

V. ADOPTION AND SURROGACY

This chapter focuses on issues of parental responsibilities and rights and the protection of children's best interests through the recognition of the non-traditional forms of family. Firstly, the recognition of the parental rights and responsibilities of unmarried fathers of children born out of wedlock remains a contested issue in some African countries, due to the customary law approach and legislative provisions that generally exclude these fathers from the lives of their children. For example, In the Kenyan case of *RM & another v. Attorney General* ([2006] eKLR) the Court refused to declare provisions of the Children's Act of 2001, which did not give an unmarried father parental responsibility in relation his child, as being discriminatory.

The African Charter on the Rights and Welfare of the Child enjoins countries to move from this discriminatory approach and to focus on the right that a child has to know and have a relationship with both his/her parents regardless of their marital status. Some courts have embraced this need to move towards a child-centred approach to parental responsibilities and rights, including the recognition of unmarried fathers' right to consent to adoption and, separately, their obligation to pay maintenance for their children. For example, in the South African case of *Fraser v. Children's Court, Pretoria North* (1997 (2) SA 264 (CC)), an unmarried father successfully challenged the constitutionality of Section 18(4)(d)4 of the Child Care Act 74 of 1983, which did not recognise unmarried fathers' rights and only required the mother of a child of unmarried parents to consent to an adoption. The maintenance requirement is illustrated in *JGM v. CNW* [2008] eKLR, wherein the Kenyan High Court recognised parental responsibilities of an unmarried father who denied parental responsibility based on the non-existence of a marriage between himself and the mother of the children and ordered him to pay child support. The case of *GK v. BOK, CGLK, MT and the Attorney General* [2015] BWHC, MAHGB-000291 from Botswana recognising an unmarried father's right to consent to the adoption of his child is a further welcome development.

This chapter will also discuss cases that pertain to surrogate motherhood agreements. In the South African judgment *AB and Surrogacy Advisory Group v. Minister of Social Development* [2015], Section 294 of the Children's Act, which requires that the child to be born from the surrogacy agreement be genetically related to at least one of the commissioning parents was declared unconstitutional. Although the judgment may be hailed for protecting reproductive autonomy of adults, the same cannot necessarily be said from a child-centred approach, as it potentially allows for the conception of children who will never know the identity of their genetic/biological parents. Nonetheless, it still remains to be seen whether the Constitutional Court will confirm the High Court judgment.

In the case of *Ex Parte MS and Others* [2014], the South African High Court confirmed a surrogate motherhood agreement where artificial insemination had already taken place. Section 292 of the Children's Act (38 of 2005) requires that a surrogate motherhood agreement be confirmed by the High Court prior to artificial insemination, making artificial insemination prior to court confirmation an offence. Despite this, the High Court found that it was in the best interests of the child who was about to be born to confirm the surrogate motherhood agreement and avoid uncertainty about the parentage of the child. In Kenya, where surrogate motherhood agreements are not regulated by law,

the Court found in *JLN and 2 Others v. Director of Children's Services and 4 Others* [2014] that the commissioning parents should be recognised as the parents of the children as this was in the best interests of the children and protected the right to dignity of the commissioning parents.

This chapter will also discuss the case of *MIA v. State Information Technology (Pty) Ltd* [2015] from the South African Labour Court in which the Court recognised “maternity” leave for a commissioning parent of a child born through a surrogate motherhood agreement. The Labour Court found that the applicant had been unfairly discriminated against, and was entitled to paid leave.

ADOPTION

GK v. BOK, CGLK, MT and the Attorney General
[2015] BWHC 1, MAHGB-000291-14
Botswana, High Court

COURT HOLDING

The Court held that Section 4(2)(d)(i) of the Adoption of Children Act Cap 28:01 is unconstitutional to the extent that it does not require the consent of the father in the adoption of his child born out of wedlock in all cases, on the grounds that such differentiation on the basis of gender and marital status cannot be shown to serve any legitimate purpose or interest.

Summary of Facts

The applicant and first respondent conceived a child who was born out of wedlock. The applicant and first respondent were never married, although the applicant provided financial and other support for the child from her birth. The child had lived with the applicant for some 12 months, during which time the first respondent became involved in a relationship with the third respondent. At the conclusion of this 12-month period, the third respondent attempted to adopt the child, which adoption was consented to by the first respondent, the child's mother. Because the child was born out of wedlock, the applicant's consent to this adoption was not required pursuant to the relevant provision of the Adoption of Children Act (the “Act”) (Section 4(2)(d)(i)). The applicant sought relief from the Court that the Act discriminates on the basis of marital status and gender, and as such should be declared unconstitutional as inconsistent with the constitutional protection against discrimination on the basis of certain protected classes secured under Section 15 of the Constitution of Botswana 1966 (the “Constitution”).

Issues

The issues put before the Court were the following:

1. Whether gender and marital status were vulnerable categories that are protected from discrimination under Section 15 of the Constitution of Botswana; and
2. Whether there were exclusions of certain legislative areas from the protections of Section 15

of the Constitution (whether the exclusions appearing in Section 15(4) permit discrimination on the basis of protected classes within these legislative areas (including adoption and personal law)).

Court's Analysis

The Court reviewed the concepts of formal and informal equality in the context of the Constitution, finding that informal equality before the law is the core principle of Section 3 of the Constitution. The Court also found that Section 3 of the Constitution should be read as an umbrella provision that informs related sections of the Constitution, including Section 15 (protection from discrimination). The Court reviewed the state of constitutional interpretation in Botswana and strongly favoured a dynamic approach that views the constitution as a living document, embodying values to be interpreted in the context of contemporary norms (citing *Attorney General v. Dow* 1992 BLR 119 (CA)).

On the basis of this approach to constitutional interpretation, the Court found that the Constitution requires that a law that promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and that legitimate purpose.

The Court undertook a thorough review of the jurisprudence regarding adoption and the rights of children in Europe, North America, and South Africa, finding that the preponderance of the jurisprudence indicates that the rights of fathers to consent to or veto the adoption of their children is based on the degree to which the father has established a familial relationship with the child, and should not be entirely informed by the marital status of the father at the time when the child was born. Accordingly, biological fathers accrue parent-like rights to direct important decisions relating to the child as they demonstrate the responsibilities of parenthood. The Court cited the South African case of *Fraser v. Children's Court Pretoria North and Others* ([1997] ZACC 1), as well as the United States case of *Caban v. Mohammed*, (441 US 380-Supreme Court 1979). The Court noted the paramount importance of the rights of the child in the consideration of all matters relating to children. The Court found that the applicant had established, on evidence, his strong familial relationship with his daughter (the second respondent).

The Court noted that gender, health status and disability are not amongst the grounds listed in the Constitution upon which discrimination is constitutionally protected. The Court cited Amisshah JP in *Attorney General v. Dow, supra*, extensively, for the proposition that the protected grounds listed in the Constitution are not exhaustive, but rather examples of the classes that are protected from discrimination under the constitution. The Court also cited *Diau v. Botswana Building Society* 2003((2) BLR 409 (IC)) for the proposition that the Constitution “outlaw[s] discrimination on grounds that are offensive to human dignity.”

The Court found that the customary laws which dictate that a child born out of wedlock belongs to the mother's family “offends any notion of fairness, equality and good conscience when measured against contemporary norms,” citing *Dow, supra*, for the proposition that the Constitution trumps customary laws to the extent of any inconsistency.

Finally, the Court addressed the exclusions of certain legislative areas in Section 15 of the Constitution, including laws relating to adoption and other matters of personal law. The Court found that the protective provisions of Section 15 (including the exclusion referenced in the preceding sentence) should be read in light of the overarching “umbrella” concepts of equality embodied in Section 3 of the Constitution. Citing *Dow, supra*, and *Ramantele v. Mmusi and Others* (CACGB-104-12) [2013] BWCA 1, the Court found that the exclusions in Section 15(4) should be interpreted narrowly where their impact would be to cause discrimination that is not rational or justifiable in the public interest. In other words, the exclusions in 15(4) of the Constitution should not be read as permitting discrimination based on protected grounds in the context of certain legislative areas, including adoption and personal matters. Rather, courts should consider the public interest (including the preservation of customary law if not antithetical to the objects of the Constitution) if discrimination based on a protected ground is established in the context of one of these excluded legislative areas.

Conclusion

The Court found that it is unfair gender discrimination to require consent of a mother, but not of a father, for adoption of a child born out of wedlock. This distinction has the potential to impair the fundamental dignity of fathers, and hence is impermissible under Sections 3 and 15 of the Constitution. The Court therefore held that the Adoption of Children Act Section 4(2)(d)(i) was unconstitutional because it has the effect of discriminating on the basis of marital status and that the discrimination did not serve any legitimate purpose or interest permissible under the Constitution.

Significance

According to Botswana customary law, which is similar to customs and traditions of many other African societies, a child born out of wedlock is considered illegitimate. As such, the father had no rights over the child. This had several implications, including that the burden of taking care of the child was shifted to the woman, who in most cases was blamed for bearing the child “illegitimately.” Importantly, it also cut the child off from the care and support of the father. Unfortunately, colonial laws also regarded a child born out of wedlock as illegitimate, so that colonial and customary law acting in synergy created a chasm between biological fathers and their children born out of wedlock. This has produced negative social consequences because such children were denied their biological father’s care. It also encouraged fathers not to take responsibility for their biological children.

Therefore, apart from the rights of the biological father being infringed upon, the best interests of the child are at stake when fathers are discouraged from taking responsibility to care for their children. Promoting the father-child relationship contributes toward the realisation of the rights of the child guaranteed by human rights treaties especially the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and is reinforced by the Court’s decision in this case.