

REPUBLIC OF SOUTH AFRICA

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**NATURAL FATHERS OF  
CHILDREN BORN OUT  
OF WEDLOCK BILL**

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*(As introduced)*

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(MINISTER OF JUSTICE)

[B 68—97]

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REPUBLIEK VAN SUID-AFRIKA

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**WETSONTWERP OP NATUURLIKE  
VADERS VAN BUIITE-EGTELIKE  
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(MINISTER VAN JUSTISIE)

[W 68—97]

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**GENERAL EXPLANATORY NOTE:**

- [                    ]    Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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# **BILL**

**To make provision for the possibility of access to and custody and guardianship of children born out of wedlock by their natural fathers; to provide for the limitation on the publishing of certain particulars of certain applications and enquiries; to provide for the notification of natural fathers of any intended adoption of their children born out of wedlock; to amend the Mediation in Certain Divorce Matters Act, 1987, so as to effect certain consequential amendments; and to amend the Births and Deaths Registration Act, 1992, so as to further regulate the alteration of the surname of certain minors; and to provide for matters connected therewith.**

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Definitions**

- 1.** In this Act, unless the context otherwise indicates—
- (i) “child born out of wedlock” does not include a child whose natural parents were married to each other at the time of his or her conception or at any time thereafter before the completion of his or her birth; (i) 5
  - (ii) “court” means a division of the High Court within whose area of jurisdiction a child born out of wedlock is domiciled or ordinarily resident; (iii)
  - (iii) “Family Advocate” means a Family Advocate appointed under section 2(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987); (ii) 10
  - (iv) “natural” means related by blood; (iv)
  - (v) “natural father” does not include a male person whose relationship with the child exists merely because he was a gamete donor in artificial fertilization of a person as defined in section 1 of the Human Tissue Act, 1983 (Act No. 65 of 1983), whereby that child was fathered, in the absence of any prior love relationship between the natural parents. (v) 15

## **Access to and custody and guardianship of children born out of wedlock by natural fathers**

2. (1) A court may on application by the natural father of a child born out of wedlock make an order granting the natural father access rights to or custody or guardianship of the child on the conditions determined by the court. 5
- (2) An application referred to in subsection (1) shall not be granted—
- (a) unless the court is satisfied that it is in the best interests of the child; and
  - (b) until the court, if an enquiry is instituted by the Family Advocate in terms of section 3, has considered the report and recommendations referred to in that section. 10
- (3) For the purposes of subsection (2) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it, and may order the parties or any one of them to pay the costs of the investigation and appearance.
- (4) In considering an application referred to in subsection (1), the court shall, where applicable, take the following circumstances into account: 15
- (a) The relationship between the applicant and the natural mother;
  - (b) the relationship of the child with the applicant and the natural mother or either of them or with proposed adoptive parents (if any) or any other person;
  - (c) the effect that separating the child from the applicant or the natural mother or proposed adoptive parents (if any) or any other person is likely to have on the child; 20
  - (d) the attitude of the child in relation to the granting of the application;
  - (e) the degree of commitment that the applicant has shown towards the child;
  - (f) whether the child was born of a customary union concluded according to indigenous law or custom or of a marriage concluded under a system of any religious law; and 25
  - (g) any other fact that, in the opinion of the court, should be taken into account.
- (5) A court granting an application under subsection (1), may make any order which it may deem fit, and may in particular, if in its opinion it would be in the best interests of the child to do so, grant to either party the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the child, and the court may order that, on the predecease of the party to whom the sole guardianship of the child is granted, a person other than the surviving party shall be the guardian of the child, either jointly with or to the exclusion of the surviving party. 30 35
- (6) For the purposes of this section the court may appoint a legal representative to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

## **Powers and duties of Family Advocate**

3. (1) The Family Advocate shall, after an application has been lodged for— 40
- (a) an order granting access rights to or custody or guardianship of a child born out of wedlock under section 2; or
  - (b) the variation, rescission or suspension of such order,
- if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him or her to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of the child concerned or regarding any such matter as is referred to him or her by the court. 45
- (2) The Family Advocate may, after any application referred to in subsection (1) has been lodged, if he or she deems it in the interest of the child concerned, apply to the court concerned for an order authorizing him or her to institute an enquiry referred to in that subsection. 50
- (3) The Family Advocate may, if he or she deems it in the interests of the child concerned, and shall, if so requested by a court, appear at the hearing of any application referred to in subsections (1) and (2) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat. 55

### **Rescission, suspension or variation of orders**

4. (1) An order in regard to access rights to or custody or guardianship of a child born out of wedlock made under this Act, may at any time on application be rescinded or varied or, in the case of an order in regard to access rights to such child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if any enquiry is instituted by the Family Advocate in terms of section 3, and unless the court is of the opinion that the best interests of the child otherwise requires, such an order in regard to access rights to or custody or guardianship of such child shall not be rescinded or varied or, in the case of an order in regard to access rights to such child, not be suspended before the report and recommendations referred to in that section have been considered by the court. 5 10

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the child concerned is domiciled or ordinarily resident in the area of jurisdiction of such first-mentioned court.

### **Limitation on publishing of certain particulars of certain applications and enquiries** 15

5. (1) Except for publishing the names of the parties to an application referred to in section 3(1)(a) or (b), or that such application is pending in a court of law, or the order of the court, no person shall publish for the information of the public or any section of the public any particulars— 20

(a) of such an application or any information which comes to light in the course of such an application; or

(b) of an enquiry instituted by a Family Advocate in terms of this Act.

(2) Subsection (1) shall not apply in regard to the publishing of particulars or information— 25

(a) for the purposes of the administration of justice;

(b) in respect of which the court is of the opinion that the publishing thereof will be in the public interest;

(c) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or 30

(d) for the advancement of or use in a particular profession or science.

(3) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

### **Certain notice required at adoption proceedings of children born out of wedlock** 35

6. (1) Subject to subsection (2), a children's court to which an application for an order of adoption of a child born out of wedlock is made in terms of the Child Care Act, 1983 (Act No. 74 of 1983), shall not grant the application unless it is satisfied that the natural father of the child concerned has been given reasonable written notice of the intended adoption. 40

(2) A notice referred to in subsection (1) may be dispensed with if the children's court is satisfied that—

(a) the natural father—

(i) cannot be identified; or

(ii) cannot be found, notwithstanding reasonable efforts to do so; 45

(b) the child was born of an incestuous relationship or as a result of rape; or

(c) it is in the best interests of the child that the requirement of notification be dispensed with.

(3) For the purposes of this section the Minister of Justice may, after consultation with the Minister for Welfare and Population Development, by notice in the *Gazette* prescribe the following matters: 50

(a) The practice and procedure in connection with the issuing and service of a notice referred to in subsection (1), including the time within which notice shall be given;

(b) the form and content of such notice and any other form required in complying with subsection (1); 55

- (c) the duties of officers of a children's court in respect of the issuing of such notice;
- (d) the fees payable in respect of the service of such notice;
- (e) any matter which he or she may deem necessary or expedient to prescribe for the attainment of the objects of this section.

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### Transitional provision

7. The regulations made under section 5 of the Mediation in Certain Divorce Matters Act, 1987, as they existed immediately before the commencement of this Act, shall, until amended by virtue of section 9 of this Act, also be applicable, with the necessary changes, in respect of enquiries by the Family Advocate in terms of this Act.

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### Amendment of section 3 of Act 24 of 1987

8. Section 3 of the Mediation in Certain Divorce Matters Act, 1987, is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) Subject to the provisions of this section the Minister may appoint at each division of the Supreme Court of South Africa one or more suitably qualified or experienced persons to be styled the Family Counsellor, to assist the Family Advocate with an enquiry [referred to in section 4(1)] in terms of any applicable law.”.

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### Amendment of section 5 of Act 24 of 1987

9. Section 5 of the Mediation in Certain Divorce Matters Act, 1987, is hereby amended—

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- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:
  - “(a) the procedure to be followed in relation to the institution of an enquiry [referred to in section 4] by a Family Advocate in terms of any applicable law, and the manner in which the report and recommendations [mentioned in that section] emanating from such enquiry shall be produced in court;”;
- (b) by the substitution for paragraphs (c) and (d) of subsection (1) of the following paragraphs, respectively:
  - “(c) the payment by the State of remuneration and allowances to a Family Advocate appointed under section 2(1) to act in a specific divorce action or an application in terms of any applicable law or in more than one such action or application and a Family Counsellor, for services rendered, the determination of criteria for the payment of such remuneration and allowances, the manner of calculation of such remuneration and allowances and the recovery thereof by the State from a party or parties to [a divorce action or an] such action or application [referred to in section 4(1)(b) and (2)(b)] by means of an order as to costs by the court;
  - (d) the appointment by a Family Advocate or a Family Counsellor of a person or persons to assist him or her with an enquiry referred to in [section 4] paragraph (a) and the payment by the State of remuneration to such person or persons;”.

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### Substitution of section 5A of Act 24 of 1987, as inserted by section 26 of Act 139 of 1992

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10. The following section is hereby substituted for section 5A of the Mediation in Certain Divorce Matters Act, 1987:

#### “Court may condone non-compliance with provision of regulation

5A. The court may, at the trial of an action or the hearing of an application [referred to in section 4] in terms of any applicable law,

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condone non-compliance with any provision of a regulation made **[in terms of]** under section 5.”.

**Amendment of section 25 of Act 51 of 1992**

- 11.** Section 25 of the Births and Deaths Registration Act, 1992, is hereby amended—
- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph: 5
- “(a) the birth of any **[illegitimate]** minor born out of wedlock has been registered and the mother of that minor marries any person other than the natural father of the minor;”; and
- (b) by the substitution for paragraphs (b) and (c) of subsection (1) of the following paragraphs, respectively: 10
- “(b) the father of any minor is deceased or his or her parents’ marriage has been dissolved and his or her mother remarries or his or her mother as a widow or divorcee resumes a surname which she bore at any prior time and the father, where the marriage has been dissolved, consents thereto in writing, unless a competent court grants exemption from such consent; 15
- (c) the birth of any **[illegitimate]** minor born out of wedlock has been registered under the surname of his or her natural father and the natural father consents thereto in writing, unless a competent court grants exemption from such consent; or” 20

**Short title and commencement**

**12.** This Act shall be called the Natural Fathers of Children Born out of Wedlock Act, 1997, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*. 25

**MEMORANDUM ON THE OBJECTS OF THE NATURAL  
FATHERS OF CHILDREN BORN OUT OF WEDLOCK BILL, 1997**

1. The Bill emanates from the report of the South African Law Commission (“the Commission”) on a Father’s Rights in respect of his Illegitimate Child (Project 79). The principal object of the Bill is to make provision for the possibility of access to and custody and guardianship of children born out of wedlock by their natural fathers.

2. The present legal position is that the natural father of a child born out of wedlock does not have any rights, in particular those of access to and custody and guardianship, in respect of his child merely by virtue of his paternity. Those rights accrue to the mother of a child born out of wedlock, save in exceptional cases in which a competent court may award those rights to another person. The court may, on application by the natural father, award any of those rights to him if the court finds that to be in the best interests of the child. The Commission recommends that the natural father of a child born out of wedlock should be empowered expressly and unambiguously to approach the court for relief in regard to access to and custody and guardianship of his child born out of wedlock, be it only to establish legal certainty.

3. In connection with custody and guardianship, the Commission recommends that a court should be empowered, on application by the natural father of a child born out of wedlock, to make an order granting such father custody or guardianship of the child.

4. The Commission further recommends that a court should be empowered, on application by the natural father of a child born out of wedlock, to make an order whereby access rights to the child are granted to the father on the conditions determined by the court. The Commission’s recommendations are contained in clause 2. The said clause further provides that the court shall not make such an order unless it is satisfied that it is in the best interests of the child and, until the court, if an enquiry is instituted by the Family Advocate, has considered the report and recommendations of the Family Advocate. In the proposed clause 2(4) guidelines are set out which the court should consider in evaluating the best interests of the child.

5. Clause 3 seeks to make provision for the powers and duties of a Family Advocate which, *inter alia*, include the obligation to institute an enquiry, if so requested by a party to the proceedings or the court, in order to furnish the court with a report and recommendations on any matter pertaining to the welfare of the child concerned.

6. Clause 4 purports to provide for the rescission, suspension or variation of orders made by a court. Provision is further made that a court other than the court which made the original order may, in certain circumstances, rescind, vary or suspend such order.

7. Clause 5 purports to limit the publishing of particulars of applications made under the Bill and enquiries by the Family Advocate in terms of the Bill.

8. Clause 6 purports to provide for the notification of natural fathers of children born out of wedlock of any intended adoption of their children.

9. Clause 7 provides for transitional arrangements pertaining to regulations made under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987).

10. Clauses 8, 9 and 10 propose to amend the last-mentioned Act, so as to effect certain consequential amendments and to extend the Minister of Justice’s power to make regulations regarding enquiries undertaken by the Family Advocate in terms of the provisions of the Bill as well.

11. In clause 11 an amendment of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), is proposed in order to provide, *inter alia*, that the written consent of the natural father of a child born out of wedlock is required to change the child’s surname if the child is a minor and was registered under the father’s surname. The Department of Home Affairs was consulted on this clause.

12. In the opinion of the Department and the State Law Adviser this Bill should be dealt with in terms of section 75 of the Constitution, 1996.

13. The Commission consulted a wide variety of interested parties, including:

- \* Family and Marriage Association of South Africa (FAMSA)

- \* Working Group on Family Law (UNISA)
- \* The National Council of Women of South Africa
- \* South African Welfare Council
- \* The Unmarried Father's Fight (TUFF)
- \* "Oranje-Vrouevereniging"
- \* The Women's Legal Status Committee
- \* Office of the Family Advocate
- \* South African National Council for Child and Family Care
- \* The Association of Law Societies of the RSA
- \* Various individuals