

# PROOF OF PARENTAGE

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## NOTE

In this publication, "Ministry" and "Minister" refer to the Ministry and Minister responsible for child protection, and "Guide" means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

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**T**he Child Care and Protection Act has rules and procedures for determining the parentage of a child. These replace the similar rules and procedures in the Children's Status Act 6 of 2006, which was repealed by the Child Care and Protection Act. Proving parentage may be relevant in cases involving access, custody and guardianship under the Act. It may also be relevant in connection with maintenance cases, to prove a child's right to inherit or in a criminal case involving baby-dumping. DNA testing can establish parentage with great certainty.

## 1. Constitutional and international framework

Both the Namibian Constitution and the Convention on the Rights of the Child protect the right of children to "know" their parents – where this is in their best interests.

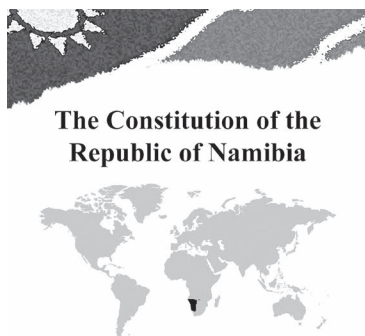
### Namibian Constitution

Article 15(1): "Children shall have the right from birth to a name, the right to acquire a nationality and, **subject to legislation enacted in the best interests of children**, as far as possible **the right to know** and be cared for by **their parents**."

### Convention on the Rights of the Child

Article 7(1): The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to know** and be cared for by **his or her parents**.

Children have a right to "know" their parents.



# Convention on the Rights of the Child

## Interpreting children's right to know their "parents"

"[...] the definition of "parents" includes **genetic parents** (for medical reasons alone this knowledge is of increasing importance to the child) *and* **birth parents**, that is the mother who gave birth and the father who claimed paternity through partnership with the mother at the time of birth (or whatever the social definition of father is within the culture: the point being that such social definitions are important to children in terms of their identity). In addition, a third category, the child's **psychological parents** – those who cared for the child for significant periods during infancy and childhood – should also logically be included since these persons too are intimately bound up in children's identity and thus their rights under article 8 [...]."

## Interpreting "as far as possible"

"First there are children whose parent **cannot** be identified (for example, when the mother does not know who the father is or when the child has been abandoned). States Parties can do little about this, although legislation under article 2 must ensure that such children are not discriminated against.

Second, births occur where the mother **refuses** to identify the father (including extreme circumstances, for example in cases of incest or when the father has raped the mother). While mothers could, arguably, be legally required to name the father, it would be difficult to enforce this and conflict could be raised between the mother's rights and the child's rights. However, in many countries fathers of children born out of marriage often refuse to be identified. While recognizing that this is a social problem, the Committee believes that the State also has a role to play: [...]

*'[...] the Committee expresses its concern that the establishment of legal paternity, where the biological father does not want to legally recognize the child, is time consuming and expensive...*

*'... the Committee recommends that the State Party facilitate the establishment of legal paternity for children born out of wedlock by creating accessible and expeditious procedures and by providing mothers with necessary legal and other assistance in this regard.'* (Antigua and Barbuda CRC/C/15/Add.247, paras. 33 and 34)

[...] Third, there are the situations when the State decides that a parent **should not** be identified. For example:

- where **adoption** law limits the children's entitlement and access to information to know that they are adopted and who their genetic parents are [...]
- with **anonymous egg/sperm donation for *in vitro* fertilization**, where most countries protect the secrecy of the donor;
- where the State tacitly encourages the **[anonymous] abandoning of children** [at facilities aimed at providing a procedure which will ensure the safety of unwanted children] [...].

[...] there are **no easy answers** as to whether it is more harmful to children's best interests to give them distressing information about their origins or to refuse them this information on the grounds the information might cause them harm.

◆ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 3<sup>rd</sup> edition, 2007, Chapter 7, pages 106-107 (emphasis added)

## 2. Terminology

**Proof of parentage:** This means establishing the identity of a child's mother or father.

**Parentage:** This is a gender-neutral term. It is usually **paternity** that is in dispute, but **maternity** could be in doubt as well. For example, maternity might need to be proved where a pregnancy was concealed, where an infant was abandoned or where infants were mixed up in a hospital.

Parentage most often comes into dispute only when a child is born outside of marriage – although there could be a dispute about parentage within a marriage where one spouse has been unfaithful, for example.

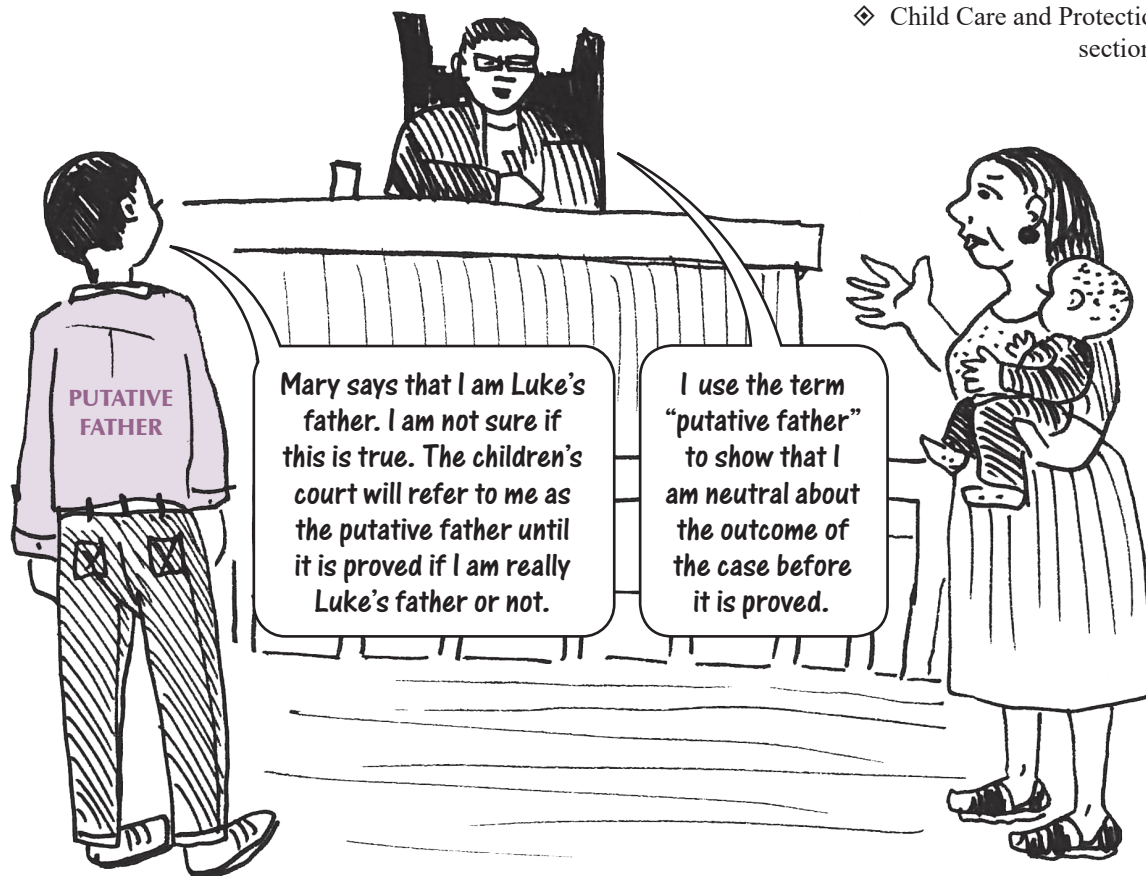
**Putative:** In the context of the Act, this term means “possible”.

A **putative father** or a **putative mother** refers to a man or a woman who claims or is alleged to be the parent of a person, before that parentage has been established or acknowledged without dispute.

A **putative child** is a person (of any age) who claims or is alleged to be the child of another person, before this is established.

The use of these terms makes it easier to talk about a parentage dispute before it is decided. In the same way, we speak of an “accused” instead of a “perpetrator” where a person is charged with committing a crime before the crime has been proved.

◇ Child Care and Protection Act, section 93(1)



### 3. Who can initiate a proceeding to establish parentage?

Proceedings to establish parentage may be brought by any of the following people:

- ⑨ the **mother or putative mother** of the person whose parentage is in question
- ⑨ the **father or putative father** of the person whose parentage is in question
- ⑨ the **person whose parentage is in question** (who could be a child or an adult)
- ⑨ the **primary caretaker** of the person whose parentage is in question.
- ⑨ **a person authorised in writing by the Minister** to act on behalf of the person whose parentage is in question (such as a social worker).

A “**primary caretaker**” is someone other than the child’s parent or guardian who takes primary responsibility for the daily care of the child with the express or implied permission of the person who is the legal custodian of the child. For example, the primary caretaker could be an extended family member or some other kinship care-giver.

◇ Child Care and Protection Act, section 1

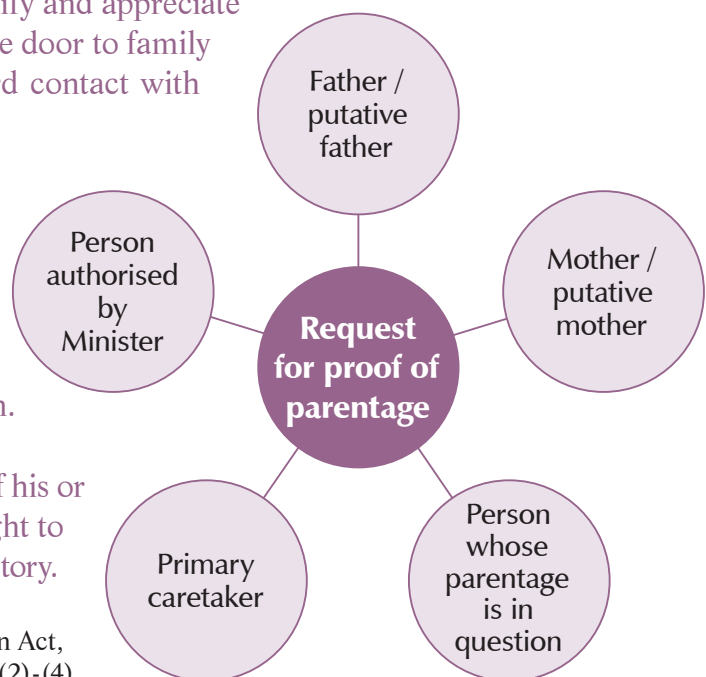
This part of the Act talks about **parentage of a “person” rather than a “child”**. The person whose parentage is in dispute might be a child or an adult. There is no age limit for determining parentage, and there are many reasons why various people might want to prove parentage.

It could be in the child’s best interests to establish paternity for purposes of maintenance, to ascertain which persons should be listed as parents on the child’s birth certificate (which could affect the child’s citizenship), to establish the right to list a child on a medical aid scheme, to establish the child’s right to inherit from a particular person, or to determine the child’s right to maintenance from a deceased estate. Establishing paternity may also give the child a better sense of his or her identity, allow the child to identify and appreciate his or her cultural heritage, open the door to family medical history or be a step toward contact with extended family members.

A parent may wish to establish a child’s parentage to support an application for custody, guardianship or access, or to establish a right to be notified of an intention to give the child up for adoption.

An adult might want to want proof of his or her own parentage to establish a right to inherit or to find out about family history.

◇ Child Care and Protection Act, section 93(2)-(4)







Ruth is an adult. Samuel, the man whom she believes to be her father, is very ill. Ruth believes that she will be entitled to a share of Samuel's property if he dies, but his other children say that Samuel is not really her father. Ruth requests a paternity test to secure her right to inherit.



Rachel tells John that he is the father of her child, Esther. John does not believe that this is true. He requests a paternity test to protect himself against unjustified claims for maintenance for Esther.



Rosa is a social worker with the Ministry. Someone in the community has found an abandoned baby who is now in hospital. There is a woman in the community named Eva who was known to be pregnant recently, but no one knows what happened to her baby. The Minister has authorised Rosa to request a maternity test to see if Eva is the mother of the baby. Even if the baby is put into alternative care, every child has a right to know the identity of his or her parents.

## Self-incrimination

The Namibian Constitution states that no one must be compelled to give testimony against themselves. **Would the protection against self-incrimination justify a refusal to give samples for a DNA test if this might provide evidence of a crime such as child abandonment, infanticide or rape?** The answer is **no**. The High Court has held that the results of such tests may exonerate or incriminate an accused person. Thus, being compelled to provide bodily samples for this purpose cannot be equated with being compelled to incriminate oneself.

- ◆ Namibian Constitution, Article 12(1)(f)
- ◆ *S v Gemeng & Another* 2018 (3) NR 701 (HC)

## 4. Proving parentage

**Standard of proof:** Proof of parentage must be on a “balance of probabilities”. This means that the court will decide what is more likely true than not true. This is the standard of proof used in all civil cases. (Criminal cases use a higher standard of proof: “beyond a reasonable doubt”).

**DNA tests:** Proof of parentage will usually involve **DNA tests**, which are currently the most accurate technology for determine parentage.

**What is DNA?** Every living thing has DNA, which is an abbreviation for **DeoxyriboNucleic Acid**. DNA contains the genetic instructions which guide the growth and development of plants, animals and persons. DNA is contained in each part of a person’s body, including blood, saliva, the roots of the hair and the skin. Patterns contained in DNA are passed from parents to children. No two people (except for identical twins) have exactly the same pattern of DNA. **DNA tests can identify the mother and father of a child very accurately.** The test looks at the DNA of a child and compares it to the DNA of the person who is possibly the child’s parent, to check for similar patterns.

**Starting points for determining parentage:** DNA tests are expensive and can involve delays. To avoid unnecessary scientific tests, the law contains a list of “**presumptions**” about **paternity**. A presumption is a starting point. If certain circumstances are present, the court will *assume* that a particular man is the father of a child unless that man can prove otherwise.

Presumptions are provided for paternity but not maternity, since paternity is more often in doubt and more difficult to prove without scientific testing. Maternity is less often in doubt and there is often obvious evidence of maternity, such as a visible pregnancy or hospital records of the birth. This is a case where differing treatment of men and women is justifiable for biological reasons.

The Act assumes that a man is the father of a child in the following circumstances:

- ⑨ he was **married to the child’s mother** at the approximate time of conception or at the time of the child’s birth, or at any time between those points
- ⑨ he **lived with the child’s mother** at the **approximate time of conception**
- ⑨ he is **listed as the father on the child’s birth certificate**
- ⑨ he admits, or it is otherwise proved, that he had **sexual intercourse with the mother at a time when the child could have been conceived**
- ⑨ **both he and the mother acknowledge that he is the father.**

### **Evidence about parentage:**

Husbands and wives cannot be *forced* to give evidence in court against each other, but they may give evidence about a spouse if they do so voluntarily. This rule applies to questions about parentage involving a spouse in a criminal proceeding.

- ◇ Child Care and Protection Act, section 93(3)
- ◇ Namibian Constitution, Article 12(1)(f)

Corroboration of evidence offered to establish a presumption of paternity is not required. No special cautionary rules are applicable to this evidence.

**The effect of the presumptions is to shift the burden of proof to the putative father.** In other words, once a presumption of paternity has been established, the man still has a chance to prove that he is *not* the father through some contrary evidence or by means of a DNA test. But he now bears the responsibility of providing proof that he is not the father. These rules are designed to discourage people from insisting on DNA tests when paternity is not really in question.

For example, suppose a mother is claiming maintenance from a man who says that he is not the father of her child. She produces a marriage certificate which shows that they were married when the child was born. She has established a presumption of paternity. Now it is up to the man to prove that he is *not* the father. He could, for instance, produce a divorce certificate which shows that the couple was no longer married when the child was conceived. He could provide some specific evidence indicating that the mother had extramarital affairs. He could also propose that he and the child undergo DNA testing to prove that he is not the child's father.

It is true that the mother of this baby is my wife, but the baby cannot be mine, I was studying in South Africa for one year before the baby was born. She did not visit me, and I did not return to Namibia even once. Our passports will show that I am telling the truth.

◆ Child Care and Protection Act, section 94

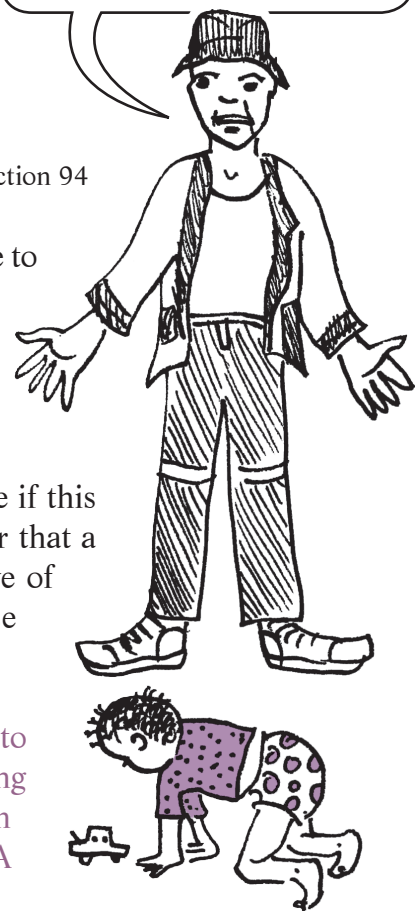
**What if a parent refuses to cooperate?:** Parents might refuse to provide samples from themselves or from the child for testing. In this case, if there is a real dispute about parentage, the court will assume that the person who is refusing to co-operate is attempting to hide the truth.

The High Court can also order that scientific testing take place if this would be in the child's best interests. This can include an order that a child, a parent, a putative parent or any potential blood relative of the child be submitted to a physical procedure for the purpose of scientific testing.

For example, suppose that two different men were claiming to be the father of a child and the mother refused to say anything about who it was or to allow anyone to take a sample from the child for a DNA test. The High Court could order DNA testing to give the child certainty about the father.

When considering past cases on this issue, it is important to keep in mind that many cases were decided in respect of the old kind of blood tests – which could not conclusively prove that a particular man was definitely the father of a child, but could only eliminate that possibility in some instances. In contrast, modern DNA tests can positively identify a person as the father of a child with a very high degree of accuracy. The improvement in the accuracy of scientific testing affects the consideration of whether or not the test will be in the child's best interests.

◆ Child Care and Protection Act, section 95





**The child's right to know with certainty?** One 2009 South African High Court case held that “it will most often be in the best interests of a child to have any doubts about true paternity resolved and put beyond doubt by the best available evidence”. However, this case was reversed on appeal to the Supreme Court of Appeal in 2010, on the grounds that scientific tests to determine paternity should not be ordered where paternity has already been shown on a balance of probabilities. Namibian courts may have to consider similar debates in the context of the meaning of the child's constitutional right to “know” his or her parents.

◆ *LB v YD* 2009 (5) SA 463 (T), paragraph 23, reversed on appeal in *YD (now M) v LB* 2010 (6) SA 338 (SCA)  
 ◆ Namibian Constitution, Article 15(1)

I know she is my child, but I am going to refuse to have a DNA test. That way they will never be able to prove I am the father!



That is a bad idea. If you refuse the test, the court will assume that you are trying to hide the evidence that you are the father. The High Court can order you to give a sample for a DNA test if there is not enough evidence to prove paternity without it. And you might even end up having to pay all the costs of the tests if the court finds out that you were just trying to hide the truth!



## Paternity presumptions in action: Examples from Namibia and South Africa

***LNL v LJJ* (I 2406/2013) [2014] NAHCMD 309 (17 October 2014)**

The issue of paternity was raised in the context of a divorce. There were four children born during the marriage who were, at the time of the divorce, ages 22, 20, 18 and 10. The husband claimed in the divorce proceeding that the wife had committed adultery with other men – but provided scant evidence or particulars. The husband claimed, for the first time, that this alleged adultery had caused him “to doubt the paternity” of the four children born during the marriage. The wife countered that she had never committed adultery, and that the husband had always accepted the children as his own and never before expressed any doubts about their paternity. She argued that his long-standing acceptance of the children as his own prevented him from now asserting in the divorce that he was not their father, based on the legal principle of estoppel. (Estoppel is a legal doctrine that prevents a person from denying the truth of a representation previously made to another, through words or conduct, if the other person acted on the representation to his or her prejudice.)

The Court noted that the operative presumption is that children born during the subsistence of a marriage are the children of the married couple. It is the husband's right to accuse the wife of adultery and to prove it, but he has no absolute right to deny paternity without laying the proper basis for why he could not be the biological father of children born during the marriage. His vague assertions did not overturn the presumption because they did not lay any factual foundation that another man had sexual intercourse with his wife at a time consistent with the conception of the children.

If the husband had raised doubts about paternity each time his wife conceived or gave birth to a child, the wife could have subjected the children to paternity tests to place the husband's paternity beyond doubt. However, his apparent acceptance of paternity for many years lulled the wife into the belief that he accepted that he was the biological father. In so doing, he caused the wife to act to her prejudice, which is one of the legal requirements for estoppel. There was no evidence that the wife had refused to subject any child over whom she had control to a paternity test – and, in any event, she had no authority over the child who had reached the age of majority. Furthermore, the husband did not assert that a paternity test would be in the best interests of any of the children.

The Court refused to order paternity tests.

### ***YM v LB 2010 (6) SA 338 (SCA)***

In this case, the South African Supreme Court of Appeal considered whether it should refuse a request for paternity testing. B, the putative father, and M, the mother, commenced a sexual relationship in February 2006. The couple started living together in October and became engaged in November of that year. At the end of the year, B told M that he would be going to work elsewhere in the country and then abroad for a short period the following year. Accordingly, M went to stay in her parents' town for what she thought would be the short period of his absence. In fact, B did not go abroad. M became disillusioned with the relationship after it became clear that B had an alcohol problem.

In late March 2007, M discovered she was pregnant and was certain B was the father. B did not dispute this fact. His conduct and correspondence with M unequivocally showed that he believed he was the father. In April 2007, M decided to break off the engagement. The child was born in November. Two days later, B's attorney sent a letter to M strongly denying paternity. She responded through an attorney saying that B would not be afforded any parental rights and would not be bound by any obligations to the child. At that point, B reversed his position and claimed he was 100% certain he was the child's father, but wanted a DNA test to confirm. M refused to comply, which led B to apply for a court order that she and the child submit to DNA testing. The High Court granted the order, but B appealed to the Supreme Court of Appeal.

The Court of Appeal allowed the appeal on the basis that paternity was not actually in dispute. It is within the inherent power of a High Court, as the upper guardian of children, to infringe rights to privacy and bodily integrity by ordering scientific tests if this is in the best interests of a child. However, each case must be considered on its own facts. This was not an appropriate case for such an order. Scientific testing such as blood or DNA testing should not be ordered where paternity has already been proved on a balance of probabilities, as it had in this case.

## 5. Who pays for scientific testing?

The person who is disputing parentage must normally pay for the DNA test. However, if this person is unable to pay, the court may order that the costs will be paid partly or totally by the other party to the dispute, or by the State.

The children's court has the power to "make appropriate orders as to costs in matters before the court". If the relevant parties are unable to pay the costs of the paternity test, the children's court has the authority to hold an interim enquiry on the question of costs. The court will consider information about the financial situation of the mother (or putative mother), the father (or putative father) and any other person who has requested the test, as well as any other relevant circumstances. Then the court can make a preliminary order on who should pay the costs of the DNA test. The court might decide that the costs should be shared between the relevant parties, or that the State should pay all or part of the costs.

The children's court can re-consider the preliminary decision on who should pay the costs of the DNA test at the conclusion of the proceeding. The court has a wide discretion to make whatever order seems fair in the circumstances.

### How much do DNA tests cost in Namibia?

As of early 2019, tests for proof of parentage cost up to N\$1900 if done on one parent and the child, and up to N\$2550 if the other parent also had to be tested (which is very uncommon). The samples are sent to South Africa for testing, and it can take three to four weeks for the results to be received. Medical aid schemes do not cover the costs of such tests.

◆ information collected from service providers by LAC

The possibility of being ordered to share costs does NOT apply to a child. A child under 18 who has requested DNA testing will never be expected to share any of the costs.

*I have considered each of your financial situations and have decided that Mr M will pay for 50% of the paternity test. Mr M has requested the test and has the means to shoulder some of the costs. The State will pay for the other 50% since Mr M is only employed part-time and cannot afford the full cost. Ms F, you are unemployed and supporting two children, so I accept that you cannot afford to contribute to the costs of the test.*



- ◆ Child Care and Protection Act, section 47(2)(d)
- ◆ Child Care and Protection Regulations, regulation 28

## 6. Proving parentage if the parent or child is deceased

It is possible that a person may want to establish parentage in a situation where the putative mother, putative father or putative child is deceased. This might be important, for instance, to determine rights to inherit from the deceased person's estate.

A person who has a reasonable belief that the deceased is his or her biological parent or child may **petition the court to exhume the body of the deceased** for the purposes of carrying out scientific tests relating to parentage.

To exhume a body means to dig it up from where it is buried.

The Child Care and Protection Act presents this option as a last resort, since exhumation is obviously likely to cause distress to the deceased's family. The Act identifies a number of circumstances where **exhumation will NOT be permitted**:

- ⑨ where there is **no family member, heir or other interested person who disputes the claim of parentage**
- ⑨ where **conclusive proof of parentage is already available**, such as a scientific test or court order
- ⑨ where it is **possible to establish parentage by carrying out scientific tests on a living family member of the deceased and the family member consents to the tests**.



When my ex-boyfriend died, some of his family members tried to claim that he was not my son's biological father so that they could claim the inheritance. I was able to prove parentage without a paternity test because a court had already determined that he was the father of my child when it granted him access rights.

◇ Child Care and Protection Act, section 93(5)

### Paternity testing when one parent is deceased Examples from South Africa

#### *D v M and Others* [2015] ZAGPJHC 288

In this case, a grandmother applied to the High Court of South Africa to compel a woman, M, and her minor son, Z, to submit to DNA tests for the purpose of determining whether her deceased son, SD, was the biological father of Z.

Following the death of SD, the grandmother determined that a death benefit amounting to R2 million was payable by the Pension Fund to SD's dependants, or failing any dependant, to his estate. The Pension Fund had determined that Z was a dependant and would be the beneficiary of the death benefit.



The grandmother, who had questioned the child's paternity during SD's lifetime, requested the Pension Fund to subject M and Z to DNA tests. The Pension Fund refused this request, but gave the grandmother time to present proof that Z was not SD's child. M opposed the grandmother's application for an order that she and her child must submit to DNA testing.

M and SD were involved in an intimate relationship from November 2005 to the middle of 2010. Z was born in December 2008. The grandmother alleged that her son's relationship with M was tumultuous and that there was a break-up of some three months after an incident of violence. Shortly after their reconciliation, M informed SD that she was pregnant. The grandmother also alleged that when Z was approximately a year old, SD and certain family members started to doubt the child's paternity based on the child's appearance. SD apparently requested a paternity test, which M refused. Thereafter, SD stopped paying maintenance for Z. M baldly denied the grandmother's allegations.

The Court was ultimately satisfied as to the credibility of the grandmother's factual allegations and found that she had established the requisite grounds for a DNA test. The Court also considered it to be in Z's best interests to know and be accepted by the paternal side of his family and not have the uncertainty of disputed paternity follow him for the rest of his life. In this case, the minor infringement of M and Z's privacy did not trump the discovery of the truth.

The Court then had to consider whether it was necessary for SD's body to be exhumed for the paternity testing. The Court relied on the evidence of an expert in human genetics that in instances where the alleged father is deceased, the best scenario is to test the mother, the child and both parents of the deceased person who is alleged to be the father. It was therefore clear to the Court that an acceptable DNA test result was possible without resorting to the body of SD. The Court ordered DNA tests to resolve whether Z or the estate was entitled to the death benefit.

### ***Ex Parte Emmerson 1992 (3) SA 987 (W)***

In this case, a pregnant woman applied for an order directing a doctor employed in the genetics department of the South African Institute for Medical Research to conduct DNA tests on a man who had been killed in a motor vehicle accident earlier in the day and whose body was in a mortuary. The woman alleged that the man was the father of the child she was expecting. He was a man of some means. The aim of the tests was to pave the way for a later claim for maintenance for the child from the deceased father's estate. Due to the extreme urgency of the matter, the Court granted the order without giving reasons.

“ [...] respect for private life requires that everyone should be able to establish details of one's identity as an individual human being and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. This includes obtaining the information needed to uncover the truth concerning important aspects of one's personal identity, such as the identity of one's parents [...]. ”

◆ *Mifsud v Malta*, European Court of Human Rights, Application no. 62257/15, 29 January 2019, paragraph 65





## 7. When might it NOT be in a child's best interests to know the identity of a parent?

**Adoption:** In the eyes of the law, the adoptive parents are in every respect the child's parents after the adoption is finalised. As explained in Chapter 17 of this *Guide* on adoption, an adopted child has a right to information about his or her biological parents only after reaching the age of majority (unless the adoption is a “disclosed adoption” where the adoptive parents and the biological parents allow their identities to be disclosed to each other from the beginning).

This means that it would not be possible for an adopted child who is still a minor, or that child's adoptive parent, to utilise the proof of parentage procedures to circumvent the normal procedure for disclosure of the identity of an adopted child's biological parents after the child reaches the age of majority. The *Implementation Handbook on the Convention on the Rights of the Child* notes that the Committee which monitors the Convention on the Rights of the Child consistently opposes “secret” adoptions and always firmly recommends that children be told about their biological parentage. However, the Namibian requirement that this information be made available by the State to the adopted child only at the age of majority can be viewed as being consistent with the Convention's recognition of the “evolving capacities of a child” (Article 5).

**Assisted reproductive techniques:** It will normally be impossible for a child to find out the identity of an egg or sperm donor where conception took place by means of *in vitro* fertilisation or other assisted reproductive techniques. As explained in Chapter 9 of this *Guide* on parental rights and responsibilities for children outside marriage, the law views the couple who arranged for the fertility technique as the mother and father of the child in question.

The *Implementation Handbook on the Convention on the Rights of the Child* questions whether it is justifiable to keep the identity of the egg or sperm donor secret, particularly as scientific research continues to uncover medical reasons why it may be relevant to know genetic origins.

**Children abandoned at safe havens:** The Child Care and Protection Act exempts parents, guardians and care-givers from prosecution for abandoning a child in their care so long as the child is left at an approved safe haven (such as a hospital, police station, school or children's home) and the child shows no signs of abuse, neglect or malnutrition. It is likely that a child abandoned in such a situation would be dropped off anonymously.

The *Implementation Handbook on the Convention on the Rights of the Child* asserts that any form of state-sanctioned secrecy about parentage may be particularly problematic. On the other hand, since safe havens are intended to discourage the recurrent Namibian problems of baby-dumping and infanticide, allowing a parent to remain anonymous for this purpose may be a justifiable infringement of the child's right to know his or her parents.

◆ Child Care and Protection Act, section 227(1)

◆ *Implementation Handbook for the Convention on the Rights of the Child*,  
UNICEF, 3<sup>rd</sup> edition, 2007, pages 106-108

## Proof of parentage is NOT always in the child's best interests: Examples from South Africa

**O v O 1992 (4) SA 137 (C):** In this South African case, the High Court had to determine whether to order a six-year-old minor, M, to submit to blood tests to determine whether the applicant was her father. M and the applicant already had a very close and loving relationship and the applicant had always treated M as his child. M in turn considered the applicant her father. Considering M's best interests, the Court decided not to order the blood tests. The evidence overwhelmingly pointed to the fact that the applicant was M's father, and his conduct over the years did not suggest that he had any substantial doubts. However, if it were to be found that he was not M's father, the effect on M would be devastating. Further, even if the tests proved he was the father, the mere knowledge that the applicant had undergone such tests might have a negative effect on their relationship. Not every case where there is a relationship between the child and putative father will be resolved in this way as each case must be decided on its own facts. However, the impact of the test and its results on the child is an important consideration in determining the child's best interests.

**MN v AJ 2013 (3) SA 26 (WCC):** Similar concerns were cited in passing in another South African case where a husband claimed compensation from his wife on the basis of unjust enrichment, on the grounds that he had paid maintenance for a child that turned out not to be his. The Court noted that courts may be wary of recognising claims necessitating an enquiry into paternity which may destroy an otherwise loving and caring parental relationship with a child.

Namibian courts would have to consider the import of the child's constitutional right to "know" his or her parents in such situations.

## Could a parent of a child born outside marriage be forced to identify the other parent against his or her will?

In Namibia, mothers of children born outside marriage can register the birth of the child without naming the father. They cannot be required to provide information about the father. Could a child's right to know his or her parents be a basis for forcing a mother to provide this information?

The *Implementation Handbook on the Convention on the Rights of the Child* treats this issue with caution, noting that the pregnancy in such a case could have resulted from rape or incest: "While mothers could, arguably, be legally required to name the father, it would be difficult to enforce this and conflict could be raised between the mother's rights and the child's rights."

In such a situation, support and encouragement for the mother might be more appropriate than legal coercion.

◆ Births, Marriages and Deaths Registration Act 81 of 1963, section 10(1)  
(to be replaced in future by a new law on civil registration)

◆ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 3<sup>rd</sup> edition, 2007, page 106

## Can one parent be forced to identify the other parent before giving a child up for adoption?

This question was explored in a 2003 South African case, where a child was born outside marriage at a time when the relationship between the parents had already ended. The relationship between them became increasingly acrimonious, and so no relationship developed between the father and son. The mother and father subsequently married other people and had more children with their new partners. When the child was 10 years old, the mother's new partner launched proceedings to adopt him. The father was not notified of the proceedings, nor was his consent obtained. He discovered that an adoption order had been made in respect of the child only when he instituted legal proceedings himself, in order to gain access to the child. The court which made the adoption order had been under the impression that the child's father was unknown. Indeed, the child's birth certificate reflected the biological father as "unknown".

The father applied to have the adoption order rescinded, but his application was dismissed on the basis that this step would not have been in the best interests of the child. In his appeal against that decision, the appellate court was required to consider whether the mother's failure to identify the natural father and notify him of the adoption proceedings was reason to rescind the step-parent adoption. The Court ultimately concluded that it was not.

The Court held that because of the serious consequences which flowed from adoption, the applicant for an order of adoption (or the consenting parent, where only one parent had given consent) is required to observe the utmost good faith in placing material before the court. This includes providing details regarding the identity and whereabouts of the other parent, if those details are known. The Court is absolved of the duty of notifying the natural father only where his identity or whereabouts cannot be established.

In this case, the mother and step-father allowed the court to be misled about the biological father's identity. That tainted the adoption process. Nonetheless, the Court concluded that the adoption order should not be rescinded as this would not be in the child's best interests.

◆ *T v C and Another* 2003 (2) SA 298 (W)

## 8. Fraud in scientific tests

In Namibia, some people have figured out ways to get "scientific tests" which are fraudulent. For example, this can result from collusion with an unscrupulous testing facility or through presentation of a fake ID (so that the person who provides the sample is not the person who is actually supposed to be tested).

The Child Care and Protection Act does not provide a specific procedure to be followed in a case where there is reason to believe that a parentage test result might be false. A court would probably reject test results if flaws in the testing procedure were shown, and possibly order a re-test with proper safeguards against fraud.

## Will courts always accept the results of scientific testing?

In South Africa, at least one case has considered the question of how to treat paternity results from scientific testing. In a 2011 divorce case, the High Court was faced with a sudden allegation by the husband that he was not the biological father of the parties' eldest child. The husband testified that, in 2008, after a call from one of the mother's friends informing him that he was not the father of O, he took O for a paternity test. The result, which he kept to himself for over two years, showed that he was not in fact the father.

At trial, a witness testified that DNA samples were taken from the father and the child and given to her for analysis. On her analysis, the father and son were not biologically related. However, the witness did not say that she was present when the samples were taken, or who drew the samples, sealed them and dispatched them to her laboratory. Relying on cases involving scientific tests in other contexts, the Court held that the results could not be regarded as conclusive proof of the paternity of the child. It held that the details of the process of taking the samples and the chain of custody ought to be properly proved in each case. It therefore rejected the paternity test report and found that the father had failed to prove on a balance of probabilities that he was not the biological father.

◇ O v O [2011] ZAGPPHC 182

**Crimes that may apply to falsely asserting or denying parentage:** A person who lies about parentage or participates in arranging a false paternity test could be charged with any one of several crimes, depending on the context:

### ⑨ fraud

Fraud consists in unlawfully making a misrepresentation with intent to defraud. The misrepresentation must cause actual or potential prejudice to another. The prejudice does not have to be financial; it can take other forms, such as impairment of someone's reputation. The misrepresentation can be made by words, by conduct alone (such as by nodding or acting in a certain way) or by some combination of words and conduct. A person who provides samples for a DNA test while pretending to be someone else has committed fraud. The person who was supposed to provide the samples would also be guilty of fraud if he or she presented the false test results as his or her own.

### ⑨ perjury

Perjury is the unlawful and intentional making of a false statement under oath in the course of a court proceeding. The elements of the crime of perjury are 1) the making of a declaration; 2) which is false; 3) under oath or its equivalent; 4) in the course of judicial proceedings; 5) unlawfulness; 6) intention. The false statement can be either oral or in the form of an affidavit. The statement must be made in the course of a judicial proceeding – but it does not have to be made *during* the proceeding if: a) the law allows the statement to be used as evidence at a judicial proceeding, and b) if this use as evidence was contemplated by the person in question at the time when the statement was made.

⑨ contravention of section 300(3) of the Criminal Procedure Ordinance 34 of 1963

This crime involves contradicting a statement made under oath (such as in an affidavit) in the course of making another statement also under oath (such as in a subsequent affidavit or under cross-examination in court). If the statements conflict with each other, they cannot both be true – so it is not necessary to prove which statement is false.

⑨ contravention of section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963

This crime involves making a false statement in a sworn document such as an affidavit. It essentially extends the penalties of perjury beyond statements which were made in the course of judicial proceedings. The required elements are: 1) a false statement; 2) in an affidavit, affirmation or solemn or attested declaration; 3) made before a competent person; 4) with the requisite state of mind. In order to be found guilty of this crime, the person who made the statement must have known that it was false at the time. It is sufficient to prove that the person who made the statement foresaw the possibility that the statement might be false. The person who made the statement must have also been aware that the statement was “an affidavit, affirmation or solemn or attested declaration”.

⑨ defeating or obstructing the course of justice

The course of justice can be obstructed in many ways – including by causing a trial to be unnecessarily delayed or postponed, tampering with documents or exhibits to prevent true evidence from being placed before the court, or fabricating false evidence. This crime may be committed by a positive act or by an omission. To be guilty of this crime, the person in question must have been able to foresee the possibility that the conduct could defeat or obstruct justice. If this form of “intention” is present, motive is irrelevant. The scope of the crime is not limited to pending judicial proceedings; it also includes interference with pre-trial processes such as police investigations. The interference might even take place before a charge has been laid, if the person in question knew or ought to have known that a prosecution was a possibility.

⑨ bribery.

The Anti-Corruption Act 8 of 2003 makes it an offence to offer or accept gratification as an inducement to do or omit doing anything, or as a reward for having done or omitted to do anything. It is also an offence to attempt or conspire to commit such an offence, or to direct or assist someone who does. So if a person bribes a testing facility to falsify a DNA test or bribes someone to provide the test samples under a false identity, this would violate the Anti-Corruption Act. It would also be an offence to offer a bribe to a witness to give false evidence in a trial.

- ◆ CR Snyder, *Criminal Law*, 3<sup>rd</sup> edition (Durban: Butterworths), 1995, pages 318-319, 322
- ◆ obstruction of justice: *S v Mouton & Others* 1993 NR 260 (HC); *S v Ipinge* 1997 NR 181 (HC)
- ◆ Anti-Corruption Act 8 of 2003, sections 33-35, 38-39



## Fraud in paternity testing: An example from South Africa

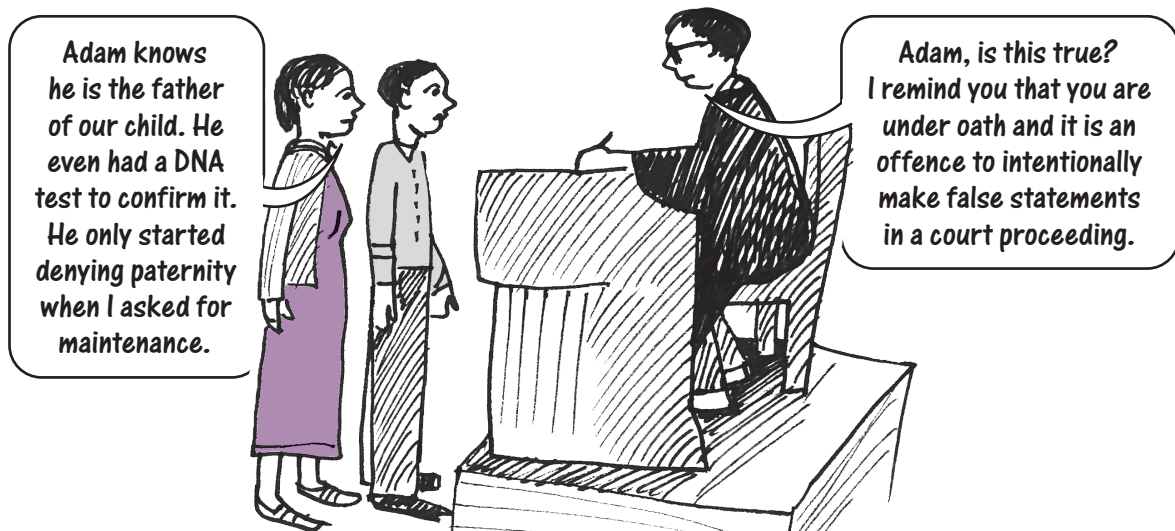
*Fanoe & Another v S* [2011] ZAECHGHC 70 (30 June 2011)

This fraud case arose from a test to determine the paternity of a child, R, born of a relationship between A and the second appellant. The two appellants were convicted of fraud after falsely representing that the blood samples were drawn from the second appellant when in fact they were drawn from the first appellant. The second appellant had denied paternity in the context of maintenance proceedings. Blood tests confirmed that the second appellant was the father of the child. Despite the outcome of the test, the second appellant once more denied paternity. The court ordered that a second test be conducted.

At the second test, the first appellant, who was in a relationship with the second appellant, was present. She advised A that she had a court order authorising her to collect the blood samples and transport them to the laboratory. The appellants drove together in one vehicle to the laboratory. The results excluded the second applicant as the father of the child. Suspecting that the samples had been tampered with, A laid a charge of fraud against the appellants. The maintenance officer ordered that further blood samples be taken so that further tests could be conducted.

The Court, considering the appeal against conviction, reviewed the evidence of the various irregularities in respect of the second test. For instance, contrary to established procedure, the first appellant informed the staff at the clinic that they should not label the blood samples and that she was the person authorised to transport them pursuant to a court order. However, no such court order was ever issued. The first appellant also obtained information about how paternity tests were conducted and acquired two additional test tubes on the pretext that two were broken. Furthermore, when a blood sample was requested from the first appellant, the results revealed that it was her blood that was submitted to the lab and not that of the second appellant.

Relying on this circumstantial evidence, the Court found that the first appellant had fraudulently interfered with the blood samples. However, it overturned the conviction for fraud against the second appellant on the grounds that, while there were a number of indicators pointing towards complicity on his part, there was insufficient evidence to prove his guilt beyond a reasonable doubt.



## Are parents legally required to love their children? An example from South Africa

### *Jooste v Botha* 2000 (2) SA 199 (T)

In the case of *Jooste v Botha*, an 11-year-old boy, assisted by his mother, sued his father for damages on the basis that since his birth his father had refused to acknowledge him, to communicate with him, to love and cherish him or to show any interest in him. As a result of the refusal and neglect, the child claimed that he had suffered damages, including emotional distress. The case did not raise the issue of maintenance or any other financial contributions.

The Court held that the parent-child relationship has two aspects: the economic aspect of providing for the child's physical needs and the intangible aspect of providing for the child's psychological, emotional and development needs. The best interests of the child demand an environment of love, affection and consideration, but this is a moral duty and not one that is legally enforceable. The South African Constitution does not state that parents are obliged to love and cherish their children or give them their attention and interest. Article 28(1)(b) of the South African Constitution, which entitles a child to "parental care", must be interpreted as applying to the custodial parent. The Court further held that the law cannot create love and affection where there is none – not between parents and their children born inside marriage, nor between fathers and their children born outside marriage. The Court's conclusion was there is no *legal* duty on the father of a child born outside marriage to afford that child love, attention and affection.

