

# LINGERING INEQUALITY IN INHERITANCE LAW: THE CHILD BORN OUT OF WEDLOCK IN BOTSWANA<sup>1</sup>

*Elizabeth Macharia Mokobi*<sup>2</sup>

## Introduction

In Botswana, the possibility of a child born out of wedlock inheriting from his or her father's estate continues to cause disquiet in legal circles. Judgments of the High Court have repeatedly restated the position in common law and customary law alike: that the extra-marital<sup>3</sup> child is not entitled to inherit from his father, and that the extent of the extra-marital child's interest in his father's patrimony is maintenance alone. However, Botswana is continually changing and with it her societal norms and practices. Indeed, the traditional home with mother, father, and siblings is now just one of the many styles of family living in our communities. In Botswana, a currently common family type is the single parent family – where children are raised primarily by their mother, often with the assistance of close relatives. The father of the children in a single parent home may be absent or sometimes simply excluded, despite his best intentions and efforts.

It has been argued that discrimination on the basis of illegitimacy differs little from discrimination on the basis of race or sex. This is because illegitimacy is a tag that is affixed to the child at birth.<sup>4</sup> In many jurisdictions worldwide, the belief that the child of a non-marital union should be branded for life as an unwanted non-person has been replaced with the idea that equal protection of the law must be afforded to all persons, regardless of the circumstances of their birth.

This paper considers the right of the extra-marital child to inherit from his or her father. The paper first outlines the current position of the law and then considers the impact of the new Children's Act.<sup>5</sup> To offer a comparative perspective, the paper considers how these issues have been treated in South Africa, the United States, and Europe. Lastly, the paper makes recommendations for reform of the law in Botswana based on the 'best interest principle', which may ensure recognition of the duty not to discriminate against the extra-marital child.

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana on 28 and 29 March 2014.

2 Senior Lecturer, Department of Law, University Of Botswana; LLB (University of Botswana), LLM (University of Cambridge).

3 In this paper, the term "extra-marital" is preferred over the term "illegitimate" to describe a child born out of wedlock.

4 WP Hirczy De Mino "From Bastardy to Equality: The Rights of Nonmarital Children and their Fathers in Comparative Perspective" (2000) 31(2) *J Comp Fam Stud* 231, 236.

5 Act No. 8 of 2009.

## Inheritance rights of the extra-marital child<sup>6</sup>

### The Position under Common Law

Roman-Dutch law does not recognise the relationship between a child born out of wedlock and his father. Barring the duty placed on the father to maintain the child, the law recognises the relationship between the child born out of wedlock and his mother and maternal relations – to the exclusion of his father and paternal relations.<sup>7</sup> With regard to matters of succession, the child born out of wedlock in Botswana has no statutory right to inherit from his father in intestacy.<sup>8</sup> The common law rule – set out in *Green v Fitzgerald and Others*<sup>9</sup> – which provides that the extra-marital child cannot inherit from his father and paternal blood relations, still holds true in Botswana.

This was illustrated in the Botswana High Court decision of *Samsam v Seakarea*,<sup>10</sup> when the Court was required to determine whether children born out of wedlock to an unmarried couple had the right to inherit from their deceased father. Lesetedi J held, as follows:

But can the children having been born out of wedlock, be entitled to reside in the Gaborone property belonging to the deceased by virtue of them being his children and she alongside as their guardian? It is common cause that the deceased died intestate. As a common law principle, children born out of wedlock do not succeed *ab intestatio* 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. See, *Moremi and Others v Mesothlo* [1997] BLR 7, and on their father's death, from his estate. See, *Lamb v Sack* 1974 (2) SA 670 (T); *Spies' Executors v Beyers* 1908 TS 473. 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.<sup>11</sup>

The application for the children to be recognised as heirs of the deceased father failed. The children were only entitled to claim maintenance.

The Botswana Court of Appeal weighed in on this debate in *Tape v Matoso*<sup>12</sup> – where the respondent married the deceased in community of property and bore him four children. The marriage broke down following an adulterous relationship that the deceased had with the appellant. The respondent left the matrimonial home. The deceased purported to marry the appellant and had ten children with her over a period of thirty years of cohabitation. Upon the death of the deceased, a dispute arose regarding who were his rightful heirs. The Court of Appeal found that since the

6 Throughout this paper, the male gender is used to refer to an extra-marital child. This is merely for convenience: 'his' should be construed to apply equally to a female extra-marital child.

7 E Spiro *Law of Parent and Child* Fourth Edition (1971) 450.

8 The situation in testate succession is different, because the doctrine of freedom of testation, codified in section 5 of Botswana's Inheritance Act, ensures that the unwed father is free, should he choose, to nominate his child born out of wedlock as his heir or legatee.

9 1914 AD 88.

10 2004 (1) BLR 378.

11 *Id.*

12 2007 (1) BLR 512.

deceased had never divorced the respondent, his supposed marriage to the appellant was bigamous and void.<sup>13</sup> The Court then determined that the children the deceased had with the appellant, with whom he had cohabited for over thirty years, could not inherit from his estate in intestacy. Citing *Green v Fitzgerald and Others*<sup>14</sup> as authority, Twum JA affirmed the position in common law in Botswana, i.e., that the extra-marital child cannot inherit from his father.

### The Position under Customary Law

The legal position of a child born out of wedlock is no less thorny under customary law. In *Hendrick v Tsawe*,<sup>15</sup> the applicant, a child 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, which was the court *a quo*, ruled that the applicant was not entitled to inherit from his father, as he had never been formally adopted under customary law. The High Court adopted a similar view. Nganunu J, citing the customary law of the parties,<sup>16</sup> held 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 had been fulfilled. He identified these legal conditions as marriage and payment of *bogadi*.<sup>17</sup> He held that only from these conditions did the rights of inheritance flow. A second route indicated by the learned judge was adoption of the extra-marital child in lieu of marriage.<sup>18</sup> 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 father.

In another decision on the same question, in *Lesomo and Another v Otukile and Another*,<sup>19</sup> the applicants sought an order declaring them to be the heirs of the estate of their late father, Lesomo Mokganedi. They claimed that he was married to their mother by customary law and that, in the alternative, they were adopted by the deceased according to customary law. The High Court ruled that in order for their application to succeed, the applicants had to prove that a *patlo* (the ceremony during which a young man's family requests the hand of a woman in marriage and delivers *bogadi*) had been conducted. Evidence from maternal uncles, who play a critical role in the marriage of a young woman, was absent. The Court also stated that evidence of adoption was also lacking – i.e., payment of cattle or other livestock to maternal relatives of their mother. The claim that the applicants were heirs of their mother's late husband therefore failed.

The precarious position that the child of an unwed father faces was illustrated to great effect in the Botswana High Court case of *Mosienyane NO v Lesetedi and Fifteen Others*.<sup>20</sup> The applicant – a young man pursuing university education – sued sixteen members of his late father's extended

13 *Id* 520.

14 1914 AD 88.

15 2008 (3) BLR 447.

16 Customary law in Botswana is not a single homogeneous body of rules, but will vary from tribe to tribe and sometimes from location to location within tribes. However, the rule regarding illegitimacy and inheritance is constant amongst tribal communities in Botswana.

17 2008 (3) BLR 447, 450.

18 *Id*.

19 2008 (2) BLR 192.

20 Miscellaneous No. F 257 of 2005 [unreported].

family, claiming the right to maintenance and tuition from his father's estate. The deceased had never married the applicant's mother. The evidence however suggested that deceased did not deny that the applicant was his son and had participated in his son's life. The deceased had funded the applicant's education. The deceased died unmarried and intestate, and the Court determined that the estate of the deceased would devolve under customary law rules of succession. In an *obiter* statement, the Court lamented the sad state of affairs that rendered the applicant unable to inherit from his late father's estate. Masuku J stated:

There is one issue that I must address as an *obiter dictum*, which has caused me spasms of disquiet. This related to the customary law position that the applicant is not entitled to benefit from his father's estate because he was born out of wedlock. In some other countries, in the region, the distinction of children on the basis of whether or not they were born out of wedlock has been removed in relation to their right to inherit from their fathers. This is an issue worth considering in this country.<sup>21</sup>

Indeed, Botswana had an opportunity to consider this issue when promulgating the new Children's Act. Sadly, the opportunity was missed.

### The Effect of the New Children's Act

Discussion of the position of the extra-marital child in Botswana with regard to inheritance is incomplete without considering section 27(4)(g) of the new Children's Act.<sup>22</sup> This provision states that a parent has a duty to ensure that a child inherits adequately from his parents' estate. Section 27(4)(g) is amplified by section 27(6), which states that where a biological parent dies intestate or fails to ensure adequate provision for the child in the will, the child shall be awarded such portion of the estate as is required by the Administration of Estates Act,<sup>23</sup> or any other relevant law.

At first glance these provisions may seem adequate to ensure that every child – whether legitimate or illegitimate – inherits from his father's estate. The provisions may appear to banish the shroud and shame of illegitimacy. However, a closer reading of these provisions reveals that they do nothing to assist the extra-marital child to inherit from his father. Section 27(4)(g) states that every parent has a duty to ensure that their child inherits from their estate, and given that a parent is defined in section 2 to include a "biological parent", it would seem that this provision serves to amend the common law to include extra-marital children as heirs. However, this is not the case, because, when read with section 27(6), section 27(4) ceases to have any real substance.

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,<sup>24</sup> 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.<sup>25</sup> Thus, this portion of section

<sup>21</sup> *Id* at para. 74.

<sup>22</sup> Act No. 8 of 2009.

<sup>23</sup> Cap 31:01 of the Laws of Botswana.

<sup>24</sup> Cap 31:03 of the Laws of Botswana.

<sup>25</sup> A tribesman is defined in section 2 of the Administration of Estates Act as a member of a tribe or tribal community in

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 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.

There is clearly no equality of outcomes in the law of inheritance relating to the extra-marital child. A child born to a married couple inherits from his or her mother and father to the fullest extent possible in intestacy. The child born to an unwed father inherits nothing from his father in intestacy. There is thus a need to abolish the concept of illegitimacy and to seek substantive equality in inheritance rights of children born out of wedlock as has been done in other jurisdictions.

## A comparative perspective

### South Africa

In South Africa, the inability of the child born out of wedlock to inherit from his father was dealt a death blow in *Bhe and Others v Khayelitsha Magistrate and Others, Shibi v Sithole and Others*, and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*.<sup>26</sup> These three cases dealing with largely similar issues were brought before the South African Constitutional Court and decided jointly in the *Bhe* case. The first issue was the constitutional validity of section 23 of the Black Administration Act,<sup>27</sup> which gave effect to the customary law of succession in South Africa. The second issue was the constitutional validity of the principle of male primogeniture in the context of the customary law of succession.

In the first application – *Bhe and Others v Khayelitsha Magistrate and Others*<sup>28</sup> – an application was brought by the applicant, Nontupheko Maretha Bhe, and the Women's Legal Centre Trust. In the application, Bhe sought an order from the court securing the property of her deceased partner for her daughters, whom he had fathered. Because the applicant had never married the father of her children, the deceased's estate stood to be inherited by the eldest male relative who was the deceased's father – to the exclusion of his extra-marital children – in application of the customary law rule of male primogeniture.

In the second application – *Shibi v Sithole and Others*<sup>29</sup> – the applicant sought to be declared the sole heir of her late brother, who had died intestate and without children. Customary law regarding

Botswana. The estates of deceased tribesmen may not be administered under the Administration of Estates Act but are administered under customary law. The Administration of Estates Act therefore creates a parallel system of succession for estates of deceased tribesmen. Unless a tribesman writes a will, there is no legal mechanism by which he can exclude the customary law from applying to his estate.

26 2005 (1) SA 580 (CC). This case is also discussed in C Mushota Nkhata & F Kayumba Kalunga "Resolving the Tension between Gender Equality and Culture: Comparative Jurisprudence from South Africa and Botswana" in this publication.

27 Act No. 38 of 1927.

28 Case CCT 49/03.

29 Case CCT 69/03.

male primogeniture prevented the applicant from inheriting the estate of her deceased brother.

The third application was filed jointly by the South African Human Rights Commission and the Women's Legal Trust,<sup>30</sup> acting in their own interest and in the public interest. This application sought a declaration that section 23 of the Black Administration Act was unconstitutional, because of its inconsistency with the Constitution's equality provisions. The Commission for Gender Equality filed an *amicus curiae* brief.

In a majority decision in *Bhe*, written by Langa DCJ, the Court held that, in the context of its history, section 23 of the Black Administration Act was an anachronistic law that served to violate the rights of black Africans. It created a parallel system of succession for black Africans, with no regard for their wishes or circumstances. Section 23 was held to be discriminatory and a breach of the right to equality (guaranteed under section 9(3) of the Constitution) and the right to dignity (guaranteed under section 10 of the Constitution). The Court found that the customary law rule of male primogeniture discriminated against women and extra-marital children and declared the rule unconstitutional.

The decision in *Bhe* is laudable. The Constitutional Court advanced the position of extra-marital children by decades – by leapfrogging the slow development of the living customary law and declaring exclusion of extra-marital children from inheritance (on the basis of the customary law rule of male primogeniture) unconstitutional. Had this decision not been taken, thousands of children would have continued to suffer the injustice of being treated as second class citizens in terms of their position in their family and in society.

The dissenting decision of Ngcobo J proposed a more cautious approach.<sup>31</sup> While accepting that the principle of primogeniture discriminates against women, he opposed it being struck down as unconstitutional. Instead, Ngcobo advocated that the principle of male primogeniture be developed by the Constitutional Court to bring it in line with the right to equality. His position did not triumph – perhaps because change was long overdue, society had moved on, and the rule of male primogeniture was increasingly losing its relevance.

## Europe

The landscape of decisions regarding the question of illegitimacy was irrevocably changed by the decision of the European Court of Human Rights in *Marckx v Belgium*.<sup>32</sup> A child was born out of wedlock to Paula Marckx in 1973. In terms of Belgian law at the time, the birth of a child out of wedlock created no legal bond between an unmarried mother and her child. In order to establish such legal bonds, the mother of the child had to recognise the child as her own, or through a judicial process instituted by the child or its legal representative. Even after such maternal recognition was obtained, the extra-marital child would remain a legal stranger to her maternal relatives. The applicant and her extra-marital daughter applied to the court, arguing that that Belgian law violated the European Convention on Human Rights (ECHR) in the nature of the relationship

30 Case CCT 50/03.

31 2005 (1) SA 580 (CC) at para. 139.

32 Application No. 6833/74 Judgment of 13 June 1979.

created between a mother and her child, and that it limited the patrimonial rights afforded to the extra-marital child.

The Court ruled in favour of the applicant. It held that article 8 of the ECHR, which required the state to protect family life, made no distinction between a marital family and a non-marital family. Furthermore, the Court held that the state had a duty to abstain from arbitrary interference in family life as well as a positive obligation to respect family life. This positive duty entailed a duty on the part of the state to ensure that its domestic legal system contained a legal safeguard that made it possible for a child to be fully integrated into his family from the moment of birth. A law that prevented such integration was in breach of article 8 of the ECHR.<sup>33</sup> This decision resulted in courts in the Netherlands and Belgium striking down national statutes that were found to be in violation of article 8 of the ECHR.<sup>34</sup>

### United States

The first decision that challenged illegitimacy in the United States was *Levy v Louisiana*.<sup>35</sup> In this case, the Supreme Court struck down a Louisiana statute that prevented extra-marital children from recovering compensation for the wrongful death of their mother. The rationale for the original prohibition – as articulated by the Court of Appeal – was one rooted in public morals and the need to discourage the birth of children out of wedlock.<sup>36</sup>

In the next decision, *Labine v Vincent*,<sup>37</sup> the Supreme Court was concerned with Louisiana laws that prevented an extra-marital child from inheriting from her father's estate. The child concerned had been acknowledged by her father who had died intestate. Her father's relatives inherited his entire estate, although she was his only child. In this case, the Court upheld the Louisiana law finding that the *Levy* decision did not mean that the state was barred from treating an extra-marital child differently from legitimate ones. The Court held that only the state's legislature had the power to enact laws protecting the extra-marital child.<sup>38</sup>

A turning point in United States jurisprudence was *Trimble v Gordon*.<sup>39</sup> In this case, the Supreme Court struck down a Louisiana workmen's compensation statute that allowed legitimate and extra-marital children of the deceased to recover equally, but relegated extra-marital children who were not acknowledged by their father to the status of "other dependents". The Court stated as follows:

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 illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

33 *Id* at para. 31.

34 See M Salzberg "The *Marckx* Case: The Impact on European Jurisprudence of the European Court of Human Rights' 1979 *Marckx* Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights" (1979) 13(2-3) *Den J Int'l L & Pol'y* 283, 294-99.

35 (1968) 391 US 68.

36 *Id* 70.

37 (1971) 401 US 532.

38 *Id* 538.

39 (1977) 430 US 762.

responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalising the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent.<sup>40</sup>

It is difficult, if not impossible, to ignore the patent injustice done to the extra-marital child by the state when it refuses to recognise him as an equal citizen, with rights equal to those of a legitimate child. The case law discussed above has illustrated that it is possible to view the question of the right to inherit from a perspective that seeks to protect the child from punishment and discrimination that is undeserved.

## A way forward for Botswana

In the case referred to earlier, of *Mosienyane v Lesetedi NO and Fifteen Others*,<sup>41</sup> Masuku J lamented that the deceased's nephews, nieces, and cousins would have the benefit of his estate to the exclusion of "his own flesh and blood" – i.e., his extra-marital son.<sup>42</sup> He restated that the object of the law is to achieve justice in each case and stated that the time had come for steps to be taken to remedy the injustice perpetrated by the law.<sup>43</sup> It is high time that Botswana shrugs off the vestiges of the past and abandons the discrimination against the extra-marital child in inheritance matters, under both common law and customary law.

Botswana's courts have already achieved a similar milestone with regard to the rights of access of a father to his extra-marital child. In *Ndlovu v Machehe*,<sup>44</sup> the High Court had occasion to consider the right of a father to have access to his child who was born out of wedlock. Dingake J noted that there were authorities that suggested that the father of a child born out of wedlock had no right of reasonable access to his child – citing that the notion of the best interests of the child, under Roman Dutch law, was subordinate to parental interests. Dingake J then argued that the best interests of the child were paramount.<sup>45</sup> The Court then went on to rule that the Roman Dutch common law rule – that a father does not have a reasonable right of access to a child born out of wedlock – was a violation of section 3, as read with section 15 of the Constitution. This was to the extent that it afforded irrational differential treatment between parents of a child simply on grounds of sex or marital status, holding that it was unconstitutional to discriminate on the basis of marital status. This decision was upheld by the Court of Appeal.<sup>46</sup>

Given that the Court of Appeal has struck down the common law rule denying a father access to his extra-marital child as being unconstitutional, nothing stands in the way of a similar decision regarding the right of an extra-marital child to inherit from his father.

With respect to the common law rule that an extra-marital child should not inherit from his father, it is proposed that the Succession Act be amended to abolish the operation of this common law rule in Botswana. In South Africa, this was achieved by enacting section 1(2) of the Intestate

40 *Id* 769-70.

41 Miscellaneous No. F 257 of 2005 (HC) [unreported].

42 *Id* at para. 75.

43 *Id*.

44 [2008] 3 BLR 230.

45 Citing *Modisenyane v Modisenyane* [2006] 2 BLR 65 (HC) with approval.

46 *Machehe v Ndlovu* [2009] 1 BLR 120 (CA).

Succession Act,<sup>47</sup> which states that illegitimacy shall not affect the capacity of one blood relation to inherit from another blood relation. In the alternative, the same result can also be achieved by the High Court, at an opportune time, by striking down this common law rule – as was done in *Ndlovu v Macheme* – and adopting a position that protects the right to non-discrimination in matters of inheritance guaranteed by our Constitution.

With regard to customary law, it is submitted that the rule excluding the extra-marital child from the estate of his deceased father, is inconsistent with the provisions of section 2 of the Customary Courts Act,<sup>48</sup> which states that:

“[C]ustomary law” means, in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.

This customary law rule can be dispensed with in a single judgment, were a court to accept that the rule falls foul of the criteria set out above for validity of a customary law rule. A rule falling foul of this minimum standard of morality, humanity, and natural justice should not qualify as a rule of customary law.<sup>49</sup> The rule that a child born outside of wedlock cannot inherit from his father is in fact contrary to morality, humanity, and natural justice. The rule breaches the basic moral tenet that we should do unto others what we would have done unto us. The rule dehumanises the extra-marital child – branding him as a mistake to be ignored, hidden, and forgotten, and does him a great injustice by excluding him from the benefit of his father’s estate. It is discriminatory and therefore unconstitutional. Equality, dignity, and justice demand that the principle of illegitimacy and the injustice it begets be banished from the Botswana legal system.

47 Act No. 81 of 1987.

48 Cap 4:05 of the Laws of Botswana.

49 See *Ramantele v Mmusi and Others* CAGCB-104-12 at para. 49. In that case, the Court of Appeal of Botswana stated that, for a customary law to be recognised as law, “[i]t must not be unconscionable either of itself or in its effect. Nor should it be inhuman. Customary law must be applied in accordance with the set out principles of morality, humanity or natural justice with the object of achieving justice and equity between the disputants.”