

Custody and Parental Responsibility in Kenya



1. Custody

Custody generally refers to parental rights and duties relating to the possession of a child. Custody can either be **legal custody**, which refers to parental rights and duties in relation to possession of a child, conferred upon a person by a court custody order or **actual custody**, which refers to the real possession of a child, whether shared or not. Legal and actual custody can either be **joint custody** or **sole custody**.

Joint legal custody refers to where both parents have legal custody, even though the child may be residing with either parent. This is the ideal type of custody and arises where both parents are able to amicably agree on their parenting rights.

Sole legal custody arises where one parent has custody conferred upon them by a court order. It is usually awarded where the parent applying for custody can show that the other parent's presence can be dispensed with for reasons such as where the other parent is permanently moving out of the county. Sole legal custody goes hand in hand with sole actual custody, meaning that the child permanently resides with one parent. The other parent may have visitation rights.

Joint actual custody refers to where each parent has possession of the child for equal amounts of time. Any person who is in actual possession of the child has a duty to safeguard the interests and welfare of the child. In determining all matters relating to children's custody, the principle of the best interest of the child is the most important factor to be considered.

Interim custody refers to temporary custody awarded by the court, pending the final determination of the custody application. The courts have power to make interim custody orders which may be reviewed from time to time, varied or suspended. An interim custody order does not exceed twelve (12) months.

Custody of children of tender years

A child of tender years is a child under the age of ten (10) years. It is a generally accepted rule that custody of children of tender years should be given to the mother, except where there are exceptional circumstances. Such circumstances include where the mother is an unsuitable person and where she is unfit to have the care and custody of a child.

Who can be given custody?

1. A parent
2. A guardian
3. Any person who applies with the consent of a parent or guardian of a child and has been in possession of the child for three months prior to the making of the custody application.
4. Any person who does not fall under 1, 2 and 3 above, but has sufficient reasons as to why he/ she should have custody of the child.

Factors considered by the court in making a custody order

When determining whether or not to issue a custody order, the court considers the following factors, in addition to the best interest of the child.

- i. The conduct and wishes of the parent or guardian of the child
- ii. Wishes of the relatives of the child
- iii. The wishes of any foster parent, or any person who has had actual custody of the child and with whom the child has been living in the last three years prior to the custody application
- iv. The wishes of the child
- v. Whether the child has suffered any harm or is likely to suffer any harm if the order is not made
- vi. The customs of the community to which the child belongs
- vii. The religious persuasion of the child
- viii. Whether a care order, a supervision order, a personal protection order or an exclusion order has been made in relation to the child concerned and whether those orders remain in force.
- ix. The circumstances of any sibling of the child concerned, and of any other children of the home, if any.

2. Parental Responsibility

Every child is entitled to parental care and protection under the Constitution. This includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. Parental Responsibility refers to all the duties, rights, powers, responsibilities and authority that a parent has towards their child and the child's property, depending on the changing needs of the child. These duties include the duty to maintain the child and provide him with adequate diet, shelter, clothing, medical care, education and guidance, as well as the duty to protect the child from neglect, discrimination and abuse and the right to give parental guidance in religious, moral, social, cultural and other values. Parental responsibility also allows a parent to determine the name of the child, appoint a guardian for the child and deal with the property of the child for the benefit and in the best interests of the child. It also includes the duty to arrange or restrict the emigration of the child from Kenya and arranging for the burial or cremation of the child if the child dies.

Who has parental responsibility?

Where the child's father and mother were married to each other at the time of his birth, both parents have equal parental responsibility. Where the child's father and mother were not married to each other at the time of the child's birth and have later married each other, both parents have equal parental responsibility. Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other, the mother has parental responsibility at the first instance and the father subsequently acquires parental responsibility for the child either through a court order or by signing a Parental Responsibility Agreement. A Parental Responsibility Agreement may only be brought to an end by a court order.

Parental responsibility is transmitted upon the death of either or both of the parents. Where one parent dies, parental responsibility is transmitted to the surviving parent, either alone or together with a testamentary guardian. A testamentary guardian is a person appointed by a will of the deceased parent. Where both parents die, parental responsibility is transferred to the testamentary guardian. If there is no testamentary guardian then parental responsibility can pass to a guardian appointed by the court or a relative who is fit to take care of the child.

Parental responsibility may be extended beyond the eighteenth birthday if the court is satisfied that there are sufficient reasons to warrant the extension. An application for extension can be made by a parent, a relative of a child, any person who has parental responsibility for the child, the Director of Children's Services or by the child himself.

Conclusion

Custody and parental responsibility go hand in hand. However, custody does not affect parental responsibility. A parent who does not have actual custody of the child still has parental responsibility over the child. The person with actual custody of the child has care and control of the child. A custody order can also be revoked by the court if there are compelling reasons.