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**THE LAW OF SUCCESSION IN LESOTHO: A CRITICAL ANALYSIS OF
EXTRAMARITAL CHILD'S RIGHT TO INHERIT FROM THEIR FATHER
UNDER INTESTATE SUCCESSION**

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CHAPTER 1

1.1 Introduction

From time immemorial, children born out of wedlock have not been looked upon kindly, both by society, its rules and the legal rules. It stems from the notion of the sanctity of the institution of marriage and the general expectation that children are to be born to parents who are married either by custom, religion or the rules of the state. However, the very birth of children outside the institution of marriage, in the past that is, was seen to be frowned upon.

Taking into account the legal rules that developed over time, including the fact that they were influenced by the norms of society; extramarital children were recognised as offspring of their mothers with no regard to their biological fathers unless they were legitimised or adopted. An example is that of the common law principle where extramarital children can inherit from their mothers but not their fathers upon death of the parent. They can under testate law.

The Law of succession in Lesotho encompasses the principles from common law, Sesotho customary law and statutory provisions. As such, the focus of this study is to provide insight into the rules regarding intestate succession and extramarital children. This is with respect to their position to inherit from their biological father's estate upon his death. This chapter will serve to give a background into the law of succession and extramarital children in Lesotho, a definition of key terms, literature review and chapter breakdown of the entire study.

1.2 Definition of Key Terms

Death

This means '...the end of a life of the person concerned...'¹ The courts held in the case of *Landby NO v De Wet*² indicated that the term 'death' had to be understood by its literal meaning.

¹ *Ex Parte Chapman*, 1972 (1) SA 168

² 1959 (1) SA 15

Extramarital/illegitimate child/children

As per the *Fraser case*, this was defined as ‘...the issue of a union or relationship not solemnised by a legally recognised marriage ceremony’³. As the case indicates, the description of this term has the potential to stigmatise such children. When the law refers to “illegitimate” children, however, what it is describing is simply the issue of a union or relationship not solemnised by a legally recognised marriage ceremony and this is the sense in which I will use the expression in this judgment⁴.

In terms of Basotho custom, this term is defined as ‘...a child born of a Mosotho woman outside a customary marriage...under the guardianship of her father or head of the family’⁵. Justice Evans in the case of *Soda Ramalapi v Justice Letsie* explains the term as follows: “The word illegitimate does not connote the same understanding as that viewed in more sophisticated circles. In the circumstances a child born of a Mosotho woman outside a customary marriage convention is but another unit under the guardianship of her father or head of the family, her offspring likewise belong to that unit not to the putative father and his family. He has no claim whatsoever on a child born outside the customary marriage”

Testate Succession

This term is affiliated with the occurrence a person’s death having left a valid will or testamentary document. Such person should have executed a will voluntarily, exercising their freedom of testation⁶.

Intestate Succession/ Inheritance

This term means ‘...the occurrence of a time when a person does not leave a will or the will that has been left is discovered to be partially or wholly invalid for one reason or another..’⁷. The case of *Harris v Assumed Administrator Estate Late Leslie MacGregor*⁸ outlined for instances

³ *Lawrie John Fraser v The Children’s Court*, Pretoria North and others CCT 31/96. Definition by Mahomed DP at Footnote 2

⁴ Ibid

⁵ *Soda Ramalapi v Justice Letsie* 1978 LLR 404.

⁶ Law of Inheritance Act 26 of 1873 (amended 23/1874). Section 5

⁷ M.J. De Waal, M.C. Schoeman-Malan. 2008. *Law of Succession*. 4th Edition. Juta. At Page 7

⁸ (304/85) [1987] ZASCA 54; [1987] 2 All SA 321 (A) (27 May 1987)

where Intestate Succession will apply: where the deceased has not left a will, where the deceased has executed a valid will either in whole or in part but it has become inoperative, where a will is valid but it cannot dispose of all the deceased's assets, and where the deceased is said to have left a testamentary document but it has not complied with the formalities of executing a valid will.

1.3 Background

The Law of Succession is the totality of the legal rules which control the transfer of assets of the deceased which are subject to distribution among beneficiaries, or those assets of another over which the deceased had the power of disposal⁹. In Lesotho, as a result of the dual system¹⁰ succession is regulated by statute, Basotho customs and the Roman Dutch Law (in this case the law to be applicable is dependent on the lifestyle of the deceased. The question would be whether the deceased has lived by custom or abandoned the customary mode of life¹¹).

In both Sotho custom and under civil law, in terms of legislation, the law of succession on Lesotho is governed by Intestate Succession Proclamation¹², Administration of Estates Proclamation¹³, Law of Inheritance¹⁴, Wills Act,¹⁵ and the Laws of Lerotholi. Whether the deceased died testate (where he has executed a will before his death) or intestate (where no will has been executed by the deceased before his death), these legislative texts alongside the principles of common law are relied on. This study will be based on the rules regarding intestate succession, in particular, the position of extramarital children inheriting from their biological fathers.

⁹ Schoeman-Malan (n 7). At page 2

¹⁰ Proclamation No. 2B of 1884:

1. *"In all suits, actions or proceedings civil or criminal, the law to be administered shall, as nearly as the circumstances of t*

2. *"However... in any suit, action or proceeding in any court, to which all parties are natives... native law may be administered."*

3. *"In all suits, actions or proceedings whatsoever, before any Native Chief exercising jurisdiction to which all parties are n*

¹¹ Intestate Succession Proclamation No. 2 of 1953 at section 3 and Administration of Estates Proclamation No. 19 of 1935 at sect

¹² Intestate Succession Proclamation No. 2 of 1953

¹³ Administration of Estates Proclamation No. 19 of 1935

¹⁴ Law of Inheritance (n 6)

¹⁵ Wills Act No. 3 of 1878

In administering estates of the deceased in terms of the common law principles, principles such as per capita, per stirpes and per lineas which are used as methods of distribution. The basic idea of these principles is that the descendants of the deceased, benefit from the deceased's estate, that is, where there are children born to the deceased, they inherit from his estate. However, in terms of a child benefiting from their parent's estate, it is their status (legitimate, extramarital or adopted) that often determines whether they can inherit or not. It is a principle that legitimate children can inherit from their parents' estate after their death, but the same cannot be said for extramarital children and children who were adopted. Under the common law, adopted children are not entitled to inherit from their adopted parents¹⁶ as they are not blood relations of their adoptive parents. On the other hand, an extramarital child, while they are entitled to inherit from their biological mother's estate upon her death, is not considered an intestate heir of his biological father¹⁷ and therefore is not entitled to inherit from his estate. This is largely based on the principles that a mother bears no bastard¹⁸ and that an extramarital child has a mother but no father¹⁹.

In Lesotho, legislative texts take precedence over the common law. The Intestate Succession Proclamation outlines provisions that govern the administration of the estate of the deceased who has died without executing a will, that is, the persons who are entitled to inherit. These persons include the surviving spouse of the deceased, the children of the deceased, the surviving blood relatives of the deceased and the adopted children of the deceased (if any). However, the provisions of the Intestate Succession Proclamation do not provide for extramarital children. It is as such that the principles of common law are applied in such circumstances, that is, an extramarital child is entitled to inherit from their mother's estate and not their father's estate. At best, an extramarital child that is still a minor is entitled to claim maintenance from their deceased biological father's estate.

¹⁶ *In re Russo* 13 SC 185

¹⁷ Schoeman-Malan (n 7). At page 32. Under Common Law, "...an extramarital child could not be intestate heir of his father or patern

¹⁸ Visser. P.J, Potgieter. J. M. 1998. *Introduction to Family Law 2nd Ed* Juta & Co. At page 200: Principle 'A mother bears no b

¹⁹ *Mookho Motanya v Tlhoriso Makenete* CIV/APN/125/2013 at paragraph 12, cited from Boberg- *Law of Persons and Family*(2nd Edition

The position of extramarital children is more or less similar in respect of inheriting from their deceased parent's estate under customary law. Ordinarily, when a father dies, his property is inherited by the first male child of the first wife²⁰ as he is recognised as the heir of his father. Sections 11 to 14 of Part One of the *Laws of Lerotholi* deal with heirs and Administration and Inheritance of property; however, the provisions do not expressly cater for extramarital children.

In the case of an extramarital child, they are not entitled to inherit from their biological father's estate as they are minors of their mother's family²¹. However, this is not just to their father's estate but to their mother's as well, that is to say, they are not entitled to inherit from their mother's estate upon her death under Sotho customary law.²² This was held in the case of *Thabi v Makopela*²³ and in the case of *Rasethuntsa v Rasethuntsa*.²⁴

1.4 Problem Statement

In light of the changing times, it is often not a surprise that the law adapts to the current standards of society, but the legal position of extramarital children remains the same. For instance, in regard to minor children, section 6 of the Children's Protection and Welfare Act²⁵ provides that a child shall not be subject to discrimination on any ground including status of birth. In the same act, section 19 denies an extramarital child right to property of his father. It is clear that while section 6 advocates for non-discrimination amongst minor children, this is not absolute when read together with section 19.

These provisions are a contradiction of the African Charter on the Rights and Welfare of the

²⁰ The Laws of Lerotholi, Part 1 section 11 (1): "The heir in Basutoland shall be the first male child of the first married wife, and if there is no male in the first house the first born male child of the next wife married in succession shall be the heir"

²¹ *Rasethuntsa v Rasethuntsa* J.C. 216/47

²² Duncan. P. 2006. *Sotho Laws and Customs*. Morija. Morija Printing Works. At page 11

²³ J.C. 360/47

²⁴ *Rasethuntsa* (n21). Brief Facts: The deceased (a woman) was survived by two children (born out of wedlock) who disputed over th

²⁵ Children's Protection and Welfare Act No.7 of 2011

Child²⁶. This charter under article 3 provides for non-discrimination in that every child is entitled to enjoyment of rights and freedoms guaranteed in the charter irrespective status such as their parent's race, ethnic group, colour, sex, language, or such other status. Similarly in the United Nations Convention on the Rights of a Child, article 2 pushes for respect and protection of the rights of the child without any kind of discrimination. It further puts the obligation on state parties to take measures to ensure the protection of a child against any and all kinds of discrimination.

Based on the above, whether the child is a minor or has attained majority, they are subject to discrimination under both common law and the statutory law when it comes to inheritance from their biological father. Not only is it inheritance in respect of the child inheriting from their father, but the father of an extramarital child cannot inherit from that child upon his or her death.

Thus it brings forth the following problem statement; there is discrimination against the extramarital child in terms of inheritance under intestate succession evident in both the customary and common law in Lesotho. The discrimination is ongoing despite the changes in societal norms and in wake of the fact that a lot of children are born outside of marriage.

1.5 Literature Review

As indicated above, an extramarital child by virtue of his status does not enjoy the same benefits of one who is legitimate in terms of inheriting under intestate succession. The legislation, in this case the Intestate Succession Proclamation, does not cater for extramarital children. It has in retrospect, entitled persons such as the spouse of the deceased and the adopted child (or children) of the deceased to inherit where the common law has denied such persons that entitlement, yet extramarital children have been left out. The legislation is above the common law when it comes to application of the law. With the exception of extramarital children inheriting property from their mother and her relations (section 19²⁷ of the *Children's Protection and Welfare Act* in the

²⁶ African Charter on the Rights and Welfare of the Child (1990/1999)

²⁷ Children's Protection and Welfare Act (n 25). Section 19: "*A child has a right to the property of his parents but where the chi*

case of a minor) there are no express statutory provisions in the matters of extramarital children and intestate succession, especially where their biological father is concerned.

The Intestate Succession Proclamation limits its application in matters of intestate succession to persons who have abandoned the customary mode of life.²⁸ It can be seen as putting to effect Proclamation 2B of 1884; in that customary matters be dealt with under customary law and civil matters be dealt with by civil law. This goes to show that extramarital children born into a customary mode of life cannot rely on the Intestate Succession Proclamation in order to inherit from their biological father's estate upon death.

Moreover, customarily, where it is often the case that the first born son is to inherit from his father's estate, his status of illegitimacy discredits him from inheriting from his biological father, which was the case in *Moliehi 'Maneo Ntene (nee Ramakau) v Sello Ramakau*.²⁹ In that case, the respondent who was a son born out of wedlock claimed to be the heir by virtue of having been taken to his father's home long after the death of his biological father. However, there was no marriage between the respondent's biological parents and there was no proof to show that the Respondent had been accepted into the family. Further, the family had nominated the Applicant as the heir of the deceased estate and she had proved to being the legitimate child of her biological parents (both deceased).

The above shows that on all counts, be it by statute, customary law or the common law, extramarital children experience prejudice when it comes to inheriting from their biological father's estate when he dies intestate. Not only that, but even the biological father's themselves are not entitled to inherit from their extramarital children. Ideally, they inherit where they have either been included in a will or legitimised. Extramarital children in this regard are both discriminated against and suffer prejudice in comparison to legitimate children because of their status. They are not acknowledged as children of their biological father in his lifetime, after his

²⁸Intestate Succession Proclamation (n 12). Section 3: "This Proclamation shall not apply to the succession to any African unless

Administration of Estates Proclamation No.19 of 1935, section 3 (b): *"This Proclamation shall not apply to the estates of Africa"*

²⁹CIV/APN/321/2013

death and under the law where they are not afforded equal and absolute protection.

There exists a big gap among people in this respect as a matter of status in Lesotho. The courts of Lesotho take note of discrimination against women in terms of intestate succession. As far as extra-marital children are concerned, especially under customary law, emphasis is made on the fact as to whether that child was adopted under customary law and that child is a male. Thus why this study aims to show the areas where the law falls short in acknowledging equality amongst persons where status is concerned in respect to intestate succession; especially from parent to child.

1.6 Outline of Study

The study will be divided into four chapters.

Chapter 1 serves as the introductory chapter of this study. This is with the objective of introducing the issue of extramarital children and their capacity to inherit from their biological fathers. This also includes discussing the position of the law in Lesotho in respect of extramarital children and intestate succession.

Chapter 2 of the study will focus on the legal framework on the subject matter of intestate succession and extramarital children from other jurisdictions (for example, South Africa, the United Kingdom and Namibia). The objective of this chapter is to view the position of extramarital children inheriting from their biological father's who have died intestate.

Chapter 3 will serve as a comparative analysis of the case law on extramarital children and their position to inherit from their biological fathers. In discussing the case law, the aim to see how the judiciary has dealt with the principles of intestate succession and extramarital children as well as application governing legislature. In this respect, case law from jurisdictions such as South Africa, Lesotho, Namibia, Botswana and the United States of America.

Lastly, chapter 4 will serve as a conclusion of the entire dissertation by providing a general

summary as to the findings of this research and outline the areas of the law of Lesotho to be addressed in regard to extramarital children by way of recommendations.

1.7 Conclusion

As shown above, this chapter has demonstrated the position of the law in Lesotho in regard to extramarital children inheriting from their biological father's estate, that is, extramarital children are not entitled to inherit from their biological father both under customary law and the common law. This is discriminatory towards extramarital children as they cannot enjoy the same rights as marital and adopted children enjoy under intestate succession. This is in light of the fact there are children born out of wedlock and cannot hope to be seen or acknowledged as a child of their father when it comes to distribution of their father's estate.

CHAPTER 2: THE DEVELOPMENT OF INTESTATE SUCCESSION IN JURISDICTIONS OUTSIDE OF LESOTHO

2.1 Introduction

The principles of inheritance law between different states, same as with any other law, shared some similar principles. But with the progression of time and other factors such as values of society, each jurisdiction branched out to fashion the law of succession that would be applicable to their states. The aim of this chapter is to discuss the legal framework of jurisdictions, such as Namibia, South Africa, Botswana and the United Kingdom, on the subject matter of intestate succession and extramarital children. Not only will this provide an insight as to the legal framework by way of enacted legislation but also into the existing customary law. This will involve the discussion of the development of law in the abovementioned jurisdictions.

2.2 South Africa

Similar to Lesotho, intestate succession was governed by the principles of the common law as discussed in chapter one. That is to say that the extramarital child could not inherit from his biological father or his relations as opposed to their biological mother³⁰.

However, the position changed with the enactment of the Intestate Succession Act³¹ which provides principles of devolution of the estate of a person that has died intestate. Section 1(2) of the Act states that the status of illegitimacy of a person would not affect their capacity to inherit from the estate of a deceased that has died intestate. This section was applied in the case of *In Re Moatsi se Boedel*.³² In this case, the deceased died intestate and was survived by his daughter who was an extramarital child. The estate was distributed in accordance with the principles of the Intestate Succession Act, particularly section 1(1) (b) which states that where the deceased is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate.

³⁰ M.J. De Waal, M.C. Schoeman-Malan. 2008. *Law of Succession*. 4th Edition. Juta. At Page 32

³¹ Intestate Succession Act 81 of 1987

³² 2002 (4) SA 712 (T)

The status of the deceased's daughter did not disqualify her from inheriting.

The Intestate Succession Act was not reliable in terms of inheritance under customary law. In South Africa, there existed a parallel system that dealt with the distribution of an estate of a deceased that died intestate and this was done in compliance of two legislative acts. These acts were the Intestate Succession Act and the Black Administration Act.³³ This is explained in detail in the tripartite constitutional case of *Bhe and Others v Khayelitsha Magistrate and Others*.³⁴ The parties appeared before the constitutional court to declare provisions of the Black Administration Act, Intestate Act as well as the Regulations for the Administration and Distribution of Deceased Blacks³⁵ to be unconstitutional. This was on the basis of the fact that the Intestate Succession Act in its application, excluded estates of persons who acquired property under customary law³⁶, that is, unless the deceased had been exempted in terms of the Regulations from the application of customary law to which his property would devolve under European law.³⁷ Moreover, the parties approached the court to have the African Customary Law rule of primogeniture declared unconstitutional as it discriminated against women and extramarital children on the grounds of race, gender and birth. The court held to that effect, the unconstitutionality of the provisions because of the discrimination it presented against rights of both women and extramarital children that the Constitution of South Africa was enacted to protect.

Following which was the statute that amended the Intestate Succession Act in relation to customary law, namely the Reform of Customary Law of Succession and Regulation of Related Matters.³⁸ As indicated in the preamble of the Act, this legislation was enacted in response to the position of widows married under customary law not benefitting from the estate of their husbands who died intestate, children born out of wedlock who are not protected under customary law, the changes in the society as well as the provisions of the constitution of South

³³ Black Administration Act 38 of 1927

³⁴ (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)

³⁵ Regulations for the Administration and Distribution of Deceased Blacks 1927

³⁶ Black Administration Act. Section 23(1): "All movable property belonging to a Black and allotted by him or accruing under Blac

³⁷ Ibid. Regulation 2 (b): "If the deceased was at the time of his death the holder of a letter of exemption issued under the pro

³⁸ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

Africa, in particular that everyone has a right to equal protection and benefit of the law.³⁹ It can therefore be inferred that the aim of the enactment of this legislation was to remove the barriers of discrimination caused by the rules of customary law in relation to women, and extramarital children when it came to inheritance of properties when the deceased died intestate. Section 2 of the Act provides as follows:

The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).

As such, whether a child is an extramarital child by way of customary law standards or as dictated in the common law, the law is such that they are entitled to inherit from the estate of a deceased who has died intestate.

2.3 Namibia

Much like South Africa and Lesotho, intestate succession was governed by the common law until legislation was enacted to govern intestate succession, that is, the Intestate Succession Ordinance 12 of 1946. The provisions of this ordinance are much similar or equivalent to that of Lesotho's Intestate Succession Proclamation, which is in as much as there's coded text on how an estate of the deceased should be distributed; there are no provisions that cater for children born out of wedlock. In Namibia, people whose estates were governed by this law upon their death were white people⁴⁰ and coloured⁴¹ people.

³⁹ The Constitution of South Africa 1996, section 9

⁴⁰ The legal definition of this term can be found under section 1(xv) of the Population Registration Act, 1950 (Act No. 30 of 1950 *white person* as: "a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person."

⁴¹ This term is defined legally under section 1 of the Coloured Persons in South-West Africa Education Act, 1972 (Act No.63 of 19

The Law Reform and Development Commission (LRDC) of Namibia made note that estates of natives were administered either by the Master of the High Court (those who followed the same rules as white people, e.g. marriage) or by the magistrates (people who followed customary law rules)⁴². The LRDC made note of the fact that depending on the race or location of the people of Namibia, different rules of intestate succession would apply.

This was the position of Namibia until the enactment of the Succession and Estates Amendment Act⁴³ which was enacted to address these differences. The LRDC has however noted that this Act, while it repealed previously enacted legislation, is still in need of further reformation as the Act only addressed racial differences.

In their 2012 report, the LRDC made recommendations on issues of succession. In relation to children born out of wedlock of people governed by customary law, one of the recommendations was that customary rules apply where the deceased is survived by a descendent, but where the aspects of the customary law are unconstitutional then the customary law will not apply⁴⁴. Alternatively, under common law, upon the death of the deceased, his estate is to be distributed to his surviving spouse and failing such, his descendants (whether born in wedlock or out of wedlock).

The LRDC 2012 Report under Annexure A provided an Intestate Succession Bill that is to govern the law of intestate succession. In its interpretation section, it defined a child as a child born in or out of marriage, adopted and a child conceived but not yet born.⁴⁵ This removes the discrimination of race, status and culture evident in the prevailing law. The provisions of this bill secure the capacity of an extramarital child to inherit intestate from either parent, eliminating the scrutiny that extramarital children face because of the status of their birth. However, because this is not enacted legislation, other legislative texts in this respect have to be used when dealing with the estate of a deceased who has died intestate.

⁴² LRDC. 2012. Report On Succession And Estates (Project 6)

⁴³ Succession and Estates Amendment Act No. 15 of 2005

⁴⁴ LRDC (n 42). At page 14

⁴⁵ LRDC (n 42). Intestate Succession Bill. Section 1: child “means a child born in, or out of marriage, including a marriage unde

Taking into account minor children, there is in place the Child Care and Protection Act.⁴⁶ Section 105 of this Act provides that children born outside marriage are to be treated in the same way as legitimate children when it comes to inheriting from the estate of the deceased whether he died testate or intestate.⁴⁷ However, while this section provides for children who are minors, as defined in the Act⁴⁸; this does not extend to persons born out of wedlock who have attained majority age (18 years). This is as opposed to the Intestate Succession Bill that did not put an age limit in its definition of a child that included extramarital children.

On the other hand, Namibian case law shed light where the legislation is silent. In the case of *Lotta Frans v Inge Paschke*⁴⁹, the plaintiff was the biological child of the (the deceased) who died intestate and the first defendant was the sister of the deceased. On the date of death, the plaintiff could not inherit from the estate of the deceased due to the common law principle excluding extramarital minor children from inheriting intestate from their fathers and as such the deceased's entire estate was awarded to the first defendant.

The common law principle was declared unconstitutional by the court on the basis that in as far as intestate inheritance is concerned; there exists a differentiation between legitimate and extramarital children.⁵⁰ It was pointed out that the basis of this principle was to punish children for the actions of their parents, but in present times the rule still discriminates even in circumstances where loving parents who are not married still live with their children. The discrimination that extramarital children faced is as a result of society's values and as such reflected onto the law. The decision of this case changed the position of an extramarital child in inheriting from the estate of their biological father.

2.4 Botswana

⁴⁶ Child Care and Protection Act 3 of 2015

⁴⁷ Ibid, Section 105 (2): "Despite anything to the contrary contained in any statute, common law or customary law, a person born

⁴⁸ Ibid (n 17), section 1: "child means a person who has not attained the age of 18 years"

⁴⁹ Case no P (I) 1548/2005

⁵⁰ Frans (n 49), Paragraph 17

The law of succession is governed by the Law of Inheritance Act⁵¹, Administration of Estates Act⁵², and the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act⁵³. With regards to descendants of the deceased, the Succession Act provides for children born to the deceased, children conceived but not yet born, and children who are adopted.⁵⁴ However this provision is not clear on children born out of wedlock. That is to say, the Act is not clear as to whether it applies only to children born in marriage or if it also includes children born out of wedlock.

As per section 4 of the Succession Act, there are provisions that govern how beneficiaries are to inherit where the deceased has died intestate. This is inclusive of the spouse and children receiving a share of the estate. Further, section 6 gives power to the court order payment out of the deceased's estate for the benefit of the surviving spouse or child on application by such affected party or on their behalf. However, the Act is silent on children who are born out of wedlock.

Further, section 3 of the Succession Act reads as follows: “*The provisions of this Act shall not extend to the estate of any person who dies either wholly or partly intestate where the rights of succession to such estate are determinable in accordance with customary law*”. This shows that the Act cannot be relied on when it comes to dealing with estates that are administered in accordance with customary law of Botswana. It further shows that the position is such that extramarital children cannot inherit from their biological father's estate upon his death in terms of customary law.

Author Elizabeth M. Mokobi⁵⁵ cited the decision of *Samsam v Seakareā*⁵⁶ case on the common law position of extramarital children and their capacity to inherit from their biological father

⁵¹ CAP 31:02 Law of Inheritance Act

⁵² CAP 31:01 Administration of Estates Act

⁵³ CAP 31:03 Succession (Rights of the Surviving Spouse and Inheritance Family Provisions)

⁵⁴ Succession Act CAP 31:03, section 1: "son" and "daughter" include the son or daughter of the deceased en ventre samère at the

(2) For the purposes of this Act any relationship by adoption under the provisions of the Adoption of Children Act shall be equi

⁵⁵ E.M. Mokobi, 2014. *Lingering Inequality In Inheritance Law: The Child Born Out Of Wedlock In Botswana*. Using the Court to Prot

⁵⁶ 2004 (1) BLR 378.

where the Letsedi J held as follows:

As a common law principle, children born out of wedlock do not succeed ab intestato to their father and his relations but to their mother and her relations.... On the other hand a child born out of wedlock is entitled to maintenance from both its parents according to their means.... This is now a settled principle of our law. In the light of the above authorities therefore, although the two children are not entitled to inherit from their father, they are entitled to claim maintenance from his estate in so far as they may be dependants. A right to maintenance is however distinct from a right to inherit and it certainly does not confer on a dependant a right to possession or occupation of any property of the estate.

Mokobi further highlights that the customary law position on intestate succession and extramarital children being similar to that of the common law position. Under custom, a child who is born out of wedlock and has not been formally adopted by their biological father under customary law cannot inherit from his estate should he die intestate.

This position was held in the Customary Appeal Court of Botswana in the case of *Hendrick v Tsawe*⁵⁷ which Mokobi highlights. In this case a child (Hendrick) born out of wedlock, claimed the right to inherit from his father and sued his father's widow to enforce the right he asserted. The Customary Court of Appeal ruled that the applicant was not entitled to inherit from his father, as he had never been formally adopted under customary law. On appeal at the High Court, the court held the same view, stating that a man could not claim a child he fathered out of wedlock, nor could such a child have any claim against his father, unless certain legal conditions (marriage and *bogadi*) had been fulfilled. The Court ruled that Hendrik had not discharged the burden to prove that he was legitimised by marriage or that he was adopted, and, therefore, that he was not entitled to inherit from his late father⁵⁸.

⁵⁷ 2008 (3) BLR 447.

⁵⁸ Mokobi (n 55). At page 142

Despite the positions of both the common law and customary law, one has to take into account the provisions of other statutes on this matter. In this regard is part four of the Children's Act⁵⁹ which provides for parental duties and rights, particularly section 27(4) (g) states as follows: *“Subject to subsections (1) to (3) every parent shall have the duties, in respect of his or her child to ensure the child inherits adequately from his or her estate”*. Read together with section 27(6)⁶⁰, the law is such that an extramarital child has a right to inherit from their deceased biological parent and the right to claim their inheritance from the estate of their deceased biological parent when they have not been accounted for at the distribution of the deceased parent's estate. In application of this Act, its drawback is that only applies to extramarital children who are minors. For extramarital children that have attained the majority age, they cannot inherit from their biological father's estate under intestate succession as the Succession Act is silent on extramarital children.

However, Mokobi comments on the effect of this provision that while it does look as though extramarital children are catered for under this Act, a closer look at the provisions reveal “...that they do nothing to assist the extra-marital child to inherit from his father”.⁶¹ She states as follows:

Section 27(6) states that where a biological parent dies intestate, such a child shall be awarded such portion as they are entitled to under the Administration of Estates Act or any other law. The Succession Act, for its part, makes no mention of extra-marital children. In any event, the Administration of Estates Act and the Succession Act do not apply to children of deceased tribesmen, which must be dealt with under rules of customary law. Thus, this portion of section 27(6) is unhelpful. Section 27(6) also provides that a child not provided for in intestacy may receive that portion of their biological parents' estate as they may be entitled to under any other law. As established above, the extra-marital child is entitled to nothing under the common law and customary laws of

⁵⁹ Children's Act No. 8 of 2009

⁶⁰ “Where the biological parent of a child dies intestate, or fails to make adequate provisions for his or her surviving child in

⁶¹ Mokobi (n 55). Page 143

Botswana. The Children's Act has therefore failed – whether by design or error – to remedy the age-old exclusion of a child of an unwed father from his father's estate. The limits of the child's rights with regard to his unwed father are simply a claim for the provision of maintenance.

Given the nature of section 27 of the Children's Act, a simple read of this section as indicated in the above quotation implies that even an extramarital child is entitled to inherit from their father under intestate succession. However, a deeper look into the provisions of this section is bound to bring about uncertainty, this as a result of no clarity in respect of children either born in or out of wedlock. It is also important to highlight that there exists distinction between maintenance and inheritance, and given the effect of the Children's Act as explained by Mokobi, an extramarital child can only go as far as claiming maintenance and not inheritance from his deceased biological father's estate.

On the other hand, the position of inheritance of extramarital children under customary law changed in the case of *Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor*.⁶² This 2014 Court of Appeal decision was discussed at length by authors Jonas and Gunda in the article *Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor*.⁶³ In the case, Legwaila JA made recognition of the trend in acknowledging the rights of children to inherit regardless of the circumstances of their birth.⁶⁴ In arriving at their decision, the judges made point of how the customary law of Botswana is changing in nature, recognising the change in the norms of society. The court highlighted how the legislature in section 27(6) of the Children's Act requires that children inherit from their biological parents and that customary law accommodate extramarital children in the same manner.

In the abovementioned article, authors Jonas and Gunda state that the rule excluding extramarital

⁶² Case No CACGB-045-13

⁶³ O. Jonas, and P. Gunda. 2015. *Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor*. The Comparative and International Law Journ

⁶⁴ Ibid. Page 93

children from inheriting from their father is not in line with modern thinking.⁶⁵ Further, both authors describe this case as an epic development in the discourse of rights of children, in general and their rights to inheritance.⁶⁶ This goes to show that extramarital children can inherit from their biological fathers under customary law.

2.5 United Kingdom

The English law was part of what fashioned the law in Lesotho. In respect of extramarital children and intestate succession, the law of intestate succession was governed by the principles of common law that is until the enactment of the United Kingdom (UK) enacted a law known as the Family Law Reform Act 1969. The provisions Section 14 were such that where either parent of an extramarital child died intestate, the extramarital child was entitled to inherit in the same way a child who is legitimate would have such entitlement⁶⁷. In the same way, the parents to an extramarital child can inherit where that child has died intestate⁶⁸.

However, this section was repealed by section 8 of Schedule 3 of the Family Law Reform Act of 1987⁶⁹. This legislation affected intestate succession after its enactment such that the status of birth as well as conception and the type of relationship the biological parents had affected the status of rights to property. Per section 1 and 18 of the 1987 Act, an extramarital child cannot inherit from their deceased biological father's estate unless they can show that their biological parents were civil partners⁷⁰. Taking into account the Inheritance and Trustees' Power Act⁷¹, there is no clear provision as to extramarital children inheriting from their biological fathers. In this respect, Schedule 2⁷² of this Act at section 2 (2) read together with section 1 (1) (c) of the

⁶⁵ Jonas and Gunda (n 63), Page 97

⁶⁶ Jonas and Gunda (n 63), Page 97

⁶⁷ Family Law Reform Act, 1969. Section 14 (1): *“Where either parent of an illegitimate child dies intestate as respects all or a*

property, e

⁶⁸ *Ibid*, Section 14 (2): *“Where an illegitimate child dies intestate in respect of all or any of his real or personal*

property, e

⁶⁹ Family Law Reform Act, 1987. Schedule 3. Section 8: *“The repeal by this Act of section 14 of the Family Law Reform Act 1969 sh*

ing into fore

⁷⁰ Family Law Reform Act (n 68), Section 1(1): *“In this Act and enactments passed and instruments made after the*

ing into fore

⁷¹ Inheritance and Trustees' Power Act 2014

⁷² Amendments of Inheritance (Provision for Family and Dependants) Act 1975

Inheritance (Provision for Family and Dependents) Act⁷³ indicates that a child of the deceased who was treated as a child of the family is entitled to inherit (whether out of marriage or out of a civil relationship). The rules of intestate succession are clear on extramarital children when it comes to the capacity to inherit. While the legislature has appeared to include the circumstances of the conception of the child, that has been limited to proving that there existed a relationship akin to marriage between the biological parents.

2.6 Conclusion

Based on the findings above, each jurisdiction has taken a different approach to dealing with intestate succession and extramarital children, especially on the issue of inheritance from their biological fathers. These findings will be used in Chapter 4 for the purposes of a comparative analysis with the above discussed jurisdictions against the position of Lesotho.

⁷³Inheritance (Provision for Family and Dependents) Act 1975

CHAPTER 3: A JUDICIAL PERSPECTIVE ON EXTRAMARITAL CHILDREN AND THEIR POSITION TO INHERIT INTESTATE SUCCESSION

3.1. Introduction

Aside from the legislature, the judiciary has always made a contribution in the development of the law. While the law developed by courts does not carry as much weight in terms of enforcement as enacted legislation, it carries importance when dealing with cases that are brought before the court for determination. This chapter is aimed at discussing case law that has dealt with intestate succession with respect to extramarital children inheriting from their biological father's estate. Study of case law will be taken from jurisdictions such as Lesotho, South Africa, Namibia, Botswana, and the United States of America.

3.2. Lesotho

3.1.1. MOLIEHI 'MANEO NTENE (NEE RAMAKAU) v SELLO RAMAKAU⁷⁴

This was an application for an interdict pending the finalisation of the case. The Applicant and her sister were the sole remaining children of their deceased parents, apart from their siblings who predeceased their parents. The deceased siblings died before they married. Among the predeceased siblings, one Khojane (Applicant's deceased brother) had a son (Sello Ntšonyana) out of wedlock. The child lived with his maternal grandparents in Morija until the age of twenty when the Applicant's father brought the child to his home. However, before any significant action could be done, the Applicant's parents died.

Upon the death of her parents, the Applicant had been appointed by the family as heir to her parent's estate. Sello claimed that he was a legitimate child and that he was the heir per the wishes of the Applicant's father and as such should inherit everything.

The court noted from the arguments brought by the Applicant that no instructions were documented anywhere to appoint Sello as the rightful heir. Further, his parents (his mother and

⁷⁴ (CIV/APN/321/2013) [2014] LSHC 3 (01 April 2014)

the deceased Khojane) were not married under custom or by civil law. The Applicant referred to section 19 the Children's Welfare and Protection Act⁷⁵, where it stipulates that a child has no right to inheritance over property of his biological father.

The court applied the Intestate Succession Proclamation⁷⁶ on the point that even where a person dies intestate it is the family that has to convene and appoint the heir. Similarly, it pointed out the provisions of the Land Act⁷⁷, particularly section 3 (b) where it states that where there is no will and no spouse to inherit from the deceased under intestate succession, then the right to the land will be given to the person nominated by the family, in which this case is the applicant.

This case shows that the statutory law and customary law governing extramarital children and their position to inherit from their biological father has a strong hold on the judiciary, in that the extramarital child is not entitled to inherit, While it is the duty of the court to interpret the law and apply it accordingly to the cases brought before it, this case shows that there was no deeper discussion made into the laws on extramarital children and intestate succession especially in these current times where right to equality for the law is becoming more pronounced.

3.3. South Africa

3.3.1. BHE AND OTHERS v KHAYELITSHA MAGISTRATE AND OTHERS⁷⁸

This case was brought to the court by the third applicant on behalf of the first and second applicants. The first and second applicants were extramarital children of the deceased who died intestate. The Applicants wanted the court to declare provisions of the Black Administration Act⁷⁹, Intestate Act⁸⁰ as well as the Regulations for the Administration and Distribution of Deceased Blacks⁸¹ to be unconstitutional. This was on the basis of the fact that the Intestate Succession Act in its application, excluded estates of persons who acquired property under

⁷⁵ Children's Protection and Welfare Act 7 of 2011

⁷⁶ Intestate Succession Proclamation 2 of 1953

⁷⁷ The Land Act No.8 of 2010

⁷⁸ CCT 49/03 [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)

⁷⁹ Black Administration Act 38 of 1927

⁸⁰ Intestate Succession Act 81 of 1987

⁸¹ Regulations for the Administration and Distribution of Deceased Blacks 1927

customary law⁸², that is, unless the deceased had been exempted in terms of the Regulations from the application of customary law to which his property would devolve under European law.⁸³ Moreover, the parties approached the court to have the African Customary Law rule of primogeniture declared unconstitutional as it discriminated against women and extramarital children on the grounds of race, gender and birth. The court held to that effect, the unconstitutionality of the provisions because of the discrimination it presented against rights of both women and extramarital children that the Constitution of South Africa was enacted to protect.

This case bears importance on account of the prejudice extramarital children faced not just in terms of the common law, but customary law. This extended to issues of race and gender. Children born out of wedlock have faced challenges both in the lifetime of their parents and post their parents lifetime. Their status as an extramarital child affected their position to succeeding their biological fathers and inheriting from them as opposed to a marital child. This case recognised the implications that the legislature and the customs imposed on the extra-marital children and as such put balance to the inequality that had long taken root into the rules over intestate succession.

3.4. United States of America

3.4.1. TRIMBLE V. GORDON⁸⁴

The Appellant Deta Mona Trimble was the illegitimate daughter of appellant Jessie Trimble and Sherman Gordon (the Deceased). Upon the death of the deceased in 1974, the Appellant's mother filed a petition for letters of administration, determination of heirship, and declaratory relief in the Probate Division of the Circuit Court of Cook County, Illinois. That court entered an order determining heirship, identifying as the only heirs of the deceased, his father, Joseph Gordon, his mother, Ethel King, and his brother, two sisters, and a half brother. The Appellant

⁸² Black Administration Act. Section 23(1): "All movable property belonging to a Black and allotted by him or accruing under Blac

⁸³ Regulation 2 (b): "If the deceased was at the time of his death the holder of a letter of exemption issued under the provision

⁸⁴ 430 U.S. 762 (1977) https://www.law.cornell.edu/supremecourt/text/430/762#writing-USSC_CR_0430_0762_ZO

was not entitled to inherit on the ground of section 12 of the Illinois Probate Act, which provides that,

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate.

The court noted that this section was in violation of the Equal Protection Clause of the Fourteenth Amendment by invidiously discriminating on the basis of illegitimacy and sex. The court also took note of the fact that the abovementioned section was meant to support state interest in protection of family relationships. But this in turn also affected the constitutional rights of an extramarital child.

This case recognised the need for equality between children in matters of succession whether they were born in or out of wedlock. It also recognises the need for uniformity between legislated acts, and the need to disband inequality that arises as a matter of status and gender.

3.4.2. IN RE ESTATE OF BURRIS⁸⁵

This case involves the constitutionality of former Section 731.29(1), Florida Statutes (1973), which required a written acknowledgement of paternity by the father of an extramarital child in order for that extramarital child to inherit from the natural father under our state laws governing intestate succession.

The Deceased (Burriss) died without a will in May, 1975 and was survived by three legitimate children and four extramarital children. The Florida Statutes in effect at that time allowed an extramarital child to be an heir of his father, for purposes of interstate succession, only if the father had acknowledged his paternity in writing, and signed such acknowledgement in the

⁸⁵ 361 So. 2d 152 (1978). <https://law.justia.com/cases/florida/supreme-court/1978/52330-0.html>

presence of a competent witness. In spite of these statutory restrictions, the extramarital claimants in this case contended that they should receive shares of the decedent's estate even though their paternity had not been acknowledged in writing. The trial court held a full factual inquiry and determined that claimants were, in fact, natural children of the decedent. In addition, the trial court held that Section 731.29(1), Florida Statutes (1973) was unconstitutional, in violation of the equal protection clauses of the state and federal constitutions. Therefore, the trial court concluded that the four extramarital children should share equally in the estate with the three legitimate children of the deceased.

In arriving at their decision, the court took note of the fact that the above mentioned statute was a reflection *of traditional moral and social values disapproving extra marital sexual relations*. It cited the case of *Weber v. Aetna Casualty & Surety Co.*⁸⁶ where it stated that

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the extramarital child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the extramarital child is an ineffectual as well as an unjust way of deterring the parent.

This case brings to light the fact that the moral standards that had been in place, do not only hold much force now, but cannot be applicable in the strict sense. Extramarital children cannot be held accountable for their parents' actions and their welfare should not be subject to the same.

⁸⁶ 406 U.S. 164, 175, 92 S. Ct. 1400, 1406, 31 L. Ed. 2d 768 (1972)

3.5. Botswana

3.5.1. BAONE KEALEBOGA & ANOR V TIDIMALO MERCY KEHUMILE & ANOR⁸⁷

In this case, appellants were born out of wedlock to the late Charles Kehumile and Keamogetse Kealeboga. About the timely death of the deceased, the deceased had offered to pay for lobola for his children and their mother but was unable to do so. The Appellants submitted to the court that they had a right to inherit from their father's estate despite the fact that they were born out of wedlock. The Respondents argued that the appellants were not entitled to inherit because they were born out of wedlock and were not known to the family. The Customary Court ruled in favour of the appellants; however, on appeal, the High Court, ruled against the appellants on the basis that "the mother of the appellants and the deceased were not lawfully married under customary law and that the appellants were not entitled to inherit from the deceased".⁸⁸ The ruling of the High Court was made in line with the position of extramarital children inheriting from their biological fathers under customary law stated in the case of *Hendrick v Tsawe*.⁸⁹ It was stated that an 'illegitimate' child could not inherit from his father and in the words of the Chief Justice, as quoted by authors Jonas and Gunda,⁹⁰

'[o]nly the children born in marriage, legitimised by subsequent marriage or by adoption can inherit the property of their father'.⁹¹

The judge in the High Court supported his conclusion as follows:

[a]s the decision that the children were entitled to inherit from the deceased was based entirely on the finding that their parents were lawfully married, there should be no need to take the matter further as a finding of the illegitimacy must lead to the conclusion that they were not entitled to inherit.

⁸⁷ Case No CACGB-045-13

⁸⁸ See Jonas and Gunda (n 63). At page 93

⁸⁹ 2008 (3) BLR 447

⁹⁰ Jonas and Gunda (n 63)

⁹¹ Jonas and Gunda (n 63), at page 91

The decision of the High Court was appealed. The Court of Appeal decided differently, stating that the existence of a trend in acknowledging the rights of children to inherit regardless of the circumstances of their birth. The court acknowledged that the customary law of Botswana is not rigid, rather it is changing and adapting to the norms of society and that the rule excluding extramarital children from inheriting was based on an outdated and demeaning description, which is ‘illegitimate’.⁹²

In their article, authors Jonas and Gunda have noted from the case that

...denying children the right to inherit from their father on the basis that they were born out of wedlock offended the spirit, object and purport of section 2 of the Customary Law Act⁹³ of Botswana, which enjoins courts of law to ensure that the application of customary law is not inconsistent with the principles of ‘morality, humanity or natural justice’⁹⁴

This acknowledges the reality of the prejudice that extramarital children faced and still do to-date. Further, that the court took into its stride the need for justice and equality for children from the law, be it civil or customary law. While there was no noticeable change to the legislature, the court pointed out that the nature of section 27 (6) of the Children’s Act⁹⁵, which puts on parents the obligation to provide for their biological children, is that it is to be applied to all parents and all children, regardless of whether they have a customary non-customary lifestyle (in other words, whether bound customary rules or civil rules). However, consideration of application of this section on children who have attained the age of majority was not discussed.

The effect of this case shows that the current generation of people should not be restricted by long standing practices of custom. That is to say, extramarital children, whether under customary law, or civil law, should be afforded the same opportunity to inherit from the estate of their father’s in the same way as legitimate children are afforded that opportunity.

⁹² Jonas and Gunda (n 63), at page 94

⁹³ Cap 16:01 Customary Law Act

⁹⁴ Jonas and Gunda (n 63), at page 94

⁹⁵ Children’s Act No. 8 of 2009

3.6. Namibia

3.6.1. FRANS v PASCHKE AND OTHERS⁹⁶

The plaintiff was the biological child of the deceased who died intestate and the first defendant is the sister of the deceased. On the date of death, the plaintiff could not inherit from the estate of the deceased due to the common law principle excluding extramarital children from inheriting intestate from their fathers and as such the deceased's entire estate was awarded to the first defendant. The plaintiff argued that the common law principle was unconstitutional as it denied him his rights in the Constitution of Namibia⁹⁷, specifically the right not to be discriminated against on the ground of the plaintiff's social status⁹⁸, the right to equality before the law⁹⁹, the right to dignity¹⁰⁰, the right to know and to be cared for by both his parents¹⁰¹, and the right to acquire property.¹⁰² In response, the Defendant argued that the common law principle in dispute is not unconstitutional as it constitutes part of the Namibian law as per Articles 66 and 140 of the Namibian constitution that allowed the customary law, the common law and previous enacted legislation prior to the 1990 constitution to remain in force. Of course these laws were subject to amendment or repeal by the parliament or to be declared unconstitutional by a competent court of law.

Much like South Africa, Botswana and Lesotho that were states under the Cape Colony, the common law principle had been the governing principle of extra-marital children when it came to inheriting from their biological father. The case outlined the fact that this principle was meant to punish children for the actions of their parents as they too were punished for indulging in sexual relations before marriage.

However the court acknowledged that in present times the rule still discriminates even in circumstances where loving parents who are not married still live with their children. The common law principle was declared unconstitutional by the court on the basis that in as far as

⁹⁶ Case no P (I) 1548/2005

⁹⁷ Namibia Constitution 1990

⁹⁸ Ibid, at Article 10 (2)

⁹⁹ Ibid, at Article 10 (1)

¹⁰⁰ Ibid, at Article 8 (1)

¹⁰¹ Ibid, at Article 15 (1)

¹⁰² Ibid, at Article 16 (1)

intestate inheritance is concerned; there exists a differentiation between legitimate and extramarital children.¹⁰³ The discrimination that extramarital children faced is as a result of society's values and as such reflected onto the law. The decision of this case changed the position of an extramarital child in inheriting from the estate of their biological father and also secured the protection of their rights outlined in the constitution.

3.7. Conclusion

From the study of the cases above, it is clear that each jurisdiction has reacted differently to the issue of extramarital children and their position to inherit from their biological fathers under intestate succession, whether it is under statutory law or customary law.

The courts from jurisdictions apart from Lesotho have acknowledged that there exists a prejudice on extramarital children that needed to be addressed promptly. The basis of the rule that extramarital children could not inherit from their fathers stemmed from the fact that it was wrong for the parents of such a child to have coitus before marriage and as such their children would bear the burden or punishment of their actions. This was more so on the fact that the biological father of the child would not want to take responsibility for that child, let alone have that child inherit from his estate upon his death. This is what inspired the legislature of jurisdictions such as Lesotho, Namibia, South Africa and Botswana.

However, the courts noted the current trend in the relationships between the extramarital child and his parents. The Namibian case *Frans v Paschke And Others* supra noted that despite the fact that parents of extramarital children, while they may not be married or choose not to stay together, that does not mean that they love do not love or care for the child. But the legislative rules still apply harshly despite these circumstances and as such change was needed.

The cases also addressed the issues of status and of the rights of extramarital children. A child born out of wedlock is stigmatised because they are not considered marital children. We are in an age where there is a need to embrace human rights and equality amongst people. It is unfortunate

¹⁰³ Frans (n 96). Paragraph 17

for that the constitution has of a state encourages the right to equality irrespective of status, gender, or race, and previously enacted legislature that does not embrace these principles is still in force. And thus why the courts in analysing these principles governing intestate succession have noted the change of the era we live in and the need for the legislature to be amended such that it is applicable to the current norms.

Courts make their decisions not just with application of the law as they as they are mandated to do but also taking into account the norms of society. What might have been true 100 years ago is not the same truth in this current day and era. The laws of a time where extramarital children faced discrimination because of the status of their birth should not hold much effecting today's society where equal rights are advocated for. The judiciary and the legislature of Lesotho have yet to adapt to this new trend as other jurisdictions have done in matters concerning extramarital children and intestate succession.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1. Introduction

Although it does not occur often, matters concerning extramarital children, be it maintenance or succession, prove to be delicate and in some cases, disadvantageous to the child. Regardless of the place they are born, there is no denying that these children have been subject to discrimination because of the status of their birth. They were not considered heirs of their biological fathers on the basis that they were the living embodiment of their parents' adulterous actions.

On top of being on the receiving end of criticism by family members and members of society as a whole the law as it was then did not look kindly upon them. In matters of succession, where no will had been executed, only legitimate children were entitled to inherit as opposed to extramarital children.

The law is a reflection of the societal norms, and as such stood by the notions of an extramarital child's place in society. But with the passage of time, the views of society towards extramarital children changed. As such, it has also influenced the law as well as a result of the introduction of human rights as well as the interest of a child.

The chapter will serve as the conclusion to this paper which will be inclusive of a brief overview of the research including a comparative analysis of the position of Lesotho as opposed to other states on extramarital children. Recommendations will also be made.

4.2. Overview of the Research

As seen from previous chapters, the law surrounding extramarital children inheriting from their biological fathers has been constant in Lesotho, in the sense that extramarital children are not entitled to inherit from their biological fathers. Lesotho has a dual legal system (governance by both statutory laws and customary law), but neither provides any rules in respect of extramarital

children inheriting from their biological fathers.

The Intestate Succession Proclamation¹⁰⁴ caters for legitimate and adopted children, but excludes extramarital children of the deceased. Before a court of law, where the Intestate Succession Proclamation lacks these principles, the common law applies. However, under common law, extramarital child can only inherit from his deceased mother and not the father. Upon the death of the biological father, the extramarital child can only claim maintenance from his estate if they are a minor. Similarly, under customary law, an extramarital child is not entitled to inherit from his biological father's estate. As shown in chapter 1, this is because the extramarital child is treated as a minor child of his mother's family.

It is evident that extramarital children, whether minors or those who have attained majority, are discriminated against when it comes to intestate succession of their biological father's estate. In these modern times, it is not always the case that their parents will marry, but nonetheless they are treated with love and care as any parent would a child. However, the customary and statutory law still prejudice extramarital children and remain in force today as they did when they were first brought into force.

4.3. Comparative Analysis

Like Lesotho, other jurisdictions had once shared the principle that extramarital children could only inherit from their mother and not biological father. However these jurisdictions have adopted a trend that is progressive towards extramarital children inheriting from their fathers under intestate succession.

Jurisdictions such as South Africa and the United Kingdom have enacted legislation that allows an extramarital child to inherit intestate from their biological father's estate. While South Africa's Intestate Succession Act¹⁰⁵ simply provides for an extramarital child entitlement to inherit as well as principles of devolution, the legislature in the United Kingdom has treated this

¹⁰⁴ Intestate Succession Proclamation 2 of 1953

¹⁰⁵ Intestate Succession Act 81 of 1987

differently. The Family Law Reform Act of 1987 requires that there must be proof of a civil relationship (marriage or a relationship akin to marriage) between the extramarital child's parents or that the child of the deceased was treated as a child of the family. The legislature of the United Kingdom dealt with inheritance as a matter of the relationship or bond that the deceased had with the extramarital child, as opposed to South Africa that based its provisions on the blood relationship between parent and child.

On the aspect of customary law, as indicated in chapter 2 and 3, case law from South Africa and Botswana has contributed to the development of the law concerning extramarital children inheriting under intestate succession from their biological father. The South African case of *Bhe And Others v Khayelitsha Magistrate And Others*¹⁰⁶ recognised that the Intestate Succession Act was not applicable to people who abided by customary rules (particularly the Black community). The prejudice was not just against extramarital children, but women as well who sought to inherit intestate from the estate of the deceased under customary law. This case brought equality amongst children regardless of status or gender that had existed because of the legislature. The case of *Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor*¹⁰⁷ treated this issue in a similar way, recognising that the rights of a marital child and the obligations of a parent towards that child should be the same for an extramarital child. The court in the *Kealeboga* case acknowledged that the customary law of Botswana is in a state of flux, ever adapting to the norms of society.

Similarly, the Namibian case of *Frans v Paschke and Others*¹⁰⁸ emphasised on the issue of equality of treatment between extramarital and marital children. This included an in-depth insight into the notion that extramarital children and their relationship with their parents are not the same as what they were before. Extramarital children, being called 'illegitimate', were evidence of their parents' actions and the treatment and discrimination towards them was basically a 'punishment' of their parents' wrongful actions. However today, society is indifferent towards them; that is to say, they are seen in the same way marital children are seen. This does not end with society but extends to their parents who also treat them with love and care. The court noted this change, thus

¹⁰⁶ CCT 49/03 [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)

¹⁰⁷ Case No CACGB-045-13

¹⁰⁸ Case no P (I) 1548/2005

declaring the common law principle of an extramarital child inheriting from their father under intestate succession, unconstitutional as it was not in line with the rights enshrined in the constitution, such as the right to equality before the law, right to dignity and the right to know and be cared for by both parents.

4.4. Recommendations

There is evident need for change in the legislature on intestate succession in respect to extramarital children. Section 156 of the Constitution of Lesotho¹⁰⁹ allows for existing laws prior to the enactment of the constitution to remain in force, of course such laws are subject to interpretation with modifications, adaptations, qualifications and exceptions in order to conform to the constitution.

Acting in accordance with section 156 of the Constitution, it is recommended that the current governing legislation such as the Intestate Succession Proclamation and the Children's Protection and Welfare Act be amended to be brought in line with the constitution. Particularly, sections 18 and 19. Section 18 and 19 speak to freedom from discrimination and right to equality before the law and equal protection of the law respectively.

In order to remove the longstanding discrimination, the Intestate Succession Proclamation should be inclusive of provisions that cater for extramarital children so that they are entitled to inherit from their biological father's estate, regardless of whether they have attained the age of majority or not. Similarly, there is a need for amendment of section 19 of the Children's Protection and Welfare Act that only allows extramarital children to inherit from their biological mothers. Just as both parents equally bear the responsibility of taking care of their minor child during their lifetime; it should extend to them after death. That is to say, in the case of an extramarital child, where the estate of the deceased parent (both mother and father) is governed intestate, they should be entitled to inherit from their parent's estate. Or just as in the Botswana Children's Act¹¹⁰, there must be an obligation on parents to award their children a portion of their estate,

¹⁰⁹Constitution of Lesotho 1993

¹¹⁰Children's Act Act No. 8 of 2009

whether the child is a marital or extramarital child, even if there is a will.

An alternative recommendation is that there be a newly enacted act that governs intestate succession. This is to not just include provisions for extramarital children, but also cater for people who live under customary lifestyle. This will ensure equality among all beneficiaries, eliminating discrimination based on gender, race, status or mode of life.

4.5. Conclusion

This study showed that as much as we try to embrace equality among people, there is need for the legislature to adapt to the modern norms. Extramarital children faced harsh discrimination because of their status, both by society and by the law. They were only recognised as children of their mother and were stigmatised because of the nature of their birth.

However, the norms of society have evolved so much and we are in an era where equality and dignity are important principles to abide by. Nowadays, an extramarital child is recognised as a child of his mother and father to the point that the law requires of both parents to equally be responsible for the well being of their child. The laws of Lesotho have remained very rigid where the norms of society have changed in respect of the aftermath of death where the deceased has left no will. It is important for the legislature to cater for all possible scenarios to enact laws that reflect the values enshrined in the constitution.

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