

WHAT HAPPENS WHEN A PARENT DIES?

WHAT THE CHILDREN'S STATUS BILL SAYS

Dianne Hubbard, Legal Assistance Centre, 2004

Last week's article discussed the provisions of the Children's Status Bill which apply to children born outside of marriage. There are other parts of the Bill which apply to all children, whether born inside or outside of marriage.

What happens when a parent dies? At the moment, married parents have joint custody of their children, in terms of the Married Persons Equality Act. If one of two joint custodians dies, then the surviving custodian takes responsibility for the child.

But there are other circumstances under the current law where one parent is the sole custodian – single mothers of children born outside of marriage, parents who became sole custodians when the other parent died, or parents who have been named sole custodians in a court order, perhaps in the context of divorce or perhaps because of child abuse or domestic violence on the part of the other parent.

In these cases, the parent who is the sole custodian can name someone to take responsibility for the child in a written will. If there is no will, the High Court can appoint a guardian for the child.

This system has proved to be problematic. Many people fail to make written wills, and High Court proceedings are expensive and inaccessible to many. The result has been that many children are being left without anyone in a clear position of legal responsibility for them. Increasing numbers of children are being affected by this problem as the numbers of children orphaned by AIDS mushrooms. This can mean that no one is in a position to make decisions on behalf of the child, or to manage the child's property. And where there is no clear legal responsibility for the child, the door may be left open to property-grabbing by unscrupulous relatives.

It is indisputable that there is a need for change.

The Children's Status Bill contains one set of rules for all children. If one parent dies, the other parent becomes the child's custodian and guardian of the child. This is the case regardless of whether the deceased parent had joint custody or sole custody. The only exception is where a court order directs otherwise.

This will not be in the child's best interests in many cases, especially where the child's parents were never married. The surviving parent might be a potentially good parent, but he or she might also be an alcoholic or an abusive person or a complete stranger to the child. The surviving parent might be a father who has not laid eyes on the child in years. The surviving parent might be out of the country. It might be someone who is completely uninterested in taking over responsibility for the child's needs.

The Task Force assembled by the Ministry of Women Affairs and Child Welfare to advise on the bill, after considering input given by stakeholders in a series of consultations, recommended a different approach.

The Task Force suggested that where parents were joint custodians and equal guardians because they were married, the surviving parent would become the sole custodian and guardian if the other parent died.

But, where one parent had sole custody or guardianship, which was envisaged to be the case in most situations where parents were not married or living together, this parent would have a right to name a custodian and guardian for the child in a will. (If a will names a guardian without naming a custodian, the guardian takes full responsibility for the child. The guardian then has the power to decide who will take physical care of the child.)

If no guardian was named in a will, a guardian could be appointed by a Commissioner of Child Welfare, in a simple and inexpensive administrative procedure provided for in the bill. (Every magistrate is a Commissioner of Child Welfare.)

The idea was that guardianship would be handled separately from the administration of the estate. A person who wants to be appointed as the child's guardian would make application to the clerk of the children's court. The application must be supported by an affidavit from the applicant stating that close family members of the child have been consulted and do not dispute the application. The application must be confirmed by the Commissioner of Child Welfare, who would have the discretion to call in the applicant and other relevant persons for questioning if necessary. Approval of the application will lead to the issue of a certificate of guardianship.

Any person can apply to become a child's guardian, whether or not related to the child. Preference will normally be given to family members of the child as guardians, or to another person who has been the primary caretaker of the child, subject to the best interests of the child. The primary caretaker or some other unrelated person *could* be preferred over a family member if this would be best for the child.

If there was a family dispute over who should become the child's guardian, the Task Force suggested that the Commissioner of Child Welfare should be required to call for a social worker investigation before making a decision on what would be in the child's best interest.

Copies of all guardianship certificates would go to the Master of the High Court for reference in respect of estates being administered by the Master, as well as to the administrators of the State Guardian's Fund. A copy of each guardianship certificate will also be kept on file at the children's court. The point of the certificate is so that the guardian who has been appointed will have some proof to show in support of transactions made on behalf of the child.

The Task Force suggested that any person with an interest in the child's well-being could make a complaint to the children's court if the appointed guardian is failing to act in the child's best interests. This complaint can be made by filing a simple written affidavit. In this case, a social worker would investigate the situation, and the court would have the power to appoint a new guardian if necessary. This procedure is intended to make it easy for interested parties to complain if there are problems with "property grabbing" or any other guardianship responsibilities.

The bill contains aspects of the suggested procedure, but it takes a different starting point. We fear that the rule which gives surviving parents custody and guardianship for their children when one parent dies is too broad to serve the best interests of all our children.

The bill as it now stands also need to provide more clarity on the procedure to be followed if there is no consensus amongst the close family members about who should serve as the guardian.

There should also be provision in the bill or in the regulations for dealing with lost and forged guardianship certificates.

This is another aspect of the Children's Status Bill which will have far-reaching consequences. We appeal to Parliament to initiate country-wide discussions of the bill so that we can be sure that it will serve Namibia's children well.

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 South Africa's approach to the issues covered by the Children's Status 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.