

**IDEAS FROM OUR NEIGHBOURS:
SOUTH AFRICAN LAW ON CHILDREN BORN OUTSIDE OF MARRIAGE**

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South Africa is currently considering a draft Children's Bill which is the product of years of study and consultation. This bill covers a wide range of issues – including the position of children born outside of marriage, one of the key topics of the Children's Status Bill recently introduced into Parliament here in Namibia. But the South African law takes a very different approach, pointing to some of the weaknesses in the policy behind the Namibian bill.

The original starting point in South Africa was the same as in Namibia. According to the common law, children born outside of marriage were seen as "illegitimate". They could not inherit from their fathers unless they were clearly named in a will, and their fathers had no rights to access, custody or guardianship. The common law obviously discriminates against these children as well as against their fathers. No one would dispute that legislative change is called for. But it is informative for us to see how South Africa is intending to provide for equal treatment of these children and their fathers in the Children's Bill.

The constitutional rights of fathers

In the 1997 *Fraser* case, South Africa's Constitutional Court held that the provisions of the Child Care Act that did not take into consideration the consent of an unmarried father to the adoption of his child were unconstitutional. The judgment stated that "the effect of the section allowing the child to be adopted by a third party without the consent of the father was to discriminate unfairly against fathers of certain children on the grounds of gender or marital status. The section drew a simplistic distinction between married and unmarried fathers, and between the fathers and mothers of extra-marital children, without reference to the circumstances of the particular case." The court referred the legislation back to Parliament for redrafting.

A new law for fathers

In South Africa, the common law position on children born outside of marriage was confirmed by the Children's Status Act 82 of 1987. This statute provides that the mother of a child born outside of marriage has sole custody and guardianship of that child unless there is a court order directing otherwise. This right of sole guardianship was reiterated in the Guardianship Act 192 of 1993. (This Act, like Namibia's Married Persons Equality Act, also said that husbands and wives have equal guardianship powers over children who are born *inside* marriage.)

In 1997, in response to the *Fraser* case, the South African Parliament enacted the Natural Fathers of Children Born Out of Wedlock Act. In terms of this law, the mother automatically has full access, custody and guardianship rights over a child born outside of marriage, including the power to make all of the decisions relating to the child's daily life – such as where the child goes to school, what religious services the child will attend, and what medical care the child should or should not have. The father does not have any of these parental powers automatically. He must apply to the High Court for access, custody, or guardianship rights. The Court will grant such orders only if it is satisfied that they are in the best interests of the child.

A court considering such an application must take into account the following factors:

- the relationship between the applicant and the natural mother, and, in particular, whether either party has a history of violence or abuse against mother or child;
- the relationship of the child with each parent;
- the effect on the child of being separated from either parent;
- the child's preference;
- the degree of commitment that the father has shown towards the child, and, in particular, the extent to which he contributed to birth-related expenses and to the maintenance of the child since birth
- whether the child was born of a customary union concluded according to indigenous law or custom or of a marriage concluded under a system of any religious law; and
- any other fact that in the opinion of the court should be taken into account.

The draft Children's Bill in South Africa

The South African Children's Bill moves away from the language of access, custody and guardianship to the concept of "parental rights and responsibilities". A person can either have full parental responsibilities or specific parental responsibilities for a child. It is even possible for persons other than the child's parents to have "parental rights and responsibilities".

A mother automatically has full parental rights and responsibilities for a child born to her – regardless of whether the child was born inside or outside marriage. A father who is married to the mother of the child (or was married to the mother at the time of conception or birth) will also acquire full parental rights and responsibilities automatically.

But the unmarried father is not entitled to any automatic rights. In terms of the draft bill, he can acquire parental rights and responsibilities (a) if he has lived with the child's mother for at least one year at any time since the child's birth (b) if he has lived or is living with the mother, and has cared for the child with the mother's informed consent for a period of at least one year (c) if the mother and father make a parental responsibilities and rights agreement which is registered at a child and family court, or confirmed by a court order or (d) where no satisfactory agreement can be reached between the parents, if the father applies to the Child and Family Court for an order granting him parental rights and responsibilities.

Regardless of the position with respect to parental rights, both parents of a child always have a duty to maintain the child in accordance with their respective means.

Agreements on parental rights and responsibilities

The regulations issued under the proposed Children's Act will set a standard format for agreements between parents. The regulations will also specify the particulars which must be included in such agreements. As noted above, these agreements must be officially registered to have binding force.

Agreements between parents can be amended or terminated by the children's court at the request of the child, any person who has parental rights and responsibilities, or any other person who has an interest in the child's well-being.

Court orders on parental rights and responsibilities

The proposed South African law will make it possible for any person with an interest in the care and well-being of the child to apply to the Child and Family Court for full or partial parental rights and responsibilities for the child. This would obviously include both parents, but it could also include extended family members or other persons involved in caring for a child.

The court will consider the following factors:

- the relationship between the applicant and child
- the relationship between the child and other relevant persons
- the degree of commitment that the applicant has shown towards the child
- the extent to which the applicant has contributed to the expenses of the birth and maintenance of the child.

Co-exercise of parental responsibilities and rights

It is clear from the South African bill that more than one or even two persons may simultaneously hold parental responsibilities and rights in respect of one child. The general rule is that parental powers are exercised independently rather than jointly – unless there is a court order to the contrary.

However, co-holders of parental rights and responsibilities must consult each other on a broad spectrum of “major decisions” affecting the child -- which include anything likely to have a significant effect on the child’s living conditions, education, health, personal relations with a parent or family member or general well-being. The views of the child must also be considered in respect of these major decisions.

- A core group of decisions can be taken only with the consent of *all* co-holders of parental rights and responsibilities (which could include both parents and third parties as well). These decisions are:
 - allowing the child to marry;
 - putting the child up for adoption;
 - taking the child out of the country;
 - applying for a passport for the child; or
 - transactions involving immovable property (land) belonging to the child.

Parenting plans

If the co-holders of parental responsibilities and rights experience difficulty in working together, they are expected to try to develop a parenting plan. This is an agreement which can include specifics such as where and with whom the child is to live, who will maintain the child, what kind of access to different people will be allowed, and who will serve as the child’s guardian. The co-holders of parental rights can ask a family advocate or a social worker to help them negotiate this agreement. The parenting plan must be written down and placed on file with the children and family court. If the parties are unable to agree upon a parenting plan, then they can ask the Child and Family Court to resolve the dispute, in light of the best interest of the child.

What will happen in South Africa when a parent dies?

In terms of the South African proposal, a parent with parental responsibilities and rights may appoint a suitable person to be a “parent-substitute” upon his or her death. A parent may appoint this “parent-substitute” in writing, or in a will. The parent-substitute

can acquire only whatever parental responsibilities and rights that the dead parent had and no more.

The responsibilities and rights acquired by a substitute parent may be suspended or terminated by application to the Child and Family Court. The co-holder of the parental responsibilities and rights, the child, the family advocate or any person with an interest in the child may bring the court application.

The Namibian Children's Status Bill

The Children's Status Bill just introduced into Parliament aims to ensure that no child will suffer any discrimination or disadvantage because of the marital status of his or her parents and that all decisions concerning the child will be made in the best interests of that child. It is important to evaluate the Namibian bill in light of the experience of other countries, including South Africa's legislation.

The Namibian bill proposes that sole custody of a child born outside wedlock shall vest in the mother until the child attains the age of seven. On the child's seventh birthday, the biological parents will automatically acquire joint custody. Joint custody is very difficult in practice. **The South African bill has rejected this idea, in favour of providing for joint decision-making only on major matters, and even then only in cases where parental rights and responsibilities have been acquired by agreement between the parents, by a court order, or by actual practical involvement in child-rearing.**

The Namibian bill is progressive and even-handed in that the consent of both parents is needed in order to put a child born outside of marriage up for adoption, or to remove the child from Namibia for a period longer than one year. But its efforts to make up for past discrimination against fathers go too far. The respective rights of mother and father must be exercised in a framework which puts the best interests of the child first. Automatic joint custody will, on the contrary, be unworkable in many cases and even dangerous to both mother and child in some circumstances. Shared decision-making power over a child in a relationship that has broken down can become a weapon against the most vulnerable parties to the arrangement. This proposal needs re-thinking.

Dianne Hubbard is the Co-ordinator of the Gender Research & Advocacy Project of the Legal Assistance Centre. She was a member of the Task Force convened by the Ministry of Women Affairs and Child Welfare to advise on children's legislation. This Task Force was chaired by the Permanent Secretary of the Ministry of Women Affairs and Child Welfare and included representatives of the Ministry of Health and Social Services, the Ministry of Home Affairs, the Ministry of Justice and the Office of the Attorney-General.

Readers who would like a copy of the Children's Status Bill or more detailed information about its provisions may contact Naomi Kisting at 223356 or NKisting@jac.org.na.