



# CHILDREN'S STATUS ACT REPEALED AND RE-ENACTED

**T**he Child Care and Protection Act repeals and re-enacts the Children's Status Act 6 of 2006. This 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.

The Children's Status Act 6 of 2006 covered three main topics:

- (1) proof of parentage
- (2) the legal position of children born outside of marriage
- (3) custody and guardianship of any child whose parent or guardian has died.

All of these topics are now covered in the Child Care and Protection Act.

## Proof of parentage

Proving parentage means establishing the identity of a child's mother or father. The identity of the father (paternity) is more often in dispute than the identity of the mother (maternity), but a mother's identity could be uncertain – for example, if she concealed her pregnancy and abandoned the newborn infant. In modern times, scientific testing known as DNA testing can establish parentage with great certainty – although the tests are expensive.

The Act provides certain presumptions about paternity. The Act assumes that a man is the father of a child if:

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

But the man can still present evidence to show that he is *not* the father, and DNA testing can be ordered if necessary. If a parent refuses to submit themselves or the child to a DNA test, the court will assume that the person refusing to co-operate is attempting to conceal the truth.

## Children born outside marriage

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 both parents, subject to legislation enacted in their best interests.

The Act deals with three important aspects of parental responsibilities and rights:

- ⑨ **Access** – having contact with a child.
- ⑨ **Custody** – responsibility for the day-to-day care of a child, including the power to make decisions relating to that care.
- ⑨ **Guardianship** – the right to make important legal decisions on behalf of the child.

The Act provides simple procedures for allocating 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 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.

### **BEFORE** Children's Status Act:

- ⌚ Mothers had sole custody and guardianship.
- ⌚ Fathers had no clear rights.
- ⌚ Children born outside marriage could not inherit from their fathers without a written will naming them specifically.



### **AFTER** Children's Status Act (now re-enacted as part of the Child Care and Protection Act):

- ⌚ Both mothers and fathers have rights.
- ⌚ The parents must decide which parent will care for the child on a daily basis.
- ⌚ The parent without custody has an automatic right of access.
- ⌚ If the parents cannot agree, a children's court will decide. The deciding factor is the best interests of the child.
- ⌚ All children have equal rights to inherit in the absence of a will, regardless of the marital status of their parents. This applies under both general law and customary law.



## Any child without a parent or guardian

The Act provides a simple procedure in the children's court for appointing a new guardian when any child's parent or guardian has died. There is also a simple court procedure to use if someone has reason to believe that a guardian is not acting in the child's best interests – such as using the child's inheritance for the guardian's own benefit.

### **BEFORE** Children's Status Act:

- ⌚ Only the High Court could name a guardian, which was expensive and inaccessible to most Namibians. The result was that many children were left with no official legal guardian.
- ⌚ There was a need to formalise the situation because some adults just wanted to get control of the child's money or property.

### **AFTER** Children's Status Act (now re-enacted as part of the Child Care and Protection Act):

- ⌚ The law provides a simple, cost-free procedure for appointing guardians. A certificate of guardianship can be obtained at a children's court.
- ⌚ There is a simple, accessible procedure for complaints in cases where the guardian is not acting in the best interests of the child.

## The re-enactment of the 2006 law

The basic principles in the Child Care and Protection Act remain the same as in the original Children's Status Act. However, some improvements have been made based on practical experience. For example, a social worker report is now required in all cases involving questions of custody, guardianship or access.

Another addition is that where a child was conceived of incest, the parent must maintain the child but the child will have no responsibility to maintain the parent. Similarly, a child born of incest can inherit from the parent in the absence of a will, but not vice versa. These are ways of discouraging incest (which involves both parents) without being detrimental to the child.

The regulations to the Children's Status Act have also been repealed and re-enacted as part of the Child Care and Protection Act regulations.