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LEGAL ALERT

HIGHLIGHTS OF THE CHILDREN ACT, 2022



INTRODUCTION

The Children Act No. 29 of 2022 (the 'Act') was assented to by the President on 6th July 2022 with a commencement date of 26th July 2022.

It repealed the Children Act No. 8 of 2001 (the 'Repealed Act'). The effect of this is that from 26th July 2022, the Repealed Act ceased to be in force, subject to transitional provisions including that the Act is not to be applied retrospectively to matters pending in Court.

The objective of the Act is to give effect to all Constitutional provisions relating to children. In this regard, it advances the concept of the child's best interest as the primary consideration in every decision touching on a child.

Most importantly, the Act contains provisions for the protection and care of children such as prioritization of family-based care, as opposed to institutionalisation of children.

HIGHLIGHTS OF SOME OF THE FUNDAMENTAL CHANGES AND NEW PROVISIONS

The Act is progressive in safeguarding and enhancing the rights of children in various ways, enumerated below:

1. Firstly, the Act enhances the rights of children by:

1.1 Expanding the scope of the primary considerations to be factored in evaluating the best interest of the child.

Section 8, read together with the 1st Schedule of the Act, provides considerations such as the age, maturity, stage of development, gender, background, and any other relevant characteristics of the child; distinct special needs (if any) arising from a chronic ailment or disability and the relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare.

1.2 Affirming a child's right to inheritance according to the Law of Succession Act (Cap. 160) Laws of Kenya. Section 17 (2) (b) of the Act further affirms that a child will not be disinherited based on various grounds such as age, sex, custom or religion. All children should therefore be treated equally in succession matters. The Act makes it an offence to deprive a child of any property accruing to them by virtue of the law relating to inheritance. The penalty imposed is two (2) years imprisonment or five (5) million shillings or both.

1.3 Recognizing intersex children under section 21 of the Act. The Act requires such children to be treated with dignity and accorded appropriate medical treatment, special care, education, training, and consideration, as a particular category in social protection services. This is in contrast with the Repealed Act, which did not make any provision whatsoever, for such children.

1.4 Extending the right of children to peaceably assemble, petition and demonstrate by virtue of section 28 of the Act. This means that children are now able to picket on pertinent matters, though this right is subject



to the rights of others.

2. Secondly, the Act increases the forms of child protection through:

2.1 Assimilating "Kafaalah" into the children's legal framework. This means that a Muslim can take in a child who has been deprived of parental or family care and protection. (Section 12(2) of the Act).

2.2 Introducing a new form of adoption, known as "Kinship Adoption." Under this concept, relatives wishing to adopt children will be able to do so in a much cheaper and faster manner, devoid of legal technicalities. (Section 183).

2.3 Providing for the establishment of children rescue centres in every county. These centres are required to provide temporary care of needy children, pending placement in alternative care.

3. Thirdly, the Act shields children from unnecessary exposure to the penal framework by:

3.1 Raising the age of criminal culpability of children from 8 to 12 years. This means that a child under the age of 12 years, shall not be held criminally responsible for any act or omission. The presumption of a criminal mind-set has been raised to children of 14 years and above. (Section 221).

3.2 Implementing the Constitutional principle which states that the detention of a child before trial shall be considered as the last resort. Further, section 223 of the

Act provides alternatives to such detention, including placement of children with a family or in an educational setting, among others.

3.3 Discouraging arraignment of children who have committed minor offences. Instead, they shall be diverted to community-based correction systems listed under section 239 of the Act.

4. Fourthly, the establishes new institutions in addition to clarifying the role of existing ones to enhance child welfare. These include the following:

4.1 The Office of the Secretary of Children's Services. The duties of the Secretary include oversight of children's officers in discharging their mandate, establishment and management of child protection centres and reform institutions. (Sections 37 and 38 of the Act).

4.2 The National Council for Children's Services, whose functions shall include coordinating inter country adoptions, advising the Cabinet Secretary responsible for children affairs on child protection, fostering research on child welfare matters and creation of a children database in Kenya (Sections 41 and 42 of the Act).

4.1 County Governments have also been recognised as a critical pillar in children's affairs. In this regard, they have been empowered to establish welfare schemes that are essential in facilitating childcare programmes and facilities. Further, the Act also reiterates the constitutional obligation to provide pre-primary



education. (Sections 61 and 62 of the Act).

5. Lastly, it entrenches financial safeguards to children's social protection. The Act requires the Cabinet Secretary responsible for children matters to establish the Child Welfare Fund. This will facilitate the realization of the right guaranteed by Article 43(3) of the Constitution, in respect of all reasonable expenses incurred in relation to alternative care and other social security programmes, designed to facilitate the realization of the welfare of the child. (Section 12(7) of the Act).

CONCLUSION

The Act is a progressive statute. Children's rights and affairs are now in line with the ratified international instruments and best practice guidelines for children matters.

Importantly, the Act recognises intersex children, introduces new childcare concepts, establishes new institutions, and seeks in various ways, to minimize the unnecessary subjection of children to the penal framework. It also realizes the effect of technology and emerging issues, such as radicalization, thus protecting children from the possible harmful effects of such vices.

The statute is robust and whether or not it will be effective, will depend on the Government's goodwill, institutional efficiency and positive mind-set of all the stakeholders.

Disclaimer

*This article is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarification, please do not hesitate to contact **Pamella Ager** (pamella@oraro.co.ke), or **James Kituku** (james@oraro.co.ke) or your usual contact at our firm.*



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