

# CHILDREN

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## Child Care and Protection Act 3 of 2015

**Summary:** This Act ([GG 5744](#)) gives effect to the rights of children as contained in the Namibian Constitution and international agreements binding on Namibia. It sets out principles relating to the best interests of children. It reduces the age majority from 21 to 18, while providing that parental consent to marry is still required up to age 21. It establishes a National Advisory Council on Children, a Children's Advocate in the Office of the Ombudsman and a Children's Fund to finance cross-cutting issues. It covers the appointment and designation of social workers, social auxiliary workers, community child care workers and probation officers, and provides for the designation of private social workers and child protection organisations for certain purposes. It also provides for children's courts and for the registration of residential child care facilities, places of care and shelters.

It provides procedures for determining the parentage of a child. It also provides for the allocation of parental responsibilities and rights in respect of children born outside marriage and children of divorced parents. It provides mechanisms for custody and guardianship of children on the death of the person having custody or guardianship. (These parts of the Act closely resemble the provisions of the Children's Status Act 6 of 2006, which was repealed and re-enacted as part of this Act to bring all related procedures in the children's court under one legislative umbrella.)

The Act covers parenting plans between persons with parental responsibilities and provides for agreements in respect of the kinship care of children.

It authorises prevention and early intervention services in relation to children and provides measures relating to children in need of protective services. It redefines foster care. It provides for the issuing of contribution orders. It covers both domestic and inter-country adoption of children, and paves the way for Namibia to adopt several key Hague Conventions on children.

It provides for additional measures for the protection of children, including issues pertaining to certain forms of child labour and measures to combat baby-dumping. It requires certain persons to be in possession of police clearance certificates to ensure that they are not unfit to work with children.

It provides for grants payable in respect of certain children and creates some new offences relating to children.

The Act was brought into force as of 30 January 2019 by GN 4/2019 ([GG 6829](#)).

**Repeals:** The Act repeals the *Children's Act 33 of 1960*, the *Age of Majority Act 57 of 1972* and the Children's Status Act 6 of 2006.

**Amendments:** The Act is amended (to remove the provisions on child trafficking) by the Combating of Trafficking in Persons Act 1 of 2018 ([GG 6562](#)), which was brought into force on 14 November 2019 by GN 335/2019 ([GG 7047](#)).

**Regulations:** Section 258 contains a savings provision for regulations made in terms of the repealed laws. However, GN 5/2019 ([GG 6829](#)) repeals the Regulations Relating to Children's Status, published in GN 267/2008 ([GG 4154](#)) in terms of the Children's Status Act 6 of 2006, a number of specific regulations issued in terms of the *Children's Act 33 of 1960* and any other regulations made under the Children's Act 33 of 1960 "in respect of any matter that is regulated by these regulations or by the Regulations Relating to Children's Court Proceedings published under Government Notice No. 6 of 30 January 2019." Thus, it appears unlikely that any regulations enacted under the repealed laws remain in force.

**Child Care and Protection Regulations** are issued in terms of this Act by GN 5/2019 ([GG 6829](#)).

**Regulations Relating to Children's Court Proceedings** are issued in terms of this Act by GN 6/2019 ([GG 6829](#)).

**Notices:** Section 258 contains a savings provision for notices and other actions done in terms of the repealed laws.

**Appointments:** GN 273/2021 ([GG 7701](#)) announces the appointment of members of the National Advisory Council on Children.

**Cases:** The following cases pertain to this Act:

*MA & Others v AG* 2021 (1) NR 292 (SC) (appropriate for High Court to decline jurisdiction over guardianship of child born outside marriage since Children's Court has jurisdiction as court of first instance over questions of guardianship even although it lacks jurisdiction to determine the validity of a will – an issue which had fallen away in this case (see para 41); overall scheme of Act outlined at paras 34-40)

*Luehl v Minister of Home Affairs and Immigration* 2021 (4) NR 1104 (HC) (sections 3(1), 95, 111(1); overturned on appeal by *Minister of Home Affairs and Immigration v Lühl*, Case No. SA 96/2021 without discussion of these sections (see more detailed discussion of case below);

*CS (born S) v CS* 2021 (4) NR 1156 (HC), upheld on appeal in *CJS v CS (born S)* 2021 (4) NR 1208 (SC) (factors in section 3 as guide to assessing child's best interests in case involving relocation of custodian parent after divorce).

See also the following cases on the status of children born via surrogacy to same-sex parents in South Africa:

*PL v Minister of Home Affairs and Immigration* 2021 (2) NR 335 (HC) (Ministry's refusal to issue emergency travel documents to twin children of same-sex parents born via surrogacy in South Africa to one Namibian and one non-Namibian parent upheld on procedural grounds combined with deference to executive; section 95(2) of the Act on DNA tests referenced in discussion of whether or not a DNA test should be required to prove the child's genetic link to the Namibian parent; the requested travel documents were issued by the Ministry despite the judgment)<sup>75</sup>

*Luehl v Minister of Home Affairs and Immigration* 2021 (4) NR 1104 (HC) (question of citizenship of child born via surrogacy in South Africa to same-sex parents, one Namibian and one non-Namibian (sibling of twin children in case cited above); citizenship by descent in terms of Art 4(2) of Namibian Constitution does not require biological link between parent and child, meaning that it is not in child's best interests to require DNA testing since there is no dispute about paternity; both parents are listed on the South African birth certificate which is recognised in Namibia under principle of comity; similarly-situated heterosexual parents and adoptive parents are not asked to prove biological link, pointing to discrimination against same-sex parents in violation of Constitution; African Charter on the Rights and Welfare of the Child (reference to "status" in Art 3 of the Charter includes sexual orientation); and UN Convention on the Rights of the Child (several provisions cited without being discussed in detail, with particular attention to Art 9 on separation of parent and child); overturned on appeal by *Minister of Home Affairs and Immigration v Lühl*, Case No. SA 96/2021, which held that registration either inside or outside Namibia is a precondition for citizenship by descent under section 2(2) of Act and declined to discuss any other issues since there was no registration in the case at hand.

Note that the High Court case cites the South African case of *YD v LB (A)* 2009 (5) SA 479 (GNP), which concerns leave to appeal the judgment in *LB v YD* 2009 (5) SA 463

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<sup>75</sup> See Werner Menges and Arlana Shikongo, "Babies can come home", *The Namibian*, 19 May 2021.

(T). It should be noted that the High Court judgment in *YD v LB (A)* was reversed on appeal by the Supreme Court of Appeal in *YD (now M) v LB* 2010 (6) SA 338 (SCA).

The following cases pertain to the *Children's Status Act 6 of 2006* –

*Frans v Paschke & Others* 2007 (2) NR 520 (HC) implicitly extended the applicability of section 16 on the inheritance rights of children born outside marriage, through section 26(2), by finding the common law rule that children born outside marriage may not inherit intestate from their fathers unconstitutional with effect from 21 March 1990.

*NS v PS* 2010 (2) NR 418 (HC) makes a passing mention of the Act, noting that section 5(1) allows for variation of a High Court custody order in the children's court "if circumstances have changed".

*S v S* 2011 (1) NR 144 (HC) suggests that the common-law concept of putative marriage should fall into disuse since the main purpose of the concept is to mitigate harshness to any children involved, now that "the Children's Status Act essentially puts children born out of wedlock on the same legal footing with children born in wedlock" (at 148B-C); rejected as having been wrongly decided by *MN v LI & Another* 2022 (1) NR 135 (SC)

*Jordaan v Jordaan* (A 317/2012) [2012] NAHCMD 106 (11 December 2012), deals with an *ex parte* application for interim custody under the Act which was found to be outside the Act's criteria for such an order.

*FN v SM* 2012 (2) NR 709 (HC) overturned a decision not to confirm an interim protection order in terms of the Combating of Domestic Violence Act 4 of 2003, and issued a final protection order giving interim custody to the mother and access to the father; the Court made this final protection order for a duration of 12 months, to allow time for a custody proceeding under the Children's Status Act.

*LNL v LJJ* (I 2406/2013) [2014] NAHCMD 309 (17 October 2014) involved a dispute about the paternity of one child in divorce proceedings, on the basis that the wife had affairs. The High Court said that the Children's Status Act reiterates the common law presumption that a child born in wedlock is the child of the father married to the mother. It "assists a father of a child born in marriage only to this extent: If the mother refuses to subject a child to a paternity test, there is a presumption that she is seeking to conceal the truth concerning the parentage of that person". The Court held that the husband cannot demand paternity tests when he has not produced any evidence which contradicts the presumption that children born inside marriage are the children of the spouses.

*JM & Another v SM* 2016 (1) NR 27 (HC) concerned a request for an interim variation of a divorce order on custody, pending the outcome of a custody application under the Children's Status Act. It is not clear why the parties utilised two different forums. The case found that the High Court has very broad discretion to consider any relevant information.

*Kriel v Kantak* (A 268-2015) [2015] NAHCMD 242 (7 October 2015) involved a High Court application for interim custody of a child launched only three court days after a custody application was made in the children's court under the Children's Status Act. The High Court refused to entertain the case on the grounds that this would be usurping the lower court's function. It noted that if the lower court is not acting, the appropriate remedy is mandamus.

*QJ v EJ* 2019 (2) NR 494 (HC) (factors cited in section 3 applied to determine best interests of child in custody dispute between divorcing parents).

The following cases pertain to the *Children's Act 33 of 1960* –

*Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State*, 1991 NR 178 (SC) (references to whipping and corporal punishment in sections 32 and 92(1) unconstitutional)

*S v Van der Bergh* 2003 NR 69 (HC) (suggestion that youthful offender is a child in need of care as defined by this Act)

*Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 174 (HC) (section 71(2)(f) declared unconstitutional and therefore invalid)

See also *NS v RH* 2011 (2) NR 486 (HC) at 526E-529B, which discusses in *dicta* the impact of *Detmold* in the absence of Namibia's accession to the Hague Convention on Inter-Country

Adoption and the subsidiarity principle in Art 21(b) of the UN Convention on the Rights of the Child incorporated into Namibian law by virtue of Art 144 of the Namibian Constitution.

**Related international agreements:** The following international agreements to which Namibia is party are appended to the Act –

***African Charter on the Rights and Welfare of the Child (ACRWC or Children’s Charter), 1990***  
***Convention on the Rights of the Child, 1989***

*Amendment to Article 43(2) of the Convention on the Rights of the Child adopted by the Conference of the States Parties, 1995*

*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*

*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000*

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000*

This Protocol is issued under the *Convention against Transnational Organized Crime (Palermo Convention), 2000*.

***Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993***

The following international agreements to which Namibia is not yet party are appended to the Act –

*Hague Convention on the Civil Aspects of International Child Abduction, 1980*

*Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996*

*Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007.*

**Commentary:**

Legal Assistance Centre, *Public Participation in Preparing A New Child Protection Law: National Consultation on the Child Care and Protection Bill, 2009*, available [here](#)

Oliver C Ruppel & Pombili L Shipila, “Adoption: Statutory and customary law aspects from a Namibian perspective” in Oliver C Ruppel (ed), *Children’s Rights in Namibia*, Konrad Adenauer Stiftung, 2009, available [here](#)

R Coomer & D Hubbard, “A major decision: Considering the age of majority in Namibia” in Oliver C Ruppel (ed), *Children’s Rights in Namibia*, Konrad Adenauer Stiftung, 2009, available [here](#)

Felicity !Owoses-/Goagoses, “Custody and guardianship of children” in Oliver C Ruppel (ed), *Children’s Rights in Namibia*, Konrad Adenauer Stiftung, 2009, available [here](#)

Tousy Namiseb, “The Children’s Status Act, 2006 (No. 6 of 2006)”, *Namibia Law Journal*, Volume 1, Issue 2, 2009, available [here](#)

Legal Assistance Centre, *Public Participation in Law Reform: Revision of Namibia’s Draft Child Care and Protection Bill, 2010*, available [here](#)

Julia Sloth-Nielsen, Lorenzo Wakefield & Nkatha Murungi, “Does the differential criterion for vesting parental rights and responsibilities of unmarried parents violate international law? A legislative and social study of three African countries”, 55 (2) *Journal of African Law* 203, 2011.

Legal Assistance Centre, *Summary of Namibia’s Child Care and Protection Act (Act No. 3 of 2015)* (set of 23 factsheets on the Act in English, Afrikaans and Oshiwambo); available [here](#)

Ministry of Gender Equality and Child Welfare / Legal Assistance Centre / Finnish Embassy / UNICEF Namibia, *Guide to Namibia’s Child Care and Protection Act 4 of 2015* (detailed 28-chapter Guide to the Act and regulations designed to serve as a manual for service providers), available [here](#).

**MISCELLANEOUS**

General Notice 250/2001 ([GG 2601](#)) proclaims 28 September as the Day of the Namibian Child “in order to re-dedicate Namibia’s commitment to her children”.

## **SELECTED CASES**

- Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State* 1991 NR 178 (SC) (constitutionality of corporal punishment)
- S v Koyoka* 1991 NR 369 (HC) (no mutual duty of support arising in a situation where one person cared for another person when he was a child, but there was no blood relationship and no legal adoption)
- Uirab v Minister of Basic Education*, Case No I 1257/2005 (High Court) (unreported; corporal punishment in school)
- S v Nkasi* (CC 02/2010) [2010] NAHC 9 (24 March 2010) (unreported; child abuse which began as corporal punishment by parent)
- S v Jeremia* 1993 NR 227 (HC) (severe sentence for child abuse)
- S v Teek* 2009 (1) NR 127 (SC) (detailed discussion of credibility of evidence of children; see also Kaijata Kanguuehi, “*S v Teek*: A critical review and analysis”, *Namibia Law Journal*, Volume 1, Issue 2, 2009, available at [www.kas.de](http://www.kas.de)); see also *S v Teek* 2019 (1) NR 215 (SC) (dangers of relying on uncorroborated evidence “especially of young children”, due to the “imaginativeness and suggestibility of children”)
- EH v D* 2012 (2) NR 451 (HC) (best interests of child considered in custody dispute; considerations of urgency when children’s rights involved, in contrast to commercial or kindred matters)
- Vivier NO & Another v Minister of Basic Education, Sport & Culture* 2012 (2) NR 613 (SC) (extensive discussion of credibility evidence of single child witness with limited cognitive abilities)
- JT v AE* 2013 (1) NR 1 (SC) (access by father to child born outside marriage considered in terms of common law with reference to Namibian Constitution and Convention on the Rights of the Child)
- Ex Parte Chingufo: In re Semente v Chingufo* 2013 (2) NR 328 (HC) (patient’s right to refuse treatment if sufficient mental capacity present, but requisite capacity missing in the case at hand), overturned on appeal in *ES v AC* 2015 (4) NR 921 (SC) (patient autonomy as a basic human right, notwithstanding children’s right to be cared for by their parents; partial dissent would have found that child’s right to prevent parent from abandoning child through an unnecessary death would have justified blood transfusion against parent’s religious wishes); see also Nico Horn, “*Ex Parte Chingufo. In re E Semente; E Semente v Chingufo*: Another unfortunate victory for formalist law”, *Namibia Law Journal*, Volume 5, Issue 1, 2013 and Carmen C Visser, “Medical treatment vis-à-vis patient’s rights”, *Namibia Law Journal*, Volume 8, Issue 1, 2016
- JS & Another v Chairperson of the Internal Disciplinary Panel of the Windhoek International School & Others* 2015 (2) NR 352 (SC) (child’s right to legal representation in a school disciplinary hearing)
- Tjingaete v Lakay NO & Others* 2015 (2) NR 431 (HC) (claim of adoption under customary law not accepted for purposes of intestate succession because of lack of proof of the customary law in question and because the Intestate Succession Ordinance recognises only formal adoptions under the relevant legislation)
- SK v SK* 2018 (1) NR 268 (HC) (custody of minor children is never *res judicata* but always subject to variation on good cause shown and subject to best interests of child).
- S v Guriras* 2022 (4) NR 929 (HC) (primary caregiver of child cannot be treated any differently than any other offender in respect of sentencing; hardship to dependents is unfortunate, but not a mitigating factor; Art 30 of the African Charter on the Rights and Welfare of the Child cannot overcome Art 10 of Namibian Constitution on equality before the law).

### **Cases on infanticide:**

- S v Glaco* 1993 NR 141 (HC)
- S v Muzanima* (1) (CC 12 of 2006) [2006] NAHC 15 (25 April 2006)
- S v Shaningwa* 2006 (2) NR 552 (HC)
- S v Uupindi* (CC 15 of 2007) [2007] NAHC 31 (20 April 2007)
- S v Kaulinge* (CC 14 of 2007) [2007] NAHC 30 (19 April 2007)
- Akwenye v S* (CA 117 of 2010) [2011] NAHC 106 (08 April 2011)
- See also *S v Seas* 2018 (4) NR 1050 (HC) (murder of 3-year-old child by mother).

## **COMMENTARY**

- G Naldi, "Supreme Court of Namibia declares Corporal Punishment Unconstitutional", 3 *African Journal of International and Comparative Law* 785 (1991)
- D LeBeau & G Spence, *Towards the elimination of the worst forms of child labour in Namibia*, University of Namibia, 2004
- Dr Elizabeth M Terry, *Elimination of Child Labour in Namibia: A discussion document on what is known, existing policy and programmes and possible gaps*, Ministry of Labour and Social Welfare, 2007
- Legal Assistance Centre, *Baby-dumping and Infanticide, Monograph 1*, 2008, available [here](#)
- Oliver C Ruppel (ed), *Children's Rights in Namibia*, Konrad Adenauer Stiftung, 2009, available [here](#) (reviewed by Norman Tjombe in *Namibia Law Journal*, Volume 2, Issue 2, 2010, available [here](#))
- FX Bangamwabo, "Towards the elimination of the worst forms of child labour in Namibia: The implementation and internalisation of international law relating to the worst forms of child labour", *Namibia Law Journal*, Volume 2, Issue 2, 2010, available [here](#)
- Legal Assistance Centre, *Corporal Punishment: National and International Perspectives*, 2010, available [here](#)
- Legal Assistance Centre, *Stepfamilies in Namibia: A Study of the Situation of Stepparents and Stepchildren and Recommendations for Law Reform*, 2011, available [here](#).

## **INTERNATIONAL LAW**

***African Charter on the Rights and Welfare of the Child (ACRWC or Children's Charter), 1990***

***Convention on the Rights of the Child, 1989***

*Amendment to Article 43(2) of the Convention on the Rights of the Child adopted by the Conference of the States Parties, 1995*

*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*

*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000*

***Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption, 1993***

***ILO Convention 138 concerning Minimum Age for Admission to Employment, 1973***

***ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999***

***Protocol to the Convention against Transnational Organised Crime, 2000 to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000***

**Cases on international law:** *NS v RH* 2011 (2) NR 486 (HC) at 526E-529B (which discusses in dicta the subsidiarity principle in Art 21(b) of the Convention on the Rights of the Child incorporated into Namibian law by virtue of Art 144 of the Namibian Constitution); *JT v AE* 2013 (1) NR 1 (SC) (best interests standard applied in case concerning father's access to child born outside marriage); *S v Gomaseb* 2014 (1) NR 269 (HC) (sentence imposed on 15-year-old offender upheld; Art 37(b) of the Convention on the Rights of the Child applied).

See also *Births, Marriages, and Deaths Registration Act 81 of 1963* (**CIVIL REGISTRATION**).

See also Combating of Immoral Practices Act 21 of 1980 (sexual offences against children under age 16) and Combating of Rape Act 8 of 2000 (rape of children) (**CRIMINAL LAW AND PROCEDURE**).

See also *Criminal Procedure Act 51 of 1977* (testimony by children and juvenile offenders) (**CRIMINAL LAW AND PROCEDURE**).

See also Prevention of Organised Crime Act 29 of 2004 (provisions on trafficking relevant to child trafficking) (**CRIMINAL LAW AND PROCEDURE**).

See also Combating of Domestic Violence Act 4 of 2003 (**DOMESTIC VIOLENCE**).

See also **EDUCATION**.

See also Intestate Succession Ordinance 12 of 1946 (intestate succession of children) (**INHERITANCE**).

See also Labour Act 11 of 2007 (provisions on child labour) (**LABOUR**).

See also Maintenance Act 9 of 2003 (child maintenance) (**MAINTENANCE**).

See also Recognition of Certain Marriages Act 18 of 1991 (adoption of children) (**MARRIAGE AND DIVORCE**).

See also **YOUTH**.