GUIDE TO NAMIBIA'S CHILD CARE AND PROTECTION ACT 3 OF 2015

CHAPTER 9

Ministry of Gender Equality and Child Welfare

Legal Assistance Centre

Embassy of Finland Windhoek

PEPFAR

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PARENTAL RIGHTS AND RESPONSIBILITIES FOR CHILDREN OUTSIDE MARRIAGE

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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The Act removes discrimination against children born outside marriage, and applies the Constitutional principle that all children have a right to know and be cared for by their parents, subject to legislation enacted in their best interests. The Act deals with three important aspects of parental responsibilities and rights:

- **custody – responsibility for the day-to-day care of a child**
- **guardianship – the right to make important legal decisions on behalf of the child**
- **access – having contact with a child.**

The Act provides simple procedures for allocating these parental rights and responsibilities in cases where children are born outside marriage. There are also simple procedures to use if someone wants to apply for a change in custody or guardianship, to stop or limit access, or to insist that the right of reasonable access is respected. These procedures are also available to divorced parents and to married parents who are living apart. The Act also contains rules about maintenance and inheritance which put children born outside marriage on an equal footing with children born inside marriage. In addition, it contains rules about who the law will recognise as the parents of a child who is born of assisted reproductive techniques which sometimes make use of donated sperm or ova.

The provisions on these topics are almost identical to provisions in the Children's Status Act 6 of 2006 which it replaced.

The procedure in children's courts is explained in more detail in Chapter 6 of this *Guide* on children's courts. Procedures for determining who is the mother or father of a child are covered in Chapter 8 of this *Guide* on proof of parentage.

PART 1 | CHILDREN BORN OUTSIDE MARRIAGE

1. Key concepts

Custody: Custody is responsibility for the day-to-day care of a child, including the power to make decisions relating to that care.

A person who has custody of a child is called the custodian. A custodian has legal responsibility for the daily care of a child.

Guardianship: Guardianship is the capacity to make important legal decisions for a child. However, the term "guardianship" can have both a narrow and a broad meaning. The broad term "guardianship" includes custody if there is no other legal custodian for the child.

In some cases, a legal guardian must also be appointed as a **tutor** in order to have the power to administer the child's property. See section 5.4 of this chapter.

A person who has guardianship of a child is called the guardian. A guardian has the power to do legal acts on behalf of a child – such as signing contracts, bringing court cases and administering property.

Access: Access means having contact with a child.

Access can include visiting the child, taking the child on trips, having telephone conversations or exchanging text messages or letters. Access is important if the parents do not live together. In that case, one parent will usually have custody and the other parent will usually have access.

> "In terms of the common law, **custody** refers to a person's capacity to physically have the child with him or her and to control and supervise the child's daily life. Thus it includes caring for the child, supporting and guiding the child, and assuming responsibility for the child's upbringing, health, education, safety and welfare. [...]
>
> At common law, the term '**guardianship**' had a wide and a narrow meaning. [The narrow meaning at common law is] the capacity to administer a minor's estate on his or her behalf, and to assist the minor in legal proceedings and the performance of juristic acts. In the wide sense, it also included custody. [...]
>
> The common law concept of **access** [...] refers to maintaining a personal relationship with the child and communicating with the child on a regular basis."
>
> ◈ Jacqueline Heaton, "Parental responsibilities and rights", in CJ Davel and AM Skelton (eds), *Commentary on the Children's Act*, Juta, 2007, updated in 2018, pages 3-5 to 3-6 (footnotes omitted and emphasis added)

2. Constitutional and international framework

The rules on custody, guardianship and access implement the Namibian Constitution by removing discrimination against children born outside marriage, and removing sex discrimination between parents. They also implement children's rights, under the Namibian Constitution and international treaties which Namibia has joined, to know and be cared for by their parents and to maintain personal relations and direct contact with both parents unless this is contrary to the child's best interests.

Namibian Constitution

Article 10:

(1) All persons shall be **equal** before the law.

(2) No persons may be discriminated against on the grounds of **sex**, race, colour, ethnic origin, religion, creed or **social or economic status**.

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**.

Article 8(1): States Parties undertake to respect the right of the child **to preserve his or her identity, including nationality, name and family relations** as recognized by law without unlawful interference.

Article 9(3): States Parties shall respect the **right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.**

Article 18(1): States Parties shall use their best efforts to ensure recognition of the principle that **both parents have common responsibilities for the upbringing and development of the child**. Parents or, as the case may be, **legal guardians** have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

African Charter on the Rights and Welfare of the Child

Article 19(2): Every child who is separated from one or both parents shall have the **right to maintain personal relations and direct contact with both parents on a regular basis**.

3. Overview

3.1 The evolution of the law

Namibian law on the parental responsibilities and rights of children born outside marriage has evolved over time. At independence, this topic was covered only by the common law (which refers to the legal rules developed over time through the decisions in individual court cases). The common law was changed by the Children's Status Act 6 of 2006. Then, in order to keep the legal rules on children in harmony, the Children's Status Act was repealed and re-enacted with some improvements by the Child Care and Protection Act 3 of 2015.

The law at independence: In the past, children born outside marriage were called "illegitimate" children. This term is no longer used because it is a negative label which is associated with discrimination. The preferred legal term is now "children born outside marriage".

The rules on parental responsibilities and rights over children born outside marriage were initially governed by the common law. If a child's parents were not married, the mother had sole custody and guardianship of the child. This meant that the mother had sole decision-making power on day-to-day decisions and important legal decisions concerning the child.

Unmarried fathers had no clear rights – not even a right to spend time with the child. These fathers rightly complained that it was unfair for them to have the responsibility to contribute to a child's maintenance when they had no rights in respect of that child.

In the past, children born outside marriage could not inherit from their fathers unless the fathers made a written will which named these children specifically. This meant that if a father died without making a will, the children could not inherit any of his property.

These old legal rules had their roots in the time when it was not possible to use scientific tests to find out who was the father of a child. Because no one could be sure of the father's identity, in the eyes of the law, a child born outside marriage was considered to be related only to the mother.

However, once it became possible to use scientific tests to prove the identity of the father of a child born outside marriage, there was no longer a basis for the old rules. In modern times, such rules were unfair to both parents and children.

Children's Status Act: The Children's Status Act 6 of 2006 came into force on 3 November 2008. It replaced the common-law rules on custody, guardianship and access of children born outside marriage with new rules designed to remove discrimination against such children, as well as discrimination between mothers and fathers of such children.

The term "status" in the name "Children's Status Act" referred to *legal status*. The law dealt with the legal status of children born outside marriage, which means that it addressed the legal position of such children and the legal responsibilities and rights of their parents and guardians.

Child Care and Protection Act: The Children's Status Act was replaced by the Child Care and Protection Act 3 of 2015, which came into force on 31 January 2019. The basic principles and rules in the Child Care and Protection Act are the same as those in the Children's Status Act, but with some small improvements. Re-enacting the Children's Status Act as part of the Child Care and Protection Act ensures harmony on issues such as child participation, legal representation for children, vulnerable witness provisions for children, and the factors courts should use to assess a child's best interests.

Other aspects of the Children' Status Act

The Children's Status Act also contained new rules on children born of void or voidable marriages and children born through assisted reproduction techniques. These are explained in later sections of this chapter.

The Children's Status Act also contained new rules on proof of parentage (a gender-neutral word that covers paternity and maternity) and on appointing a guardian for any child whose parent or guardian has died. These issues are discussed in other chapters of this *Guide* because they apply to all children, not just children whose parents are unmarried, divorced or separated. See Chapters 8 and 10 of the *Guide*.

3.2 Summary of the current rules

The current rules on custody, guardianship, access and inheritance apply regardless of whether the children in question were born before or after the law came into force.

Because parents who are not married usually live apart, only one of them will take care of the child on a daily basis. This parent is the child's custodian. The parent who is the custodian will also be the guardian, with rights to make legal decisions on behalf of the child, unless a court order says otherwise.

Both the mother and the father of a child born outside marriage have equal rights to act as the custodian and guardian of the child. But only one parent can be the child's custodian and guardian in terms of an agreement made between the parents. This parent could be the mother or the father.

If the parents cannot agree on which of them will be the child's custodian and guardian, they can ask the children's court to decide. The court's decision must be based on the best interests of the child, not on the competing rights of the child's mother and father. The court will usually choose one parent to have custody and guardianship, while the other will have rights of access. However, the court order can give custody and guardianship rights to more than one person in appropriate circumstances.

> Giving the children's court power to appoint custodians and guardians is intended to make these procedures more accessible to the public. But the High Court is the "upper guardian" of all children and still has the power to appoint a custodian or a guardian for a child.

If the parents make no agreement and do not approach the children's court for a decision, then the old common-law position applies by default – meaning that the child's mother is the custodian and guardian of the child.

Regardless of which parent is the custodian or guardian of the child, the written consent of both parents is required for taking a child out of the country – with certain exceptions. Both parents must also consent to give the child up for adoption – again, with some exceptions.

The parent who is not the custodian of the child has a right to have reasonable contact with the child. This right of access can be cancelled or restricted by the children's court if this is in the child's best interests.

All parents, married or unmarried, have a duty to contribute to the maintenance of their children in proportion to their respective financial positions. This duty can pass to grandparents and other family members if the parents cannot fulfil it.

Children born outside marriage may now inherit from both their mothers and their fathers, even if there is no will. This puts them in the same position as children whose parents are or were married.

- Child Care and Protection Act, sections 97, 99-107, 172(1)(a) and (14)
- Married Persons Equality Act, section 14
- common law on parental responsibilities and rights

OVERVIEW OF CURRENT RULES	
MARRIED PARENTS	**UNMARRIED PARENTS**
CUSTODY	
Married parents are joint custodians. If there is a divorce, the court will usually name one parent as the custodian.	**The parents can agree on which parent will be the child's custodian. If the parents cannot agree on who will do this, they can ask the children's court to decide.** The guiding principle is the best interests of the child. Only one person can be the child's custodian by agreement, but the children's court has the power to make an order for joint custody. If the parents make no agreement and do not approach the children's court for a decision, then the old common-law position applies by default — meaning that the child's mother is the custodian of the child.
GUARDIANSHIP	
Married parents have equal guardianship powers, in terms of the Married Persons Equality Act. This means that they can make legal decisions for the child independently, without having to consult each other. But both parents must consent to these decisions: • the marriage of a child under age 21 • putting a child up for adoption • taking the child out of Namibia • applying to add a child's name to either parent's passport (although Namibian practice is now to issue children with their own passports, with the consent of any parent listed on the child's birth certificate) • selling land belonging to the minor child, or doing anything which affects the child's right to that land. If there is a divorce, both parents might continue to have equal guardianship powers, or the court might name one parent as the child's sole guardian.	**The custodian is also the guardian.** But, with some exceptions, both parents must consent to these decisions: • taking the child out of Namibia • giving the child up for adoption.
ACCESS	
This normally becomes a problem only if there is a divorce. During the marriage, both parents share custody, so both have rights of contact with the child. If there is a divorce, usually one parent will get custody of the child and the other parent will get a right of access.	**The parent without custody has an automatic right of reasonable access to the child,** unless a court decides that this access would be contrary to the child's best interests. There are safeguards in the law to make sure that the right of access is not abused.
PREVENTING DISPUTES	
When married parents divorce, the **divorce order** will sometimes include rules about access or other issues to help prevent disputes. Divorced parents can approach a children's court to adjust the divorce order if there are changed circumstances. Married, separated or divorced parents can make a **parenting plan** with details about access or other issues, to help prevent disputes.	Unmarried parents can approach the **children's court** to request a change in custody or guardianship, or to resolve a dispute about access. Unmarried parents can make a **parenting plan** with details about access or other issues, to help prevent disputes.
MAINTENANCE	
No difference between children of married and unmarried parents. All parents have a duty to contribute to the maintenance of their children in proportion to their respective financial positions. This duty can pass to grandparents and other family members if the parents cannot fulfil it.	
INHERITANCE	
No difference between children of married and unmarried parents. Children inherit from married or unmarried parents in the absence of a will.	

◈ Child Care and Protection Act, sections 97, 99-106, 172(1)(a) and (14) (see also Chapter 7 on parenting plans)
◈ Married Persons Equality Act, section 14
◈ common law on parental responsibilities and rights

3.3 Factors to guide decisions on custody, guardianship or access

When making any decision about custody, access or guardianship pertaining to a child born outside marriage, the children's court must consider the **factors which guide any determination of a child's best interests** (discussed in Chapter 2 of this *Guide* on objects and general principles). Below are some examples of how each of these general factors might be applied to decisions about custody, access and guardianship. There are also some **specific additional factors** which must be taken into account in decisions about custody, guardianship or access. The court is supposed to consider ALL the different factors that affect the best interests of a child in each case; no factor on its own will decide the issue.

◈ Child Care and Protection Act, section 3(2) (general factors relevant to child's best interests), and section 96 (read together with section 44)

General Factors

- the child's age, maturity and stage of development

  EXAMPLE: The child in question is still an infant. The mother should have custody so that she can breastfeed the baby.

  EXAMPLE: Jane is 17 years old and has lived in Windhoek all her life. Her mother has applied to be Jane's custodian and wants Jan to live with her in rural Ongwediva. It might be best for Jane to remain with her father in Windhoek. This is what Jane prefers, and given her age, the court will give strong weight to her views.

- the child's sex

  EXAMPLE: Charlene is just entering puberty and might be more comfortable with her mother than with her father, so that she can discuss the physical changes she is going through with a parent of the same sex.

- the child's background

  EXAMPLE: Mary was born out of a short relationship between her parents, who never married. She has lived with her mother her whole life and has had some intermittent contact with her father interspersed with long periods of absence. Her father has now applied for custody, even though he has a very limited relationship with Mary. It would be best for Mary's mother to continue to have custody.

- other personal characteristics of the child (as relevant)

  EXAMPLE: Jerry's father is disturbed that Jerry is overweight. He regularly ridicules Jerry about this. It would be best if his access to Jerry was limited to one visit a month, at a time when Jerry's mother is also present.

EXAMPLE: Lucy loves playing soccer. Her mother thinks that girls should not play sports and forced her to leave the team. Lucy has been depressed ever since, and her test scores are falling. Lucy's father is very supportive of Lucy's soccer, as well as being a suitable parent in other ways. His acceptance of Lucy's passion for sport is a point in favour of his custody application.

- the child's physical security

  EXAMPLE: Anna's father has a quick temper. Occasionally this anger has been directed at Anna. There was an occasion when Anna disobeyed her father, with the result that he smacked her hard enough to leave bruises. Every time Anna visits her father, she comes home shaking and in tears. Under these circumstances Anna's mother is worried about unsupervised access by the father.

- the child's emotional security

  EXAMPLE: Michael has had a close relationship with both of his parents since birth. He has lived with his mother, but remained in regular contact with his father. Now that his father is getting married, Michael's mother wants to deny him access. This could be very upsetting for Michael and does not seem justified.

- the child's intellectual, emotional, cultural and social development

  EXAMPLE: Amon has applied for custody of his son, George, who is due to start matric exams in a few weeks. If Amon is granted custody, George would have to move to another town and change schools. George would be better off remaining with his mother so that he does not have to change schools at such a crucial time.

- the views of the child, in light of the child's age, maturity and stage of development

  EXAMPLE: Ruth, age 3, has expressed a wish to continue to live with her mother, but this preference seems to be influenced primarily by her concern about being separated from her new puppy. She is clearly affectionate towards both of her parents. Additional factors need to be considered to determine which parent is the best custodian for Ruth.

- the right of the child to know and be cared for by both parents, **UNLESS** his or her rights are persistently abused by either or both parents **OR** continued contact with either or both parents would be harmful to the child's well-being

  EXAMPLE: The social worker assessment includes reports of repeated and severe beatings by Samuel's father, including a medical report about one incident which resulted in a broken arm. It appears that it would not be safe for Samuel to be placed in his father's custody.

- the relationship between the child and other significant persons in the child's life, including:
  - the child's mother and father
  - any relevant family member
  - any other care-giver of the child
  - any other relevant person

EXAMPLE: Mark's father was not around for most of Mark's life because he was working overseas but now he wants to make up for lost time. He had not previously acknowledged paternity, but this seems to have been a result of his long absences rather than a reluctance to accept his duty as a father. He should be granted a right of access to Mark so that they can continue to develop their relationship.

- the attitude of the child's mother and father towards the child and towards the exercise of parental responsibilities and rights

  EXAMPLE: Susanna's mother is a loving and nurturing parent. She takes her parental role seriously and Susanna has thrived in her care. Susanna's father has applied for custody, but it seems as if he has had no contact at all with Susanna for the past two years. That makes it hard to believe that his interest in her welfare is genuine.

- the capacity of the mother or father or other care-giver or other relevant person to provide for the needs of the child, including emotional and intellectual needs

  EXAMPLE: There is a strong bond between Adam and his father. There is easy communication between them and the father has a good understanding of Adam's needs and is able to cater for them. Adam loves to join his father in sporting activities and views him as a role model. It is in Adam's best interests to live with his father.

- the desirability of keeping siblings together

  EXAMPLE: Hannah has a very positive relationship with her half-sister who lives with their mother. It is desirable for Hannah to continue living in the same home as her half-sister.

- the likely effect on the child of any change in circumstances, including a separation from –
  - either or both parents
  - a sibling or other child
  - any other care-giver
  - any other person the child has been living with

  EXAMPLE: The court might consider the advantages of keeping siblings together, or the advantages of separating siblings if there was evidence that one of them was abusing the other.

- the practical difficulty and expense which will be required for the child to maintain contact with either or both parents, and whether that difficulty or expense will substantially interfere with the child's right to maintain a relationship with that parent

  EXAMPLE: Miriam's mother wants to move with Miriam from Oshakati to Windhoek to pursue an employment opportunity. She intends to facilitate contact between Miriam and her father through regular telephone calls and monthly visits, so that Miriam and her father will not lose their sense of connection.

- the need for children to maintain connections with their
  - family
  - extended family
  - culture and tradition

EXAMPLE: Monica is very close to her extended family, and very active in cultural activities in her community. She has been living with her mother up to now, but the mother is relocating to South Africa for work. Monica is in favour of her father's application for custody because she does not want to leave her country or her community.

- the impact of any disability or chronic illness of the child

  EXAMPLE: Thomas has a physical disability that requires specialist treatment. His mother lives in a rural area in Kunene, and his father lives in Walvis Bay. One factor in the decision on which parent should have custody is that there is a large hospital in Walvis Bay where Thomas can have regular treatment and therapy.

- the importance of a stable family environment (or something similar to a caring family environment)

  EXAMPLE: Laura's mother has had many short relationships with different boyfriends and moved house three times this year. Laura might have more stability if she went to live with her father.

- the need to protect the child from physical or psychological harm from –
  - maltreatment, abuse, neglect, exploitation or degradation of the child
  - exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person
  - any family violence involving the child or a family member of the child

  EXAMPLE: Jacob has witnessed his father being physically and verbally abusive to his mother. Now his father wants to visit Jacob. It is in Jacob's best interests for his father's visits to be supervised by a neutral third party, so that Jacob and his mother will be safe.

- the need to minimise further legal and administrative procedures

  EXAMPLE: Johannes has approached the court three times this year because the mother of his child is unreasonably denying him access. It might be better to give Johannes custody of the child if he is willing and fit for this role.

- any other relevant factor.

Specific Additional Factors

- The court must consider the **degree of commitment and responsibility which each parent has shown towards the child**, by providing financial support, maintaining or attempting to maintain contact with the child, being listed as a parent on the child's birth certificate or in other ways.

  EXAMPLE: James has applied for custody of his 10-year-old son, but he has not previously visited the child or paid any maintenance. He has not shown much commitment to his son.

- The court must consider the **respective financial positions of the parents**, although this factor is not decisive. The court must ***not*** approve an application for custody that is motivated by an attempt to avoid paying maintenance for the child.

EXAMPLE: Maria's mother lives in an informal settlement and does not have very much money. But she has convinced the court that she loves her child and will do everything she can to give her a good life. Maria's father has a better income, but the social worker report indicates that he spends all of his money on drinking and gambling. It appears that Maria's mother would be the better custodian.

EXAMPLE: Sarah has custody of her daughter, Naomi. Sarah works a night shift. She has put Naomi in the school hostel because there is no one at home to take care of her at night, but she is struggling to make ends meet even with the maintenance payments from Naomi's father. The court might decide that it makes more sense for Naomi to live with her father. Then she could stay at his house instead of having the extra expense of the school hostel. Her mother lives nearby, and so could easily visit Naomi when she is not working.

- In every case, the court must also be mindful of the **right of a child to know and be cared for by both parents**, provided that this is not contrary to the child's best interests.

  The court should generally give priority to the child's needs rather than to the wishes of the parents.

- Furthermore, the court must also keep in mind the **goal of resolving disputes in a non-adversarial manner if possible**.

  To this end, the court could refer the dispute to a lay-forum (such as mediation, a family meeting or a traditional leader) to see if the parties can reach agreement before the court considers the case.

◈ Child Care and Protection Act, section 3(2) (general factors relevant to child's best interests), and section 96 (read together with section 44)

3.4 Child participation

It is important to remember in proceedings about custody, guardianship and access that the child's view must also be given due consideration, if the child is of sufficient age and maturity to express a view.

Every child has the right to choose ***not*** to participate, but the child in question must be given sufficient information and advice about the matter to enable him or her to make a decision on participation which is in his or her best interests.

◈ Child Care and Protection Act, section 4(1)

4. Custody

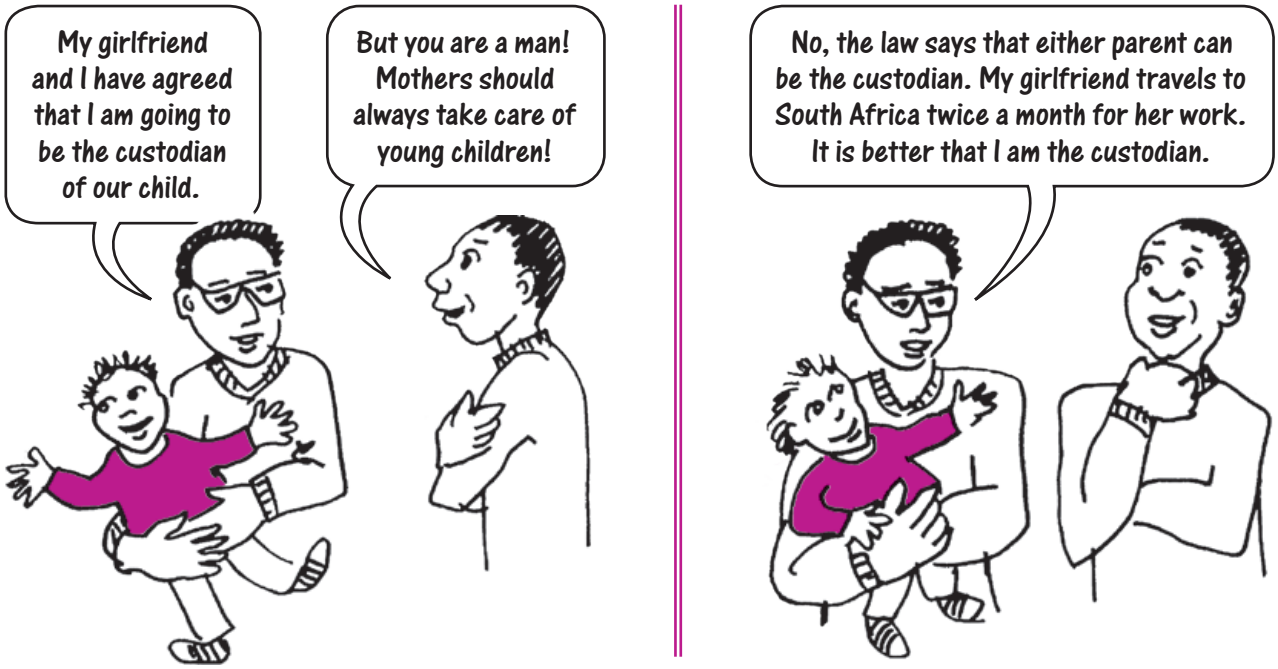
4.1 Rights to custody

The parents of a child born outside marriage have equal rights to become the custodian of their child. The parents can make a **written agreement** on who will be the child's custodian. Only one parent at a time can be named as the custodian of the child by means of such an agreement.

If the parents cannot agree on who should be the child's custodian, they can ask the children's court to decide. The children's court will usually issue a **court order** naming one parent to be the child's custodian, but it can make an order for joint custody in certain limited circumstances.

If the parents make no agreement between themselves and do not approach the children's court for a decision, then the **common-law position** applies by default – meaning that the child's mother is the custodian of the child.

A minor parent can be his or her child's custodian.



4.2 Making an agreement about custody

Making an agreement: The parents of a child born outside marriage can make a **written agreement** between themselves on which parent will be the child's custodian. The agreement must be signed by both parents in the presence of two witnesses. An agreement between unmarried parents about custody should be on **Form 5A**, which is appended to the Child Care and Protection Regulations.

The parents might ask a social worker or a trusted friend or family member to help them reach agreement

The witnesses can be any adults who can confirm that the parents really signed the agreement.

Parents who make an agreement about custody might also want to make a **parenting plan** with details about how they will exercise their parental responsibilities and rights. Chapter 11 of this *Guide* covers parenting plans.

Optional registration: One or both of the parents who are parties to the agreement may submit it to the clerk of the children's court for **registration**. *Both parents must indicate a wish to have the agreement registered*. They can submit the agreement to the clerk together, or one parent can submit it along with a written request for registration which has been signed by both parents. Registration is an optional step. If an agreement on custody is registered, it can be used as proof that the parent named in that agreement has custody of the child and has the legal power to act in that capacity. A registered agreement may also be useful as proof of eligibility to apply for or receive a State grant on behalf of a child.

The agreement must be submitted to the clerk of the children's court in the area where the child normally lives. If the paperwork is in order, **the clerk must record the agreement in the register** kept at the court for this purpose, and keep a copy of the agreement.

The Act is silent on the steps for amending an agreement about custody. But it says that if more than one agreement about the same child is submitted for registration, the **most recent agreement will take precedence.**

- Child Care and Protection Act, section 99(2)-(4)
- Child Care and Protection Regulations, regulation 29, Form 5A

What is the difference between custody agreements between parents of a child born outside marriage and kinship care agreements?

Custody agreements between parents of child born outside marriage

- Made by equal parties: Can only be made between two parents
- Determines which parent has custody
- Can be changed or terminated by agreement, or situation can be altered by application to children's court for an order on custody

Kinship care agreement

- Made by unequal parties: persons on one side who have parental responsibilities and rights, and persons on the other who do not
- Does not affect custody rights
- Can be unilaterally changed or terminated by either party (except where there is a court order)

Parental responsibilities and rights cannot normally be transferred by private agreement, but only by court order. The Act authorises agreements about custody *between two parents*. It does not allow agreements about custody or guardianship to be made privately between a parent and some other person.

A parent can make a kinship care agreement with a relative or a friend which temporarily delegates responsibility to care for a child. But a kinship care agreement can *not* transfer any parental responsibilities and rights such as custody or guardianship.

4.3 Applying for a children's court order on custody

If the parents cannot agree on who should have custody, they can ask the children's court to decide. Other people can also approach the court to ask for a court order on who should have custody of a child.

Who can apply for a custody order? The following persons may seek an order about the custody of a child born outside marriage:

- the **father**, regardless of whether he is a major or a minor
- the **mother**, regardless of whether she is a major or a minor
- the **child's care-giver**
- **someone else acting in the best interests of the child**.

Application: A person who seeks a court order on custody must make an application to the clerk of the children's court on **Form 5B**, submitted together with **Form 6**. Both of these forms are appended to the Child Care and Protection Regulations.

The application will normally be brought by the person who is seeking custody of the child. If an application for custody is brought by someone else, the children's court may grant an order for custody *only after hearing directly from the person seeking to be the custodian*. The children's court must also consider the application in the presence of the person who made the application (or his or her legal practitioner).

Notification: The clerk of the court must notify the following people of the application on **Form 7**, which is appended to the Child Care and Protection Regulations, enclosing a copy of the application:

- the child's **parents**
- the child's **care-giver** (if the child is in the care of someone other than a parent)
- anyone other than a parent who had **custody or guardianship of the child immediately prior to the application**
- **any other person identified by the court or the relevant social worker** as having an interest in the application.

Minor parents

Minor parents (under age 18), like any other minors, cannot usually bring court cases without assistance from their own parent or guardian. But the law makes an exception in this case. A parent who is still a minor can bring an application for custody without anyone's assistance.

◈ Child Care and Protection Act, section 100(1)(a)-(b)

Who is a care-giver?

"Care-giver" means any person other than a parent or guardian, who takes primary responsibility for the day-to-day care of a child. This includes —

- a foster parent
- a kinship care-giver
- a primary caretaker, which means a person (whether or not related to the child) who takes primary responsibility for the daily care of the child with the express or implied permission of the child's parent or other legal custodian
- a person who cares for a child while the child is in a place of safety
- the person who is the head of a facility where a child has been placed by court order
- a child who is the head of a child-headed household.

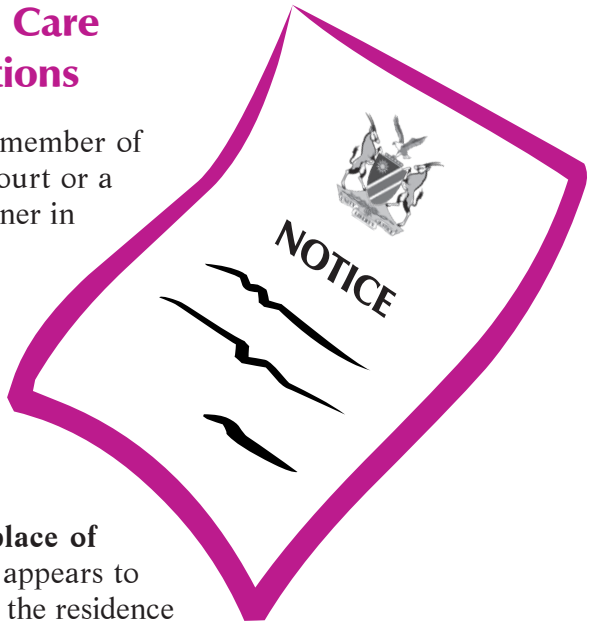
◈ Child Care and Protection Act, section 1 (definitions of "care-giver" and "primary caretaker")

The idea is to make sure that everyone closely involved with the child has a chance to give an input if they wish.

Notice must also be given to other parties. The affected **child** is always a party to the proceedings. Any person with physical control of the child concerned must ensure that the child attends the proceedings of the children's court, unless the clerk of the children's court or the court directs otherwise. Parties may also include the **Minister**, a **staff member of the Ministry** who is authorised by the Minister and the **Children's Advocate**, all of whom have the right to be parties to any case arising under the Act.

The methods of giving notice are described in the box below.

Notices under the Child Care and Protection Regulations



Notices from the court must be served by a member of the police, a messenger of the magistrate's court or a person authorised by the children's commissioner in the following manner:

(1) The notice can be served **personally** on the person.
(2) The notice can be given to the person's **legal practitioner**, if the legal practitioner's name and address have been provided to the court for purposes of proceedings under the Act.
(3) The notice can be left at the person's **place of residence or business**, with anyone who appears to be at least 16 years of age and residing at the residence or working at the business.
(4) The notice can be left at the person's **place of employment**, to anyone who appears to be at least 16 years of age, and employed at the same place or in charge there.
(5) In the case of a **legal person (such as an organisation),** the notice can be left at its **registered office or main place of business**, with a director or a responsible employee.

If the person to be served in any way **prevents the notice from reaching him or her**, it is sufficient service to **attach a copy of the notice to the outer door or security gate** of the relevant place.

If a notice cannot be served in any of these ways, the member of the police, messenger of the magistrate's court or other person authorised by the children's commissioner must attempt notification in one or more of the following ways:

(1) The person can be notified by **telephone**.
(2) The person can be notified by **fax**.
(3) The person can be notified by **e-mail**.
(4) The person can be notified by **courier** or **registered post**.
(5) The person attempting notification can visit the last known residential address or place of business or employment of the person in question, to **attempt to discover the current contact details** of the person, and then try to use that contact information to serve the notice.

If all efforts to serve the notice fail, the person who attempted notification must give the children's **court proof of the attempts made**.

Proceedings in a children's court may begin or continue in the **absence of a person who was notified, or attempted to be notified,** to attend the proceedings or to make representations – IF the children's court considers it to be in the **interests of justice** and in the **best interests of the child**.

The court must **postpone** the matter due to the **absence of a person who was notified to attend** in any one of these circumstances:

- The person who is not present at children's court proceedings is **likely to make a valuable contribution** regarding the best interests of the child in question.
- The court is of the opinion that the presence of the person is **necessary** for the purposes of the court proceeding.
- The person who is absent is the relevant child's **parent, guardian, custodian, care-giver or a person identified by the court or the relevant social worker as having an interest in the matter** (see section 56(3) of the Act).
- The person who is absent is the **investigating social worker** (see section 56(3) of the Act).

In such a case, the court can postpone the matter and arrange for the issue of a **subpoena** to the absent person on **Form 4**, which is appended to the **Regulations relating to Children's Court Proceedings**.

A person who fails to appear before the children's court without a reasonable cause after being issued with a notice or a subpoena commits a crime punishable by a fine of up to N$5 000 or to imprisonment for up to one year or both. A person is not subject to a penalty for non-attendance if the children's court decided to proceed in that person's absence.

◈ Child Care and Protection Regulations, regulation 120

Social worker report: The court must order a social worker to prepare a report on the child's situation, and set a deadline for the delivery of this report.

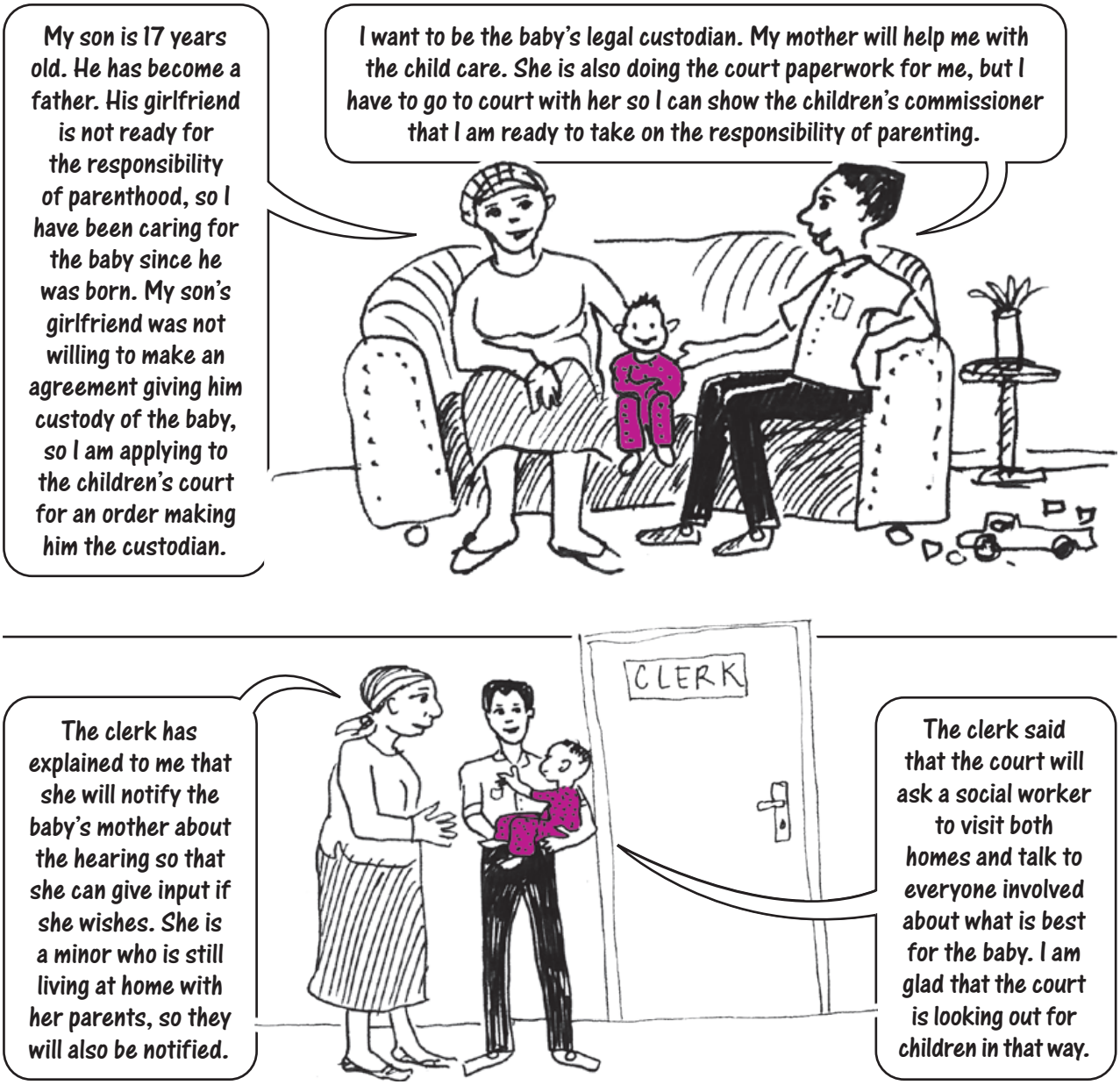
> "In some instances the court enlists the services of either a social worker or psychologist for professional assessment. The recommendations therefrom, though not binding on the court are, however, persuasive and unless they are out of step with the normal upkeep of children or offend the sense of decency or are outrageous, the court is likely to follow them with amendments where necessary."
>
> ◈ Jacqueline Heaton, "Parental responsibilities and rights", in CJ Davel and AM Skelton (eds), *Commentary on the Children's Act*, Juta, 2007, updated in 2018, pages 3-5 to 3-6 (footnotes omitted and emphasis added)

Channelling draft social worker reports via Ministry

All social worker reports must be channelled through a staff member designated by the Minister before being submitted to the children's court. This rule is intended to provide quality control and to harmonise the work of State and private social workers. The Ministry official may return the report to the social worker with directions for improvement if necessary. If so, the social worker must re-submit the revised report to the channelling officer for final approval before it is submitted to the court.

- Child Care and Protection Act, section 33(7)-(8)
- Child Care and Protection Regulations, regulation 8
- See Chapter 5 of this *Guide* for more details on the channelling procedure.

Other investigations and evidence: The court may also summon any witnesses and order any other investigation which it considers necessary, and it may order the parent or parents or other applicant to pay the costs of the investigation or witness appearances.



Child protection: If it appears to a children's court during proceedings relating to custody of a child that the child may be in need of protective services, the proceedings must be converted into a child protection hearing.

> This could result in the alternative placement of a child in kinship care, with a foster family or in a children's home, or an order for appropriate services to support the child or the family. See Chapter 14 of this *Guide* on child protection hearings for more information.

Custody order: The custody order could give custody to either parent or to someone other than a parent. It could give joint custody to more than one person.

Varying or withdrawing a custody order: The children's court may vary or withdraw a custody order. A request to change or withdraw custody works in the same way as an initial application for custody.

> For example, if an aunt is the custodian of a child and she finds that she can no longer care for the child, she might ask for custody to be given to someone else. Or, if the court initially refused to give a father custody because his living circumstances were not safe for children, he could reapply for custody after he moved to more suitable accommodation.

Appeals: Any party involved in a custody matter may appeal to the High Court against an order made by the children's court, or against the refusal to make an order. It is also possible to appeal to the High Court in respect of a decision concerning variation, suspension or rescission of any children's court order.

> The children's court order which is being appealed may be suspended pending the outcome of the appeal if this would be in the child's best interests. The court can also make another appropriate order in the child's best interests pending the appeal. There is more information about appeals in Chapter 6 of this *Guide*.

- Child Care and Protection Act, sections 46, 100 and 116
- Child Care and Protection Regulations, regulation 30

Joint custody

Married parents automatically have joint custody of the children born to them both.

Joint custody might be appropriate for **unmarried parents** who are informally living together, or living apart in circumstances which make joint custody feasible. However, the Act appears to provide for joint custody for unmarried parents only by means of a court order – and not by means of a private agreement.

> Section 99(2) of the Act refers to custody by one parent, and Form 5A for agreements between unmarried parents provides only for sole custody. Similarly, section 101(1) of the Act contemplates only sole custody and guardianship, in the absence of a court order which provides otherwise. However, section 100(1) of the Act states that a parent may seek a court order for sole or joint custody. The reason for limiting joint custody to court orders is probably because no court order on custody can be issued until after a social worker has investigated and reported on the family situation.

Regulation 30(4) states that a children's court may grant joint custody to ***parents or other persons who do NOT reside together*** only after consideration of the same factors which would apply to a grant of joint custody in a case of divorce:

- whether both applicants are fit to take care of the child;
- whether both applicants desire continuous contact with the child;
- whether both applicants are perceived by the child as sources of emotional support;
- whether both applicants are able to communicate and co-operate in promoting the best interests of the child; and
- whether the applicants live in sufficiently close physical proximity to make joint custody feasible.

The regulations are silent on what factors must be considered where the applicants for joint custody are ***parents or other persons who DO reside together***.

The regulations also state that a children's court may grant joint custody to **divorced parents** *only* if they can show that ***circumstances have changed*** since the divorce order was granted. This provision is designed to ensure that a children's court is not misused as an "appeal" of a High Court divorce order.

- Child Care and Protection Act, sections 99(2), 100(1), 101(1)
- Child Care and Protection Regulations, regulation 30(4)

A person who is caring for a child is NOT always the custodian of the child

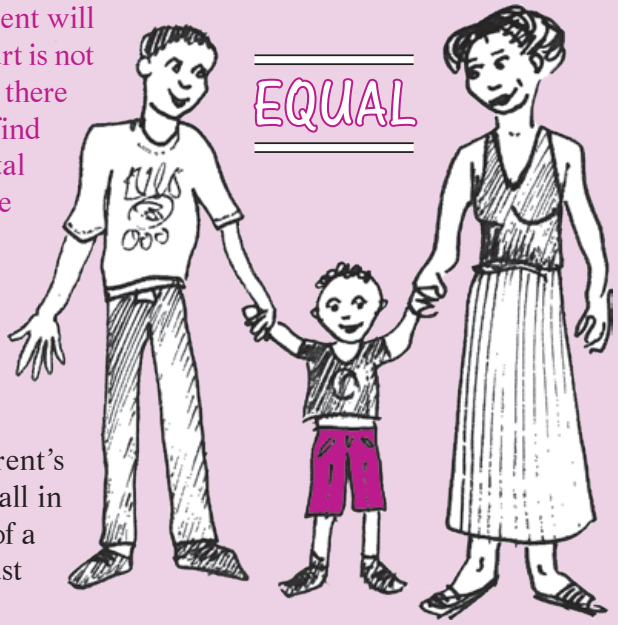
For example, suppose that Lucy's mother is her custodian. If Lucy's mother sends Lucy to live with her sister, this does not make the sister Lucy's custodian. Lucy's mother is still the custodian. She could bring Lucy back from her sister's house to live with her or visit her at any time, and she can visit Lucy whenever she wants. In this situation, the sister is Lucy's primary caretaker. Lucy's mother and her sister could make a kinship care agreement, which could make it possible for the sister to access State grants on behalf of Lucy. But the sister's decision-making power over Lucy is only so much as Lucy's mother allows.

But suppose that the mother sends Lucy to live with her sister and stops remaining in contact with them, or starts behaving in a way that is not in Lucy's best interests. The sister could go to the children's court and apply to become Lucy's custodian. This would give the sister all the decision-making powers that go along with custody. The sister would control day-to-day decisions about the child, and Lucy's mother would have a right of reasonable access to Lucy because she would now be a non-custodian parent. She would no longer be able to come and take Lucy away whenever she wished. Her right of access to Lucy would be subject to reasonable control by her sister, Lucy's new custodian.

EQUALITY BETWEEN MOTHERS AND FATHERS

"The days when fathers were seen only as providers and not care-givers belongs to the past era – parenting is about being consistent and predictable. All things being equal, **it is the quality of love that matters and not who gives it.** In a custody dispute the court's primary concern is the 'best interest' of the minor child. The court must decide which of the parents is better able to promote and ensure the child's physical, moral, emotional and spiritual welfare. The court's duty is not to seek out the perfect parent who should be awarded custody. It has been held that:

> 'In determining what custody arrangement will best serve the children's interests … a Court is not looking for the perfect parent – doubtless there is no such thing. The Court's quest is to find what has been called the least detrimental available alternative for safeguarding the child's growth and development.'



It is therefore settled that **parenting is a gender-neutral role or function**. A parent should not be denied custodial rights simply because they are of a particular gender. That is not to suggest, however, that a parent's gender should not be placed in the scale at all in determining what would be the best interest of a minor child in a custody dispute. Its case must be treated on its merits."

◈ *NS v PS* 2010 (2) NR 418 (HC), paragraph 18 (footnotes and brackets omitted; emphasis added)

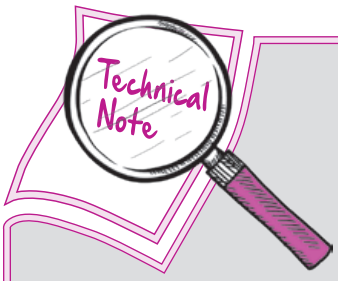
"In all recent decisions, due to constitutional developments, the courts emphasise that **parenting is a gender neutral function** and that **the assumption that a mother is necessarily in a better position to care for her child belongs to a past era**."

◈ *NS v RH* 2011 (2) NR 486 (HC), paragraph 66 (emphasis added)

4.4 Default position in absence of agreement or court order

If the parents make no agreement between themselves and do not approach the children's court for a decision, then the common-law position applies by default – meaning that the child's mother is the custodian and guardian of the child.

It would be unsafe for a child to be in limbo, without anyone having a clear legal duty to take responsibility for the child's daily care. Since the Child Care and Protection Act did not repeal the common law, the common-law rule would fill the vacuum left in the absence of any agreement or court order.



Default position

The Act does not discuss the "default position" in the absence of an agreement between parents or a court order, and no court cases on this issue were decided under the Children's Status Act.

For support for the view that the common-law position would apply (discussing the similar rules in the Children's Status Act 6 of 2006), see Julia Sloth-Nielsen, Lorenzo Wakefield & Nkatha L 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) at pages 203-229.

However, for a contrary view (also discussing the Children's Status Act 6 of 2006), see Felicity !Owoses-/Goagoses, "Custody and guardianship of children" in Oliver C Ruppel (ed), *Children's Rights in Namibia*, Konrad Adenauer Stiftung, 2009 at 183.

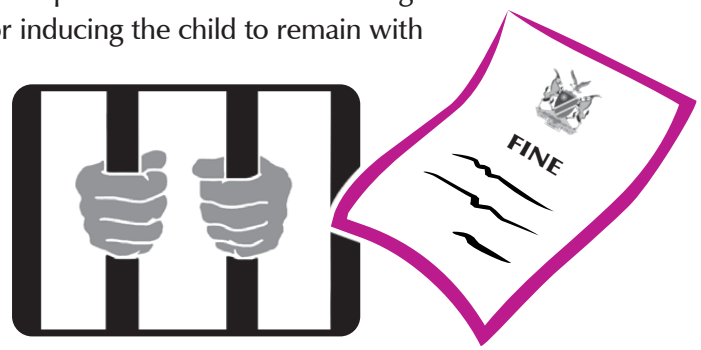
On this issue, it should be noted that regulation 4(3) issued under the Children's Status Act provided as follows:

> "(3) If the parents of a child fail to reach agreement over the custody of the child as contemplated in section 11(3) of the Act, and no application is made to the court as contemplated in that section, the Minister or any person designated by him or her is authorised to take any decision which the primary custodian of the child could have taken on behalf of the child until such time that the issue of custody of the child is resolved." (Government Notice 267/2008, Government Gazette 4154)

This interim measure was entirely unworkable in practice and appears to have been ignored. No such "fall-back provision" is contained in the Child Care and Protection Act or its regulations, supporting the view that the common-law position would fill the gap.

Unlawful removal or detention of a child

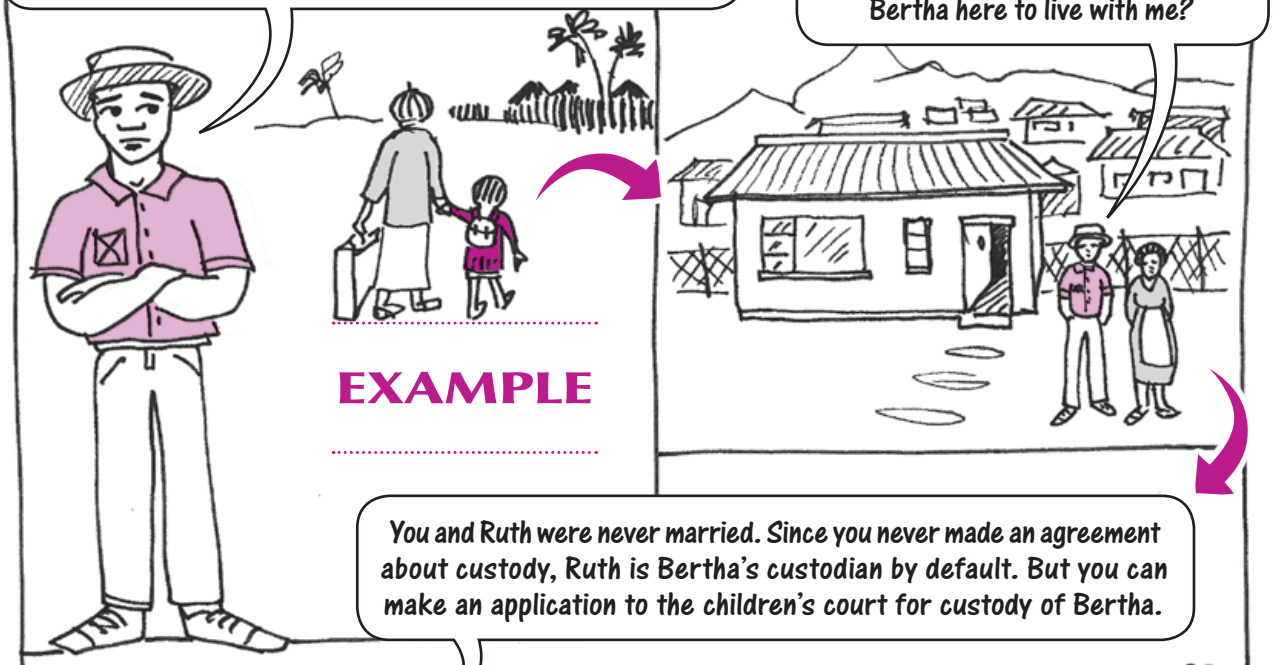
This issue can arise in various contexts, but it could involve a situation where one parent is trying to circumvent a court order on child custody. It is a crime for anyone to remove a child from the lawful control of another person. It is also a crime to detain a child with the result that the child is kept out of the lawful control of another person. This includes causing the child to be detained by someone else or inducing the child to remain with someone other than the person with lawful control over the child. The penalty is a fine of up to N$50 000 or imprisonment for up to 10 years, or both.



◈ Child Care and Protection Act, sections 235-236

My six-year-old daughter Bertha has been living with her mother Ruth since birth. But now Ruth has a new job. She has to work late many evenings. Ruth has sent Bertha to live with Ruth's mother in the village. Ruth's mother is very old and ill, and I am not sure that she can take care of Bertha.

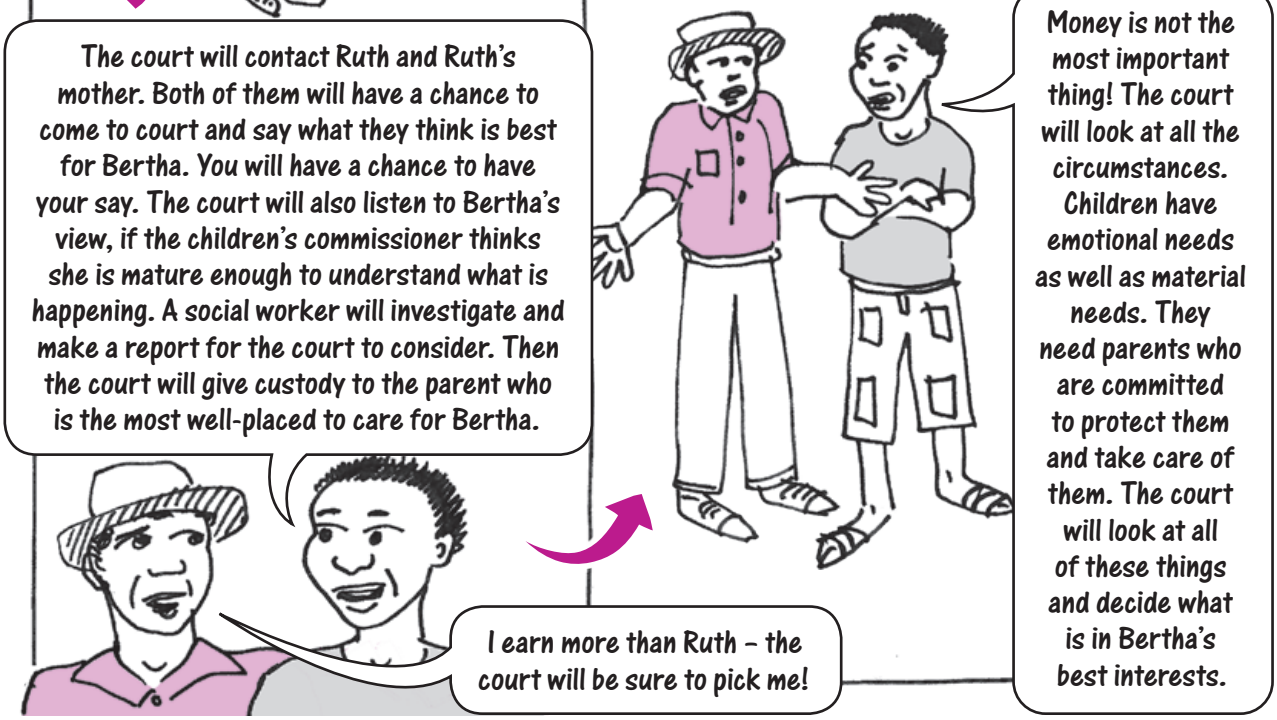
I have a wife now, and a house in Windhoek. I think I could provide a very stable and healthy environment for Bertha, plus good access to schools. Do I have a right to bring Bertha here to live with me?



EXAMPLE

You and Ruth were never married. Since you never made an agreement about custody, Ruth is Bertha's custodian by default. But you can make an application to the children's court for custody of Bertha.

The court will contact Ruth and Ruth's mother. Both of them will have a chance to come to court and say what they think is best for Bertha. You will have a chance to have your say. The court will also listen to Bertha's view, if the children's commissioner thinks she is mature enough to understand what is happening. A social worker will investigate and make a report for the court to consider. Then the court will give custody to the parent who is the most well-placed to care for Bertha.



Money is not the most important thing! The court will look at all the circumstances. Children have emotional needs as well as material needs. They need parents who are committed to protect them and take care of them. The court will look at all of these things and decide what is in Bertha's best interests.

I earn more than Ruth – the court will be sure to pick me!

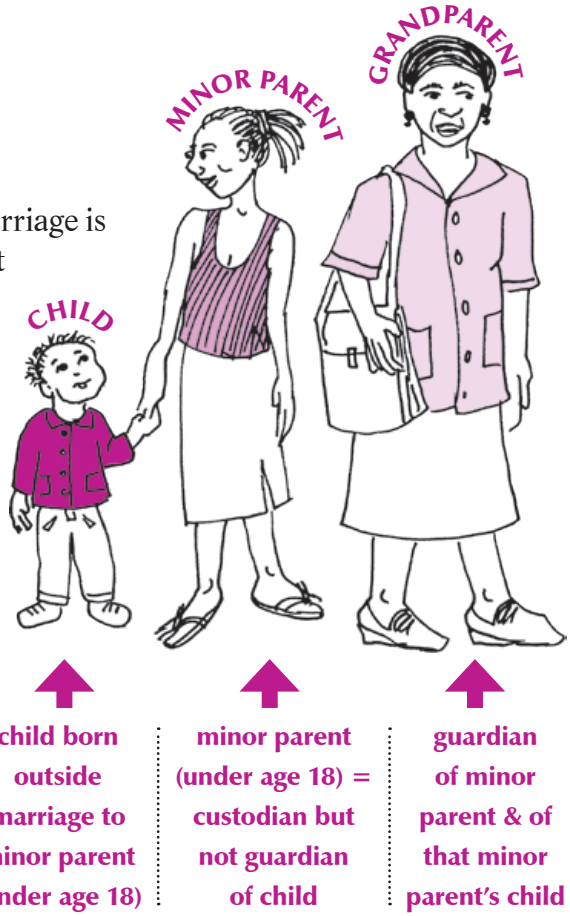
5. Guardianship

5.1 Rights to guardianship

A person with legal custody of a child born outside marriage is automatically the guardian of the child, unless a court order says otherwise. In other words, **guardianship normally goes with custody.**

However, **if the mother or father of the child is a minor, the guardian of that minor parent will also be the guardian of that minor parent's child**. This will usually be the minor parent's mother or father (the grandmother or grandfather of the minor parent's child). This rule applies automatically, but can be changed by court order.

Minors cannot normally take legal decisions without assistance from their own parent or guardian – this is why a parent who is still a minor can be a custodian, but not a guardian.



5.2 Decisions that require the consent of both parents

No matter who is the guardian of a child born outside marriage, there are two major decisions that require the written consent of both the child's parents, unless the children's court has ordered otherwise:

- removing a child from Namibia
- giving a child up for adoption.

Removing a child from Namibia: The consent requirement applies even if the child is leaving Namibia for a short period of time. The reason is that any time period would be easy to evade. A parent taking a child out of Namibia could simply lie about the time period in question – then once the lie was discovered, the child would be outside Namibia and beyond the jurisdiction of Namibia's courts. The consent requirement applies to situations where the child is removed by the parent or by anyone else.

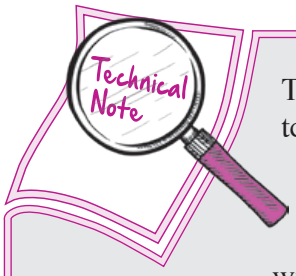
Sometimes one parent may unilaterally take a child to another country, instead of making an agreement with the other parent or letting the court decide if this should be allowed. This can leave the other parent without any ability to remain in reasonable contact with the child. This is addressed by the Hague Convention on the Civil Aspects of International Child Abduction. The Convention provides a mechanism for returning a child who has been removed in this way to the child's country of usual residence, so that issues about custody and access can be decided by that country's courts. However, as of 2019, Namibia had not yet become a party to this Convention.

There are some **EXCEPTIONS** to the parental consent requirement. Consent is **NOT required** where –

- the parent **cannot be found** after the required efforts have been made
- the parent cannot give valid consent because he or she is **mentally incapacitated**
- if the children's court decides that requiring **parental consent would not serve the best interests of the child**.

The **children's court** also has the power to **overrule** a parent's refusal to give consent if this would be in the best interests of the child.

◈ Child Care and Protection Act, section 101(8)-(9)



The Act allows for an exception to the parental consent requirement when a parent cannot be located "through any of the prescribed means of notice within the prescribed period". Regulation 120 covers service of documents and notices in general, but it does not set a specific notice procedure for this purpose, and the regulations do not set any time period for this purpose. Thus, it is not clear how the exception to the parental consent requirement for situations where one parent cannot be located would be applied in practice.

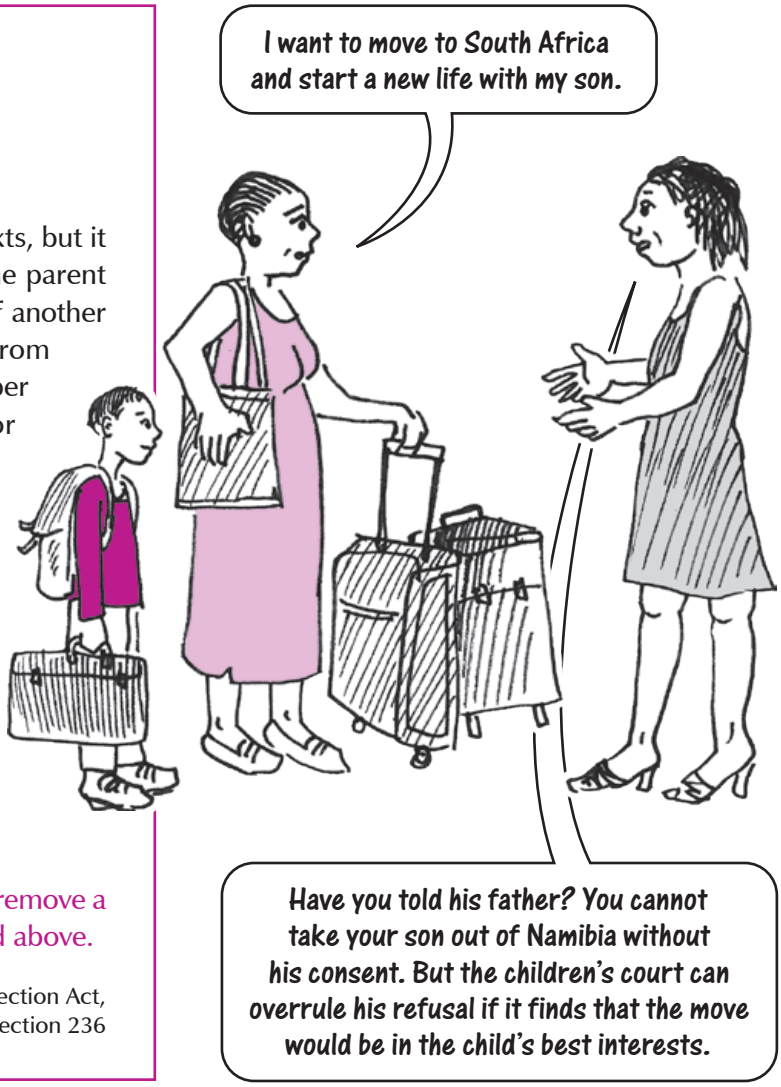
◈ Child Care and Protection Act, section 101(9)(a)
◈ Child Care and Protection Regulations, regulation 120

Unlawfully taking or sending a child out of Namibia

This issue can arise in various contexts, but it could occur in a situation where one parent is trying to get around the refusal of another parent for the removal of a child from Namibia, without following the proper procedures. It is a crime to take or send a child out of Namibia in violation of a court order prohibiting the removal of the child from Namibia, or without the consent of the person or persons who hold the relevant parental responsibilities and rights in respect of the child or the consent of a court. The penalty is a fine of up to N$50 000 or imprisonment for up to 10 years, or both.

The rules on parental consent to remove a child from Namibia are explained above.

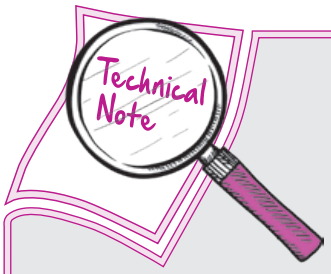
◈ Child Care and Protection Act, section 236



Giving a child up for adoption: The consent of both parents of a child born outside marriage is normally required to give a child up for adoption. However, there are a number of **EXCEPTIONS** to this rule, particularly for fathers of children born outside marriage who have not voluntarily acknowledged paternity or been involved in the child's life.

The consent requirement and the exceptions are discussed in detail in Chapter 17 of this *Guide* on adoption.

◈ Child Care and Protection Act, section 172-173



Joint decisions by married or divorced parents

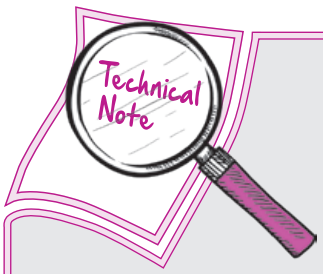
Married parents: Married parents are equal guardians of their children, but they must both consent to the following decisions (unless there is a court order that says otherwise):

- the **marriage** of a child under age 21
- putting a child up for **adoption**, with certain exceptions
- **removal of a child from Namibia** by a parent or anyone else
- **applying to add a child's name to either parent's passport** (although Namibian practice is now to issue children with their own passports, with the consent of any parent listed on the child's birth certificate)
- **selling land belonging to the minor child**, or doing anything which affects the child's right to that land.

◈ Married Persons Equality Act 12 of 1996, section 14

Divorced parents: The consent of both parents would be required to give a child up for adoption, with certain exceptions. The law is silent on the issue of what other decisions require the consent of both parents. It would depend on the terms of the divorce order.

See Chapter 17 of this Guide on adoption for more information about parental consent to adoption and exceptions to the usual consent requirements.



Children's passports

Note that the Ministry of Home Affairs and Immigration issues children with their own passports, with the consent of any parent who is listed on the child's full birth certificate. The other parent's consent is not required. The approach is the same for both married or unmarried parents. A parent who is not listed on the child's birth certificate cannot give consent for the child to be issued with a passport.

◈ Information from Ministry of Home Affairs and Immigration, 2019

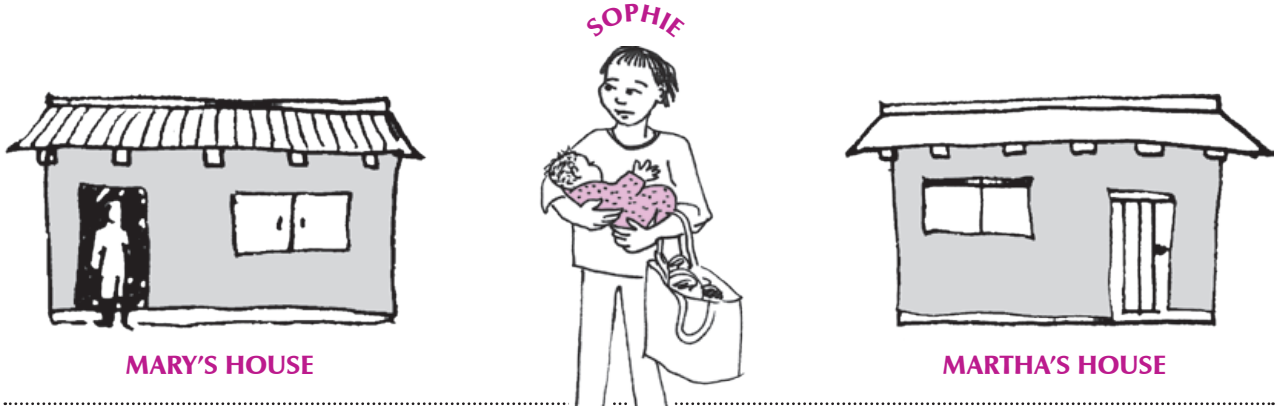
5.3 Applying for a children's court order on guardianship

In the case of unmarried parents, guardianship normally goes with custody automatically.

The court can **separate** custody and guardianship, by making one person the custodian and another person the guardian.

It is also possible for the court to name more than one person to **share** guardianship powers over a child.

For example, the court order could make both parents equal guardians, which might make sense if they also shared joint custody. It is also possible for a court order to make an order giving guardianship powers to a parent together with some other person, or to multiple other persons. For example, a parent and a step-parent of a child, or the aunt and uncle of a child who is living permanently with them, might apply for shared guardianship powers over the child.



Here is an example of a situation where a court order might separate guardianship and custody. Suppose that a teen mother named Sophie is the custodian of her baby. Martha — who is Sophie's mother and the baby's grandmother — is the guardian of both Sophie and her baby. Martha becomes ill and can no longer make decisions for Sophie and her baby. Sophie and her baby go to live with Martha's sister, Mary. Mary might apply to the court to become the legal guardian of both Sophie and her baby.

Applications for court orders giving guardianship to more than one person Examples from South Africa

***W v S & Others (1)* 1988 (1) SA 475 (N):** In a case involving a child ("M") born outside marriage, the child's father (who was White) asked for a court order appointing him a joint guardian together with the mother (who was Indian). The Court refused to grant this request, for the following reasons (at pages 491-492; emphasis added):

> […] I have doubt as to the desirability of making parents joint and equal guardians where they do not live together in relative harmony. The potential for disagreement and conflict as to decision-making and temptation to use the child as a weapon against each other seem to me, having regard to human nature, to be real difficulties which can militate

against such a regime being in the best interests of a child; the more so where the parents may not have parted on good terms and there may be a measure of friction between them. This danger is, in my view, heightened where the parents come from different racial, cultural and social backgrounds and may therefore be, to some extent, subject to the pressures of their respective environments. A further factor which may also serve to complicate such a situation would be that of a child who is manipulative and seeks to play off one parent against another. I do not say that there may not be instances where such an order may merit serious consideration but, given the circumstances to which I have referred, it seems to me that such instances would be rare indeed. Even in the context of divorce and in relation to legitimate children, a Court would not be quick to grant joint guardianship and may even have reservations where the parties have reached agreement in this regard.

In the present case, where one party claims joint guardianship, which claim is resisted by the other, it seems to me to follow that the Courts will subject such claim to even greater scrutiny. There is nothing to show that the first respondent is unfit to exercise the powers of guardianship. That much follows from the fact that what is sought is not to deprive her of the power totally but merely to impose a limitation upon her right to exercise it solely. Where no case is made for deprivation or to show that the guardian is unfit in any particular respect, then it seems to me that a Court would only in very exceptional circumstances entertain a claim such as the present. In the present case there is the situation that the parties have separate households, come from separate cultural backgrounds and the [mother] has, from the birth of M, been his guardian. The papers show that there was disagreement between the parties from time to time, and it seems to me not improbable that, given their differences, both of view and of cultural background, they may well disagree as to what may be in M's best interests when it comes to the exercise of this power. That factor alone, in my judgment, is sufficient to refuse the relief sought. I would, however, add the fact that the only basis upon which this is sought is the expressed desire by the [father] to have a more meaningful participation in the life of his son. While this is a clearly laudable sentiment expressed by him, it does not in the present case constitute any proper basis, in my view, for granting to him either full joint guardianship or any lesser form thereof. I am satisfied that no case has been made at all which requires a change of the present regime.

***Ex Parte Kedar & Another* 1993 (1) SA 242 (W):** The unmarried mother of a 10-year-old child and her employer bought an application asking the court to name them joint guardians of the child. They wanted to enrol the child at a local primary school, but the school refused to admit the child on the grounds that his guardian did not own property in the vicinity of the school. The court granted the requested order on the grounds that it was in the best interests of the minor.

Who can apply for a guardianship order?

The following persons may seek an order about legal guardianship of a child born outside marriage:

- the **father**
- the **mother**
- the **child**
- the **child's care-guardian**
- **someone else acting in the best interests of the child**
- **a person authorised in writing by the Minister to act on behalf of the child.**

Minor parents

Minor parents (under age 18), like any other minors, cannot usually bring court cases without assistance from their own parent or guardian. But the law makes an exception in this case. A parent who is still a minor can bring an application for custody without anyone's assistance.

◈ Child Care and Protection Act, section 100(1)(a)-(b)

The person making the application can ask to be the guardian themselves. The person making the application can also ask the court to name someone else as the guardian.

Solomon, age 17, was born outside marriage. Solomon's father, Paulus, is Solomon's custodian and guardian. Solomon's mother was killed in a car accident last year. Solomon inherited some money from his mother. Paulus takes good care of Solomon, but he has a gambling problem and he has been gambling away Solomon's inheritance. Solomon could go to the children's court and ask the court to name his uncle as his guardian even if Paulus remains his custodian. That way, Solomon could still be in charge of Solomon's everyday care, but the uncle would control Solomon's inheritance money.

Application: A person who seeks a court order on guardianship must make an application to the clerk of the children's court on **Form 8**, submitted together with **Form 6**. Both of these forms are appended to the Child Care and Protection Regulations.

The children's court must consider the application in the presence of the applicant (or his or her legal practitioner).

Notification: The clerk of the court must notify the following people of the application on **Form 7**, which is appended to the Child Care and Protection Regulations, enclosing a copy of the application:

- the child's **parents**
- the child's **care-giver** (if the child is in the care of someone other than a parent)
- anyone other than a parent who had **custody or guardianship of the child immediately prior to the application**
- **any other person identified by the court or the relevant social worker** as having an interest in the application.

The idea is to make sure that everyone closely involved with the child has a chance to give an input if they wish.

"**Care-giver**" means any person other than a parent or guardian, who takes primary responsibility for the day-to-day care of a child. This includes –

- a foster parent
- a kinship care-giver
- a primary caretaker, which means a person (whether or not related to the child) who takes primary responsibility for the daily care of the child with the express or implied permission of the child's parent or other legal custodian
- a person who cares for a child while the child is in a place of safety
- the person who heads a facility where a child has been placed by court order
- a child who is the head of a child-headed household.

◈ Child Care and Protection Act, section 1 (definitions of "care-giver" and "primary caretaker")

Notice must also be given to other parties. The affected **child** is always a party to the proceedings. Any person with physical control of the child concerned must ensure that the child attends the proceedings of the children's court, unless the clerk of the children's court or the court directs otherwise. Parties may also include the **Minister**, a **staff member of the Ministry** who is authorised by the Minister and the **Children's Advocate**, all of whom have the right to be parties to any case arising under the Act.

The procedure for giving notice is the same as for a custody application. See the box on page 16 of this Chapter.

Social worker report: The court must order a social worker to prepare a report on the child's situation, and set a deadline for the delivery of this report.

The social worker must remember the channelling procedure required for all court reports. See the box on page 18 of this Chapter.

Other investigations and evidence: The court may also summon any witnesses and order any other investigation which it considers necessary, and it may order the parent or parents or other applicant to pay the costs of the investigation or witness appearances.

Child protection: If it appears to a children's court during proceedings relating to custody of a child that the child may be in need of protective services, the proceedings must be converted into a child protection hearing.

This could result in the alternative placement of a child in kinship care, with a foster family or in a children's home, or an order for appropriate services to support the child or the family. See Chapter 14 of this *Guide* on child protection hearings for more information.

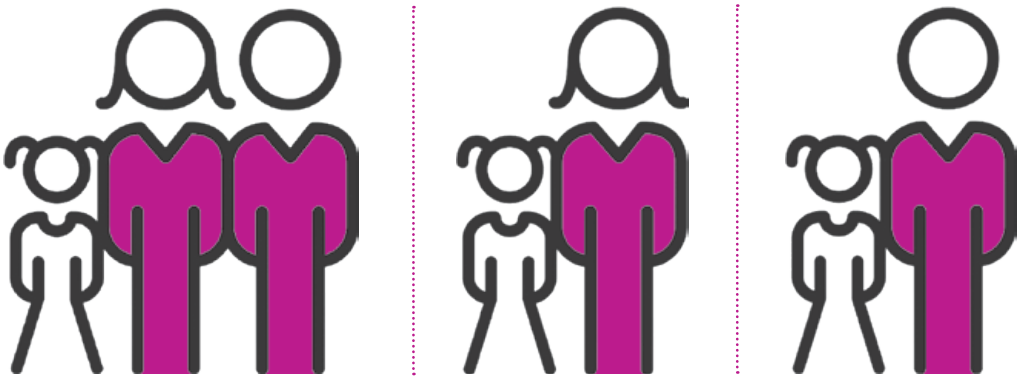
Guardianship order: The guardianship order could give guardianship to either parent, or to someone other than a parent. It could give guardianship powers to more than one person.

Varying or withdrawing a guardianship order: The children's court may vary or withdraw a guardianship order. A request to change or withdraw guardianship works in the same way as an initial application for guardianship.

For example, guardianship might be changed if someone was concerned that the guardian was not acting in the best interests of the child.

Appeals: Any party involved in a guardianship matter may appeal to the High Court against an order made by the children's court, or against the refusal to make an order. It is also possible to appeal to the High Court in respect of a decision concerning variation, suspension or rescission of any children's court order.

The children's court order which is being appealed may be suspended pending the outcome of the appeal if this would be in the child's best interests. The court can also make another appropriate order in the child's best interests pending the appeal. There is more information about appeals in Chapter 6 of this *Guide*.



- Child Care and Protection Act, sections 46, 102 and 116
- Child Care and Protection Act Regulations, regulation 31

5.4 Appointment of a legal guardian as a "tutor"

Where a **legal guardian** appointed by the children's court **is NOT a natural guardian** of the child, that legal guardian may not administer any property belonging to the child, or make decisions about the child's person, unless he or she has been appointed by the Master of the High Court as a **tutor** in terms of the Administration of Estates Act.

In such cases, the legal guardian must apply to the Master of the High Court to be appointed as tutor. The Master will normally give preference to a legal guardian to be named as the child's tutor, but may appoint another suitable person as tutor if this is in the best interests of the child concerned. If the child has property, the Master can require the payment of **security** by the tutor to the Master, in an amount that the Master will determine. However, if the property does not exceed a certain value which is set from time to time, the security requirement can be **waived**.

The **letters of tutorship** which are provided by the Master of the High Court may contain other conditions pertaining to the rights and duties of a tutor.

- Child Care and Protection Act, section 114
- Administration of Estates Act 66 of 1965, sections 72(1) and 77

Who is a "natural guardian"?

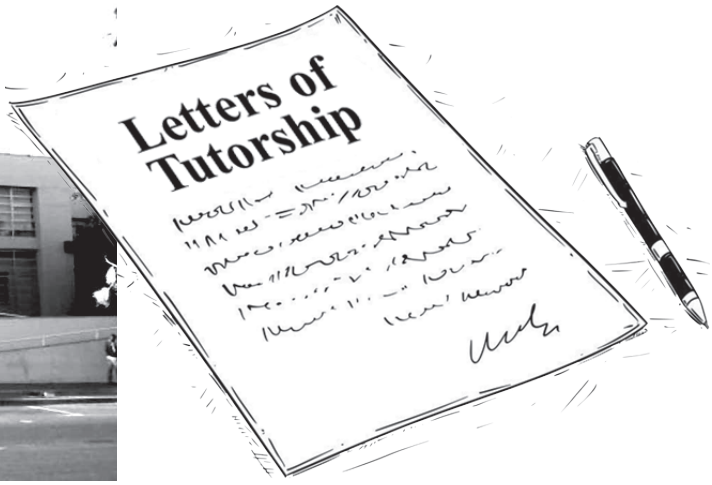
A parent is the "natural guardian" of a child when that parent's guardianship duties are imposed by law in a way which gives the parent no choice about whether to accept the responsibilities of guardianship. In contrast, in a situation where a person becomes a "legal guardian" as a result of an agreement between the parents authorised by the Act, a court order or a nomination in a will, the person in question can *choose* whether they wish to accept the office of guardian. Because of this distinction, there are certain differences between the duties of a natural guardian and a legal guardian who is NOT a natural guardian.

Both parents are natural guardians of a child born inside marriage, but the biological father of a child born outside marriage is *not* a natural guardian – although he may acquire guardianship rights in respect of the child in several ways.

A person other than a parent may be appointed as the "legal guardian" of a child, but such a person is not the child's "natural guardian".

The "child's person"

This legal term refers to the child himself or herself, as opposed to the child's property.



5.5 Complaints about guardians or tutors

Some people may seek to become the guardian of a child in order to get control of the child's money or property, without having the child's best interests at heart. The Act provides a complaints mechanism to deal with such situations.

Who can make a complaint?: Any person who has a genuine interest in the well-being of a child may make a complaint to the clerk of the children's court about a guardian or tutor who is not acting in the best interests of the child. The complaint must be submitted on **Form 10D** submitted together with **Form 6**. Both of these forms are appended to the Child Care and Protection Regulations. **The complaint can be made anonymously.**

Notification: The clerk of the court must notify the guardian or tutor who is the subject of the complaint on **Form 7,** which is appended to the Child Care and Protection Regulations, and enclose a copy of the complaint.

Investigation: When the children's court receives such a complaint, it must order an **investigation by a designated social worker** within a timeframe set by the court. This report must be submitted to the court on **Form 10E,** which is appended to the Child Care and Protection Regulations.

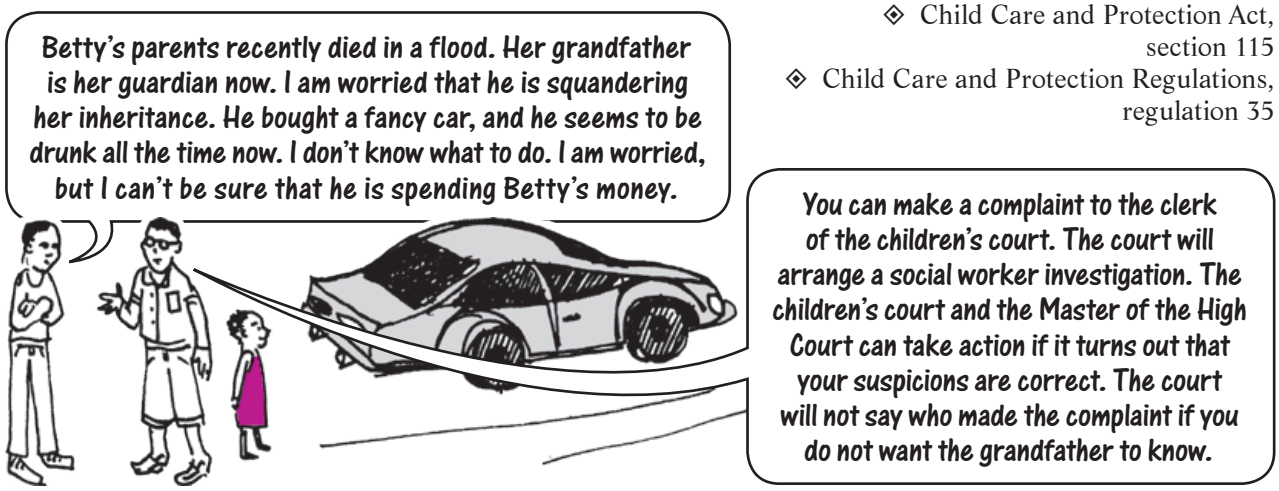
The children's court may subpoena the social worker who prepared the report, or any other person, to give oral evidence to the court before the court decides whether or not to alter an appointment of guardianship or to recommend alteration of an appointment of tutorship.

Decision: After considering the social worker's report and any other evidence, the children's court can take appropriate steps if it finds that a guardian or tutor has not been acting in the best interests of a child.

- The court may **alter the appointment of guardianship**.
- In the case of a **tutor**, the court must direct the clerk of the children's court to **notify the Master of the High Court, who may alter the appointment of tutorship** and if necessary issue new letters of tutorship.

If the children's court alters the appointment of a person as guardian or recommends a change of tutorship in response to a complaint, the clerk must arrange for **notice** to the person whose guardianship or tutorship is affected.

- Child Care and Protection Act, section 115
- Child Care and Protection Regulations, regulation 35



6. Access

6.1 Rights to access

Automatic access: If the parents of a child are not married, one parent will usually be the child's custodian and guardian, and the other parent will have a right of reasonable access.

In the past, **unmarried mothers** had automatic parental rights in terms of the common law, but **unmarried fathers** did not.

Now, in terms of the Act, an unmarried father has an **automatic right of access** if he has **voluntarily acknowledged paternity** by –

- giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court before the birth of the child, or after the birth of the child but before the child reaches the age of six months
- voluntarily paying or offering to pay maintenance for the child
- paying damages in respect of the pregnancy in terms of customary law
- being listed as a parent on the child's birth certificate.

This approach is intended to give effect to children's constitutional right "to know and be cared for by their parents". The theory is that most parents will not abuse this right, so the courts should become involved only in cases where there are problems. If all non-custodial parents had to approach the courts for an order before they could have access to their children, then the right would be restricted in practice to the few parents who are willing to undertake this step.

The list of ways in which paternity can be voluntarily acknowledged can be expanded in future by regulation.

◈ Child Care and Protection Act, section 102(1)

Access in terms of a court order: If there was **NO voluntary acknowledgement of paternity**, the parent can still **apply to the children's court for access rights**.

For example, suppose that John denies that he is the father of Mary's child, but then a paternity test shows that he really is the father. He would not automatically have a right to visit the child, but he could apply to the court for a right of access if necessary. The court must decide whether John has a sufficient degree of commitment and responsibility towards the child. Maybe he denied paternity because he was trying to avoid paying maintenance, or maybe he really had genuine doubts about whether he was the father.

◈ Child Care and Protection Act, section 102(4)

Who has rights of access if a child's custodian is someone other than a parent?: In such a case, ***both*** **of the child's parents** would be non-custodian parents. The **mother** would have automatic access rights in terms of the common law, and the **father** would have either an automatic right of access (if he has voluntarily acknowledged paternity) or a right to apply to a children's court for access.

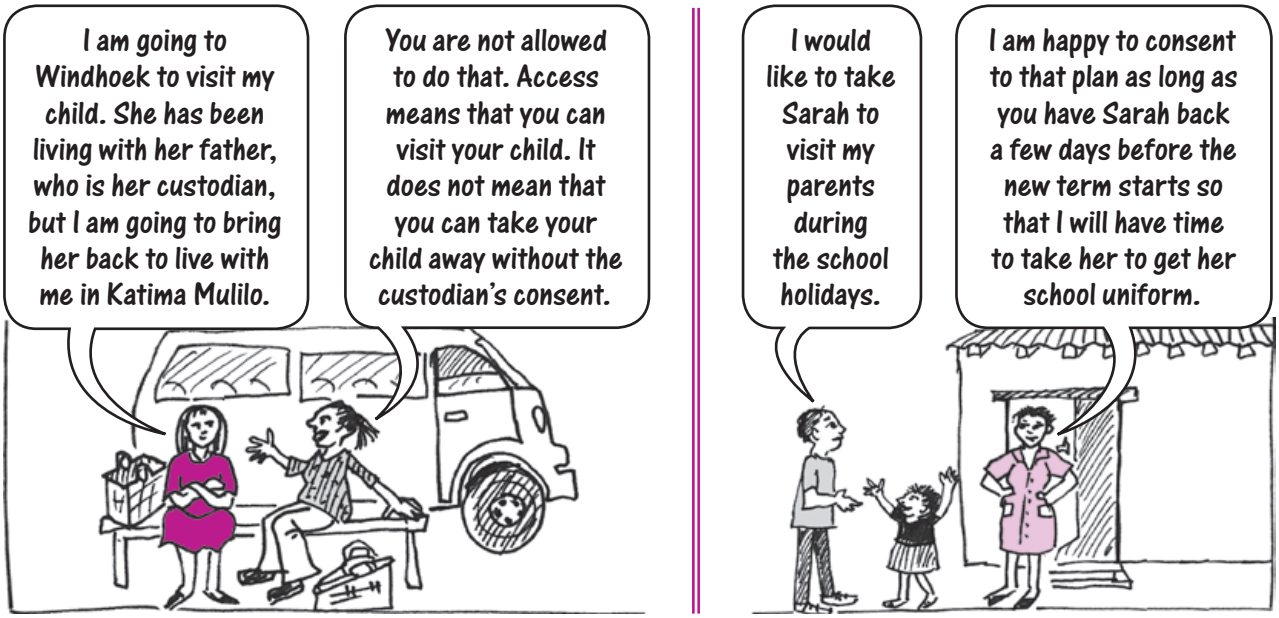
For example, Rebecca has been living with her aunt in the village since she was born. Rebecca's parents, who are both listed on her birth certificate, work in Windhoek. Rebecca's aunt successfully applied to the children's court for custody several years ago. Rebecca's parents both come to visit her whenever they can, and they telephone her between visits to see how she is. Her parents are both exercising their automatic rights of reasonable access.

◈ Child Care and Protection Act, section 102(3)

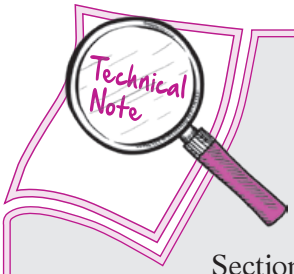
6.2 Rules about access

There are **safeguards** in the law to make sure that the right of access is not abused.

(1) The parent with access has **no right to remove the child** from the usual place of residence **without the custodian's consent**.



(2) The right of access is subject to the **reasonable control of the child's custodian** or the primary caretaker who has been entrusted with the care of the child by the custodian.



Changes of wording in the provisions on access from the Children's Status Act to the Child Care and Protection Act

Section 102(1)-(2) of the Child Care and Protection Act refer to the access rights of unmarried fathers, without mentioning unmarried mothers. This is because unmarried mothers already have automatic parental rights and responsibilities (including access rights) in respect of their children in terms of the common law.

> **102.** (1) Despite anything to the contrary contained in any other law, the biological father of a child born outside marriage who does not have custody has a right of reasonable access to such child, subject to any parenting plan that may have been agreed on in terms of section 119, unless a competent court, on application made to it, directs otherwise, but the right accrues only where the biological father in question has voluntarily acknowledged parentage of the child -
>
> (a) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court at any time before the birth of the child or after the birth of the child but before the child reaches the age of six months;
>
> (b) by voluntarily paying or offering to pay maintenance in respect of the child;
>
> (c) by paying damages in respect of the pregnancy in terms of customary law;
>
> (d) by causing particulars of himself to be entered in the registration of birth of the child in terms of the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963); or
>
> (e) in any other prescribed manner.
>
> (2) The right of access contemplated in subsection (1) does not give the biological father, contemplated in that section, the right to remove the child from the home of the person who has custody or from any other place where the child resides without the consent of the person who has custody.

The corresponding provisions of the Children's Status Act (which has been replaced by the Child Care and Protection Act) were gender-neutral:

> **14.** (1) Despite anything to the contrary contained in any other law, the non-custodian parent of a child born outside marriage has a right of reasonable access to such child unless a competent court, on application made to it, directs otherwise, but the right accrues only where the parent in question has voluntarily acknowledged parentage of the child.
>
> (2) The right of access referred to in this section does not give the non-custodian parent the right to remove the child from the custodian parent's home or from any other place where the child resides without the consent of the custodian parent.

The import of the two approaches is the same. The gender-neutral provisions may have been more clear than the current ones, but they merely re-stated the common law with respect to unmarried mothers. The effect of both approaches is to put unmarried mothers and unmarried fathers on a similar footing with respect to children born outside marriage.

The differences in the common law positions of *married* mothers and fathers in respect of their children have all been equalised by the Married Persons Equality Act.

- Child Care and Protection Act, section 102(1)-(2)
- Children's Status Act 6 of 2006, section 14(1)-(2)
- Married Persons Equality Act 1 of 1996, sections 13-14

6.3 Types of children's court orders on access

There are three situations where a person might apply to a children's court for an order concerning access to a child born outside marriage:

(1) A *parent or other interested person* can ask the court *to restrict or deny access by a non-custodian parent* if this would be in the best interests of the child. The following persons may seek such an order:

- the custodian parent
- a person other than a parent who has custody of the child
- the child
- the child's care-giver
- someone else acting in the child's best interests
- a person authorised in writing by the Minister to act on behalf of the child.

An application for this kind of access order must be made on **Form 9A**.

"**Care-giver**" means any person other than a parent or guardian, who takes primary responsibility for the day-to-day care of a child. This includes –

- a foster parent
- a kinship care-giver
- a primary caretaker, which means a person (whether or not related to the child) who takes primary responsibility for the daily care of the child with the express or implied permission of the child's parent or other legal custodian
- a person who cares for a child while the child is in a place of safety
- the person who heads a facility where a child has been placed by court order
- a child who is the head of a child-headed household.

◈ Child Care and Protection Act, section 1 (definitions of "care-giver" and "primary caretaker")

(2) A *person with a right of access* to a child can request a children's court order *to enforce access* if the custodian of the child is unreasonably denying or restricting access. The following persons may seek such an order:

- a non-custodian parent who has a right of access
- any other person who has a right of access to a child in terms of this Act or any other law, or in terms of a court order issued under this Act.

An application for this kind of access order must be made on **Form 9B**.

(3) An *unmarried father who has not voluntarily acknowledged paternity* can request a children's court order *to establish a right of access*. In this case, the parent who wishes to establish a right of access makes the application, and the other parent (or any other person who has custody of the child) must be made a party to the proceedings.

An application for this kind of access order must be made on **Form 9C**.

◈ Child Care and Protection Act, section 102
◈ Child Care and Protection Act Regulations, regulation 32

6.4 Procedure for deciding questions about access

Application: A person who seeks a court order on access must make an application to the clerk of the children's court on the appropriate form for the type of access order the applicant is seeking, submitted together with **Form 6**. All of these forms are appended to the Child Care and Protection Regulations.

> The children's court must consider the application in the presence of the applicant (or his or her legal practitioner).

Notification: The clerk of the court must notify the following people of the application on **Form 7**, which is appended to the Child Care and Protection Regulations, enclosing a copy of the application:

- the child's **parents**
- the child's **care-giver** (if the child is in the care of someone other than a parent)
- anyone other than a parent who had **custody or guardianship of the child immediately prior to the application**
- **any other person identified by the court or the relevant social worker** as having an interest in the application.

The idea is to make sure that everyone closely involved with the child has a chance to give an input if they wish.

> **Notice must also be given to other parties.** The affected **child** is always a party to the proceedings. Any person with physical control of the child concerned must ensure that the child attends the proceedings of the children's court, unless the clerk of the children's court or the court directs otherwise. Parties may also include the **Minister**, a **staff member of the Ministry** who is authorised by the Minister and the **Children's Advocate**, all of whom have the right to be parties to any case arising under the Act.
>
> The procedure for giving notice is the same as for a custody application. See the box on page 16 of this Chapter.

Social worker report: The court must order a social worker to prepare a report on the child's situation, and set a deadline for the delivery of this report.

> The social worker must remember the channelling procedure required for all court reports. See the box on page 18 of this Chapter.

Other investigations and evidence: The court may also summon any witnesses and order any other investigation which it considers necessary, and it may order the parent or parents or other applicant to pay the costs of the investigation or witness appearances.

Access order: The children's court can make any order pertaining to access that is in the best interests of the child.

> For example, a request to restrict or deny access might be successful if the parent with access is violent to the child or the custodian parent.

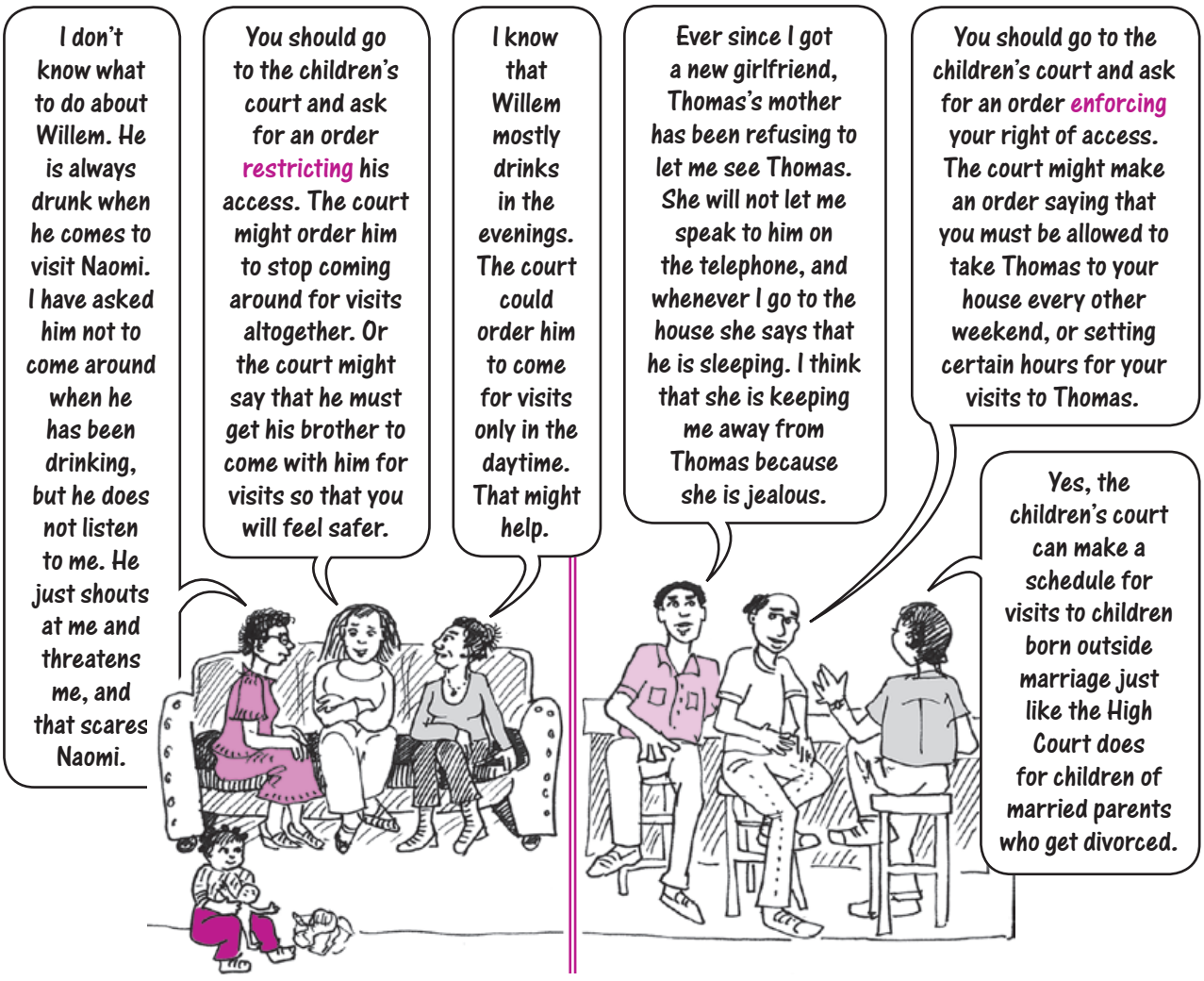
Varying or withdrawing an order on access: The children's court may vary or withdraw an order pertaining to access. A request to change or withdraw an access order works in the same way as an initial application about access.

For example, suppose that the court restricted a mother's access to her child because she and the child's father were getting into physical fights when she came to visit. If the parents went for counselling and stopped fighting, the mother could ask the court to remove the restrictions on access.

Appeals: Any party involved in an access matter may appeal to the High Court against an order made by the children's court, or against the refusal to make an order. It is also possible to appeal to the High Court in respect of a decision concerning variation, suspension or rescission of any children's court order.

The children's court order which is being appealed may be suspended pending the outcome of the appeal if this would be in the child's best interests. The court can also make some other appropriate order in the child's best interests pending the appeal. There is more information about appeals in Chapter 6 of this *Guide*.

- Child Care and Protection Act, sections 46, 102 and 116
- Child Care and Protection Act Regulations, regulation 32



6.5 Emergency procedure for restricting or denying access

It is possible to get a **temporary order restricting or denying access to a child** by a non-custodian parent IF the applicant proves that there is a **risk of immediate harm to the child** from continued access.

Anyone who can apply for an order restricting or denying access can also use this emergency procedure.

> An applicant who wants to request an immediate temporary order must complete **Part B of Form 9A**, in addition to Part A of Form 9A, asking the children's court to grant the temporary order before going through the normal procedure for an order restricting or denying access.

This temporary order can be made without hearing the other parent's side of the story. It can be made right away, without notice to any of the persons who must normally be notified. But the court will make a temporary order restricting or denying access only if it is convinced that this is necessary for the child's safety and protection.

The clerk will give notice of the temporary order to the parent with access right away. The temporary order will have immediate effect, as soon as it is served. It will remain in force until the normal procedure for a court order restricting or denying access has run its course.

- Child Care and Protection Act, section 102(9)
- Child Care and Protection Act Regulations, regulation 33

6.6 Access to a child by persons other than parents

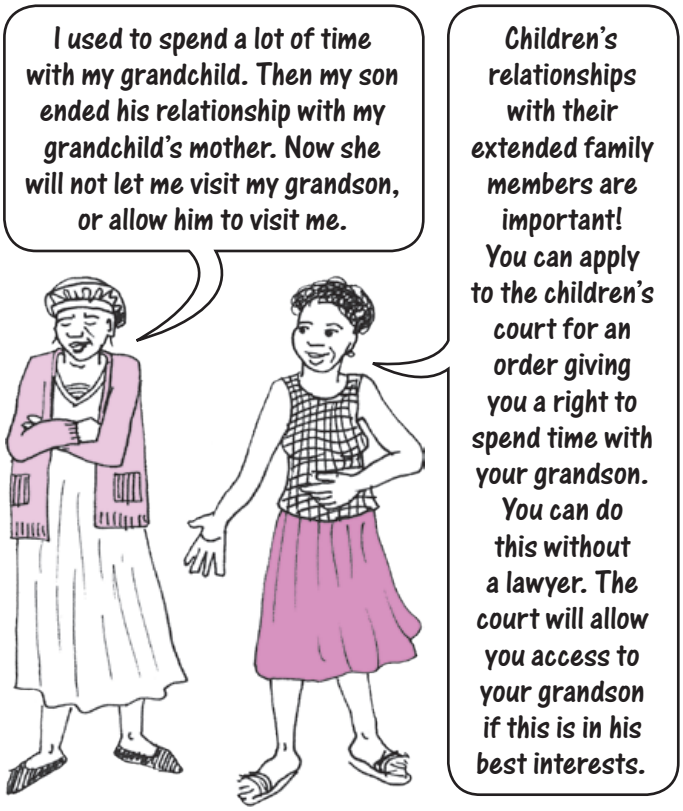
Any family member of a child may apply to a children's court for an order granting them rights of access to a child born outside marriage. The procedure is the same as for other applications concerning access, including the requirement of notice to both parents and other persons closely involved with the child and a social worker report on the issue. The court order can include any conditions necessary in the best interests of the child concerned.

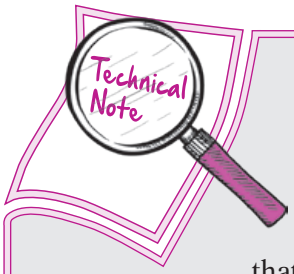
- Child Care and Protection Act, section 103

Who (other than a parent) is a "family member" of a child"?

- any other person who has **parental responsibilities and rights** in respect of the child
- a **grandparent**, **step-parent**, **brother**, **sister**, **uncle**, **aunt** or **cousin** of the child
- **any other person with whom the child has developed a significant relationship**, based on psychological or emotional attachment, which resembles a family relationship

◈ Child Care and Protection Act, section 1 (definition of "family member")





What if the High Court has already made an order about custody, guardianship or access?

The High Court is the "upper guardian" of all children. This means that the High Court always has the power to make decisions about children, even if other courts also have some decision-making power over children's issues. Procedures in the High Court are more formal than in a children's court, which means that people usually need help from a lawyer for a High Court case. The children's court is designed to be more accessible, especially for people without lawyers.

There may be a situation where the High Court has already made an order about custody, guardianship or access of a child born outside marriage. Normally, a children's court would not have the power to change a High Court order, because the High Court is more "senior" in Namibia's court system. But **the Child Care and Protection Act gives children's courts the power to vary a High Court order** on custody, guardianship or access – **IF the circumstances affecting the child have changed** since the order was made. The children's court can also take **action to ensure compliance with a High Court order** on custody, guardianship or access.

If the children's court changes a High Court order, a judge of the High Court must **review** this decision in chambers. This procedure helps to ensure that children's court processes are not being abused as low-cost "appeals" of High Court decisions. *The procedure for this automatic review is described in section 13.2 of this chapter.*

◈ Child Care and Protection Act, section 98(1)
◈ Child Care and Protection Regulations, regulation 27

Jason's father is very high up in one of the ministries. He has lots of money. He went to the High Court a few years ago and got custody of Jason. I did not really fight it because I had no money for a lawyer. I thought that Jason's father would provide a good home for Jason. But now he is married with other children, and I believe that he is neglecting Jason.

It sounds like circumstances have changed since that court order was made! You could go to the children's court and apply to change the High Court order on custody. You would not need a lawyer to do this. The children's court is set up to be accessible to people without lawyers. The clerk of the court will help you with the papers.

7. Inheritance

Without a will: Children born outside marriage can inherit from their father's estate even if there is no will. This rule also applies to children who have already grown into adults before their fathers die.

In the past, the law said that children born outside marriage could inherit from their mothers with or without a will. But a child born outside marriage could *not* inherit from the father's estate if the father did not leave a will naming the child as an heir. This was because it was impossible to identify the fathers of children born outside marriage with certainty in the days before scientific tests.

With a will: General words in a will like "children" or "issue" automatically include children born outside marriage, unless the will was clearly written with an intention to exclude them.

In the past, if the father of a child born outside marriage left a will which mentioned his "children" or some other general term, this wording would *not* cover children born outside marriage. They were covered only if the will included their names or some other very specific reference to them.

Freedom of testation

Article 16(1) of the Namibian Constitution protects the rights of persons to bequeath their property as they wish. The rule on wills affects only the *interpretation* of the words used in a will. People who make wills have the right to leave their property to anyone they choose, or to leave out anyone they choose. They can leave out all of their children, or one child whom they do not like, or children born to a particular woman or children born outside marriage. But if the will makes a general reference to "children", this will be understood to include children born both inside and outside marriage.

"My property should be equally divided between all my children ..."

This would cover children born inside and outside marriage.

"My property should be divided equally between the two children born to me and my wife ..."

This would not cover children born outside marriage to the deceased and another woman.

Customary law: Children born outside marriage must be treated the same as children born inside marriage for the purposes of inheritance under customary law.

> **In the past**, the customary laws of some communities had different rules on inheritance for children born inside marriage and children born outside marriage.

Retroactive effect: These rules on inheritance apply to all persons irrespective of whether they were born before the law came into force, and irrespective of whether the matter arose before or after the law came into force.

◈ Child Care and Protection Act, sections 92 and 105

Different inheritance rules for children born outside marriage are unconstitutional

***Frans v Paschke & Others* 2007 (2) NR 520 (HC):** In 2007, a High Court case considered the common-law rule which said that children born outside marriage could not inherit from their fathers in the absence of a will. The Court found that this rule was an unconstitutional form of discrimination on the basis of social status, and was thus invalid from the date of Independence (21 March 1990) when the Namibian Constitution came into force.

8. Maintenance

Children born inside and outside marriage must be treated the same when it comes to maintenance. All children have a right to be maintained by both of their parents, and this duty extends to the immediate family members of both parents if necessary.

All children have a corresponding duty of support to both of their parents, and this reciprocal duty also extends to the immediate family members of both parents – if these family members need assistance and the child is in a position to provide it.

All children have a right to claim maintenance from the estate of a deceased person who had a duty to support them.

8.1 The reciprocal duty of maintenance

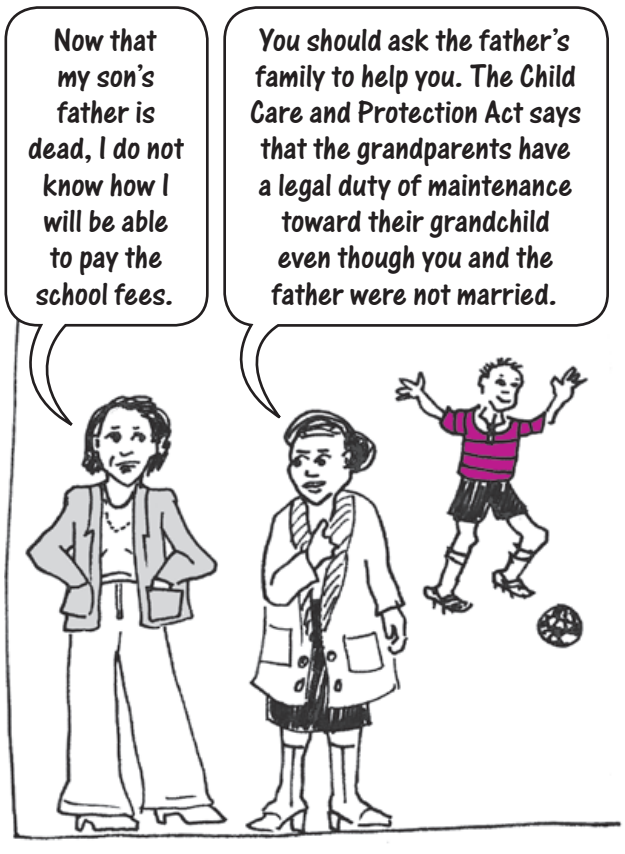
The Child Care and Protection Act has removed all remaining differences between the rules on maintenance for children born inside and outside marriage. This means that all children now have (1) a right to be maintained by their mothers and fathers, and both their parents' immediate family members and (2) a corresponding duty of support to their mothers and fathers, and both their parents' immediate family members.

The duty of the parents: The Maintenance Act 9 of 2003 states that both parents have a legal duty to contribute to the cost of maintaining their child, regardless of whether the child was born inside or outside marriage. The Maintenance Act also makes it clear that all children

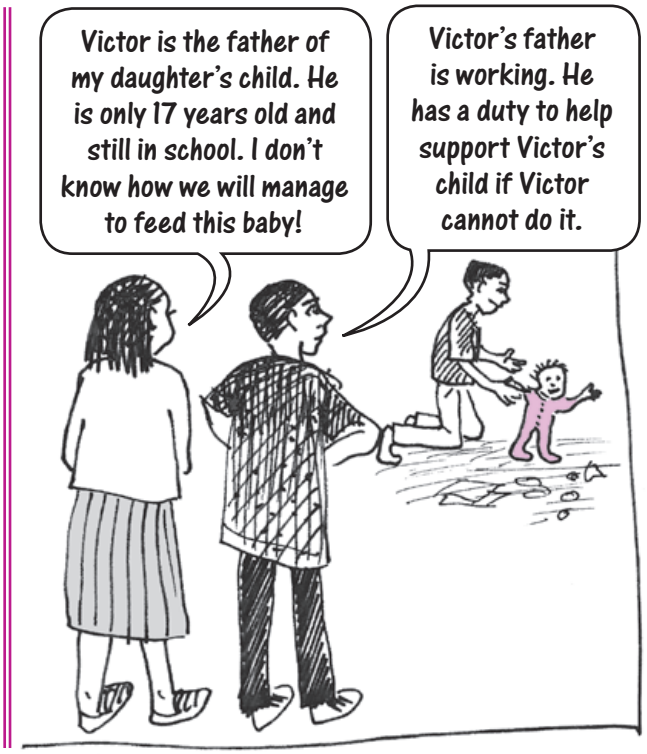
must be treated equally, regardless of the order or circumstances of their birth. The only thing that matters is the child's needs. For example, if the school fees are higher for an older child, the maintenance for that child could be higher to cover this. But the Maintenance Act failed to correct a few aspects of the common law which treated children born outside marriage differently from children born inside marriage for purposes of maintenance.

The duty of other close relatives: The Maintenance Act clearly gives the father of a child born outside marriage a legal duty to contribute to the cost of maintaining the child. But under the common law, this duty was not transferable to the father's relatives as it would be if the child had been born inside marriage. The mother's legal duty of maintenance was transferable to her relatives under the common law, regardless of whether the child was born inside or outside marriage. (This is because there was seldom any doubt about the mother's identity even before scientific tests were possible, while the father's identity was impossible to prove in the past.) The Child Care and Protection Act says that the legal duty of maintenance works the same for children born inside or outside marriage. This means that the father's parents or other relatives would now have a legal duty to contribute to the child's maintenance if the father could not support the child, just like the mother's relatives.

The child's reciprocal duty to maintain parents and other relatives: The duty placed on the father's relatives to help maintain a child born outside marriage also gives an advantage to the father's relatives, because the legal duty of support is reciprocal. This means that maintenance is a two-way street – the child who has a right to be maintained also has a duty to maintain the parents and other members of the parents' immediate family, if they need assistance and the child is in a position to provide it. This usually happens after the child has become an adult and the parents and other family members have grown old.



- Child Care and Protection Act, section 106(1)
- Maintenance Act 9 of 2003, section 3(1) and 4(1)

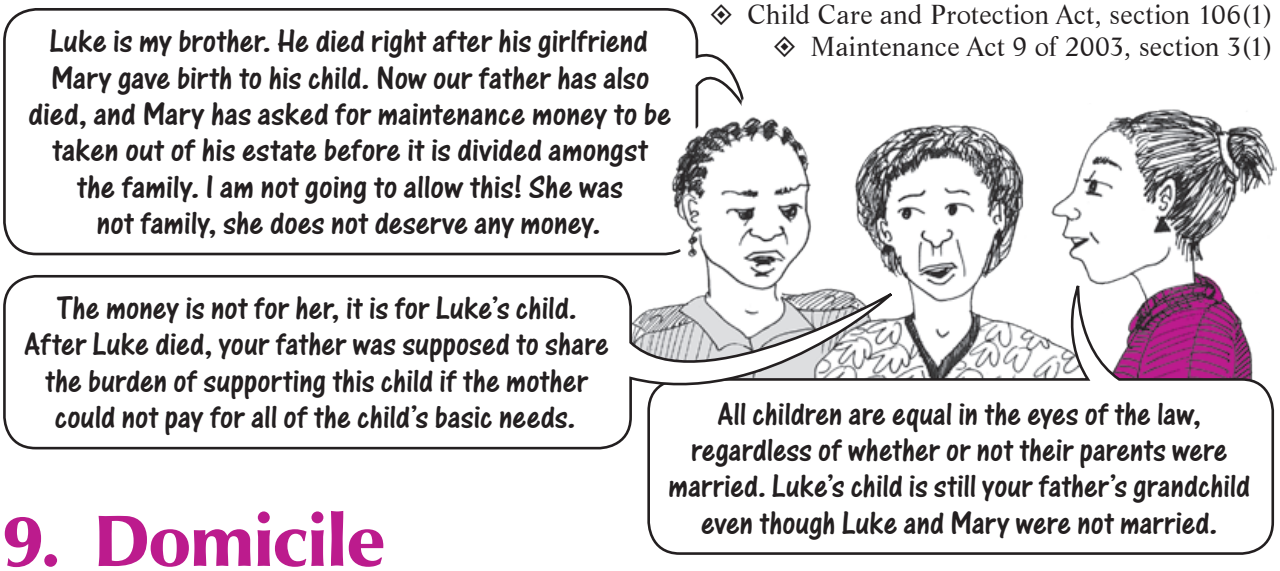


8.2 Claiming maintenance from the estate of a deceased person

Children born outside marriage (or someone acting on their behalf) can apply for maintenance from the estate of a deceased parent. This is possible no matter whether or not there was a will, and no matter whom a will names as the heirs of the deceased.

Now that there is no difference in the rules for children born inside or outside marriage, any child can claim maintenance from the estate of a deceased parent – and if there is no parent who can provide for the child, the child can also claim against the estate of a deceased grandparent or another immediate family member who had a duty of support.

- Child Care and Protection Act, section 106(1)
- Maintenance Act 9 of 2003, section 3(1)

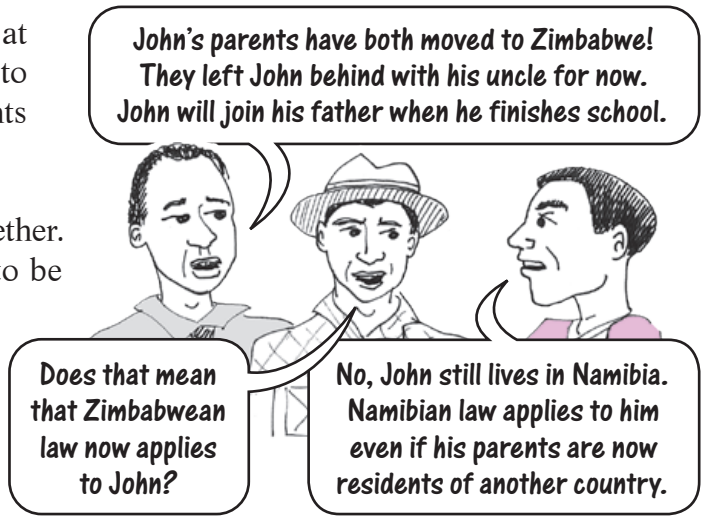


9. Domicile

Domicile is a legal concept. Courts look at domicile to decide which country's laws to apply in cases involving citizens or residents of different countries.

Parents and children do not always live together. So it is best for the domicile of a child to be considered separately from the domicile of the child's parents.

Under the common law, children had the domicile of their parents. The Married Persons Equality Act provided for children born to married parents to have an independent domicile. The Child Care and Protection Act does the same for children born outside marriage. In both cases, **the domicile of a child is the place the child is most closely connected to.**



Under the old common law, John's legal domicile would be Zimbabwe even though he has never set foot there. But in terms of the Act, John's domicile is Namibia, and Namibian law will still apply to him.

- Child Care and Protection Act, section 107

CHILDREN OF MARRIED PARENTS	CHILDREN OF UNMARRIED PARENTS
◎ The Married Persons Equality Act says that the domicile of a child of married parents will be the place the child is most closely connected to. ◎ If the child is living with both parents, or with one parent, a court will assume that this place is the child's domicile — unless it is proved that the child actually has a different domicile. ◈ Married Persons Equality Act 1 of 1996, section 13	◎ The Child Care and Protection Act says that the domicile of a child of unmarried parents will be the place the child is most closely connected to. ◎ Where the child's parents live is not relevant. ◈ Child Care and Protection Act 3 of 2015, section 107

10. When parents marry after the birth of their child

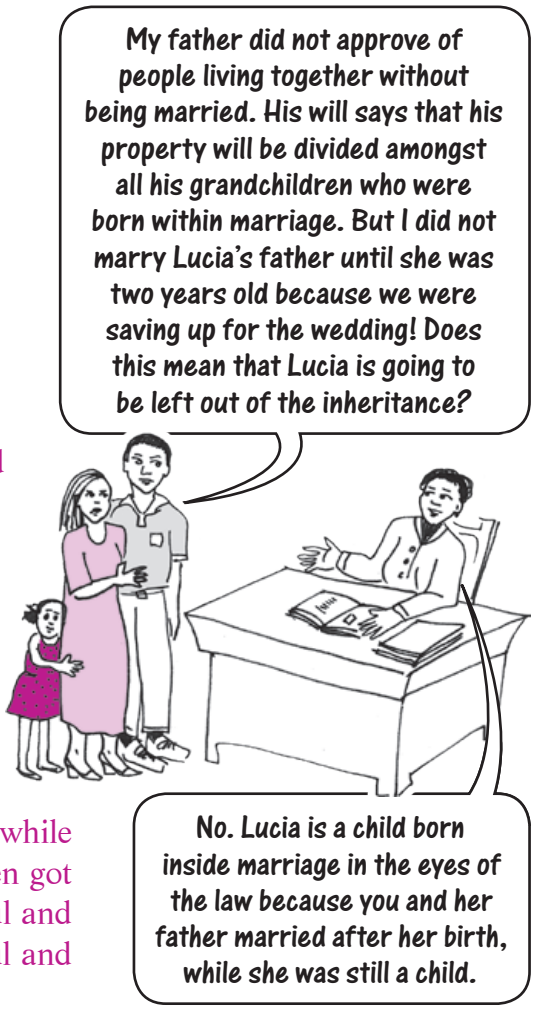
If the parents of a child are not married when the child is born but marry each other at some point after the birth of the child, the child will be treated as though the parents were married all along.

This means that a child born to a couple before they get married is in the eyes of the law exactly the same as a child who is born to the couple after they get married.

This rule applies even if the parents of the child could not have married each other at the time when the child was born.

This rule also seems to apply even if the subsequent marriage takes place after the child in question has already reached the age of majority. (Note the use of the phrase "at any time" in the Child Care and Protection Act, and the reference to "person" rather than "child" in the Births, Marriages and Deaths Registration Act.)

◈ Child Care and Protection Act, section 108
◈ Births, Marriages and Deaths Registration Act 81 of 1963(which is expected to be replaced with a new law in 2020)



EXAMPLE: Paul and Marsha had a baby together while Paul was still married to Ellen. Then Paul and Ellen got divorced when the baby was one year old, and Paul and Marsha married each other. The law will treat Paul and Marsha's baby as a child born inside marriage.

11. Special rules for children born as a result of rape

There are certain special rules that apply to situations where a child is conceived through rape. They apply to both male and female rapists who have been convicted of their crime.

> Although it is very rare for a female rapist to become pregnant from a rape, it is not impossible. For example, if a female teacher has sex with a 13-year-old learner, she would be charged with rape even if the boy agreed to have sex, because of the age gap between them. If she became pregnant from this rape, the rules would apply to her.

These rules apply only in cases where the rapist has been charged and convicted of the crime of rape. They do NOT apply if the rapist paid a penalty under customary law for the rape but was not convicted of the crime of rape.

◈ Child Care and Protection Act, section 1 (definition of "rape")

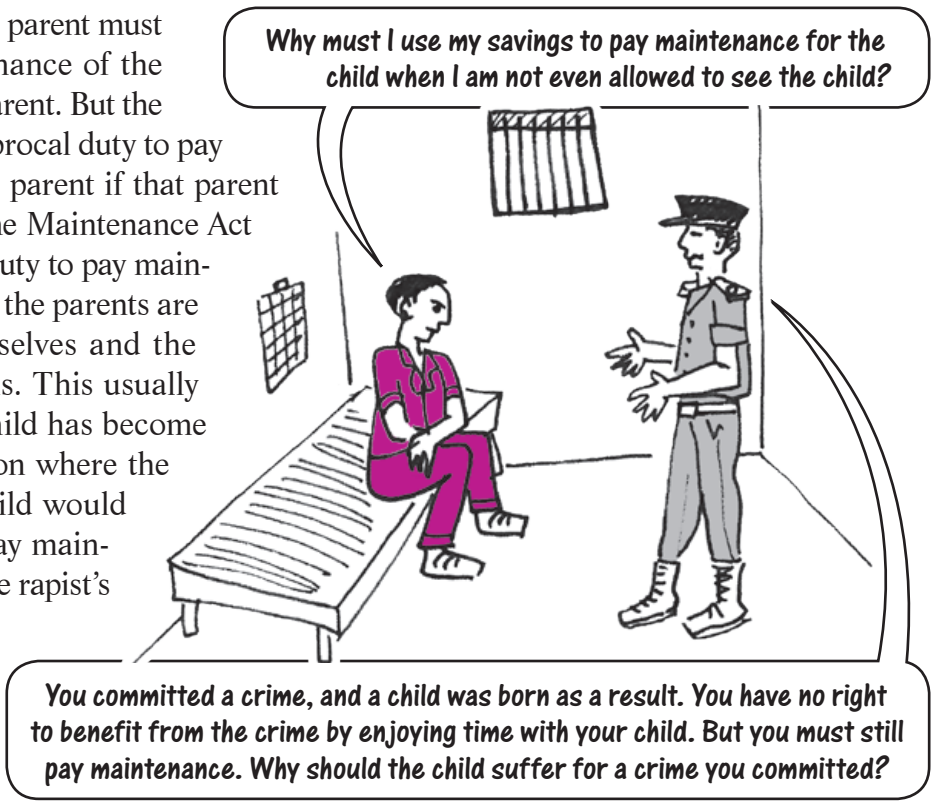
Custody, guardianship and access: A convicted rapist does not have any automatic rights to custody, guardianship or access. But the rapist could apply to the court for an order granting any of these rights if this was somehow in the child's best interests.

> This could possibly occur in a situation where the rape took place within marriage, and the child born of the rape developed a relationship with the rapist.

◈ Child Care and Protection Act, section 104

Maintenance: The rapist parent must contribute to the maintenance of the child, just like any other parent. But the child does not have a reciprocal duty to pay maintenance to the rapist parent if that parent should ever need help. The Maintenance Act says that children have a duty to pay maintenance to their parents if the parents are unable to care for themselves and the child has sufficient means. This usually happens only after the child has become an adult. But in a situation where the parent is a rapist, the child would not ever have a duty to pay maintenance to the rapist or the rapist's relatives.

◈ Child Care and Protection Act, section 106(2)



Inheritance: A child can inherit from a rapist parent even if there is no will, in the same way as any other child born outside marriage. But the rapist parent cannot inherit from the child unless there is a will naming that parent as an heir.

> For example, suppose that the child of a rapist becomes a very successful businessman but is killed in a car crash before he has had time to make a will. He does not have any family except for his parents. His rapist father cannot inherit any of the property. Instead, all of the property would go to the mother.

◈ Child Care and Protection Act, section 105(4)

Consent to adoption: If the children's court finds that a child was conceived through rape by the child's biological father, the father's consent is not required to give the child up for adoption.

> No conviction for rape is required, as the child conceived in the rape might be given up for adoption before the criminal trial has taken place. The finding by a children's court that a rape took place for purposes of consent to adoption is not relevant to the criminal trial for that rape.

◈ Child Care and Protection Act, section 172(13)(b)

Other references to "parent": The Act defines the term "parent" to exclude a convicted male rapist who fathered a child as a result of the rape. This means, for example, that he would not be entitled to the notice of various children's court proceedings which must go to a "parent".

> In the rare case where the child was conceived through a rape where the mother was the rapist, this rule does not apply. The child would be with the mother at birth and probably during breastfeeding, or might accompany the mother for even longer while she was in prison.

◈ Child Care and Protection Act, section 1 (definition of "parent")

12. Special rules for children born as a result of incest

There are certain special rules that apply to situations where a child is conceived through incest. Incest is not defined for this purpose, but the rules would probably apply only in cases where there was a criminal conviction for incest.

Custody, guardianship and access: Where a child was conceived through incest, neither parent is barred from rights to custody, guardianship or access. This is because it is possible that *both* parents could be convicted of the incest which resulted in the child's conception, and it would probably not be in the child's best interests to be deprived of the care of both parents.

◈ Child Care and Protection Act, section 104 (covers only rape, without mentioning incest)

Maintenance: A parent of a child conceived through incest must contribute to the maintenance of the child, just like any other parent. But the child does not have a reciprocal duty to pay maintenance to the incestuous parent, if that parent should ever need help.

◈ Child Care and Protection Act, section 106(2)

Inheritance: A child can inherit from a parent who conceived the child through incest if there is no will, in the same way as any other child born outside marriage. But this parent cannot inherit from the child unless there is a will naming that parent as an heir.

◈ Child Care and Protection Act, section 105(4)

Other references to "parent": The Act defines the term "parent" to exclude the father of a child conceived through incest. This means, for example, that he would not be entitled to the notice of various children's court proceedings which must go to a "parent".

> As in the case of rape, where a child was conceived through incest, even if the mother was found guilty, the child would be with the mother at birth and probably during breastfeeding, or might accompany the mother for even longer while she was in prison. Thus, the mother is not excluded from the definition of "parent".

◈ Child Care and Protection Act, section 1 (definition of "parent")

PART 2 | CHILDREN OF DIVORCED OR SEPARATED PARENTS

13. Applying children's court procedures to children of divorced or separated parents

13.1 Powers of children's court

Custody, guardianship and access: As of 2019, divorce from a civil marriage requires a divorce order from the High Court. The High Court will consider the best interests of the children while it is deciding on the divorce. The divorce order will usually state –

- who will have custody of the child
- who will be the child's guardian
- how access by the parent without custody will work
- whether the parent without custody must pay maintenance for the child.

In the past, if divorced parents wanted to make any changes to the provisions in the divorce order on custody, guardianship or access, they would have to go back to the High Court.

Now, in terms of the Child Care and Protection Act, divorced parents who want to make changes to the provisions in their divorce order on custody, guardianship or access *because of changed circumstances* can go to the children's court and use the same procedures that are available to parents who were never married.

A divorced parent can also use the children's court procedures to deal with a situation where there is a need to restrict or deny access to protect the child, or where access rights contained in a divorce order are being unreasonably denied.

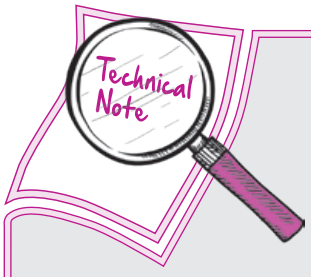
Family members of a divorced parent can also use the children's court procedures to apply for access rights to a child.

These procedures give families who have experienced divorce more low-cost and accessible avenues for dealing with changed circumstances or with certain disputes which arise after the divorce.

The provisions in the Child Care and Protection Act which are available to divorced parents are also available to married parents who are separated but have not commenced divorce proceedings.

> Once a divorce proceeding has been initiated, there are procedures for interim measures in terms of Rule 90 of the Rules of the High Court. This rule provides for interim orders on maintenance, custody, access and domestic violence amongst other things. It would not be appropriate for the children's court to act in a case where the High Court was already considering the same matter.

- Child Care and Protection Act, sections 97, 98(1)
- Rules of the High Court, Rule 90



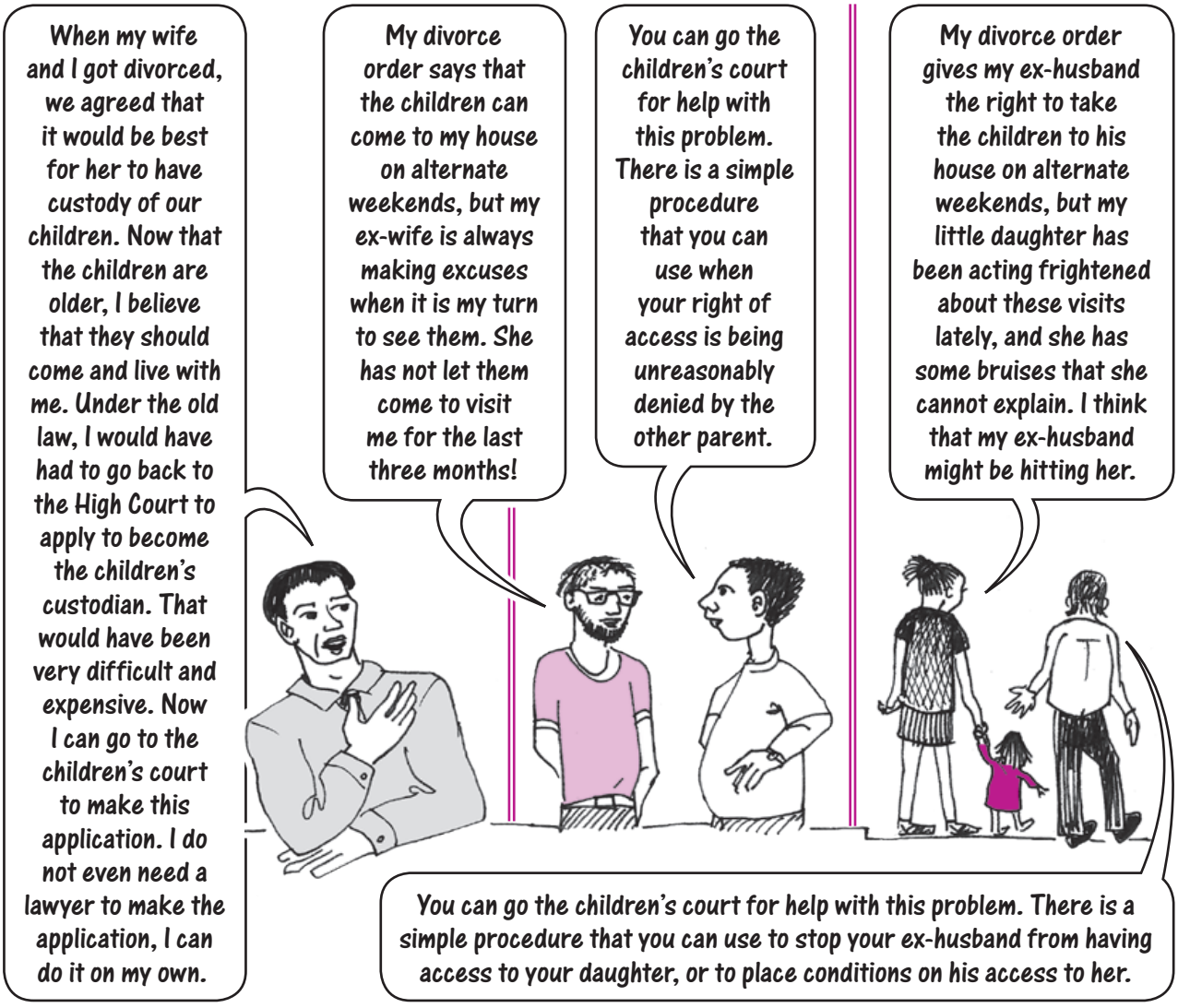
Children's court procedures which are NOT available to divorced or separated parents

Emergency temporary orders restricting or denying access: Note that temporary emergency orders from the children's court restricting or denying access are not available to divorced or separated parents. Section 97 of the Act applies subsections 102(5) to (8) to divorced or estranged parents. However, emergency orders are covered by section 102(9). Divorced or estranged parents could still make use of other mechanisms to protect children in such a situation – including

- protection orders
- removal of the child from the care of the parent suspected of being abusive by means of the procedures on children in need of protective services
- an urgent interdict in the High Court.

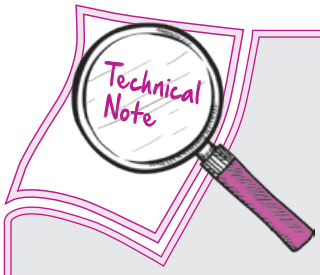
Overruling a parental consent requirement for removing a child from Namibia: A parent of a child born outside marriage can apply to a children's court to dispense with the parental consent requirement for removing a child from Namibia where this would be in the child's best interests. But this option is not available to divorced or separated parents. Section 97 of the Act applies subsections 101(3) to (7) to divorced or estranged parents. However, the power to dispense with parental consent for removal is covered by section 101(9)(c). Divorced or estranged parents would have to approach the High Court for such a decision.

- Child Care and Protection Act, section 97 and Chapter 10 (child protection proceedings)
- Combating of Domestic Violence Act 4 of 2003



Maintenance: The possibility of dealing with aspects of a divorce order in a lower court was already provided for in terms of the Maintenance Act 9 of 2003. This law allows maintenance courts to deal with substitutions and enforcement of maintenance orders which are embodied in divorce orders issued by the High Court.

- Maintenance Act 9 of 2003, sections 1 (definitions) and 17



Powers of magistrate' court to vary maintenance in a divorce order

Section 17 of the Maintenance Act gives a maintenance court (which is a magistrate's court) the power to substitute, discharge or suspend a maintenance order that is already in force. Section 1 defines a "maintenance order" to include a maintenance order made by a maintenance court under any other law…". It defines "maintenance court" to include "any other court which is authorised by law to grant maintenance orders" – which would include the High Court acting in divorce proceedings or in any other context where maintenance was at issue. This cumbersome approach has caused some confusion in practice, and clarifying amendments were under consideration as of late 2019.

13.2 Automatic review by High Court

If the children's court changes a divorce order made by the High Court, a judge of the High Court must review this decision in chambers – even if none of the parties to the case have requested a review.

The clerk of the children's court must submit the case record and relevant documents to the Registrar of the High Court within 21 days of the children's court decision, and the Registrar must give them to a High Court judge as soon as possible. To avoid lengthy delays, the children's court order becomes final if the review has not taken place within 30 calendar days from the date when the papers are given to a judge.

Judicial review in chambers means that a judge of the High Court must look at the record of the relevant proceeding in the children's court to be sure that the children's court followed the correct procedure and made a reasonable decision. The High Court does not hold a hearing for this purpose. A High Court judge will examine the papers from the children's court in his or her private office to make sure that the children's court followed the correct procedure and made a decision that was reasonable in light of the information before the court.

The children's court order which is being reviewed may be suspended pending the outcome of the review if this would be in the child's best interests. The children's court can also make some other appropriate order in the child's best interests pending the outcome of the review.

The automatic review is intended to ensure that children's court processes are not being abused to substitute for appeals of High Court decisions.

- Child Care and Protection Act, sections 98(2)-(4) and 116
- Child Care and Protection Regulations, regulation 27

No High Court review is required in terms of the Maintenance Act where a maintenance court has substituted provisions on maintenance in a High Court divorce order. Custody, guardianship and access are arguably even more serious matters than maintenance, and they are often highly-controversial aspects of divorce.

- Maintenance Act 9 of 2001, section 1 (definition of "maintenance order")

> ❝ I am mindful that in terms of s 5(1) of the Children's Status Act 6 of 2006 [now replaced by corresponding provisions of the Child Care and Protection Act 3 of 2015], a parent against whom an adverse custody order has been made by the High Court may at any stage approach the children's court for a variation of the order if circumstances have changed. The defendant would be able to have recourse to the children's court when her personal circumstances change and should she feel that the minor children would be better off being in her physical care. ❞
>
> ◈ *NS v PS* 2010 (2) NR 418 (HC), paragraph 31 (footnote omitted)

PART 3 | CHILDREN OF VOID AND VOIDABLE MARRIAGES

14. Protecting children of void and voidable marriages

14.1 Void marriages

A void marriage is a marriage that never existed because the requirements for a valid marriage were not met. The circumstances listed below can make a civil marriage void.

- **The formalities for the marriage were not followed** – for example, the person who conducted the marriage was not a real marriage officer, or there were no witnesses to the marriage.
- **The parties are the same sex**, instead of being one man and one woman.
- One or both parties are **already married to someone else** in a civil marriage.
- One or both parties are **under age 18**.
- One or both parties were **mistaken about the nature of the marriage ceremony or the identity of the other party** – such as in a case where a marriage took place while one party was so drunk that he or she did not understand what was happening.
- One or both parties are **insane**.
- The parties are so **closely related** that marriage between them is forbidden.

A marriage that is void is automatically invalid. There is no need for a court ruling to dissolve the marriage, because the marriage never really existed in the first place. This is true even if the problem which makes the marriage void was discovered only after one of the parties to the marriage has died.

> Either spouse, or anyone else with an interest in the marriage, can ask the High Court to make an order *confirming* that the marriage is void. The court order merely places on record the fact that the marriage never existed. This can give certainty and prevent any doubt or confusion.

If one or both of the parties entered into the marriage in good faith, the court has the power to adjust the affairs between them to prevent hardship or unfairness. But the court does not have the power to say that a void marriage is a valid marriage. This situation is sometimes called a "putative marriage".

For example, suppose that two people get married because they both believe that the husband's first wife is dead. Some time after the second marriage ceremony has taken place, everyone is surprised to discover that the first wife is actually still alive. The court could not declare the second marriage to be a valid one, but it could say that some of the consequences of a valid marriage will apply to the situation to prevent unfairness to the parties and to any children involved.

14.2 Voidable marriages

A voidable marriage is a marriage which can be annulled (cancelled) by the High Court on the basis of some fraud or mistake. The circumstances listed below can make a civil marriage voidable.

- **One (or both) parties is under age 21 and did not have the required consent of the parent or guardian for the marriage.** In this case, the court will annul the marriage only if the annulment would be in the best interests of the minor or minors.
- **One (or both) parties gave consent to the marriage only under duress** – which means only in response to threats or pressure.
- **Either spouse was *at the time of the marriage* permanently unable to have sexual intercourse for some physical reason** (such as impotence or the results of some injury) **and the other spouse did not know this**. This is not the same as a refusal to have sexual intercourse. Refusing to have sex on an ongoing basis is grounds for divorce, but not for annulment. Becoming physically unable to have sexual intercourse *after* the marriage takes place is not a basis for annulment.
- **The wife was pregnant by another man *at the time of the marriage* and the husband did not know this.** It does not matter if the wife concealed the pregnancy or not. The husband can ask for an annulment in this case even if the wife was also unaware of the pregnancy at the time of the marriage. It is not a basis for annulment if one spouse finds out after the marriage that the other spouse hid the fact that he or she had *sexual relations* with other people before the marriage took place. Only the wife's *pregnancy* by another man *before* the marriage will be sufficient grounds for annulment. If the wife becomes pregnant by another man only *after* the marriage has already taken place, this is grounds for divorce, but not annulment.
- **Either spouse knew *at the time of the marriage* that he or she was physically unable to procreate** (in other words, the man knew he was sterile or the woman knew she was barren) **and the other spouse did not know this.** Case law disagrees on whether this is really a basis for annulment. Some cases have said that an annulment is possible only if the sterile or barren spouse in question intentionally concealed this fact in order to deceive the other spouse.

A voidable marriage becomes invalid only if it is annulled (cancelled) by a court at the request of the wronged spouse. If both spouses want the marriage to remain in place, then it can continue to be a marriage.

If the spouses continue to live together for a substantial period of time after the relevant factors come to light, the court might say that this means that they have accepted the situation. In this case, the court might refuse to declare the marriage void.

The request to annul the marriage must be made while both spouses are still alive. The annulment is a process for "undoing" the marriage as if it never happened in the first place.

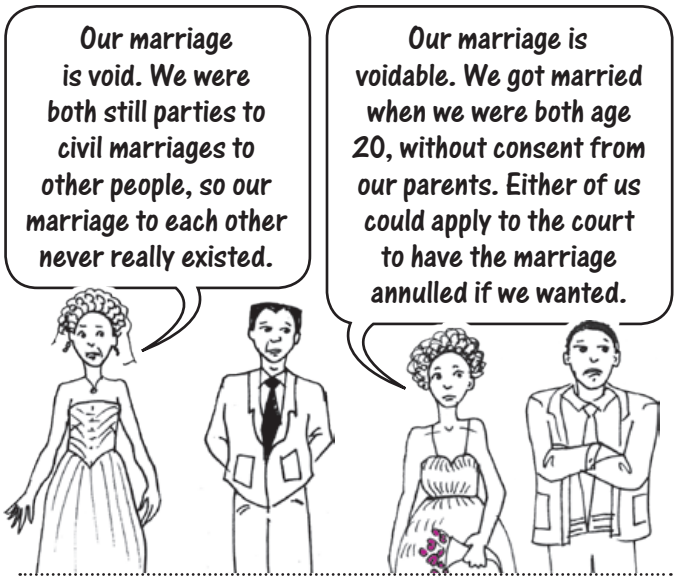
14.3 The effect of the Child Care and Protection Act

A child who is born to parents in a **void marriage** is in the same position as a child born outside marriage, because there never really was a marriage. The Act says that where a child is born into a void marriage, a court must enquire into the best interests of the child and make provision for safeguarding that child's interests. The steps which are necessary will depend on the circumstances of the particular case.

The Act says that the status of a child born to parents in a **voidable marriage** will not be affected by the annulment of the marriage. In other words, the child will not become a child "born outside marriage" even after the annulment. A court which annuls a voidable marriage must consider the best interests of the child in the same way as it would if the parents were getting a divorce.

In either of these situations, the court might need to make a maintenance order or an order for custody, guardianship or access in respect of a child in order to protect the child's best interests. All of the provisions in the Child Care and Protection Act on custody, guardianship or access and the provisions in the Maintenance Act on maintenance can be utilised in respect of children of void or voidable marriages.

◈ Child Care and Protection Act, sections 109-110



In both situations, the law says that the best interests of any children born to these couples must be protected.

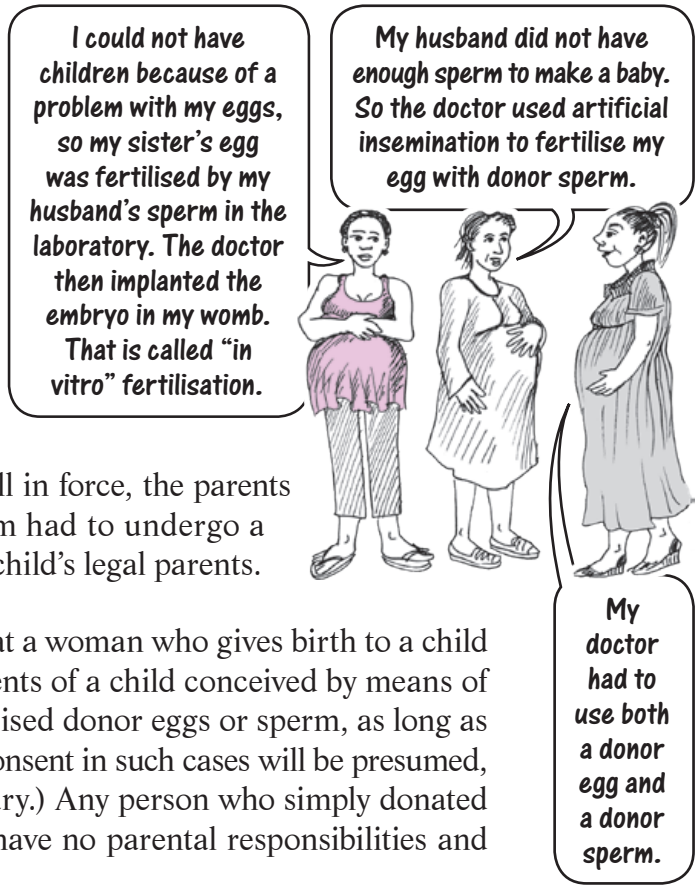
PART 4 | CHILDREN BORN OF ASSISTED REPRODUCTIVE TECHNIQUES

15. Protecting children born of assisted reproductive techniques

A baby grows from an embryo which results from the union of a woman's ovum ("egg") and a man's sperm. If a couple cannot conceive children, there are medical techniques that can be used to assist. Some of these techniques use donor eggs or donor sperm.

The law uses the word "gamete" to refer to both eggs (female gametes) and sperm (male gametes).

The common law rules which previously applied in Namibia came from a time when such medical procedures were not possible. So under the common law, the persons who supplied the egg and the sperm were the child's biological parents. This is clearly not the intended result of modern assisted reproductive techniques. While the common law was still in force, the parents who were assisted by donor eggs or sperm had to undergo a formal adoption procedure to become the child's legal parents.



The Child Care and Protection Act says that a woman who gives birth to a child and her husband will be the biological parents of a child conceived by means of assisted reproductive techniques which utilised donor eggs or sperm, as long as they both gave consent to the procedure. (Consent in such cases will be presumed, unless there is some evidence to the contrary.) Any person who simply donated an egg or a sperm for the procedure will have no parental responsibilities and rights in respect of the child.

◈ Child Care and Protection Act, section 111

Situations NOT covered by the rules in the Act

- **What happens if one of the spouses did not consent to the procedure?** In this case, the common law would apply. The parents would be the persons who supplied the egg and sperm. If their identity is not known, then the child might have only one legal parent, or no legal parents.
- **What happens if an unmarried woman has a child by one of these techniques?** In this case, the common law would apply. The parents of the child are the egg and sperm donors. If the woman's egg was fertilised by sperm from an anonymous donor, then the child will have no legal father.

In some situations, it might be possible to use adoption procedures to adjust the child's legal parentage.

Donor Anonymity

The Child Care and Protection Act does not address the issue of access to information about the identity or medical history of a child's genetic parents in cases of assisted reproduction.

Some believe that the Convention on the Rights of the Child – in Articles 7(1) on children's right to know their parents and Article 8(1) on children's right to preserve their identity, including nationality, name and family relations – encompasses a right to information on donor-assisted reproduction, possibly subject to the child's evolving capacities and level of maturity. The Committee on the Rights of the Child has recommended in its concluding observations in several countries that States Parties should, in the regulation of assisted reproduction technologies,

ensure respect for the rights of children to have access to information about their origins, subject to their best interests.

◈ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 3rd edition, 2007, page 108

◈ Donna Lyons, "Domestic Implementation of the Donor-Conceived Child's Right to Identity in Light of the Requirements of the UN Convention on the Rights of the Child", *International Journal of Law, Policy and The Family*, Volume 32, 2018

"There is general agreement that prospective parents ought to be able to enter into arrangements with gamete donors that specify certain kinds of engagement between the donor and future child, such as the provision of detailed biographical information or even ongoing contact. However, gamete donation arrangements in which there is an expectation that donors remain anonymous are more contentious. While some intending parents and donors prefer anonymous donation, there has been much discussion about the ethical permissibility of such arrangements.

Advocates of children's rights to access identifying information about their donors generally defend their view by pointing to the possible harms that might arise in the absence of such information, and/or the purported fundamental right that individuals have to information about their origins. Possible harms considered include psychological distress, damaged familial relationships, reduced self-knowledge, and incomplete or incorrect medical records. Those who favour permitting anonymous donation argue that it is a mistake to place a great deal of importance on genetic origins, and question both the severity of the harms caused by anonymous donation and whether the existence of such harms even constitute an argument against donor anonymity.

The philosophical debate takes place within a background of changing legal norms governing donor anonymity. While maintaining donor anonymity was once common practice (and is mandatory in certain jurisdictions, such as France) there has been a strong trend towards enshrining in law donor-conceived children's rights to access identifying information about their donor, at least once they reach the age of majority."

◈ R Brandt, S Wilkinson and N Williams, "The Donation and Sale of Human Eggs and Sperm", in EN Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2017 Edition) (citations omitted)

Surrogacy

Surrogacy involves an agreement between a woman and a commissioning parent in which it is agreed that the woman will bear a child for the commissioning parent. Surrogacy might be used by a married couple where the woman is unable to conceive or sustain a pregnancy. Surrogacy might also be used as a way to have a child by a single man, a single woman who is unable to bear children or a same-sex couple. Surrogacy usually involves artificial insemination. It may involve the egg of the surrogate mother, the egg of a commissioning parent or a donor egg, and the sperm of a commissioning parent or donor sperm. Surrogacy is not mentioned in the Child Care and Protection Act. There is no legal framework for surrogacy in Namibia. This means that a surrogacy contract might not be enforceable in court if there was a dispute, as it might be viewed as being contrary to public policy to make such an agreement about the birth of a child. Not knowing how the courts would treat a surrogacy agreement makes it a risky venture, as there are many points of dispute which could arise — such as:

- disputes about compensation
- cases where the commissioning parent does not want to take the child after birth
- cases where the surrogate mother does not want to give up the child
- dealing with the consequences of miscarriage
- cases where the surrogate mother engages in behaviour which could be detrimental to the foetus
- cases where the pregnancy poses a health risk for the surrogate mother.

Even if no dispute arose, the common law would apply to the parentage of the child, meaning that the parents would be the suppliers of the egg and sperm. This situation could possibly be adjusted by means of an adoption proceeding, depending on the circumstances.