THE STUDY OF UNMARRIED FATHERS: GUARDIANSHIP, CUSTODY AND ACCESS

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BY

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DECLARATION

I, the undersigned hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of Bachelor of Laws is my original work and that I have not used any other sources than those listed in the bibliography and quoted in these references.

Signature:

Date:

CERTIFICATION

I, _____________________ hereby certify that the research and writing of this dissertation was carried out under my supervision.

Signature:

Date:
ABSTRACT

This dissertation will deal with the concept of unmarried fathers. The common law in Namibia dictates what rights unmarried fathers have to their extra-marital children. According to Namibian common law an unmarried father has no right of guardianship, custody or access to his child. The Namibian Constitution came into force in 1990 and Article 10 of the Namibian Constitution prohibits discrimination and calls for equality for all citizens. The common law positions in Namibia regarding unmarried fathers, is not consistent with the principles of equality stated in the Namibian Constitution and with international laws regarding equality. It is impossible to show empirically that mothers are closer to their extra-marital children than fathers of extra-marital children. In many areas of our common law there is a need for development. The common law will have to change to be in line with the Namibian constitution and international regulations. The Constitution will compel common law positions to be changed. It is for this very reason that legislators have been debating on a Children’s Status Bill which is as yet not enforced, but if implemented can change the legal position that unmarried fathers have under the common law.
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Chapter One

Introduction and background to the dissertation

This dissertation will deal with the concept of unmarried fathers. This work will examine what rights an unmarried father has (if any) in terms guardianship, custody and access. In addition to this an examination will be done to assess whether the law regarding the rights of unmarried father’s is constitutional. Before one examines the background regarding the legal position of unmarried fathers in Namibia, three important aspects regarding the topic needs to be defined: namely Guardianship, custody and access.

Hubbard\(^1\) defines these aspects as:

“Guardianship is the right to make important legal decisions on behalf of the child such as bringing a court case on behalf of the child or dealing with property belonging to the child”

“Custody is the responsibility for the day to day care of the child including the power to make decisions relating to that care”

“Access is the ability to visit or have contact with the child”

A child born to parents who were not legally married to each other at the time of the child’s conception or at the time of the birth of the child is regarded as an extra-marital child. According to our Namibian laws and regulations a mother of an extra-marital child is given sole automatic rights to guardianship, custody and access of the child. The father of an extra-marital child has no automatic rights to his child and only has the responsibility to financially maintain the child. Presently, the only way a father can obtain guardianship or custody of the child is by making an application to the court.

\(^1\) Hubbard D (2006): Proposed Amendments to the Children’s Status B Windhoek Legal Assistance Centre p. 6.
It is commonly known that children born outside of marriage have a right to maintain contact with both their parents. Therefore, one has to ask what is the rationale for vesting all parental powers upon the mother. The law has chosen this route, because the mother is the only person who is certain to be at the birth of the child and therefore the law awards her all parental authority. One acknowledges that in several instances the unmarried father is not present at the birth of the child and is not involved in raising the child. However, there are unmarried fathers who do wish to be involved in their children’s lives and thus such fathers should be accommodated by the law.

There has been this constant gap in our law dealing with concept of unmarried parents and their children. Legislators have noticed that this concept needs to be dealt with and have drafted a Children’s Status Bill which will, if implemented, enhance the legal position of an unmarried father.²

**Statement of the problem**

The dissertation will deal with the concept of unmarried fathers. The dissertation will evaluate what rights to guardianship, custody and access does a single parent have. The position in our law as stated above is that the unmarried mother is automatically given full custody of the child and the ability to solely make decisions regarding the well being of the child. Yes, One acknowledges that there are irresponsible fathers, however, our country has a constitution that needs to be adhered to.

Article ten of the Namibian Constitution states that:

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“10 (1) all persons shall be equal before the law”
(2) no person may be discriminated against on the grounds of
sex, race, colour, ethnic origin, religion, creed or social or
economic status”
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This article in the constitution requires that all persons should be treated equally however, the law regulates different rules for single mothers and single fathers.

² The proposed Children’s Status Bill will be discussed and evaluated in chapter three.
The constitutionality of the present position of our law needs to be examined and will be discussed in the course of the dissertation.

This article in the Constitution requires that all persons should be treated equally however, the law regulates different rules for single mothers and single fathers. The constitutionality of the present position of our law needs to be examined and will be discussed in the course of the dissertation.

In an article written by Williams\textsuperscript{3}, she informs the reader that according to the 1992 Namibia Demographic and Health Survey, forty-five percent of women are either mothers or pregnant with their first child at the age of nineteen. It is common knowledge that at the age of nineteen most girls are not married, hence this implies that about forty-five percent of Namibian girls are unmarried mothers. Hence, on the other side of the coin about forty-five percent of Namibian men are unmarried fathers. These large numbers of fathers have no rights to guardianship, custody and access to their child and may be denied this even if they are involved fathers who want to maintain their children and therefore this problem has to be evaluated.

Thus, the problem to be discussed in the course of the dissertation is the problem that unmarried fathers have no automatic rights to their children and that in numerous instances the power given to mothers by the law is misused by the mother who may selfishly deny a child access to his or her father.

In order to discuss the position of the unmarried father, the following research question will be dealt with in the course of the dissertation:

1) what common law states is the position of the unmarried father

2) the constitutionality of the common law perception

\textsuperscript{3} Williams L (2006): \textit{Teenage Age Fathers Behind the Indifference}
Windhoek The Namibian 10 march p.2.
3) How the proposed Children’s Status Bill will change the current legal position of the unmarried father?

4) What rights and responsibilities does an unmarried father have?

**The Common Law Position Regarding Unmarried Fathers**

**Guardianship of an extra-marital child**

The mother has the right of guardianship over an extra-marital child. Common law regulates that the exception to this is that an unmarried mother who is still a minor cannot be her child’s guardian.⁴ If the minor becomes a major then full custody and guardianship will be vested in her, unless a court rules otherwise. Should an unmarried mother marry a man that is not the child’s father, such mother will remain the sole guardian of the child.⁵ As a result of the mother being the sole guardian of the child Robinson⁶ concurs that she is consequently, in control of the child’s estate and legal transactions.

An extra-marital child is usually registered under the surname of his or her mother, but the father may consent to the child bearing his surname. In the case of Wy S⁷, the father of an extra-marital asked for an order directing the mother to take steps to change the child’s surname to that of the father. The mother opposed such an application and the court ruled that since the application did not provide evidence before the court demonstrating, that such a change of name would be in the best interest of the child, the order was thus refused.

In the past children born out of wedlock would also acquire the domicile of their mother. This position in the law has changed and provides that the domicile of the child will be

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⁷ 1988 (1) SA 475 (N) 492
the place that the child is most closely related to.\textsuperscript{8} Robinson\textsuperscript{9} additionally states that in this regard, the law does not draw a distinction between legitimate children and extra-marital children.

The High Court may terminate the mother’s guardianship if it is considered to be in the best interest of the child.\textsuperscript{10} The court has a wide discretion in this regard, the court will only interfere if it is reasonable and if the order can be properly monitored.\textsuperscript{11} Should the mother of an extra-marital child die then, rights of guardianship may be awarded to the father.

\textbf{Custody of an extra-marital child}

The mother of the extra-marital child has the right of custody over an extra-marital child, a mother who is a minor has custody over her child unless a court grants otherwise. Common law regulates that if the mother of an extra-marital child dies, custody may be awarded to the father. Formally it was held that the father when the mother dies, does not have a stronger claim than that of any other person, but from recent judgments it seems the court are more favourably disposed towards the father of an extra-marital child and that a father is favoured over strangers because of the biological relationship and genetic factors.\textsuperscript{12} The question on whether preference should be given to the claims of the natural father if the mother is deprived of guardianship or custody has not received much attention in our courts.\textsuperscript{13}

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In Bethell v Bland\textsuperscript{14}, a son was born to minor single parents. The minor mother’s father applied for custody of the baby, who was divorced from the girl’s mother. At the time the application was made, the baby was living with his father and grand parents. The child’s father and his parents made a counter application to obtain custody of the child. Judge Wunsh in his judgment held that evidence showed that the father of the child has an intelligent character, responsible attitude and the necessary understanding to exercise custody of the child in a manner that will be in the child’s interest. Although the child’s father did not have the necessary finances to care for the child, the judge was of the opinion that the grand parents of the child felt a moral duty to help support the needs of the child. In the judgment it became clear that in determining what is in the best interest of the child the court must decide which of the parents is better able to promote and ensure the child’s physical, moral and spiritual welfare.

When a court determines what is in the best interest of the child, the following is taken into account:\textsuperscript{15}

(a) the love, affection and other emotional ties which exist between parent and child.

(b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires.

(c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity of the child’s feelings.

(d) the capacity and disposition of the parent to give the child guidance that is required.

(e) the ability of the parent to provide for the basic physical needs of the child. The so-called creature comforts such as clothing, food, housing etc.

\textsuperscript{14} 1996 (2) SA 194 (W)

(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular.

(g) the ability of the parent to provide for the child’s emotional, psychological cultural and environmental development.

(h) the mental and physical health and moral fitness of the parent.

(I) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo.

(j) the desirability or otherwise of applying the doctrine of same sex matching.

(k) the desirability or otherwise of keeping siblings together.

(l) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration.

(m) any other factor which is relevant to the particular case which the court is concerned.

In the case of *Coetzee v Singh*\(^{16}\) custody was also granted to the father of the extra-marital child when the court discovered that the father of the child could provide the child with better education and accommodation.

In the case of *Ex Parte Van Dam*\(^{17}\), an extra-marital child was born to a couple who were divorced from one another. The parties entered into an agreement regarding the extra-marital child and the legitimate children that the couple had while they were married to one another. The parties desired that both parents should have a future relationship with the children.

\(^{16}\) 1996 (3) SA 153 (D)

\(^{17}\) 1973 (2) SA 182(W)
In order to achieve this, the parties entered into an agreement in which, the mother would have custody of both children whilst the father would maintain the extra-marital and legitimate children and have reasonable access to them. The unmarried father would also be the guardian of both children in terms of the agreement.

The court asked the question of whether the mother’s guardianship of the extra-marital child can be transferred to the father. The judge in this case namely, Gardner JP said the aspect of transferring guardianship from a mother to a father has not been examined thoroughly enough by Roman law writers. Gardner JP states that in her view, the court has the power in a proper case to deprive the natural guardian of legitimate children of his guardianship, and vest it in another, thus, there appears no reason why the court should not act similarly in the case of extra-marital children.

The above-mentioned case illustrates that before the birth of a child, the unmarried parents should be allowed enter into an agreement concerning what rights each parent would have and what contributions should be made in raising the child. Should either party breach a term in the agreement that assistance can be sought from the court.

Access to an extra-marital child

Guardianship and Custody has thus far been discussed and now the concept of Access will be discussed. Since the cases of Mattews v Haswari\(^\text{18}\) and Wilson v Ely\(^\text{19}\) one can say that the father of an extra-marital child has a right of reasonable access to the child.

\(^{18}\) 1937 WLD 110
\(^{19}\) 1914 WR 34
However, recently courts have held that the father of an extra-marital child has no inherent right of access to the child.\textsuperscript{20} Judge Harms in the case of \textit{F v L}\textsuperscript{21} is of the opinion that the father of an extra-marital child does not acquire parental authority over the child and, since the right of access to a child is a consequence of parental authority, the father has no \textit{prima facie} right of access to the child.\textsuperscript{22} Cognizance should be taken of the fact that the duty to maintain the child does not give rise to a right of access and such a duty can exist quite independently of parental authority or a right of access.

Judge Van Zyl in the case of \textit{Van Erk v Holmer}\textsuperscript{23}, mentions that access should be regarded as a right and should only be denied if it is in the best interest of the child. Judge Van Zyl goes on to state that old authorities are silent on this matter and that where there is no legislation, precedent or custom in point, the court has to decide in accordance with the principle of reasonableness, justice, equity and the \textit{boni mores}.

I concur with Judge Van Zyl. Since old authorities are silent on the aspect of access, the concept of reasonableness should be encouraged. It is only reasonable to allow a child access to both parents unless there is sufficient evidence to prove that seeing both parents is not in the child’s best interest.

The judge further emphasized that social \textit{mores} and attitudes have changed considerably and that the social realities of modern society are completely different from those which prevailed in earlier times. Judge Van Zyl made a very important point when he stated that no distinction should drawn between legitimate and illegitimate children and that the importance should be placed on the child’s right to have access to both parents than to focus on the father’s right of access to the child.

\textsuperscript{21} 1987(4) SA 525 (W)
\textsuperscript{22} Cronje DSP, Heaton J (1999): \textit{The South African Law of Persons} Durban Butterworths p.66
\textsuperscript{23} 1992 (2) SA 636 (W)
Judge Van Zyl is of the opinion that it is unfair to deny a father who is compelled to pay maintenance for his child and who is prepared to devote himself to the interest of the child, the right to see or visit the child. Judge Flemming in the case of S v S disagrees with Judge Van Zyl in Van Erk v Holmer. Judge Flemming is of the opinion that the fact that no old authority expressly gives the father of an extra-marital child a right of access to the child is a strong indication that no such right exists.

Judge Flemming additionally says that public policy does not demand that an inherent right of access be granted to the father. The unmarried father has a right to apply for access to his child and will be granted this right if he can satisfy the court that it is in the interest of the child. In the case of B v P, the Judge emphasized that the father who applies for access to his child must prove that it is in the best interest of the child and if access is granted it will not interfere with the mother’s right of custody.

In the case of B v S Judge Howie lays down what principles the court should look at to determine whether a father should obtain access to his child they are:

(1) the degree of commitment the father has shown towards the child is the first determining factor

(2) the degree of attachment between the father and the child will also be considered and lastly,

(3) the reasons why the father is applying for the court order will also be examined.

25 1993 (2) SA 200 (W)
26 1992 (2) SA 636 (W)
27 1993 (2) SA 200 (W)
28 1991 (4) SA 113 (T)
29 1995 (3) SA 571 (A)
In addition to the three factors mentioned above the court will also take the following factors in account according to Cronje\textsuperscript{30}:

(A) The relationship between the father and the child’s mother, in particular whether either party has a history of violence against or abuse of each other or the child.

(B) The child’s relationship with the applicant and the mother, or with the proposed adoptive parents (if any) or any other person.

(C) The effect that separating the child from the applicant or the mother or proposed adoptive parents (if any) or any other person.

(D) The child’s attitude in relation to the granting of the application.

(E) The degree of commitment the applicant has shown towards the child. The court must in particular take note of the extent to which the father contributed to the laying-in expenses incurred by the mother in connection with the birth of the child and to the expenditure incurred by her in connection with the maintenance of the child from the child’s birth to the date on which an order (if any) in respect of the payment of maintenance by the applicant for the child has been made, and the extent to which the applicant complies with the maintenance order. Whether a father should be granted access to his child, the court may allow for an investigation to be made and may call any person to produce evidence that may assist the court in reaching a decision.

The issue of a father’s right of access to his extra-marital child has received the attention of the South African Law Commission with view to legal reform.\textsuperscript{31} The commission issued a report called \textit{Report on a Father’s Right in respect of his illegitimate Child Project 38 of 1994}. The report concluded that the common law position should be retained. Thus, an unmarried father has no inherent right of access to his child unless he applies to the High Court to grant him the right to access.

\textbf{The debated relationship between an unmarried father and his extra-marital child}


The general rule is that there is no relationship between a father and his extra-marital children except that he is obliged to maintain such children and the children have a right to claim maintenance from him. Robinson concurs by stating the status of an extra-marital child, can from a legal point of view, be described as the child having only a mother and no father.

This view was greatly criticised by Judge Van Zyl in the case of Van Erk v Holmer. Judge Van Zyl is of the opinion that it is incorrect to state that a child is not related to his or her father because the father’s obligation to maintain his extra-marital child is based on the blood relationship arising from the father’s paternity. Judge Van Zyl further states that if a father is not related to the child, he should have neither rights nor duties in respect of the child. Why should a father have an obligation to maintain a child that he has no right to? Judge Van Zyl’s opinion was disregarded in the case of S v S by Judge Flemming. Judge Fleming’s view is that to say that an extra-marital child is not related to his or her father is no more than a short-hand way of sketching the crux of the law’s approach, which is that the legal consequences of the natural relationship between a extra-marital child and his father is reduced to the minimum.

Adoption procedure of an extra-marital child

Adoption is a procedure in which the biological parents of a child legally award all rights they have regarding the child to another set of parents. The South African Child Care Act 74 of 1983, used to require only the consent of the mother in order for the child to be adopted.

34 1992 (2) SA 636 (W)
35 1993 (2) SA 200 (W)
However, this was found to be unconstitutional in the case of Fraser v Children’s Court Pretoria North\textsuperscript{37}. The court in this case found that Section 18 (4) (d) which stated that only the consent of the mother is necessary for adoption procedures to proceed is unconstitutional as this discriminates unfairly against fathers in matrimonial unions and infringes on the right to equality.

The constitutional court in the case of Fraser v Children’s Court, Pretoria North\textsuperscript{38} found that section 18(4) (d) of the Child Care Act 74 of 1983, might be vulnerable to constitutional attack as it constituted unfair discrimination on the grounds of gender and marital status, which is prohibited by the equality clause in the constitution.\textsuperscript{39} In addition to this, the court stated constituted unfair discrimination on the grounds of gender and marital status, which is prohibited by the equality clause in the constitution.

Additionally to this, the court stated that section 14(4) (d) discriminated unfairly on the ground of gender because the consent of the mother of an extra-marital child was always required, while the consent of the father is not required. If parents of a child were married, the consent of both parents was necessary for the adoption to be successful. Thus, there is clear discrimination as married fathers are treated differently from fathers that are not married. Section 18 (4) (d) was changed by enacting section 4 of the Adoption Matters Amendment Act 56 of 1998, which stated that the consent of both parents of a child born out of wedlock is needed to effect an adoption if the child’s father acknowledge paternity in writing and made his identity and whereabouts known as contemplated in section 19A of the Child Care Act\textsuperscript{40}.

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\textsuperscript{37} 1973 (2) SA182 (W)
\textsuperscript{38} 1997 (2) SA 261 (CC)
\textsuperscript{40} Cronje submits that acknowledgement of paternity and registering particulars can only be done with the consent of the mother. If a father wishes to acknowledge paternity or register his particulars and the mother does not consent to this, then such a father may apply to the High Court for the mother’s consent to be withdrawn.
Section 19 A of the Child Care Act states that only if one parent consents to the child’s adoption and the other parent is unavailable to give consent, a notice must within 14 days be served on the other parent informing him or her that consent has been given and giving that parent the chance to:

A) give or reject consent

B) provide reasons why consent should not be distributed with

C) In a situation of a father not married, he may apply for adoption of the child.

The notice mentioned above, can only be served if the other parent’s whereabouts are unknown and need to a father of a child born out of wedlock if:  

(A) The father has acknowledged paternity in writing and has entered his particulars in the child’s birth registration and has ensured that those particulars are correct at all times.

(B) The child’s mother, at the time of consenting to the child’s adoption, confirms in writing that the child’s father has acknowledged paternity and furnishes particulars regarding his identity and whereabouts.

(C) A social worker, within 60 days of the mother’s having consented or at any stage before the adoption order is granted, submits a report confirming the father’s identity and whereabouts. The report must be made to the commissioner who attested the mother’s consent or to the children’s court in which the adoption application has been made. A social worker who obtains information about the father’s identity and whereabouts is under obligation to submit a report.

In the following circumstances the consent of a father may be dispensed with in adoption procedures:  

(a) The father has failed to acknowledge paternity

(b) The child was conceived as a result of incest

(c) The child was conceived as a result of rape or assault of the child’s mother

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(d) The father, after an enquiry by the children’s court following an allegation by the child’s mother, found, on a balance of probabilities, to have raped or assaulted the child’s mother: and
(e) The father failed to respond to the notice in terms of section 19A of the Child Care Act.

According to Cronje\textsuperscript{43} both parents have an obligation to support their extra-marital child provided that they are in a financial position to do so and the child is in need of support. The support that the child needs is to be divided among the parents in respect to what the child needs. An extra-marital child is obliged to support his mother but not his or her father.\textsuperscript{44}

It is also known that the extra-marital father has an obligation to support his child and it seems only fair that the child should also have the obligation to support his or her father in appropriate circumstances. This position of the common law is an infringement of the constitution which calls for equality in article 10 of the Namibian constitution. The position of the law is this way because of the fallacious argument that the father of an extra-marital child is not related to the child.\textsuperscript{45} This is an unacceptable argument because how can a child not be related to someone who is under the law known as their father, surely one is related to your father whether your parents are married or not.

The estate of a parent is responsible for the maintenance of the child if either parent passes away. In the case of Motan v Joosub\textsuperscript{46}, it was found that if neither parent nor his or her estate can meet the needs of the child then the responsibility will rest on the child’s maternal grand-parents to support the child.

\textsuperscript{43} ibid
\textsuperscript{44} ibid
\textsuperscript{45} ibid
\textsuperscript{46} 1930 AD 61
Once again this common law principle is in conflict with article ten of our constitution which states that no person may be discriminated against in respect to gender. The common law should state that if neither parent nor his or her estate is capable of supporting the child then it the responsibility of both sets of grand- parents to support the needs of the child. If parents are married to one another, however, the parents or their estates are unable to support the child then it is the duty of the paternal grand- parents to support the needs of the child. Thus, common law further discriminates as the position is different when child are born of a marriage and when the child is born out of wedlock. There should be no such distinction and both sets of grand- parents should be responsible for supporting the child when the parents or their estates are unable to do so.

**Inheritance law concerning an extra-marital child**

In the next part of this dissertation the concept of inheritance regarding extra-marital children will be discussed. When the concept of inheritance is made a distinction should always be drawn between intestate succession and testate succession.

Intestate succession occurs when the father of the extra-marital child left behind no will to determine his estate. When intestate succession of extra-marital children is studied, the rule *een moder maakt geen bastaard*\(^{47}\) has always been applied.

According to common law extra-marital children inherited from their mother and her maternal relations in the same way as her legitimate children.\(^{48}\) At common law extra-marital children could not inherit from their father or his paternal relatives.

The Intestate Succession Act 81 of 1987, regulates the capacity of extra-marital children to inherit. Section 1 (2) of this Act, changed the position of the common law by stating that an extra-marital child can inherit intestate from any blood relative be it the father or

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\(^{47}\) In plain this means that no woman bears a bastard child.

his relatives or the mother and her relatives. In terms of intestate succession no distinction is made between extra-marital, legitimate or adoptive children.\textsuperscript{49}

Testate succession occurs when the father of the extra-marital child left behind a will to determine his estate. Common law states that a father of an extra-marital child had restrictions placed on him in distributing his estate. The common law position regarding testate succession is as follows: a parent, who had both extra-marital children and legitimate children, could not leave more than one-twelfth of his or her estate to the extra-marital child in his or her will.\textsuperscript{50} The mother of an extra-marital child could however, treat her extra-marital child as if the child were a legitimate child and once again the common law discriminates in terms of equality in the form of gender.

However, in \textit{Green v Fitzgerald}\textsuperscript{51} the position of the common law has been altered and found that both parents may treat their extra-marital child as if the child were a legitimate child. An interesting part of testate succession, is the question of how you interpret the words to ‘my children’ in a will.\textsuperscript{52} ‘To my children’ in a will does it include extra-marital children or does this only refer to legitimate children? If the intention of the testator was not clear a reference in a will to ‘my children’ would, in the case of a mother, include extra-marital children, but not in the case of a father.\textsuperscript{53}

The legislator once again interfered with the common law and changed this rule in section 2D (1) (B) of the Wills Act 7 of 1953. This section provides that for the purpose of interpreting a will, extra-marital birth will be ignored when determining a person’s relationship to the testator or any other person.

\textsuperscript{51} 1914 AD 88
Conclusion of Chapter One

In chapter one, of the assignment the reader was introduced to the concept of unmarried fathers and the fact that they have no automatic rights to their children. The exact common law regulations were stated regarding a father’s right to his extra-marital children. The reader was informed in detail regarding an unmarried father’s rights regarding guardianship, custody, access, adoption, inheritance and his relationship with his extra-marital child. The reader was also introduced to the fact that common law can be discriminatory and therefore in chapter two of the assignment the reader will be informed about the constitutionality of the common law regulations.
CHAPTER TWO

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CHAPTER TWO

The Constitution in relation to the legal position of unmarried fathers.

Introduction to Chapter Two

Chapter one of the dissertation made it clear that unmarried fathers have no rights of guardianship, access and custody to their extra-marital children. This is the common law position that has remained after independence, however, since 1990 Namibia has had a Constitution that promotes equality and therefore one needs to question whether the common law position is in line with the Constitution. The whole of Chapter three of the Namibian Constitution is devoted to the protection of fundamental human rights and freedoms and has been described as expressing values and ideals which are consonant with the most enlightened view of a democratic society existing under law. In chapter two an evaluation will be done on whether the common law principles adhere to the Namibian Constitution.

Article ten of the Namibian Constitution

The difficult question to ask is whether the legal relationship between extra-marital children and their parents is constitutional and should it be considered. The first constitutional issue to discuss is in relation to article 10 of the Namibian constitution which states that:

10 (1) all persons shall be equal before the law
(2) no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status

Article ten is concerned with equality and non-discrimination. This provision reflects in part the Rule of law in that every person is equally subject to the law of the law's administered by the courts.\textsuperscript{56} In the case of \textit{S v Van Wyk}\textsuperscript{57} it was stated that equality before the law includes equal protection by the law. Article 10(2) of the Namibian constitution mentions different forms of discrimination. It is aimed at protecting all persons or entities as well as the state.

\textbf{Non-discrimination on the grounds of sex}

Article 10(2) of the Constitution prohibits discrimination on the basis of sex. Article 1(1) of the International Convention on the Elimination of all forms of Discrimination defines sex discrimination as any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impacting the recognition, enjoyment or exercise on an equal footing, of the human rights and fundamental freedoms of women, irrespective of marital status. Hence, conventional international law seeks to ensure that men and women enjoy identical treatment.\textsuperscript{58} Hence, if this is narrowly interpreted our law should accord equal rights to men and women and therefore, men should not be treated differently than women in respect of their children.

Article ten of the constitution clearly states that all persons in the country shall be treated equally before the law and that no person shall be discriminated upon on the grounds of sex. The crucial concept here is that the common law position allows for mothers and fathers to be treated differently by the law in terms of their extra-marital children. The question therefore is the common law position unconstitutional?

\textsuperscript{56} Naldi G (1995) \textit{Constitutional Rights in Namibia} Juta and co, Ltd p.28.

\textsuperscript{57} 1992 (1) SACR 147 (NMS)

\textsuperscript{58} Naldi G (1995) \textit{Constitutional Rights in Namibia} Juta and co, Ltd p.28.
In the case of \textit{B v S}\textsuperscript{59} the Supreme Court of Appeal in South Africa considered the issue of discrimination in the context of access and concluded that the practical reality is that the father of an extra-marital child is not unfairly discriminated against. The court stated that in reality the father of an extra-marital child is in reality not unfairly discriminated against. The reason why the judge has stated this is largely based on public opinion and events taking place in society. In most cases the father of an extra-marital usually has no interest in the child and does not maintain the child or is not involved in life of the extra-marital child. However, this occurs in most cases and not in all cases and therefore the concept of constitutionality has to be raised to protect fathers who indeed want to know and raise their extra-marital child or children.

The \textit{Muller} case was heard in the Namibian High Court\textsuperscript{60} and the Namibian Supreme Court\textsuperscript{61} and in both instances it was held that it is not unconstitutional for married men who wish to take their wives surnames to follow a more difficult procedure than that used by married women who want to take their husband’s surnames. The reason given for this is that very few men wish to take their wives surname. As both Namibian courts could provide no remedy to Muller, Muller and his wife Engelhard took the matter to the International Human Rights Committee against the Namibian government and the Namibian Supreme Court’s judgment was overturned by the International Human Rights Committee.\textsuperscript{62} Muller made submissions that the Aliens Act No. 1 of 1937 was discriminatory as it allowed women to take their husbands surname without following any procedures while, men had to follow the following procedures in order to obtain their wives surname:

(i) must publish this, in two consecutive editions of the official gazette and two daily newspapers in a prescribed form, an advertisement of his intention and

\textsuperscript{59} 1995 (3) SA 571 (A)
\textsuperscript{60} Muller first filed a complaint to the High Court on 10 July 1997 and on 15 May 1998 His request was dismissed in the High Court with costs.
\textsuperscript{61} Muller’s appeal to the Supreme Court was dismissed with costs on 21 May 1999.
\textsuperscript{62} http://sim.law.uu.nl/SIM/CaseLaw/CCPRease.nsf/f87c3178fofb6defc125684a0036443f/881... 1August 2006 09:00.
reasons to change his surname, and he must pay for these advertisements.

(ii) he must submit a statement to the Administrator general or an officer in the
government service authorized thereto by him.

(iii) the commissioner of Police and the magistrate of the district must furnish
reports about the author

(iv) any objection to the person assuming another surname must be attached to
the magistrates report

(v) the Administrator-General or an officer in the government service authorised
thereto by him, must on the basis of these statements and reports be satisfied
that the author is of good character and that there is sufficient reason for his
assumption of another surname.

(vi) the applicant must pay the prescribed fees and comply with such
requirements as may be prescribed by regulation.

Thus, it is observant that men had to follow a lengthy and costly procedure to gain their
wives surname while women would not follow any procedure to obtain her husbands
surname. The same applies to extra-marital children, the mother automatically gains all
rights to her child while a father has to follow a lengthy and costly procedure to obtain
any rights to his child. The Namibian government in its submissions stated that the Aliens
Act is not discriminatory because it does not prevent a man from obtaining his wife’s
surname it merely specified procedures that a man can follow in order to obtain the
surname. The Namibian government also mentioned that it has been a long-standing
tradition for women in Namibia to take the surname of their husband, while men have not
whished to have the surname of their wife, thus the law is merely reflecting what is
generally accepted in the Namibian society. The International Human Rights Committee
stated that it failed to see why the sex based approach taken by section 9 of the Alien’s
Act may serve the purpose of creating legal security, since the choice of the wife’s
surname can be registered as well as the choice of the husband’s.

63 Muller and Engelhard v State of Namibia
http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/f87c3178fofb6defc125684a0036443f881...
1 August 2006 09:00
In addition to this the committee stated that the principle of equality between men and women, is important and the argument of a long standing tradition cannot be maintained as a general justification for different treatment of men and women. Therefore, like in this case few men wish to take their wife’s surname, many are of the opinion that few fathers wish to be part of their children’s lives. This case proves that in the international community it is clear that equality is important and the fact that only few fathers are committed fathers is no justification for any laws discriminating against fathers who do wish to be part of their children’s lives.

A similar case is the South African case of Hugo. The facts to this case are that in June 1994, South African Nelson Mandela pardoned certain categories of prisoners who had not committed very serious crimes. A blanket of pardon was given to mothers with minor children under the age of 12. Fathers of young children were eligible to apply for pardons on an individual basis. The explanation for the different procedures was that only a minority of South African fathers are actively involved in child care. A male prisoner with a son who was under the age of 12 at the time challenged the pardon in court on the grounds that it was unfair sex discrimination. The constitutional court in this case found that the different pardon procedures were not unconstitutional.

According to the South African court, it is necessary to look at the practical considerations involved, since male prisoners outnumber female prisoners almost fifty fold in South Africa. Thus, releasing the fathers of young children as well as the mothers would have meant the release of a very large number of prisoners. These two examples do indeed not accord equal rights to females and males however, because important of realities differences are made, however, this does not make it clear that it is not unconstitutional to treat single parents differently.

64 Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p.8.
Article 10(2) of the Constitution affords equal rights to all citizens and giving equal rights to single parents would be in the best interest of the child and therefore the common law should be revised. The message that the law is sending to the public is that child care is a mother’s duty and that father’s are incapable of or unsuited to child care. From a children’s right and a gender equality perspective, full sharing of parental rights and responsibilities should operate regardless of whether the child is a legitimate child or an extra-marital child.

Namibia and South Africa have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child. Both conventions require recognition of the common responsibility of parents for the upbringing and development of their children and CEDAW additionally requires that countries who are part of the convention to take measures to ensure that men and women have the same rights and responsibilities as parents, irrespective of their marital status and sex.

The essential content is that a father’s right’s is not completely negated, since an unmarried father may still apply to the court to be granted access. However, the common law rule is not reasonable and it justifiable in an open democracy based on freedom and equality. The view that the mother’s interest justifies the common law rule is neither reasonable nor democratically justifiable.

Non- discrimination on the grounds of marital status

Article 10(2) of the Namibian Constitution states that a person may not be discriminated against because of their marital status.

If the matter is looked at from the perspective of both parents, the present legal position amounts to inequality before the law as well as unfair discrimination on the ground of marital status.\(^{68}\) The discrimination by saying that the law compels the father of an extra-marital child to approach the court if he wants to have access to his child and to convince the court that access will be in the child’s best interests, while the father of a legitimate has an inherent right of access and is therefore, legally, automatically entitled to have access to his child.\(^{69}\) A father of an extra-marital child will also have to apply to the court should he want guardianship or custody of his child and that it is in the best interest of the child while this is a right that is automatically granted to a father of a legitimate child.

The present position also discriminates against married mothers on the grounds of their marital status because the mother of an extra-marital child has sole parental power while the mother of a legitimate child has to share parental power with the child’s father.\(^{70}\) In this way the law favours the mother of an extra-marital child over the mother of a legitimate child purely because she married the child’s father. As shown above that present position distinguishes between a married father and an unmarried father, it discriminates against married mothers and the present position discriminates between the sexes because it favours the mother of an extra-marital over the father of an extra-marital child.

Many who oppose equal rights for unmarried parents point out that single mothers are still the primary caretakers of extra-marital children and they argue that the mothers’ primary responsibility for child care justifies exclusion of the fathers from automatic


\(^{69}\) ibid

\(^{70}\) ibid
rights in respect of the children.\textsuperscript{71} The problem of the application of this primary-caretaker test is that, because it relies heavily on past behaviour, it offers no hope to fathers who have been excluded from their children’s lives.\textsuperscript{72}

Equality in terms of article ten means treating people who are similarly situated the same way. D Hubbard\textsuperscript{73} states that it is not unconstitutional to treat single mothers and fathers differently because it is legally acceptable to take social realities into account for example, the Labour Act provides for maternity leave, but does not give fathers paternity leave. It is indeed true that one should take social realities into account, however, married fathers and unmarried fathers are situated in a the same class as they both want what is best for the child, both parents care for the child, and want an opportunity to have to raise the child and therefore it is unconstitutional to discriminate between the two if one strictly applies what Hubbard\textsuperscript{74} says is the meaning of article ten.

Although Hubbard\textsuperscript{75} states that Acts such as the Labour Act provides for maternity leave but not for paternity leave, it is in my opinion impractical to give paternity leave as men can have several children at regular intervals from different women especially men who may do this in terms of their traditions and thus, some men who are needed in the Namibian workforce will have too much paternity leave while this usually does not happen with women. In addition for health reasons women do not get too many children especially women who have had a caesarian and thus the government can afford women maternity leave.

Therefore the example used by Hubbard\textsuperscript{76} is not concrete because unlike the maternity leave regulation it can be practical to afford both a single mother and a single father equal rights.

\textsuperscript{73} Found in her Article The Proposed Amendments to the Children’s Status Bill
\textsuperscript{74} Hubbard D (2006): \textit{Proposed Amendments to the Children’s Status Bill} Windhoek Legal Assistance Centre p.7.
\textsuperscript{75} Hubbard D (2006): \textit{Proposed Amendments to the Children’s Status Bill} Legal Assistance Centre p.7.
\textsuperscript{76} Hubbard D (2006): \textit{Proposed Amendments to the Children’s Status Bill} Windhoek Legal Assistance Centre p. 7.
A father of an extra-marital child has no inherent right to access, but such a father can be granted access if the court considers it to be in the best interest of the child. This approach places all fathers of extra-marital children in the same position.\textsuperscript{77}

The Namibian constitution includes marital status as prohibited ground of discrimination making it even more likely that fathers of extra-marital children are discriminated against if access to the child is denied. If the chapter in the constitution relation to fundamental human rights apply to the common law as between private individuals, then a denial to an inherent right to access maybe unconstitutional.\textsuperscript{78} It is self-contradictory to deny a right of access to father’s on the basis of a generalised assumption of irresponsibility where the very denial may itself reinforce any such irresponsibility.\textsuperscript{79}

Non-discrimination on the grounds of social origin

Article 10(2) of the Namibian Constitution prohibits discrimination on the grounds of social origin. There is support for the view that social origin includes illegitimacy.\textsuperscript{80} According to the technical committee on fundamental rights it was stated that social origin is deemed to encompass birth, class and status.\textsuperscript{81}

Article 9(3) of the United Nations Convention on the Rights of the Child states that parties to this convention shall respect the rights 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, unless this would not be in the best interest of the child. A further problem

\begin{footnotesize}
\end{footnotesize}
regarding social origin is the term that children born out of wedlock, are referred to as illegitimate children.

The legal category of illegitimacy remains, and this means that children born out of wedlock will be discriminated against because the stigma related to illegitimacy. It is in the interest of the child to know its biological father, since this contributes to the development of the child’s self-worth and origin.

**Article 15 of the Namibian Constitution**

Article 15 of the Namibian Constitution deals with children’s rights and states the following:

“15(1) Children shall have the right from birth to a name, the right to require a nationality and, subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by both parents.

This article states that if possible a child has a right to be cared for by both its parents and thus have the right to have a relationship with both its parents. When dealing with issue of constitutionality one must always bear in mind that in all cases the best interest of the child should be the most crucial factor. The best interest of the child is not met by separate rules in respect of parental power over extra-marital child.

Differentiation between the child’s parents amounts to unfair discrimination against the extra-marital child on the ground of social origin and birth because in the case of an
extra-marital child, the law, in effect, decides, in advance, that the child is not entitled to a legal relationship with both parents.\textsuperscript{82}

If the best interest of the child needs to be taken into account then surely it is in the best interest of the child that such a child has a right not only to maternal care but also paternal care.

Article 15 of the Constitution states that if it is possible a child has the right to be cared for by both its parents. However, is the law making it possible for a child to have this right to be cared for by both its parents? The law gives mother automatic rights of guardianship, access and custody thus it is from birth possible for a child to be cared for by their mother. The problem is that not in all cases is a father allowed to have any rights to his extra-marital children. Under our law he has no right to his child unless he applies to the court for any rights.

However, court procedures are lengthy and costly and therefore not all fathers can follow this route. Secondly, mothers in many instances have the discretion to choose whether the father may see the child or not and may selfishly deny a father the right to his child and therefore, ultimately the child cannot be cared for by both parents.

Naldi\textsuperscript{83} states that there is not clarity on whether the rights of children born out of wedlock are protected by the Namibian Constitution. The Constitution in general and the section on equality and children’s rights in particular do not expressly apply to extra-marital children.

Common International law holds that extra-marital children should be placed legally and socially in a position akin to that of a legitimate child and that the absence of an appropriate legal regime reflecting the extra-marital child’s natural family ties amounted

\textsuperscript{83} Naldi G (1995) \textit{Constitutional Rights in Namibia} Juta and co, Ltd p.79.
to a failure to respect family life.\textsuperscript{84} The Namibian Constitution acknowledges the dissolution of a marriage in article 14(1) however, it fails to specify provisions for the protection of the child in the case of the dissolution of a marriage.

If the constitutional section of equality and children’s rights is given a wide interpretation then one can state that discrimination against extra-marital children is unconstitutional.

Article 2(1) of the Convention on the Rights of the Child 1989 provides that:

“The state Parties to the Present convention shall respect and ensure the rights set forth in this convention to such child within their jurisdiction without discrimination of any kind, irrespective of the Child’s or his or her parents or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status”

Article 2(2) of the Convention on the Rights of the Child 1989 provides that:

“State Parties shall take all the appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status activities, expressed opinions or beliefs of the child’s parents, legal guardians or family members.’’

The Republic of Namibia has signed the Convention on the Rights of a Child 1989, on the 26\textsuperscript{th} of September 1990 and has ratified the Convention on the 30\textsuperscript{th} of September 1990. In principle Namibia should be implementing the provision of the Convention into the Laws of Namibia. Article 2(1) and 2(2) provide that a child may not discriminated against because of their status and the places an obligation on the state to ensure that children are not discriminated against because of their status.

Currently the common law does discriminate against children born out of wedlock in numerous circumstances, for example a child born out of wedlock may not inherit interstate from his or her biological father.

\textsuperscript{84} Naldi G (1995) \textit{Constitutional Rights in Namibia} Juta and co, Ltd p.79.
Much has been stated about taking social realities into account. One can also at this point ask why are there disputes between unmarried parents regarding the child that they have together. They both share the child so why can they not raise the child together and grant the child the right to be cared for by both parents even if they are living apart or no longer in a relationship.

The social reality is that in many instances the single mother and father end their relationship and the trauma resulting from a break up causes the parents to longer understand each other and affects the child negatively. In many instances the father decides to no longer be part of the child’s life and disappears and in other instances the mother decides that the father may no longer see his child. A petitioner\textsuperscript{85} on the internet has stated that if unmarried parents split up the mother is automatically given full custody and rights over the child if the father is involved in the child’s life

The petitioners\textsuperscript{86} say that the law allows the mother to use the child as a weapon against the father by keeping the child away from the father and subjects the father to emotional torture. The law states that an aggrieved father can go to court to settle the matter however, as stated before court procedure can only be afforded by few and even if the father can afford to take the matter to court, the procedure used in court can be very long and by the time the court has reached a decision valuable time with child and special moments in the child’s life has already been missed.

\\textsuperscript{32.} The petition\textsuperscript{87} on the internet states that the law should take into account if the father supported the child since birth and should not disregard the support given to the child by its paternal grandparents.

\textsuperscript{86} ibid
\textsuperscript{87} ibid
Petitioners\textsuperscript{88} painted the picture as follows:

“Sure you can spend thousands of dollars to hire a lawyer to go to court and get the father and grandparents some rights. Then six to twelve months down the road, you can see the child more. In the meantime, you are suffering in the grief of losing contact with that precious child. This child could even be with a mother you do not feel can care for the child without help. The tragedy is that the child is the one being deprived of more loving family to be involved in their life.”

Clearly after reading this one can see the law protects the mother but often this protection can be manipulated by the mother and therefore the common law will have to be revised.

This piece of information also indicates that the procedure of a father having to go to court in order to have rights over his child is not adequate and cannot reach the urgency that is required in such cases. The right to family life has been understood to include the right to recognition of the legal relationship between the extra-marital child and his or her parents.

**Conclusion of chapter Two**

The aim of chapter two was to assess whether the common law rules which dictate what relationship a father has with his extra-marital child is constitutional? There seems to be no clear cut answer to this question. The fact is that article 10 of our constitution clearly states that all should be treated equally and no one may be discriminated on the grounds of sex and marital status.

It is clear that the common law position does indeed treat mother and fathers differently and additionally has different rules for married fathers and unmarried fathers. Thus, discrimination is indeed made by the law and the question remains on whether this discrimination should be allowed or not. Social realities do indeed need to be taken into account. It is true that in many instances many unmarried fathers choose not to be part of


Accessed on 26 February 2006
their children’s lives however, the law cannot because of this allow a committed father not to have any rights to his child.

The law can not discriminate on the grounds of sex and marital status merely because there are men who do not care for there children this is not justifiable. In addition to this Article 15 of the Namibian Constitution awards a child the right to be cared for by both parents if possible therefore if a father wishes to be part of his child’s life the law should assist him in granting this right to his child. As seen from the Muller case even if few men wish to take their wife’s surname the law discriminates on this ground. Thus, even if only few fathers wish to have rights over their children the law cannot discriminate over them as they are protected by the Constitution and equality clauses in numerous international agreements.

CHAPTER THREE

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CHAPTER THREE

The Proposed Children’s Status Bill
Introduction to Chapter Three

Namibian legislators like South Africa have also seen the need to introduce new laws regarding the position of single parents in our law. The Children’s Status Bill has been introduced but due to objects by parliamentarians the bill is still being revised and not promulgated as yet. However, in the next part of this dissertation the bill will be discussed in order to assess how common law will possibly change and to assess which rules in the Bill could be to the best interest of the extra-marital child.

Guardianship, custody and access in terms of the Proposed Children’s Status Bill

Two different Bills were tabled in Parliament. In October 2004 the Parliamentary Standing Committee on Human Resources, Social and Community Development tabled the first Bill in the National Assembly and then a second Committee Report was tabled in February 2005. Hubbard\(^89\) explains that the two Bills have conflicting views and the differences illustrated by Hubbard\(^90\) are as follows:

Regarding custody, the recommendations from the 2004 report states that custody of a child born outside of marriage would automatically vest in the mother as a starting point because only the mother is certain to be present at the child’s birth, a father will be able to apply to the court for custody of the child at any time.

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\(^89\) Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p. 7.
\(^90\) Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p. 7.
The court’s decision would be guided solely by the best interest of the child. According to the 2005 report, the mother and father have equal rights to custody; in addition to this either parent can approach the court for sole custody.

In terms of Guardianship the 2004 report states that sole guardianship would generally follow custody, but the parent without guardianship would have an opportunity to apply to a children’s court for guardianship powers. The best interest of the child is the guiding factor at all times. The 2005 report states that both parents would automatically have equal guardianship powers. This has the effect that both parents would be able to act independently on most matters. The ability of both parents being able to act independently on matter regarding the child could prove to be problematic in cases where the parents disagree on a similar matter and legislators will have to find a solution for such a problem. In terms of access to the extra-marital child, the 2004 report states that children born outside of marriage would have a right to maintain contact with both parents. A father would have an automatic right to reasonable access to the child unless a court decides that such access would be contrary to the child’s best interest. The 2005 report simply states that a non-custodian parent has automatic right to access. Thus it is clear that the two proposed Children’s Status Bills differ however both have aspects to take note of.

The 2004 report is very similar to the common law as in terms of custody and guardianship; the mother still has all the parental authority unless the unmarried father applies to the court for assistance. However, in many instances court procedures are very expensive and are lengthy and thus, many fathers cannot afford to take their grievances to court and therefore, the unmarried father is still being prejudiced. Thus, if the 2004 report is implemented the common law will remain the only aspect that will
substantially change if the fact that under this report it will be clear that a father would be entitled to reasonable access.

Hubbard\textsuperscript{91} is also of the opinion that the law needs to make special arrangements for unmarried couples that are cohabiting. Hubbard\textsuperscript{92} proposes that cohabiting couples should be allowed, to make contractual arrangements which place them in the same position as parents who are married for the duration of the cohabitation and should the cohabitation end then, the situation should revert to that of other single parents unless the court orders otherwise. The suggestion made by Hubbard\textsuperscript{93} regarding special arrangements made by cohabiting parents can also be successfully applied in the situation of single parents not cohabiting or married. Single parents can before the birth make arrangements regarding the child in a sensible way and this will prevent future arguments and a situation where a mother may for the wrong reason prevent a father from seeing his child.

**Adoption in terms of the Proposed Children’s Status Bill**

The proposed Children’s Status Bill\textsuperscript{94} deals in addition with concept of adoption and the removal of an extra-marital child from Namibia. The Bill states that adoption requires the consent of both parents except in cases where the other parent cannot be located or is unreasonably withholding his or her consent. The Bill in addition requires the consent of both parents if the child is being removed from the country for more than one year. The rational for this is that if the child is removed from the country for more than a year it would prevent the other party from having a meaningful contact with the child. Hubbard\textsuperscript{95} mentions that the following are arguments against requiring the consent of both parents should the child be removed from the country for more than a year:

\textsuperscript{91} Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p. 7.  
\textsuperscript{92} Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p.7.  
\textsuperscript{93} Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p.7.  
\textsuperscript{94} The Bill that was tabled second will be discussed in this Chapter as it is the most recent.  
\textsuperscript{95} Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p.14.
(a) This may prevent the parent who was caring for the child from accepting a job or study opportunity in another country, which if the opportunity was granted could have benefited both the parent and the child.

(b) The requirement of gaining both parents consent could prove difficult to enforce as the parent who wanted to leave Namibia could pretend to be going abroad for less than a year and then simply fail to come back. Enforcement in such a case would be difficult because parent and child would already be outside the jurisdiction of the Namibian Courts.

(c) If one parent is not in regular contact with the child, it might be difficult for the parent caring for the child to find this other parent. However, in such cases, a rule can be inserted which states that if the parent whose consent is required cannot be located or unreasonably holds consent, then that parent’s consent will not be needed.

If the requirement of consent from both parents is needed to remove the child from the country for more than a year is made permanent in the Bill, Hubbard\textsuperscript{96} proposes that certain changes will have to be made. Hubbard\textsuperscript{97} suggests that the following should be added to the requirement that the consent of both parents is needed if an extra-marital child is removed from the country for more than a year:

38.

(a) The consent of a parent will not be needed if the parent cannot be located through any of the prescribed means of notice within a prescribed period;

(b) The parent whose consent is required is not competent to give consent due to a mental condition rendering him or her incapable of appreciating the nature and effect of the consent;

(c) Consent will not be required if sole guardianship has been awarded to the other parent or to another person by a competent court;


\textsuperscript{97} ibid
(d) Consent will also not be required from a parent who has not seen the child for more than a year and was not prevented from doing so;

(e) Consent will further not be required if the court finds that the parent in question has seriously or persistently abused, ill-treated or neglected the child; and

(f) Consent to an adoption which will be in the interests of a child may be withheld by a non-custodian parent only where that parent is willing, fit and able to assume custody of the child himself or herself.

The Concept of Rape in terms of extra-marital Children

The practical reality in society is that certain children are conceived as a result of rape. The Children’s Status Bill will indeed not award any parental rights to a rapist. Although there is a need to award unmarried fathers more automatic rights to their children but in no way should a rapist be able to benefit from his crime. It would be impractical to award right to rapists, as a convicted rapist will be in prison for most of the child’s beginning years and it would be uncomfortable for a mother to have contact with a rapist after he is released from prison.

Regarding rapist’s suggestions can be made that after a convicted rapist is released from prison he should be given a restraining order which states that he is not allowed to come near or make contact with the child’s mother or the child. Firstly, because a person released from prison can be unstable and is capable of committing crimes again especially when they are depressed or have anger and secondly many men will be curious to know is the child alive or how the child looks and thus, the rapist may try to make contact with the mother who may still be afraid of the rapist. The only exception to such a

98 The Second Bill that was issued states that rights will not be awarded to a parent that raped the other parent.

99 Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p. 16.
restraining order can be if the mother of the child has forgiven the rapist and she decides that he can have access to their child.

It is unconceivable that a rapist who has forced a pregnancy on a woman through a brutal act of forced sex should be able to have any say in whether or not she is able to give the child who is the fruit of that rape up for adoption\textsuperscript{100}. In addition the Bill should include that a rapist or his near family should not be allowed to adopt the child because a child could never be completely safe being raised by a rapist.

If the family of a rapist adopts the child they could out of love for the rapist\textsuperscript{101} allow him to see the child and spend time with the child and this would allow the rapist to benefit from his crime. Hubbard\textsuperscript{102} explains that the provision regarding rape in the Bill should be limited to male perpetrators because it will be very rare for a pregnancy to result from actions by a female rapist and in such rare event, there may be a need for the female rapist to care for the child for a time for the purposes of breastfeeding. The opposing argument to that of Hubbard is for the purposes of equality as mentioned in article 10 of the constitution the bill should deal with the rare instances where a female has raped a man. A female rapist if convicted should be treated equally to what treatment men receive.

She should not have any rights to her child and the child should be removed from her authority. Although it is best to breastfeed a baby there, is a lot of evidence that proves that babies who are bottle fed from birth can survive and be healthy babies. Many women due to illness and infections are not allowed to breastfeed and opt to bottle feed the baby and the baby can be healthy thus, in such instances the baby should immediately be taken away from the mother as should be allowed to benefit from her crime merely because she is women. In addition to this, a father who was raped by a woman and a child is

\textsuperscript{100} Hubbard D (2006): \textit{Proposed Amendments to the Children’s Status Bill} Windhoek Legal Assistance Centre p. 16.

\textsuperscript{101} Family members are often more forgiving and although the rapist has committed the crime they still love the person as they raised or grew up with the rapist. Therefore, the family of the rapist can prove not to have the best interest of the child at heart.

\textsuperscript{102} Hubbard D (2006): \textit{Proposed Amendments to the Children’s Status Bill} Windhoek Legal Assistance Centre p. 16.
conceived may be awarded to option to adopt the child or should be allowed to force the woman rapist to go for an abortion should he not want the child.

This option is awarded to woman when they are raped and should be awarded to men when they are raped. The underlying aim of the law would be to protect women who are victims of such circumstances by allowing the mother to veto parental rights for the unmarried father. A further question regarding rape is should a rapist be required to pay maintenance. The bill does not address this issue and it should be addressed as that child which is conceived as a result of rape needs food, clothing and shelter. A rapist like any other father should be liable to pay maintenance as a sign of responsibility to their child.

The rapist even, if he pays maintenance should still have no rights to the child and the maintenance will merely severe as a tool to remedy the situation in a slight way. Additionally the Bill should include that if a child is conceived as a result of rape such a child shall have no duty to maintain the parent or no duty to maintain any of the parent’s relatives. Even if fathers are given equal rights to custody on paper, it is not likely in the practical reality that many men will take such an opportunity. However, there are fathers who want to take the opportunity and because of documents such as the constitution should be awarded the opportunity.

Conclusion of Chapter Three
Chapter three dealt with aspects that are part of the Children’s Status Bill. The Bill although not enacted makes provisions that could possibly benefit the unmarried father if enacted. In the course of the chapter reference was made to two reports that was tabled in the National Assembly and only time will tell which of the two reports will be enacted. In the course of the chapter it is importance to note that important decisions regarding the child could be made before the child’s birth such as arrangements should be made

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103 Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p. 16.
regarding what rights each parent will have and if a father can prove his involvement he should be given automatic rights to the child unless the child was conceived as a result of rape. Many female activists, groups in society and organization’s oppose equal rights for unmarried fathers and this may play an active role in determining what the outcome of the Bill will be. Public policy may be a very unruly horse, but once you get your stride on a constitutional saddle, you have an idea of where it will carry you.\textsuperscript{105}

\textbf{CHAPTER FOUR}

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CHAPTER FOUR

The legal position of unmarried father’s in England, South Africa and Canada

Introduction to chapter Four
Throughout the Western world a trend to improve the legal position of the unmarried father is noticeable. In Chapter four the legal position of an unmarried father in Canada, South and England will be evaluated. In Canada an unmarried father has full parental responsibility and in England the position is the same as in Namibia. In South Africa a Children’s Act has been introduced to give rights to fathers especially those that are cohabitating with the unmarried mother.

**The legal position of an unmarried father in Canada**

In Canada, a child’s father, even if he is not married to the child’s mother has the same rights and responsibilities towards a child as does a married father.\(^{106}\) Most Canadian provinces declare that unmarried fathers are joint guardians with the mother.\(^{107}\) There are a number of variations on this, with provinces such as Alberta requiring the father to have cohabited with the mother for at least one year prior to the birth, and others declaring that joint guardianship only exist while the parents cohabit or reach agreement.\(^{108}\) Canadian Law is remarkably different to other countries of the world such as Namibia, USA and England.

As far as guardianship is concerned most provinces in Canada state that guardianship is provided to both the unmarried mother and unmarried father if the mother and father have lived together for a year before the birth of the child. For example in the province of British Colombia they have a Family Relations Act that under section 27 states that:\(^{109}\)

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27(1) Subject to section 28, whether or not married to each other and for so long as they live together, the mother and father of a child are joint guardians unless a tribunal of competent jurisdiction otherwise orders.

27(5) if the father and mother of a child
   (a) have not been married to each other during the life of the child or 10 months before the child’s birth,
   (b) are living separate and apart, and
   (c) do not share joint guardianship under this section or under the order of a tribunal of competent jurisdiction, the mother is sole guardian unless a tribunal of competent jurisdiction otherwise orders.

From the section it is apparent that in most parts of Canada provision is made for unmarried couples that are living together for more than a year. Unlike Namibian law Canadian law allows an unmarried father automatic rights to guardianship should he prove that he and the child’s mother are in a committed relationship. In regard to access the law makes it clear that an unmarried father has automatic access to his child unless a competent court grants otherwise (for example in cases of rape an unmarried father will have so access to his child). Canadian law like Namibian law states that if a mother refuses the father any rights to his child then the father may make an application to the court to gain rights to his child.\textsuperscript{110}

Canadian law has shown an example of how the law should protect unmarried fathers especially in cases where the unmarried father has proved his commitment and that in cases where the mother and the father are living together and proves that Namibian law should be revised especially concerned unmarried fathers who is living with the unmarried mother.

The legal position of unmarried fathers in South Africa

South Africa has recently passed the Children’s Act that states how the law deals with single parents. In South Africa the common law position which is the same as in Namibia, has been altered by this Children’s Act. According to the Children’s Act the biological mother of an extra-marital child has full parental responsibilities and rights in respect of the child, but the father has to prove his commitment first. Although a father has to prove his commitment first, the law has changed as it provides a committed father the chance of gaining rights to his child should he maintain this commitment.

A father according to Hubbard\textsuperscript{111} in terms of the South African Children’s Act can acquire parental rights as a matter of right only if he: (a) acknowledged paternity (b) contributed to the child’s upbringing and (c) contributed towards the child’s maintenance over a reasonable time period. These conditions will allow committed fathers be play an active role in the child’s life and will disallow uninterested fathers to be part of their children’s lives. This is an example of how Namibia can alter the common law position. Hubbard\textsuperscript{112} additionally states that should a father not meet the above-stated requirements, then his only option is to enter into an agreement with the mother specifying what rights and responsibilities he will have. If this is not successful then the father’s last option is to apply to the court to gain any rights over his child.

According to the Legal Assistance Centre\textsuperscript{113} a father under South African Law is entitled to parental rights if he was living with the mother in a “permanent life-partnership” when the child was born. This changes the common law position, in the sense that a father who is unmarried is awarded rights to his child if he stays with the child’s mother. Common law did not take into account whether the mother and the father lived together at the time of the birth of the child. The report by the Legal Assistance Centre\textsuperscript{114} goes on to say that in the absence of marriage or cohabitation the father can acquire parental rights as a

\textsuperscript{111} Hubbard D (2006): Proposed Amendments to the Children’s Status Bill Windhoek Legal Assistance Centre p. 8.
\textsuperscript{112} ibid
\textsuperscript{113} Legal Assistance Centre (2006) Unmarried Fathers in Namibia Windhoek
matter of right only if he has acknowledged paternity, contributed to the child’s upbringing and contributed towards the child’s maintenance over a reasonable time period. If the father does not comply with the above stated conditions his only other option is to enter into an agreement with the child’s mother specifying what right each party will have. The Legal Assistance Centre states that if such an agreement is entered into by single parents, then such an agreement must be made into an order of court or registered with the family advocate to see if it is in the best interest of the child. This position in South African under the new Children’s Act is very similar to the law regarding unmarried fathers in the USA. In the USA unmarried fathers have no standing unless they have proved their commitment by financial and health care provisions during the pregnancy and afterwards and registered a Declaration of Paternity.

**The legal position of an unmarried father in England**

In England and in Wales, the law governing relationships between parents and children has been slow to recognize the parental status of unmarried fathers. Unmarried fathers similarly to unmarried fathers in Namibian law are treated different to married fathers.

In England the position was that the father has authority over his legitimate children alone and it was not until the Guardianship Act of 1973 that mothers had authority over children which they could exercise independently. According to English common law, children born outside of marriage had no legally recognised guardians, and neither the mother nor the father had a right to custody. The position changed by the late 19th century, when the courts developed a preference for giving custody of extra-marital children to the mother of the extra-marital child.

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In England the Children Act of 1989 introduced the concept of parental responsibility, which defines as ‘all the rights, duties, powers and responsibilities and authority which by law a parent of a child has in relation to the child and his property’. The Act like Namibian common law confers parental responsibility automatically on all mothers and on married fathers. The Act also introduced a new procedure for an unmarried father to acquire parental responsibility by making an agreement with the mother, which must be properly witnessed and registered with the court. This procedure could prove to be valuable in Namibian law and thus such lessons can be learned from English Law. In order to create certainty regarding the child and determining what is in the best interest of the child, the unmarried mother and father can enter into an agreement with each other stating what rights each will have towards the child. This will prevent conflict and will prevent parties from having to follow lengthy and expensive court procedures.

The Children Act of 1989 rest on the belief that children are generally best looked after within the family, with both parents playing a full part and without resort to legal proceedings. Indeed it is for the very reason that children are best looked after being cared by both parents that legislators should provide that both parents have equal rights to their child.

Yes, it is true that having a family is the best way for the child, however, not all unmarried parents get married but the child will still be in a better position if loved and cared for by both parents.

The Children Act in England of 1989 stated that all married fathers and all mothers have parental responsibility for their children, therefore, the law in England like in Namibia has failed to accord equal footing for married and unmarried fathers. The Children Act does however, have difference to the Namibian Common Law position. Under the

117 ibid
118 ibid
119 ibid
English Children Act a father may acquire parental responsibility by entering into an agreement with the mother, which must be properly witnessed and registered with the court. In cases where no agreement can be reached by the unmarried mother and father, then, the father may apply to the court for a parental responsibility order. The majority of such applications are successful.\textsuperscript{120} Similar to the Namibian position, courts in England will consider the degree of commitment which the father has shown towards the child, the degree of attachment between the father and the child and the reasons for applying for the order when a father makes an application to gain parental responsibility over his child.

The English law changed on 1 December 2003, to make it easier for unmarried fathers to get equal parental responsibility. All that needs to be done is for both parents to register the birth of the baby together. Before this change took place, you could only gain parental responsibility by later marrying the child’s mother, signing as official agreement with the mother or getting a court order. Parental responsibility is automatic for married parents, even if divorced and also for unmarried mothers. Thus, an unmarried father is treated differently in England to a married father.


In England should an unmarried father wish to make an application to court he can do so in Family proceedings Courts which is magistrates courts. In Namibia a father has to apply to the high court to gain parental responsibility over his child.

An unmarried mother can on the other hand approach a lower court, namely the magistrate’s court should she wish to claim maintenance from the father. The family
justice system in England and Wales gives unmarried fathers a raw deal and does not give enough consideration to preserving the relationship between the father and the child.\textsuperscript{121} The Child Support Act in the UK aims to ensure that absent parents pay toward the support of their children. The payment is inversely proportional to the time that the child spends with the so-called absent parent. Many judgments made by the courts have been criticised for not allowing fathers to be as involved as they would like to be or at all, and the courts for failing to enforce their orders.

**Recommendations for the future regarding the rights of unmarried fathers.**

It is clear that the concept of the rights and responsibilities of unmarried fathers needs to be addressed. As seen above many countries in the world are recognizing that law reform needs to be done. Countries such as Canada has granted equal parental responsibilities and countries such as England and South Africa has recently made legislation to award fathers more rights to their extra-marital children. The Namibian Constitution in Article 10 requires that citizens of Namibia should be accorded equal rights, therefore, Namibian legislators will have to bear this in mind not only to adhere to the principles of the Constitution but be in line with international standards.

The very significant proportions of births outside marriage which are registered by both parents living at the same address seems to reflect the growing acceptance of long-term cohabitation as a preliminary or alternative to marriage. One can understand the logic behind what the common law tried to achieve, however, modern lifestyles has changed over the years and therefore, law needs to be adjusted to suite modern lifestyles.\textsuperscript{122}

\textsuperscript{121} Fathers’ rights movement in the UK (2006) Rights for unmarried Fathers File://A:\Fathers’rights

Cohabitation is becoming a popular trend and such relationships can be just as stable as marriages and therefore such parties should be treated similarly to the position of married parents. The law can in addition make provisions for what should happen if the parties no longer cohabitate just like the law makes provisions for divorced parents.

The most far-reaching alternative for the future would be to change the law to create an automatic link between biological parentage and parental responsibility. This would allow all unmarried fathers full rights to their children regardless of what their marital status would be. There should still be a provision for challenge by the mother, and perhaps others, on the grounds that a man claiming parental responsibility was not in fact the father of the child concerned.\(^\text{123}\) Should legislation allow equal rights to both unmarried mother and father, the legislators should include a provision that will allow a mother to override the father’s automatic rights, even when the father’s paternity is not in dispute. This will allow the law to give committed fathers the rights they deserve and disallow uncommitted fathers to have any rights regarding the child. Such a provision will disallow a rapist any rights to the child he conceived under forced circumstances.

An additional approach would be to limit the automatic conferment of parental responsibility to a defined category or categories of unmarried fathers, retaining the existing provisions for court orders and parental responsibility agreements for those who did not qualify automatically.\(^\text{124}\) The most obvious category would be those unmarried fathers who sign the birth register jointly with the mother. The birth certificate would provide proof of the father’s status. In addition, the joint registration could probably be assumed to imply the mother’s agreement, and to demonstrate an appropriate degree of commitment to the child.\(^\text{125}\)


From the research done above it is clear that unmarried committed fathers should be granted automatic access to their children. Unmarried fathers can be granted rights to their children but one acknowledges that this should be subject to safeguards to protect unmarried mothers from violent fathers, rapists and uncommitted fathers. Rights to full parental responsibility should be limited to certain categories of unmarried fathers such as fathers who have shown their commitment, fathers who was living with the mother at the time of the child’s birth, a father who registers the child’s birth jointly with the mother etc. Parental responsibility should not be accorded to all unmarried fathers but only to fathers who has shown some form of commitment and interest to the child needs. Unmarried fathers such as rapist and abusers should not be accorded rights to their children as this will not be in the best interest of the child.

The law can accord parental rights to categories of unmarried fathers but should also make provisions that a mother’s objection should override the parental right of the father. For instance, if a father has parental rights because he lived with the child’s mother at the time of the birth of the child and entered into an agreement with the mother, and later the mother has evidence that he has become an abuser, then her objections should override his parental responsibility.

In conclusion one can state that the situation regarding unmarried fathers is by no means settled. More and more unmarried fathers are demanding rights to their children and thus legislators will have to revise the Namibian common law position to adhere to international standards and to act in accordance with the constitution. There is absolutely no doubt that it is in the child’s best interest be cared for by a committed mother and a committed father. The proposed Children’s Status Bill if implemented may grant a father more rights towards his child. More importantly the proposed Children’s Status bill should additionally make provisions for Family courts.
These should be specialised courts that deal with matters regarding rights to a child and maintenance. This will also allow that applications to get access to the child will be dealt with faster and more efficiently.

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