

SOLE LEGAL CUSTODY OF A MINOR

INTRODUCTION

The presence of both parents in a child's life is envisioned to serve their best interests and upholds their right to receive parental love and care as enshrined in the Constitution of Kenya, The Children's Act 2022 and International legal instruments that Kenya is party to.

Where parents reside together, the custodial relationship is dealt with in a manner that best suits the family dynamic. Where parents go separate ways, for various reasons, then custodial arrangements have to be made by agreeing and signing a Parental Responsibility Agreement or by a Court of law.

The Children's Act 2022 has defined legal custody and the conferment, to a person, of parental rights and responsibilities of a person having lawful custody of a child for a defined period of time under an order of a court of competent jurisdiction.

For a better understanding, we have aid of the Black's Law Dictionary 8th Edition which defines custody as the care, control and maintenance of a child awarded by a court to a responsible adult.

The Dictionary further states that custody involves:

a) Legal custody-decision making authority; **the authority to make significant decisions on a child's behalf, including decisions about education, religious training and healthcare**.
b) Physical custody-caregiving authority; the right to have the child live with the person awarded custody by the court also **the possession of a child during visitation**.

We discussed custody of a child in Kenya the law, some definitions and circumstances which a parent could lose custody over their child in our article; Custody of a Child in Kenya. (Kindly link this article)

We shall therefore focus on **Legal Custody** in this article.

JOINT LEGAL CUSTODY VS. SOLE LEGAL CUSTODY

The distinction between actual/physical custody of a child and legal custody has been discussed above and as follows by our Honorable Courts;

In ***J. O v R. M. M Nakuru DC No. 4/2004 (2005) KLR*** Musinga J held as follows in regard to actual and legal custody;

> *"Actual custody is defined to mean the actual possession of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is present..."*

By virtue of biological parenthood, the child's mother and father both have rights and responsibilities over a child.

For absconding parents, the law through the Constitution of Kenya, The Children's Act 2022, Convention on the Rights of the Child & The African Charter on the Rights of the Child clearly provide that the parents to a child have joint legal custody by right to the child, it is the child's best interest, until it is not...

So, when does it become necessary to seek that one parent (usually the custodial parent) to ask that the court grant them Sole Legal Custody?

1. **Where there is evidence that the other parent is unfit to have decision making powers over the child(ren).**

In ***S. M. M vs. A. N. K (2022) eKLR*** Justice Joel Ngugi held as follows;

> *"... in the present case, given that there was no evidence that either parents were unfit or suitable to have custody, it was unnecessary to grant legal custody to one parent only. Indeed, I find no reason, despite the distance inconvenience (a non-factor in decision-making in the modern day due to technological advances), I find no reason to restrict legal custody to one parent only..."*

Circumstances that render a parent unfit vary from case to case and may include but are not limited to; where a parent has made decisions exposing the child to drugs, pornography, unsafe online/internet use and practices.

2. **Where the other parent has abandoned the child(ren).**

Abandonment speaks to lack of interest in participating in the minor's life, ignoring communication with regards to their parental rights and responsibilities, denying the minor their right to receive parental love and care, failure to honor agreed and/or court ordered maintenance and/or access protocols with regard to the child amongst other forms of abandonment on a case-by-case basis.

3. **Where the child has suffered any harm or is likely to suffer harm if the order is not made.**

Notably, legal custody is the decision-making aspect with regards to children. If a parent negligently and continuously delays to make decisions that directly impact the child e.g healthcare decisions, education decisions amongst others on a case-by-case basis, the same could be considered a ground to deny them the decision-making power as they have proven to lack capacity to make decisions in the minor's best interests.

4. The best interest of the child.

All the factors mentioned above on their own and jointly affect the minor's best interest. Is it good for a minor to have an uninterested parent, negligent parent, one who has abandoned them, one who has exposed them to drugs, arms, harmful culture, pornographic materials make decisions over their life? It is surely not.

The court has to carefully weigh the best interests of the minor vis a vis the parental conduct and mischief against the child, harm already suffered and likely to be suffered and if the scales tilt unfavorably towards the parent having legal custody of the minor, then such a decision is to be made.

The Court of Appeal in ***Atwal vs. Amrit (2011) E.A 20*** held:

> *"Article 53 (1) (e) and Section 24 (1) of the Children Act allow both parties to have equal parental responsibility for the child. Neither has a superior right to the other. The court held that the rights and wishes of parents and fact of parenthood although relevant and important are subordinate to the best interest of the child."*

In ***"M.A vs. R.O.O (2013) eKLR"*** while considering the issue of custody of a child, the court stated: -

> *"...what is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow in..."*

In the case of: ***"ZH (Tanzania) (FC) vs. Secretary of State for the Home Department (2011) UKSC 4"***, Lord Kerr stated: -

> *"...it is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interest. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child favor a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It*

is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in the child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result..."

CONCLUSION

Navigating the complexities of parental responsibility and legal custody when parents separate can be incredibly challenging. While the law in Kenya, supported by international conventions, strongly advocates for both parents' involvement in a child's life, there are critical circumstances where seeking sole legal custody becomes necessary for a child's best interests. As we've explored, factors such as a parent's unfitness, abandonment, history of causing or likely causing harm, and indeed, the overarching principle of the child's best interest, are paramount in these decisions.

Ultimately, the goal is always to ensure a child grows up in a safe, stable, and loving environment, with their welfare prioritized above all. The legal system, while upholding the rights of parents, decisively places the child's well-being as the supreme consideration, intervening to grant sole legal custody when the conduct or inaction of one parent jeopardizes that welfare.

HOW MAY WE HELP?

At **CM Advocates LLP**, the **Private Wealth, Family Law, Family Business & Global Mobility Advisory Services** offers tailored support to parents and other stakeholders with intention to structure their parental rights and obligations in a child's best interests. We provide step by step guidance on the legal provisions, both local and international, approaching court tactfully, navigating the mediation process and coming up with comprehensive Parental Responsibility Agreements in a timely and consistent manner. Whether the custody matter is straightforward or involves complex family dynamics, we ensure that all needs are catered to in compliance with the law.

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