

**TAKING CARE OF  
CHILDREN BORN OUTSIDE OF MARRIAGE  
ACCESS, CUSTODY AND GUARDIANSHIP IN THE CHILDREN'S STATUS BILL**  
Dianne Hubbard, Legal Assistance Centre, 2004

One of the main aims of the Children's Status Bill is the removal of discrimination against children born outside of marriage.

For example, the bill would remove discrimination against such children in relation to inheritance – they must inherit in the same way as children born inside marriage in future, regardless of any civil law or customary law rules that say otherwise. (People who make written wills can still leave their property to anyone they wish.) This is a much-needed change which should be applauded. As the Minister of Women Affairs and Child Welfare stated in Parliament, children have no control over their parents' marital status – so why should any child suffer a disadvantage because the child's parents were not married?

The bill also makes changes to the relative rights of single mothers and single fathers. This is certainly an area of law that is in need of reform. At present, single fathers have a duty to pay maintenance, but they have no right to maintain contact with their children unless the mother agrees to this. The present system is bad for both fathers and children.

The starting point for law reform on this issue is the Constitutional mandate that children shall have "as far as possible the right to know and be cared for by their parents", subject to "legislation enacted in the best interests of children" (Article 15).

A Task Force of experts assembled by the Ministry of Women Affairs and Child Welfare, after a series of consultations with relevant stakeholders, recommended that fathers should have an automatic right of reasonable access to their children. If this access was endangering the child (through domestic violence or child abuse, for example), the child's custodian could utilise a simple procedure to get an order from a magistrate's court removing or restricting the father's access – after both parties had a chance to tell their sides of the story.

The Task Force also made recommendations on custody and guardianship. (Custody is responsibility for the day-to-day care of a child, and the right to make decisions on the child's daily life, such as what school or church the child should attend. Guardianship is the power to deal with the child's property and to make legal decisions on behalf of the child.) The suggestion was that custody should rest with the mother as a starting point. This is based on biological grounds -- only the mother is sure to be present at the child's birth, and most children will benefit from breastfeeding when they are young. But the father would have the right to apply for custody at any stage. The court would be expected to make custody decisions purely on the basis of what is in the best interests of the child – without taking gender into account.

The Task Force also suggested that guardianship should follow custody – on the theory that the parent who is involved with the child's daily care is in the best position to know what decisions are best for the child. Major decisions – such as putting the child up for

adoption or removing the child from the country for long periods – would require the consent of both parents (with certain safeguards to deal with situations such as parents who cannot be found or consents being unreasonably withheld).

The bill tabled in Parliament last week adopts the Task Force's recommendations on access but takes a different approach to custody and guardianship. The bill gives sole custody to the mother of a child born outside marriage as a starting point, but it would give automatic joint custody to the mother and father when the child reaches age seven.

This could be very dangerous to the child. A pregnancy outside of marriage may result from a committed relationship between two parents who are planning to marry in the future. But it could also result from a one-night stand, or a romantic relationship which has gone sour. It may result from a relationship that ended because of domestic violence. It may result from incest, or from the impregnation of a schoolgirl by a school teacher. It may involve a father whose whereabouts are unknown to the mother, or a father who is not even aware that he has caused a pregnancy. The pregnancy may involve a commercial sex worker and her client, or a secret affair between two people who are both married to other persons.

Married parents have joint custody of their children under the Married Persons Equality Act, but in a marriage the parties have a legal commitment which is governed by a set of civil or customary law rules and safeguards. It is difficult to imagine cooperative decision making about a child taking place in the wide range of encounters outside marriage which can result in pregnancies.

Joint custody is seldom granted even in divorce cases where both parents are present before the court and in favour of it, because the courts are not convinced that joint custody is workable in a situation where there is a lack of harmony between the parties. It also tends to work only where the parents live in close physical proximity, because it can otherwise become a situation where one parent bears all the daily responsibility for the child's well-being and the other parent has decision-making power which is unmatched by regular input into the child's life.

The bill would give joint custody to fathers who have never laid eyes upon their children, as well as to caring and committed fathers. It provides no mechanism for telling the difference. It provides no system for sorting out conflicts between the parents. This could be very harmful to the child.

Imagine this situation. A man and a woman who are not married have a child together, but their relationship ends soon afterwards. The mother and the maternal grandmother take care of the child, while the father provides some maintenance and visits the child occasionally. There is no regular contact between the child and the father, who is now involved with another woman. This would not be an unusual Namibian scenario.

In terms of the bill tabled in Parliament, this mother and father would acquire joint custody automatically when the child reaches age seven, even though it is the mother who is actually taking responsibility for the child's daily care. If the mother requests maintenance from the father at this stage, the father may simply say that he is going to take the child to live with him or his extended family – regardless of whether or not this change would be good for the child.

Since the bill would give both of these parents equal guardianship powers, both of them would have equal rights to bring court cases, enter into contracts or deal with property on behalf of the child. But these equal powers would probably not work well in a situation where the parents have minimal contact and opposing interests. They might well find themselves working at cross-purposes.

Suppose that the child remains with the mother, who suddenly dies when the child is eight years old. The father, who is a virtual stranger to the child, would suddenly become the sole custodian and guardian of the child. The father may live in another part of the country, which may mean that the child will have to leave her friends, the mother's extended family who has helped to care for her, and the school and church which are familiar to her. Perhaps it would have been in the child's best interests to remain in the care of the maternal grandmother, who has helped to care for her since birth, but all of the decisions about her life are now in the hands of her father, who hardly knows her.

This is of course only one possible scenario, but the legal rules must be workable for the situations which are most common in Namibia today. It would be nice to say that caring and committed fathers were the widespread norm, but this is not yet a genuine picture of Namibian society.

Of course, not all single mothers are caring and committed parents either, but the indisputable fact is that in Namibia more single mothers than single fathers take serious responsibility for their children. The law should take Namibia's social realities into account.

It will be difficult to settle upon one approach that will work for all mothers and fathers and their children. But the automatic positions should be one that will work for most people most of the time, to reduce the need for families to have to turn to the courts for help.

The Children's Status Bill will affect huge numbers of children. The Legal Assistance Centre recommends that it be referred to committee for further consultation throughout the country. The law is urgently needed – but it is important to take the time to make sure that the law will indeed be in the best interests of Namibian children.

*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.*

*An article discussing other aspects of the bill will appear in next Friday's edition of The Namibian.*

*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@lac.org.na](mailto:NKisting@lac.org.na).*