, Natalie Otieno, and Sherry Waweru have primarily focused on recommending amendments to the 2001 Children Act, which have been remedied by the 2022 Act. Maria Walusala suggested amendments to the 2001 Children Act aligning with the non-discriminatory provisions of the 2010 Constitution, Natalie Otieno emphasized the best interest of the child principle in the 2001 Children Act, and Waweru advocated for equal parental responsibility through the Proposed Children Bill of 2016, now incorporated in the 2022 Act. Building on their groundwork, my study, akin to Waweru and Otieno, centers on the child's best interest but uniquely fills a research gap by analyzing parental responsibility within the specific framework of the 2022 Children Act.

In the realm of retrospective application of statutory law, South African scholar Wet de Villiers has predominantly focused on fiscal legislation in South Africa. My study breaks new ground by examining the retrospective application of section 32 of the Kenyan Children Act 2022. Departing from De Villiers' emphasis on fiscal matters, I uniquely analyse the legality of applying the Children Act 2022 retrospectively by considering common law rules, the Constitution of Kenya 2010, and the specifics of the Children Act 2022. This approach provides a nuanced perspective on the permissibility and implications of retrospective application in Kenya.

1.9 Methodology

The study in general is a qualitative analysis and a desktop study. It will rely on both primary and secondary sources. The primary sources are the Constitution of Kenya 2010, the Children Act 2001, the Children Act 2022 and the Children Bill 2016. The secondary resources that will be relied on include data from Kenyan and international articles, journals, books, and chapters in books. The study will use a deductive approach by setting out a main claim which will be supported by other premises whose findings will be used to prove the main claim. Additionally, the study will entail a historical analysis of scholarly articles.

1.10 Chapter breakdown

This chapter encompasses important foundational aspects of the study. These entail the background, research objectives, justification of the study, conceptual framework, and a literature review. It sets the foundation on which subsequent chapters are built. Chapter two will provide the definition of a child's best interest that is best cut out for the Kenyan context. This will be done by exploring and comparing the definitions in other jurisdictions. Additionally, it will entail a historical analysis of scholarly articles showing the origin of the best interests rule. In doing this it will determine the building blocks upon which this doctrine was constructed. The exploration will show the shift from a focus on factors such as the gender of a parent or the age of a child to a focus on the best interest of the child. It will make the argument that the definition should encompass the child's current physical, emotional and psychological well-being.

Chapter three will analyse how Kenyan courts have interpreted and applied the doctrine of necessary implication in statutory interpretation. It will do this by analyzing various Kenyan cases where the rule of necessary implication has been applied and scholarly work on the Kenyan definition of the best interests of the child.

Chapter four will be dedicated to determining whether section 32 of the Children Act 2022 can be applied retrospectively. It will do this by determining which application is in line with the child's best interest.

Lastly, chapter five will conclude the research as to the impact of the retrospective application of section 32 of the Children Act 2022 on the family. It will offer recommendations for the necessary amendments that should be made to the Children Act 2022.

CHAPTER TWO: INTERPRETATION OF THE CHILD'S BEST INTEREST IN THE KENYAN CONTEXT

2.1 Introduction

Different scholars have different views on what is considered the correct legal interpretation of statutes, constitutional provisions, and other legal materials. William Baude and Stephen Sachs for example argue that instead of the theoretical complexities, normative disagreements and linguistic disputes that have characterized debates on legal interpretation, we should simply turn to the law for answers.⁶⁰ In response to this, Mark Greenberg, argues that a method of legal interpretation is correct when it accurately detects legal facts. He suggests that the answers to difficult interpretive questions revolve around how the content of the law is determined.⁶¹ Therefore, given the diverse perspectives on what is considered correct legal interpretation of legal materials, it is necessary to identify the correct legal interpretation of legal principles such as Child's best interest principle in the Kenyan context.

The principle of the Child's best interest generally lacks an acceptable standard definition⁶². Elizabeth Scott posits that the best interests standard has become broader and more discretionary.⁶³ As a result, judges are granted a great deal of discretion in deciding on matters regarding child custody.⁶⁴ If defining standards are not provided, the child's best interest principle gives wide discretion to judges allowing them exercise their own views on what they believe is best for children.⁶⁵ This will lead to similar cases being decided differently and such cases would lack precedential value, which is a pillar of common law. Additionally, parents would lack a guiding framework of the norms that are used to judge them in various cases.⁶⁶ Therefore, there is the need for a standard interpretation of the child's best interest principle to guide their decisions.

Furthermore, while Article 53 of the Constitution of Kenya stipulates that the best interest of the child is at the core of matters involving children⁶⁷ it does not specify what constitutes the best

⁶⁰ William B and Stephen S , 'The Law of interpretation', 130 *Harvard law review* 4 , 2017, 69.

⁶¹ Greenberg M, 'What makes a method of legal interpretation correct? Legal standard vs fundamental determinants,' 130 *Harvard law review forum* 4 , 2017, 23.

⁶² Roger J, 'Best interest of the child' *Indiana University* ,383.

⁶³ Scott E, Pluralism, parental preference, and child custody, 80 *California law review* 3, 1992, 621.

⁶⁴ Stamps L, 'Maternal preference rule in child custody decisions' 37 *Journal of divorce and remarriage* 3, 2009, 4.

⁶⁵ Ramsay L, 'The tender years doctrine: A defense' 70 *California law review* 2, 2009, 357.

⁶⁶Ramsay L, 'The tender years doctrine,' 358.

⁶⁷ Article 53, Constitution of Kenya (2010).

interests of the child.⁶⁸ Hence, in light of the ambiguous nature of the Child's best interest principle the imperative for a standardized interpretation becomes evident.

This chapter seeks to establish the most suitable definition of the child's best interest principle for the Kenyan context. Through this exploration, the chapter will provide a definition of the child's best interest principle that will aid in the effective interpretation of Section 32 Children Act 2022. This will ensure that the Act's objectives are met. Moreover, this determination is crucial as it forms the foundation for addressing the overarching research question.

In order to achieve this objective, this chapter begins with a brief introduction that contextualizes the doctrine of the child's best interest to the study. It then examines the history and evolution of the Child's best interest principle. Part three of the chapter is analysis of interpretations of the child's best interest principle provided by various scholars. Part four analyses the various interpretations of the from the previous sections to determine the most appropriate definition of the principle of the Child's best interest for the Kenyan context. Finally, the fifth section serves as a conclusive summary, summarizing the key findings and insights obtained throughout the chapter.

2.2 The history and evolution of the Child's best principle

Over time the criteria used to determine child custody have changed. The criteria went from the paternal preference rule,⁶⁹ to the maternal preference⁷⁰, then to the tender years doctrine and ultimately to the child's best interests rule.⁷¹ This section will analyse this evolution of principles to the principle of the child's best interest that is used in present day Kenya.⁷²

⁶⁸ Muragu J, 'Child custody: A study of the application of the best interest standard' unpublished, Strathmore University, Nairobi, 2020, 12.

⁶⁹ Kelly B, 'The determination of child custody: The future of children', 4 Children and divorce 1, 1994, 94.

⁷⁰ Lafave L, 'Origins and evolution of the 'Best interests of the child' standard' 34 South Dakota law review, 1989, 467.

⁷¹ Article 53, Constitution of Kenya (2010).

⁷² Article 53, Constitution of Kenya (2010).

In early times, paternal preference was preferred in matters of child custody.⁷³ This meant that the father was given custody over the child in the first instance⁷⁴ unless his wife proved him unfit to take care of the child.⁷⁵ This is because fathers were considered the primary caregivers of children since they were the breadwinners of the family.⁷⁶ However, with the onset of the industrial revolution, fathers started working and mothers were left with the children at home.⁷⁷ This led to a shift in judicial thinking and reason in matters of child custody. This is exemplified in the 1836 English case of *Norton v Viscount Melbourne for Criminal Conversation*.⁷⁸ In this case, Caroline Norton was deprived custody of her children. As a result, she worked with lawmakers to successfully persuade the British Parliament to pass a bill safeguarding mothers' custody rights. This law was the 1839 Custody of Infants Act. The Act established the presumption of maternal custody for young children.⁷⁹

The maternal preference doctrine is a legal standard that presumes that mothers should have custody over children regardless of the fitness of the father or other factors. This doctrine is rooted in traditional gender roles and societal norms that viewed women as the primary caregivers for children.⁸⁰ Furthermore, it is based on the belief that granting child custody to mothers is in the best interests of the child.⁸¹ In Kenya the maternal preference doctrine was provided for by the repealed Guardianship of Infants Act.⁸² The maternal preference doctrine was eventually replaced by the tender years doctrine.⁸³

The tender years doctrine prioritizes the child's need over the gender of the parent. According to this doctrine a mother should have custody over a child during their tender years, which are regarded as when the child is four years and under,⁸⁴ unless the father can prove the mother to be

⁷³ Degol A and Dinku S, Notes on the principle 'Best interest of the child': Meaning, history and its place in Ethiopian law, 321 - < [file:///C:/Users/HP/Downloads/ajol-file-journals_419_articles_145487_submission_proof_145487-4993-384735-1-10-20161008%20\(1\).pdf](file:///C:/Users/HP/Downloads/ajol-file-journals_419_articles_145487_submission_proof_145487-4993-384735-1-10-20161008%20(1).pdf) >- on 2 January 2024.

⁷⁴ Degol and Dinku, 'Notes on the principle 'best interest of the child', 321.

⁷⁵ Degol A and Dinku S, Notes on the principle 'best interest of the child', 321.

⁷⁶ Kelly B, 'The determination of child custody: The future of children', 4 *Children and divorce* 1, 94.

⁷⁷ Leann L, Origins and the evolution of the "Best interests of the child" standard, 467.

⁷⁸ *Norton v Viscount Melbourne for Criminal Conversation* (1836) The United Kingdom House of Lords.

⁷⁹ Custody of Infants Act of 1839 (United Kingdom)

⁸⁰ Leann L, Origins and the evolution of the 'Best interests of the child' standard, 465.

⁸¹ Stamps L, 'Maternal preference rule in child custody decisions' 37 *Journal of divorce and remarriage* 2, 2009, 9.

⁸² Guardianship of infants Act (No. 7 of 1964).

⁸³ Leann L, Origins and the evolution of the 'Best interests of the child' standard, 465.

⁸⁴ Baysinger H LLP, The tender years doctrine: Origin, history, modern usage and criticism, [Tender Years Doctrine: Origin, History, Modern Usage and Criticism \(baysingerlaw.com\)](https://www.baysingerlaw.com) on 10 January 2024.

an unfit custodian.⁸⁵ This doctrine is rooted in the belief that young children should be placed with the parent who could provide the most nurturing environment which in this case is the mother.⁸⁶ The doctrine is based on the presumption that a mother's care is in the best interests of a child of tender years.⁸⁷ Kenya courts adopted this doctrine. For example, in the case of *Karanu v Karanu* (1988) the court posited that the general rule regarding custody of children was that mothers should be granted child custody of children of tender years unless the court deems her incapable of ensuring the protection and promotion of the welfare of the child.⁸⁸

However, the tender years doctrine became the topic of adverse commentary and critique upon the rise of modern concerns about gender-specific classifications.⁸⁹ For example, the court in *Watts v Watts* held that the father's right to equal protection under the Fourteenth Amendment was violated by any presumed preference for mother custody.⁹⁰ Hence, critics advocated for a different approach in which the trial court makes decisions based on what is 'best' for a child.⁹¹

Finally, in order to eliminate gender bias, the judicial system ultimately prioritized the rule of a child's best interests when determining custody. The child's best interest is a legal standard that considers a variety of criteria to determine what is in the best interests of the child. These factors may include the child's emotional, social, moral, material, and educational needs, the respective home environments offered by the parties, the characteristics of those seeking custody, including age, character, stability, mental and physical health.⁹²

⁸⁵ *Stafford v. Stafford* (1941), The court of appeal United States.

⁸⁶ Leann L, Origins and the evolution of the 'Best interests of the child' standard, 466.

⁸⁷ Ramsay L, 'The tender years doctrine: A defense' 70 California law review 2, 2009, 357.

⁸⁸ *Karanu v Karanu* (1988) eKLR.

⁸⁹ Ramsay L, 'The tender years doctrine: A defense' 70 California law review 2, 2009, 336.

⁹⁰ Ramsay L, 'The tender years doctrine: A defense', 336.

⁹¹ Ramsay L, 'The tender years doctrine: A defense', 337.

2.3 Scholarly definitions of the child's best interest principle

The principle of the child's best interest has been argued to be vague and indeterminate.⁹³ Most scholars have opted to interpret it by listing factors that should be considered in order to give effect to the main objective of this principle. This is exemplified by scholars such as Leighton Stamps⁹⁴, Elizabeth Scott⁹⁵ and Samuel Poole.⁹⁶

Leighton Stamps discusses parental responsibility in the context of custody decisions and what the Child's best interest in such cases is. According to his study, despite the existence of gender-neutral custody laws, American judges still have a preference for maternal care over paternal care in child custody decisions. According to his research, judges believe that granting the mother custody is in the child's best interest unless there are special circumstances that demand otherwise.⁹⁷ However, he argues that the best interests of the child will be achieved through a gender-neutral evaluation of the family as advocated for in all American state laws. He asserts that the best interest of the child standard requires a case-specific evaluation to determine the most suitable parent for parental responsibility. This challenges the automaticity of maternal preference in considerations of parental responsibility.⁹⁸ Therefore, Leighton Stamp's interpretation of the child's best interest principle calls for a gender neutral and a case-by-case assessment based on a variety of factors such as the child's age, educational needs and the parent's capacity to meet those needs. The objective of this assessment is to ascertain which custody arrangement would be in the child's best interests, taking into account all relevant factors.⁹⁹

Similarly echoing Leighton Stamp's perspective, Elizabeth Scott posits that the best interest standard has encouraged judges to consider a range of factors when deciding which parent should have custody. These factors include the parents' moral fiber, mental stability and capacity to create a stable home environment.¹⁰⁰ Her argument does not blindly have maternal preference it instead

⁹³Bekink, B. and Bekink M, Defining the standard of the best interest of the child: Modern South African perspectives, 37 De Jure 1, 2004, 22.

⁹⁴ Stamps L, 'Maternal preference rule in child custody decisions' 37 Journal of divorce and remarriage 2 ,2009.

⁹⁵ Scott E, Pluralism, parental preference, and child custody, 80 California law review 3, 1992, 621.

⁹⁶ Samuel N, 'Maternal preference and the double burden: Best interest of whom?' 38 Louisiana law review 4 ,2010.

⁹⁷ Stamps L, 'Maternal preference rule in child custody decisions',1.

⁹⁸ Stamps L, 'Maternal preference rule in child custody decisions',9.

⁹⁹ Stamps L, 'Maternal preference rule in child custody decisions',10.

¹⁰⁰ Scott E, Pluralism, parental preference, and child custody, 621.

has a case-specific approach.¹⁰¹ Therefore, Elizabeth Scott's argument aligns with Stamp's in advocating for a subjective approach to defining the child's best interest, rejecting a blind adherence to maternal preference.

Furthermore, Samuel Poole also criticizes the maternal preference rule similarly to Leighton Stamps. He argues that the maternal preference rule is no longer applicable to the changing nature of marriages.¹⁰² Moreover, he contends that the maternal preference presumption is not in line with the best interests of the children since gender is irrelevant to the capacity and willingness to perform the mothering function and to the child's experience of mothering.¹⁰³

Therefore, in defining the best interest of the child the scholars call for a more nuanced, gender neutral, case-specific and child-centric interpretation of the best interest principle. This interpretation involves a consideration of factors tailored to the unique circumstances of each case. Such factors include such the child's age, educational needs, the parent's moral character, mental stability, and the ability to provide a stable home environment.

2.4 Interpretation of the principle of Child's best interest in Kenyan jurisprudence

There has been a discernable trend in Kenyan jurisprudence which is a shift from the maternal preference rule to the best interest of the child principle. Earlier legal decisions, such as *G.Z.B v V.P* (2006)¹⁰⁴ and *S.O v L.A.M* (2009),¹⁰⁵ embodied the maternal preference rule and the tender years doctrine. In contrast, post-2010 jurisprudence, exemplified by cases such as *SMM v ANK* (2022)¹⁰⁶ and *OGM v FG and another* (2017),¹⁰⁷ reflects a departure towards prioritizing the child's best interest. This transformation can be attributed to the enforcement of the Constitution of Kenya, which incorporates the principle of the child's best interest in Article 53¹⁰⁸. Consequently, Kenyan courts have transitioned to interpreting the principle of the child's best interest in a gender-neutral,

¹⁰¹ Scott E, Pluralism, parental preference, and child custody, 621

¹⁰² Samuel N, 'Maternal preference and the double burden: Best interest of whom? 38 Louisiana law review 4,2010, 1099.

¹⁰³ Samuel N, 'Maternal preference and the double burden: Best interest of whom? , 2010,1099.

¹⁰⁴ *G.Z.B v V.P* (2006) eKLR.

¹⁰⁵ *S.O v L.A.M* (2009) eKLR.

¹⁰⁶ *SMM v ANK* (2022) eKLR.

¹⁰⁷ *OGM v FG and another* (2017) eKLR.

¹⁰⁸ Article 53, Constitution of Kenya (2010).

context-sensitive, and child-centric manner, aligning with perspectives advocated by scholars like Elizabeth Scott.¹⁰⁹

The case of *G.Z.B v V.P* (2006),¹¹⁰ reflects the application of both the tender years doctrine and the maternal preference rule when interpreting the principle of the child's best. In this case the parents of the child were getting a divorce and there was an issue regarding the custody of the child who was approximately 8 years old. The court held that it would be in the best interest of the child to grant custody to the mother since the child was 8 years old and was considered to be of tender age.¹¹¹ Additionally, in the case of *S.O v L.A.M*¹¹² the best interest of the child was based on the maternal preference rule and the tender years doctrine. In this case, the court granted custody to an unemployed mother over a father who was a member of parliament earning Kshs. 485,000 monthly. The court believed that the application of the tender years' doctrine was in line with the best interests of the child and held that he lives with his mother. This is a clear example of the courts interpreting the child's best interest principle through the lens of the maternal preference rule and the tender years doctrine.

However, in recent jurisprudence, there has been a shift in the interpretation of the principle of the child's best interest. In the case of *SMM v ANK* (2022),¹¹³ the mother who was the appellant was challenging the trial court's decision to grant the father custody. The appellant based her argument on the tender years doctrine. The court asserted that although the tender years principle remains useful for determining child custody, it is no longer an inflexible legal principle. The court observed that changing norms reflected in Article 53 of the Constitution¹¹⁴ have undermined the doctrine's application since in deciding custody matters, the tender years doctrine must now be expressly applied to the best interests of the child principle.¹¹⁵ Additionally, in the case of *OGM v FG and another*, (2017)¹¹⁶ the court examined how custody with the biological father would negate the best interest of the child and concluded that the applicants were not able to prove this. Moreover, the court emphasized that the best interest of the child is determined by the

¹⁰⁹ Scott E, *Pluralism, parental preference, and child custody*, 621.

¹¹⁰ *G.Z.B v V.P* (2006) eKLR.

¹¹¹ *G.Z.B v V.P* (2006) eKLR.

¹¹² *S.O v L.A.M* (2009) eKLR.

¹¹³ *SMM v ANK* (2022) eKLR.

¹¹⁴ Article 53, Constitution of Kenya (2010).

¹¹⁵ *SMM v ANK* (2022) eKLR.

¹¹⁶ *OGM v FG and another* (2017) eKLR.

circumstances of the case as they specifically relate to the child. The focus must be on the child and what is best for him/her and that consideration should be guided by the basic rights of the child which are provided under the Constitution of Kenya 2010 and the Children Act.¹¹⁷

Patrick Kiage argues that in the Kenyan context, the interpretation and implementation of the child's best interest do not produce results that are different from the tender years doctrine. The reason for this similarity is explained as a convergence of various factors in most cases.¹¹⁸ The cases of *G.Z.B v V.P* 2006¹¹⁹ and *S.O v L.A.M*¹²⁰ are a reflection of his claim. However, I disagree with this premise in that recent jurisprudence such as *SMM v ANK* 2022¹²¹ and *OGM v FG and another*, 2017¹²² demonstrate a departure from this alignment.

2.5 Interpretation of the principle of the Child's best interest most suitable for the Kenyan context

The interpretation of the principle of the Child's best interest that is best suitable for the Kenyan context is one that aligns with Leighton Stamps'¹²³, Elizabeth Scott's¹²⁴ and Samuel Poole's,¹²⁵ and recent jurisprudence's interpretations of the doctrine. This involves recognizing that the best interests standard is not static and requires a case-by-case assessment rather than a presumption based on gender or age, which is a departure from the tender years doctrine and the maternal preference rule which have traditionally influenced court decisions. This interpretation advocates for a gender-neutral evaluation in custody decisions, challenging the automatic preference for maternal care.

The Kenyan courts have adopted this interpretation of the principle of the child's best interests. Recent jurisprudence such as the case of *SMM v ANK*,¹²⁶ signals a shift in Kenyan courts' views

¹¹⁷ *OGM v FG and another* (2017) eKLR.

¹¹⁸ Kiage P, *Family law in Kenya: Marriage, divorce and children*, Law Africa publishing, Nairobi ,2016, 282.

¹¹⁹ *G.Z.B v V.P* (2006) eKLR.

¹²⁰ *S.O v L.A.M* (2009) eKLR.

¹²¹ *SMM v ANK* (2022) eKLR.

¹²² *OGM v FG and another* (2017) eKLR.

¹²³ Stamps L, 'Maternal preference rule in child custody decisions' 37 *Journal of Divorce and Remarriage* 2, 2009.

¹²⁴ Scott E, Pluralism, parental preference, and child custody, 80 *California Law Review* 3, 1992, 621.

¹²⁵ Samuel N, 'Maternal preference and the double burden: Best interest of whom?' 38 *Louisiana law review* 4,2010, 1099.

¹²⁶ *SMM v ANK* (2022) eKLR.

on the tender years doctrine, emphasizing a departure from it and its alignment with the principle of the child's best interest. This emphasizes the need for a more nuanced and context-specific approach to determining the child's best interest. Additionally, the case of *OGM v FG and another*,¹²⁷ highlights the significance of considering the particular facts of each case and prioritizing the fundamental rights of the child as outlined in Article 53 of the Constitution of Kenya.¹²⁸

In conclusion, a suitable interpretation of the Child's best interest principle in the Kenyan context is one that embraces flexibility, rejects automatic preferences based on gender or age, and considers a range of factors relevant to the specific circumstances of each case. This aligns with Mark Greenburg's perspective of what is considered correct legal interpretation.¹²⁹ Therefore, this interpretation ensures a more just and equitable application of the Child's best interest standard in Kenyan jurisprudence.

2.6 Conclusion

In conclusion, the most suitable interpretation of the Child's best interest principle for the Kenyan context emerges as one that transcends the historical adherence to the tender years doctrine and maternal preference rule. This interpretation, involves a case-by-case assessment, rejecting automatic preferences and considering a range of factors relevant to the specific circumstances of each case. Furthermore, it aligns with the evolving societal norms and constitutional principles reflected in Article 53, as demonstrated in recent jurisprudence.

¹²⁷ *OGM v FG and another* (2017) eKLR.

¹²⁸ Article 53, Constitution of Kenya (2010).

¹²⁹ Greenberg M, 'What makes a method of legal interpretation correct? Legal standard vs fundamental determinants,' 23.

CHAPTER THREE: AN ANALYSIS OF THE JUDICIAL INTERPRETATION AND APPLICATION OF THE DOCTRINE OF NECESSARY IMPLICATION IN KENYAN COURTS

3.1 Introduction

A legal gap is defined as a problematic instance which occurs when applying the law and the law lacks, or seems to lack, the possibility to infer, from the general legal system, a specific answer, for the question at hand.¹³⁰ Legal gaps emerge from drafting errors that may be made by legislators and manifest in various forms.¹³¹ Among these types of legal gaps is inconsistency, which occurs when the established law handles a situation in a way that defies rationality. Secondly there is the indeterminacy legal gap, which means that the rules of law are vague. There is also the axiology legal gap, which arises when the existing law handles a situation in a way that is immoral. Finally, there is the insufficiency legal gap, which occurs when the law fails to establish rules where necessary.¹³²

Insufficiency as a legal gap arises during the formulation of statutes, where legislators may inadvertently overlook potential future scenarios in which the law could be applied. In this context, the insufficiency legal gap arises because the established law fails to provide rules or regulations for specific situations that were not foreseen or addressed by the legislators. The law is insufficient in covering all potential scenarios, and as a result, the law omits crucial details necessary for its effective application.¹³³ As discussed in the previous paragraph, such oversights create gaps in the law, leaving certain situations unaddressed.

In such instances, canons or rules of statutory construction play a crucial role by bridging these legal gaps and ensuring a more comprehensive interpretation and application of the law.¹³⁴ The purpose of every rule of statutory construction is to clarify statutory meaning.¹³⁵ Therefore, these

¹³⁰ Astolfi R, 'Legal gap: Porosity as opportunity', 103 Archives for philosophy of law and social philosophy 4, 2017, 6.

¹³¹ Ogwezy, M. , 'Appraisal of what constitutes legal gaps in how they are filled in different jurisdictions, 41 Journal of Malaysian and Comparative Law 1, 2014, 141.

¹³² Peczenik A., On law and reason, Springer, 8 Springer science, Netherlands, 2008, 18.

¹³³ Peczenik A., On law and reason, 18.

¹³⁴ Department of Environment and Natural Resources v. United Planners Consultants, Inc., (2020) Supreme Court, Republic of Phillipines.

¹³⁵ Johnstone Q, 'An evaluation of the rules of statutory interpretation', 3 University of Kansas law review1, 1954, 1.

rules of statutory construction ensure that statutes are applied consistently with the intention of the legislature when coming up with the respective statute.¹³⁶ There are various rules of statutory construction. These include *eiusdem generis*,¹³⁷ the golden rule, the mischief rule¹³⁸ and the rule of necessary implication.¹³⁹

The rule of necessary implication is a canon of statutory construction that is used to fill in identified gaps in the law. This is because what was once thought to be an all-embracing legislation at the time of enactment, may be inadequate for application in future scenarios.¹⁴⁰ In the 2020 Pilipino case of the Department of Environment and Natural Resources v. United Planners Consultants, Inc. the court invoked the doctrine of necessary implication while discussing the execution of the confirmed arbitral award against the Department of environment and natural resources. The court ruled that what is suggested in a statute is just as much a part of it as what is declared, according to the principle of necessary implication.. Therefore, this rule requires that it be implied that a statute contains all provisions that may be necessary to effectuate its objective and purpose.¹⁴¹

Furthermore, the Doctrine of Necessary Implication can be applied to determine whether a statute can be applied retrospectively. This is reflected in the 1961 English case of *Sunshine Porcelain Potteries Pty Ltd v Nash*, which dealt with the application of the doctrine of necessary implication in the context of the retrospective application of the Workers' compensation Act of 1928. In this case, Lord Reid contended that there is a rebuttable presumption that a legislator does not intend to create a new responsibility in relation to something that has already happened.

However, this presumption may be rebutted by the doctrine of necessary implication. Therefore, the court held that the Workers' Compensation Act of 1928 was retrospective to some extent.¹⁴²

¹³⁶ Alward, S., *Canons of statutory construction*, Vol. 20(8), *Canadian law times*, 1901.

¹³⁷ Johnstone Q, 'An evaluation of the rules of statutory interpretation', 1.

¹³⁸ Okur P, 'The rules of statutory interpretation', Unpublished, Leiden University, Leiden, 2021, 1.

¹³⁹ Department of Environment and Natural Resources v. United Planners Consultants, Inc. (2020) Supreme Court, Republic of Phillipines.

¹⁴⁰ Department of Environment and Natural Resources v. United Planners Consultants, Inc. (2020) Supreme Court, Republic of Phillipines.

¹⁴¹ Department of Environment and Natural Resources v. United Planners Consultants, Inc. (2020) Supreme Court, Republic of Phillipines.

¹⁴² *Sunshine porcelain potteries pty ltd v Nash*, (1961), Privy council, United Kingdom.

Additionally, in the case of *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* (2012) The court, referencing Halsbury's laws of England, held, that all non-criminal legislation is generally prospective, with the exception of those that are merely declaratory or that only pertain to procedural or evidentiary matters. Retrospective legislation can only be made explicit through express language or impliedly if it is evident from the context that the legislature intended such a result.¹⁴³ The court emphasized that a retroactive law is not unconstitutional unless it is constitutionally forbidden, diminishes contractual obligations, takes away rights granted by the constitution, or is really a bill of attainder.¹⁴⁴

The Children Act 2022 does not have an express provision on its retrospective application. Hence, inferring from the cases above, the rule of necessary implication may be applied in interpreting section 32 of this Act. Therefore, this chapter aims to determine whether the doctrine of necessary implication can be applied to the Children Act 2022. Specifically, in determining whether section 32 of the Children Act 2022 can be applied retrospectively to grant parental responsibilities to previously unqualified fathers under the Children Act 2001.

This chapter is divided into four sections. The first one is a brief introduction to the chapter that contextualizes the chapter to the study. The second section is a comprehensive examination of how Kenyan courts have interpreted and applied the doctrine of necessary implication and the third section will be an application of the doctrine of necessary implication to the study. Finally, the chapter will conclude with a synthesis of the findings.

3.2 Examination of how Kenyan courts have interpreted and applied the doctrine of Necessary implication

The case of *Kenya Bankers Association v Attorney General and another* (2020)¹⁴⁵, involved a challenge to the Finance Act, 2018's Section 32(b)(iv), which raised excise duties on fees for money transfer services and other services provided by banks retroactively for the period of July 1, 2018, to September 28, 2018.¹⁴⁶ The court contended that the presumption of a statute only

¹⁴³Halsbury's laws of England, 4th ed. Vol. 44, 570.

¹⁴⁴ *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* (2012) eKLR.

¹⁴⁵ *Kenya Bankers Association v Attorney general and another* (2020) eKLR.

¹⁴⁶ Section 32 (b) (iv) , Finance Act (No 10 of 2018).

having a retroactive effect may be rebutted either expressly or by necessary implication¹⁴⁷. This means that if a statute does not expressly state its retrospective nature, then court may still find that it has retrospective effect if it is necessary to do so to effectuate the objective of the drafters. Therefore, the court held that the retroactive application of the law, regarding Section 32(b)(iv) of the Finance Act, 2018, was not unconstitutional since its retrospective nature was expressly stated. The court stressed that retroactive legislation, especially in tax matters, is not inherently illegal, noting that the Finance Act 2018 clearly identified the dates at which each of the adjustments would apply.¹⁴⁸

Additionally, in the case of *Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited (2018)*¹⁴⁹ a key issue was the retrospectivity of Section 48 of the Finance Act, 2000¹⁵⁰, which amended Section 39A of the Income Tax Act¹⁵¹. The key question was whether the amendment had retrospective or prospective effect. The court, in its determination, relied on legal principles related to the retrospective application of statutes. It considered Section 23(3) of the Interpretation and general provisions Act¹⁵², which provides guidelines on the effect of the repeal of a written law on existing rights. The court further noted that the general rule that a statute is not retroactive has some exceptions. The legislature's goal when drafting the statute is one of the crucial factors. Ultimately, the appellate court concluded that Section 48 of the Finance Act was a tax incentive meant to attract new investments in the future and was intended to operate prospectively¹⁵³.

Moreover, in the case of *John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014)*¹⁵⁴, one of the issues was whether it was constitutional for section 68 of the Kiambu County Alcoholic Drinks Act, 2013¹⁵⁵ to have a retrospective effect. Section 68 of this Act stipulates that, a person who was in compliance with the Alcoholic Drinks Control Act, 2010 immediately prior to the start of this 2013 Act, as a manufacturer, importer, distributor, or retailer

¹⁴⁷ *Kenya bankers association v Attorney general and another (2020)* eKLR .

¹⁴⁸ *Kenya Bankers Association v Attorney General and another (2020)* eKLR.

¹⁴⁹ *Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited (2018)* eKLR.

¹⁵⁰ Section 48, Finance Act (No 3 of 2000).

¹⁵¹ Section 39A of the Income Tax Act (No 8 of 2009).

¹⁵² Section 23(3) of the Interpretation and General Provisions Act (No. 7 of 1952)

¹⁵³ *Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited (2018)* eKLR.

¹⁵⁴ *John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014)*, eKLR.

¹⁵⁵ Section 68, Kiambu county alcoholic drinks Act, 2013.

of any alcoholic drink under the previous 2010 Act, will be deemed to be in compliance with the 2013 Kiambu County Alcoholic Drinks Act.¹⁵⁶

In the John Munyaka case, the court applied the doctrine of necessary implication to determine the issue. The court contended that the doctrine of necessary implication is employed to ascertain whether the legislature intended for a statute to have a retrospective effect. It stated that a statute should be enforced retrospectively if it can be inferred from its language or context that the legislature intended for it to have retrospective effect.. However, if there is no such implication, then the statute will be presumed to only have a prospective effect. Therefore, the court held that it was apparent from the language of section 68 Kiambu County Alcoholic Drinks Act 2013, that the legislature intended for it to have retrospective effect.¹⁵⁷

3.3 Application of the doctrine of necessary implication to the study

The aforementioned cases can serve as precedent in determining whether section 32 of the Children Act 2022 can be interpreted retrospectively. In the case of in the case of Samuel Kamau Macharia and another v Kenya commercial bank limited and 2 others the court emphasized that a retrospective law is legal unless it divests vested rights, is constitutionally forbidden, impairs the obligation under contracts and is in the nature of a bill of attainder¹⁵⁸. If section 32 of the Children Act 2022 were to be applied strictly retroactively it would be unconstitutional. This is because it would deprive previously unqualified fathers their right to parental responsibility in the first instance as granted to them under section 32 of the Children Act 2022.¹⁵⁹

Moreover, in the Kenya Bankers Association¹⁶⁰ case the court contended that the presumption of a statute only having a retroactive effect may be rebutted either expressly or by necessary implication. In this case the court held that the Finance Act 2018 clearly and expressly stated the dates at which each of the amendments would apply hence the Act could be applied

¹⁵⁶ Section 68, Kiambu county alcoholic drinks Act, 2013.

¹⁵⁷ John Kinyua Munyaka and 11 others v County government of Kiambu and 3 others (2014), eKLR.

¹⁵⁸ Samuel Kamau Macharia and another v Kenya commercial bank limited and 2 others (2012) eKLR.

¹⁵⁹ Section 32 Children Act (No 29 of 2022).

¹⁶⁰ Kenya Bankers Association v Attorney general and another (2020) eKLR

retrospectively.¹⁶¹ Applying this same rationale to the Children Act 2022 the presumption that this Act only has a retroactive effect can be rebutted by necessary implication. This is because the Children Act 2022 lacks an express provision on its retroactive nature. Therefore, in applying the doctrine of necessary implication section 32 of the Children Act 2022 can be applied retrospectively.

Furthermore, drawing from the 2018 case of Commissioner of Income Tax v Pan African paper mills (E.A.) limited¹⁶² wherein the court argued that the basic rule that a statute is not retroactive has some exceptions. One of the exceptions is when the legislature's intent, as expressed in the statute's construction, requires a different outcome. Therefore, in applying this to the issue of the retrospective application section 32 of the Children Act one can look at the intention of the legislature when drafting the Act. The intention of the legislature when drafting the Children Act 2022 was to give effect to Article 53 of the Constitution¹⁶³ which entails upholding the child's best interests in every matter concerning the child.¹⁶⁴ Therefore, in applying section 32 retrospectively, previously unqualified fathers will acquire parental responsibility in the first instance. This will be in the best interest of the child as they will benefit from having both parents.

Moreover, the case of John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014)¹⁶⁵ can serve as a precedent in determining the answer to the overarching research question of this study. In this case, the court held that in using the doctrine of necessary implication the intention of the legislature can be implied from the context of the statute. In this case, what was meant by 'the context of the statute' was that in interpreting a specific provision of an Act, the court must consider the provision in the context of the entire Act, as well as the purpose and objective of the statute as a whole¹⁶⁶. This is a purposive approach to statutory interpretation.

This approach can be applied in interpreting the Children Act 2022. In doing this one must first establish the purpose and objective of the statute as a whole in order to determine whether the rule

¹⁶¹ Kenya Bankers Association v Attorney general and another (2020) eKLR

¹⁶² Commissioner of income tax v Pan African paper mills (E.A.) Limited (2018) eKLR.

¹⁶³ Kithinji K, Mulevu M, Ogolla E, A commentary on the Children Act, 2022: A Panacean 'Enclave' to Children, 26TH September 2022, -< <file:///C:/Users/Admin/Downloads/61st-Legal-Update-A-Commentary-on-the-Children-Act-2022.pdf> >-, on 16th December 2022.

¹⁶⁴ Article 52, Constitution of Kenya (2010).

¹⁶⁵ John Kinyua Munyaka and 11 others v County government of Kiambu and 3 others (2014), eKLR.

¹⁶⁶ John Kinyua Munyaka and 11 others v County government of Kiambu and 3 others (2014), eKLR .

of necessary implication can be applied. The drafters of the Children Act 2022 made their intentions and objectives known in the title of the Act. The title states that it is an Act of Parliament intended to give effect to section 53 of the Constitution and to provide for parental responsibility.¹⁶⁷ Therefore, guided by the precedent of John Kinyua Munyaka the doctrine of necessary implication can be applied to the Children Act 2022. Using this doctrine, it can be inferred that it was the intent of the legislature that the Act have a retrospective effect. This is because a retrospective interpretation will grant parental responsibility to previously unqualified fathers in the first instance. This gives effect to Article 53 of the Constitution since it is in the best interest of the Child that they benefit from both parents.

3.4 Conclusion

In conclusion, drawing from the aforementioned cases when determining whether the doctrine of necessary implication can be applied to Section 32 of the Children Act 2022 to determine its retrospectivity one should look at three main requirements. These are the whether the act has an express provision on its retrospective nature as provided for in the Kenya Bankers Association case.¹⁶⁸ The second requirement is whether the retroactive application of the law is unconstitutional because it divests vested rights. This is drawn from the Smauel Kamau case.¹⁶⁹ Finally, the third requirement is whether the intention of the legislature requires the act to have a retrospective case. This is drawn from the Commissioner of Income Tax Act¹⁷⁰ and the John Kinyua case.¹⁷¹

Therefore, since the Children Act lacks an express provision on its retroactive nature the doctrine of necessary implication can be applied to Section 32 of the Children Act 2022. Furthermore, if section 32 of the Children Act 2022 were to be applied strictly retrospectively it would be unconstitutional. This is because it would deprive previously unqualified fathers their right to parental responsibility in the first instance as granted to them under section 32 of the Children Act 2022¹⁷². Therefore, the doctrine of necessary implication can be applied to permit the

¹⁶⁷ Act Title, Children Act (Act No 29 of 2022).

¹⁶⁸ Kenya Bankers Association v Attorney general and another (2020) eKLR.

¹⁶⁹ Samuel Kamau Macharia and another v Kenya commercial bank limited and 2 others (2012) eKLR.

¹⁷⁰ Commissioner of income tax v Pan African Paper Mills (E.A.) limited (2018) eKLR.

¹⁷¹ John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014), eKLR.

¹⁷² Section 32 Children Act (No 29 of 2022).

retrospective application of Section 32 of the Children Act 2022.¹⁷³ Finally, using the doctrine of necessary implication, it can be deduced that it was the intent of the legislature that the Act has a retrospective effect. This is because a retrospective interpretation will grant parental responsibility to previously unqualified fathers in the first instance. This gives effect to Article 53 of the Constitution since it is in the best interest of the Child that they benefit from the care of both parents.



¹⁷³ Section 32 Children Act (No 29 of 2022).

CHAPTER FOUR: AN ANALYSIS OF THE IMPACT OF THE RETROSPECTIVE APPLICATION OF SECTION 32 OF THE CHILDREN ACT 2022 ON THE FAMILY

4.1 Introduction

The family stands as the cornerstone of societal structure, as highlighted by Sam Kneller.¹⁷⁴ Echoing this sentiment, Article 16 (3) of the Universal Declaration of Human Rights (UDHR) stipulates that the family has a right to protection by the society and the state as it is the fundamental building bloc of the society.¹⁷⁵ Furthermore, in Kenya, Article 45 (1)¹⁷⁶ of the Constitution reflects the vital importance of the family in society. Article 45 (1) recognizes the family as the natural and fundamental unit of society that is required for maintaining social order and shall enjoy the recognition and protection of the State.¹⁷⁷ Hence, it is crucial for the state to ensure the protection of the family, as doing so serves the public interest, considering the family's central role as the foundational unit of society.

Over time, Kenya's family laws for example the Marriage Act 2014 have undergone reforms to protect the family in modern society.¹⁷⁸ Such reforms include the requirement of registration of all marriages¹⁷⁹. The need for these reforms stemmed from a range of factors. These include the need to consider the evolving landscape of Kenyan society, which has been characterized by a shift towards secularization and a departure from traditional norms. These legal reforms were required to protect women from discriminatory traditions and practices that were deeply ingrained in and continued inside the family setting.¹⁸⁰ Additionally, the laws had to reflect the socio-economic changes that were taking place in marriages such as women becoming more financially independent from their husbands and the marital relationship becoming increasingly one of

¹⁷⁴ Kneller S, 'Family- The cornerstone of human society, Medium, 4 September 2020-< <https://medium.com/the-explanation/family-the-cornerstone-of-human-society-b59c41b4821c> >- on 26th December 2023.

¹⁷⁵ Article 16 (3), Universal Declaration of Human Rights.

¹⁷⁶ Article 45 (1), Constitution of Kenya (2010).

¹⁷⁷ Article 45 (1), Constitution of Kenya (2010).

¹⁷⁸ Baraza N., 'Family law reforms in Kenya: An overview', Heinrich boll foundation's gender forum, Nairobi 2009, 1.

¹⁷⁹ Part IX, Marriage Act 2014

¹⁸⁰ Oduor M and Odhiambo R, 'Gender equality in the new constitutional dispensation of Kenya', in Lumumba PLO, Mbondenyei M, Osero S (eds) The Constitution of Kenya; Contemporary readings, 1 ed, Law Africa, Kenya, 2012, 3.

personal choice.¹⁸¹ This increased economic independence by women led to an increase divorce and separation in marriages and this contributed to an increase in single- mother households.¹⁸²

Single- mother households constitute a family structure in Kenya among a diverse array of family structures such as stepfamily, grant parent-headed, cohabiting and widowed families among others.¹⁸³ Despite the increased empowerment and economic independence of women¹⁸⁴ single-mother families face various challenges such as poverty which affects the well-being of children¹⁸⁵. Single mothers struggle in providing basic needs of their children and this affects the overall wellbeing of the child.¹⁸⁶ Therefore, the law should promote shared parental responsibility to support single-mother households, since the state has a duty to protect the family structure.¹⁸⁷ Furthermore, shared parental responsibility ensures the child's best interest standard is met since the burdens single mother's face are alleviated hence enhancing the overall welfare of the child.

Therefore, strictly applying Section 32 of the Children Act 2022 to future cases heightens the challenges faced by single-mother households. This is because applying Section 32 to future cases does not grant parental responsibility to previously unqualified fathers in the first instance. Hence the sole burden of parental responsibility is left to the mothers. Despite the child's birth circumstances, Section 32 of the Children Act 2022 bestows equal parental responsibility upon both parents.¹⁸⁸ However, its strict application to future cases does not remedy the problem that was previously created by Section 24 as read with section 25 of the Children Act 2001. The problem was that that fathers to children born out of wedlock, did not acquire equal parental

¹⁸¹ Baraza, Family law reforms in Kenya: An overview, 2.

¹⁸² Omoro P, Investigating the causes and possible solutions of divorce in Nairobi County Kenya, Unpublished, LLB, University of Nairobi, Nairobi, 2013, 16.

¹⁸³ National council for population and development, 2022 study on status of the family in Kenya (Kwale county) , 8 May 2022, 1.5.

¹⁸⁴ Omoro P, Investigating the causes and possible solutions of divorce in Nairobi County Kenya, Unpublished, University of Nairobi, Nairobi, 2013, 16.

¹⁸⁵ Ndirangu N , Single motherhood and poverty level in Kenya, November 2019 -< https://www.researchgate.net/publication/337782244_SINGLE_MOTHERHOOD_AND_POVERTY_LEVEL_IN_KENYA#:~:text=The%20challenges%20facing%20single%20mothers,well%2Dbeing%20of%20their%20children. >- on 25th December 2022.

¹⁸⁶ Kagendo P, Single mothers and parenting in Kenya: The case of Zimmerman, Nairobi county, University of Nairobi, ,2015,52,-

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/101970/Njau,Purity%20K_Single%20Mothers%20and%20Parenting%20in%20Kenya-%20the%20Case%20of%20Zimmerman,%20Nairobi%20County.pdf?sequence=1 >- on 1st February 2023.

¹⁸⁷ Article 45 (1), Constitution of Kenya (2010).

¹⁸⁸ Section 32, Children Act (No 29 of 2022).

responsibility in the first instance and this was not in the best interest of the child and hence Section 24 and 25 of the Children Act 2001 were declared against the constitution in the case of *Zak and another v MA and another* (2013).¹⁸⁹ Therefore, applying Section 32 of the Children Act 2022 retrospectively will alleviate the challenges faced by single mothers and will be in the best interest of the child since the child will benefit from the parental care of both parents.

This chapter seeks to examine the challenges faced by single-mother households and analyse how the retrospective application of Section 32 of the Children Act 2022 can remedy these challenges. Additionally, the chapter will examine how the retrospective application of Section 32 of the Children Act 2022 serves the child's best interests.

4.2 An examination of the challenges faced by single mother households

Single-parent households face a range of challenges that significantly impact both the parent's and the children's well-being. The economic difficulties prevalent in these households lead to a range of negative outcomes. The economic hardship affects parent's ability to provide their children's basic needs, such as food and shelter. This could lead to stress, anxiety and depression in the parents.¹⁹⁰ Moreover, a study done by Nkereuwem Stephen and Lawrence Udis reveals that economic instability in single parent households correlates with lower educational achievements in children, leading to social stigmatization.¹⁹¹ Their study also reveals that children raised in such households face an increased risk of dropping out of school and disengaging from the labor force.¹⁹² These factors impact on the child's quality of life and their general welfare. Therefore, single-parent households face a variety of challenges that affect children.

Single-mother households have challenges unique to them. Boys in single-parent households face greater problems than girls since living with the opposite sex (i.e a single mother) may be more difficult for boys than girls.¹⁹³ Laveena D'Mello's study echoes this in revealing that long periods

¹⁸⁹ *Zak and another v MA and another* (2013), eKLR

¹⁹⁰ Burgund A., Pantelic M. and Milanovic M., 'Single parent families social status, needs and challenges', 3(1) *Human*, 2013, 18.

¹⁹¹ Nkereuwem S and Udis I, *Single parent families and their impact on children: A study of Amasomma community in Bayelssa State*, 4(9) *European journal of research in social sciences*, 2016, 20.

¹⁹² Nkerewem S and Udis I, *Single parent families and their impact on children: A study of Amasomma community in Bayelssa State*, 21.

¹⁹³ Nkerewem S and Udis I, *Single parent families and their impact on children: A study of Amasomma community in Bayelssa State*, 22.

of absence of fathers can harm a boy's psychological development, especially before school age. Particularly, boys in families without a father figure may be at greater risk of delinquency.¹⁹⁴ Finally, single mothers experience difficulties in reconciling their professional and family life and this affects their ability to be present for their children in aspects of their lives such as emotionally. This challenge of reconciling family and professional life underscores the need for supportive policies to be enacted by the state to address this issue.¹⁹⁵ Therefore, single mothers experience challenges that can be alleviated by additional assistance or support in bringing up their children. This additional assistance can be provided for by fathers.

In Kenya, single-mother families face various challenges such as poverty which affects the well-being of children.¹⁹⁶ Due to economic constraints single mothers are forced to bear the financial responsibilities of absentee fathers and as a result, they strain in affording to meet their children's basic needs.¹⁹⁷ These challenges faced by single mothers affect the well-being and development of their children, potentially perpetuating a cycle of poverty and inequality.¹⁹⁸ Furthermore, single mothers may lack adequate support systems, both in terms of childcare assistance and emotional support, which can make it difficult for them to cope with their responsibilities.¹⁹⁹ Therefore, single-mother households have the greatest need for alternative child care²⁰⁰. This entails the child being taken care by other caregivers, specifically their fathers. Therefore, the law should promote shared parental responsibility to support single-mother households through ensuring that it does not hinder alternative parental care from fathers. Shared parental responsibility will be in the best interests of the child since the burdens single mother's face are alleviated hence enhancing the overall welfare of the child.

¹⁹⁴ Norohna L, Govindaraju M., Monteiro M, 'A Study on the challenges faced by single parent on teenager care', 1 (1), International journal of advanced trends in engineering and technology, 2016, 54.

¹⁹⁵ Burgund A., 'Single-parent families- social status, need and challenges, 3(1), Human, 2013, 16.

¹⁹⁶ Ngunjiri N., 'Single motherhood and poverty level in Kenya', Unpublished, University of Nairobi, 2019, 4.

¹⁹⁷ Kagendo P, Single mothers and parenting in Kenya: The case of Zimmerman, Nairobi county, University of Nairobi, 2015, 52, <
http://erepository.uonbi.ac.ke/bitstream/handle/11295/101970/Njau,Purity%20K_Single%20Mothers%20and%20Parenting%20in%20Kenya-%20the%20Case%20of%20Zimmerman,%20Nairobi%20County.pdf?sequence=1 >- on 1st February 2023.

¹⁹⁸ Ngunjiri N., 'Single motherhood and poverty level in Kenya', 2.

¹⁹⁹ Ngunjiri N., 'Single motherhood and poverty level in Kenya', 5.

²⁰⁰ Kabiru M, Njengam A and Swadener B. 'Early childhood development in Kenya: Empowering young mothers, mobilizing a community', 79 (6), Childhood education 2003, 359.

4.3 How the retrospective application of Section 32 of the Children Act 2022 is in the best interest of the child

To address the challenges faced by single-mother households, the retrospective application of Section 32 of the Children Act 2022 becomes crucial. Section 32 of the Children Act 2022 specifies that both parents of a child shall possess equal parental responsibility for the child, irrespective of whether the child is born within or outside of marriage.²⁰¹ Strictly applying Section 32 of the Children Act 2022 to future cases does not grant parental responsibilities to previously unqualified fathers in the first instance. This situation places the burden of sole responsibility for caring for the children on single mothers until fathers acquire parental responsibility by entering into a parental responsibility agreement with the mother, as outlined in Section 33 of the Children Act 2022..²⁰²

However, a retrospective application of Section 32 of the Children Act 2022 can potentially address these challenges. By granting equal parental responsibility to both parents irrespective of whether the child was born within the parents marriage, in the first instance, the retrospective application of Section 32 can alleviate the burden placed on single mothers. This could ensure parental responsibility in the first instance to single fathers who did not previously qualify for parental responsibility under the Children Act 2001.²⁰³ Therefore, the retrospective application of section 32 of the Children Act 2022 will aid in better childcare, and ultimately, safeguarding the best interests of the child as required by Article 53 of the Constitution of Kenya 2010.²⁰⁴

The retrospective application of Section 32 of the Children Act will be in the best interest of the child. Given the unique challenges faced by single-mother households—ranging from economic difficulties to psychological impacts on children—a retrospective application of Section 32 emerges as a crucial step toward balancing parental responsibilities and offering support to single-parent households. Affording both parents equal responsibility, it not only addresses legal gap created by the Children Act 2022 but also fosters an environment conducive to the well-being and development of the child within these family structures, hence will be in the best interests of the child.

²⁰¹ Section 32, Children Act (No 29 of 2022).

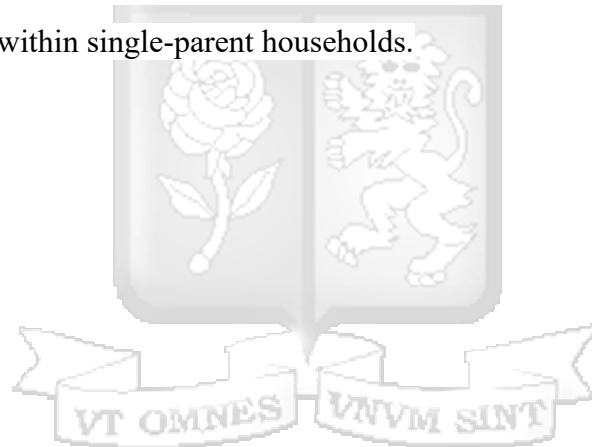
²⁰² Section 33, Children Act (No 29 of 2022).

²⁰³ Children Act (Act No 8 of 2001)

²⁰⁴ Article 53 of the Constitution of Kenya (2010).

4.4 Conclusion

Single-mother households encounter multifaceted challenges, primarily driven by economic disparities and the absence of shared parental responsibility. The retrospective application of Section 32 emerges as a potential solution to alleviate the burden faced by single mothers. While the strictly applying Section 32 to future cases doesn't immediately grant parental responsibilities to previously unqualified fathers, a revised approach could bridge this gap. By affording equal parental responsibility to both parents from the outset, the Children Act 2022 can mitigate the sole burden placed on single mothers. Therefore, the retrospective interpretation of Section 32 of the Children Act 2022 aligns with the constitutional mandate of ensuring that the best interests of the child standard is upheld by ensuring that children benefit from the parental care of both parents. Ultimately, by embracing the retrospective application of Section 32, the law not only addresses legal gaps but also endeavors to create an environment conducive to the holistic well-being and development of children within single-parent households.



CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

As this study concludes, it is tasked with discussing whether Section 32 of the Children Act 2022 can apply to past cases to grant parental responsibilities to previously unqualified fathers. The chapter will do this by summarizing the findings derived from the research conducted in preceding chapters. Furthermore, it will propose recommendations aimed at addressing the the upholding of the child's best interest standard in child custody proceedings.

5.2 Conclusion of the study

The main aim of the Children Act 2022 is to give effect to Article 53 of the Constitution of Kenya 2010. This is provided in the Children Act's title which provides that it is a Statute enacted by Parliament intended to give effect to section 53 of the Constitution and to provide for parental responsibility.²⁰⁵ To achieve this goal a definition of the principle of the Child's best interest must be provided for the Kenyan context. From the research done in this study, the most suitable interpretation of the principle of the Child's best interest advocates for a departure from rigid presumptions based on gender or age. Instead, it calls for a more nuanced, gender-neutral,²⁰⁶ case-specific and child-centric interpretation of the best interest principle.²⁰⁷ This interpretation involves considering factors tailored to each case's unique circumstances. These factors include the child's age, educational needs, the parent's moral character, mental stability, and the ability to provide a stable home environment.²⁰⁸ Kenyan courts have adopted such an interpretation as seen

²⁰⁵ Act Title, Children Act (Act No 29 of 2022).

²⁰⁶ Samuel N, 'Maternal preference and the double burden: Best interest of whom? ', 2010,1099.

²⁰⁷ Schneider, C. On the duties and rights of parents, (8) Virginia law review, 1995, 2485.

²⁰⁸Leann L, Origins and the evolution of the 'Best interests of the child' standard, 483.

in recent jurisprudence such as *SMM v ANK (2022)*²⁰⁹ and *OGM v FG and another (2017)*.²¹⁰ Therefore, since the principle of the Child's best interest calls for a departure from maternal preference and the tender years doctrine,²¹¹ it would be in line with the best interests of the child to interpret Section 32 of the Children Act retrospectively. This is because the retrospective interpretation will enable previously unqualified fathers to be granted parental responsibility. This would be in the best interest of the child as the child would benefit from the involvement and support from both parents.

Moreover, from the case of *Samuel Kamau Macharia* a Statute can be interpreted to have a retrospective effect through an express provision or necessary implication. Since the Children Act 2022 does not have a provision on its retrospective nature the doctrine of necessary implication can be applied to determine whether it can be applied retrospectively.²¹² Furthermore, drawing from the cases of *Kenya Bankers Association v Attorney General and another (2020)*²¹³ and *John Kinyua Munyaka v County Government of Kiambu (2014)*²¹⁴, when determining whether the doctrine of necessary implication can be applied to Section 32 of the Children Act 2022 to determine its retrospective nature one should look at three main requirements. These are whether the Act has an express provision on its retrospective nature.²¹⁵ The second requirement is whether the retroactive application of the law is unconstitutional because it divests vested rights.²¹⁶ Finally, the third requirement is whether the legislature's intention requires the act to have a retrospective nature.²¹⁷

Therefore, since the Children Act lacks an express provision on its retroactive nature the doctrine of necessary implication can be applied to section 32 of the Children Act 2022. Furthermore, if section 32 of the Children Act 2022 were to be applied strictly to future cases it would be unconstitutional. This is because it would deprive previously unqualified fathers of their

²⁰⁹ *SMM v ANK (2022)* eKLR.

²¹⁰ *OGM v FG and another (2017)* eKLR.

²¹¹ Samuel N, 'Maternal preference and the double burden: Best interest of whom?' 38(4), *Louisiana law review* 4, 2010.

²¹² *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others (2012)* eKLR.

²¹³ *Kenya Bankers Association v Attorney General and another (2020)* eKLR.

²¹⁴ *John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014)*, eKLR.

²¹⁵ *Kenya Bankers Association v Attorney General and another (2020)* eKLR.

²¹⁶ *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others (2012)* eKLR.

²¹⁷ *John Kinyua Munyaka and 11 others v County Government of Kiambu and 3 others (2014)*, eKLR.

right to parental responsibility in the first instance as granted to them under section 32 of the Children Act 2022.²¹⁸ Therefore, the doctrine of necessary implication can be applied to permit the retrospective application of Section 32 of the Children Act 2022.²¹⁹

Finally, by applying the necessary implication doctrine, it can be inferred that the legislature intended the Section 32 of the Children Act 2022 has a retrospective effect. This is because a retrospective interpretation will grant parental responsibility to previously unqualified fathers in the first instance. This gives effect to Article 53 of the constitution since it is in the best interest of the Child that they benefit from both parents.

Furthermore, the impact of the retrospective application of Section 32 of the Children Act 2022 on single-parent households unveils the challenges faced by these families. Single-mother households encounter multifaceted challenges, primarily driven by economic disparities²²⁰ and the absence of shared parental responsibility. The retrospective application of Section 32 of the Children Act 2022 emerges as a potential solution to alleviate the burden faced by single mothers and mitigate the challenges confronting these families. The retrospective application of Section 32 alleviates the challenges faced by single mothers by granting parental responsibilities to previously unqualified fathers. By affording equal parental responsibility to previously unqualified father's the law can mitigate the sole burden placed on single mothers. Therefore, the retrospective interpretation of Section 32 of the Children Act 2022 aligns with the constitutional mandate of safeguarding the child's best interests, ensuring a supportive environment for their development. Additionally, the retrospective application of Section 32 of the Children Act 2022 acknowledges the changing dynamics of familial structures and supports shared parental responsibility.

²¹⁸ Section 32 Children Act (No 29 of 2022).

²¹⁹ Section 32 Children Act (No 29 of 2022).

²²⁰ Burgund A., Pantelic M. and Milanovic M., 'Single parent families social status, needs and challenges' , 3(1) Human,2013, 18.

5.3 Recommendations

5.3.1 Retrospective Application of Section 32 of the Children Act 2022

The author recommends that there should be a retrospective application of Section 32 of the Children Act 2022 for various reasons. Firstly, the retrospective application of Section 32 of the Children Act 2022 will uphold the best interest of the child as required by Article 53 of the Constitution.²²¹ The primary objective of the Children Act 2022 is to safeguard the best interests of the child,²²² as enshrined in Article 53 of the Constitution. The retrospective interpretation of Section 32 of the Children Act 2022 ensures that children born prior to the enactment of the Children Act 2022 are not disadvantaged by being denied paternal care. Granting parental responsibility to previously unqualified fathers serve the child's best interests by ensuring that children are cared for and supported by their fathers.

Moreover, the retrospective application addresses the constitutional concerns raised by the previous provisions of the Children Act 2001, particularly section 25,²²³ which was declared unconstitutional in the case of *Zak and another v MA and another* (2013).²²⁴ By granting equal parental responsibility to both parents, regardless of marital status, Section 32 of the Children Act 2022 rectifies the discriminatory practices of the past.

Furthermore, the retrospective application of Section 32 of the Children Act 2022 will promote gender equality. Section 32 promotes gender equality by recognizing fathers' rights to parental responsibility from the time when the child was born. Previously, under the Children Act 2001, fathers were required to acquire parental responsibility through court orders or agreements with the mother, perpetuating maternal preference in parental responsibility decisions. Retrospective application eliminates this disparity and affirms fathers' equal rights and responsibilities in child-rearing.

Finally, the retrospective application of Section 32 of the Children Act will alleviate challenges faced by single mothers. Single-mother households in Kenya face numerous challenges, including

²²¹ Article 53, Constitution of Kenya (2010)

²²² Act Title, Children Act (Act No 29 of 2022).

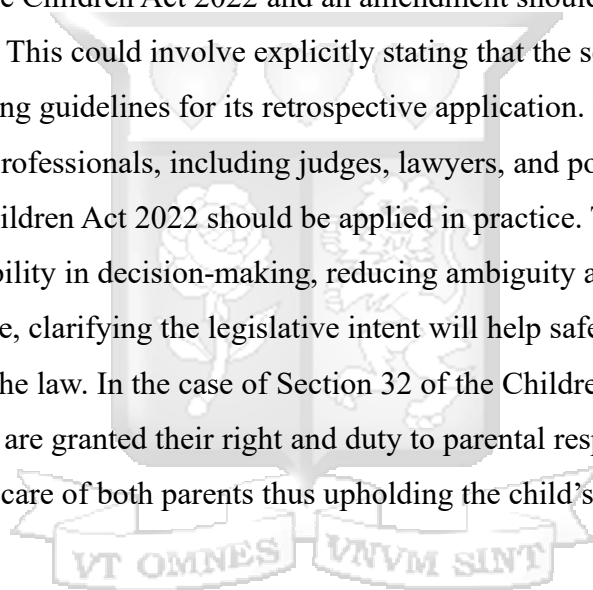
²²³ Section 25, Children Act (Act No 8 of 2001).

²²⁴ *Zak and another v MA and another* (2013) eKLR.

economic hardships and the sole burden of parental responsibility. The retrospective application of Section 32 provides support to these households by ensuring that fathers share in parental responsibilities from the outset. This alleviates the financial and emotional strain on single mothers, promotes shared parenting, and contributes to the well-being of children in these households.

5.3.2 Amendment and clarification of legislative intent regarding Section 32 of the Children Act 2022

The author recommends that the legislature clarify its intent regarding the retrospective nature of Section 32 of the Children Act 2022 and an amendment should be made to include this to the Children Act 2022. This could involve explicitly stating that the section applies retrospectively or providing guidelines for its retrospective application. This clarity on legislative intent ensures that legal professionals, including judges, lawyers, and policymakers, understand how Section 32 of the Children Act 2022 should be applied in practice. This promotes consistency and predictability in decision-making, reducing ambiguity and potential conflicts in court rulings. Furthermore, clarifying the legislative intent will help safeguard the rights of individuals impacted by the law. In the case of Section 32 of the Children Act, clarification would ensure that fathers are granted their right and duty to parental responsibility and that children benefit from the care of both parents thus upholding the child's best interests.



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