



# THE CHILDREN ACT 2022

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## BACKGROUND



- ▶ The process of amending the Children Act 2001 was necessitated by the need to align it to the Constitution of Kenya 2010, the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and other relevant international instruments relating to children.
- ▶ There was also a need to address emerging issues affecting children in Kenya and gaps identified during the implementation of the Children Act 2001.
- ▶ The Act also seeks to address some of the emerging issues such as ; radicalization, online abuse, deinstitutionalization, intersex children, inheritance and diversion for children in conflict with the law.

## INTERPRETATION



- ▶ “**Act**” means the Children Act, Cap 141.
- ▶ “**Child**” means and individual who has not attained the age of eighteen years.
- ▶ “**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to children’s affairs.
- ▶ “**Council**” means the National Council for Children’s Services.
- ▶ “**CCIs**” means Charitable Children Institutions.
- ▶ “**PBO**” means Public Benefit Organisation.
- ▶ “**CWP**” means Child Welfare Programmes.
- ▶ “**CEO**” means Chief Executive Officer.

## CITATION- the Children Act, 2022



AN ACT of Parliament to give effect to Article 53 of the Constitution; to make provision for children rights, parental responsibility, alternative care of children including Guardianship, Foster Care placement and Adoption; to make provision for Care and Protection of children and children in conflict with the law, and regulate the administration of children services; to establish the National Council for Children's Services and for connected purposes

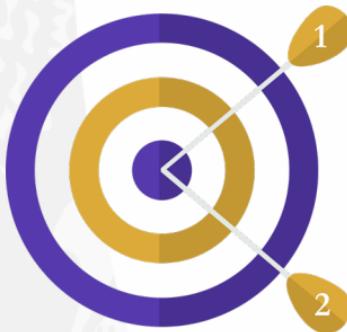
### Date of Assent:

6th July, 2022

### Date of Commencement:

26th July, 2022

## Objectives of the Act- Section 3



To give effect to the provisions of the constitution on matters relating to children.

( Articles 27, 47, 48, 49, 50, 51 and 53 )

To give effect to the State's obligations concerning the wellbeing of children in accordance with the general rules of international law, treaties and conventions ratified by Kenya.

## Conflicts of laws-Section 4

1. In case of inconsistency between the Act and any other legislation on children matters, the Act shall prevail.
2. However, another legislation on children matters may prevail if it offers a greater benefit in law to a child.
3. A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child.

# Arrangement of the Children Act, 2022





## Schedules

### First Schedule

Best interest consideration

### Second Schedule

Conduct of business and affairs of the Council

### Third Schedule

Offences disqualification in applicant from adoption

### Fourth Schedule

Offences requiring record and preservation of information with regard to the condition of the Child

### Fifth Schedule

Assessment of a child who is in conflict with the law

### Sixth Schedule

Consequential amendments

### Seventh Schedule

Transitional provisions

## Key Gains

### 1. Best interests of the child

the principles that prime the child's right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53 (1) of the Constitution and section 8 of the Children Act 2022

### 2. Age of Criminal responsibility

Section 221 – a person under the age of twelve years shall not be held criminally responsible for any act or omission

### 3. Parental responsibility

Section 32 (1) the Parents of a child shall have parental responsibility over the child on equal basis, and neither the father nor the mother of the child have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock

#### 4. Intersex Child

Section 7(3) The Principal Registrar shall take measures to ensure correct documentation and registration on intersex children at birth.

Section 21- an intersex child shall be treated with dignity, appropriate medical treatment, special care, education, training.

Section 26 (3) – Male , female and intersex children deprived of liberty shall be accommodated in separate.

Section 63 – Child protection units shall be desegregated for boys, girls & intersex.

Section 144 (z) an intersex child who is likely to be discriminated is categorized a child in **need of care and protection**.

#### 5. Protection from Abuse

Section 22- No person shall subject a child to

- Psychological abuse; or
- Child abuse

**Online abuse** (cyber bullying, grooming and solicitation, cyber enticement, cyber harassment and cyber stalking) is an offence under Section 22(3) of the Children Act, 2022

## **6. Establishment of Child Protection Units and Special Police Unit**

Section 64 and 242 mandate the Inspector general of Police shall establish Child Protection Units in every police station and a Special Police Unit to deal with children matters

## **7. Role of County Governments**

Section 61 (2)— every County government shall, in consultation with the Cabinet Secretary, develop policies and guidelines for the better carrying out of the functions specified in section 1 (preprimary education and child care facilities)

## **8. Alternative Family-Based Care**

Section 12 (1) every child whose parents or guardian is unable to maintain the child has a right to social security as guaranteed by Article 43(3) of the Constitution

Section 12 (2) social security includes; Kinship care, guardianship, foster care, adoption, Kafaalah, care in emergency situation, supported independent living, supported child headed households, institutional care.

## 9. Legal Representation

The Act now provides for legal representation for all children brought before a children's Court. (Sec 96)

## 10. Children With Disabilities

The Act has made provision for Non-discrimination against a child on grounds of disability. For example, under Sec 20, the Act provides that children with disability have the right to be treated with dignity, and be accorded appropriate medical treatment, special care, education and training free of charge

## 11. Diversion

Section 224 provides that Children in Conflict with the Law be taken either through the judicial process or through diversion.

## PART II: SAFEGUARDS FOR THE RIGHTS AND BEST INTERESTS OF THE CHILD

Safeguards are Actions that are taken to promote the welfare of children and protect them from harm.

The Children Act, 2022 has enhanced safeguard provisions emanating from the Constitution 2010

Additional safeguards include;

1. Protection for the intersex child,
2. Right to Assemble, Demonstrate, Petition and Participate in public life
3. Right to Inheritance
4. Right to social security

### Realization of the rights of the child (Section 5)

1. The state shall take measures to progressively achieve the full realization of the rights of the child
2. The Cabinet Secretary to develop, implement policies, laws and programs for full realization of the rights of the child

## Survival and Development of the child (Section 6)

Every child shall have a right to life, survival, wellbeing, protection and development

## Name and Nationality (Section 7)

Every child shall have the right to a name and nationality and, as far as possible the right to know and be cared for by their parents- Article 53 (1) (e) of the Constitution

## Best interests of the child (Section 8)

The best interest of the child shall be the primary consideration

The best interest of the child shall include, but not limited to the considerations set out in the First Schedule

## Non- discrimination (Section 9)

No person shall discriminate against a child on the grounds of **age**, origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, **health status, pregnancy**, social, political, economic or other status, race, disability, tribe, residence or local connection or any other status.

## Right to Parental Care (Section 11)

- Every child has the right to parental care and protection

## Right to social security (Section 12)

- Every child whose parents or guardian is unable to maintain the child has the right to social security as guaranteed under Article 43(3) of the constitution; Social Security includes Alternative care services

## Right to Education (Section 13)

- Every child has the right to free and compulsory basic education in accordance with Article 53 (1) (b) of the Constitution

## Right to leisure, recreation and play (Section 14)

- Every child shall be entitled to leisure, play, and participation in non-harmful cultural and artistic activities.

## Religion and religious education (Section 15)

- Every child shall have the right to freedom of thought, conscience, religion, and religious education subject to parental guidance, and in the best interest of the child.

## Right to Health care (Section 16)

- Every child shall have the right to the highest attainable standard of healthcare services in accordance with Article 43 of the constitution

## Right to inheritance (Section 17)

- Every child shall have the right to inherit property in accordance with the Law of Succession Act.

## Protection from Child Labour (Section 18)

- No person shall subject a child to child labour, domestic servitude, economic exploitation or any work or employment which is hazardous, interferes with the child's education or is likely to be harmful to the child's health or physical, mental, moral or social development

## Protection from armed conflicts (Section 19)

- The state shall establish mechanisms for the protection, care, and respect of the rights of the child in situations of armed conflict.

## Right of children with disabilities (Section 20)

- A child with disability shall be treated with dignity, accorded appropriate medical treatment, special care, education and training free of charge in addition to the rights guaranteed under the constitution. (Constitution: Article 53)

## Right of intersex children (Section 21)

- An Intersex Child shall have the right to be treated with dignity, accorded appropriate medical treatment, special care, education, and training and consideration as a special need category in social protection services

## Protection from Harmful cultural practices (Section 23)

- The Children Act, 2022 outlaws the following harmful cultural practices against children;
- a) forced circumcision; (b) female genital mutilation; (c) child marriage; (d) virginity testing; (e) girl child beading;
- organ change or removal in case of an intersex child except with the advice of a medical geneticist
- Cultural or religious rite, custom or practice that is likely to negatively affect the child's life, health, social wellbeing, dignity, physical, emotional or psychological development

## Protection from drugs and substance abuse (Section 24)

- Children shall not be subjected to use of use of hallucinogens, narcotics, alcohol, tobacco products, glue, psychotropic drugs or any other drug declared harmful by the Cabinet Secretary responsible for matters relating to health or involvement in production, trafficking, sale storage or distribution of any drugs or substances referred herein.

## Right to freedom from torture (Section 25)

- Every child has the right to freedom from torture and cruel, inhuman, or degrading treatment ( Article 25 of the Constitution)

## Detention of children in conflict with the law (Section 26)

- A child shall not be deprived of his/her liberty except in accordance with the persons deprived of liberty according to section 26(1), Constitution. Art. 29 (f); Detention of a child shall be last resort - in conformity with Article 53 (f) of the Constitution.

## Privacy (Section 27)

- No child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, private affairs, correspondence, attacks reputation.

## Right to assemble, demonstrate, petition and participate in public life (Section 28)

- Children have the right to lawfully peacefully assemble, demonstrate, present petitions to public authorities,
- Children have the right to freely participate through lawfully established forums, associations, and assemblies at the national and county levels

## Enforcement of rights under this Part (Section 29)

- Any person may institute court proceedings if he/she feels any right or fundamental freedom is infringed or threatened
- Apart from Parents/Gurdians, any Persons can institute proceedings on behalf of a child if he/she is ; *acting on behalf of a parent/ guardian ; a member of an interest group, acting in the public interest; a member of a registered association promoting children's rights.*

The Chief Justice may make rules for better enforcement of rights under this section with regards to practice and procedure of the High Court

## Duties and responsibilities of a child (Section 30)

- Work for the cohesion of the family.
- Respect his parents, superiors and elders at all times and assist them in case of need provided that the child's best interest shall remain paramount.
- Service his national community by placing his physical and intellectual abilities at its service
- Preserve and strengthen social and national solidarity
- Preserve and strengthen the positive cultural values of his community in his relations with other members of that community.
- Attend school unless prevented by factors beyond their ability
- Non discriminate against other children on account of ethnicity, race, disability, gender, social status or other grounds
- Protect the environment
- Not abuse or harm other children
- Not destroy any property

## **PART III: PARENTAL RESPONSIBILITY**

### **(Section 31): Definition**

The duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the children's property in a manner consistent with the evolving capacities of the child

### **Equal parental responsibility (Section 32)**

The parents of a child shall have parental responsibility on an equal basis.

### **Parental responsibility agreement (Section 33)**

Parents of a child not married to each other may enter into a parental responsibility agreement where, both, designate and agree on clear individual responsibilities towards the child

### **Transmission of parental responsibility (Section 34)**

If either of the child's parent dies, the surviving parent shall have parental responsibility alone or with the testamentary guardian.

### **Extension of responsibility beyond eighteenth birthday (Section 35)**

This is extended by a court order when the child attains the age of eighteen years and it is applicable where the child has special needs arising from severe disability or developmental disorder.

## PART IV: ADMINISTRATION OF CHILDREN'S SERVICES

### National Council for Children's Services (Section 41- 50)

A state corporation mandated to regulate, coordinate, oversight and advise the government on children matters

### The Office of The Secretary Children Services

Section 37-40 provides for establishment of the office of the secretary, the functions and powers. The office is in charge of the implementation of children services

### Children Advisory Committees

The Council may establish Children Advisory Committees for proper discharge of its function at the County, Sub-county and other decentralized units of service delivery. Their main function is to coordinate and regulate services and programs that enhance the rights of the child and report to the Council

## Funds Of The Council (Part V)

The activities of the Council shall be funded by:

- a) Monies appropriated by Parliament for the purposes of the Council
- b) Grants, gifts, donations or other endowments given to the Council;
- c) Such funds as may vest in or accrue to the Council in the performance of its functions under the Children Act or any other written law.

The receipts, earnings or accruals of the Council and the balances at the close of each financial year shall not be paid into the Consolidated Fund, but shall be retained for purposes of the Council under this Act.

The Council shall, in each financial year, prepare and submit to the Cabinet Secretary its annual report.

## PART VI: ROLE OF COUNTY GOVERNMENTS



### Role of County Government

Every County to develop policies and guidelines in consultation with the Cabinet Secretary to further the realization of functions in the 4<sup>th</sup> Schedule.



### Welfare Schemes

A county government may, either by itself or jointly with other county governments, and in consultation with the Council, establish welfare schemes to provide or facilitate the provision of childcare facilities and programmes for children including children with disabilities.

## General provisions in regard to children's institutions

- All the institutions are to be disaggregated by developing capacities of children as well as their with clear sections for boys, girls and intersex children.
- Shall be a last resort and shall only be done by the relevant institutions Change of user of any institution must seek authority of the Council.
- There shall be no establishment of new CCI's.
- All CCIs to seize their operation of hosting children by 27th of July 2032.
- There shall be no placement of a child below 3 years to a residential institution unless in very extreme circumstances.
- All programs run by charitable institutions to be approved by the Council
- The Council to register and deregister children institutions
- A child can only be admitted in the Rehabilitation School if it is in the child's best interest.

## PART VII: CHILDREN'S INSTITUTIONS

**01** Children  
rescue centers  
(Section 63)

The Cabinet Secretary shall establish rescue centres in every county for temporary care of children in need of care and protection not exceeding 6 months pending placement in alternative care and other interventions.

**02** Child  
Protection  
Units  
(Section 64)

A facilities established by Inspector General located in every police stations to provide a safe and non-threatening environment for children on temporary basis.

**03** Children  
Remand  
Homes  
(Section 77)

It is a place of safety where children in conflict with the law may be committed under an order of the Court until their matters are finalized.

**04** Rehabilitation  
Schools  
(Section 78)

Designed to provide rehabilitation, accommodation, education, training and facilities for the care and protection of children between 12 and above 15 years.

**05** Existing  
Charitable  
Children  
Institutions  
(Section 65)

CCIs that were approved or licensed by the Council prior to the commencement of the Children Act 2022;

**06****Overriding objectives of CCIs (Section 67)**

To provide family based care for children. The placement of a child shall be a measure of a last resort and the child has no immediate access to parental care or guardian.

**07****Institutions not deemed to be CCIs (Section 68)**

A rehabilitation school, children rescue centres, a school within the meaning of the Basic Education Act, a borstal institution, a healthcare institution, a children day care center, nursery or other similar establishment.

**08****Contraventions (Section 65)**

Operation of an existing CCI contrary to this Act, Admits a child to the care of a CCI not approved by NCCS, Implements or attempts to implement a CWP, or a CCI in the name of a Public Benefits Organization (PBO), religious organization or other association on contravention of the section.

**09****Secretary Children services**

Facilitate the improvement of the conditions and the well-being of the children placed in CCI.

Supervise operations of all CCI and SCIs Carry out inspections of CCIs to ascertain condition for the wellbeing of children accommodated therein.

Take appropriate steps to facilitate improvement of conditions and well-being of children as necessary.

Facilitate placement of children in appropriate alternative family care at the earliest opportunity.

## 10

## National Council for Children's Services

- Keep and maintain a register of all existing CCIs.
- Prescribe the minimum standards for operation of existing CCIs
- Inspect and assess facilities and operation of CCI in conformity with minimum standards
- Deregister a non compliant existing CCI

### Change of User

Change of user may be done;

- By making an application to the Council at least six months prior to the date the proposed change is to take effect.

Upon Receipt and approval, the Council shall :

- Reintegrate the children placed in the institution with alternative families or guardians; or
- Transfer the children to another institution; and
- Ascertain that the application is made in good faith.
- Observe the Best interest of a child in making the decision;

## 11 Child Welfare Programmes

- The Cabinet Secretary shall make regulations to provide for operation of CWP
- Any CCI or PBO intending to run a CWP should notify council of their intention to implement a CWP stating the mode of operation and objects of the program (Section 74)
- The CEO shall table a report on proposed CWP to the council for approval
- The council may approve the program in whole or part

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## PART VIII: CHILDREN'S COURT

### Designation of Children's Court and appointment of magistrates (Sec 90)

Children's courts are designated by the Chief Justice via a gazette notice. The CJ also appoints and gazettes the magistrates.

### Friendly environment of Children's Court (Sec 92)

A Children's Court shall have a setting that is friendly to the children who are before it

### Jurisdiction of the Children's Court (Sec 91)

1. Conduct civil proceedings on matters set out under Part III, VII, VIII, IX, X, XI, XIII, XIV and XV
2. Hear any charge against child, other than a charge of murder.
3. Hear a charge against any person accused of an offence under this Act
4. Hear a charge in any case in which a person is accused of an offence against a child or in which a child is the victim or complainant
5. Exercise any other jurisdiction conferred by this Act or any other written law

## Sitting of children's court (sec 93)

1

### Determination

Shall sit at such times and locations as the Chief Justice may determine via gazette notice

2

### Timing and Location

Shall not sit at the same time or in the same court room as other courts. A magistrate court may be converted into a children court

3

### Persons in the court

Judicial Officer, Children's Officer, Parents or Guardians, Person involved in matter, Accredited Journalist/ Media Professional and any other person that the court may allow from time to time, and as need be.

4

### In camera settings

Court proceedings may be held to the exclusion of any persons mentioned above as the court may deem necessary.

## General principles with regard to proceedings in children's court (sec 95)

Best interest of the child is considered when making an order

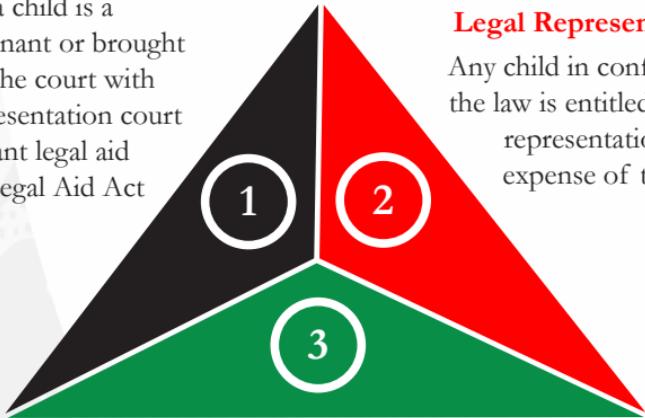
1. When making an order, the court shall have regard to provisions in Section 95.
2. The court shall have regard that delay in determining the question is likely to be prejudicial to the welfare of the child.
3. The court may summon an expert witness whose expense is under the Judiciary fund.



## Provision of Legal Aid in certain cases (Sec 96)

### Legal Aid

Where a child is a complainant or brought before the court with no representation court shall grant legal aid under Legal Aid Act 2016.



### Legal Representation

Any child in conflict with the law is entitled to legal representation at the expense of the state.

### Legal Aid Fund

Any reasonable fees and expenses incurred in relation to legal representation of a child shall be covered by The Legal Aid Fund.

## Power of Court to order production of reports (Sec 97)

1

The Court may summon and direct any person to prepare and present to it a report or statement containing such information in respect of child as the Court may direct.

2

When a Court orders or summons an expert, a party to the proceedings shall be given an opportunity to submit their views before the court makes an order.

3

The Court may take into account any statement contained in the report or any evidence given in respect of the matters referred to in the report, as long as the Court's opinion, the statement or evidence is relevant.

## Appointment of guardian ad litem (Sec 98)

### Appointment

An adult appointed by the court to represent the best interests of the child; (Children Act, 2022)

### Guardian ad litem

A court before which a child is brought, and especially where that child is not represented by an advocate, may appoint a guardian ad litem for the purposes of the proceedings in question and to safeguard the interests of the child

## PART IX: CUSTODY AND MAINTENANCE

**Child Maintenance:** parental rights and duties as relate to the possession of a child.

**Custody:** lawful custody, whether operation of law, written agreement or order of a court of competent jurisdiction

**Legal Custody** means the rights and duties in relation to possession of a child conferred upon a person by a court.

The duties include the duty to maintain the child and provide them with basic needs as well as the duty to protect the child from neglect, discrimination and abuse.

**Actual custody** of a child is synonymous with care and control of a child. It is the actual possession of a child whether or not such custody is exercised independently or jointly with another person.

Thus whoever the court gives actual custody of the child, is the person who will live with the child and is responsible for the physical care of the child including where the child lives and daily decisions.

**Custody Order** vesting legal custody of a child in the applicant who has care and control of the child

**NOTE: It does not include a hospital, hostel or a boarding school, at which the child is temporarily accommodated.**

**A custodian** is a person whom legal custody of the child is awarded to. (A parent, a guardian, any person who applies with the consent of a parent or guardian of a child and has actual custody for a period of three years preceding the making of the application; any person who is not falling in the three mentioned above.

**Custody is shared** between the parents/guardians with a determination on when each parent may have actual custody

The court is always guided by the best interest of a child while making a determination on which parent to grant actual custody.

**Sole custody** may be granted where one party is declared unfit to raise a child.

**The non – custodial parent has a right to have the child visit or may visit the child in their home without taking custodial possession of the child.**

## The Principles to be applied when granting custody

- a) the conduct and wishes of the parent or guardian of the child;
- b) the ascertainable wishes of the relatives of the child;
- c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
- d) the ascertainable wishes of the child;
- e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- f) the customs of the community to which the child belongs;
- g) the religious persuasion of the child;
- h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- j) the best interest of the child.

## Revocation of custody order

1

A Court may, on application in the prescribed form, revoke a custody order provided that, before doing so, the court shall make an order as to who is thereafter to have custody of the child or give an appropriate order.

2

A custody order made in respect of a child, access or maintenance of a child shall cease to have effect when the child attains the age of 18 years, however on application made, to extend a custody, access or maintenance order beyond the child's 18th birthday on such terms as the Court may deem fit.



## **PART X: GUARDIANSHIP**

A guardian is a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility over a child on the death of the parent of the child either alone or jointly with the surviving parent of the child

Guardianship is a family based alternative family care option.

A guardian appointed under the Children Act 2022 must be a Kenyan Citizen

### **Customary Guardianship**

Type of guardianship where a person is appointed by the Court in accordance with the customs, culture or tradition of a specific community in the manner prescribed

### **Extension of appointment of guardian beyond child's eighteenth birthday**

Exceptional circumstances for extension of guardianship:

- i. Child suffers from a mental or physical disability
- ii. Illness that will render him incapable maintaining himself, or managing his own affairs and his property without assistance of a guardian after eighteenth birthday
- iii. Exceptional circumstances with regard to the child as the court may deem proper to warrant making such an order

## Appointment of a Guardian

A parent can appoint a guardian by will or by deed to act with the surviving parent.

**A guardian may be appointed in respect of the person or estate of the child or both**

the guardian need not have actual custody of the child but has responsibilities regarding administration and safeguarding of his estate, producing accounts or inventory of the estate as may be required

## ROLES AND RESPONSIBILITIES OF A GUARDIAN

1. A guardian has power and responsibility to administer the estate of the child and, in particular, to receive, recover and invest, the property of the child in his own name in trust for, and for the benefit of, the child.
2. Has power to create a Trust Fund for the child in respect to any estate of the child.
3. Has duty to take all reasonable steps to safeguard the estate of the child from loss or damage

4. the duty to prepare and submit accounts and inventory in respect of the child's estate on every anniversary of the date of his or her appointment as such to: Parent or custodian of the child; Secretary; The court; Such other person as the court may direct
5. the duty to produce any account or inventory in respect of the child's estate when required to do so by the Court



## PART XI: JUDICIAL INTERVENTION FOR THE CARE AND PROTECTION OF CHILDREN

- The Court may make any order under the Children Act 2022 or any other written law for the protection of a child in any proceedings concerning the welfare and upbringing of the child
  - Power of Court to make orders in certain proceedings

### Persons qualified to apply for an order for the protection of a child



## Orders which Court may make

<b>Access Orders</b>	requiring the child to visit or stay periodically with the person named in the order.
<b>Residence Order</b>	requiring a child to reside with the person named in the order.
<b>Exclusion order</b>	requiring a person who has inflicted or threatened to inflict violence on a child –depart; restrain.
<b>Child assessment order</b>	requiring a child or the child's family to be investigated or evaluated by a person appointed by a court.
<b>Family assistance order</b>	requiring a person appointed by court to provide advice, counselling or guidance to a child or parents.
<b>Wardship order</b>	requiring that a child be placed under the protection and custody of a court.
<b>Provisional child care order</b>	requiring placement of a child for provisional care by any fit person or institution pending further orders of the court.

**Production order**

requiring any fit person unlawfully detaining a child to disclose the whereabouts of the child and/or produce the child in Court.

**Protection order**

directing care and protection of a child involved in drug abuse or who has been a victim of ideological radicalization or criminal gangs.

**Non-interference Order**

preventing any fit person from interfering with the life of a child.

**Supervision orders**

1. An order placing the child under the supervision of a children's officer or an authorized officer.

**Note: The court may give such an order under its own motion or upon application by any person**

2. A supervision order shall not remain in force for a period exceeding twelve months.
3. The court may either vary or Discharge the orders made on application by:
  - (a) The child with the leave of court

- (b) any person with parental responsibility in respect of the child.
- (c) the supervisor
- (d) any person with whom the child for the time being resides
- (e) any person acting on behalf and in the best interest of the child.



## PART XII: CHILDREN IN NEED OF CARE AND PROTECTION

### A Child in need of care and protection

A child who lives in difficult circumstances and needs to be protected from all kinds of neglect, abuse or exploitation.

### A Child living on or off the streets

A child who because of abuse, neglect, poverty, community upheaval or any other reason lives, begs or works on the streets or because of inadequate care, begs or works on the streets but returns home at night.

### Children in need of care and protection (section 144)

- Who is an orphan and has no guardian;
- Who has been abandoned by their parent or guardian;
- Who is found begging or receiving alms;
- who is lost and found and whose parent or guardian cannot be found;
- whose parent or guardian has been detained, held in custody or imprisoned or is in remand,

- Who is in the company of a parent or guardian who is detained, held in custody, in prison or in remand;
- Whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship of the child;
- Who parents are unable to provide to him or her proper care and attention by reason of being intensely engaged in litigation over custody and maintenance or other related family dispute prejudicial to the wellbeing of the child;
- Whose parent or guardian is below eighteen years of age;
- Who is being denied education
- Who has been or is likely to be subjected to female genital mutilation, intersex genital mutilation, child marriage, or other customs and practices prejudicial to the child's life, education and health;
- Who has been subjected to forced male circumcision;
- Whose life is in danger or whose security is threatened by a member of the family;
- Who is a victim of human trafficking
- Who is kept in any premises which, in the opinion of an authorized officer or a medical, are overcrowded, unhygienic or dangerous;

- Who is exposed to any form of violence;
- Who is pregnant or who is responsible for the pregnancy of another child;
- Who is mentally ill, terminally ill, or whose parent or guardian is mentally ill or terminally ill;
- Who has disability or other special needs and is unlawfully confined, concealed or ill-treated;
- Who has been sexually abused or is likely to be exposed to sexual abuse and exploitation, including prostitution and pornography;
- Who engages in sexual conduct of any kind;
- Who is engaged in any work likely to harm his or her health, education, mental or moral development;
- Who is displaced as a consequence of war, civil disturbances or natural disasters, or is otherwise a refugee;
- Who is exposed to any circumstance likely to interfere with his or her physical, mental, psychological and social development;
- Who is intersex and is subjected to or likely to be subjected to discriminatory treatment or abuse;

- Who has had any of the offences mentioned in the Third Schedule to this Act committed against her, or he or she is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child
- Who in conflict with the law or is a witness to, or a victim of, a crime;
- Who is engaged in the use of, or trafficking of drugs or any other substances that may be declared harmful by the Cabinet Secretary responsible for matters relating to health;
- Who heads or lives in a child-headed household;
- Who lives and works on the streets;
- Who for any other reason, is, in the opinion of an authorized officer, vulnerable to harm or abuse;
- Who is Human Immunodeficiency Virus (HIV) positive or has Acquired Immunodeficiency Syndrome (AIDS), and is subjected to discriminatory treatment or abuse, and whose parents are unable to exercise proper care of the child;

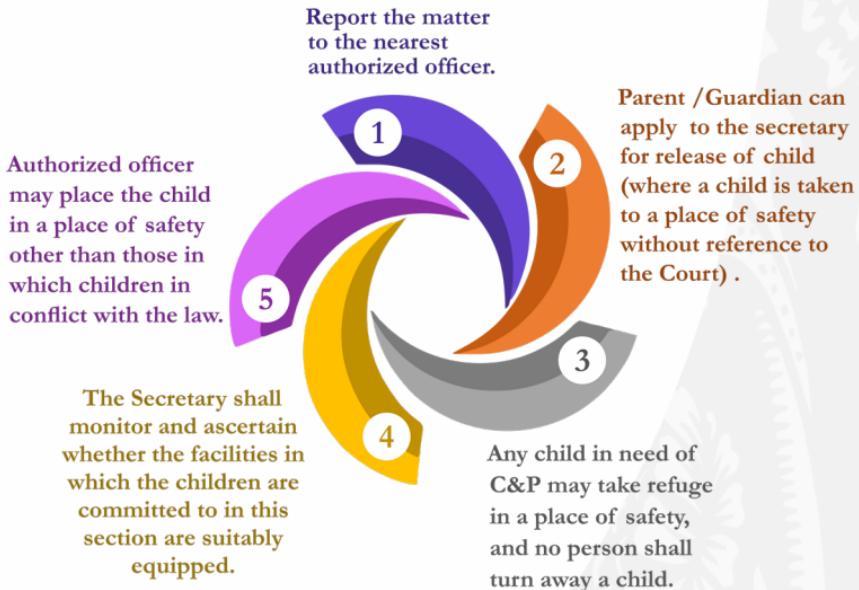
- Who is recruited or is at risk of being recruited into unlawful gangs, or is exposed to or in imminent danger of being exposed to radicalization or other repugnant teachings;
- Who is suffering from a terminal, debilitating or chronic illness and whose parents are unable to exercise proper care of the child; or
- Who is in need of medical treatment but denied access thereto by the parent or guardians on religious grounds.



## Gains

1. Whose parent or guardian is below eighteen years of age;
2. Who has been or is likely to be subjected to female genital mutilation, intersex genital mutilation ,child marriage,
3. Who has been subjected to forced male circumcision
4. Whose life is in danger or whose security is threatened by a member of the family;
5. Pregnant or who is responsible for the pregnancy of another child;
6. Who engages in sexual conduct of any kind;
7. Who is intersex and is subjected to or likely to be subjected to discriminatory treatment or abuse;

## Proceedings in respect of children in need of care and protection (Section 145)



## Healthcare (Section 146)

- For inpatient care at Health Facility, Authorized officer shall,
- The child's parent or guardian /Any other person who has parental responsibility over the child/ The Secretary or his representative.
- Any expenses incurred in connection with the medical treatment or hospital accommodation of a child under this section shall be defrayed out of public funds.

## Home determination

- If the Court determines that the child has a home or has been found in the local limits of a particular County Government, the Courts shall order that the child be accommodated in the facility operated by such County Government entity.
- Without prejudice to the generality of subsection (1), the Court may remit the case involving the child for determination by the Court within whose local jurisdiction the child has a home or was found

## Right of parent to be heard

- Parent, guardian or other person having parental responsibility over the child, has the right to be heard and may participate in the proceedings.

## Power of the court in relation to children in need of care and protection (Section 150)

The court can order:-

- For a report or professional advice
- That the child be returned to his or her parent/ guardian,
- The parent/ guardian of the child, or to execute a bond with or without surety to exercise proper care and guardianship;
- Committal of child to a rehabilitation school suitable to the needs and interests of the child;
- guardianship under Part X;
- The Secretary to take steps to ensure that the child is provided with appropriate care and protection
- that the child be reunited with his or her parent/guardian;
- Nullification child marriage;

- child be committed to a drug rehabilitation center for treatment, professional counselling;
- Make any other order which the Court may think fit, and in the best interest of the child.

## Grounds for care order (Section 153)

Care order

Order entrusting the care, control and custody of the child to a person other than the parent, guardian or custodian of the child, or an institution appointed by the Court.

When  
is Care  
order  
given?

- All possible alternative methods for assisting the child have been unsuccessful
- The child concerned is suffering or is likely to suffer substantial harm
- Exposure to severe danger warranting immediate removal from place of residence

## Care Order requirements

1

It must be in writing

2

Disclose the Child's age  
and religious faith.

3

Consent of the person  
or institution

4

Directive of delivery of the  
care order by the applicant

5

Period of stay (One year or less)

## Grounds for care order (Section 153)

### A care order may be discharged if:

- An Adoption Order in respect of the child is made
- Child is found guilty of a criminal offence under Part XV
- Issuance of a residence order
- Any other reason the court directs based on application

### Who may apply for discharge:

- Child
- The Secretary
- Parents/ Guardians
- Any other person who has parental responsibility over the child
- A person acting on behalf of and in the best interest of child

## PART XIII: FOSTER CARE PLACEMENT

**Foster Care Placement** is a temporary placement of a child or children in the care of a person who is not the parent, relative or guardian of the child.

The application for foster care shall be made to the secretary or the court who also has powers to terminate the same if it is in the best interest of the child.

A **foster parent** is a person with whom a child is placed in accordance with Section 174 of the Children Act 2022.

Spouses of a marriage where one or both the spouses are between twenty-five and sixty five years of age; a single woman or man aged between twenty-five years and sixty-five years of age

### Objectives of foster care placement

1. To protect and nurture children in need of care and protection by providing a safe, healthy environment with wholesome support.
2. To promote long term parental care, with the goal of family reunification in the first instance
3. Accommodating children in alternative, safe and nurturing family relationships for long periods of time

4. To provide social and economic stability in the life of a child or children who may be denied or unable to have a stable family support system
5. To promote family relationships in the context of Kenya's cultural, ethnic and community diversity

## Persons who qualify foster children

(Section 174 a, b and c)

1. Spouses of a marriage where one or both the spouses are between twenty-five and sixty-five years of age;
2. A single woman of between twenty-five and sixty-five years of age; or
3. A single man between twenty-five and sixty-five years of age.

## Key points about foster care

1. Foster care shall, in the first instance, be on application to the Secretary, and shall be for a period not exceeding twelve months, but liable to extension from time to time for a period not exceeding three years in the aggregate (CA 2022 Section 171(2))

2. No child shall be placed under foster care for a period exceeding three years without an order of the Court. (CA Section 172(3))
3. A foster parent shall not remove a child from the jurisdiction of the Republic of Kenya without leave of court and such leave shall only be granted upon exceptional circumstances(174(6))
4. The child is not permanently separated from his/her natural family neither does he acquire any rights of inheritance in the fostering family except where foster care transitions to adoption

### **Grounds for termination of foster care**

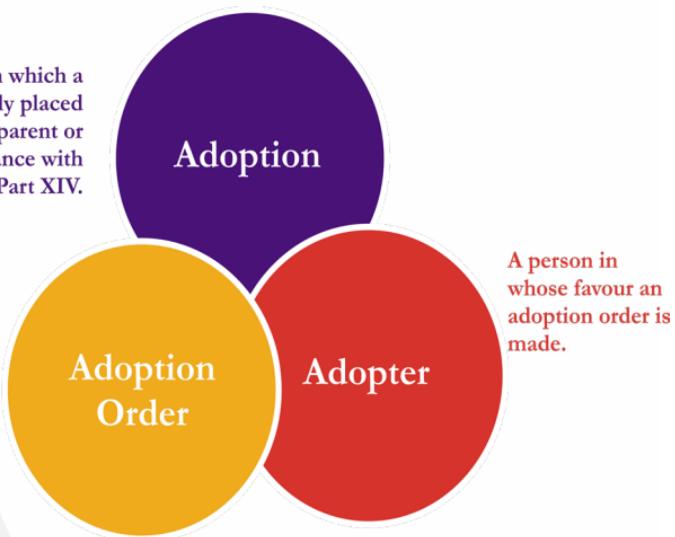
Foster care placement may be terminated on written direction of the Secretary if the termination is in the best interest of the child

### **Factors to consider before directing termination**

1. when the biological parent reclaim care of the child:  
The bond that exists between the child and the child's biological parent;
2. The bond that subsists between the child and the foster parent; and the child and the family of the foster parent
3. The prospects of achieving social stability in the child's life

## PART XIV: ADOPTION

A process through which a child is permanently placed with a legal parent or parents in accordance with Part XIV.



### TYPES OF ADOPTION (SECTION 184(4))

**Local Adoption** - Applicants are Kenyan citizens and the child to be adopted is a resident in Kenya

**Kinship Adoption** - Adoption by relatives of a child

## Foreign Adoption

1. the adopting parent or parents are foreign nationals whether or not resident in Kenya;
2. the adopting parent or parents are Kenyan nationals with dual citizenship;
3. the adopting parent or parents are not Kenyan nationals but are biologically related to the child; or
4. the adopting parent or parents were once Kenyan nationals but have lost their nationality by operation of the law of the host country to which the prospective parent or parents have a nationality

## Pre-requisites for Adoption

1. A child has been declared free for adoption.
2. The child has attained the age of 6 weeks

## Children who may be adopted

1. A child who is an orphan and has no guardian or caregiver able and willing to take care of the child
2. A child who has been abandoned and whose parents and guardians whereabouts cannot be traced within a period of one year.

3. Children who are willingly offered for adoption by their biological parents.

## Who may apply for adoption

1. A sole applicant
2. Two spouses jointly

## Who cannot apply for adoption (Section 186 (6))

1. is of unsound mind within the meaning of the Mental Health Act;
2. Is incapable of exercising proper care and guardianship of a child;
3. Has convicted by a Court of competent jurisdiction for any of the offences specified in the Third Schedule or similar offences;
4. In the case of joint applicants, if the applicants are not married to each other;
5. Is a sole male applicant except where the applicant is a biological relative of the child; or
6. Is a foreign applicant except where the applicant is a biological relative of the child

## Who may consent (Section 186 (8))

1. a parent or guardian of the child, or any person who is liable by virtue of any order or agreement to contribute to the maintenance of the child;
2. on the application of one of the spouses, the consent of the other spouse; and
3. in the case of a child who has attained the age of ten years, the child himself or herself.

## Review of adoption (Sec 190)

1. The child in respect of whom an adoption order has been granted by a court was lost or abducted;
2. The biological parent reported to the secretary and took all measures to trace, to find and to reunite with the child and were not successful; and
3. It is in best interest of child to reunite with the child with their biological parent.

An application for an adoption order must be accompanied by a written consent.

## Offences Disqualifying Applicants from Adoption

1. Any sexual related offence
2. Any offence related to robbery
3. Indecent assault involving the infliction of grievous bodily harm
4. Indecent assault on a person under the age of 16 years
5. Any offence related to drug trafficking
6. Any offence relating to-
  - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament;
  - (b) the possession of a firearm, explosives or armament
7. Any offence relating to exchange, control, corruption, extortion, fraud, forgery or uttering
  - (a) involving amounts of more than Kshs. 50,000.00; or
  - (b) any conspiracy or incitement to commit any offence referred to in this Schedule or an attempt to commit any of the offences referred to in this Schedule
8. Any offence relating to trafficking in persons

An application for registration of an adoption society under this Act shall be made to the Secretary in the manner prescribed in regulations (*the Children (Adoptions) Regulations*)

The Secretary shall refer the matter to the Council which may-

- a) approve the application for registration
- b) refuse the application for registration

## Adoption Societies

- i. A person taking part in the management or control of the society or a member of the society has been convicted of an offence under this Part, or has been guilty of breach of any regulations made under this Part; or
- ii. It would not be in the public interest to approve the application, having regard to the number of duly registered adoption societies for the time being in active operation in the applicant's local limits

## Functions of adoption societies

- To examine and interview any applicant for an adoption order and make such inquiries.
- To make inquiries/ investigations and prepare reports as required by the Court.

- Ensure that the parent or guardian of a child who is giving up their child understands the effect of their actions in relation to their rights.
- Ensure that the parent to whom an adoption is issued understands their rights and responsibilities.
- To prepare and submit records of children available for adoption to the National Council for Children's Services.
- Maintain a register and records in respect of all or any children of whom arrangements for adoption have been made.

## Review of Adoption

Grounds for review of order for adoption:

- a) The child in respect of whom an adoption order has been granted by a Court was lost or abducted;
- b) The biological parent reported to the Secretary and took all measures to trace, to find and to reunite with the child and were not successful; and
- c) It is in best interest of child to reunite with the child with their biological parent.

The Court may

- a) Issue an order to revoke the adoption order
- b) Review an existing order to give joint custody to a biological parent and adoptive parent.

Conditions for joint custody order

- a) The child has been in the custody of the adoptive parents for more than five years; and
- b) The child expresses that he or she would wish to maintain a relationship with adoptive parents.

### Inter-country adoption Seventh Schedule (Transition provisions- Para 17)

- The Moratorium issued on 26th November, 2014 shall apply to all matters relating to inter-country adoption under this Act.

## **PART XV: CHILDREN IN CONFLICT WITH THE LAW**

### **Assessment of Children in conflict with the law**

Under the Children Act, children who are suspected to have committed an offence will be required

1. To undergo assessment by the Children Officer.
2. However, this does not apply to a child who commits an offence of murder under Section 217 (1).

A police officer who arrests a child shall notify the parent, guardian, children officer or any other authorized person within 24 hours. Refer to section 218 (1); This is following Art.49 of the Constitution.

### **Assessment of a child on arrest (Section 218)**

A children officer who receives a notification from the police officer shall:

1. Assess and submit a report to the police officer on; social inquiry child's tendency to engage in activities which conflicts with the law, facts and circumstances leading to the child's conduct.
2. Assess a child in a secure and child friendly and conducive environment Section 218 (3), considering the best interest of the child as provided in Section 218 (4)

3. Assessment shall be carried out in accordance with the fifth schedule of the Act

### **Criminal liability of a child (Section 221)**

- ✓ A person under the age of twelve years shall not be criminally responsible for any act or omission.
- ✓ A child who commits an offence while under the age of fourteen years shall be presumed not to be capable of differentiating between right and wrong, unless the Court is satisfied on evidence to the contrary

### **Detention of children (Section 223)**

- ✓ Detention of children in conflict with the law pending trial shall be used as a means of last resort.
- ✓ A child shall not be deprived of his or her liberty or otherwise treated in a manner contrary to Articles 29(f) and Article 51 of the Constitution except in accordance with Persons deprived of liberty section 26(1)

### **Procedure in cases of children in conflict with the law (Section 224)**

A child in conflict with the law may be subjected to either of the following processes

- a) Diversion in accordance with the Act;

- b) Judicial process in accordance with the Criminal procedure code, subject to the provisions of this part

## Definition of diversion

Diversion is the intervention and programmes designed to divert children from the criminal justice system

## Objects of diversion (Sec 226)

- a) Make use of alternative methods of holding children accountable for their unlawful acts or omissions resulting in harm to other persons;
- b) Promote the rehabilitation of the child, and re-integration of the child into the family and community;
- c) Provide an opportunity to those prejudicially affected by the unlawful conduct of the child to express views concerning such conduct
- d) Encourage symbolic restitution by the offending child as compensation for the harm caused to the aggrieved person;
- e) Promote reconciliation between the child and the person or community affected by the harmful conduct of the child; and

- f) Minimize stigmatization of the child, and prevent adverse consequences likely to arise from his or her subjection to the criminal justice system.

### **Child eligible for diversion (Sec 227)**

1. Compelling evidence that the child committed the alleged offence.
2. The child freely and voluntarily admits responsibility
3. The offence is not a capital offence
4. A person exercising parental responsibility over the child consents to diversion
5. The concerns of the victims have been considered
6. The child is a first or second offender

### **Determination of child's Age (Section 229)**

If the age of a child is uncertain, the magistrate shall estimate the child's age based on-

- (a) a previous determination of age by a magistrate under this Act or any other written law;
- (b) statements made by a parent, guardian or any other person likely to have direct knowledge of the age of the child, or a statement made by the child in that regard;

- (c) a baptismal certificate, school registration form or school report, or other information of a similar nature;
- (d) an estimation of age made by a medical practitioner; or
- (e) a report of a social worker, children officer or other authorised officer in that regard.

## Levels of diversion (Sec 230)

### 1. Level One

- An oral or written apology to a specified person
- A formal caution with conditions
- Placed under supervision and guidance order, reporting order, family time order and prohibition order from specific places. **All the orders should not exceed three months,**
- Referral to counselling or Psychotherapy
- Placed under Compulsory attendance to specific centre or place for specified education not exceeding five hours per week.
- Symbolic restitution to a specified person
- Restitution of a specified object to specified victim(s) of the alleged offence

## 2. Level Two

- All orders in level one apply but extended to six months duration
- Compulsory attendance to a specified centre for a vocational course not exceeding eight hours per day for eight months.
- Performance of Community Service Order (**not provided for in level one**)
- Payment of a specified sum or benefit to a specified victim(s), **not provided in level 1**
- Compensation of a maximum of five thousand to a specified person (s) or institution.
- Referral to appear at a family conference

Note. A child can be subjected to more than one or two of the options outlined

## 3. Level Three

- Options in level two(b) but extended period to twelve months

- Referred to a programme that does not exceed six months, with a residential period of thirty five days and twenty one consecutive days.
- Performance of service without pay
- Compulsory attendance to a specified Centre or place for a specified course or education for six months of thirty five hours or less in a week.

## Special police unit (Section 242)

A special police unit shall be designated by the Inspector General to

- a) Deal with children matters
- b) Prevent and control child offences
- c) Apprehend child offenders
- d) Investigate child offences; and
- e) Perform such other functions as may be referred to the unit by the Children Act or by regulations under the Act or by any other enactment





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## THE CHILDREN ACT 2022

The Popular Version

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