

Custody and guardianship of children

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Introduction

Pursuant to its powers under Article 44¹ of the Namibian Constitution, Parliament² enacted the Children's Status Act.³ The Act has made immense changes in the status of children born outside marriage (also referred to as *illegitimate children*). The status of children born inside marriage (also referred to as *legitimate children*) is uncontroversial. For the purpose of this paper, use of the terms *legitimate* and *illegitimate* are avoided in favour of the phrases *children born inside marriage* and *children born outside marriage*, respectively.

The aim of this paper is to revisit the status of children born inside or outside marriage. Furthermore, it addresses custody and guardianship of such children. Moreover, it explains the status of the said categories of children before the enactment of the Children's Status Act, upon its enactment, and the implications of these changes for the said children and other persons to whom the Act applies.

The Children's Status Act

The enactment of this law is a result of the discriminatory practices imposed by common law and statutory law between children born inside or outside marriage in matters relating to custody, guardianship and inheritance.⁴ The short title of the Act reinforces the reasons underlying the enactment of the Act, as follows:

1 Article 44 provides as follows:

The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable, to the powers and functions of the National Council as set out in this Constitution.

2 Article 146(1)(a) provides as follows:

“Parliament” shall mean the National Assembly and, once the first National Council has been elected, shall mean the National Assembly acting, when so required by this Constitution, subject to the review of the National Council.

3 No. 6 of 2006; hereinafter referred to as the *Act* or the *Children's Status Act*, depending on context. The Act came into operation on 3 November 2008 in terms of *Government Notice* No. 266 of 3 November 2008.

4 Heathcote AJ delivered the judgement in *Frans v Paschke & Others*, 2007 (2) NR 520 (HC), para. 19, declaring the common law rule barring children born outside of marriage from inheriting intestate from their fathers unconstitutional.

To provide for children born outside marriage to be treated equally regardless of whether they are born inside marriage or outside marriage; to provide for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage; to provide for matters which are in the best interest of all children; and to provide for matters connected thereto.

In addition, the Act aims to remedy the situation explained above. Accordingly its objectives are –⁵

... to promote and protect the best interests of the child and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents and this Act must be interpreted in a manner consistent with these objectives.

The Children's Status Act contains certain important definitions, which are as follows:⁶

“child” means a person who is under the legal age of majority;

“marriage” means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia;

“parent” means a woman or a man in respect of whom parentage has been acknowledged or otherwise established;

“sole custody” means the exercise of the rights, duties and powers of custody by one person, to the exclusion of all other persons; and

“sole guardianship” means the exercise of the rights, duties and powers of guardianship by one person, to the exclusion of all other persons.

The reference to age of majority in the definition of a *child* is a reference to the Age of Majority Act,⁷ which fixes the age of majority at 21 years.⁸ The definitions are important for understanding –

- to whom the Act applies
- the rights and responsibilities of the persons to whom the Act applies, and
- the legal consequences that attach to the said rights and responsibilities.

What is *parental authority*?

The common law⁹ concept of *parental authority*¹⁰ (also referred to as *parental*

5 Section 2.

6 Section 1.

7 No. 57 of 1972.

8 Section 1.

9 Section 1(1) of the Administration of Justice Proclamation No. 21 of 1919 made the Roman-Dutch law, as it existed and was applied in the Cape of Good Hope as at 1 January 1920 and after that date, the Common Law of the Protectorate (South West Africa). Article 66 of the Namibian Constitution recognises common law as part of Namibian law. See also *R v Goseb*, 1956 (2) SA 696 SWA.

10 See Spiro (1985:84), who explains that some writers refer to *parental authority* as distinct from *parental power*, but that the terms are synonymous in his view.

*power*¹¹ refers to the complex of rights, powers, duties and responsibilities vested in or imposed upon the parent, by virtue of their parenthood, in respect of their minor child and his or her property. For the purpose of this paper the term *parental authority* is adopted.

The common law concept of *parental authority* has two components, namely custody, and guardianship.¹²

Van Heerden states that *custody* is that portion of parental authority which pertains to the personal day-to-day life of the child.¹³ *Custody* is also seen as the control and supervision of the daily life and person of the child.¹⁴ The common law concept of *custody* includes the following duties:¹⁵

- The duty to provide the child with accommodation, food, clothing and medical care
- The duty to maintain and support the child
- The duty to educate and train the child, and
- The duty to care for the child's physical and emotional well-being.

Guardianship is used in two senses: one broad, the other narrow. In its broad sense, *guardianship* is equated with parental authority and includes custody. It is seen as the lawful authority which one person has over the person and/or property of another who suffers from the incapacity to manage his or her own affairs and/or person, in the interest of the latter.¹⁶ In its narrow sense, *guardianship* refers, firstly, to the control and administration of the child's estate, and secondly, to the capacity to assist and represent the child in legal proceedings or in performance of juristic acts.¹⁷ In this latter sense, *guardianship* is seen as relating exclusively to the guardianship of minors. In this context, the term *natural guardian* is used as a synonym for *parental authority*.¹⁸ Both Van Heerden¹⁹ and Schäfer²⁰ agree that the latter – narrow – definition is the more common and sensible approach when it comes to the guardianship of minors.

The Children's Status Act does not define the terms *custody* and *guardianship*; hence, these terms retain their common law meanings as explained above. Unlike Namibia, South Africa has codified and amended the common law concept of *parental authority*

11 Van Heerden (1999:313). In *Chief Family Advocate & Another v G*, 2003 2 SA 599 W 601 para. I, the courts seem to use the term *parental responsibility* as being synonymous with *parental authority* and *parental power*.

12 Van Heerden (1999:313).

13 (ibid.).

14 Schäfer (2007:38).

15 (ibid.).

16 Van Heerden (1999:313).

17 Schäfer (2007:38).

18 Van Heerden (1999:313).

19 (ibid.).

20 Schäfer (2007:38).

and replaced it with “parental rights and responsibilities”,²¹ while the term *custody* has been replaced with “care”²², and the term *access* with “contact”.²³

The concepts of *sole custody* and *sole guardianship*

Schäfer states that a distinction is made in South African law between (*single*) *custody* and *sole custody*, and (*single*) *guardianship* and *sole guardianship*.²⁴ These distinctions have an impact on the rights and duties of the parents in each case. Schäfer further states that a parent with sole custody is subject to all the duties imposed by common law in relation to custody, with the additional power of appointing, by testamentary disposition, any person to be vested with sole custody of the child.²⁵ With respect to *sole guardianship*, Schäfer states that a sole guardian has all the powers, and is subject to all duties imposed by common law, with the additional power of appointing a testamentary guardian.²⁶

Namibia seems to have followed the South African law as to the meaning of the concepts *sole custody* and *sole guardianship*.²⁷ The Children’s Status Act defines these terms as the exercise of the rights, duties and powers of custody or guardianship by one person, to the exclusion of all other persons.²⁸

Section 13(3) of the Act provides that any of the following persons may seek an order for sole guardianship:

21 Section 18, Children’s Act, 2005 (No. 38 of 2005).

22 (ibid.:section1(2)).

23 (ibid.).

24 Schäfer (2007:41).

25 (ibid.).

26 (ibid.:35).

27 In respect of *sole custody*, section 20(2) and (3) provides as follows:

- (2) A parent with sole custody of a child may, by will or other testamentary disposition, appoint any other person as a custodian of the child, and where a will or other testamentary disposition appoints a guardian without naming a custodian, that guardian is the custodian of the child unless a competent court, on application made to it, directs otherwise.
- (3) Where a parent shares joint custody with another parent because the parents are or were married, or in terms of any law or agreement, the surviving parent acquires sole custody upon the death of the other parent, unless a competent court, on application made to it, directs otherwise.

In respect of *sole guardianship*, section 21(2)–(4) provides as follows:

- (2) On the death of one of two equal guardians, the surviving guardian does, unless a competent court directs otherwise, acquire sole guardianship over a child.
- (3) A person with sole guardianship of a child may, by testamentary disposition, appoint another person as the sole guardian of that child.
- (4) Where there is no provision in a will or other testamentary disposition naming a guardian for a child, or where there is for any other reason no competent guardian for a child, a guardian can be registered for the child by means of the procedure contained in this section.

28 Section 1.

The following persons may seek a court order granting sole guardianship to one parent, or to some other person:

- (a) either parent;
- (b) the child;
- (c) someone, other than the mother or father of the child, who is acting as the primary caretaker of the child; or
- (d) a person authorised in writing by the Minister to act on behalf of the child.

Section 13(7) of the Act provides as follows, however:

Unless the children's court orders otherwise, the written consent of both parents is required for –

- (a) the adoption of the child, subject to the provisions for dispensing with any required consent, contained in the law on adoption; or
- (b) the removal of a child from Namibia for a period longer than one year.

The provisions of section 13(3) and 13(7) seem to apply to both children born inside marriage and those born outside marriage.²⁹ A reading of section 13(7) suggests that an order of *sole guardianship* does not divest the person who does not have guardianship from parental authority in total, and that such person retains the right of consent as provided in that section.

Parental authority and the Namibian law

The common law concept of *parental authority* is treated as being outmoded and unsatisfactory as it treats parental authority from a parent's point of view.³⁰

Namibia has made commitments both domestically³¹ and internationally³² to observe, protect and uphold children's rights. For example, Article 15(1) of the Namibian Constitution provides as follows:

Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents.

29 See section 4(3) of the Act, which provides as follows:

The procedures for orders pertaining to custody in section 12, orders pertaining to guardianship in section 13(3) to (6), orders restricting or denying access to a non-custodian parent [in] section 14(5) to (8) and orders dealing with the unreasonable denial or restriction of access in section 14(11) to (12) will apply with the necessary changes to children of divorced parents.

30 Van Heerden (1999:17).

31 Article 5, Namibian Constitution.

32 Article 144 of the Namibian Constitution provides as follows:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Namibia has ratified a number of international instruments which call on its signatories to observe, protect and uphold children's rights. The most notable are the United Nations Convention on the Rights of the Child,³³ the Convention on the Elimination of all Forms of Racial Discrimination against Women and Children,³⁴ and the African Charter on the Rights and Welfare of the Child.³⁵

Both the constitutional utterances on children's rights and the ratification of such international instruments demand a shift from the currently adopted parent-rights-based approach to one where children are seen as holders of rights.

Status of children born outside marriage

A *child born outside marriage* is one whose parents were not legally married to each other at the time of the child's conception or birth or at any intervening time.³⁶

Under common law, children born outside marriage are distinguished as follows:³⁷

- ***Natural children:*** These are children who are born of parents who, though not married to each other at the time of the child's conception or birth or at any intervening time, could have validly married each other.
- ***Adulterine children:*** These are children where one or both of the child's parents were married to someone else at the time of the child's conception.
- ***Incestuous children:*** These are children born of parents who could not have been married to each other at the time of the child's conception, because they were closely related.
- ***Children procreated by means of artificial insemination (now called assisted reproduction):***³⁸ These are children born as a result of assisted reproduction of an unmarried woman or a married woman with the semen of a man other than the husband of the thus fertilised woman.³⁹

However, the categorisation of children seems to have been done away with in light of court decisions such as *Frans v Paschke & Others*⁴⁰ and with the enactment of the Children's Status Act.

33 Namibia signed the Convention on 26 September 1990 and ratified it on 30 September 1990.

34 Namibia acceded to this Convention on 23 November 1992.

35 Namibia signed this Convention on 13 July 1999, and ratified it on 23 July 2004; Convention text available at <http://www.africa-union.org/child/home.html>; last accessed 2 October 2009.

36 Cronjé & Heaton (2003:45).

37 (ibid.).

38 See section 24, Children's Status Act.

39 Section 13(2), Children's Status Act.

40 In that case the court declared the common law rule that barred children born outside of marriage from inheriting intestate from their fathers as unconstitutional.

Common law on custody and guardianship of children born outside marriage

In terms of common law, custody and guardianship of a child born outside marriage vests in the mother of the child.⁴¹ If the mother of a child born outside marriage is also a minor, guardianship vests in the guardian of the minor mother,⁴² but the minor retains custody of the child.⁴³ If the mother of a child born outside marriage is a minor but acquires status of majority by marriage⁴⁴ or obtains a declaration of majority under the Age of Majority Act,⁴⁵ custody and guardianship vests in the mother.

Notwithstanding the above, the court has power in terms of common law to award guardianship and custody of a child born outside marriage to the father if it is in the best interest of the child.⁴⁶

Children's Status Act on custody and guardianship of children born outside marriage

The current status of children born outside marriage is contained in the Children's Status Act. The Act provides that both parents have equal rights to become custodians of the child born outside marriage.⁴⁷ The Act further provides that the person with custody of the child is also the guardian of the child, unless a competent court on application made to it directs otherwise.⁴⁸ The above-mentioned provisions suggest that the mother of a child born outside marriage no longer has the automatic custody and guardianship of the child that she had under common law: the Act places both parents of the child born outside marriage on equal footing in respect of custody and guardianship of their child.

The position Namibia has taken on the parental authority of children born outside marriage accords with the fundamental rights entrenched in the country's Constitution.⁴⁹ It further reflects Namibia's international commitments contained in the Convention on the Rights of the Child, which provides that both parents have common responsibilities for the upbringing and development of the child.⁵⁰

41 *Dhanabakium v Subramanian*, 1943 AD 160; *Engar v Engar v Desai*, 1966 (1) SA 621 (T).

42 See *Dhanabakium v Subramanian*, at 166.

43 Spiro (1985:454)

44 Section 24(2), Marriage Act, 1961 (No. 25 of 1961).

45 Section 6.

46 Cronjé & Heaton (2003:45).

47 Section 11(1).

48 Section 13(1).

49 Article 10(1) of the Namibian Constitution guarantees equality before the law. Article 10(2) prohibits discrimination on the grounds of sex and marital status, among other things.

50 Article 18(1) of the Convention on the Rights of the Child. Section 16(1) of the Convention on the Elimination of all Forms of Discrimination against Women directs states parties to take appropriate measures to ensure that men and women have the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.

From the above-mentioned, it seems that the status of parents determines the legitimacy of a child, and at this stage it is important to understand who the child's parents⁵¹ are for the purposes of the Children's Status Act. In most cases, the parentage of a mother is not in question, whereas the same cannot be said for that of the father. For this reason, the Children's Status Act provides for a number of rebuttable presumptions in disputes relating to paternity in order to assist both women who are or were married or unmarried women. The Act provides as follows:⁵²

Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if:

- (a) he was at the approximate time of the conception, or at the time of the birth, of the person in question, or at any time between those two points in time, married to the mother of such person;
- (b) he cohabited with the mother of the person in question at the approximate time of conception of such person;
- (c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963);
- (d) both he and the mother acknowledge that he is the father of the person in question; or
- (e) he admits or it is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived.

The above-mentioned provision means that, unless the alleged father – who is termed the “putative father” in the Act⁵³ – institutes parentage proceedings under section 8 of the Act to rebut the presumptions contained in section 9 of the Act, he is regarded as the father of the child. The onus is on the putative father to prove that he is not the father of the child, and the onus of proof is on the balance of probabilities.⁵⁴

However, a problem arises where a putative father or a putative mother⁵⁵ disputes parentage. To remedy this situation, the Children's Status Act provides for a procedure for bringing parentage proceedings. In terms of section 8 of the Act, parentage proceedings may be brought by –

- (a) the mother or putative mother of the person whose parentage is in question;
- (b) the father or putative father of the person whose parentage is in question;
- (c) the person whose parentage is in question;
- (d) someone, other than the mother or father of the person whose parentage is in question, who is acting as the primary caretaker of such person; or

51 Section 1. Children's Status Act.

52 Section 9(1).

53 Section 8(1)(a) defines *putative father* as a man who claims or is alleged to be the father of a persons for whom parentage has not yet been established or acknowledged without dispute.

54 Section 8(4).

55 Section 8(1)(b) defines *putative mother* as a woman who claims or is alleged to be the mother of a person for whom maternity has not been established or acknowledged without dispute.

- (e) a person authorised in writing by the Minister to act on behalf of the person whose parentage is in question.

Status of children born inside marriage

At common law, a *child born inside marriage* is one whose parents were lawfully married to one another other at the time of conception, birth, or at any time between these dates.⁵⁶

Traditionally, children born inside marriage have been categorised as follows:

- Children conceived and born during the subsistence of the marriage of their parents.⁵⁷
- Children born of a putative marriage⁵⁸ are considered to be legitimate, to use the old terminology. At common law, the annulment of a voidable marriage rendered children born or conceived of the union retrospectively as children born outside marriage.⁵⁹

Statute law has enlarged the categories of children born inside marriage as follows:

- In terms of section 74(2) of the Children's Act,⁶⁰ an adopted child is deemed in law to be a "legitimate" child (child born inside marriage) of the adoptive parent.
- Contrary to the consequence of the common law rule that the annulment of a voidable marriage rendered children born or conceived of the union retrospectively as children born outside marriage, the status of a child conceived of a voidable marriage is not affected by the annulment of the marriage by a competent court, and that child is regarded as a child born inside marriage.⁶¹
- Under common law, a child born as a result of assisted reproduction of an unmarried woman, or assisted reproduction of a married woman with the semen of a man other than her husband, is treated as a child born outside marriage, even if the husband consented.⁶² The Children's Status Act seems to have repealed that common law rule. In terms of section 24(1), the Act provides that a child born to a woman as a result of assisted reproduction or in vitro fertilisation with the gamete or gametes of any person other than that woman and her spouse, provided they both consented to the use of assisted reproduction or in vitro fertilisation, is regarded as a child born inside marriage. There is a rebuttable presumption that the necessary consent was present.⁶³

56 Schäfer (2007:6); Van Heerden (1999:327–328).

57 Schäfer (2007:6).

58 Schäfer (2007:7); Schäfer states that "a *putative marriage* is one which, although invalid, was entered into in good faith by at least one of the parties".

59 Van Heerden (1999:329–330).

60 No. 33 of 1960.

61 Section 22, Children's Status Act.

62 Section 5.

63 Section 24(2), Children's Status Act.

- Another inroad made by the Children's Status Act is the definition of marriage.⁶⁴ The definition of marriage includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia. Section 26(1) of the Act provides as follows:

Subject to subsection (2), this Act applies to all children or persons, where applicable, and to all matters relating to children or persons, where applicable, irrespective of whether the children or persons, where applicable, were born or the matters arose before or after the coming into operation of the Act.

- A conjunctive reading of the definition of *marriage* and section 26(1) of the Act suggests that children born of customary marriages are recognised as children born inside marriage.

Custody and guardianship of children born inside marriage

Joint and equal custody and guardianship vests in both parents of a child born inside marriage. Section 14(1) of the Married Person's Equality Act⁶⁵ provides the following:

Notwithstanding anything to the contrary contained in any law or the common law, but subject to any order of a competent court with regard to sole guardianship of a minor child or to any right, power, or duty which any other person has or does not have in respect of a minor child, the father and the mother shall have *equal guardianship* over a minor child, including an adopted child, of their marriage, and such guardianship shall, subject to subsection (2), with respect to rights, powers and duties be equal to the guardianship which every guardian immediately before the commencement of this Act had under the common law in respect of his or her minor children. [Emphasis added]

Section 14(2) of the Act further provides that –

[w]here both the father and the mother have guardianship of a minor child, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of –

- (a) the contracting of a marriage by the minor child;
- (b) the adoption of the minor child;
- (c) the removal of the minor child from Namibia by either of the parents or any other person;
- (d) the application for the inclusion of the name of the minor child in the passport issued or to be issued to any one of the parents;
- (e) the alienation or encumbrance of immovable property or any right to immovable property vesting in the minor child.

The above-mentioned provision is reflective of joint guardianship shared by persons who are married.

64 Section 1, Children's Status Act.

65 No. 1 of 1996.

Who may seek custody and guardianship of a child?

The Children's Status Act provides the following:⁶⁶

- (1) The following persons may seek an order pertaining to custody of a child born outside marriage, provided that such a proceeding [is] brought by or on behalf of the person who is seeking custody of the child:
 - (a) the father, regardless of whether he is a major or a minor;
 - (b) the mother, regardless of whether she is a major or a minor;
 - (c) someone, other than the mother or father of the child, who is acting as the primary caretaker of the child; or
 - (d) a person authorised in writing by the Minister to act on behalf of the child.

With respect to guardianship, the Act provides the following:⁶⁷

- (3) The following persons may seek a court order granting sole guardianship to one parent, or to some other person:
 - (a) either parent;
 - (b) the child;
 - (c) someone, other than the mother or father of the child, who is acting as the primary caretaker of the child; or
 - (d) a person authorised in writing by the Minister to act on behalf of the child.

The application for a custody order under section 12(2) of the Children's Status Act and the application for a sole guardianship order under section 13(4) of the Children's Status Act⁶⁸ needs to be made to the children's court.⁶⁹ The Act further provides that the children's court may vary or withdraw a custody or guardianship order made under section 12 or 13, respectively.

Under section 13, the Act further provides the following in respect of a custody application:

An order for custody in terms of this section may only be made after the prescribed attempts have been made to notify the child's parents, the child's primary caretaker and any other person or persons with custody or guardianship of the child immediately prior to the application, and that person has or those persons have been given an opportunity to be heard.

Under section 14, the Act further provides the following in respect of a guardianship application:

66 Section 12(1).

67 Section 12(3).

68 Regulation 5 and 6 of the Regulations relating to Children's Status, published under Government Notice No. 267 of 2008.

69 Section 1 of the Children's Status Act states that children's court "means the children's court referred to in section 1 of the Children's Act, 1960 (Act 33 of 1960)". Section 4(2) of the Children's Act provides "that every magistrate's court shall be a children's court for any part of the area of its jurisdiction for which no children's court has been established under subsection (1)".

An order for guardianship in terms of this section may only be made after the prescribed attempts have been made to notify the child's parents, the child's primary caretaker and any other person or persons with custody or guardianship of the child immediately prior to the application, and that person has or those persons have been given an opportunity to be heard.

Another inroad made by the Children's Status Act is that persons convicted of rape have no rights to custody, guardianship or access in terms of the Act, unless the Children's Court orders otherwise.⁷⁰ This provision has the effect that, in respect of a married woman who gives birth to child who is a result of rape by her husband, and whose husband is convicted of rape, that husband forfeits rights to custody and guardianship of that child.

Conclusion

From the above it is clear that the Children's Status Act has modified and repealed the discriminatory common law practices relating to children born outside marriage as regards custody, guardianship and inheritance. The Act also recognises that persons other than the parents of the child may have an interest in its well-being. The Act therefore allows for custody and guardianship applications to be made by the child's caretaker or the Minister of Gender Equality and Child Welfare, amongst others.

A notable jurisdictional change brought about by the Children's Status Act is that the children's court may vary or withdraw a guardianship order made by the High Court.⁷¹

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70 Section 15(1).

71 See section 13(1), where reference is made to "a competent court". In terms of the High Court Act, 1990 (No. 16 of 1990), only the latter has the jurisdiction to hear and determine issues relating to the status of a person.