

**THE IMPACT OF THE DEATH BENEFITS AFTER
RETIREMENT TO MINOR CHILDREN UNDER THE
NAMIBIAN GOVERNMENT INSTITUTION PENSION FUND**

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DECLARATION

“I, Ndaruka Whitney Chaka, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL B is my own original work and that i have not used any other sources than those listed in the bibliography and quoted in the reference.”

Signature:

Date:

SUPERVISOR'S CERTIFICATE

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

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Date:

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ABSTRACT

How do the rules governing the distribution of death benefits after retirement affect the minor dependants of the deceased member in terms of their right to maintenance and their best interests?

In order to answer the preceding question it is essential to present the purpose of the study, which is to evaluate the extent of the exercise and protection of a child's right to maintenance and their best interests in terms of the pension benefits of a deceased retired member.

The paper also looks at the distribution of pension benefits and its impacts on minor dependants of a deceased retired member. It further looks at the parental responsibilities and their duties. Furthermore, it looks at national, regional and international framework for children's rights and the provisions for a child's best interests.

The research methodology used to conduct this paper was library or desktop method.

The provision embodied in rule 9.1.(3)(b) requires amendment which would also include minor dependants of a deceased retired member to benefit maintenance from the monthly emolument which the surviving spouse is the sole beneficiary under the current Act Parents have the legal duty to maintain their minor children whether dead or alive. When a parent dies, maintenance order can be taken against the person's estate if he or she left any.

LIST OF ABBRIVIATIONS

1. ACRWC – African Charter on the Rights and Welfare of the Child
2. GIPF – Government Institutions Pension Fund
3. HRC – Human Rights Committee
4. ICCPR – International Covenant on Civil and Political Rights
5. ICESCR – International Covenant on Economics Social and Cultural Rights
6. NPA for OVC – National Plan Action for Orphans and Vulnerable Children
7. UNCRC – United Nations Convention on the Rights of the Child

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CHAPTER 1

ORIENTATION TO THE STUDY

1.1 Introduction

This chapter provides an orientation to the study by reflecting on the following: brief background to the study, the problem statement, the aim of the study, the research questions, purpose of the study, the significance of the study, limitation of the study, research methodology and, finally, an outline of the study programme - division of chapters.

1.2 Background to the study

The Government Institution Pension Fund (GIPF) is a pension fund established on 1 October 1989 by the Post Namibian Government to provide retirement and auxiliary benefits¹ for employees in the service of the Namibian Government as well as Institution established by an Act of parliament.²

The death benefit is one of the major benefits that the GIPF provides. This benefit entails the payment of money to dependants and nominees of a member who passes away while in the employment of the government.³

There are two types of death benefits, death in service prior to normal retirement age and death benefits after retirement. In terms of Rule 9.1 (3) of the Fund Act⁴, on the death of a pensioner his or her pension shall cease and the following shall then be payable:

A pension to his or her qualifying spouse, commencing on the pensioner's death or 60 months after the commencement of the pensioner's pension, whichever occurs last, equal to 50% of the pension payable immediately prior to the commencement of the pension to the qualifying spouse. It is a proviso that where the pensioner entered into a recognized marital union with such qualifying spouse after the date of the pensioner's retirement, the pension payable to the qualifying spouse shall be

¹ In relation to a fund, means any amount payable to a member or beneficiary in terms of the rules of that fund.

² <http://www.gipf.com.na/about/index.php?page> accessed on Wednesday 6 April 2011 at 13:12.

³ Official Newsletter of the Government Institutions Pension Fund. January 2004, p4.

⁴ The Pension Fund Act No. 24 of 1956.

reduced by a percentage thereof, as determined by the trustees, acting on the advice of the actuary, for each year by which the age of the pensioner exceeds the age of the qualifying spouse. Death in service prior retirement, subject to the provisions in section 37 C of the Act, Rule 9.1, 9.2, and 9.3 the benefits set out below shall be payable on the death of a member while in service prior to normal retirement age or while in receipt of a disability in terms of Rule 6. A lump sum equal to twice the member's pensionable emoluments; plus a pension to his or her qualifying spouse equal to 40% of the member's pension immediately before his or her death, provided that the trustee manage to locate the spouse. Furthermore, a pension in respect of the qualifying children.⁵

1.3 Statement of the problem

Parents have the legal duty to maintain and support their minor children during their life time and even after death.⁶ However, the current legislation on the death benefits of a retired member is that if a member gets married after retirement and dies thereafter, the pension payable to the spouse shall be reduced by a percentage thereof, as determined by the Trustees, acting on the advice of the Actuary, for each year by which the age of the pensioner exceeds the age of the spouse.⁷ In the event the deceased member is survived by a spouse and dependants mainly minor children, it is likely that the dependant's interest will be jeopardized especially if the minors concerned are not the surviving spouse's offspring or issues with the deceased member.

1.4 Main research question

Does the distribution of pension benefits after death of a retired member as provided for in Rule 9.1 (3) (b) meant to meet the best interests of minor dependants?

⁵ Available at <http://www.gipf.com.na/about/index.php?page> accessed on Wednesday 6 April 2011 at 13:12.

⁶ Carelse v Estate De Vries (1906) 23 SC 532.

⁷ Rule 9.1 (3) (b).

1.5 Sub-research questions

1. Does the current law on death benefits after retirement terminate a dependant's right to support and maintenance upon the member's death?
2. Is the current legislation on distribution of pension benefits after retirement in line with the child's best interests as provided in the constitution⁸?

1.6 Purpose of the Study

In order to answer the preceding question it is essential to present the purpose of the study, which is to evaluate the extent of the exercise and protection of a child's best interest in terms of the pension benefits of a deceased retired member.

1.7 Rationale for the study

The preamble of the maintenance Act⁹ has provision for the payment of maintenance; to provide for the holding maintenance enquiries and the enforcement of maintenance orders. Furthermore, the Children's Status Act¹⁰ preamble provides for children born in or out of marriage to be treated equally; to provide for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage; to provide for matters which are in the best interest of all children; and to provide for matters connected thereto. With this being said, this paper was conducted to evaluate whether the pension death benefits of a retired member are in conformity with the provisions of maintenance legislation and the best interests of the deceased member's minor children or dependants.

⁸ Article 15(1) of the Namibian Constitution.

⁹ Act No. 9, of 2003.

¹⁰ Act No. 6, 2006.

1.8 Limitation of the study

The target population of this research paper are minor children. A study population refers to a population as the study object which may be individual persons, groups and organizations. The target population entails a set of elements the research focuses on and to which the yield results can be generalized.¹¹

1.9 Research methodology

The method of research used to conduct this research paper was desktop or library research. Research may be defined as a systematic process of gathering and logically analysing information for some purpose.¹² Research is “aimed at developing an argument and a conclusion amounting to a knowledge claim”.¹³ Research methods (sometimes termed methodology) are employed to collect and analyse data.¹⁴ This research paper was primarily devoted to the determination whether or not the death benefits after retirement solely carter for surviving spouse as contemplated by rule in rule 9 (1) (3) of the Fund Act.¹⁵ The aim is to establish to what extent the rule protects children’s best interest in general, furthermore establish the constitutionality of the above mentioned rule. In view of the fact that this study is aimed at evaluating the extent of the constitutional protection of children’s rights and interests.

¹¹ Hebe, HN. 2009. *An Evaluation of the Environmental Literacy of Educators: A case study*. Johannesburg: University of South Africa, p4.

¹² Macmillan and Schumacher (1997: 9).

¹³ Robertson (1994: 21).

¹⁴ Ibid.

¹⁵ Pension Fund Act No. 24, of 1956.

1.10 Outline of chapters

Chapter one is titled - Introduction to the study, and it deals with the introductory position of the whole dissertation. The background of the research topic and the problem statement.

Chapter two is titled literature review- it contains an extensive list of authors and statutes that support the issue at hand.

Chapter three is titled - the death benefits, the child and parent's responsibility. It deals with the death benefits of members of the pension fund. The impact of the benefits on the beneficiaries. It defines a child and the relationship between a parent, as well as the parental responsibilities and the duty to maintain. Furthermore, it deals with what occur upon the death of the person liable for maintenance and the extent to which a child can become a right-holder to have a claim in a court of law.

Chapter four titled – Constitutional and International protection of children's rights. It deals with how the law protects children, the constitutional protection, national law on children. It also deals with regional law and international law on the protection of children. It further deals with the best interests of the child; it introduces the legal framework of the best interests' principle. It discusses the principle in international law and other relevant legal systems. It also looks at the paramountcy importance of the principle in Namibia and South Africa. It also has cases where the courts uphold the best interests of a child and where they declined it.

Chapter five Deals with the conclusion and recommendations.

CHAPTER 2

LITERATURE REVIEW

Literature is, indeed, an important aspect of any form of research and, hence, the need for this chapter. In order to avoid ambiguity, it must be stated that the term “literature” is used, in this context, to refer “to all kinds of information, including books, journals, electronic materials, and oral information.”¹⁶

According to the Pension fund Act,¹⁷ fund means a pension organisation. Member in relation to a pension fund is any member or former member of the association by which such fund has been established; a person who belongs or belonged to a class of persons for whose benefits that fund has been established, but does not include any such member or former member or person who has received all the benefits which may be due to him from the and whose membership has thereafter been terminated in accordance with the rules of the fund. The term dependant, in relation to a member, means- a person in respect of whom the member is legally liable for maintenance; a person in respect of whom the member is not legally liable for maintenance, if such person- (a) was, in the opinion of the person managing the business of the fund, upon the death of the member, in fact dependant on the member for maintenance; (b) is the spouse of the member, including a party to a customary union according Customary law or Civil law.¹⁸ Section 37A of the Pension Funds Act¹⁹ protects pension fund benefits from claims of creditors. However, there are exceptions to this protection which includes certain claims under the Maintenance Act.

A parent is liable for maintaining his or her child. According to Heaton,²⁰ parents have the duty to support their children. The duty is apportioned between them according to their respective means. If a parent dies, his or her estate is responsible for the child’s maintenance. If either parent or his or her estate cannot support the

¹⁶ Kaniki, A.M. 2006. “Doing an information search”. In Terreblanche, M. Durrheim, K. & Painter, D. (ed.), *Research in practice: applied methods for social sciences*. 2nd Ed. Cape Town: University of Cape Town Press, p19.

¹⁷ Act No. 24 of 1956.

¹⁸ Section 1 of The Pension Fund Act 24 of 1956.

¹⁹ Ibid.

²⁰ Heaton, J. 2008. *The South African Law of Persons*. 3rd Ed. Durban: LexisNexis, p68.

child, the duty of support passes to the child's grandparents.²¹ However, this rule was declared unconstitutional in *Petersen v Maintenance Officer*²² on the grounds that it unjustifiably violates the right of a child born of unmarried parents not to be subject to unfair discrimination on the ground of birth and the child's best interests.

Dausab²³ indicates that the best interest of the child means considering the child before a decision affecting his or her right is made. The courts are the upper guardians of minor children and they have a final say in determining the overall welfare of the child.

The Constitution of Namibia²⁴ state that: Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of a children, as far as possible the right to know and be cared for by their parents.²⁵

Barker²⁶ recalls that the relationship between a parent and child is natural and immutable. Thus it cannot not be terminated as opposed to that of a marital relationship. Until then it was settled law that the duty of mutual support as between spouses was a function of the existence of a marriage and that termination of the marriage by death or by other means terminated the duty of mutual support

In *Carelse v Estate De Vries*²⁷ De Villiers CJ held that parents duty to support their children passed on to their deceased estate. This principle was also accepted in *Glazer v Glazer*²⁸ that children have a claim for maintenance against the deceased estates of their parents.

Article 3 (1) on the United Nations Convention on the Rights of the Child provides that: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

²¹ Ex parte Jacobs 1936 OPD 31.

²² 2004 (1) SA 117 (C).

²³ Dausab, Y. 2009. "The best interest of the child". In Ruppel, OC (Ed.) *Children's rights in Namibia*, Windhoek: Macmillan Education Namibia, p147.

²⁴ Act No. 1 of 1990.

²⁵ Article 15 (1) of the Namibian Constitution.

²⁶ Barker, HJ. 1993. *The drafting of wills*. Cape Town: Juta & Co, p70.

²⁷ (1906) 23 SC 532.

²⁸ 1963 (4) SA 694 (A) 706.

According to Mary Ryan²⁹ the courts recognize that individuals and institutions owe a higher duty of care to children than they do to adults (for example, to take steps to prevent children falling off a balcony) and similarly, if an action in negligence is brought against a child, the court will take into consideration the child's ability or otherwise to make a judgement about the likely effect of their actions and will not treat them as if they were an adult.

The Maintenance Act No. 9 of 2003 also provides that both parents of a child are liable to maintain that child, regardless whether the child in question is born inside or outside the marriage of the parents; born in the first, current or subsequent marriage; and parents are subject to any system of customary law which does not recognise both parents' liability to maintain.³⁰

A child has a right to be maintenance. The law usually employs the concept of "rights" to determine people's legal entitlements in relation to each other and towards certain objects like for instance money.³¹

In terms of section 17 (1) of the Children's Status Act³² "Despite anything to the contrary contained in any law, a distinction may not be made between a person born outside marriage and a person born inside marriage in respect of the legal duty to maintain a child or any other person. The children's Act enhances children's rights even further. The rights that a child has in terms of the Act supplement those that the constitution confers on every child. The Act inter alia seeks to give effect to the child's constitutional rights to parental care, to be protected from maltreatment, neglect, abuse or degradation and to have his or her best interests considered of paramount importance in every matter concerning him or her. The Act also seeks to give effect to the obligations concerning the wellbeing of children that Namibia has incurred in terms of International Instruments such as the African Charter on the Rights and Welfare of the child and the United Nations Convention on the Rights of the Child."³³

²⁹ Ryan, M. 1999. "Children and the law". In Tunstill, J (Ed.) *Children and the State: Whose problem?* New York: Cassell publications, p8.

³⁰ Section 3 of the Maintenance Act.

³¹ Eekelaar, J. And Dingwall, R. 1990. *The Reform of Child Care Law: A practical guide to the children Act 1989.* London: Routledge, p19.

³² Act No.6 of 2006.

³³ Heaton, J. 2008. *The South African Law of persons.* Durban: LexisNexis, p87.

Parents have the legal duty, during their life time and after death to maintain their minor children. The Namibian legal system has legislation both domestically³⁴ and internationally that provides for the welfare of a child and protecting a child's best interest in all matters concerning them, and that includes inheritance; support; and inheritance. Despite the above, there is no clarity on the position of a minor dependant of a deceased retired member who got married after the date of retirement to claim maintenance from the deceased's monthly emolument which is later received by the surviving spouse.

This paper serves as a contribution in the protection, welfare, and wellbeing of all minor children who are affected by the impact of the Pension Fund³⁵ rules relating to the death benefits of a retired member in Namibia.

³⁴ The Children's Status Act; Maintenance Act; and the Constitution of Namibia.

³⁵ Pension Fund Act 24 of 1956.

CHAPTER 3

DEATH BENEFITS, THE CHILD, AND PARENT'S RESPONSIBILITY TO THEIR MINOR CHILDREN.

3.1. Death benefits after retirement of a member of GIPF

On the death of a pensioner his or her pension shall cease as provided for in Rule 9 (1) (3). And the following shall then be payable:

- a) If the Pension in respect of a member who has no dependants has been paid for a period of less than 60 months as from the date of retirement, the equivalent value of the outstanding pension payments shall be paid in a lump sum in accordance with the provisions of section 37C of the Act³⁶, or if the pension in respect of a member who is survived by a qualifying spouse has been paid for a period of less than 60 months as from the date of retirement, payment of the pension shall continue until 60 monthly instalments have been paid. In addition, there shall also be payable:
- b) A pension to his or her qualifying spouse, commencing on the pensioner's death or 60 months after the commencement of the pensioner's pension, whichever occurs last, equal to 50% of the pension payable immediately prior to the commencement of the pension to the qualifying spouse.

It is also a proviso that where the pensioner entered into a recognised marital union with such qualifying spouse after the date of the pensioner's retirement, the pension payable to the qualifying spouse shall be reduced by a percentage thereof, as determined by the trustees, acting on the advice of the actuary, for each year by which the age of the pensioner exceeds the age of the qualifying spouse.

3.2. Death benefits prior retirement of a member of GIPF

Upon the death of a member while in service prior to normal retirement age, the following benefits shall be payable in accordance with rule 6 as follows:³⁷

A lump sum equal to twice the member's pensionable emolument; plus a pension to his or her qualifying spouse equal to 40% of the member's pensionable emoluments

³⁶ Pension Fund Act No. 24 of 1956.

³⁷ Available at <http://www.gipf.com.na/about/index.php?page> last accessed on Wednesday, 6 April 2011.

immediately before his or her death, provided that the trustees manage to locate the qualifying spouse within twelve months of the member's death; plus a pension in respect of qualifying children of the member equal in total to a percentage of the member's pensionable emoluments immediately before his or her death.³⁸

3.3. The Impact of the benefits to the dependants (minors children)

There is no problem when a member dies while in service prior to normal retirement age because both the surviving spouse and dependants of the deceased member will benefit financially. The surviving spouse will get a lump sum equal to 40% of the pensionable emolument and a monthly salary determined by the trustees until her death or when she remarries. While the dependants share the remaining 60%, if the dependant is above 21 years old they will get their share at once while the minor's share is invested by master and furthermore an amount will be paid into their guardian's account for their maintenance.³⁹

However, problems may arise if the member dies after they have retired and received their pension. Some members are not wise enough to invest their pension further after retirement for the benefit of their dependants, instead what they do is spend it and forget that they still young ones or even have children after retirement. If a member gets married after retirement and he dies, leaving behind a spouse and minor children of the current and subsequent marriage, or sometimes no child with the surviving spouse, children not of the surviving spouse will suffer in that the spouse has a discretion to either share the monthly salary in support of such children since there is no lump paid to both because everything was paid when the member retired.⁴⁰

The foregoing statement is a result of rule 9 (1) (3) (b) where a pensioner enters into a marriage after retirement.

3.4. Distribution of pension benefits when a member of the fund dies

By looking at the legislature, one can conclude that the spouse comes first, then the qualifying children or dependants of the deceased. The Government institution fund

³⁸ Available at <http://www.gipf.com.na/about/index.php?page> last accessed on Wednesday, 6 April 2011.

³⁹ Ibid.

⁴⁰ Own input.

automatically pays 40% of the pensionable emolument to the surviving spouse upon the death of the member, the remaining 60% is divided amongst the children not matter how many they are.⁴¹

If a person dies intestate and is survived by a spouse as well as a descendant or descendants, the surviving shall inherit a child's share or R125 000⁴² (whichever is greater) and the descendants will inherit the remaining residue (if any) of the intestate estate.⁴³

It is unfair to put the surviving spouse first priority to the children. Until then it was settled law that the duty of mutual support as between spouses was a function of the existence of a marriage and that termination of the marriage by death or by other means terminated the duty of mutual support.⁴⁴

The above principle was attacked in *Glazer v Glazer*⁴⁵. The attack was parried by Steyn CJ in a judgement in which he implied that the acceptance in law of the principle that the deceased estate of a parent is liable for maintenance of a minor child had an error due to a misleading of Groenewegen. He went on to urge that to extend the error to the case of a widow result 'by parity of reasoning' to benefit persons whom the deceased had had no legal duty to support.

'However close the relationship between husband and wife, it is terminable, and not the same as the immutable natural relationship between parent and child.' The dubiety of his reasoning is plain; having regard to his holding that liability for child maintenance was based on an error, and also to the implication that the unique relationship arising from 'holy matrimony' can be equated by 'parity of reasoning to other relationships.

⁴¹ Rule 6 of the Pension Fund Act No. 24 of 1956.

⁴² In Namibia the amount is \$50 000.

⁴³ Section 1 (1) (c) of the Intestate succession Act No. 81 of 1987.

⁴⁴ Barker, H. 1993. *The Drafting of Wills*. Cape Town: Juta & Co Ltd, p70.

⁴⁵ 1962 (2) SA 548.

3.5. Definition of a child

One cannot meaningfully debate whether children have a right to support and whether parents have a duty to provide child support without some common understanding of the terms 'child' and 'parent'. According to Nick Wikeley⁴⁶, the legal definition of a 'child' is a young person who has yet to attain the age of 18 years. The Namibian Children's Status Act⁴⁷, 2006 defines a child means a person who is under the legal of majority. By parent we mean the child's 'biological' parents.

3.6. The relationship between a parent and child

Marriage is one of the most important criteria determining a person's rights, especially in customary law. And throughout the history of common law, marriage has been a primary determinant of legal parenthood. Thus children born outside of marriage have been subject to different laws, procedures, and rights than children born to married parents.⁴⁸ Regardless whether a child is born in or out of marriage the relationship between a parent and child is natural and immutable.⁴⁹

Furthermore, children are presumed in law to be incomplete beings during the whole period of their development. Their ability to provide for their own basic needs, or even to maintain life without extraneous help, justifies their being automatically assigned at birth to their biological parents or, where this relationship either does not develop or fails to function, assigned by later court proceedings to parent substitutes.⁵⁰

The law, both civil and criminal, recognizes that children should be treated differently from adults, and it also recognizes that older children should be treated differently from younger children, either by setting specific age limit or by considering the level of a child's understanding. This is the case both with common law (the law developed through court decisions only and not governed by statute) and with Act of

⁴⁶ Wikeley, N. 2006. *Child Support: Law and Policy*. Oxford- Portland Oregon: Hart publishing, p4.

⁴⁷ No. 6 of 2006.

⁴⁸ Swisher et al. (1998: 331).

⁴⁹ Barker, HJ. 1993. *The Drafting of wills*. Cape Town: Juta & Co Ltd, p70.

⁵⁰ Goldstein, J et al. 1996. *The best interests of the child: The least detrimental alternative*. New York: The Free Press, p8.

Parliament. Thus with negligence claims, the courts recognize that individuals and institutions owe higher duty of care to children than they do to adults.⁵¹

3.7. Parental responsibilities and the duty of maintenance

Parental responsibilities and rights include the responsibility and the right –

3.7. 1. To care for the child (called custody)

When a parent has custody, it means that the child lives with such a parent, and that the custodial parent made most of the day-to-day decisions relating to the child. The definition of care is broader, in that it spells out the various facets of caring for a child. It includes financial support, promoting the well-being of the child, promoting his or her rights and guiding and directing the child.⁵²

3.7.2. To maintain contact with the child (previously called access)

Contact means maintaining a relationship with the child; and if the child lives with someone else – communication with the child on a regular basis by visiting or being visited by the child, or other regular communication on the post or telephone or other electronic communication.⁵³

3.7.3. To act as guardian of the child (called guardianship)

Parental responsibilities and rights also include guardianship. At common law guardianship could be understood in both a narrow or broad sense. In a narrow sense it included the administration of the child's property, and assisting the child in legal proceedings. In the broader sense, it included what was then called custody.⁵⁴

3.7.4. To contribute to the maintenance of the child.

Blackstone's *commentaries on the Laws of England*, first published in 1765, identified the relationship between parent and child as 'the most universal relation in nature'.⁵⁵ So far as maintenance was concerned, Blackstone declared that: the duty of parents to provide for the maintenance of their children, is a principle of natural

⁵¹ Tunstill, J. (Ed.) 1999. *Children and the state, whose the problem?* New York: Cassell publishers, p8.

⁵² Trynie, B. (Ed). 2009. *Child Law in South Africa*. Claremont: Juta & Co Ltd, p66.

⁵³ Ibid, p67.

⁵⁴ Hill v Hill 1969 (3) SA 544 (RA).

⁵⁵ Morrison, M. (Ed). 2001. *Blackstone's Commentaries on the Laws of England*. Volume 1. London: Cavendish publishing, p343.

law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.⁵⁶

Under the Namibian Maintenance Act, section 2 (a) provides that the Act applies where a person has a legal duty to maintain another person, regardless of the nature of relationship which creates the duty to maintain and must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons.⁵⁷

Both parents of a child are liable to maintain that child regardless of whether the child is born in or out of marriage, previous or current marriage.⁵⁸

According to Cronje both parents are obliged to support both their marital and extra-marital children provided they are in a financial position to do so and the child is in need of support.⁵⁹ The duty to support is apportioned between the parents according to their means. And a mother has a claim for past maintenance in respect of her extra-marital child.⁶⁰

The statement that both parents have the burden of support in our law earned an unusual qualification in *A v M*⁶¹ when judge Barry laid down the principle that the father of a child born out of wedlock is only liable for nominal maintenance and that the father's obligation as a substantial amount of money only realises when the mother is needy and not able to pay.

If either the father or the mother dies, his or her estate is responsible for the child's estate is responsible for the child's maintenance. If both parents and their estates cannot support the extra-marital child, the liability passes to the child's maternal

⁵⁶ Wikeley, N. 2006. *Child Support. Law and Policy*. Oxford – Portland Oregon: Hart publishing, p66-67.

⁵⁷ Section 2 (a) of the Maintenance Act of 2003.

⁵⁸ Section 3 (1) of the Maintenance Act of 2003.

⁵⁹ *S v Pitsi* 1964 (4) SA 583 (T).

⁶⁰ *Van der Harst v Viljoen* 1977 (1) SA 795 (C) at 798-A.

⁶¹ 1930 WLD 292 at 294.

grandparents but not to the paternal grandparents. This is an unfair and unacceptable rule which is clearly in conflict with our common.⁶²

3.8. Death of the person liable for maintenance

Upon the question whether the obligation of a father to support his children passes to his heirs, the authorities are by no means agreed. Voet maintains that the obligation is ceased upon the death of the parent, while Groenewegen maintains the opposite view.⁶³

In *Carelse v Estate De Vries*⁶⁴ De Villiers CJ's concluded that parents duty to support their children passed on to their deceased estate and this has become settled law that children has the right to claim for maintenance against the deceased estates of their parents and this was also tacitly accepted by the appellate division in *Hoffman v Herdan*.⁶⁵ However, it should be noted that extra-marital children will only have a claim for maintenance against their parents' estate if there is sufficient assets to support the legitimate children.

3.9 To what extent can a child become a right-holder to have a claim in court

Traditionally, a person cannot be termed a right-holder unless he or she has the necessary competence to exercise a choice over the exercise of that right. The autonomy and reasonableness of individuals is the point of focus of the will theory.⁶⁶

According to the will theory, the existence of a right is dependent on the rights-holder's capacity for reasoned decision-making. If it is assumed that the majority of children do not have the competence to make choices and claim rights, it follows that children cannot be said to have rights. Some liberalists believe that there is no problem with this way of thinking and base this on the presumption that the child is in possession of the necessary capacity.⁶⁷

However, the interest theory of rights has the advantage that it does not hold that rights are to be determined by the moral capacity to act rationally. This theory argues

⁶² Cronje, DSP. 1990. *The South African Law of Persons and Family Law*. Durban: Butterworths, p76.

⁶³ Law of succession case book.

⁶⁴ 1906 23 SC 532.

⁶⁵ 1982 (2) SA 274 (T) at 275.

⁶⁶ Boezaart et al (2009:248).

⁶⁷ Ibid p248.

that children, as humans, have rights if their interests are the basis for having rules that require others to behave in a certain way with respect to these rules.

CHAPTER 4

NATIONAL, REGIONAL, AND INTERNATIONAL PROTECTION OF CHILDREN'S RIGHTS AND THE BEST INTERESTS OF A CHILD

4.1. How the law protect children

The government of Namibia has taken many steps to protect children from all forms of violence, abuse and neglect, and generally to ensure the welfare of Namibia's children. Apart from national laws, the government has agreed to uphold many international laws, or principles on child protection. One of the most important ways to protect children's rights is by giving them human rights education. Human rights and education go hand in hand ever since the Charter of the United Nations was accepted.

The phrase human rights education can refer both to the human rights to education- which is a right protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and, which is more often the case, to the context of education to develop a substantive knowledge and understanding of human rights.⁶⁸

The right to education and the teaching of human rights (human rights education) are intertwined. Children have a right to education, but the education that they ought to receive is not ideologically neutral: it is compelled to include education on human rights. Human rights education as a process of developing the person to become a moral agent who accepts his or her own dignity, respects the rights of others, and has the same ability to participate in a free society and contribute to peace. This somewhat utopian understanding of the values of education underlines the fact that the International Covenant on Economic, social and cultural Rights, with its emphasis on social justice, will be an exercise in futility if the poor and marginalised do not have the social skills and knowledge to exercise their rights.⁶⁹

⁶⁸Horn, N. 2009. "Human rights education in Africa". In Anton and Diescho, (Ed.) *Human Rights in Africa: Legal Perspective on their Protection and Promotion*. Windhoek: Macmillan Education Namibia, p54.

⁶⁹ Ibid.

4.2. National law on children

The most important national law on children namely the Child care and protection Bill quite completely sets out the 'best interest' principle as well as the factors to be considered when making a decision in the best interest of the child. For example the Bill takes into account the nature of the relationship between the child and its parents or caregivers, their capacity, attitude, and the effect that a change in environment will have on the child.⁷⁰

In 2007, the Namibian government launched the National Plan of Action for Orphans and Vulnerable Children (NPA for OVC) to provide services to children in four areas: rights and protection; education; care and support; health and nutrition. In the area of rights and protection, the objective is " to put in place a framework for protecting and promoting the well-being of all the Orphans and Vulnerable Children, ensuring that the rights of all OVC and their caregivers are protected, respected and fulfilled".⁷¹

The Maintenance Act⁷² provides for a tone that supports the best interest of the child. Previously, the issue of maintenance was a 'battle of sexes'. The emphasis of the current legislation on maintenance is that it is about the welfare of the child.⁷³

4.3. The Constitution of Namibia

The preamble of the Namibian Constitution provides Inter alia:

Whereas the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

The inherent dignity is not only applicable to adults, but also to children. This is the first protection that is accorded to children by the Constitution. Another protection can be said to be in article 10 of the Constitutions which provides as follows:

(1) All persons are equal before the law.

⁷⁰ Dausab, Y. 2009. "The best interest of the child". In Ruppel, OC (Ed.) *Children's rights in Namibia*, Windhoek: Macmillan Education Namibia, p155.

⁷¹ *Critical Services for Children In Need in Namibia*. Published by the Ministry of Gender Equality and Child Welfare with support from the United Nations Children's Fund (UNICEF).

⁷² No. 9 of 2003.

⁷³ Section 4 (1) of the Maintenance Act.

(2) No person shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

For purposes of this research paper, the fact that rule 9 (1) (3) (b)⁷⁴ of the pension fund Act does not include children or dependants of the deceased retired member but only the surviving spouse who got married after the retirement, questions whether the Fund Act is meeting the equality clause in article 10 of the Constitution.

In addition, respect for human dignity⁷⁵ as well as equality⁷⁶ and freedom from discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status are recognized within Chapter 3 of the Constitution as fundamental rights to be upheld by the executive, legislature and judiciary and all other organs of government, as well as by all natural and legal persons in Namibia.⁷⁷

In *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State*⁷⁸ the Attorney-General asked the Supreme Court to decide if corporal punishment (whipping or canning) by State institutions was in conflict with the Constitution.

The court noted firstly that each of the sub-elements of Article 8(2)(b) of the Constitution should be read separately. In other words, the sub-article prohibited punishment or treatment that constituted torture was cruel or inhuman, or degrading. Secondly, in deciding what was inhuman or degrading, the court made a value judgement. The court made this value judgement by looking at the present values of the Namibian people as expressed in Namibia's national institutions and the Constitution. The court also looked at the values of the civilised international community, of which Namibia is a part.⁷⁹

The court concluded that corporal punishment of both adults and juveniles was inhuman or degrading punishment in conflict with Article 8 of the Namibian Constitution. Regarding corporal punishment of male school children, the court

⁷⁴ Of the Pension Fund Act 24 of 1956.

⁷⁵ Article 8.

⁷⁶ Article 10.

⁷⁷ Article 5.

⁷⁸ 1991 NR 178 (SC); Legal Assistance Centre. NAMIBIA. *A Summary of selected human rights cases from independence to the year 2000*. Windhoek: Out of Africa Publisher, P8.

⁷⁹ *Ibid.*:p8.

further found that this was also in conflict with Article 8 of the Constitution. The court did not indicate or determine whether corporal punishment of school children was torture or cruel, inhuman or degrading punishment.

Article 15 (2)⁸⁰ states that: Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral, or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.

Suppose a retired pensioner father dies, and he is survived by his spouse whom he married after retirement, with six children four which are above the age of 21 years and two below the age of 16 but none of them are the surviving spouse's children. Given that the pensionable emolument only provides for the wife in terms of rule 9 (1) (3) (b) and the Court gives her discretion to or not maintain the minor children of her deceased husband. In the event she elects not to maintain the minors what will be of them? They none of their family members will step in to take responsibility which was naturally transferred to the surviving spouse and who neglected to fulfil such duty, definitely the children will become street kids, and resort to violence because they are bitter that they cannot have the life they used to live before and blame the surviving or step mother and consequently even plan to kill her. Sometime they can turn into street vendors, selling goods to earn a living at a very young stage when they should be in school. All this seeks the attention of Article 15 (2) of the Constitution in light of the death benefits of a retired member of any Pension Fund.

4.4. Regional law on the Rights of the child

The African Charter on the Rights and welfare of the Child (ACRWC)

The African Children's Charter defines a child as every human being below the age of 18.⁸¹ The definition is clear and precise, with no exception or qualification. The African Children's Charter provides for the civil, political, economic, social and cultural rights of children. Hence states parties are obliged to implement the African

⁸⁰ Of the Constitution of Namibia Act 1 of 1990.

⁸¹ Article 2 of the African Children's Charter.

Children's Charter without making any distinction among the different categories of rights.⁸²

The African Children's Charter has several clearly spelt out obligations on states parties to provide protection to children in specific circumstances. States have to ensure access to education for every child. Pregnant girls should also be allowed to continue with their education based on their individual ability.⁸³ Specific measures should be taken to protect children from begging activities in streets.

The African Children's Charter is best understood with reference to three anchoring principles: the best interests of the child, the principle of non discrimination, and the primacy of the Charter over harmful cultural practices and customs.

4.4.1 The best interests of the child

The 'best interests' of the child is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children. Article 4 of the African Children's Charter states that in all actions concerning children, the best interests of the child 'shall be the primary consideration'.⁸⁴

4.4.2 Non- discrimination

Children are entitled to equal enjoyment of the rights under the Charter, irrespective of whom they are and who their parents are. Some grounds on which discrimination is outlawed are the fortune, birth or other status of the child, the parent or the legal guardian.⁸⁵

4.4.3 Primacy over culture

In Africa children often form part of a rural traditional setting where customs rather than formal law prevail. However, in an ambitious leap, the African Children's Charter asserts its own primacy above culture and customs that are prejudicial to the health or the life of a child and discriminatory to the child on the basis of sex or other

⁸² Article 1 of the African Children's Charter.

⁸³ Article 11(7) of the African Children's Charter.

⁸⁴ Viljoen, F. 2000. "The African Charter on the Rights and Welfare of the Child". In Davel, CJ (Ed.) *Introduction to Child Law in South Africa*, Lansdowne: Juta & Co Ltd, p 219.

⁸⁵ Ibid.:219.

status. There are numerous instances of such practices in traditional African society, such as female genital mutilation.⁸⁶

4.5 The International law on children's rights

Namibia is bound by international law, agreements, treaties or conventions by virtue of article 144 of the Constitution which states that:

Unless otherwise provided by this Constitution or Act of parliament, the general rules of public international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The concept of children's rights is not new but it has been difficult to determine its content. In 1989 the United Nations adopted a Convention on the Rights of the Child, the Human Rights Committee (HRC) adopted a 'General Comment'⁸⁷ on article 24 of the International Covenant on Civil and Political Rights (ICCPR) which concerns children's rights and Namibia enacted a major piece of legislation on child law, the Children's Status Act.⁸⁸

Strength might be derived for the claim that children must be right holders from the wealth of international material based on such an assumption. There appears to be a world-wide acceptance that children have rights to be protected.⁸⁹

4.5. 1. The United Nations Convention on the Rights of the Child

The convention covers the full range of civil, political, economic, social, and cultural rights. It is powerful yet peaceful agent of social change. It has legitimized what was once considered radical and defined what was once in search of a definition. It provides a framework and a list of priority measures for ensuring that resource distribution is directed towards the most the most vulnerable, and it requires communities to develop a culture of listening to children. For the states, communities

⁸⁶ Viljoen, F. 2000. "The African Charter on the Rights and Welfare of the Child". In Davel, CJ (Ed.) *Introduction to Child Law in South Africa*, Lansdowne: Juta & Co Ltd, p 219.

⁸⁷ General Comment 17 (35), adopted on 5 April 1989, Annual Report of the Human Rights Committee 1989, UN Doc A/44/40,173.

⁸⁸ Act No. 6 of 2006.

⁸⁹ Article 19 of The Convention on the Rights of the Child of 1990.

and organizations which have welcomed its provisions it is an evolutionary revolution, radically but peacefully changing images of childhood.⁹⁰

Broadly speaking, the Convention on the rights of the Child is concerned with the four 'P's: the participation of children in decisions affecting their own destiny and their participation in community life; the protection of children against discrimination and all forms of torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation; the prevention of child abduction; and the provision of preventative health care and the prevention of harm to children.⁹¹

The United Nations Committee on the Rights of the child, the body monitoring the Convention, has identified four articles as enshrining general principles. These are article 2 (non discrimination), article 3 (best interests), article 6 (survival and development) and article 12 (freedom of expression). Article 2 is a very broad non-discrimination clause, which not only prohibits discrimination against children on the basis of the child's status, but also prohibits discrimination on the basis of the family's status. Discrimination against children occurs not only when there is discrimination between adults and children but also between different groups of children.

Article 3 (1)⁹² refers to 'all action' in a broader way, to encompass all states agencies and includes both action and inaction. The article does not create rights or duties; it is only a principle of interpretation which has to be considered in all actions concerning children. It therefore has the advantage, unlike article 2(1) of operating as a principle to be considered in relation to each of the rights in the convention and, importantly, residually to all actions taken by Namibia concerning children.

Any decisions taken in the child's best interests ought to take into account the inherent inability of any legal system, national, regional, or international, adequately

⁹⁰ Van Bueren, G. 2000. "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution". In Davel, CJ (Ed.) *Introduction to Child Law in South Africa*, Lansdowne: Juta & Co Ltd, p202.

⁹¹ Article 42 of the Convention on the Rights of the Child.

⁹² [i]n all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the Child shall be a primary consideration.

to supervise not only family relations but also interpersonal relationships, and ought therefore to recognize the difficulty in making long-term predictions.⁹³

4.6 The best interest of the child

The ‘universality’ to which international human rights standards aspire has been strongly contested in recent years. Nevertheless, the Convention on the Rights of the Child is likely to achieve near-universal ratification within the next years. Article 3 (1)⁹⁴ incorporates the principle that, in all actions concerning children, ‘the best interests of the child shall be a primary consideration’, to examine the broader relationship between culture and human rights.

4.7 what is the best interests of a child?

Although there is no standard definition of the “best interests of the child,” the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and others will best serve a child as well as who is best suited to take care of a child. “Best interests” determinations are generally made by considering a number of factors related to the circumstances of the child and the circumstances and capacity of the child’s potential caregiver(s), with the child’s ultimate safety and well-being as the paramount concern.⁹⁵

Simply put, the best interest of the child means considering the child before a decision affecting his or her life is made. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist primarily courts and other institutions in the decision-making process. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say determining the overall welfare of the child. This they do through a relatively delicate balancing of the interests. These interests themselves are particularly

⁹³ Van Bueren, G. 2000. “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution”. In Davel, CJ (Ed.) *Introduction to Child Law in South Africa*, Lansdowne: Juta & Co Ltd, pp203-204.

⁹⁴ Convention of the Rights of the Child.

⁹⁵ Child Welfare Information Gateway. 2010. *Determining the Best Interest of the Child: Summary of State Laws*. Available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm; last accessed on [8 August 2011].

sensitive as they often relate to family status matters in terms of divorce, maintenance, and custody and control.⁹⁶

4.8. Article 3 (1) on the Convention of the Rights of the Child of 1989.⁹⁷

The article reads as follows: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The phrase that ‘in all actions concerning children’.... the best interests of the child shall be a primary consideration’, is addressed to decision makers in general. Whether it is a formal decision to be taken by court or informal decision to be made in home by a parent or guardian, such a decision maker must first consider the child’s interests as of greater importance to the decision to be made.

However, when it comes to legally binding characters, presuming there is, is confined to considerations, which typically indicates a discretionary commitment, as contrast to the normal cases of administrative discretion, article 3 (1) extends a discretionary commitment to legislative bodies.

The “best interest” standard relates to opportunities and facilities to enable the child to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner. That means that the concept of the ‘best interests’ covers the all-round development of the child according to its abilities as a human person within a sound human environment.⁹⁸

The 1989 Convention on the Rights of the Child (CRC) is the main legal instrument on the protection of children. It embodies four general principles:

1. The best interests of the child as a primary consideration in all actions affecting children.⁹⁹

⁹⁶ Dausab, Y. 2009. “The best interest of the child”. In Ruppel, OC (Ed.) *Children’s rights in Namibia*, Windhoek: Macmillan Education Namibia, p147.

⁹⁷ Of the United Nations Convention on the Rights of the Child

⁹⁸ Wolf, J. 1992. “The concept of the ‘best interest’ in terms of the United Nations Convention on the Rights of the Child”. In M, Freeman, P, Veerman (Ed.) *Ideologies of Children’s rights in International Studies in Human Rights*, volume 23. Netherlands: Martinus Nijhoff, p126.

⁹⁹ Article 3 of the Convection on the Rights of the child of 1989.

2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status.¹⁰⁰
3. States Parties recognize that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child.¹⁰¹
4. Children shall be assured the right to express their views freely in all matters affecting them, their views being given due weight in accordance with the child's age and level of maturity.¹⁰²

The term “best interests” broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences. Its interpretation and application must conform with the CRC and other international legal norms, as well as with the guidance provided by the Committee on the Rights of the Child in its 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin. The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

- The best interests must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
- The best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).

4.9 Other relevant legal sources

When determining the best interests of the child, it is important to consider all the rights of the child. In addition to the norms contained in the CRC, there are other relevant legal bases, both at the international and the national level, that may affect

¹⁰⁰ Article 2 of the Convention on the Rights of the Child.

¹⁰¹ Ibid Article 6.

¹⁰² Article 12 (CRC).

such decisions. In accordance with Article 41 of the CRC the higher standard must always apply.

- International and regional instruments of relevance include those on general human rights, international humanitarian law,² refugee law³ and child-specific instruments (see box below). Soft law, such as the above-mentioned General Comment No. 6 by the Committee on the Rights of the Child, and UNHCR Executive Committee (ExCom) Conclusion No. 107 on Children at Risk, are valuable interpretative sources.¹⁰³
- National law and domestic jurisprudence may provide more specific guidance on general principles set forth in international instruments, and should be carefully analysed, bearing in mind, however, that best interests principles elaborated at national level may be specific to custody disputes or petitions for adoption.

In Namibia the Constitution is the supreme law of the country,¹⁰⁴ and provides for the protection and promotion of a wide array of human rights.¹⁰⁵ This supremacy also means then also means that any law or conduct inconsistent with the provisions of the constitution will be invalid.¹⁰⁶ Children's rights are provided for in terms of Article 15(1). Unlike the South African Constitution,¹⁰⁷ which provides that "A child's best interest is of paramount importance in every matter concerning the child", there is no such explicit provision in the Namibian Constitution. Instead, the supreme law leaves this task to the legislator. This is problematic because, as the supreme law, the Constitution ought to be the guiding document. Legislators are supposed to seek guidance from the Constitution when drafting laws that will affect the rights of the children.

However, in South Africa section 28(2) intends to expand the meaning of the application of the best interests to all aspects of the law that affect children. The section has helped to develop the meaning of some of the other rights in the Bill of Rights. It has been used to determine the ambit, and to limit, other competing Rights.

¹⁰³ UNHCR Executive Committee (ExCom) Conclusion on Children at Risk, No. 107 (LVIII), 2007.

¹⁰⁴ Article 1(6), states that "[t]his Constitution is the supreme law of Namibia".

¹⁰⁵ In terms of its Chapter 3, the Namibian Constitution has an entrenched and justifiable Bill of Rights.

¹⁰⁶ Article 25(1) of the Constitution, states that – "Parliament shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid".

¹⁰⁷ Section 28(2) of Act No. 108 of 1996.

Section 28(2) should not be regarded merely as a principle that helps interpretation of other rights. It is a right in itself. Despite the emphatic words of 'paramount importance', it does not serve as a trump to automatically override other rights, and as a right in a non-hierarchical system of rights, is itself capable of being limited.¹⁰⁸

In *Minister of Welfare and Population Development v Fitzpatrick and other*¹⁰⁹ the court declared section 18(4)(f) of the Child Care Act¹¹⁰ to be invalid because it prohibited the adoption of a South African child by non-citizens. The court found that the law was too restrictive because it limited the best interests of the child, which would sometimes be achieved through being adopted by non South African parents. In paragraph 17 of the case Judge Goldstone pointed out that section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. And the plain meaning of the words clearly indicates that the reach of the section cannot be limited to the rights enumerated in section 28(1) and 28(2) must be interpreted to extend beyond these provisions. It creates a right that is independent of those specified in section 28(2).

In *AD v DW*¹¹¹ the court had to weigh up the best interests of the child against other important international law principles pertaining to inter-country adoption. In the Supreme Court of Appeal, the majority judgement had given substantial weight to the principle of subsidiary, which is a rule that requires inter-country adoption to be subsidiary to domestic solutions – in practise requires that sufficient efforts must be made to find a suitable family replacement for a child in his or her country of origin before proceedings with inter-country adoption. The Constitutional Court found that, important as the subsidiary principle was, it was of less importance than the best interests of the child, particularly as the child was almost three years of age, and her adoption by anyone other than the applicants seemed unlikely. The court found that the best interests of each child must be examined on an individual basis and not in the abstract. Justice *Sachs* stressed that 'child law is an area that abhors maximalists legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of each case.

¹⁰⁸ Boezaart et al. (2009:280).

¹⁰⁹ 2000 (3) SA 422 (CC).

¹¹⁰ Act No. 74 of 1983.

¹¹¹ 2008 (3) SA 183 (CC) paragraph [55].

In the High Court matter of *De Reuck*¹¹² the court held that the ban on pornography did not contravene the applicant's rights to privacy and freedom of expression because of the paramountcy of the best interests of the child, which limited the ambit of the right. The Constitutional Court¹¹³ did not allow the best interests to limit the ambit of the rights to freedom of expression, and found instead that the laws banning child pornography infringed those rights. Thus the law banning child pornography limits rights to privacy and freedom of expression, but this limitation is justifiable due to the importance of the purpose of protecting children's best interests. The law was therefore not unconstitutional.

It was also in the *De Reuck* case that the Constitutional Court made it clear that the word 'paramount' in section 28(2) of the Constitution did not mean that children's best interests could never be limited by other rights. The court pointed out that the general approach it had adopted was that constitutional rights are 'mutually interrelated and interdependent and form a single constitutional value system'. In keeping with this approach, the court stated that 'section 28(2), like other rights enshrined in the Bill of Rights, is subject to limitations that are justifiable in compliance with section 36'. This laid to rest the idea that, because of the paramountcy principle, children's best interests could act as a trump, always overriding other rights.

¹¹² 2003 (3) SA 389 (W).

¹¹³ 2004 SA 406 (CC).

Conclusion

The purpose of the study was to evaluate the extent to which children's rights and interests are exercised and protected, when it comes to the rules of maintenance or support in relation to circumstances when their deceased parent was a retired member of GIPF. The initial hypothesis was that rule 9.1(3)(b) of the pension fund Act¹¹⁴ which was believed to be out of ambit of the constitutional order specifically Article 15 (1) and other International instruments on the best interests of the child and most importantly, a minor child's right to maintenance when a parent passes on who was a retired member of the GIPF.

The above rule¹¹⁵ makes provision for a right to maintenance for the spouse of a retired member, and it does not include minor children of the deceased. However close the relationship between a husband and wife, it is terminable and it not the same as the immutable natural relationship between a parent and child. Based on that view, it is deemed that a minor child should also be a beneficiary to claim maintenance from a deceased parent's pensionable emolument¹¹⁶, together with the surviving spouse.

Prior a surviving spouse had no claim for maintenance out of the deceased spouse's estate. However, this position is no longer valid since the position of the surviving of spouses was changed by the Maintenance of Surviving Spouses Act 27 of 1990. Section 2(1) provides that a surviving spouse shall have a claim against the estate of the deceased spouse for the provision of a reasonable maintenance until death or remarriage in so far as he or she is able to provide therefore from his or her own means and earnings.

When it comes to children, they are various statutes, nationally, regionally and internationally that fights for children's rights to maintenance. Maintenance is one of the grounds that where a child's best interests should be put first. The court acting as

¹¹⁴ Act No.24 of 1956.

¹¹⁵ 9. 1(3) (b) of the Pension fund Act.

¹¹⁶ Emolument includes any salary, wages, allowance, or any other form of remuneration or any other income which is paid periodically to any person, whether expressed in money or not.

the upper guardian of children plays an important role to ensure that children's best interests are met.

The function of the Court when faced with a matter where rule 9.1(3)(b) of the pension fund Act 24 of 1956 is an issue that should always be interpreted in the best interests of the minor child if they are children left behind especially if they are not of the surviving spouse.

The determination of the best interests will depend on the circumstances of each case, and this is not a weakness, but strength. A truly child-centered approach requires an in-depth consideration of the needs and rights of the particular child in the precise real life situation he or she is in.

The voice of the judiciary is quiet strong and sometimes people are unable to challenge it. When the court interpret rule 9.1(3)(b) as it stands, it will definitely put minor children's best interest in jeopardy. Consequently, given that in Namibian people are reluctant to challenge what the court says or not even aware of their own rights to claim what is due to them by law such issues are just swept under the carpet.

In the final analysis, my submission is that rule 9.1(3)(b) is not in line with the constitution as it discriminates children against the surviving spouse of a retired member of the pension fund. Consequently it compromises the child's best interests and affects minor children's right to maintenance.

Recommendations

The aim of the study was to evaluate the impact of the pension fund rules of that of a deceased retired member of GIPF to minor children's right to maintenance and their best interests. Since the Pension Fund Act rule that regulate such a pension states that a certain percent is payable to the surviving spouse, but it does not in any way make provision for the qualifying children of the deceased. This in itself is a problem that discriminates minor children of the deceased retired member against the surviving spouse and also conflicts with a child's right to maintenance and their best interests. The researcher therefore recommends the following to the above problem.

- That rule 9.1(3)(b) be changed in a manner that would include both the qualifying spouse and children.
- Alternatively the pension fund should take an initiative to educate the pensioner upon retirement that it better to invest a certain percent for the benefit of their minor children instead of claiming the whole pension because if not, it is their children who will suffer should he die after retirement.
- Thirdly, the law should make a provision to reserve a certain portion of the pensioner's pensionable emolument to be transferred to a trust for the benefit of such a person's children after retirement. Despite that Namibia has a National Plan of Action for Orphans and Vulnerable Children, it is a burden on the State to pay a grant to children who have a valid claim against their parents pension but cannot do so merely because of the above said rule.
- Lastly, it is vital that the State should make all means to provide human rights education, so that all stakeholders can learn what rights they have and what to do when such rights are infringed either by the state or individual. And encourage people to seek the court's guidance or the Office of the Ombudsman in issues concerning their rights that is why we do not have many of cases concerning people's rights.

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