

# The Role of Children's Court in Parental Responsibility and Child Maintenance: A Comparative Study of England and Kenya Children's Court

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**Abstract:** From the dawn of time, a child has been viewed as an incomplete person who needs the assistance of adults, usually his parents or those acting in loco parentis, to live and thrive in life. Parental responsibility for a child is seen as an essential instrument for fully realizing children's rights. However, when it comes to a child's health, this obligation is sometimes fulfilled to the child's harm rather than for the child's benefit. In such a scenario, the government generally intervenes through the courts to prepare the necessary actions in the child's best interests. Given the stringent and time-consuming procedures connected with some countries' courts, situations may necessitate immediate action. This study examines parental responsibility under Kenyan law and compares it to the system in the United Kingdom, a nation that occupied Kenya until 1963 and is still the source of many written laws in Kenya. Children may be a divine gift, but even gifts require work and care to preserve their usefulness, beauty, or productivity. Despite the importance of raising children, many parents don't take their parental responsibility seriously enough, making it difficult for the child and thereby underpinning their rights and interests. This study investigated the child's right to health in relation to the parental obligation to defend this right in crises. It used a doctrinal approach to the research. It proposed, among other things, that provisions be created in the child's legislation to allow health providers to consider the child's best interests in an emergency without resorting to the courts.

**Keywords:** Responsibility of Parents, Children Rights, Health Worker, Courts System, Kenya, Comparative Study

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## 1. Introduction

The early Roman Family law's central point was the *paterfamilias* who had the responsibility of *patriapotestas* over the dependants and the rest of the family.<sup>1</sup> The world has moved from the *ius vitae necisque*,<sup>2</sup> which empowered a father to deal with his children as his property, and his (the

father's) responsibility was limited to just provision of food, to the world of today, which give the primary responsibility for the child to parents, which includes, looking after, maintaining, educating and instructing their children,<sup>3</sup> this goes on to include provision for food, shelter, clothing, health, and educational requirements. These responsibilities are taken care of by both parents. Suppose both the parents willingly and fully undertake parental responsibilities; in that case, the child should enjoy unconditional love until they turn

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1 See Tufts University, Perseus Digital Library (visited Jan. 24, 2001) <<http://www.perseus.tufts.edu>> [hereinafter Perseus Digital Library]. *Paterfamilias* means "father in the family." *Id.* *Patriapotestas* means the authority of the father over the members of the family."

2 *Ius vitae necisque* was the power of life and death and was only exercised in exceptional circumstances. It was subject to the requirement that a concilium be convened to hear the case and the *paterfamilias* was bound by the verdict that the concilium passed.

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3 Convention on the Rights of the Child, Nov. 20, 1989, G. A. Res. 44125, U. N. GAOR, 44th Sess., Supp. No. 9, at 166, U. N. Doc. A/44/49, 28 I. L. M. 1448 (1989) Article 18 of the Child Convention states "both parents have common responsibilities for the up-bringing and development of the child. Parents... have primary responsibilities for the up-bringing and development of the child. The best interests of the child will be their basic concern."

18. The reality is that some parents tend to avoid taking responsibility when the child is born, most so father; however, the responsibility of a mother is hard to be dispensed with, having carried the pregnancy to terms and delivered the baby. [7]

### 1.1. Background

Article 26 of the Kenyan Constitution guarantees the right to life to every person in Kenya;<sup>4</sup> in the broader interpretation of this article in terms of the child's right, it includes the right to health, which is inextricably related to the development and survival of the child, these child's rights are the responsibility of the parents or the close caregiver of the child. Without proper health, a child cannot fully realize their potential; health is indeed wealth. A child's health is entirely dependent on the parents and their caregiver because they (children) are easily vulnerable to unfavorable health circumstances such as poor nutrition, sanitation, and the environment, they typically have little influence over; hence it is the duty of the parents and immediate caregivers to protect the children. In case of conflict between the child's rights and the parents' duties, the states intervene by using the law to maintain the child's best interest.

The courts in Kenya have pronounced themselves in this regard in the appellant case of JKN vs. HWN. The Court recognized the vulnerability and incapacity of the child to make decisions relating to his health when it held that:

*"All adults have the unalienable right to make whatever decision they want and to live with the consequences. But when the children are involved, some other factors must be considered because a child is incapable of making judgments for himself, and the State is obligated to protect such a person from abuse of his rights when he grows older and disregards those religious views."*<sup>5</sup>

Health workers tendering to children have often moved the courts for an advisory opinion on the best way to ensure that they (children) fully get the needed medical attention, while at the same time, the health worker is not going against the rights of parents to the child, the courts have always complied, however, in case of an emergency that requires a fast response to save the life of a minor, moving the Court in time may not be possible, especially where the judicial system is slow in giving directives. The question then becomes, are there alternatives to judicial procedures in the child's emergency health situation? Furthermore, before performing medical treatment on a child whose parents have withdrawn their consent to medical care, individuals responsible for health care delivery must acquire first court instructions. This article aims to provide answers to these and other related topics.

4 "26. Right to Life - Kenya Law Reform Commission (KLRC)," accessed October 4, 2021, <https://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/192-26-right-to-life>.

5 See "Civil Appeal 32 of 2017 - Kenya Law," accessed October 5, 2021, <http://kenyalaw.org/caselaw/cases/view/148515>.

### 1.2. Responsibility of Parents to a Minor

Parenthood was a term that orthodoxly referred to married couples of opposite gender having children born by them; it connoted the term father and mother; however, in modern days, the term has been redefined to include adoptive parents, natural parents, putative blood parents of the child who have accepted the partitivity of the child and it also includes a person or an agency legally recognized as guardians of a child. Unfortunately, the convention on the Rights of the Child, which is the blueprint for other countries' laws dealing with a child's rights, has failed to define the term parents, even though the word "parent" is mentioned 36 times in the document of the convention.<sup>6</sup>

The Kenyan children's Act has defined the termed parents in section 2 as "the mother or father of a child, as well as any person who is legally obligated to keep a child or has custody of him."<sup>7</sup> the term parents as defined under the Act, include not merely giving birth to the child but the responsibility that comes with it. The United Kingdom Child's right Act has also not directly defined the term parents; however, It has included the father and mother of a child born within wedlock; at the moment of a child's birth, civil partners, and persons recognized as legal parents of a child born after sperm donation, artificial insemination, or other fertility treatment when describing people with parental responsibility.<sup>8</sup>

Before going deep into the child's health and who can consent to the child's treatment, I would like to cover the parental responsibility of the person who has custody of the child.

## 2. Parental Responsibility and Child Maintenance in England

The Children's Act of 1989 given the meaning of parental responsibility as the responsibilities coupled with rights, power, authority, and duties that parents have legally over the child and the child's properties, and even those who do not have parental responsibility but have the custody of the child, are still authorized by the Act to do everything within their ability to safeguard and promote the welfare of the child. Lack of parental responsibility does not stop one from the statutory obligation to provide for the child and have any right to the child's property upon the child's death.<sup>9</sup>

*A family rights group charity<sup>10</sup> opined that*

6 See "OHCHR | Convention on the Rights of the Child," accessed October 5, 2021, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

7 See "The Children's Act, Kenya\_0.Pdf," sec. 2, accessed October 5, 2021, [https://bettercarenetwork.org/sites/default/files/The%20Children%27s%20Act%2C%20Kenya\\_0.pdf](https://bettercarenetwork.org/sites/default/files/The%20Children%27s%20Act%2C%20Kenya_0.pdf).

8 See 'Children Act 1989' s 6 <<https://www.legislation.gov.uk/ukpga/1989/41/section/1>> accessed 5 October 2021.; "The Children Act 1989: 30 Years On," CYP Now, accessed October 5, 2021, <https://www.cypnow.co.uk/features/article/the-children-act-1989-30-years-on>.

9 See Children Act 1989, section 3, Participation, "Children Act 1989."

10 According to the Family Rights Group, "with parents whose children are in

*“Each parent with parental responsibility has the right to make day-to-day choices regarding the child without consulting anybody else with parental duty, except for taking the child outside of the United Kingdom. However, it is still advisable for a person with a parental duty to consult with everyone else about essential decisions such as immunizations, medical treatment, school change, etc. This is especially critical if the judgments may impact contact arrangements. This is because it is typically better for the child if the people in their lives agree on arrangements made for them.”<sup>11</sup>*

In the case of *Gillick v West Norfolk and Wisbech Health Authority*, the child's welfare was pronounced by Lord Scarman as the driving force of parental responsibility. In the ruling, Lord Scarman made the following *Obiter dictum*:-

When a court has a question about the care and upbringing of a child, in selecting the order to be created, it must prioritize the wellbeing of the child. A concept that controls and restricts the exercise of parental rights to custody, care, and control. It is a theory entirely consistent with the parent's legal status as the child's natural guardian. It, however, brings out the fact that parental rights must be applied according to the welfare concept and can be questioned if not overruled.<sup>12</sup> Nevertheless, which shows that the rights and duties given to the parents are dependent on the child's welfare, the parents can exercise the rights and duties to ensure that the child's welfare is provided and maintained. [8]

Parental responsibility reduces as the child gets older, it starts with the duties to provide basic needs and control to the child, and as the child gets older, it reduces to just giving advice. [16]

### 2.1. Acquiring Parental Responsibility

In England, the child's biological mother automatically gets the parental responsibility of the child.<sup>13</sup> Moreover, a married father to the child's mother also automatically acquires the parental responsibility for the child when the child is born, and the responsibility is not lost in case of a subsequent divorce.<sup>14</sup>

A second female partner in a civil relationship or married to the mother of the child also automatically gains the parental responsibility for the child if the marriage was in existence at the time the embryo or donor's sperms and or eggs were planted or artificial insemination done to the mother of the child. However, the responsibility ceases if the female partner shows that she did not consent to the

insemination or plant the embryo to the child's mother.<sup>15</sup>

The term second female partner is recognized in Sections 42 and 43 of the Human Fertilisation and Embryology Act 2008, modified by the Marriage and Civil Partnership (Scotland) Act 2014 and the Civil Partnership Act 2004 (Consequential Provisions) Modifications 2014 Order.<sup>16</sup> When a female civil partner or spouse bears a child as a consequence of donor insemination (anywhere in the world), she is legally recognized as the child's mother, and her civil partner or spouse is automatically recognized as the other parent (the second female parent) unless the other civil partner does not consent to the mother's treatment. For example, suppose a same-sex female couple is not married or in a civil partnership; in that case, one of the women has a child as a result of DI [Donor Insemination] in the UK's licensed clinic, and the couple has in place when the sperm or embryo is transferred, resulting in conception, if the other lady has current notifications of permission to being regarded as a parent, she will be a legal parent (i.e., the second female parent).<sup>17</sup>

At the time of their children's birth, for unmarried fathers, the amendment of the Children's Act on 1<sup>st</sup> December of 2003 has included them in acquiring automatic parental responsibility for their children; however, only if they are included on the child's birth certificate.<sup>18</sup>

If the father's or a second female's names are not included in the birth certificate, they can still acquire parental responsibility by following ways:

- a) re-registering the child's birth certificate to include their names in accordance with section 10A of the Births and Deaths Registration Act 1953<sup>19</sup>
- b) Signing a special agreement for parental responsibility with the mother (see section 4.1);
- c) Getting a court order for the same (see section 4.2)<sup>20</sup>
- d) Getting into civil partnership or marriage with the mother of the child<sup>21</sup>
- e) By approaching the Court to be named in the child's arrangement order for residence;<sup>22</sup> order for contact<sup>23</sup>

### 2.2. Step-Parent's Status Towards Stepchildren

Stepparents denote that the person is married to the child's biological parent. The responsibility of stepparents to a child is not automatic unless they are legally married to the

need, at risk, or in the care system, and with members of the larger family who are raising children unable to remain at home," [About Us, Family Rights Group, webpage accessed on 10 October 2021]

11 Family Rights Group, Parental Responsibility, factsheet 2, 29 October 2014, p5

12 1986 1 FLR 229, quoted in Hershman and McFarlane, Children Law and Practice, para A51

13 Children Act 1989, section 2

14 Children Act 1989, section 4 (1) (a)

15 See Children Act 1989, section 2 (1A)

16 SI 2014/3229

17 Human Fertilisation And Embryology Act 2008-EN, p30, paras 179-180; "2008: Human Fertilisation and Embryology Act – It's Love That Defines What Makes a Parent," Stonewall, May 22, 2019, <https://www.stonewall.org.uk/our-work/campaigns/2008-human-fertilisation-and-embryology-act-%E2%80%99s-love-defines-what-makes-parent>.

18 See, Children Act 1989, section 4

19 See, Children Act 1989, section 4. Parental responsibility runs from the date of the registration rather than the birth.

20 See, Children Act 1989, sections 4 and 4ZA

21 See, Legitimacy Act 1976, sections 2 and 2A

22 "Hershman and McFarlane," para. B281.

23 See, Children Act 1989, section 12

biological parent;<sup>24</sup> cohabiting together does not qualify one to be legally responsible for a child.<sup>25</sup> Stepparents are permitted by the Children's Act of 1989, under section 3 (5), to do everything possible within their power to ensure that the best welfare of the child is protected and provided to the child; however, stepparents generally lack parental responsibility to their stepchildren, even though in the United Kingdom, a stepfamily is estimated to be about 10% of the family with children depending on them,<sup>26</sup> and the trend of stepfamilies is growing very fast. [9]

By section 4A (1) (a) of the Children Act 1989, stepparents are no longer required to seek Court's approval for a parental responsibility agreement; they can have a special arrangement with the biological parents of the child for the parental agreement, however, if the biological parents are not consenting to that arrangement, the stepparent can seek Court's intervention in getting the parental responsibility for the best interest of the child.<sup>27</sup>

### 2.3. How Others Can Acquire Parental Responsibility

Others who are not biological or step parents of the child can acquire the responsibility for them in England through the following ways;

- a) If they are neither the parents nor guardians of the child, they can acquire parental responsibility by their names being added to the child's arrangement order for both contact and residence. [10]
- b) They can adopt the child, which will end other's parental responsibility for the child and vest it all on the adopters; this is in accordance with section 6 (1)<sup>28</sup>
- c) By being appointed the legal guardian of the child, either by the Court or by those who have the parental responsibility for the child. [8]

Local authority usually gets parental responsibility when a child is taken to them for care or an emergency protection order. The adoption agency also has parental responsibility for the child under their care before the legal adoption procedure is finalized.<sup>29</sup>

### 2.4. Limitation on the Power Under Parental Responsibility

The exercising of the power, duties, and authority over a child under parental responsibility are limited in the

following:

- a) Prohibited steps order; An order given to stop moving the child from one place to another, including the change of a place of residence, school, or even out of the country; this order can be given against anyone, including the biological parents of the child;
- b) Specific issue order; this is an order to respond to a specific question relating to the child; it is given to settle a dispute related to the child's schooling, medical attention, or religion the child should be part of.<sup>30</sup>
- c) Suppose a person who is not an unmarried spouse or second female partner of the child-mother has acquired a child arrangement order. In that case, that person authority, power, and right over the child can be restricted by denying the person power to grant consent for the adoption of the child, appointment of the guardian, moving the child out of the United Kingdom for more than a month or change the surname of the child, unless with the permission of everyone having parental responsibility for the child or the order given by the Court.<sup>31</sup> However, moving the child out of the United Kingdom for less than a month by a person having parental responsibility is permitted<sup>32</sup>

### 2.5. Order for Care

When a court makes an order for care for the child and places the child under the care of a local authority, that local authority acquires the parental responsibility; however, this does not end any other parental authorities held by others, even though others can now exercise that parental responsibility with the permission of the local authority and only if it furthers the welfare of the child,<sup>33</sup> which means that local authority is empowered to override others with parental responsibility including the biological parents of the child, as long as the child is under the protective care of a local authority.<sup>34</sup> However, a local authority power is limited by some acts of parliament which grant parents some power, rights, authority, responsibility, and duty like the education Act.<sup>35</sup> Those having parental responsibility for a child are still permitted to do what is reasonable for the best interest of the child<sup>36</sup>

The Court can give an emergency Protection Order for a limited period of eight days at the request of the police office or a local authority, and the applicant, in that case, is allowed to do everything necessary to protect the welfare of the child.<sup>37</sup> The short duration of the order is meant to stop the applicant from making long-term plans for the child, like

24See, Expert Participation, "Matrimonial Causes Act 1973," Text (Statute Law Database), sec. 23, accessed October 8, 2021, <https://www.legislation.gov.uk/ukpga/1973/18/section/23>.

25 "Best Legal Consultant in London UK : Step-Parent after a Divorce," *Bowling & Co Solicitors* (blog), June 14, 2018, <https://www.bowlinglaw.co.uk/rights-step-parent-divorce/>.

26 "Families and Households in the UK - Office for National Statistics," 4, accessed October 8, 2021, <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriage/s/families/bulletins/familiesandhouseholds/2015-11-05>.

27 See, Children Act 1989, s 4A (1) (a) introduced by s 112 of the Adoption and Children Act 2002.

28 "Hershman and McFarlane," para. A239.

29 Family Rights Group, Parental Responsibility, factsheet 2; <https://frg.org.uk>, "Advice Sheets," *Family Rights Group* (blog), 4, accessed October 10, 2021, <https://frg.org.uk/get-help-and-advice/advice-sheets/>.

30 See, Children Act 1989, section 8

31 "Hershman and McFarlane," paras. B292 and B301.; Children Act 1989, section 13

32 Children Act 1989, section 13 (2)

33 Children Act, section 32; "Hershman and McFarlane," para. A234.

34 Family Rights Group, Parental Responsibility, p7, 10 October 2021

35 "Hershman and McFarlane," para. A234.

36 "Hershman and McFarlane," para. A234.

37 Children Act 1989, section 44 (5) (b)

changing the school arrangement.<sup>38</sup>

## 2.6. Order for Adoption or Placement

This occurs, or the order is issued, when the child's parent does not consent to the child being put for adoption, it is a short-term order giving the adoption agency and the potential adopters the custody of the child and the parental responsibility, while the matter is still in Court, the order does not remove the parents or others from having the parental responsibility for the child. However, it can be limited until the case is decided.<sup>39</sup>

## 2.7. Special Guardianship

A person granted a special guardianship can exercise the parental responsibility to exclude others with the same duty or responsibility, except another special guardian.<sup>40</sup> Even though others with parental responsibility are now limited under this type of guardianship, They can ask the Court to overturn the order or permit them to perform their duties and responsibility under a specific issue order.<sup>41</sup> During the existence of this special order, the child cannot be removed from the territory of the United Kingdom or change their names without the permission of every person with parental responsibility or by the leave of the Court.<sup>42</sup> However, under the Children Act 1989, section 14C (4), a special guardian can take the child from the United Kingdom for three months.

## 2.8. Losing Parental Responsibility

The children Act of 1989 of the United Kingdom does not permit surrendering or transfer of parental responsibility; however, it permits the making of arrangements by the person with the parental responsibility and another person to perform all or some of the duties of the parents.<sup>43</sup> Thus, parental responsibility acquired through adoption generally extinguishes others' parental responsibility, including those held by the birth parents.

A mother, father of the child at the time of birth of the child, and a second female partner in a civil union or married to the mother of the child can lose the parental responsibility for the child if an order for the surrogate child is made for the mother of the child.<sup>44</sup> An acquired parental responsibility can come to an end only by order of the Court, especially in cases of an unmarried father whose name is on the birth certificate or a second woman not in any union or married to the mother or a stepparent<sup>45</sup>

### 2.8.1. Parental Responsibility for a Child's Health: A Legal Framework

Parental responsibility is essential in almost every child's life, but it is especially challenging in child health problems. Although parental duty is not stated in Article 24 of the (The Convention on the Rights of the Child) CRC, parents are required to offer and make use of living situations necessary for the child's growth.

National laws recognize parental responsibilities in preserving their child's right to health in addition to the CRC. Section 23 of the Kenyan Children's Act puts an obligation on parents to maintain the child, mainly to provide him with proper medical care, including immunization,<sup>46</sup> as one of the three critical components of parental responsibility. In England, there are over 42 rights granted to children, including the right to health.<sup>47</sup> The CRC under section 13 (3) imposes the following duties on members states;

- a) Make every effort to lower newborn and child death rates;
- b) ensuring the provision of required medical support and health care services to all children, with a focus on the growth of primary health care;
- c) make sure that appropriate nutrients and safe drinking water are available;
- d) ensuring that proper hygiene and environmental sanitation are provided;
- e) battle illness and malnutrition within the context of primary health care by utilizing relevant technologies;
- f) ensuring that pregnant and breastfeeding moms receive adequate health care; and
- g) assist the mobilization of national and local community resources to develop primary health care for children through technical and financial means.

The law requires parents to guarantee that their children use government-provided health treatments. In addition, every parent, guardian, or person in charge of a child under two years must guarantee that the child receives full immunisation. Failure to do so constitutes a felony [14].

### 2.8.2. Parental Responsibility in Child Health Matters: What Are the Boundaries

In general, parents act as user representatives for their children until they can completely represent themselves. As the overarching guiding concept, until their child reaches the age of majority, parents are responsible for granting consent to health and medical exams and treatments on their behalf. Furthermore, parents have the legal right to participate in decision-making about their child's health care. This indicates that parents can influence decision-making over individual changes to their child's care, examinations, and treatments. This is consistent with family-centred care strategies, which anticipate parental participation in the coproduction of children's health care in collaboration with health providers. [18] Parents have essential information

38 Hershman and McFarlane, Children Law and Practice, para C541

39 Adoption and Children Act 2002, section 25

40 Children Act 1989, section 14C (1) (a)

41 Family Rights Group, DIY Special Guardianship Orders – information for family and friends carers, factsheet 19, 10 October 2021, p5

42 Children Act 1989, section 14C (3)

43 Children Act 1989, section 2 (9)

44 Hershman and McFarlane, Children Law and Practice, para A243

45 Children Act 1989, sections 4 (2A) (fathers) and 4ZA (5) (second-female parents); Children Act 1989, section 12 (4); Children Act 1989, section 4A (3) (step-parents); Hershman and McFarlane, Children Law and Practice, para B281

46 See "The Children's Act, Kenya\_0.Pdf," sec. 23 (2).

47 "Children's Human Rights | Nidirect," October 30, 2015, <https://www.nidirect.gov.uk/articles/childrens-human-rights>.

about their children and play a significant role in their children's health care. Although parental engagement in decisions regarding their child's health care is commonly acknowledged, parents do not participate as often as they want [1], resulting primarily from the complications linked with parental responsibility for their children's health.

Essentially, the government, not the child's parents, has a significant obligation to provide health care services to the child and safeguard the child's health. Article 24 of the Convention on the Child's Rights requires the State to provide the most outstanding practicable level of health and facilities to treat disease and health rehabilitation. States Parties are also obligated to guarantee that no child is denied the right to such health care services. The child's parents' main job is to ensure that the youngster uses the available services.

Even though the parents and the government are in agreement that the government must provide health care facilities, the disagreement is about who can give consent on the medical care that a child should get, is the obligation limited to transporting the child to the hospital and returning him once medical care has been administered? Does it include being told about the child's diagnosis, the best therapy for the child, and the option of submitting to the chosen treatment? The majority of cases in this field are around parents' rights to knowledge and control over decisions affecting their children's health. This was the situation in the case of *Esabunor & Anor v Faweya & Ors*, [15] *LPELR 46961 (SC)*, where the parents of a one-month-old infant tried to exert control over the medical treatment of their critically ill child by refusing blood transfusions for the youngster, citing religious beliefs.

In many Western nations, parents have a legal right to participate in decisions regarding their child's health care to guarantee that health care is delivered in line with the requirements and preferences of the children and families. From the standpoint of health promotion, this gives parents the chance to have more personal control over their child's health treatment and their living situations. This is in accordance with the World Health Organization's (WHO) approach for health promotion, which advocates for supporting circumstances and introducing salutogenesis in society. [14]

Whatever the parents' responsibilities regarding their children's health, parental power is not absolute. When the option is detrimental to the child's best interests, the government may step in, aligning with the notion of *parens patriae* (which means "father of the country" in Latin). In law, this refers to the State's ability to monitor and intervene against an abusive or negligent father, as well as to serve as the "father" of any child or person in need of protection. The Supreme Court of the United States held that in *Prince vs. Massachusetts*,<sup>48</sup> both religion and parenthood are not exempt from this restriction.

Section 9 of the Children Act in Kenya, the obligation to provide the most effective health care possible for the child is jointly imposed on the government, parent, guardian, institution, service, agency, organization, or entity in charge of the child's care.<sup>49</sup> Where the child's right to health is likely to be violated due to his parents' failure to carry out their responsibility to the child, the government, institution, or individual responsible for providing the child with such health care can intervene in the best interests of the child and ensure that the child's health is protected. Unfortunately, parental responsibility for his child's health care has become a weapon to defend the parents' interests rather than the child's, exposing the youngster to critical health conditions and, in some cases, inescapable death. As a result, health providers have repeatedly confronted parents of their underage patients in health care to reduce child death rates and long-term health difficulties. Keeping in mind their legal need to respect parental responsibility, Some of these health care experts force parents to sign per medical advice, while others seek state involvement through the courts to preserve the child's life. This might happen when clinicians decline to initiate or continue fruitless therapies or when therapy is not deemed in the patient's best interests.

Cases may also be submitted to the courts when physicians believe therapeutic alternatives exist, but parents refuse to consent. Parental disagreements are also possible. The child's best interests are vital, and their wellbeing should always take precedence. However, as parents' expectations rise and physicians fear a lawsuit if they act against their parents' desires, the Court's view will be more sought. [11] To resolve disputes between parents and health care professionals, the Court must balance a parent's rights against the child's interests. The projected outcome of the illness or condition is a significant aspect in this process; if the planned medical therapy has a high likelihood of success and the expected consequence without treatment is death, courts are more inclined to intervene and overturn parental decisions; If the planned medical therapy has a low chance of success or the expected end is not death, courts typically affirm the parents' decision. In general, weighing interests favours the child, and the government authority only claims the child's rights when the child's life is in danger. [2] Obtaining a court order without giving proper weight to the parent's views and exhausting all dialogical possibilities can harm the family unit and the children.

According to Kopelman and Deville, the State's forceful involvement in the prerogatives of parents is justifiable for the sake of society and children when there is clear proof that the acts or decisions of parents pose a substantial risk to children [5]. Furthermore, Sher points out that negligence, which is the foundation for the State's intervention in many healthcare instances, is not always the case; [17] failure to offer a minimal level of care that the community can endure has been defined. For example, in *Newmark v. Williams*, 588

48 "Prince v. Massachusetts, 321 U.S. 158 (1944)," Justia Law, accessed November 18, 2021, <https://supreme.justia.com/cases/federal/us/321/158/>.

49 "Children-Act.Pdf," accessed November 18, 2021, <http://www.childrencouncil.go.ke/images/documents/Acts/Children-Act.pdf>.

*A2d 1108 (Del 1990)*, the Delaware Supreme Court ruled, 'decided favour the parents. The Newmark boy was diagnosed with Burkitt's lymphoma and was given a 40% chance of life if he received chemotherapy treatments. Rather than subjecting him to an unclear and unpleasant medical therapy, his parents decided to get the treatment through their church. The State opposed and sought interim custody of the child. The Court ruled that the parents had the right to refuse the therapy. The spiritual therapy exemptions, according to the Court, reflect, in part, "this State's policy for the quality of life," in the caring and loving environment of their family, a critically ill child may have, against the pristine hospital atmosphere sought by physicians wanting to give excruciatingly painful and perhaps life-threatening therapies with dubious efficacy.

### **2.8.3. In Emergency Medical Situations, Court Proceedings Are Not Necessary**

By taking an interventionist approach to child-related matters, the courts have significantly decreased the abuse of parental power over decisions affecting their children's health. Although requesting judicial clearance is essential to avoid arbitrary acts against the child's parental rights, Applying to and waiting for the Court to make an order before health practitioners make confident choices in treating an ill child may be a pointless endeavour if the child's status is exceedingly severe and cannot withstand even the slightest delay in the medical procedure.

In developing countries like Kenya, the courts are fraught with many problems ranging from lack of infrastructural facilities to shortage of human resources to expedite proceedings. However, under Article 3 of the CRC and Section 9 of the Children's Rights Act, the law has already granted such health practitioners the authority to act in the child's best interests. Therefore, once the person in charge of the child's health is convinced that the therapy to be delivered is in the child's best interests, there may be no need to go to Court before preserving a child's life, especially in life-threatening conditions.

## **3. The Legal Position in Kenya**

### **3.1. Legal Position Before the Constitution of Kenya 2010**

Before the coming in to force of the 2010 Kenya's constitution, mothers had the priority in parental responsibility of minor; [19] the children supported this Act 2001, under section 24 (3), which stated that "If the child's father and mother were not married at the time of the child's birth and have not since married, the mother shall have parental responsibility in the first instance." The father had to apply to Court to have custody of the child, which would be granted only when he does not have any special agreement with the mother of the child and under the condition that the father had not denied paternity and maintained or lived with the child for at least 12 months. This means that the father's responsibility to the child is not automatic. [19]

### **3.2. Legal Position Under The Constitution of Kenya 2010**

Marital status is no longer a factor in parental responsibility in Kenya, and this has been made possible by the 2010 Kenyan constitution.<sup>50</sup> Therefore, Every child has the right to parental care and protection, including the mother and father's parental obligation to provide for the child whether they are married or not; this is a right of a child guaranteed by the 2010 Kenyan Constitution, in article 53 (e) which states that all children have the right to parental care and protection, includes the mother's and father's equal responsibilities to provide for the kid, regardless of whether they are married or not. [19]

The Court pronounced itself clearly on the matter of parental responsibility when section 24 and 25 of the children Act in Kenya were questioned as against the Constitution, in the case of *Zak & Another vs. The Attorney General & Another* (2013) eKLR; the petitioner argued that the two sections were against Article 27 (1) which guarantees equality in the eye of the law which includes equal legal protection and advantages any form of discrimination, and justice *Mumbi Ngugi*, held that, the two sections (24 and 25) of the children Act were in contravention to the Constitution as they bestow the responsibility of child born out of wedlock, entirely on the mother. [19] The decision was given by *Mumbi Ngugi J*, essentially made sections 90 (a) and (e) along with section 24 of the Children Act, which puts the whole responsibility of the child on the mother as unconstitutional. [19]

The Judge went ahead to advise that the Children Act and the provisions of Section 7 of the Constitution's Sixth Schedule have to be interpreted to bestowing parental responsibility on both of their biological parents, whether they were married or not at the time of the child's birth, hence the provision of the Children Act stated above were declared unconstitutional, hence not applicable. [19]

The Judge tied her decision to Article 2 (4) of the Constitution, which makes any law inconsistent or contravenes the Constitution void ab initio to the extent of inconsistency as it prevents the full realization of what is in the best interest of the child. [19]

### **3.3. Parental Responsibilities as Provided Under the Children Act, 2001**

The responsibility of parents outlined in this Act includes the authorities, duties, rights, responsibility, and power a parent has over the child, including a property that by law belongs to the child. A parent's duties to the child include providing food, medical care, clothing, shelter, guidance, and education.<sup>51</sup> In addition, the duties of parents extend to religious guidance, which includes social, cultural, moral, and other societal value; protecting the child from any abuse,

50 Anthony Mwicigi, Principal Magistrate, Milimani Law Courts. "A Discussion on Parental Responsibility and the Constitution." A paper presented at the Law Society of Kenya CLE Seminar in Nyeri. Accessed on [www.lsk.or.ke](http://www.lsk.or.ke) on 6<sup>th</sup> October, 2021.

51 "ChildrenAct\_No8of2001.Pdf," sec. 23.

neglect, and discrimination; parents are responsible for naming the child; be the guardian or appoint one for the management of the child's property, to benefit the child; the responsibility of a parent is wide enough to restrict the immigration of the child from Kenya, and in the event of the child's death, the parents are responsible for performing last rites and burial or cremation of the remains of the child.

### **3.4. Analysis of the Provisions of the Children Act, 2001 and the Constitution of Kenya 2010 on Parental Responsibility**

#### **3.4.1. The Children Act**

The responsibility of parents is covered in Part III of the Act, which contains sections 23- 29. The Act defines parents' responsibility as "*all the duties, rights, duties, obligations, and authority that a parent of a child has by law over the child and the child's property in a way compatible with the child's increasing capacities.*"<sup>52</sup>

The Act under section 23 (3) bestows power on a cabinet secretary to make necessary regulations that help in the dischargement of parental responsibility by the parents whose nature of work takes them away from home for a substantial period. This ensures that the child is not denied the attention and love from a parent due to work conditions.

According to section 23 (4) and (5), the fact that a person does not have parental responsibility but has other obligations towards the child will not exclude that person from providing the statutory maintenance of the child and the right the person may have concerning performing the last rite of the child in the event of death, including being an executor of the child's property. This shows that the Act bestows parental responsibility to biological parents and any other person legally having custody of the child. The Act considers the child's best interest, which is why it has given parental duties to non-biological parents. [4, 12]

The best interest of a child is a guiding principle for courts worldwide; when it comes to deciding on matters touching on a child, courts are the ultimate guardians of the minors and have the power to make the final determination of the child's welfare.

The Act in section 24 (1) provided the responsibility to biological parents by stating that, when parents are married to each other, they automatically have equal parental responsibility, in section 24 (2), in case the parents, when the child was born, were not married to each other, they shall acquire equal parental responsibility for the child.

Section 24 (3) states that, where the child's biological parents were not married at the time of the birth and have not gotten married, the child's mother will have priority parental responsibility, and the father can acquire responsibility under section 25 of the Act. The Act under section 24 (4) envisages that responsibility for a child can be given to more than one person simultaneously. Following section 24 (5), that responsibility will not end at any time, and everyone with parental responsibility can work alone without consulting the

other if the action is for the child's benefit.<sup>53</sup> According to section 24 (8), Parental responsibility cannot be transferred by one to another, even though an arrangement can be made for some duties to be performed by someone else who also has parental responsibility for the child.

Section 25 (1) of the Act permits a biological father not married to the child's mother to acquire parental responsibility by petitioning the Court or making a special arrangement with the child's mother. A father can also acquire parental responsibility under section 25 (2) if he has cohabited with the mother for a period not less than 12 months, has accepted the child's paternity, and has maintained the child for that period. In addition, a parental agreement made between a father and a mother of the child can be terminated if the child or any person having parental responsibility petition the Court and obtain an order.

In case biological parents having parental responsibility for the child dies, the living parent would continue being responsible to the child either alone or with an appointed guardian of the deceased parent; however, the surviving parents can apply to Court to revoke the appointment of the guardian by the deceased parent, if they have a reason to think that the guardian appointed is not fit to be responsible for the child, at the same time, the appointed guardian or relatives of the deceased parents can apply to Court for the revocation of the rights of the surviving parents if they have a reason to think that the person is not fit to be a parent.<sup>54</sup>

The responsibility of parents to the child can be extended past the age of 18 years if the person having the parental responsibility applies to the Court, and the Court deems the circumstance of the application to be special, the order would be given<sup>55</sup>

#### **3.4.2. 2010, Constitution of Kenya**

The Constitution of Kenya is not silent on children's rights, and it outlines them in article 53. According to Article 53 (1), every child has to have a name and nationality the moment they are born; they are guaranteed a free and compulsory primary education; necessities like clothing, food, shelter, and affordable healthcare; the Constitution implores on parents and those with parental responsibility to protect minors from abusive cultural practices and labourers that are harmful to the child; the child should not be detained unless it is essential to do so and if that happens, it should be for a very short period and not be mixed with adults and the child's gender must be considered to avoid the possibility of sexual exploitation.

When a decision affecting the child is being made by those having custody of them, especially those with parental responsibility, they must consider what is in the child's best interest.<sup>56</sup> The Constitution, under Article 53, shows that the protection and provision for the child is a responsibility taken

<sup>53</sup> "ChildrenAct\_No8of2001.Pdf," sec. 24 (6).

<sup>54</sup> "ChildrenAct\_No8of2001.Pdf," sec. 27 (2).

<sup>55</sup> "ChildrenAct\_No8of2001.Pdf," sec. 28.

<sup>56</sup> "Const2010," Article 53 (2), accessed October 7, 2021, <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>.

<sup>52</sup> "ChildrenAct\_No8of2001.Pdf," sec. 23 (1).



seriously by law, and the highest law of the land has recognized it.

### 3.4.3. Acquisition of Parental Responsibility Under in Vitro Fertilization (IVF) Technology in Kenya

The definition of the term “parent” given by the Children’s Act 2001, as a mother and father of the child, is not clear whether it includes a situation where a child is born through other means like gamete<sup>57</sup> or embryo donation since the straightforward interpretation of the definition is where a child is born through a natural means.<sup>58</sup> The strict interpretation of the definition seems to leave out couples who get their child through gamete or embryo donation, or sperm donation, especially the child’s legitimacy would be in question, especially if the woman were to get artificial insemination without permission from her husband.

Kenyan law appears to nearly invariably consider the husband the child’s father, regardless of whether he agreed to the wife’s insemination with the donor’s sperm. Although, this leads one to question the reason a man would be forced to provide for children born by other men through artificial insemination, what would ensue in a case where a father is infertile, and a child is conceived through IVF, would still a man be expected to maintain the child?, the answer seems to lie in the Kenya Evidence Act, under section 118, in which it states that a child born when the mother and father are married or within 180 days of the dissolution of marriage if the mother was not with another man during that period, would be presumed to be the man’s legitimate child, unless the father can demonstrate that no sexual intimacy occurred with the child mother during the time that child could have been conceived. [13]

Human Fertilisation and Embryology Act of 1990 (UK), under section 28, foresee the rising of the question of paternity of the child conceived through assisted human reproduction, even though through section 3 of the Judicature Act, it is applicable in Kenya, the UK Act fails to deal with the issue of the presumption of paternity under section 118 of the Kenyan Evidence Act.<sup>59</sup> Section 28 (5) of the Human Fertilisation Embryology Act 1990 (UK) seem to ignore the consent of a husband in regards to the legitimacy of a child born through the human-assisted reproductive system, as read with section 118 of the Evidence Act of Kenya, which assumes any child born when the man and woman are married, is a biological child of the man. Kenyan courts have yet to deal with a case where a child is conceived through artificial insemination with sperm from another man without a father’s consent.

In 2008, the United Kingdom approved the Human Fertilisation and Embryology Act, which defines legal

parents of a minor after sperm donation, artificial insemination, or another type of fertility therapy to include same-sex couples, married or unmarried couples of the opposite sex. Therefore, the maternity of the mother is not in question under the Act; however, the other partners right to the child is based on the following factors: whether the insemination took place informally under a private arrangement; or at a licensed clinic in the UK; whether or not the mother is married or in a same-sex civil partnership; and whether the mother’s partner agreed to the mother being inseminated or to the IVF treatment.

The Kenyan Constitution is not clear about the responsibility of a father of a child conceived through artificial insemination; however, according to Justice Mumbi, in the case of *ZAK v MA (2013) eKLR*, she made the following obiter dictum in paragraph 35, while delivering her judgment,

*“When seen through the lens of the Constitution, notably Article 53 (2), which states that The best interests of the child must come first, in all matters involving the child, in such cases, I think that a stepparent must be judged to have a legal obligation to exert parental responsibility for their stepchild, as specified in Section 23 of the Children Act, it would be an affront to decency and Constitutional ideals for a party who has had a connection with a child similar to that of a father or mother to abdicate all obligation and duty to maintain the child when he or she falls out with the child’s parent. Such accountability, however, would be determined by the facts of each case, and the relationship that is shown to have existed between the person in question and the children in respect of whom they are sought to be charged with parental responsibility.”*<sup>60</sup> This essentially means a man married to the woman is responsible to the child whether the child is biologically his or not.

## 4. Comparison and Contrast of the System in England and Kenya

“Ideas can fly. No significant judicial system has been able to claim independence from foreign influence.”<sup>[6]</sup> Although these remarks are more than thirty years old, they are still as relevant now as they were then. The Children’s Act<sup>61</sup> did not evolve in a void. The Act came into being due to developments within Kenya’s legal system,<sup>62</sup> international law<sup>63</sup>, and foreign law’s influence. [20] The Kenya Law

60 “ZAK & Another v MA & Another [2013] EKLR — Youth And Corruption Blog.”

61 “ChildrenAct\_No8of2001.Pdf.”

62 This growth has resulted in revolutionary changes in Kenya’s parent-child relationship, particularly in the areas of guardianship, care, and contact.

63 “Despite its newness, the African regional [human rights] system is the most forward-thinking of all regional systems, with the potential to significantly contribute to the advancement of international human rights legislation and scholarly discourse on the issue. The African human rights system is the first to establish a treaty expressly dealing with children’s rights and concerns, allowing for the promotion, protection, and monitoring of the child’s rights and welfare, and implicitly requiring everyone to execute tasks. It expressly states that parents/guardians and children must fulfill their obligations. It is consistent with international developments; the [CRC] has been accepted virtually unanimously...

57 A mature male or female germ cell with a haploid chromosomal set capable of beginning the development of a new diploid person by fusion with an opposite sex gamete

58 Lucky Suerte, “Parental Responsibility towards a Child in Kenya,” accessed October 7, 2021, [https://www.academia.edu/33195731/Parental\\_Responsibility\\_towards\\_a\\_Child\\_in\\_Kenya](https://www.academia.edu/33195731/Parental_Responsibility_towards_a_Child_in_Kenya).

59 Md and PhD (Cand.).

Reform Commission<sup>64</sup> looked at the legal provisions found in other countries governing the parent-child relationship when deciding what should be incorporated into the Children's Act; the reason the Act dealing with children in Kenya is very similar to the one in the United Kingdom, some of the similarities and differences are as follows;

When a child is involved in a court's proceedings, the best interest of the child is paramount [3]; the same is the case in England and Kenya, the system in the two countries puts the interest of the child first, and the courts' decisions in matters involving children are given in such a way that the child is protected and fully catered for.

In both countries, the responsibility of the biological parents to the children is automatic at the birth of the child. The duties involved are similar: the provision of basic needs and education.

Kenyan system does not recognise same-sex relationships, and, under Article 45 (2) of the 2010 constitution, it recognises only marriage between opposite sex; for that reason, same-sex couples are not recognised as parents in Kenya, they do not have a responsibility towards a child; this is not the case in England, same-sex couples are recognized in England and allowed to adopt or have children with the help of the science, and as discussed above, they get responsibilities when they marry the child's biological mother.

Furthermore, Kenya is yet to have a law that deals with having babies with the help of science, so the area of men having responsibility for the child they have not fathered is still grey; it is an area that if it comes up, the courts in Kenya will have to rely on the decision made in England and Human Fertilisation and Embryology Act 2008, as modified by the Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions) Modifications)) 2014 order.

## 5. Conclusion

The above research work has brought out clearly that before the Court of law, when a child is involved, the welfare or what is in the child's best interest is paramount in assuring the child's protection, care, and maintenance. Parental responsibility is a legal duty that both parents or anyone granted the responsibility must provide to the child. The courts in Kenya are yet to deal with matters touching on IVF, but the courts in England are very well versant with the matter, and it is enshrined in their laws; Kenyan courts can rely on the decision given by courts in England in dealing with those matters, especially in safeguarding the best interest of the child while deciding on the matters dealing with children.

The term "gillick competent" refers to a child." when they

are judged to have adequate comprehension and intellect to comprehend their planned management properly. Before they attain this level of competence, choices about their physical and emotional wellbeing must be made on their behalf, including choices about their medical care. Parents are thought to be the finest people to make these decisions since, above all, they should have their child's best interests at heart. However, as the case law demonstrates, there are times when parents' actions are not perceived to be in their child's best interests, and the courts may be requested to interfere at this stage. As a result of the procedural bottlenecks encountered in the Court, a child in an emergency health crisis is at danger of mortality, and as such, this study suggests that:

- a) Where a delay in obtaining a court order would cause irreversible injury or death to the child, the health officer or any other person responsible for the child's health care must, in the best interests of the child, provide the necessary treatment without recourse to the Court.
- b) A provision should be introduced to the applicable statute requiring that any therapy recommended by the health officer be certified by his superior in office or, in the absence of a superior, by a government-approved medical officer appointed only to certify such treatment.
- c) When a health officer works in the child's best interests within a reasonable degree of competence and following the ethics of his profession, the law makes provisions to protect him against an unwanted lawsuit.
- d) There is a need to clearly define and streamline the level of parental participation and control over the health care provided to their children.

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The [ACRWC] embodies the 'African' notion of human rights... The Children's Charter takes into account the qualities of African cultural heritage, historical background, and African civilizational values, which should inspire and characterize their thought on the notion of child rights and welfare."

64 "Kenya Law Reform Commission KLRC," Kenya Law Reform Commission (KLRC), accessed November 15, 2021, <https://www.klrc.go.ke/>.

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