

**ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS**

**by**

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## **ABSTRACT**

The thesis explores the impact of the new Children's Act 38 of 2005 on the acquisition of parental responsibilities and rights within a newly proposed framework designed for the purpose of reflecting the various ways in which parental responsibilities and rights can be acquired. The research has shown that the Children's Act has fundamentally transformed the way in which parental responsibilities and rights are acquired. The transformation has created a scheme for the acquisition of parental responsibilities and rights that is for the most part constitutionally compliant and progressive insofar as it gives recognition to the different family forms found in South Africa. To this end the Children's Act has considerably expanded the ways in which parental responsibilities and rights can be acquired. Whereas previously exclusively the preserve of heterosexual married parents in a nuclear family, parental responsibilities and rights can now automatically be acquired by a committed biological father and a married lesbian couple conceiving by artificial means. Apart from authorising courts to assign parental responsibilities and rights, the Children's Act allows any holder of parental responsibilities and rights to confer responsibilities and rights on another by prior approved agreement. The Act also includes specific provisions to regulate the acquisition of parental responsibilities and rights by commissioning parents in the case of a surrogate motherhood agreement.

The structure developed for the research topic reflects the transformation of the law in this regard by making the application of the best interests-standard, rather than the marital status of the child's parents, the distinguishing feature of the subdivision between automatic and assigned acquisition. In this way the structure is an embodiment of the paramountcy of the best interests principle in section 28(2) of the Constitution. Insofar as the law still requires a distinction to be made between biological mothers and fathers, on the one hand, and naturally and artificially conceived children, on the other, the structure also highlights the remaining shortcomings of the law in this regard. The structure is, furthermore, necessarily complicated by the need to distinguish between the acquisition of care, on the one hand, and guardianship, on the other.

As far as fathers are still not treated the same as mothers in the automatic allocation of parental responsibilities and rights, the Act is deemed not to have been progressive enough. Conferring full parental responsibilities and rights on both parents based on their biological link to the child would not only be in line with worldwide trends, but would also meet the constitutional demands of substantive sex and gender equality. It will further place the focus on the best interests of the child, which emphasises the importance of *both* parents for the child.

While the research shows that tensions between the biological and social constructs of parenthood may possibly hamper the legal recognition of *de facto* care-givers or other persons with whom the child has developed a psychological bond, the greatest weakness of the Act would seem to lie in the failure to implement an integrated family court structure.

## **KEYWORDS**

**parental responsibilities and rights**

**guardianship**

**care**

**contact**

**custody**

**access**

**parental responsibility**

**adoption**

**surrogate motherhood**

**unmarried father**

**parent-child relationship**

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# **SECTION A: GENERAL INTRODUCTION**

## **CHAPTER 1: INTRODUCTION**

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## 1.1 AIM OF RESEARCH

The aim of the research is to investigate the proposed future legal framework within which parental responsibilities and rights can be acquired in order to –

- (a) determine whether the new legal framework meets the ever increasing and immediate need to ensure parental care (or alternative care) for all children;
- (b) ascertain whether it (proposed legal framework) meets its constitutional and international law obligations;<sup>1</sup>
- (c) compare it, where relevant, with the law found in other jurisdictions;<sup>2</sup>
- (d) propose a new structure for the law pertaining to the acquisition of parental responsibilities and rights;<sup>3</sup> and
- (e) identify deficiencies and inconsistencies and make preliminary proposals on possible reforms.<sup>4</sup>

## 1.2 RESEARCH METHODOLOGY

The research methodology followed in this thesis will mainly be qualitative by nature. This means that a critical assessment will be made of the provisions of

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<sup>1</sup> See “Context of Research” discussed in 1.4 below.

<sup>2</sup> For the extent to which comparative law will be used, see 1.2 below.

<sup>3</sup> See Ch 3 below.

<sup>4</sup> Boshoff 1999 *TSAR* 276 at 284 suggests that “[t]he lawgiver, and all those concerned with the development of family law, should move beyond the role of mere technicians, wearily fixing an outdated model with secondhand parts. They should assume the role of active and innovative engineers, articulating and re-thinking the fundamental problems relating to the most intimate and most chaotic aspects of human existence”. Dey & Wasoff 2006 *IJLPF* 225 at 226-227 consider it useful to distinguish the different roles that family law can play, *ie* (a) the protection of the interests of family members at risk; (b) the resolution of disputes (with a shift in emphasis from using the courts in favour of private ordering and mediation); (c) the regulation and guidance of conduct (such as in the case of divorce) which is associated with a further purpose which is (d) “symbolic and hortatory” (normative and educative). According to these authors (at 227) “[e]ven accepting the educative role of law in challenging certain kinds of behaviour (such as discrimination) law reform is more likely to succeed in its regulatory and symbolic roles if it goes with rather than against the grain of contemporary opinion and practice. At the same time, family law risks falling into disrepute if it fails to fulfil its instrumental roles of child protection and dispute resolution”.



the new Children's Act,<sup>5</sup> not only in relation to the existing common law rules regulating the acquisition of parental responsibilities and rights, but also in relation to the guidelines and standards set by the Constitution of the Republic of South Africa<sup>6</sup> (hereinafter simply referred to as the Constitution) and international law instruments.<sup>7</sup> A critical analysis of the new statute, which is both retrospective and forward-looking in nature, could aid in identifying deficiencies, discrepancies and *lacunae* with a view to informing future law reform in this field.

The use of comparative law will be restricted to the extent that it is functional.<sup>8</sup> This means that a comparative study will only be included in those cases where it is deemed to serve a purpose – whether it be to contextualise a particular aspect such as the differential treatment of mothers and fathers as far as the automatic acquisition of parental responsibilities and rights is concerned,<sup>9</sup> or to inform legal discourse where legal precedent in South Africa is either absent, as in the case of the acquisition of parental responsibilities and rights by means of a surrogate motherhood agreement,<sup>10</sup> or the law under-developed.<sup>11</sup> The aim was to avoid comparative studies merely for the sake of comparison. An exception was made in the comparative review regarding terminology,<sup>12</sup> simply to show the overall international trend in this regard. Another reason for the focused attention to foreign law is the fact that the Children's Act,<sup>13</sup> and more specifically the provisions relating to the acquisition of parental responsibilities and rights as the

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<sup>5</sup> 38 of 2005, as amended by the Children's Amendment Act 41 of 2007.

<sup>6</sup> Act 108 of 1996, referred to as the Constitution of the Republic of South Africa, 1996: Citation of Constitutional Laws Act 5 of 2005.

<sup>7</sup> As discussed in 1.4 below.

<sup>8</sup> The value of comparative study is to ensure that law reforms are "substantive and real, and not merely theoretical and rhetorical" such as the best interests (or welfare) test, according to Norrie 2002 *SALJ* 623 at 624, which ostensibly gives paramountcy to children's rights (rhetoric found in the new Children's Acts of Scotland, England and Australia), while the reality is that paramountcy belongs to parents.

<sup>9</sup> See 4.3.1 and 4.3.2.4 below.

<sup>10</sup> See 6.4 below.

<sup>11</sup> See eg the problems highlighted by the Australian case *Re Patrick (An Application for Contact)* (2002) 28 Fam LR 579 [2002] FLC 93-096 [Re Patrick] pertaining to the homo-nuclear family discussed in 4.4.2.2(b), the importance of regulating AIH as evidenced by the English case *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FCR 599 in 4.4.3.1, the problem of dissenting donors highlighted by the American and English cases discussed in 4.4.5.1(b), the problems relating to the assignment and sharing of parental responsibilities and rights as discussed in Ch 5 and the problems surrounding the granting of freeing orders in terms of English law referred to in 7.2.7.

<sup>12</sup> See 2.2.2.

<sup>13</sup> 38 of 2005.

centre of the focus of the thesis, is the product of a comprehensive investigation by the SALRC – an investigation that included an extensive comparative law research component.<sup>14</sup> The final provisions included in the Children’s Act<sup>15</sup> have, therefore, been drafted with a thorough consideration of the law in other African and common law countries. The choice of countries included in the comparative studies were dictated by the specific topic under discussion and are not the same throughout the thesis. Thus, while the central focus of the thesis relating to the automatic acquisition of parental responsibilities and rights called for a more comprehensive comparative study, the comparative study in the case of assigned acquisition of parental responsibilities and rights was restricted to England, from whence a number of the new provisions in this regard were drawn, and Australia, that have taken great strides in addressing the problem of the co-exercise of parental responsibilities and rights. The United Kingdom and the United States of America were chosen for the comparative study in the case of surrogate motherhood because the provisions included in the Children’s Act<sup>16</sup> were largely informed by the law in these countries.<sup>17</sup> Apart from a brief reference to the problems relating to freeing orders in England, no comparative study was undertaken with regard to the acquisition of parental responsibilities and rights by means of an adoption order. Unlike the law relating to surrogate motherhood, adoption law in South Africa has been regulated by statute since 1923 and is reasonably well developed with a considerable body of jurisprudence interpreting it. A comprehensive comparative study was thus not considered “functional” and in any event deemed well beyond the scope of this thesis, dealing as it does with adoption merely as one of a multitude of ways in which parental responsibilities and rights can be acquired. The existence of country specific legislation is also the reason behind the decision not to include a comparative study in Chapter 8 as far as the acquisition of parental responsibilities and rights at the death of one or both parents of the child is concerned.<sup>18</sup>

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<sup>14</sup> See SALC First Issue Paper on the *Review of the Child Care Act* par 10, SALC Discussion Paper on the *Review of the Child Care Act* pars 8.2.2, 8.3.2, 8.4.3, 8.5.2.2 and 8.5.3.2.

<sup>15</sup> 38 of 2005.

<sup>16</sup> 38 of 2005.

<sup>17</sup> See 6.4.

<sup>18</sup> Since the *quasi*-acquisition of parental responsibilities and rights in fact fall outside the scope of the thesis, a comparative study was naturally not considered appropriate in the discussion of the issue in 8.3.

### 1.3 SCOPE OF RESEARCH

The acquisition of parental responsibilities and rights was originally chosen as the topic of research after it became clear that the current legal framework concerning the allocation of parental responsibilities and rights was out of pace with the legal and social changes which have occurred both nationally and internationally. New legislation has in the meantime been enacted to respond to these changes in an appropriate and holistic manner. As such, the current research will to a large extent be targeted at evaluating the new legal framework pertaining to the acquisition of parental responsibilities and rights as evidenced by the provisions contained in the new Children's Act.<sup>19</sup>

The creation of a new legal dispensation for parents and other persons associated with the care, well-being or development of a child became necessary because of, *inter alia*:

- (a) The creation of a constitutional democracy in 1994,<sup>20</sup> followed by the adoption of the final Constitution which came into operation on 4 February 1997;
- (b) South Africa's international obligations flowing from the ratification of various international instruments, most importantly the United Nations Convention on the Rights of the Child (hereinafter referred to as the UNCRC);<sup>21</sup> and
- (c) the socio-economic realities in South Africa.<sup>22</sup>

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<sup>19</sup> 38 of 2005. According to the Memorandum on the Objects of the Children's Bill, 2003 GG 25346 dd 13 Aug 2003 (par 2 entitled "General Background and Overview"), the consolidated Children's Act is aimed simultaneously at – (a) reforming current legislation that "... is not in keeping with the realities of current social problems and no longer protects children adequately"; and (b) incorporating international principles into local legislation in accordance with SA's duties as a member state to various international conventions.

<sup>20</sup> The interim Constitution of the RSA, Act 200 of 1993 came into force on 27 Apr 1994.

<sup>21</sup> Ss 231 and 233 of the Constitution.

<sup>22</sup> For an overview of these realities in SA, see Burman 2003 *IJLPF* 28 at 33-37. According to the Social Development Minister Zola Skweyiya, "... [existing] legislation was hampering the ability of the government to respond to the 'challenging social realities' facing children, families and communities in post-apartheid South Africa": See "Children's Bill gets the nod" (22 Jun 2005) on

Through the efforts of the South African Law Commission<sup>23</sup> (now the South African Law Reform Commission or SALRC<sup>24</sup>), a new Children's Act<sup>25</sup> has finally, nine years after it was first mooted, been enacted and partially become operational. The first step towards the creation of this new Act was taken when a first draft Bill was published as Annexure "C" to the SALC's Report on the *Review of the Child Care Act* in December 2002.<sup>26</sup> This draft Bill was subsequently split due to the fact that it dealt with the full spectrum of protection of children in both national and provincial spheres. Because of its "mixed" character the deputy speaker of the National Assembly requested the Executive to excise the provisions from the draft Bill that affect provincial governments.<sup>27</sup> The excised Section-75 Bill, containing provisions that only affect the national government, was tabled in January 2004 (Children's Bill B70-2003 re-introduced<sup>28</sup>) and finally

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www.news24.com in which the Minister is quoted. These social realities include dealing with the increasing multitude of SA children who are abandoned and orphaned because of poverty, the breakdown of families and, more recently, the spiralling effect of the HIV/AIDS epidemic. See "Protection and support for orphans and families affected by HIV/AIDS" available at [www.unicef.org](http://www.unicef.org). Statistical estimates provided by UNICEF show that 19% of all children in SA will have been orphaned by 2010: "Children on the Brink 2004" ([www.unicef.org](http://www.unicef.org)). According to the SALRC, children in particular have suffered directly as a result of the unequal application of the fragmented laws affecting them: SALC Discussion Paper on the *Review of the Child Care Act* par 1.1. The preamble to the Children's Act 38 of 2005 now recognizes the need to provide appropriate care for children: "Whereas it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding".

<sup>23</sup> See in this regard the SALC Issue Paper on the *Review of the Child Care Act*, SALC Discussion Paper on the *Review of the Child Care Act* and SALC Report on the *Review of the Child Care Act* published respectively in Apr 1998, Dec 2001 and Dec 2002.

<sup>24</sup> The name change was effected by s 8 of the Judicial Matters Amendment Act 55 of 2002 which amended the South African Law Commission Act 19 of 1973: See *SALC Bulletin* Vol 8 No 1, Jan 2003. In line with the approach adopted by Skelton & Proudlock in the *Commentary on Children's Act*, documents published prior to 17 Jan 2003 (when the name change became effective) are cited as emanating from the South African Law Commission as that was the name of the Commission at the time when the document was published: See Skelton & Proudlock Ch 1 in *Commentary on Children's Act* 1-12 fn 2. In all other references the abbreviation SALRC will be used.

<sup>25</sup> 38 of 2005.

<sup>26</sup> Children's Bill [B – 2002].

<sup>27</sup> In terms of s 76 of the Constitution, a different legislative procedure is prescribed for legislation which affects the functional area of concurrent national and provincial legislative competence: See par 1 of the Memorandum on the Objects of the Children's Bill, 2003 in GG 25346 dd 13 Aug 2003.

<sup>28</sup> This Bill was preceded by two earlier versions, *ie* Children's Bill [B-2003] dd 19 Jun 2003 and Children's Bill [B-2003] dd 13 Aug 2003. The explanatory summary of the latter Bill was published in GG 25346 dd 13 Aug 2003. Both Bills are available on the website of the Children's Institute, University of Cape Town: <http://www.ci.org.za/site/frames.asp?section=lawreform>.

passed by Parliament in December 2005 (Children's Bill B70D-2003<sup>29</sup>) after extensive debate and public consultation.<sup>30</sup> Although the plan was originally to delay the implementation of the Section-75 Bill (subsequently enacted as the Children's Act 38 of 2005), until a consolidated Children's Act could be enacted, the Minister of Social Development thought it fit to fast track the commencement of some of these provisions that in her opinion "... do not require regulations for operationalisation".<sup>31</sup> Apart from the sections dealing with the interpretation of the Act and the general principles underlying the Act, many of the new provisions that came into operation on 1 July 2007<sup>32</sup> deal with matters associated with the acquisition of parental responsibilities and rights.<sup>33</sup> Of these, the provisions allowing for the (retrospective) automatic acquisition of parental responsibilities and rights by certain unmarried fathers are probably the most significant for present purposes.<sup>34</sup>

The Section-76 Bill,<sup>35</sup> containing provisions that affect both national and provincial governments, was passed by parliament on 22 November 2007 and subsequently enacted as the Children's Amendment Act 41 of 2007.<sup>36</sup> The Children's

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<sup>29</sup> Available on <http://www.ci.org.za/site/frames.asp?section=lawreform>.

<sup>30</sup> The excised Section 75-Bill met with outrage at being a "mutilated" and "barely recognisable" version of the original innovative Bill proposed by the SALRC: See Mail & Guardian dd 29 Oct 2003. For an illuminating discussion on some of the most significant changes between the original "consolidated" SALC Bill (Dec 2002) and the Aug 2003 version of the S-75 Bill, see submission made to the NCOP select committee on social services for consideration at the public hearings on 11 Oct 2005 by the Johannesburg Child Welfare Society and especially the Community Law Centre, Children's Rights Project, University of the Western Cape to be found on <http://www.ci.org.za/site/frames.asp?section=lawreform>. See also other submissions found under the heading "Submissions, discussion papers and research" on the website of the Children's Institute, University of Cape Town: <http://www.ci.org.za/site/frames.asp?section=lawreform>.

<sup>31</sup> See statement issued by Department of Social Development on 29 Jun 2007 on [www.info.gov.za/speeches/2007/07062915151003.htm](http://www.info.gov.za/speeches/2007/07062915151003.htm).

<sup>32</sup> By proclamation 13 of 2007: GG 30030 dd 29 Jun 2007.

<sup>33</sup> The following sections came into operation on 1 Jul 2007 (GG 30030 dd 29 Jun 2007): 1 up to and including 11, 13 up to and including 21, 27, 30, 31, 35 up to and including 40, 130 up to and including 134, certain subsections of 305, 307 up to and including 311, 313, 314, 315 and the second, third, fifth, seventh and ninth items of Schedule 4. Not all the sections pertaining to the acquisition of parental responsibilities and rights have, however, become operational. Sections relating to parental responsibilities and rights agreements, the assignment of parental responsibilities and rights, adoption and surrogate motherhood were eg not implemented. The other sections (130-134) that came into operation deal with protective measures relating to the health of children and more particularly the HIV-testing of children.

<sup>34</sup> S 21 of the Children's Act 38 of 2005.

<sup>35</sup> Referred to as such because the Bill must follow the procedure set out in s 76 of the Constitution.

<sup>36</sup> GG 30884 dd 18 Mar 2008.

Amendment Act completes the current Children's Act<sup>37</sup> by inserting the provisions which add to welfare service delivery and further protection of families and children.<sup>38</sup> These provisions include the regulation of partial care, early childhood development, the child protection system, prevention and early intervention programmes, alternative care, foster care and child and youth care centres.<sup>39</sup> Apart from a few selected provisions,<sup>40</sup> the Children's Amendment Act<sup>41</sup> is clearly of lesser importance to the present discussion and research.

The provisions of the consolidated Children's Act, consisting of the Children's Act<sup>42</sup> and the Children's Amendment Act,<sup>43</sup> will only come into operation once the regulations pertaining to the consolidated Act have been finalised (originally anticipated in 2008 but now only in the second half of 2009<sup>44</sup>). The consolidated draft regulations have been gazetted for public comment.<sup>45</sup> The Child Care Act<sup>46</sup> will in the meantime still be applicable to the extent that the new provisions have not been put into force.

While the thesis proceeds from the premise that the new Children's Act,<sup>47</sup> once it becomes fully operational, will be applied and implemented as planned, there has been considerable speculation about the lack of state funding made available for the implementation of the Act.<sup>48</sup> Despite government's inability to meet the demands created by the current, far more limited, Child Care Act,<sup>49</sup> it now plans to

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<sup>37</sup> 38 of 2005.

<sup>38</sup> See par 4 of the Memorandum on the Objects of the Children's Bill, 2003 published in *GG* 25346 dd 13 Aug 2003.

<sup>39</sup> See Children's Amendment Act 41 of 2007.

<sup>40</sup> Such as those relating to child-headed households (s 137) and the responsibilities and rights of children in alternative care (Ch 11 and 12).

<sup>41</sup> 41 of 2007.

<sup>42</sup> 38 of 2005.

<sup>43</sup> 41 of 2007.

<sup>44</sup> See "Latest developments" on <http://www.ci.org.za/site/frames.asp?section=lawreform>.

<sup>45</sup> For quick access to the "Consolidated Draft Regulations Pertaining to the Children's Act, 2005 (Including regulations pertaining to Bill 19 of 2006 now Act 41 of 2007 but hereinafter referred to as the Bill), Feb 2008", see <http://www.ci.org.za/site/frames.asp?section=lawreform>.

<sup>46</sup> 74 of 1983.

<sup>47</sup> 38 of 2005.

<sup>48</sup> Budlender, Proudlock & Monson confirm these fears in their essay "Budget allocations for implementing the Children's Act" on <http://www.ci.org.za/site/frames.asp?section=lawreform>.

<sup>49</sup> 74 of 1983.

implement a far more expensive comprehensive new Children's Act.<sup>50</sup> The legislature seems to be well aware of the challenge as provided for in section 4(2):

“Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the object of this Act.”

Although South Africa will ostensibly not be able to hide behind this provision to shirk its responsibilities,<sup>51</sup> the government is under immense pressure to deliver as far its commitment to children in general is concerned.<sup>52</sup> The impact of budgetary constraints on the implementation of the new provisions relating to the allocation of parental responsibilities and rights is not entirely clear.<sup>53</sup> It is reasonable to assume that the additional burden placed on the Family Advocate, *inter alia*, to –

- (a) mediate disputes regarding the acquisition of parental responsibilities and rights by unmarried fathers;<sup>54</sup>
- (b) register parental responsibilities and rights agreements;<sup>55</sup> and
- (c) assist in the preparation and registration of parenting plans<sup>56</sup>

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<sup>50</sup> According to a report “Kinderwet kort tande oor staat nie genoeg geld gee, sê DA” in *Beeld* (31 May 2007), only 35% of the funding needed to implement the existing Child Care Act 74 of 1983 is currently being used for that purpose. Another report “Kommer oor waar Kinderwet se geld gaan” in *Beeld* (3 Jul 2007) puts the percentage at 25.

<sup>51</sup> Skelton & Proudlock quote authority for the view that the phrase “to the maximum extent of their available resources” does not permit developing countries (presumably like SA) to shirk their responsibilities. These authors prefer to interpret the section as “... a call for prioritisation of children within the state budget so as to ensure appropriate levels of service delivery”: Skelton & Proudlock Ch 1 in *Commentary on Children's Act* 1-34.

<sup>52</sup> Concerns about the government's commitment to children in general were bolstered by the Department of Social Development's R800 million under expenditure in the last fiscal year and the burden of 300 000 alleged new HIV/Aids orphans in 2007: *Beeld* (31 May 2007).

<sup>53</sup> The costing of the Act has largely concentrated on the additional burden placed on the delivery of social services by the Department of Social Development. For an overview of the costing and implementation planning of as well as the budgetary challenges posed by the Act, see Skelton & Proudlock Ch 1 in *Commentary on Children's Act* 1-16 to 1-19.

<sup>54</sup> S 21(3)(a) of the Children's Act 38 of 2005.

<sup>55</sup> S 22(4)(a) of the Children's Act 38 of 2005.

<sup>56</sup> Ss 33(5)(a) and 34(1)(b) of the Children's Act 38 of 2005.

will have an impact on the resources (financial and otherwise) of the Family Advocate's already overstrained office,<sup>57</sup> which falls under the auspices of the Department of Justice.<sup>58</sup> As far as the assignment of parental responsibilities and rights is concerned, additional burdens will similarly be placed on the courts in general. In the case of the children's courts, the increased jurisdiction to grant contact and care orders<sup>59</sup> will probably have a significant effect and in the case of the High Court, guardianship assigned in terms of a parental responsibilities and rights agreement<sup>60</sup> or an order which is now possible on application by "... any person having an interest in the care, well-being and development of a child"<sup>61</sup> as well as the approval of surrogate motherhood agreements<sup>62</sup> may cause additional burdens.

However obvious the observation might be, it cannot be overemphasised that the current research is exclusively concerned with the *acquisition* of parental responsibilities and rights and not the *exercise* thereof. "Acquisition" in this context refers to "the act of acquiring" deduced from the Latin word "*acquirere*" which means to seek,<sup>63</sup> while "exercise," on the other hand, would mean "to carry out (duties, etc.), perform or fulfil".<sup>64</sup> Where a parent or other person, automatically or otherwise, "acquires" parental responsibilities and rights, that parent or person will have to exercise the rights, duties and responsibilities inherent in such responsibilities and rights subject to the best interests of the child concerned. A failure to do so might induce the state (or rather the courts) to suspend or even terminate some or even all responsibilities and rights. The distinction between the acquisition and the exercise of parental responsibilities and rights is especially poignant in the case of the unmarried father, as will become apparent in due course.<sup>65</sup>

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<sup>57</sup> Van Zyl 2000 *Obiter* 372; Glasser 2002 *THR-HR* 74.

<sup>58</sup> See Barberton *The Cost of the Children's Bill* 79.

<sup>59</sup> S 45(1)(b).

<sup>60</sup> S 22(4)(b) read with s 22(7).

<sup>61</sup> S 24(1).

<sup>62</sup> S 292(1)(e).

<sup>63</sup> *Webster's Dictionary* sv "acquisition".

<sup>64</sup> *Webster's Dictionary* sv "exercise" – meaning 6.

<sup>65</sup> See 4.2.3.2 and 4.2.4 below.



The scope of the research topic will moreover be limited to a parent- or person's *first* acquisition of parental responsibilities and rights as already stated. A mother and a father of a child born in wedlock will, for example, initially be vested with parental responsibilities and rights (a "first" acquisition).<sup>66</sup> Parental responsibilities and rights may subsequently be transferred to a third party who is not the biological parent of the child.<sup>67</sup> As far as the third party is concerned this transfer of parental responsibilities and rights will constitute a "first" acquisition and will, therefore, like the initial acquisition of parental responsibilities and rights by the father and the mother of the child, fall within the scope of the research.<sup>68</sup> In this way the assignment of parental responsibilities and rights to a third party/non-parent by agreement<sup>69</sup> or an order of court will form part of this thesis.

In terms of the Children's Act<sup>70</sup> a person who has not acquired parental responsibilities and rights but who voluntarily cares for a child, has certain responsibilities in respect of that child. The extent to which such a person can incur liability for the child in his or her care,<sup>71</sup> will briefly be dealt with in Chapter 8.<sup>72</sup>

Parental responsibilities and rights that were previously acquired, whether automatically, by agreement or through a court order, but subsequently varied, extended or curtailed because of changed circumstances, will not be covered by the research. For example, the acquisition of sole custody (now "care") or sole guardianship by a parent at the time of divorce will not constitute a "first"

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<sup>66</sup> The position will now be the same in the case of a child born out of wedlock, provided the father is or was living with the mother in a permanent life partnership at the time of the birth of the child (s 21(1)(a)) or qualifies in terms of s 21(1)(b) of the Children's Act 38 of 2005 to acquire parental responsibilities and rights automatically.

<sup>67</sup> Parental responsibilities and rights can be vested in non-parents in terms of the inherent jurisdiction of the High Court as upper guardian of all minors (discussed in 5.2.2 below) or in terms of its statutory jurisdiction (as discussed in 5.2.3 and 5.3 below).

<sup>68</sup> The parental responsibilities and rights of the third party may, of course, at some stage yet again be terminated and vested in another person, eg an adoptive parent. The acquisition of parental responsibilities and rights by this "other person" would only qualify as a "first" acquisition if this "other person" is not the biological or natural parent, who had initially acquired such responsibilities and rights of the child concerned.

<sup>69</sup> In terms of s 22 of the Children's Act 38 of 2005.

<sup>70</sup> 38 of 2005.

<sup>71</sup> The provisions of s 32 of the Children's Act 38 of 2005 will in future regulate this issue when it comes into operation (s 32 did not come into operation on 1 Jul 2007 with some of the other sections of the Children's Act 38 of 2005).

<sup>72</sup> See Ch 8 below.

acquisition of those aspects of parental responsibilities and rights since such a parent would already have acquired parental responsibilities and rights, albeit perhaps less extensively, in respect of the child at an earlier stage.<sup>73</sup> As will be explained more fully in 3.3 below, the acquisition of specific (or incidences of) parental responsibilities and rights will also not be dealt with in this thesis.

For purposes of this thesis a “first” acquisition of parental responsibilities and rights can, therefore, be defined as:

**The acquisition of full parental responsibilities and rights in respect of a child that was not preceded by the acquisition of any specific incident of parental responsibilities and rights in respect of the same child at any time prior to the date of such acquisition.**<sup>74</sup>

## 1.4 CONTEXT OF RESEARCH

### 1.4.1 Introduction

It is at the outset important to emphasise that the research is concerned primarily with the acquisition of *parental* responsibilities and rights and not the rights of *children per se*. The subject matter is thus approached from the view of the parent, at least insofar as it is possible to distinguish it from the child’s rights. The extensive international and constitutional focus on children’s rights rather than parental rights sometimes masks the distinction.<sup>75</sup>

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<sup>73</sup> Parental responsibilities and rights are generally acquired at birth but the effects of the responsibilities and rights may precede the birth of the child provided it has already been conceived: See Spiro *Parent and Child* 36-37 and 4.2.1.1 fn 70 below, where the acquisition of parental responsibilities and rights in respect of *nascituri* is discussed. It is important to note that while the (re)allocation of parental responsibilities and rights following divorce is not directly dealt with in the thesis it has had a considerable impact on the criteria applied when assigning parental responsibilities and rights for the first time and as such will be considered where relevant: See 5.2.2 below.

<sup>74</sup> A foster parent who acquires full parental responsibilities and rights by adopting the foster child in his or her foster care, will thus also not be deemed to have acquired parental responsibilities and rights for the “first” time.

<sup>75</sup> According to Norrie 2002 *SALJ* 623 at 633, “... one should not be misled by its [the welfare test otherwise known in SA as the best interests of the child-standard] predominance in the rhetoric into believing that that [sic] child law actually concerns itself primarily with children. Child law is, rather, the law for finding resolutions or compromises in disputes between parents (and for protecting parents’ freedom when there is no dispute). The rhetoric of child law is that the child’s interests are paramount; the reality is that paramountcy belongs to parents. Child’s law is parent’s law.”

In terms of its preamble, the Children's Act<sup>76</sup> expressly recognises the State's constitutional<sup>77</sup> and international obligations<sup>78</sup> to respect, protect, promote and fulfil the rights of children, but also acknowledges that since –

“... protection of children's rights leads to a corresponding improvement in the lives of other sections in the community ... it is neither desirable nor possible to protect children's rights in isolation from their families and communities”.

In this way the Children's Act<sup>79</sup> is thus by implication also committed to improving the rights of those adults entrusted with the care of children.

#### 1.4.2 International demands

Viljoen<sup>80</sup> explains the role of international law as follows:

“Once a state has agreed to respect a human rights treaty by ratifying that treaty, the main duty of that state is to adopt national laws and policies to square with its obligations under the treaty. In this way, the international human rights treaty becomes a gravitational force, pulling states towards global normative consensus.”<sup>81</sup>

Despite the multitude of international instruments<sup>82</sup> that may have some impact on the way in which states regulate the parent – child relationship, only some of these affect the acquisition or allocation of parental responsibilities and rights directly.<sup>83</sup> Of these the most important overarching instrument is undeniably the UNCRC which was adopted on 20 November 1989 by the General Assembly and

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<sup>76</sup> 38 of 2005.

<sup>77</sup> As mainly embodied in s 28 of the Constitution as far as children are concerned.

<sup>78</sup> See 1.4.2 below.

<sup>79</sup> 38 of 2005.

<sup>80</sup> Viljoen Ch 12 in Davel *Introduction to Child Law* 215.

<sup>81</sup> According to the SALC Issue Paper on the *Review of the Child Care Act* par 3.1, “[I]nternational instruments on children's issues, by their very nature, represent a common pool of wisdom, and culmination of efforts to ensure recognition of children's rights”.

<sup>82</sup> For an overview of these, see Olivier Ch 10 in Davel *Introduction to Child Law* 197-201.

<sup>83</sup> See Olivier Ch 10 in Davel *Introduction to Child Law* 199, for an outline of SA's position with regard to human rights treaties referring specifically to children.

has been in force since 2 September 1990.<sup>84</sup> Today all United Nations' member states except the United States of America and Somalia have ratified the UNCRC.<sup>85</sup> Some states such as the Cook Islands, Niue<sup>86</sup> and Switzerland have ratified the UNCRC despite not being United Nations' members.<sup>87</sup>

Although the UNCRC is not generally regarded as a direct source of individual rights and obligations because its provisions are generally not formally incorporated into municipal law,<sup>88</sup> it has been held<sup>89</sup> to enjoy a heightened status in the South African legal framework for two important reasons:

- (a) Convention rights pertaining to children have been constitutionalised in section 28 of the Constitution thereby giving the UNCRC legal significance in South Africa; and
- (b) specific provisions (such as sections 39(1)(b) and 233) in the Constitution require courts to consider international law in their deliberations.<sup>90</sup>

In addition, the Children's Act<sup>91</sup> now states as one of its objectives the realisation of the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.<sup>92</sup> With regard to the acquisition

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<sup>84</sup> For an overview of the UNCRC, see Van Bueren Ch 11 in Davel *Introduction to Child Law* 202-213.

<sup>85</sup> Sloth-Nielsen 1994 *SAJHR* 401 at 402 finds it noteworthy that no other treaty, especially in the field of human rights, has been ratified by so many countries within so short a period of time.

<sup>86</sup> An island in the South Pacific Ocean, northeast of New Zealand in a triangle between Tonga, Samoa and the Cook Islands.

<sup>87</sup> See Viljoen Ch 12 in Davel *Introduction to Child Law* 217.

<sup>88</sup> The Children's Act 38 of 2005, however, expressly incorporated certain aspects of the UNCRC such as the preamble, to name but one example.

<sup>89</sup> Sloth-Nielsen 2002 *IJCR* 137 at 139.

<sup>90</sup> While other provisions of the Constitution, such as ss 39(1)(a) and 39(2), do not specifically refer to international law, Sloth-Nielsen (2002 *IJCR* 137 at 139) still regards them as significant insofar as they were inspired by international norms.

<sup>91</sup> 38 of 2005.

<sup>92</sup> S 2(c). The Act in its preamble recognises the proclamation by the United Nations in the Declaration of Human Rights that children are entitled to special care and assistance and the need to extend particular care to children as stated in the "... Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children".

of parental responsibilities and rights, Article 5 of the UNCRC compels state parties to respect –

“...the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child,<sup>93</sup> to provide, in a manner consistent with the evolving capacities<sup>94</sup> of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.”

Sloth-Nielsen<sup>95</sup> is of the opinion that this article is indicative of the current international view concerning the interrelationship between state, family and child. In terms of this view the child is perceived as part of a unit that has primary responsibility for their well-being – emphasising that they are not children of the state. At the same time the article ensures that it is the child that is the bearer of the rights accorded him or her in the UNCRC.<sup>96</sup>

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<sup>93</sup> According to Van Heerden “The Parent-Child Relationship” prepared for Ch 8 of the SALC Discussion Paper on the *Review of the Child Care Act*, the UNCRC recognises in Art 5 that there is a broad range of persons who may take responsibility for children and as such sees the “family” as a broad and flexible concept. Also see Sloth-Nielsen 1994 *SAJHR* 401 at 406, who supports a similar interpretation of the article. The UNCRC, however, does not define the concept “family”.

<sup>94</sup> According to the SALC in its First Issue Paper on the *Review of the Child Care Act* par 3.2, this is an important provision since it not only emphasises the role of parents, families and communities in children’s lives, but requires states to protect this role – a clear message (according to the SALRC) that professionals and service providers should not take over the role of parents, but that service delivery should focus on support to families. Robinson 2002 *Stell LR* 309 at 313, on the other hand, uses Art 5 to illustrate the fact that the UNCRC recognises that childhood is not a “single, fixed universal experience” and that “the direction of the parent lessens as the child becomes more mature” in accordance with the approach followed in the English case of *Gillick v West Norfolk and Wesbech Area Health Authority* [1986] 1 AC 112 (HL). Quoting with approval from a Massachusetts Supreme Judicial Court judgment (*Custody of a Minor* (1978) 379 N.E. 2d 1053), Dickens describes a parental rights as “... a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than [a right of] advice”: Dickens 1981 *LQR* 462 at 483. For the recognition of such an approach adopted in SA, see *H v I* 1985 3 SA 237 (C) 244A-B.

<sup>95</sup> See Sloth-Nielsen 1994 *SAJHR* 401 at 405.

<sup>96</sup> According to Sloth-Nielsen (1994 *SAJHR* 401 at 405), Art 5 of the UNCRC is thus another example of the “carefully structured” duality found in the UNCRC’s approach to the state of childhood and the child’s position within the family – on the one hand viewing children as independent beings and not mere property and on the other hand recognising “... that the primary responsibility for the child rests with the family, that the right to self-determination should be balanced by the child’s inability to choose what is in fact in his or her best interests and that the child’s notional independence should be countered by the enjoyment of a happy childhood as a child”.

Article 9(3) of the UNCRC obliges State Parties to respect the child's right to contact with both parents while Article 18(1) of the UNCRC compels State Parties to –

“... use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”<sup>97</sup>

The following international instruments, although clearly of lesser importance, are significant insofar as they elucidate, support or confirm the norms found in the UNCRC.<sup>98</sup>

- (a) The United Nations Convention on the Elimination of All Forms of Discrimination against Women (UNCEDAW).<sup>99</sup>

Article 16(1) of the Convention directs States<sup>100</sup> Parties to –

“...take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular ... ensure, on a basis of equality of men and women”, *inter alia*, “... [t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”<sup>101</sup> and “... [t]he same rights and responsibilities with

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<sup>97</sup> Read together with the preamble to the UNCRC recognising “that the child, for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding”, Sloth-Nielsen is of the opinion that the UNCRC underscores the potential for conflict between the best interests of the child and the interests of the adult members of the family. According to this author the formulation of these provisions implies that children's lives are a public and not merely private concern or, put more bluntly, “... parents are not given a free hand”: See Sloth-Nielsen 1994 *SAJHR* 401 at 405. As pointed out before (fn 92 above), the preamble to the Children's Act 38 of 2005 is couched in similar terms.

<sup>98</sup> The international instruments mentioned in (a) and (b) have been arranged chronologically according to the date in which they were ratified by SA. The conventions mentioned in (c) and (d) have not been ratified by SA.

<sup>99</sup> This Convention was adopted by the General Assembly of the United Nations (in terms of resolution 34/180) on 18 Dec 1979 and ratified by SA on 15 Dec 1995.

<sup>100</sup> The text of the Convention refers to “States Parties”:

[www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article) (accessed on 3 Aug 2007).

<sup>101</sup> Art 16(1)(d).

regard to guardianship, wardship, trusteeship and adoption of children”.<sup>102</sup>

(b) The African Charter on the Rights and Welfare of the Child:<sup>103</sup>

As a regional human rights instrument it deals with issues pertinent to children in Africa that could not be dealt with on a global scale, including specifically with regard to the parent-child relationship:

- (i) The disadvantages influencing female African children; and
  - (ii) the negation of the role of particularly the extended family in the upbringing of children and in matters of adoption and fostering.<sup>104</sup>
- (c) The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR)<sup>105</sup>:

Although the ECHR does not recognise the rights of children or parents in particular, Article 8 of the Convention guarantees the right to respect for “family life” and prohibits any state interference with that right which is not in accordance with law, in pursuit of a legitimate aim and necessary in a democratic society. By its interpretation of Article 8, the European Court of Human Rights as the Convention’s main supervising body, has provided valuable guidance in determining the nature and extent of parental rights

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<sup>102</sup> Art 16(1)(f). For a general overview of the Convention, see Kathree 1995 *SAJHR* 421 and in particular the discussion of Art 16 at 425.

<sup>103</sup> The Charter came into force on 29 Nov 1999 and was ratified by SA on 7 Jan 2000. See Viljoen Ch 12 in Davel *Introduction to Child Law* 219-222, for a detailed discussion of the provisions of the Charter as a whole.

<sup>104</sup> Viljoen Ch 12 in Davel *Introduction to Child Law* 219 and 222 (par 12.5.4.2). The following provisions of the Convention are relevant for purposes of the acquisition of parental responsibilities and rights: Art X (Protection of privacy), Art XVIII (Protection of the family), Art XIX (Parental care and protection), Art XX (Parental responsibilities) and Art XXIV (Adoption).

<sup>105</sup> The Convention was adopted under the auspices of the Council of Europe and opened for signature on 4 Nov 1950. The Convention came into force in 1958 when the requisite eight States had accepted the compulsory jurisdiction of its main supervisory body, the European Court of Human Rights: Kilkelly *The Child and the European Convention on Human Rights* 1.

and responsibilities – not only to countries falling within its jurisdiction<sup>106</sup> but also to South Africa.<sup>107</sup> In this regard it is significant to note that the European Court on Human Rights has shown a willingness to emphasise the social, rather than the biological reality when interpreting the protection afforded by Article 8.<sup>108</sup>

- (d) The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (also referred to as the Hague Convention of 1996 on the International Protection of Children<sup>109</sup>):

In terms of this Convention the meaning and allocation of parental responsibilities and rights<sup>110</sup> will be determined by the state in which the child is or becomes habitually resident.<sup>111</sup>

### 1.4.3 Constitutional imperatives

The Constitution of the Republic of South Africa, 1996<sup>112</sup> contains a Bill of Rights which guarantees certain fundamental rights and freedoms to all South Africans, including children. In her discussion on the influence of constitutional rights on

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<sup>106</sup> England incorporated the ECHR into their domestic law by means of the Human Rights Act 1998, which came into operation on 2 Oct 2000: See Bainham *Children–The Modern Law* 79; Choudhry & Fenwick 2005 *Oxford Journal of Legal Studies* 453.

<sup>107</sup> Kilkelly *The Child and the European Convention on Human Rights* 4.

<sup>108</sup> See Kilkelly *The Child and the European Convention on Human Rights* especially 212; Van der Linde unpublished LLD thesis UP (2001) 477. According to Stalford 2002 *IJLPF* 410 at 413, the European Court for Human Rights “... have gone some way towards acknowledging modern patterns of family life. For instance, they apply what is commonly referred to as the ‘reality test’ whereby de facto family relationships are taken into account when considering whether or not ‘family life’ exists”. To this extent the approach of the European Court for Human Rights in Strasbourg conflicts with that followed by the European Court of Justice which, for purposes of facilitating the mobility of prospective migrant workers within the European Union, still adheres to a strict application of the direct or legal tie (at 413).

<sup>109</sup> <http://www.hcch.net/upload/outline34e.pdf>. The Convention was concluded on 19 Oct 1996 and came into force on 1 Jan 2002.

<sup>110</sup> For purposes of this Convention, “... the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child”: Art 1(2) of the Convention.

<sup>111</sup> In terms of Art 17 of the Convention:

[http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=70](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=70).

<sup>112</sup> See fn 6 above.



family law, Bonthuys<sup>113</sup> makes the following observation:

“Family law is probably the area of South African private law which has expanded and changed most rapidly in the past nine years. Many of these changes have come about as a result of the enactment of the Bill of Rights in both the interim<sup>114</sup> and the final Constitution. On the one hand, this is not surprising, since family law contains many legal rules which are overtly discriminatory on the basis of sex, gender, culture, religion and sexual orientation. On the other hand, legal rules in this area represent a codification of moral and social norms in the quotidian and ‘private’ lives of many people, which are often resistant to scrutiny and change.”

Implied in these comments is a reference to the debate about the so-called private/public law dichotomy of family law. The debate concerns the extent to which family law can be categorised as falling strictly within the ambit of private law and consequently, the extent to which the family and family relationships are placed beyond the scrutiny of the state.<sup>115</sup> In pursuing the ideal of developing a coherent system of family law based on principled theoretical reasoning, Boshoff calls for a “... move beyond the private/public law dichotomy, beyond outdated ideological perceptions about ‘privacy’ and ‘interference’ and, most of all, beyond entrenched patterns of prejudice”.<sup>116</sup> It is now generally accepted that the strict boundaries between private and public law have been blurred, “... the bright line between them fudged by the entrenchment of fundamental rights in the Bill of Rights”.<sup>117</sup>

The relationship between the Bill of Rights and existing legal rules in general is commonly described in terms of two distinctions, namely, that between horizontal and vertical application and between direct and indirect application. The issue of horizontal and vertical application of the Bill of Rights relates to the parties who

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<sup>113</sup> Bonthuys 2002 *SALJ* 748.

<sup>114</sup> Act 200 of 1993.

<sup>115</sup> According to Boshoff 1999 *TSAR* 276 at 278, the public or private debate “... has a profound influence on our perception of the parental role in family law. If child care is a private matter then state intervention should be minimised to cases of serious transgression of public norms, such as abuse or severe neglect. If, on the other hand, the norms of child care are fundamentally community-based, then parents merely act as delegates of the community with the task of implementing public policy”. See also Sinclair “Family Rights” in Van Wyk *et al Rights and Constitutionalism* 508 *et seq.*

<sup>116</sup> Boshoff 1999 *TSAR* 276 at 277.

<sup>117</sup> See Sinclair Ch 1 in Van Heerden *et al Boberg’s Law of Persons and the Family* 10.

are subject to the Bill of Rights. It is clear in terms of section 8(1) of the Constitution that the Bill of Rights applies vertically insofar as "... the legislature, the executive, the judiciary and all organs of state" are bound by its provisions. This represents the traditional function of constitutional guarantees which is to protect the individual, and in this case the parent, from arbitrary interference from the state.<sup>118</sup> With regard to the horizontal application of the Bill of Rights, section 8(2) of the Constitution explicitly determines that "[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right", thus opening up the application of the Bill of Rights to individuals *inter se*. The distinction between the direct and indirect application of the Bill of Rights is based on the different ways in which the Bill of Rights may affect a legal rule found to be in conflict with it. Section 8(3) of the Constitution provides that:

"When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –  
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right."

Bonthuys<sup>119</sup> explains the distinction in the following terms:

"Direct application would mean that the Bill of Rights overrides any law which conflicts with it and provides litigants who rely on fundamental rights with special remedies based on their fundamental rights ... Where the fundamental rights in the Bill of Rights apply indirectly, they do not found a cause of action, but function instead as higher values which provide guidelines for the interpretation and application of existing legal rules, which in turn determine the procedures followed and the remedies awarded."

The Bill of Rights can, furthermore, apply directly or indirectly to both common law and legislation. Direct application of the Bill of Rights to legislation would result in the invalidation of the impugned provision(s) with the creation of appropriate

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<sup>118</sup> Bonthuys 2002 *SALJ* 748 at 749.

<sup>119</sup> *Ibid.*

remedies,<sup>120</sup> while the direct application of the Bill of Rights to common law would involve "... those admittedly rare situations where there are no existing common-law rules and remedies to deal with a situation and would require courts to create new common-law remedies".<sup>121</sup> An indirect application of the Bill of Rights to legislation would entail a reading down or reading in of the legislation to remedy the legislation by interpreting it in accordance with constitutional values.<sup>122</sup> In the case of common law a similar process would be followed by developing the common law to reflect the values underlying the Bill of Rights.<sup>123</sup> These values are evident from the interpretation clause contained in section 39 of the Constitution that requires courts to "... promote the values that underlie an open and democratic society based on human dignity, equality and freedom" when interpreting the Bill of Rights.<sup>124</sup> It is, therefore, not surprising that one of the most important constitutionally enshrined rights is that to equality embodied in section 9 of the Constitution.<sup>125</sup>

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<sup>120</sup> See *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC) [118], in which the court declared s 30(1) of the Marriage Act 25 of 1961 inconsistent with ss 9(1) and 9(3) of the Constitution to the extent that they make no provision for same-sex couples to get married.

<sup>121</sup> Bonthuys 2002 SALJ 748 at 750. See *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 1 SA 6 (CC) in which the common law crime of sodomy was declared unconstitutional and abolished.

<sup>122</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) [70]; *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) [9] and *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) [39]. The unconstitutionality of s 5 of the (since repealed) Children's Status Act 82 of 1987 was remedied in this manner: *J and Another v Director-General, Department of Home Affairs, and Others* 2003 5 SA 621 (CC) [28], as was ss 17(a), 17(c) and 20(1) of the Child Care Act 74 of 1983 and s 1(2) of the (since repealed) Guardianship Act 192 of 1993: *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) [44].

<sup>123</sup> Bonthuys 2002 SALJ 748 at 750.

<sup>124</sup> In exercising their power to develop the common law judges should according to Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC), however, "... be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary" and "[t]he judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society" (at [36]). The Constitutional Court also held that the obligation of courts to develop the common law in the context of s 39(2) of the Constitution is not purely discretionary and "... that where the common law as it stands is deficient in promoting the s 39(2) objectives, the courts are under an obligation to develop it appropriately" (at [39]).

<sup>125</sup> As observed by Mahomed DP in *Fraser v Children's Court, Pretoria North, and Others* 1997 2 SA 261 (CC) [20]: "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised". See also Sinclair Ch 1 in Van Heerden *et al Boberg's Law of Persons and the Family* 12.

Apart from certain rights of general application found in the Bill of Rights such as the rights to equality, dignity, privacy, on the one hand, and the right of *children* to family care or parental care, on the other hand, the Constitution does not expressly protect the rights of parents *qua* parents in any direct manner.<sup>126</sup> The paucity of constitutional protection afforded to the family, and more particularly the parents of the children within the family in the present context, stands in stark contrast to all major international human rights instruments that provide for the protection of the family and family relations in some way or another.<sup>127</sup> The effect of this *lacuna* in our law has been the subject of much debate.<sup>128</sup> Van der Linde<sup>129</sup> concludes that an express protection of the right to respect for family life, such as found in Article 8 of the ECHR, would have avoided the convoluted manner of (indirect) protection currently necessitated by the absence of such a right and would have brought South Africa more in line with international trends in this regard.<sup>130</sup>

Although the Constitution contains no express right to family life,<sup>131</sup> the Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*<sup>132</sup> held that such right is indirectly protected *via* the right to dignity.<sup>133</sup> The applicants in this case based their case

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<sup>126</sup> Bekink & Brand Ch 9 in Davel *Introduction to Child Law in South Africa* 186.

<sup>127</sup> See Visser & Potgieter 1994 *THR-HR* 494 at 495.

<sup>128</sup> See Van der Linde unpublished LLD thesis UP (2001) 15-21.

<sup>129</sup> Van der Linde unpublished LLD thesis UP (2001) 490.

<sup>130</sup> For similar views, see Visser 1996 *De Jure* 351 at 354, who questions the value of a right to family care where the family as a unit is not deemed worthy of protection and Robinson 1998 *Obiter* 329 at 334-335.

<sup>131</sup> The Constitutional Court justified the omission in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 4 SA 744 (CC) as discussed in Sloth-Nielsen & Van Heerden 2003 *IJLPF* 121 at 122. Had such a right been included in the Constitution it would, according to Bonthuys 2002 *SALJ* 748 at 781, have avoided the contradictory judgments on the extent and ambit of the “family”.

<sup>132</sup> 2000 3 SA 936 (CC) [36].

<sup>133</sup> See also Currie & De Waal *Bill of Rights Handbook* 605; Bekink & Brand Ch 9 in Davel *Introduction to Child Law in South Africa* 186. Despite the absence of a provision directly protecting the right to family life “... the principles of dignity, equality and concern for the vulnerability of marginalized groups in society” have, according to Sloth-Nielsen & Van Heerden 2003 *IJLPF* 121 “... heralded a wide-ranging revision of the legal meaning of family, of how the law should protect family members, and is reshaping the understanding of relationships between family members (including children)” (see abstract of article).

partly on section 28(1)(b) of the Constitution,<sup>134</sup> arguing that the rights of their children to family and parental care, as provided for in that section, was violated by the provisions of section 25(9)(b) of the Aliens Control Act<sup>135</sup> requiring them to leave South Africa. The Constitutional Court, however, decided the matter on the basis of the right to dignity of the applicants (parents) themselves, finding it unnecessary to decide on the issue of the right to family life of the children.<sup>136</sup>

While parents and family are the primary sources of care for children, the state is obliged to assign or reassign such care where the best interests of the child so dictate. The following two Constitutional rights are pivotal in the determination of the assignment of parental responsibilities and rights under these circumstances:

(a) Section 28(1)(b) in terms of which:

“Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”;<sup>137</sup> and

(b) Section 28(2) of the Constitution in terms of which:

“A child’s best interests are of paramount importance in every matter concerning the child”.

As far as the relation between sections 28(1)(b) and 28(2) is concerned it is important to take note of the following elucidating comments (paraphrased here for the sake of brevity) made by Sachs J in *S v M (Centre for Child Law as Amicus Curiae)*:<sup>138</sup>

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<sup>134</sup> Quoted in full below.

<sup>135</sup> 96 of 1991.

<sup>136</sup> See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) [36] and the discussion by Bekink & Brand Ch 9 in Davel *Introduction to Child Law in South Africa* 186.

<sup>137</sup> According to Haupt & Robinson 2001 *THR-HR* 23 at 31, the SA Constitution adopts neither a *kiddie libber* – nor a *kiddie saver* approach but rather an approach that recognises that “... kinders *qua* draers van fundamentele regte steeds ouerlike en familie sorg benodig”. In terms of this view children thus have a fundamental right to protection of the parent-child relationship in terms of s 28 of the Constitution within which scope the state protects their physical, emotional, religious and intellectual welfare. See also Bates 1983 *SALJ* 664; Human 2000 *Stell LR* 71.

<sup>138</sup> 2007 2 *SACR* 539 (CC).

- (a) Despite the “sweeping” character of section 28(2) the provision not only serves as a general guideline to the courts but, more importantly, read with section 28(1) it establishes a set of children’s rights that courts are obliged to enforce.<sup>139</sup>
- (b) Every child has his or her own dignity which presupposes, amongst other things, that the sins and traumas of fathers and mothers should not be visited on their children.<sup>140</sup>
- (c) Section 28(2) creates a right that is independent of those specified in section 28(1).<sup>141</sup>
- (d) As far as the “operational thrust” of section 28(2) is concerned, it is not seen as “... an overbearing and unrealistic trump of other rights” but subject to limitation in terms of section 36 of the Constitution.<sup>142</sup> Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all other rights their operation has to take account of their relationship to other rights, which might require that their ambit are limited.<sup>143</sup>

The realisation of both these constitutional rights of children is now, *inter alia*, expressly listed as objectives of the new Children’s Act.<sup>144</sup> In the case of children with disability or chronic illness due consideration must be given to providing the

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<sup>139</sup> With reference to *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 1 SA 406 (CC) [54]-[55]; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) [17]; *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC) [29].

<sup>140</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) at [18].

<sup>141</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) at [22], with reference to *Fraser v Naude and Others* 1999 1 SA 1 (CC) [9] and *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) [17]. See also *J v J* 2008 6 SA 30 (C) at [36].

<sup>142</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) at [26].

<sup>143</sup> *Ibid.*

<sup>144</sup> 38 of 2005: S 2(b)(i) and (iv). The general principles underlying the implementation of all legislation applicable to children and all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general must, furthermore, respect, protect, promote and fulfill the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in s 7 and the rights and principles set out in the Children’s Act 38 of 2005: S 6(2)(a). S 9 of the Act reiterates the application of the “... standard that the child’s best interest is of paramount importance” in all matters concerning the “... care, protection and well-being of a child.”

child with parental care, family care or *special* care “... as and when appropriate”.<sup>145</sup>

The best interest-standard is not a new concept in South Africa but its application has previously been limited to private law disputes pertaining to custody, guardianship or access.<sup>146</sup> Its application in terms of the Constitution to *every matter concerning the child* is, therefore, significant and the wording stronger than that of the UNCRC.<sup>147</sup> According to the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)*,<sup>148</sup> section 28 must be seen as responding in an expansive way to South Africa’s international obligations as a State party to the UNCRC.

After much criticism of the best interests-standard<sup>149</sup> as being too vague and unreliable it seems as though South Africa is following the international trend<sup>150</sup> to

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<sup>145</sup> S 11 of the Children’s Act 38 of 2005.

<sup>146</sup> SALC First Issue Paper on the *Review of the Child Care Act* par 3.8. The Appellate Division first gave paramountcy to the standard of the “best interests of the child” in *Fletcher v Fletcher* 1948 1 SA 130 (A) 134. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) [18] and *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) [12]. Davel Ch 2 in *Commentary on Children’s Act 2-6* refers to authority indicating that the application of the standard has gradually been extended by the judiciary beyond the realm of private law.

<sup>147</sup> In terms of Art 3(1) of the UNCRC “[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration”. As to the significance of making the best interests of children the “primary” consideration (as found in the ECHR) as opposed to the “paramount” consideration (in accordance with the welfare principle found in the UK Human Rights Act 1998), see Choudhry & Fenwick 2005 *Oxford Journal of Legal Studies* 453.

<sup>148</sup> 2007 2 SACR 539 (CC) [16].

<sup>149</sup> See Van Heerden Ch 18 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 502-504 and the sources quoted in 504 fn 13, 14 and 15; SALC Discussion Paper on the *Review of the Child Care Act* par 5.3 and the sources quoted therein. According to DeWitt Gregory 1999 *FLQ* 833 at 840, the best interest standard is one of two developments (the other being the invention of novel and eccentric definitions of family and parent) that have placed family autonomy and parental authority in danger and is “... both vague and indeterminate and gives precious little guidance to judicial decision makers. It provides to judges the invitation, which they frequently accept with alacrity, to engage in virtually untrammelled exercises of discretion in deciding issues of child custody and visitation. It serves poorly the interests of children in custody and visitation cases, speaking rather to the interests of contending adults. The standard lacks any settled meaning and is more a rubric than an analytical tool for deciding child custody and visitation cases”.

<sup>150</sup> Set by countries like Canada, Australia and Uganda: For details of which see SALC Discussion Paper on the *Review of the Child Care Act* par 5.3.

give substance to the standard.<sup>151</sup> Section 7 of the new Children's Act<sup>152</sup> provides a so-called checklist of factors to consider in determining the best interests of the child. These include, *inter alia*, the nature of the relationship between the child and the parents or any other care-giver, the attitude of the parents towards the child and the exercise of parental responsibilities in respect of the child, the capacity of the parents to provide for the needs of the child and which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child. It is also interesting to note that section 6(3), outlining the general principles underlying the Act, now also recognises that in certain instances cognisance must be taken of the view of the child's family by stating that "[i]f it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child".

Viewed from the perspective of the child the Constitution guarantees the child a right to be cared for by a parent or appropriate substitute caregiver and thus presumably by implication, imposes a concomitant duty on that parent<sup>153</sup> or substitute to "care".<sup>154</sup> The Constitutional Court's judgment in *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>155</sup> confirmed that the state's obligation to provide "appropriate alternative care" only arises when

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<sup>151</sup> Judicial precedent has already proposed some guidelines in this regard: See *French v French* 1971 4 SA 298 (W); *McCall v McCall* 1994 3 SA 201 (C) 204J-205G and an interesting overview of the best interests criterion between 1985-1995 by Palmer in Keightley *Children's Rights* 98-102.

<sup>152</sup> 38 of 2005.

<sup>153</sup> Confirmed by Hurt J in *P and Another v P and Another* 2002 6 SA 105 (N) 107J-108A, who emphasised the fact that since "... a right is tantamount to the creation on the part of another of a duty to fulfil that right" guardianship and custody "... should not be viewed as rights vesting in the parent, but as duties imposed upon the parent". See also Currie & De Waal *Bill of Rights Handbook* 605 who insist that "[p]arents cannot derive any rights from the section".

<sup>154</sup> According to Bekink and Brand Ch 9 in Davel *Introduction to Child Law* 183, the section entails a number of possible entitlements for a child, *ie* the entitlement to the provision of care of a certain nature and quality; the entitlement not to have that care interfered with in an unwarranted fashion (primarily operating against the state); and the entitlement to respect for the institution of family as the context within which it should be provided. For purposes of this discussion only the first mentioned entitlement is relevant and as such (at 184-185) creates for a child the right to be cared for – whether by parents, the family or any other appropriately assigned caregiver (presumably by the state). "Care" in this context probably includes both tangible and intangible components as pointed out by Bekink & Brand Ch 9 in Davel *Introduction to Child Law* 183. S 1(1) of the new Children's Act 38 of 2005 explicitly defines "care" as including material elements such as the provision of a suitable place to live, financial support, etc, as well as the more abstract elements such as guiding and directing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development. The child's right to care (and the concomitant duty it imposes) is first and foremost enforceable against its parents and family.

<sup>155</sup> 2001 1 SA 46 (CC) 82A-B.



care is “lacking”.<sup>156</sup> According to the SALRC<sup>157</sup> the judgment in *Grootboom* contradicts an earlier indication<sup>158</sup> that section 28(1)(b) is primarily applicable in the vertical sphere. In this case the court directed that section 28(1)(b) should be read together with section 28(1)(c)<sup>159</sup> – the former defining those responsible for giving care to children, whilst the latter lists various aspects of the care entitlement (the right to basic nutrition, to shelter, to basic health care services and to social services). The judgment clearly suggests that section 28(1)(b) is primarily of horizontal application (that is between individuals), as the obligation for fulfilment of the rights enumerated in section 28(1)(c) was regarded as lying primarily on parents. As such the court concluded that as the children *in casu* were being cared for by their parents and were not in the care of the state or in any alternative care or abandoned, there was no obligation on the state (vertical application) to provide shelter to the respondents who were children, and through them, to their parents in terms of section 28(1)(c).<sup>160</sup> While recognising that “... the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents”, Mokgoro J in *Bannatyne v Bannatyne (Commisson for Gender Equality, as Amicus Curiae)*<sup>161</sup> held that there is an obligation on the State to create the necessary environment for parents to do so by providing “... the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28”.<sup>162</sup>

It is interesting to note that section 28(1)(b) would seem to give priority to “family care” rather than “parental care” if regard is had to the order in which those responsible for the care of the child is listed in the section.<sup>163</sup> According to

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<sup>156</sup> As in the case of unaccompanied foreign children: *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 (T) [17].

<sup>157</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 3.2.

<sup>158</sup> *Jooste v Botha* 2000 2 BCLR 187 (T) 195F-G.

<sup>159</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 81H.

<sup>160</sup> At 82G.

<sup>161</sup> 2003 2 SA 363 (CC).

<sup>162</sup> At [24], with reference to *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) [78]. The Maintenance Act 99 of 1998, according to the court (at [25]) provides an example of such a legal infrastructure.

<sup>163</sup> While s 2(b)(i) of the Children’s Act 38 of 2005 reflects the same order of care as found in s 28(1)(b) of the Constitution, s 11 of that Act requires, in the first instance, consideration of the provision of “parental care” before “family care” in any matter concerning a child with disability or chronic illness.

Skweyiya AJ in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*<sup>164</sup> the child's constitutional right to "family care and parental care" gives recognition to the fact that many children were not brought up by their biological parents, that family care "... includes care by the extended family of a child, which is an important feature of South African family life",<sup>165</sup> and that section 28(1)(b) clearly gives constitutional recognition to the importance of family life for the well-being of all children.<sup>166</sup>

Despite the fact that the parents of a child bear the primary burden to care for their child,<sup>167</sup> the Constitution does not expressly entrench or protect the right of a parent to care and assume responsibility of his or her biological child.<sup>168</sup> Since the Constitution, and more specifically the Bill of Rights, "... does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill",<sup>169</sup> parents would seem to retain their inherent common law right to assume responsibility of their children without arbitrary interference from the state.<sup>170</sup> The court in *Jooste v Botha*<sup>171</sup> was prepared to interpret section 28(1)(b) in a manner consistent with the common law as being "... aimed at the

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<sup>164</sup> 2003 2 SA 198 (CC).

<sup>165</sup> At [18].

<sup>166</sup> *Ibid.* The importance of the family and the community is also reflected in the preamble to the Children's Act 38 of 2005 capturing, according to Skelton & Proudlock, the idea of *ubuntu*: See Skelton & Proudlock Ch 1 in *Commentary on Children's Act* 1-21. On family care in general, see Currie & De Waal *Bill of Rights Handbook* 606-607 who views the inclusion of the right to family care "... a welcome improvement", especially insofar as it gives recognition to the fact that "... the common-law position, which grant the biological parents exclusive rights of access, is not always conducive to the best interests of the child". Schweltnus 1996 *Obiter* 153 at 158-159 sees this "broader approach" as an opportunity to compare this constitutional right with the term "family life" as used in Art 8 of the ECHR (at 157), in particular as applied to the Dutch law on illegitimacy.

<sup>167</sup> According to Moosa J in *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 (T) [10]: "The primary responsibility for the protection and promotion of the interests of the child vests in the parents".

<sup>168</sup> Cockrell in *Bill of Rights Compendium* 3E21. Cockrell contends in the same paragraph that such a right is also not recognised by implication in terms of s 28(2) of the Constitution and calls for a strict interpretation of the latter section "... so as not to amount to a back-door recognition of the parental power".

<sup>169</sup> S 39(3) of the Constitution.

<sup>170</sup> Van Heerden Ch 18 in Van Heerden et al *Boberg's Law of Persons and the Family* 497 refers to this right as a "primordial" right that was reaffirmed in *Petersen en 'n Ander v Kruger en 'n Ander* 1975 4 SA 171 (C) 173H.

<sup>171</sup> 2000 2 BCLR 187 (T) 195F-G.

preservation of a healthy parent-child relationship in the family environment against unwarranted executive, administrative and legislative acts.”

The Constitution also does not explicitly protect the equal sharing of the rights and responsibilities of parents *vis-a vis* their children, as found in many international instruments.<sup>172</sup> These instruments not only enshrine a right to parental care for all children but also proceed from the fundamental premise of equality between the biological parents of the child – a full sharing of parental responsibilities regardless of whether the child is born in or out of wedlock. According to Article 18(1) of the UNCRC “... both parents have common responsibilities for the upbringing and development of the child...” and according to Article 9(3) a child has the right to maintain personal relations with both parents if separated from one or both parents. Article 16(1)(d) of UNCEDAW states unequivocally that men and women have the “... same rights and responsibilities as parents”. The African Charter on the Rights and Welfare of the Child outlaws discrimination on grounds such as fortune, birth or other status of the child, the parent or the legal guardian, thereby ensuring protection of parental rights and responsibilities whatever their marital status.<sup>173</sup> The absence of similar guarantees in the South African Constitution begs the question whether biological parents have a constitutional right to assume parental responsibilities and rights on an equal basis? This highly contentious issue will be given due consideration in Chapter 4 dealing with the automatic acquisition of parental responsibilities and rights.

## 1.5 CONCLUSION

It is within this constitutional and international legal context that the research pertaining to the acquisition of parental responsibilities and rights is undertaken. According to the Council of Europe, “... respect for family life implies in particular

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<sup>172</sup> The Constitution only protects the right to equality in general (s 9(1)) by prohibiting unfair discrimination on the grounds of, *inter alia*, sex, birth and marital status in s 9(3). There is some uncertainty as to whether s 28(1)(b) protects a child’s right to bond with both its parents. While the section has been interpreted in *Jooste v Botha* 2000 2 BCLR 187 (T) as referring to care only by a custodian parent, Mosikatsana 1996 CILSA 152 at 163 and Currie & De Waal *Bill of Rights Handbook* 607 maintain that it relates to care by both parents. Currie & De Waal *Bill of Rights Handbook*, however, at the same time admit (at 607) that “[m]ost legislation and judicial decisions do not protect the child’s right to be cared for by both natural parents”.

<sup>173</sup> See Viljoen Ch 12 in Davel *Introduction to Child Law* 219 par 12.5.1.2.

... the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family".<sup>174</sup> The protection of a child's right to parental care can only be ensured if there is a parent or at least a substitute parent ("appropriate alternative care") to take such care at all times.<sup>175</sup> A daunting task, considering the context of the current socio-economic climate in South Africa with the high number of children who will be orphaned by HIV/AIDS and the large numbers of children who will have to head up households, coupled with the increasing number of children requiring care and support outside of the family because they have been orphaned, abandoned or displaced from their families.<sup>176</sup> However, ensuring that all children are being cared for by a parent or parent-substitute is not the only problem. The principles underlying the assignment of responsibilities and rights to these parents or substitutes must also conform to the values and norms as embodied, in the first instance, in the Constitution and, secondly, the international law which must be considered when interpreting the Bill of Rights.<sup>177</sup>

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<sup>174</sup> Guidelines provided to Member States of the Council of Europe when introducing or considering legislative reforms in a White Paper on *Principles Concerning the Establishment and Legal Consequences of Parentage*:

[www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/family\\_law\\_and\\_children](http://www.coe.int/t/e/legal_affairs/legal_co-operation/family_law_and_children).

<sup>175</sup> Lowe 1997 *IJLPF* 192 at 197.

<sup>176</sup> See *South African Child Gauge 2007/8* Children's Institute, University of Cape Town on <http://www.ci.org.za/site/frames.asp?section=lawreform>. Other factors such as the rising number of births out of wedlock, the rapidly increasing number of children living in stepfamilies because of the rising divorce rate and the increasing demand for medically-assisted procreation because of the increasing rise in infertility which is experienced worldwide, makes the challenge just so much more daunting: Schwenger 2007 *Electronic Journal of Comparative Law*.

<sup>177</sup> S 39(1)(b) of the Constitution.

## SECTION A: GENERAL INTRODUCTION

### CHAPTER 2: TERMINOLOGY

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## 2.1 INTRODUCTION

Although it is common practice to define terminology relevant to the research topic, the endeavour is especially challenging in the present context since, in the words of Freeman:<sup>1</sup> “The whole adult-child relationship is obfuscated in tangled terminology”. The reason for this state of affairs can largely be attributed to the fact that terminology associated with the parent-child relationship continuously have to be redefined, and in some cases even be replaced, to keep up with the changes in the way the legal relationship between parent and child is perceived.<sup>2</sup> As far as South African law is concerned,<sup>3</sup> the changing perceptions regarding the parent-child relationship can be traced back to the following distinguishable stages:

- (a) Originally, in terms of the common law, the emphasis was placed on the *father's rights* over his legitimate children. Although these rights were shared with the mother and not as extensive as the *patria potestas* in terms of Roman law,<sup>4</sup> the father's rights (referred to as “*natural guardianship*”) were regarded as superior to those of the mother as far as third parties were concerned.<sup>5</sup> A child born out of wedlock was in the power of the mother alone<sup>6</sup> since “*eene moeder maakt geen bastaard*”.<sup>7</sup>

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<sup>1</sup> Freeman 1974 *Current Legal Problems* 165 at 168. Hoggett *The Law of Parental Responsibility* 5 is of the opinion that “[i]t is much easier to define what we mean by a family than it is to define the legal rights and responsibilities of the people in it”.

<sup>2</sup> According to Bainham *Children—The Modern Law* 101, there is no question that one of the most striking features of the reform of Family Law over the past decade has been the reformulating of concepts and that behind the reformulation lies shifting values. See also Bainham 1998 *CFLQ* 1.

<sup>3</sup> Although the discussion here is limited to the context in SA, these trends are found throughout the western world: See Meulders-Klein 1990 *IJLF* 131 at 132; Schwenzler 2007 *Electronic Journal of Comparative Law*.

<sup>4</sup> According to Spiro the term does not occur in any ancient text despite the common usage of the term - the term “*patria majestas*” was apparently used by Livius: Spiro *Parent and Child* 1 fn 1.

<sup>5</sup> *Calitz v Calitz* 1939 AD 56 61; *Dreyer v Lyte-Mason* 1948 2 SA 245 (W) 250; *Shawzin v Laufer* 1968 4 SA 657 665H. While the mother shared the custody of the child with the father, the father qualified as the child's guardian for the purposes of administering the child's property, giving consent to legal transactions and supplementing his or her limited *locus standi in judicio*: See Van Heerden Ch 14 in Van Heerden *et al Boberg's Law of Persons and the Family* 317 fn 17; Sinclair assisted by Heaton *The Law of Marriage* Vol 1 at 112.

<sup>6</sup> *Ex parte Van Dam* 1973 2 SA 182 (W) 183C-D.

<sup>7</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 166.

- (b) Then, for a short period attention was paid to improving the *mother's position*. The previous patriarchal society was gradually replaced by a human rights culture that equalised the position between married fathers and mothers.<sup>8</sup> During this phase the emphasis was on “*equal and independent guardianship*”.<sup>9</sup> Upon separation one parent was awarded “*custody*” and the other had reasonable “*access*” yet always dependent on the best interests of the child. “*Joint custody*” was rarely assigned post separation but in some cases encouraged.<sup>10</sup> Unmarried fathers had no inherent parental rights but could approach the High Court to be vested with guardianship, custody or access if it was deemed in the best interests of the child.<sup>11</sup>
- (c) The protection of children as a specially vulnerable category of persons and the resultant development of a culture of children's rights shifted the emphasis from parental authority to the rights of children.<sup>12</sup> Parents now

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<sup>8</sup> The Matrimonial Affairs Act 37 of 1953 remedied the unfairness of the common law which gave preference to the father's wishes in a dispute between the parents about consent to the marriage of the minor (later substituted by s 25(4) of the Marriage Act 25 of 1961) and also changed the common law rule that the father could appoint a testamentary guardian to the exclusion of the mother (s 5(3)(b) of the Act which was also later substituted). The Guardianship Act 192 of 1993 finally removed all the inequalities between husbands and wives as far as the acquisition of “guardianship” was concerned: See in general, Sinclair assisted by Heaton *The Law of Marriage* Vol 1 at 113. This Act was repealed by Schedule 4 to the Children's Act 38 of 2005, which came into operation on 1 Jul 2007: GG 30030 dd 29 Jun 2007. According to the SALRC the change brought about by the former Guardianship Act 192 of 1993 was important in emphasising the fact that parental “power” was in fact more concerned with duties and responsibilities of parents than with parents' rights and powers. It is noteworthy that the SALRC reached this conclusion despite the retention in the said Act of the common law terms parental “rights”, “duties” and “powers” and the absence of any indication of what “guardianship” in fact entailed: SALC Discussion Paper on the *Review of the Child Care Act* par 8.3.1.

<sup>9</sup> Van Heerden & Clark 1995 SALJ 140.

<sup>10</sup> Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 550-558.

<sup>11</sup> Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

<sup>12</sup> The substitution of the term “illegitimate child” with the clumsy phrase “child born out of wedlock” brought about by the Child Care Amendment Act 96 of 1996 (published in the GG 17606 dd 22 Nov 1996), would be one example. Objections were raised against the use of the term “illegitimate” on the grounds that it stigmatised the child and was thus considered offensive: See *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC) [10] fn 15 and the SALC Report on the *Legal Position of Illegitimate Children* par 6.25-6.26. The SALRC recommended (in par 6.26) that the legislator use the word “extra-marital” child rather than “bastard” or “illegitimate” child. While the courts have been slow to adopt the suggested terminology, legislation after 1985 shows several examples of the shift in terminology. See Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 326 fn 1, who refers to, *inter alia*, the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 as an obvious

have the “*responsibility*” and right to “*care*” for and maintain “*contact*” with their children and children predominantly have “*rights*”.<sup>13</sup>

- (d) The most recent changes focus on improving the position of *unmarried fathers* and places a further emphasis on the child’s right to “... know and be cared for by his or her parents”<sup>14</sup> and to “... maintain personal relations and direct contact with both parents on a regular basis” post separation.<sup>15</sup>

The importance of terminology, especially in the field of child law, has also been the subject of considerable speculation.<sup>16</sup> While there is some truth in the assertion that playing with conceptual labels will not necessarily have any effect on the substance of family relations, it cannot be disputed that modernisation of terminology is an important issue because it may have a symbolic or educative effect on social attitudes.<sup>17</sup> The use of the term “parental responsibilities and rights” thus clearly warrants further consideration.

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example of this trend. According to Davel & Jordaan *Law of Persons* 102, the offensive word was not “illegitimate” but “illegal”. Although the word “onwettig” was sometimes used to describe illegitimate or extra-marital children in Afrikaans, it is submitted that the directly translated word “illegal” was not used in this context. Labuschagne 1984 *De Jure* 332 at 349 was of the opinion that “[o]m ... na ‘n mens as onwettig te verwys, is ‘barbaars’”.

<sup>13</sup> Introduced by the Children’s Act 38 of 2005: S 1(1) *sv* “parental responsibilities and rights”, “care” and “contact”.

<sup>14</sup> Art 7 of the UNCRC.

<sup>15</sup> Art 9(3) of the UNCRC. Although the Children’s Act 38 of 2005 has improved the position of unmarried fathers (ss 20 and 21), Australia has given full recognition to the rights in the UNCRC – All parents are vested with “parental responsibility” regardless of their marital status (S 61C(1) of the Family Law Act 1975 (Cth) as amended by the Family Law Reform Act 1995 (Cth)) and *equal shared parental responsibility* is taken as the starting point after separation: Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). A key feature of the legislation is the shift towards consideration of “equal time” or “substantial and significant time” for both parents where shared parental responsibility is considered: S 65 DAA of the Family Law Act 1975 (Cth). The changes also carry an emphasis on dispute resolution between separating parties before, instead of, attending court in family law cases. In the majority of cases, the amendments replace references to “residence” with “lives with” and references to “contact” with “spends time with” and “communicates with”: Mills *Family Law* 110. See discussion in 4.3.1.4 below.

<sup>16</sup> See Bates 1983 *SALJ* 664 at 674-5. Cretney & Masson *Principles of Family Law* 609 refer to “cosmetic renaming” that nevertheless “... influence judicial thinking”. According to Bromley & Lowe *Family Law* 298, the effect of the change in terminology (brought about by the UK Children Act 1989) on the substance of the law is “... arguable though its effect upon lay persons should not be underestimated”.

<sup>17</sup> Bainham *Children—The Modern Law* 101. Bainham makes the following observations in an earlier article (1998 *CFLQ* 1 at 2): “In family law, perhaps more than in most areas of law, the language which we use is of central importance. Mary Ann Glendon (*The Transformation of Family Law* (University of Chicago Press, 1987) has warned that ‘mesmerised by the coercive power of law, we tend to minimise its persuasive and constitutive aspects’. This, it is argued, is especially so in a field of law in which coercion seldom works. Family law is inherently



## 2.2 PARENTAL RESPONSIBILITIES AND RIGHTS

### 2.2.1 Introduction

Parental “authority” or parental “power” as it was traditionally referred to in South Africa, was defined in terms of the common law as “... the sum total of rights and duties of parents in respect of their minor children arising out of parentage”.<sup>18</sup> The term usually denoted a legal *nexus*,<sup>19</sup> rather than a biological link, between parent and child. Although the natural or biological parents, in most cases, had parental “power” in respect of their children (and thus had legal parenthood), as in the case where a married couple procreated, parentage was never a *sine qua non* for the acquisition of parental “power” nor has parental “power” in all cases been an automatic incidence of being a (biological) parent.<sup>20</sup> The same holds true for the position after the enactment of the Children’s Act.<sup>21</sup> The following two examples will support this supposition: A third party, such as a grandparent,<sup>22</sup> may be awarded parental responsibilities and rights in cases where the parents cannot or do not exercise their rights, duties and responsibilities in the best interest of their children, while an unmarried natural father, despite being a (biological) parent, will not necessarily automatically acquire parental responsibilities and rights in respect of his child born out of wedlock.<sup>23</sup> Determining who a child’s biological parent (parentage) is, will, therefore, still not necessarily answer the question of who has parental responsibilities and rights in respect of the child.

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unenforceable in the traditional sense since it attempts to regulate human relationships. Parents cannot ultimately be forced to see children, or children to see parents ... If therefore family law is to have any real influence on family behaviour it is more likely to be at the conceptual level – through what it attempts to tell us about desirable or acceptable models of family life”.

<sup>18</sup> Spiro *Parent and Child* 36 at 43.

<sup>19</sup> Spiro *Parent and Child* 30 refers to a “*vinculum juris*” between parent and child.

<sup>20</sup> See Clark Ch 10 in Van Heerden *et al Boberg’s Law of Persons and the Family* 268.

<sup>21</sup> 38 of 2005.

<sup>22</sup> See eg *Kaiser v Chambers* 1969 4 SA 224 (C), where the custody of two small children was awarded to their maternal grandmother, their mother having recently been killed in an accident and their father not able to care or provide adequate accommodation for them.

<sup>23</sup> While fathers of children born out of wedlock previously had no inherent parental rights (*B v S* 1995 3 SA571 (A) 579H-I and Spiro *Parent and Child* 41), such fathers may now automatically acquire parental responsibilities and rights in terms of the Children’s Act 38 of 2005 provided they fall within the ambit of s 20 or 21.

Eekelaar<sup>24</sup> is of the opinion that the concept of parenthood can in reality be broken down into three distinguishable elements, *ie* biological parenthood (parentage), legal parenthood and parental “responsibility”, *ie* the term used by Eekelaar to refer to parental responsibilities and rights. A few examples can be used to illustrate the point:

- (a) A natural father<sup>25</sup> has biological parenthood until such time as he acquires parental responsibilities and rights, at which stage his status will be elevated to that of a legal father with legal parenthood.<sup>26</sup>
- (b) A biological parent who is married has legal parenthood in respect of a child born from the marriage until the court terminates that parent’s parental responsibilities and rights in which case the parent will only have biological parenthood.
- (c) A grandparent, uncle, aunt or interested person may be vested with parental responsibilities and rights but can never derive their status from either biological or legal parenthood.

Parental “responsibility”, according to this view, is distinct from both biological and legal parenthood in that, while it confers extensive powers and duties normally exercised by parents, it does not create the status of legal parenthood<sup>27</sup> and it can be vested in many categories of carers who are not biologically connected with children. Although the various elements may, therefore, be split up between individuals or between individuals and institutions (in the case of children in need

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<sup>24</sup> Eekelaar in Morgan & Douglas *Constituting Families* 85-89. Eekelaar’s theory is also discussed at length in Bainham *Children—The Modern Law* 89-90.

<sup>25</sup> This term refers to a biological father of a child born out of wedlock.

<sup>26</sup> A legal parent is, therefore, a biological parent vested with parental responsibilities and rights.

<sup>27</sup> Barton and Douglas *Law and Parenthood* 50 *et seq* maintain that the primary test of legal parenthood is the extent to which legal recognition is given to a person’s intention or desire to be regarded as a parent and to fulfil the functions of a parent. This viewpoint not only fails to distinguish between the different elements of parenthood as described by Eekelaar but also does not provide an answer to the question of whether a person, acting as a parent while in reality not being a parent, should be called a “parent”.

of care), the three elements may in other cases be vested in the same person (as is the case, for example, with a biological parent who is married).<sup>28</sup>

Eekelaar's model is attractive insofar as it not only accommodates the co-exercise of parental responsibilities and rights in respect of a child by parents and non-parents simultaneously,<sup>29</sup> but also provides an integrated model in terms of which the problematic terminology endemic in this field of law can be applied in a consistent manner.

For purposes of this research the phrase "acquisition of parental responsibilities and rights", refers to the initial automatic acquisition of legal parenthood at the birth of a child or the first acquisition of parental responsibilities and rights by a parent or other person thereafter, as explained more fully in 1.3 above.

The choice of the term parental "responsibilities and rights", rather than parental "responsibility", "authority", "power" or "rights, duties and obligations", is deliberate and justified in terms of both the international trend in this regard<sup>30</sup> and South Africa's response to this trend, evidenced by the terminology introduced by the new Children's Act.<sup>31</sup>

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<sup>28</sup> Eekelaar in Morgan & Douglas *Constituting Families* 85-89. According to Bainham *Children—The Modern Law* 89, English law also makes a distinction between the status of parenthood and the status of possessing parental "responsibility". According to Bainham (at 90) it may be that in future the law will need a clear concept through which to recognize and preserve the biological link. Conceding that this is not the direction in which the law has consistently moved thus far (at 90 fn 7), Bainham suggests that this should be the concept of parenthood and that parental "responsibility" should be left as the status-conferring concept for non-biological care-givers. It is interesting to note that English law has redefined the term "parenthood" as a primary *legal* (as opposed to biological) concept: According to Bainham 1989 *IJLPF* 208 the status of parenthood is characterised by the acquisition of parental "responsibility".

<sup>29</sup> An expressed aim of the new Children's Act 38 of 2005 in terms of which "[m]ore than one person (presumably including both parents and non-parents) may hold parental responsibilities and rights in respect of the same child": See s 30 of the Act.

<sup>30</sup> See Lowe 1997 *IJLPF* 192.

<sup>31</sup> 38 of 2005: S 1(1) *sv* "parental responsibilities and rights" read with s 18.

## 2.2.2 International trend

### 2.2.2.1 *International law*

As far as the international trend in this regard is concerned, the UNCRC was probably the most important initiative to create a children rights' culture globally and to shift the emphasis from parental rights to parental "responsibilities". It is clear from the wording of the Convention, and for that matter most of the international instruments referred to in Chapter 1, that parental "responsibility" or parental "responsibilities", mostly used in conjunction with "rights", is the preferred term to denote the legal relationship of parents *vis-à-vis* their children. By way of illustration (own italics used for this purpose) reference can again be made to:

- (a) Article 5 of the UNCRC, which compels state parties to respect the "*responsibilities, rights and duties of parents*";
- (b) Article 18 of the same Convention, which obligates state parties to "... use their best efforts to ensure recognition of the principle that both parents have common *responsibilities* for the upbringing of the child" and that "[p]arents...have the primary *responsibility* for the upbringing and development of the child"; and
- (c) Article 16(1) of the UNCEDAW which directs state parties to take all appropriate measures to ensure that men and women have "... the same *rights and responsibilities* as parents, irrespective of their marital status, in matters relating to their children",<sup>32</sup> as also "... the same *rights and responsibilities* with regard to guardianship, wardship, trusteeship and adoption of children",<sup>33</sup>

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<sup>32</sup> Art 16(1)(c).

<sup>33</sup> Art 16(1)(f).

- (d) the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>34</sup> in terms of which the recognition of an adoption includes the recognition of "... parental responsibility of the adoptive parents for the child";<sup>35</sup> and
- (e) the redrafted 1996 Hague Convention, now fully entitled the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, in terms of which the meaning and allocation of parental *responsibility* will be determined by the state in which the child is or becomes habitually resident.<sup>36</sup>

### **2.2.2.2 Other jurisdictions**<sup>37</sup>

#### **(a) United Kingdom**

The term parental "responsibility" is an English innovation, formally introduced for the first time in the Children Act of 1989. According to Douglas and Lowe<sup>38</sup> the concept parental "responsibility" was introduced in England to bring uniformity and legal certainty to what they call –

"... the ambiguous and misleading terms previously employed in legislation such as 'parental rights and duties', 'parental powers and duties' or 'the rights and authority' of a parent."<sup>39</sup>

The English Law Commission in its report entitled "Family Law – Review of Child Law - Guardianship and Custody"<sup>40</sup> in general came to the conclusion that

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<sup>34</sup> This Convention has now been incorporated into SA domestic law in terms of Schedule 1 to the Children's Act 38 of 2005.

<sup>35</sup> See Art 26(1)(b).

<sup>36</sup> See in particular Art 16(1).

<sup>37</sup> For a comparative review of the issue, see SALC Discussion Paper on the *Review of the Child Care Act* par 8.4.3.

<sup>38</sup> Douglas & Lowe Ch 9 in *Parenthood in Modern Society* 145.

<sup>39</sup> Other jurisdictions in the UK such as the Isle of Man (under the Manx Family Law Act 1991) and Northern Ireland (in the Children (Northern Ireland) Order 1995, which came into operation on 4 Nov 1996) have followed suit by adopting the term parental "responsibility" in domestic legislation. The position in Scotland is discussed below.

<sup>40</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.4.3.

“responsibility” would reflect the everyday reality of being a parent and emphasise the responsibility of all who are in that position.<sup>41</sup> The English Law Commission rejected the inclusion of a comprehensive list of the incidents of parental “responsibility” in the English Children Act on the basis that it was “impracticable” to do so.<sup>42</sup> The English Law Commission reasoned that “... the list would have to change from time to time to meet the differing needs and circumstances and would vary with the age and maturity of the child together with the circumstances of each individual case”.<sup>43</sup> According to Douglas and Lowe<sup>44</sup> parental “responsibility” has now become a pivotal concept of the Children Act of 1989 despite the lack of precision in the definition of the term contained in that Act as generally including: “... all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.<sup>45</sup> Apart from it being essentially a non-definition, the definition has been criticised because “... it throws one back to the rights and duties concept which ‘responsibility’ was supposed to replace”.<sup>46</sup> It also gave rise to the view that it seemed “... somewhat unusual to define parental responsibility in terms of rights”.<sup>47</sup>

The Children (Scotland) Act 1995, in contrast to the English Children Act 1989,<sup>48</sup> uses the term “parental responsibilities and parental rights”. In terms of section 1(1) of the Children (Scotland) Act 1995 –

- “... a parent has in relation to his child the responsibility –
- (a) to safeguard and promote the child’s health, development and welfare;
  - (b) to provide, in a manner appropriate to the stage of development of the child –
    - (i) direction;

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<sup>41</sup> Douglas & Lowe Ch 9 in *Parenthood in Modern Society* 145.

<sup>42</sup> Lowe 1997 *IJLPF* 192 at 195.

<sup>43</sup> See Bainham 1993 *Journal of Child Law* 3 and Lowe 1997 *IJLPF* 192 at 195.

<sup>44</sup> Douglas & Lowe Ch 9 in *Parenthood in Modern Society* 145.

<sup>45</sup> S 3(1) of the Children Act 1989: SALC Discussion Paper on the *Review of the Child Care Act* par 8.4.3.

<sup>46</sup> Lowe 1997 *IJLPF* 192 at 195.

<sup>47</sup> A view expressed by the Scottish Law Commission in their Discussion Paper on *Parental Responsibilities and Rights: Guardianship and the Administration of Children’s Property* (1990) par 2.19, for details of which, see Bainham 1993 *Journal of Child Law* 3 and fn 8.

<sup>48</sup> The position also contrasts with that found in the Australian Family Act 1975 (Cth), as discussed in (b) below.

- (ii) guidance,  
to the child;
- (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative".<sup>49</sup>

In terms of section 2(1) of the same Act –

- “... a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right –
- (a) to have the child living with him or otherwise to regulate the child's residence;
  - (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
  - (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
  - (d) to act as the child's legal representative”.

Bainham applauded the provisions introduced in the Children (Scotland) Act on the basis that it has the effect of preserving rights *and* responsibilities (own emphasis) “... as independent incidents of parenthood and, indeed, to spell out the specific content of each more precisely”.<sup>50</sup> Bainham contended that the provisions not only underline “... the modern view, shared in England and elsewhere, that such rights as a parent has exist ‘in order to enable the parent to fulfil his or her parental responsibilities,’”<sup>51</sup> but the provisions also expressly acknowledge parental rights in addition to parental duties which is important because –

“... the concern is that the popular appeal and constant repetition of expressions like ‘children's rights’ and ‘parental responsibility’ is capable of creating an unbalanced view of the parent-child relationship. The phrase ‘children are the ones with rights, not parents’ captures the mood of the times, but it is really quite illogical. There is no reason in logic for assuming that where two parties are in a legal relationship to one another they cannot have reciprocal claims and obligations. It would, for example, be an odd contract which did not recognise this. It is true that the parent-child

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<sup>49</sup> But only “... in so far as compliance with this section is practicable and in the interests of the child”: S 1(1) of the Children (Scotland) Act 1995.

<sup>50</sup> Bainham 1993 *Journal of Child Law* 3.

<sup>51</sup> Adopted by Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 A.C. 112 at 184. While agreeing with the thrust of this statement, Bainham is, however, critical of the view that parental “powers” exist “*exclusively or exhaustively*” for this purpose, arguing that there are situations (*eg* in the case of parental decisions regarding family outings or holidays and the decision of parents to separate) where parents' interests may be thought to outweigh those of their children and thus legitimise such action: Bainham 1993 *Journal of Child Law* 3.

relationship is hardly a contractual one, but there are surely dangers in portraying it as one with all the rights on one side and all the obligations on the other. Is this perhaps just semantics – does it really matter what language is used? It is suggested that it does ...”.<sup>52</sup>

Lowe<sup>53</sup> agrees with Bainham on this point and describes the definition of parental responsibilities and parental rights in the Scottish legislation as “... vastly superior to the English and Australian and should act as a model for other legislators desirous of introducing the concept of ‘parental responsibility’”.<sup>54</sup>

## **(b) Australia**

The term parental “responsibility” is also employed in Australia. Section 61B of the Family Law Act 1975 (Cth)<sup>55</sup> defines “parental responsibility” to mean “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”. Although it takes its origins from the English Children Act 1989 it can be distinguished from the concept included in the latter Act insofar as it is defined in terms which do not make reference to parental “rights” at all,<sup>56</sup> ostensibly to “... discourage any perception that parents own, or have some form of property in, their children”.<sup>57</sup> It must, however, be said that the word “powers” in the definition is probably wide enough to encompass the “rights” of parents.

### **2.2.3 South Africa’s response**

It is evident from an examination of some of the most authoritative Family Law sources that the same plethora of terminology which was found in the United Kingdom before 1989, is currently used in South Africa to refer to the rights, duties and responsibilities which a parent exercises in relation to his or her child.

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<sup>52</sup> Bainham 1998 *CFLQ* 1 at 5.

<sup>53</sup> Lowe 1997 *IJLPF* 192.

<sup>54</sup> Lowe 1997 *IJLPF* 192 at 197.

<sup>55</sup> As amended by the Family Law Reform Act 1995 (Cth), which came into operation on 11 Jun 1996 in terms of which the concept of, *inter alia*, parental “responsibility” was introduced: Mills *Family Law* 33.

<sup>56</sup> This distinguishes it from the UNCRC as well which, as noted above, recognises that parents have rights (Art 5).

<sup>57</sup> Dickey *Family Law* 244.



According to Spiro, describing the position in terms of the common law,<sup>58</sup> parental “power”<sup>59</sup> was not only often referred to as “natural guardianship”<sup>60</sup> but the latter concept was, in fact “... identical with the parental power”.<sup>61</sup> Where one parent was assigned custody of the child<sup>62</sup> the other parent generally retained what was referred to as “residuary guardianship”, *ie* “... those aspects of parental power that remain after custody has been excised from it”.<sup>63</sup>

Van der Vyver & Joubert<sup>64</sup> employed the term “ouerlike gesag”, translated as parental “authority” in case law,<sup>65</sup> to describe the capacities, rights and duties of parents in relation to their children. Spiro<sup>66</sup> was uncertain whether there was a distinction between parental “authority” and parental “power”<sup>67</sup> but contended that if there was, “... whatever the meaning of such authority may be, it is included in parental power”.<sup>68</sup> Despite recognising the shift in emphasis from the notion of parental “powers” to one of parental “responsibility” and children’s rights, Van Heerden still clings to the traditional concept of parental “power”.<sup>69</sup> Van Schalkwyk<sup>70</sup> uses the term “parental responsibilities and rights (parental power)”

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<sup>58</sup> Spiro *Parent and Child* 47.

<sup>59</sup> Used in *In Re Estate James Archbell* (1867-1868) NLR 306 307; *R v C* 1939 OPD 178 181; *Van Schoor v Van Schoor* 1976 2 SA 600 (A) 608.

<sup>60</sup> See *Van Rooyen v Werner* (1892) 9 SC 425 428, wherein the father is described as “... the natural guardian of his legitimate children until they attain majority”.

<sup>61</sup> Spiro *Parent and Child* 47.

<sup>62</sup> The use of the phrase “custody and control” (“toesig en beheer” in Afrikaans) as utilised in divorce proceedings has been criticized by the court in *Stassen v Stassen* 1998 2 SA 105 (W) 107E-F; Van Heerden Ch 18 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 561 fn 211; Van Schalkwyk *Family Law* 239 fn 82.

<sup>63</sup> *Matthee v MacGregor Auld* 1981 4 SA 637 (Z) 640A-B.

<sup>64</sup> Van der Vyver & Joubert *Persone-en Familiereg* 592.

<sup>65</sup> *In Re Estate James Archbell* (1867-1868) NLR 306 307; *South African Orphanage v De Villiers* 1914 CPD 555 558; *Tiffen v Cilliers* 1925 OPD 23 25; *Rossiter v Barclays Bank* 1933 TPD 374 383; *Germani v Herf* 1975 4 SA 887 (A) 901A; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 3 SA 221 (C) Headnote. See also Bosman & Van Zyl Ch 2 in Robinson *The Law of Children and Young Persons* 51.

<sup>66</sup> Spiro *Parent and Child* 84.

<sup>67</sup> As contended by authors like Lee, according to Spiro *Parent and Child* 84.

<sup>68</sup> Spiro *Parent and Child* 39-43 uses the discussion on the nature of parental power to rationalise his preference for the term parental “power”. It is, however, not easy to gather the reasons for this preference. The common usage of the term in the statutory and other sources quoted by the author (42-43 fn 56) would, in my opinion, have been a (far better) justification for the choice of the term. In addition to the different terms already referred to, the SALRC confounded the issue further by referring to parental “control” as “... the collective term for the legal capacity, rights and obligations that a parent has towards a child, the child’s estate and the legal actions of the child”: See SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 2.6.

<sup>69</sup> Van Heerden Ch 19 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 658 fn 2.

<sup>70</sup> Van Schalkwyk *Family Law* Ch 13.

as the heading of the Chapter dealing with the issue but has substituted “parental power” with parental responsibilities and rights throughout the rest of the Chapter.

According to the SALRC, the purpose of the introduction of the concept parental “responsibilities and rights” in South African law is to replace the common law concept of parental “power” which has become “outmoded and unsatisfactory”<sup>71</sup> because of the modern emphasis on the rights and interests of children rather than on the parental “powers” or rights of parents. This shift in emphasis was for the first time recognised in South Africa<sup>72</sup> by Foxcroft J in *V v V*<sup>73</sup> in the following terms:

“There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children’s rights. Children’s rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.”<sup>74</sup>

The SALRC consequently felt that by substituting the concept of parental “power” with parental “responsibilities and rights” it was not only acting in accordance with constitutional demands,<sup>75</sup> but was also fulfilling its international obligations as a state party to the UNCRC. The Commission, however, felt that “... an appropriate balance should be struck between the responsibilities of parents towards their children and the rights and powers needed to enable parents to fulfil their responsibilities” and that care should be taken to avoid new legislation becoming “parent-unfriendly”.<sup>76</sup> Hence the inclusion of the words “responsibilities” as well as

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<sup>71</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.3.1.

<sup>72</sup> Chronologically speaking it seems as though Germany was one of the first countries to shift the emphasis from parental “power” (“*elter Gewalt*”) to parental “care” (“*elterliche Sorge*”) in 1980: See Frank 1990 *IJLPF* 214 and Lowe 1997 *IJLPF* 192. Spiro *Parent and Child* 11 fn 1, suggests that the change in the title of the SA “Children’s Act” (33 of 1960) to the “Child Care Act” (74 of 1983) in 1983 may have had something to do with the change in German law. See also Robinson 1992 *SA Public Law* 228 238. See in general, SALC Discussion Paper on the *Review of the Child Care Act* par 8.3.2.

<sup>73</sup> 1998 4 SA 169 (C) at 176D.

<sup>74</sup> Which is almost an exact repetition of an observation made by Sinclair in Sinclair assisted by Heaton *The Law of Marriage* Vol 1 at 111-112. Also see Sinclair in Van Wyk *et al Rights and Constitutionalism* 502.

<sup>75</sup> As enunciated in s 28 of the Constitution.

<sup>76</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.3.1.

“rights” in the definition and the inclusion of a provision, which could be deemed a corollary of the rights children are afforded in the Act,<sup>77</sup> to the effect that: “Every child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state.”<sup>78</sup>

#### 2.2.4 Conclusion

Whereas the English Children Act of 1989 has simplified the multiplicity of terms associated with the concept of parental “power” by replacing it with a single term, *ie* “responsibility”, the Children’s Act<sup>79</sup> introduces a composite term “responsibilities and rights”<sup>80</sup> for the same purpose. It is interesting to note that there seemed to have been some ambivalence in this regard with, on the one hand, a recommendation by the SALRC that parental “power” be substituted with parental “responsibility”<sup>81</sup> and, on the other hand, proposed draft provisions containing a reference to both “responsibilities and rights”.<sup>82</sup> The choice of the term parental “responsibilities and rights” is all the more significant considering the allure of the less clumsy and more widely accepted term parental “responsibility”.<sup>83</sup> Moreover, there is some support for the view that as long as the law’s language reflects the idea that the responsibilities of parents are the reason for any rights they have, it does not really matter which terminology is employed.<sup>84</sup>

Insofar as the Children’s Act<sup>85</sup> is more in line with the balanced approach found in the Scottish Children Act,<sup>86</sup> the legislator should be applauded for its insistence on

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<sup>77</sup> Davel Ch 2 in *Commentary on Children’s Act* 2-26.

<sup>78</sup> S 16 of the Children’s Act 38 of 2005. Davel Ch 2 in *Commentary on Children’s Act* is of the opinion (at 2-26) that a commitment to the African Charter on the Rights and Welfare of the Child that contains a similar provision, could better explain the inclusion of the section.

<sup>79</sup> 38 of 2005.

<sup>80</sup> S 1(1) *sv* “parental responsibilities and rights”.

<sup>81</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.3.4.

<sup>82</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.4.5.1.

<sup>83</sup> Despite divergent definitions and content, the term “parental responsibility” has gained a certain degree of universal acceptance: Lowe & Douglas *Bromley’s Family Law* 369-370. The term, as pointed out above, is used in both England and Australia, is commonly employed in international instruments and comparative journal articles on the topic, *eg* the article by Lowe entitled “The Meaning and allocation of parental responsibility – A common lawyer’s perspective” 1997 *IJLPF* 192.

<sup>84</sup> Hoggett *The Law of Parental Responsibility* 11.

<sup>85</sup> 38 of 2005.

expressly retaining a reference to “rights” in the term chosen for the Act, for in the words of Lowe –

“... it grapples with the problem of having to deal with the parent-child relationship not simply between parent and child (in which context the expression ‘responsibility’ seems absolutely right), but also as between the parents themselves and between parents and third parties (in which context the expression ‘rights’ seems appropriate)”.<sup>87</sup>

### 2.3 CONTENT OF PARENTAL RESPONSIBILITIES AND RIGHTS

A detailed analysis of the common law in this regard is considered beyond the scope of this thesis since the research topic is concerned exclusively with the “acquisition” of parental responsibilities and rights and not the content thereof.<sup>88</sup> The content of parental responsibilities and rights is, however, of limited importance in the present context insofar as it is necessary to gain an understanding of what is in general meant by the term and to appreciate the difference between the acquisition of “full” parental responsibilities and rights and “specific” parental responsibilities and rights.<sup>89</sup>

In terms of South African common law, parental “power” or “natural guardianship” consisted of two components, *ie* custody and guardianship in the narrow sense of

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<sup>86</sup> SALC Report on the *Review of the Child Care Act* par 7.3. The definitions are, however, not identical – *eg*, whereas the Scottish version specifies the content of parental responsibilities and parental rights separately with the rights to a large extent, but not exactly, a mirror of the parental responsibilities outlined in the Act, the SA version defines the term simply to mean “... the responsibilities and rights referred to in s 18” (s 1(1) of the Children’s Act 38 of 2005 *sv* “parental responsibilities and rights”), implying that the parents’ responsibilities exactly mirror their rights. The Scottish definition, furthermore, gives express recognition in the definition to the developmental interests of the child in the exercise of a parent’s responsibilities and rights (s 1(1)(b) and 2(1)(b)) whereas the SA Act include these interests as factors to be considered when generally applying the best interests of the child in terms of s 7(1)(g) of the Children’s Act 38 of 2005. For a discussion on the significance of these features, see Bainham 1993 *Journal of Child Law* 3.

<sup>87</sup> Lowe 1997 *IJLPF* 192 at 196.

<sup>88</sup> For a detailed discussion of the content of parental “power” or “authority” before the enactment of the Children’s Act 38 of 2005 see, *inter alia*, Nathan *Common Law of South Africa* 105-108; Studiosus 1946 *THR-HR* 32; Conradie 1948 *SALJ* 396; Lee *Introduction to Roman-Dutch Law* 33-39; Spiro *Parent and Child* 1-5; Van der Vyver & Joubert *Personen-en Familiereg* 592-595 and Van Heerden Ch 19 in Van Heerden *et al Boberg’s Law of Persons and the Family* 658-659. See also SALC Report on the *Legal Position of Illegitimate Children* 73-83 par 8.2 *et seq* and SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* 4-25 par 2.6.

<sup>89</sup> As distinguished in s 18(1) of the Children’s Act 38 of 2005.

the word.<sup>90</sup> Custody referred to the right and duty of a parent to make decisions regarding the person of the child or the day-to-day decisions regarding the child,<sup>91</sup> while guardianship (in the narrow sense) presupposed the right and duty of a parent to administer the child's property and to assist the child in the performance of judicial acts and the conduct of legal proceedings.<sup>92</sup> While there was some uncertainty as to whether access<sup>93</sup> should be considered a separate incident of parental power or not,<sup>94</sup> Schäfer<sup>95</sup> submitted that both points of view could be reconciled "... since custody is a subtraction from [natural] guardianship<sup>96</sup> while access is, in turn, a subtraction from custody".

The Children's Act<sup>97</sup> now expressly defines "parental responsibilities and rights" as meaning the *responsibility and the right* (own emphasis) in relation to a child –

"(a) to care for the child;<sup>98</sup>

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<sup>90</sup> *Smith v Berliner* 1944 WLD 35 at 37.

<sup>91</sup> *Kastan v Kastan* 1985 3 SA 235 (C) 236E; Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 313 fn 4; Van Schalkwyk *Family Law* 239.

<sup>92</sup> See Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 313 fn 3.

<sup>93</sup> When the state was obliged to interfere with the exercise of parental power by suspending or terminating the custody of a parent, *eg* upon divorce or by order of the High Court as upper guardian of all minors, the non-custodian parent had a right (of access) to keep in contact with the child. See in this regard *Lecler v Grossman* 1939 WLD 41 44; *Van Schoor v Van Schoor* 1976 2 SA 600 (A) 608A. According to Howie JA in *B v S* 1995 3 SA 571 (A) 582A, the right of contact is "... that of the child, not the parent". As to the problems associated with this approach and the inconsistent application thereof, see Schäfer LI Div E in *Family Law Service* 46 fn 6 and the sources quoted therein. Bainham 1998 *CFLQ* 1 also questions the viability of a similar held belief in English law observing that: "If contact is a right of both parent and child it must, by definition, also be a duty of each – subject always to the application of the welfare principle" (at 7) emphasising that "[n]one of this should be taken as an indication that the emphasis on children's rights is misplaced – it is merely that parents have them too". The courts will generally deny such a right of access only in very exceptional circumstances: Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 504 and 567.

<sup>94</sup> With cases like *F v L* 1987 4 SA 525 (W) 527I-J and most authors (such as Van Schalkwyk *Family Law* 296; Cronjé & Heaton *South African Family Law* 280) supporting the view that it is an incident of parental responsibilities and rights, while Van Zyl J in *Van Erk v Holmer* 1992 2 SA 636 (W) 647F was of the opinion that access should not always or necessarily be regarded as an incidence of "parental responsibility", holding that "... [i]n the case of legitimate children it can be so regarded, but it is certainly not so in cases where access has been granted to the father of an illegitimate child on the ground that it is in the child's best interests". Under such circumstances, Van Zyl J submitted "... it cannot be said that a Court is conferring parental responsibility upon the father".

<sup>95</sup> Schäfer ID *The Law of Access to Children* 31.

<sup>96</sup> Natural guardianship in this context refers to guardianship in the wide sense of the word and is used synonymously with parental "power", "responsibility" or "responsibilities and rights".

<sup>97</sup> 38 of 2005: S 1(1) *sv* "parental responsibilities and rights" read with s 18(2).

<sup>98</sup> In terms of s 1(1) of the Children's Act 38 of 2005 "care" in relation to a child, includes – (a) within available means, providing the child with – (i) a suitable place to live; and (ii) living conditions that are conducive to the child's health, well-being and development; (b) safeguarding

- (b) to maintain contact with the child;<sup>99</sup>
- (c) to act as guardian of the child;<sup>100</sup> and
- (d) to contribute to the maintenance of the child".<sup>101</sup>

The definition thus clearly encompasses guardianship and what was previously known as "custody" and "access". What is not entirely clear is the extent to which the new terminology defining the content of "parental responsibilities and rights" will replace the old.<sup>102</sup> Section 1(2) of the Children's Act<sup>103</sup> clearly states that "[i]n addition to the meaning assigned to the terms "custody" and "access" in any law, and the common law, the terms "custody and "access" in any law must be construed to also mean "care" and "contact" as defined in this Act". Skelton &

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and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical and moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act; (e) guiding and directing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development; (f) guiding, advising and assisting the child in decisions to be taken by the child, taking into account the child's age, maturity and stage of development; (g) guiding the behaviour of the child in a humane manner; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have and (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

<sup>99</sup> "Contact" in relation to a child, means – (a) maintaining a personal relationship with the child; and (b) if the child lives with someone else – (i) communication on a regular basis with the child in person, including – (aa) visiting the child; or (bb) being visited by the child; or (ii) communication on a regular basis with the child in any other manner, including – (aa) through the post; or (bb) by telephone or any other form of electronic communication: S 1(1) sv "contact".

<sup>100</sup> In terms of s 18(3) "guardianship" in relation to a child means – (a) administering and safeguarding the child's property and property interests; (b) assisting or representing the child in administrative, contractual and other legal matters; or (c) giving or refusing any consent required by law in respect of the child, including – (i) consenting to the child's marriage; (ii) consenting to the child's adoption; (iii) consenting to the child's departure or removal from the Republic; (iv) consenting to the child's application for a passport; and consenting to the alienation or encumbrance of any immovable property of the child.

<sup>101</sup> S 1(1) sv "parental responsibilities and rights" read with s 18(2).

<sup>102</sup> According to Heaton the meaning of guardianship "... more or less corresponds to the narrow meaning the term had at common law" and the content of "contact" "... corresponds to the common-law concept of "access": Heaton Ch 3 in *Commentary on Children's Act* 3-5. The substitution of "custody" and "access" was considered necessary to symbolise the move away from the potentially damaging sense of "winners and losers" (see SALC Discussion Paper on the *Review of the Child Care Act* par 8.4.5.2.). It must, however, be noted that these terms have already assumed a more child-centred meaning that incorporates both consideration of the paramountcy of the child's best interests and the right of the child to be cared for and have contact with both parents as far as possible. The trend is evident from reported cases remarking on the desirability of awarding joint custody to parents upon divorce, as in *Krugel v Krugel* 2003 6 SA 220 (T), the protection of the access rights of a non-custodian father in relocation cases as in *F v F* 2006 3 SA 42 (SCA) and the erosion of the maternal preference rule as in *Van der Linde v Van der Linde* 1996 3 SA 502 (O) 515B-D, which emphasised the equal ability of both parents to care or "mother" a child.

<sup>103</sup> 38 of 2005.

Proudlock<sup>104</sup> are of the opinion that “... future case law will have to refashion the concepts to fit in with the new definitions of care and contact”. Heaton,<sup>105</sup> quite correctly it is submitted, regards the term “care” as more extensive than the term “custody”. This view was recently confirmed in the case of *J v J*,<sup>106</sup> where the court held that the definition of “care” in the Act “... encompasses the topics covered by the traditional concept of custody, although it also includes matters (for example, paragraphs (h) – (i) of the definition<sup>107</sup>) which would seem to be the responsibility of all who have parental responsibilities and rights, however limited these may be”.<sup>108</sup>

Insofar as custody (now “care”) also includes the right and duty to provide the child with, *inter alia*, shelter<sup>109</sup> and financial support,<sup>110</sup> it overlaps with the duty of the parent to “contribute to the maintenance of the child”.<sup>111</sup> However, since the duty of support between parent and child is based on blood relationship<sup>112</sup> and not upon the existence of parental responsibilities and rights, it is distinguishable from the latter.<sup>113</sup> While parental responsibilities and rights exercised by parents will come to an end when the minor child obtains majority status, the duty of support

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<sup>104</sup> Skelton & Proudlock Ch 1 in *Commentary on Children’s Act* 1-29. Despite anticipating a more lenient approach to the displacement of “care” in terms of the Children’s Act 38 of 2005, Schäfer interprets section 1(2) in a way that “custody” “must” be construed as meaning “care”: Schäfer LI Div E in *Family Law Service* 39.

<sup>105</sup> Heaton Ch 3 in *Commentary on Children’s Act* 3-3.

<sup>106</sup> 2008 6 SA 30 (C) at [25].

<sup>107</sup> See fn 98 above.

<sup>108</sup> See Du Bois Wille’s *Principles of South African Law* 350, further supporting the court’s view that the term “care” is more extensive than the traditional concept of “custody”.

<sup>109</sup> In terms of s 1(1) *sv* “care” includes “... providing the child with a suitable place to live”.

<sup>110</sup> S 1(1) *sv* “care”.

<sup>111</sup> See definition of parental responsibilities and rights in s 18(2) of the Act referred to above and Van Schalkwyk Ch 2 in Davel *Introduction to Child Law in South Africa* 42 referring to the same position under common law.

<sup>112</sup> In the case of adoption the duty of support is based on assumed blood relationship: S 20(1) of the Child Care Act 74 of 1983.

<sup>113</sup> The relationship between parent and child is often described in terms of these two distinct components. According to Lee & Honoré *Family, Things and Succession* 152, “... the relationship between parent and child expresses itself primarily in the parental power over a minor child and in the mutual duty of support between parent and child.” In similar vein Van Dijkhorst J in *Jooste v Botha* 2000 2 SA 199 (T) held that the parent-child relationship consists of two aspects, namely “... [t]he economic aspect of providing for the child’s physical needs and the intangible aspect of providing for his psychological, emotional and developmental needs” (at 201E-F). See also Spiro *Parent and Child* 31; Cronjé & Heaton *South African Family Law* 291; Van Schalkwyk *Family Law* at 313 and Heaton Ch 3 in *Commentary on Children’s Act* 3-4.

will continue for as long as the child is in need of maintenance.<sup>114</sup> Furthermore, once paternity has been established, a natural father of a child born out of wedlock will be liable to contribute towards the maintenance of his child despite the fact that such a father may not have acquired parental responsibilities and rights in respect of his child. The issue of maintenance *per se*, except insofar as it is relevant to, and included in, the care exercised by a parent or other caregiver<sup>115</sup> in relation to a child, will consequently not be dealt with separately in this thesis.

Parental responsibilities and rights in the present context thus include the right and responsibility of the parent to care for the child, to maintain contact with the child and to act as the child's guardian.

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<sup>114</sup> Provided, of course, the parent remains financially capable to contribute towards such maintenance.

<sup>115</sup> Defined in short as any person other than a parent or guardian who factually cares for a child: Children's Act 38 of 2005, s 1(1) *sv* "care-giver".



## **SECTION A: GENERAL INTRODUCTION**

### **CHAPTER 3: RESTRUCTURING OF THE LAW PERTAINING TO THE ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS**

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### 3.1 INTRODUCTION

The current research will ultimately show that the Children's Act<sup>1</sup> has fundamentally changed the law of parent and child in general and the law pertaining to the acquisition of parental responsibilities and rights, in particular. The new legal framework naturally calls for a new structure within which the principles relevant to the acquisition of parental responsibilities and rights can be presented. The structure chosen for this thesis, although admittedly rather complicated, in the first place makes a clear distinction in general terms between the initial *automatic* acquisition of parental responsibilities and rights by the biological parents of a child, on the one hand,<sup>2</sup> and the role of the various courts in *assigning* parental responsibilities and rights to any interested person,<sup>3</sup> on the other hand. As far as the automatic acquisition of parental responsibilities and rights is concerned the structure reflects the differential treatment of mothers on the one hand, and fathers on the other hand, and accommodates the increasing *ex lege* recognition of biological fathers as legal parents. Since the Children's Act<sup>4</sup> has now for the first time created the possibility of acquiring parental responsibilities and rights through a surrogate motherhood agreement that has been confirmed by the High Court, the inclusion of surrogacy in the proposed structure is also deemed of significance.

The proposed structure was preceded by an investigation and critical assessment of the structural approaches found in some of the more well known South African sources<sup>5</sup> and a number of English sources<sup>6</sup> on the topic of the acquisition of parental responsibilities and rights. The structural approaches in the South African sources investigated were, however, of little value in devising the new

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<sup>1</sup> 38 of 2005, as amended by the Children's Amendment Act 41 of 2007.

<sup>2</sup> The automatic acquisition of guardianship by the guardian of a minor mother constitutes the only exception to this rule: See s 19(2) as discussed in 4.2.2 below.

<sup>3</sup> Who may, of course, include a parent: See ss 23 and 24 of the Children's Act 38 of 2005.

<sup>4</sup> 38 of 2005: Ch 19.

<sup>5</sup> Spiro *Parent and Child* 51-78; Van der Vyver & Joubert *Persone-en Familiereg* 595-607; Van Heerden Ch 14 in Van Heerden *et al Boberg's Law of Persons and the Family* 313-325 and Cronjé & Heaton *South African Family Law* 265-277.

<sup>6</sup> Cretney & Masson *Principles of Family Law*; Bainham *Children—The Modern Law* and Barton & Douglas *Law and Parenthood*. The general similarity between South African and English law in this field excluded other common law jurisdictions (such as Australia) from the ambit of the comparative study.

structure as they are all to a lesser or greater degree outdated,<sup>7</sup> lacking in an underlying logic<sup>8</sup> and/or are for the most part irreconcilable with the context created by the Children's Act.<sup>9</sup>

### 3.2 PROPOSED NEW STRUCTURE

The structure chosen makes a primary distinction between the **automatic** acquisition of parental responsibilities and rights and **assigned** acquisition of parental responsibilities and rights.

In the case of assigned acquisition, the vesting of parental responsibilities and rights is subject to state approval and will not be conferred on a person without a court order<sup>10</sup> or, in the case of contact or care being conferred in terms of a parental responsibilities and rights agreement, prior registration with the Family Advocate.<sup>11</sup> To this extent the chosen approach conforms to that followed by Barton & Douglas,<sup>12</sup> except that what the latter authors refer to as "ascribed" "parental responsibility" is now called "assigned" "parental responsibilities and rights" in accordance with the terminology used in the Children's Act.<sup>13</sup> When reference is made to "assigned" parental responsibilities and rights it presupposes a legal procedure specifically aimed at determining whether the assignment is in the best interests of the child considering, *inter alia*, the specific child's circumstances and the suitability of the person assigned with such responsibilities and rights.<sup>14</sup> Where a biological father, for example, marries the mother of his child, parental responsibilities and rights is not assigned to the father – the father automatically acquires parental responsibilities and rights by operation of law

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<sup>7</sup> The discussion of the provisions of the Children's Bill [B70 of 2003] in Cronjé & Heaton *South African Family Law* 267 is already outdated since the Bill did not survive scrutiny by the legislative committee and was ultimately enacted (as the Children's Act 38 of 2005) in a substantially altered form.

<sup>8</sup> Especially true of the structure adopted by Van der Vyver & Joubert *Persone-en Familiereg* 595-607.

<sup>9</sup> 38 of 2005. One of the reasons for this state of affairs is the diminishing importance of the marital status of the parents in the automatic allocation of parental responsibilities and rights.

<sup>10</sup> In terms of ss 23 and 24 of the Children's Act 38 of 2005.

<sup>11</sup> See s 22 of the Children's Act 38 of 2005.

<sup>12</sup> Barton & Douglas *Law and Parenthood* 45-110.

<sup>13</sup> 38 of 2005.

<sup>14</sup> For a checklist of factors to be considered, see s 7 of the Children's Act 38 of 2005.

because of the marriage and his biological relationship to the child.<sup>15</sup> The acquisition of parental responsibilities and rights resulting from the marriage is deemed or presumed to be in the best interests of the child. In short then, the distinguishing factor between automatic and assigned acquisition is the presence or absence of the application of the best interests-standard *prior* to the acquisition.

With regard to the automatic acquisition of parental responsibilities and rights, the structure distinguishes, first of all, between the automatic acquisition of parental responsibilities and rights in the case of a naturally conceived child and the automatic acquisition of parental responsibilities and rights in the case of an artificially conceived child. This distinction is necessary because of the separate treatment of children conceived by artificial fertilisation in section 40 of the Children's Act.<sup>16</sup> Not only do the principles differ depending on the manner of conception but they also differ depending on the sex of the parent. A further distinction is thus drawn between the way in which the mother of a naturally

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<sup>15</sup> S 20 of the Children's Act 38 of 2005. Cf however, Van Schalkwyk *Family Law* 297 who holds the view that only the mother "automatically" acquires parental responsibilities and rights. The reason for the divergent approaches lies in the different interpretations given to "automatic" with regards to the acquisition of parental responsibilities and rights. Where Van Schalkwyk (at 297) regards the automatic acquisition of parental responsibilities and rights as an acquisition which requires no additional act (such as marriage, joint birth registration, cohabitation or adoption) to acquire parental responsibilities and rights, the approach adopted here is that where the acquisition of parental responsibilities and rights occurs by operation of law, without prior application of the best interests of the child-standard, it is deemed to be an automatic acquisition. Van Schalkwyk thus regards the acquisition of parental responsibilities and rights by the father as "non-automatic" since he has to comply with the "additional" requirements of ss 20 and 21 to acquire such responsibilities and rights (at 300). In terms of the approach suggested in this thesis the acquisition would be deemed automatic since the father acquires the responsibilities and rights by operation of law once he has married the mother or complied with the requirements of s 21 without the application of the best interests-standard to determine whether the acquisition is in the best interests of the child. The problem with Van Schalkwyk's approach is that without any additional qualification one could also regard giving birth as "a further/additional act" required by the mother to acquire parental responsibilities and rights. Where the "automatic" acquisition of parental responsibilities and rights is made conditional upon execution of certain legally significant acts such as marriage or the joint birth registration of a child that are not specifically aimed at determining the desirability of the acquisition (*ie* by applying the best interests-standard) and consequently do not qualify as acts through which parental responsibilities and rights are "assigned" in terms of this thesis, one could perhaps talk of a *conditional* automatic acquisition of parental responsibilities and rights. See, however, Dey & Wasoff 2006 *IJLPF* 225 at 232 who indicate that in the UK and Scotland, for example, where joint birth registration is conditional to the acquisition of parental "responsibility" by unmarried fathers, the condition does not in reality operate as a condition because most unmarried parents apparently already register the birth of their children jointly and would thus, in a sense, "automatically" acquire parental "responsibility". According to Lowe & Douglas *Bromley's Family Law* 305 legal parental status in England can in this way paradoxically be "assigned automatically".

<sup>16</sup> 38 of 2005.

conceived child acquires parental responsibilities and rights and the way in which the father can acquire such responsibilities and rights. Where the acquisition of parental responsibilities and rights of an artificially conceived child is concerned a distinction is drawn between the way in which a donor of the female gametes used for such conception can acquire parental responsibilities and rights and the way in which the donor of the male gametes can do the same.

As far as the assignment of parental responsibilities and rights is concerned, a distinction can be made between the assignment of **full** parental responsibilities and rights and the assignment of **specific** incidents of parental responsibilities and rights, *ie* contact, care or guardianship. Contact or care can be assigned to a person or persons by the High Court in terms of its inherent powers as upper guardian of all minors or in terms of specific statutory jurisdiction in this regard, by the divorce court in divorce proceedings, by the children's court in care proceedings or now also in terms of a parental responsibilities and rights agreement registered with the Family Advocate.<sup>17</sup> Guardianship, on the other hand, can only be assigned to a person or persons by the High Court or by a divorce court. *Full* parental responsibilities and rights can be assigned to a person or persons by the High Court, by a divorce court or by the children's court in the case of adoption. Where a person acquires full parental responsibilities and rights through the assignment thereof by the High Court, a distinction can be drawn between the acquisition of full parental responsibilities and rights in the context of a surrogate motherhood agreement and the acquisition of such responsibilities and rights outside the context of surrogacy.<sup>18</sup> Surrogacy and adoption are, therefore, similar insofar as they both constitute ways in which **full** parental responsibilities and rights can be acquired after prior scrutiny by a court. As such surrogacy should naturally be dealt with under the subheading "High Court" and adoption under "Children's Court". Surrogacy and adoption are, however, both dealt with in separate chapters for much the same reasons as advanced by Bainham, to wit:<sup>19</sup>

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<sup>17</sup> S 22 of the Children's Act 38 of 2005.

<sup>18</sup> The acquisition of full parental responsibilities and rights in terms of a parental responsibilities and rights agreement confirmed by the High Court in terms of s 22(7), would be such an example.

<sup>19</sup> Bainham *Children—The Modern Law* 219.

- (a) The legal effect of a valid surrogate motherhood agreement and an adoption order can be distinguished from the effects of assigning full parental responsibilities and rights to a person or persons in other cases. The commissioning and adoptive parents are by law for all purposes deemed to be the parents of the child so born or adopted as if that child was born of those parents,<sup>20</sup> while persons vested with full parental responsibilities and rights by the High Court in other cases are not.
- (b) The second reason is that both adoption and surrogacy are vast subjects in their own right. From a practical point of view it, therefore, makes sense to treat these subjects separately.

The last chapter will address the following two diverse issues:

- (a) The acquisition of parental responsibilities and rights by other persons in the event of the death of one or both parents of a child; and
- (b) the *quasi*-acquisition of parental responsibilities and rights by persons *in loco parentis*.

The acquisition of parental responsibilities and rights at the death of one or both parents of a child occurs either by way of testamentary disposition, in which case the acquisition will take place upon the guardian's acceptance of the testamentary nomination<sup>21</sup> or, in the absence of a testamentary nomination or appointment (as a result of the death, incapacity or refusal to accept a nomination), in terms of an appointment made by order of court or the Master of the High Court. As such, the acquisition of parental responsibilities and rights at the death of one or both parents of a child should, strictly speaking, partially be addressed in the chapter dealing with automatic acquisition (in cases where the acquisition is effected by

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<sup>20</sup> Ss 242(3) and 297(1)(a) of the Children's Act 38 of 2005, respectively.

<sup>21</sup> The nomination must be endorsed (by means of the issuing of letters of tutorship) by the Master of the High Court if the guardian wants to exercise those parental responsibilities and rights with regard to the minor's property: S 71 of the Administration of Estates Act 66 of 1965.

testamentary disposition, the acquisition is generally not subject to the prior application of the best-interests-standard<sup>22</sup>) and partially in the chapter dealing with assigned acquisition (in cases where the appointment of a guardian or tutor is made by the High Court or the Master of the High Court as prescribed in the Administration of Estates Act<sup>23</sup>). Although the law relating to this issue can thus in fact easily be accommodated in the structure chosen for the thesis, it is dealt with in its entirety in a separate chapter to prevent what would have been an unavoidable fragmentation of the topic.

A person who holds no parental responsibilities and rights but who voluntarily cares for a child, whether at the request of a parent or otherwise, must safeguard and protect the child and may exercise any parental responsibilities and rights necessary for such protection in much the same way as a person who in fact has acquired parental responsibilities and rights. Without actually acquiring parental responsibilities and rights in the strict sense of the word, the “quasi-acquisition” of responsibilities and rights by these *de facto* care-givers actually falls outside the parameters of this thesis but will briefly be addressed for the sake of completeness.

The structure outlined above is illustrated in Schedule 1 at the end of this chapter. Schedule 2 provides the details of the structure pertaining to the automatic acquisition of full parental responsibilities and rights in the case of artificial conception and has been inserted as a preamble to the discussion of the topic in 4.4.2 below.

### **3.3 BRANCHES OF STRUCTURE SELECTED FOR RESEARCH: THE ACQUISITION OF *FULL* PARENTAL RESPONSIBILITIES AND RIGHTS ONLY**

It is evident from the structure suggested in paragraph 3.2 above that the law pertaining to the acquisition of parental responsibilities and rights encompasses a

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<sup>22</sup> The testamentary guardian must, however, not be incapacitated from being a tutor of a minor and must comply with the requirements of the Administration of Estates Act 66 of 1965: S 72(1)(e).

<sup>23</sup> 66 of 1965: S 73.

diverse range of aspects, each probably worthy of a thesis on its own. While it is hoped that a significant portion of the contribution of this thesis will lie in its proposal of a new legal framework for the law pertaining to the acquisition of parental responsibilities and rights, it would clearly be impracticable to deal with every aspect of this vast topic. Thus, while not wanting to limit the scope of the research in the choice of a *title* restricting the topic at the outset (which would have made it very difficult to justify the restructuring of the *whole* field), the research has been confined to the investigation of the acquisition of **full** parental responsibilities and rights only. This means that the branch of assigned parental responsibilities and rights entitled “Specific incidents of parental responsibilities and rights” (indicated with a patterned fill-effect in Schedule 1) will not be dealt with in this thesis at all. The demarcation of the research topic can also be justified by the fact that it is especially in the context of the acquisition of full parental responsibilities and rights that the Children’s Act<sup>24</sup> has proved to be most innovative. The changed legal position of the unmarried father,<sup>25</sup> the accommodation of the homo-nuclear family unit<sup>26</sup> and the introduction of provisions to regulate surrogacy<sup>27</sup> are but a few of these innovations that are worth mentioning.

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<sup>24</sup> 38 of 2005.

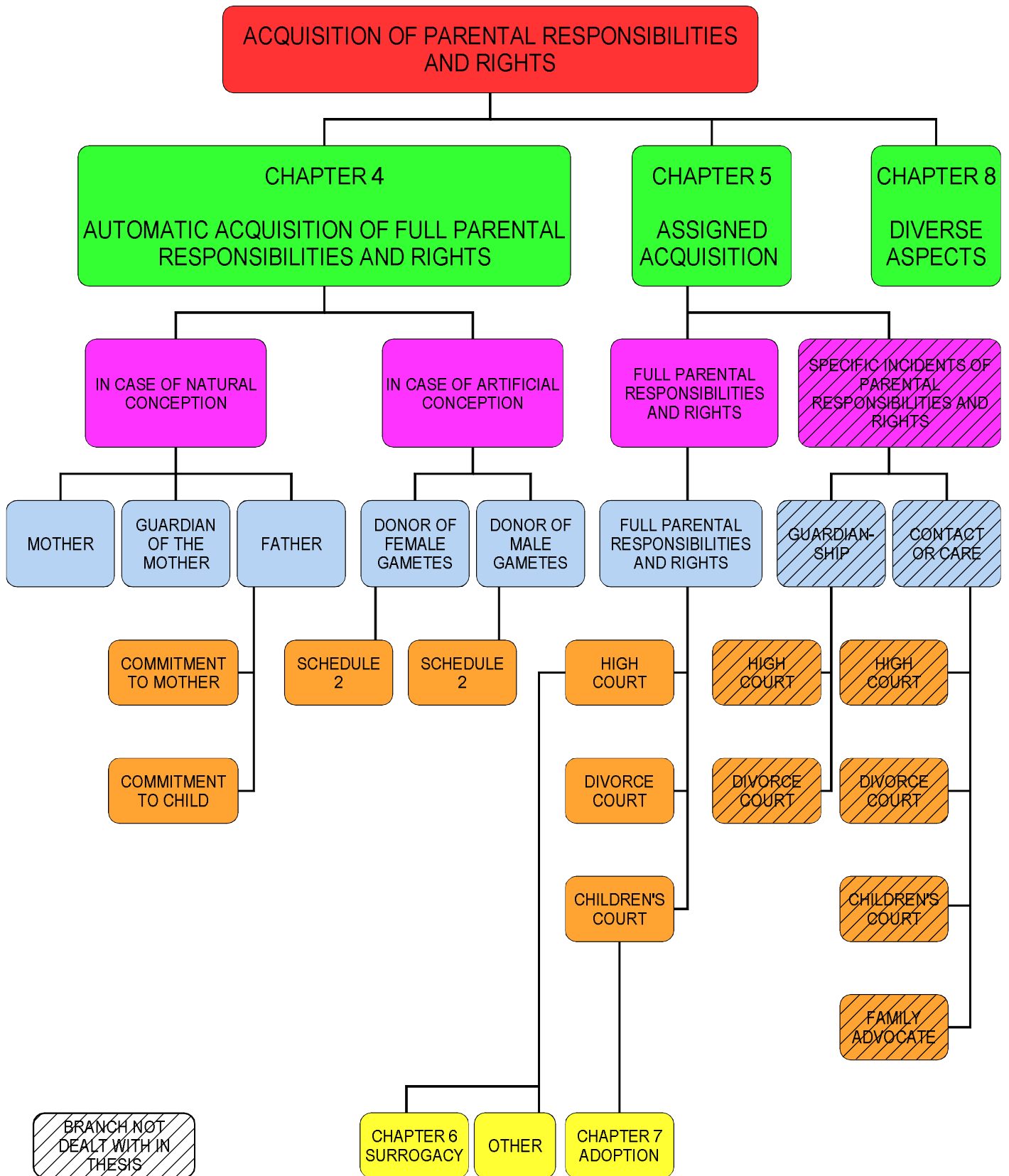
<sup>25</sup> Discussed in detail in Ch 4.

<sup>26</sup> In terms of s 40 of the Children’s Act 38 of 2005, a married lesbian couple can now automatically share full parental responsibilities and rights in respect of an artificially conceived child born to one of the partners or spouses: See discussion in 4.4.2 below.

<sup>27</sup> Children’s Act 38 of 2005: Ch 19, discussed in Ch 6 below.



SCHEDULE 1:  
PROPOSED NEW STRUCTURE FOR THE ACQUISITION OF PARENTAL  
RESPONSIBILITIES AND RIGHTS



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P190

**SECTION B: THE VARIOUS WAYS IN WHICH FULL PARENTAL RESPONSIBILITIES AND RIGHTS CAN BE ACQUIRED**

**CHAPTER 4: AUTOMATIC (*EX LEGE*) ACQUISITION OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS**

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## 4.1 INTRODUCTION

While the acquisition of parental responsibilities and rights or the determination of legal parenthood traditionally depended merely on the legitimate status of the child in question, the context within which such matters are to be decided has become considerably more complex in recent times.<sup>1</sup> Whereas a child born out of wedlock in terms of the common law only had a mother and no father (except insofar as his duty to maintain the child was concerned), the biological father may now, in terms of the new Children's Act,<sup>2</sup> automatically acquire responsibilities and rights for such a child despite the fact that he is not married to the child's mother.<sup>3</sup> Both parents of a child born out of wedlock may thus, as in the case of a legitimate child, automatically acquire parental responsibilities and rights at the birth of such child.<sup>4</sup> The distinction between a child born in wedlock and a child born out of wedlock, at least insofar as the determination of legal parenthood is concerned, has thus to a large extent become redundant.<sup>5</sup> The possibility of procreating by other than natural means has, furthermore, fundamentally changed the legal landscape in terms of which parental responsibilities and rights are acquired. The woman who gives birth to a child is no longer necessarily the only

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<sup>1</sup> According to Richards 1994 *Wayne Law Review* 1227 at 1270-1271: "Courts must take into account the changing lifestyles and advancing technology affecting our traditional notions of parenthood and should, in the light of these changes, construe and adapt legal principles in ways that will continue to protect the child's interest." Charo 1994 *Texas Journal of Women and the Law* 265 at 268-269 regards it thus: "Our emotional attachment to a definition of family based on blood, our modern tendency toward a definition based on contract, and our legal definitions based on fictional re-creations of the biological nuclear family are all ripe for reform for many reasons. First, the increased incidence of divorce and stepparenting has made traditional allocations of parental rights and responsibilities ever more difficult in light of the day-to-day experience of children living with stepparents. Second, the frequency with which single persons and homosexual couples are seeking to parent has strained the two-person, two-gender model of parenthood. Third, the advent of so-called 'gestational surrogacy' has clouded identification of 'biological' maternity, thus, for the first time, opening the door to an examination of just what entitles biological parenthood to such extraordinary respect. Finally, the human genome project promises to usher in an era of genetic exploration and invention."

<sup>2</sup> 38 of 2005.

<sup>3</sup> In terms of s 21 of the Children's Act 38 of 2005.

<sup>4</sup> "The tenets of the fundamental principle of equality are such that unmarried parents are accorded the same, or at least substantially the same, rights as married parents": Murphy J in *Botha v Dreyer* Unreported Case 4421/08 (T) at [43], interpreting the new provisions of the Children's Act 38 of 2005 relating to the acquisition of parental responsibilities and rights.

<sup>5</sup> The term "child born out of wedlock" is, however, still employed in s 36 of the Children's Act 38 of 2005, providing for a presumption of paternity where the biological mother is unmarried. The term is thus still used in the provisions regulating the determination of paternity but no longer in the provisions determining *legal* paternity, otherwise referred to as the acquisition of paternal responsibilities and rights: See ss 20 and 21 of the Children's Act 38 of 2005.

person who could legally qualify as the mother of the child. Depending on the criteria applied,<sup>6</sup> an artificially conceived child may by law have two,<sup>7</sup> or even three mothers, in the case of surrogacy.<sup>8</sup>

Despite these changes, biological parents of age<sup>9</sup> are still the only persons who can acquire parental responsibilities and rights of a child automatically, *ie* by operation of law, where the child is conceived naturally. This state of affairs is reflected in the fact that parents have the "... primary responsibility for the upbringing and development of the child",<sup>10</sup> as stated in Article 18 of the UNCRC.<sup>11</sup> As such it is to be expected that the biological parents of a child should by law automatically be vested with parental responsibilities and rights at the birth of the child to enable them to fulfil their legal role as parents.<sup>12</sup> In

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<sup>6</sup> Whether it be a genetic link, gestation and birth or the intention to become a parent (or a mother in this case).

<sup>7</sup> Where eg the child is conceived with gametes (*ova*) donated by the same-sex spouse of the birth-giving mother, the genetic mother (or donor) as well as the gestating mother (who gives birth to the child) qualify as the mother of the child.

<sup>8</sup> The woman who commissions the birth of the child need not be genetically related to the child nor be the woman who gave birth to the child. A distinction can thus be drawn between the intentional mother who will acquire parental responsibilities and rights in terms of the surrogate motherhood agreement, the biological mother, who acts as a gamete donor for purposes of the conception of the child and the surrogate mother who gestates and gives birth to the child. See in this regard Stumpf 1986 *Yale Law Journal* 187 at 187-188 who proposes a "comprehensive legal matrix to accommodate the shifting parental rights and obligations in this rapidly changing area of family law".

<sup>9</sup> If the mother of the child is a minor, her guardian(s) will automatically be vested with parental responsibilities and rights until she becomes a major provided the biological father of the child does not have guardianship of the child: S 19(2) of the Children's Act 38 of 2005, discussed in 4.2.2 below.

<sup>10</sup> Confirmed in cases like *Petersen en 'n Ander v Kruger en 'n Ander* 1975 4 SA 171 (C) 173H, in which the court declared: "Dit lê aan die grondslag van ons regstelsel dat, onderhewig aan sekere beperkinge, die reg van beheer en toesig oor 'n kind aan sy *natuurlike* ouers toekom." (Own emphasis.) See also *R v H and Another* 2005 6 SA 535 (C) [10] in which the court re-affirmed that the "... primary responsibility for the protection and promotion of the interests of the child vests in the parents".

<sup>11</sup> Quoted in full in 1.4.2 above.

<sup>12</sup> Various reasons have been advanced to explain the origin of the parent-child relationship: The paternal "power" in Roman times was said to originate from the existence of a legal marriage: Nathan *Common Law of South Africa* 106. In terms of Roman-Dutch law parental "power" was considered to originate from "... *aangebore en goddelike gegevene wet*". Literally translated meaning according to inherited and God-given law: Huber *Hedendaagse Rechtsgeleertheit* Kapittel XII entitled "Van de Mach de Vaders over hare Kinderen" par 2. Parents had to nourish and raise children from their marriage "... in accordance with the dictates of natural reason": Huber *Hedendaagse Rechtsgeleertheit* Kapittel XII par 1; Nathan *Common Law of South Africa* 115. Children, on the other hand remained bound to obey and respect their parents "... in accordance with the law of nature and the revealed law of God": Van Leeuwen *Commentaries on Roman-Dutch Law* 87. According to *Grotius* the special relationship between parent and child - "... takes, indeed, its shape from civil laws, but has its origin in natural law. For natural law teaches us that children, having derived their existence, under God, from their parents, owe to them all honour,

accordance with this expectation, the SALRC<sup>13</sup> in 1993 held the view that "... [t]he approach of our law throughout is that consanguinity is the deciding factor in determining parentage, except where the legislature intervenes (as in the case of adoption)".<sup>14</sup>

Unless "parentage" in the quoted statement was not meant to refer to *legal* parentage,<sup>15</sup> it is my submission that the above statement should be qualified. While parental responsibilities and rights are generally *exercised* by the biological parent(s) of the child,<sup>16</sup> the existence of a genetic link between parent and child

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gratitude and submission": Lee's translation of *Grotius* 1.3.8 quoted by Van Heerden Ch 19 in Van Heerden *et al Boberg's Law of Persons and the Family* 657 fn 1. Van Heerden agrees with Spiro that parental "power" arises out of parentage, and is vested in or imposed upon parents by virtue of their parenthood: Ch 14 in Van Heerden *et al Boberg's Law of Persons and the Family* 313 and Spiro *Parent and Child* 42-43. This sentiment was confirmed in *Krugel v Krugel* 2003 6 SA 220 (T) [7]. In their discussion of the sources of law, Van Zyl & Van der Vyver intimate that parents are in terms of the internal structure of the family competent to instruct their children to perform certain tasks and to chastise children for disobeying them: Van Zyl & Van der Vyver *Inleiding tot die Regswetenskap* 280. As such parents are deemed to have "original" competency, as opposed to a competency derived from positive law, to create and enforce law within the internal structure of the family: Conradie 1948 *SALJ* 396 at 398. According to Van der Vyver & Joubert *Persone- en Familiereg* 592, the capacities ("kompetensiebevoegdheide") of parents are not dependent on a subjective right and thus not an entitlement ("inhoudsbevoegdheid") of a subjective right of a parent in respect of his/her child. According to these authors the capacity (or "power") of a parent in this regard is derived from the law in objective sense if the necessary legal facts are present for the existence thereof. See also SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.18, where it is suggested that it would be more correct to refer to "powers" in the context of parental responsibilities and rights because of the absence of a subject-object relationship. In *Lynch v Lynch* 1965 2 SA 49 (SR) 52C, a judgment by the then called Southern Rhodesian Supreme Court, Young J intimated that "... [g]uardianship [here used in the wide sense] of minors is in the nature of a trust". While a number of writers have advocated this view, Barton & Douglas find the comparison problematic in the following respects: (a) The concentration on the welfare of the (trust) beneficiary may lead to an emphasis on the quality of parenting and "[i]f we think about the ways in which the powers of trustees are hedged around with limitations and safeguards for the beneficiaries, it is not obvious that we would wish to treat parenthood similarly"; (b) the trust metaphor may be incoherent since it is not clear who is the object, the settlor and the beneficiary; and (c) "The trust concept ignores a category of parental rights which need not be based on the child's interests or welfare. The right to possession is one of these ... there might be many people who could make a better job of bringing up a child than the parents": Barton & Douglas *Law and Parenthood* 24-25.

<sup>13</sup> SALC Report on the *Legal Position of Illegitimate Children* par 10.

<sup>14</sup> Lupton 1985 *TSAR* 277 at 293, discussing alternative methods of determining the status of the artificially conceived child, seems to share the same view that the genetic link traditionally determined legal parentage.

<sup>15</sup> A remote possibility when regard is had to the discussion in par 10 of the SALC Report on the *Legal Position of Illegitimate Children* as a whole. The SALRC was in fact later obliged to admit (in par 10.2) that "[i]n the common law relating to parentage consanguinity was assumed". Moreover, if the statement was meant to refer to biological parentage it could be considered so obvious as to be completely pointless.

<sup>16</sup> Bonthuys 1997 *SAJHR* 622 at 624.

has not until the recent enactment of the Children's Act<sup>17</sup> ever been the *sine qua non* for the *acquisition* of parental responsibilities and rights.<sup>18</sup> In terms of the common law, a genetic link between a mother and her child was irrebuttably presumed<sup>19</sup> once it was shown that she gave birth to the child: *Mater semper certa est*. Parturition or the act of birth thus determined who the legal mother was and not the blood relationship between mother and child *per se*, although the latter relationship necessarily existed.<sup>20</sup>

As far as legal *paternity* is concerned, consanguinity has never automatically conferred parental responsibilities and rights on a father.<sup>21</sup> In terms of the common law presumption of paternity, the husband of the mother is presumed to be the biological father of the child and as a consequence automatically vested with parental responsibilities and rights until the presumption is rebutted.<sup>22</sup>

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<sup>17</sup> 38 of 2005.

<sup>18</sup> In cases such as *Matthews v Haswari* 1937 WLD 110 at 112, *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) at 120A; *Kaiser v Chambers* 1969 4 SA 224 (C) at 228E, *Petersen en 'n Ander v Kruger en 'n Ander* 1975 4 SA 171 (C) at 171F, *P and Another v P and Another* 2002 6 SA 105 (N) at 107J-108B and *Tyler and Another v Tyler and Others* [2004] 4 All SA 115 (NC) at 130i-131b, the importance of the natural bond between parent and child was emphasised insofar as it concerned the possible re-allocation of parental responsibilities and rights. The cases were thus concerned with the (continued) exercise of parental responsibilities and rights that had already been acquired by the biological parent and were not in any way concerned with the criteria for the acquisition of such responsibilities and rights in the first place. A typical example of the importance of distinguishing between the acquisition and the exercise of parental responsibilities and rights.

<sup>19</sup> There are no indications that the rule with regard to maternity created a presumption that could be rebutted in any way, as is also the view of Pretorius unpublished LLD thesis UNISA (1991) 278. According to Stumpf, 1986 *Yale Law Journal* 187 fn 1, "... this presumption is not articulated as such in the legal field, for the presumption has been so absolute as to have generated no controversy". Stumpf (in fn 2) mentions that the mother's identity was clear as long as the birth itself was observed. The footnote makes mention of the importance of the "witnessing of births" in determining hereditary succession in England in the 17<sup>th</sup> century because there was the risk that the child could be "smuggled in with a warming pan". Reference is also made to the current Jewish tenets in terms of which the certainty of maternity is preserved by the tradition that a child born of a Jewish mother retains Jewish status regardless of the father's ethnicity, whereas a child born of the reverse combination does not. The same phenomenon was, according to Stumpf (in the same fn), found in colonial North America where a society of matrilineal descent was created in terms of which children of slave mothers were also designated as slaves.

<sup>20</sup> Artificial procreation, and the consequent possibility of a mother giving birth to an unrelated child, is a relatively new medical technology. The first baby (Louise Brown) resulting from *in vitro* fertilisation was born in England on 25 Jul 1978.

<sup>21</sup> Thus making the statement by the SALC in its Report on the *Legal Position of Illegitimate Children* (par 10) referred to above, even less true.

<sup>22</sup> See Thomas 1988 *SALJ* 239, with reference to D 2.4.5 (*Paulus libro quarto ad edictum*): "[Q]uia semper certa est, etiam si vulgo conceperit: pater vero is est, quem nuptiae demonstrant".



In terms of the common law then, parental responsibilities and rights are acquired automatically through parturition in the case of mothers and the presumption of biological paternity in the case of married fathers.<sup>23</sup>

Legislation reflected this state of affairs by defining “parent” for the first time<sup>24</sup> in 1937<sup>25</sup> as including “... the father or the mother of a child born of or legitimated by a lawful marriage, or the mother of an illegitimate child,<sup>26</sup> and ... includes an adoptive parent”.<sup>27</sup> The Child Care Act,<sup>28</sup> however, found it unnecessary to define the term other than stating that “parent” includes an adoptive parent,<sup>29</sup> prompting Heher J in the case of *Haskins v Wildgoose*<sup>30</sup> to interpret the term as including the father of a child born out of wedlock.<sup>31</sup> The court admitted, however, that the father was “... from a legal point of view, no different from that of any outsider”<sup>32</sup> and could be considered a parent “in name only”<sup>33</sup> since “[h]e is not, and indeed never was, the guardian of the child nor did he exercise any authority over him”.<sup>34</sup>

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<sup>23</sup> Who included fathers who legitimised their children by marrying the mother after their birth: Spiro *Parent and Child* 22; Van der Vyver & Joubert *Persone-en Familiereg* 206.

<sup>24</sup> The only pre-union Act found to contain any indication of the meaning of “parent” is the Children’s Protection Act 38 of 1901 (Natal). In s 33 of this Act it was stated that for purposes of interpreting the provisions in the Act relating to the guardianship and maintenance of children found to be destitute in terms of the Act, the word “parent” included a stepparent. The said provisions obliged the “parents” of such children to contribute towards their maintenance while being maintained by the Government or in a Government institution. This broad definition of “parent”, therefore, seems to have been purely functional from a financial point of view and was obviously not meant to apply in general. The first post-union Children’s Protection Act 25 of 1913 did not define “parent”.

<sup>25</sup> Children’s Act 31 of 1937: S 1 *sv* “parent”. An identical definition was included in the Children’s Act 33 of 1960. Both Acts have been repealed.

<sup>26</sup> *Edwards v Fleming* 1909 TH 232 at 234-235.

<sup>27</sup> The inclusion of an adoptive parent in the definition is ignored for present purposes since parental responsibilities and rights are assigned to adoptive parents by order of court and not automatically acquired: See Ch 5 for a general discussion of assigned parental responsibilities and rights and Ch 6 dealing specifically with the acquisition of parental responsibilities and rights by means of an adoption order.

<sup>28</sup> Act 74 of 1983.

<sup>29</sup> Child Care Act 74 of 1983: S 1 *sv* “parent”.

<sup>30</sup> [1996] 3 All SA 448 (T).

<sup>31</sup> At 450j-451a. The court included, *inter alia*, the following reasons for its extended interpretation: (a) The ordinary meaning of the word “parent” embraced biological parents (at 451a); (b) the change in legislative language – whereas the Children’s Act 33 of 1960 excluded the father of a child born out of wedlock from its definition of “parent”, the Child Care Act 74 of 1983 is silent on the issue, thus, according to the court (at 451b) “... apparently choosing to leave the decision to the context” (the same conclusion was reached in *Fraser v Children’s Court, Pretoria North* 1997 2 SA 218 (T) at 228E); and (c) policy considerations, relating principally to the best interests of the child concerned (at 451f).

<sup>32</sup> At 452f.

<sup>33</sup> At 453f.

<sup>34</sup> *Ibid.*

Section 1(1) of the Children's Act<sup>35</sup> now defines "parent" as including –

“... the adoptive parent of a child, but excludes—

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;<sup>36</sup>
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation;<sup>37</sup> and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.”<sup>38</sup>

While the new definition reiterates the (non-) definition found in the Child Care Act,<sup>39</sup> thus creating at the outset the impression that all biological parents, *ie* mothers and fathers, are considered parents by law, the definition now expressly excludes certain categories of biological parents from its ambit. The question to be asked is: What is the significance for a biological parent not to be deemed a parent by law? Furthermore, does the definition of "parent" for purposes of the Children's Act<sup>40</sup> have any relevance insofar as the acquisition of parental responsibilities and rights is concerned? The Children's Act<sup>41</sup> does not provide clear answers to these questions. The uncertainty arises as a result of the fact that the sections dealing with the acquisition of parental responsibilities and rights<sup>42</sup> only refer to "mothers" and "fathers" – the term "parent" is not employed in any of these provisions. As such, one could argue, the definition of "parent" should be ignored for purposes of interpreting the sections regulating the

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<sup>35</sup> 38 of 2005.

<sup>36</sup> See discussion on the possibility of such fathers acquiring parental responsibility in 4.2.3.2, 5.3.2.2 and 5.3.3 below.

<sup>37</sup> Certain exceptions would, however, apply in terms of s 40(3) of the Children's Act 38 of 2005: See 4.3.2.2 and 4.3.3.2 below.

<sup>38</sup> The application may be brought by, *inter alia*, a co-holder of parental responsibilities, an interested person or even the child himself or herself but only with leave of the court: S 28(3) of the Children's Act 38 of 2005. The latter provision creates the possibility of terminating "any or all" the parental responsibilities and rights which a specific person has in respect of the child. It must be assumed, since the provision is not clear on the point, that a parent will no longer be considered a "parent" only if *all* parental responsibilities and rights of the parent have been terminated.

<sup>39</sup> 74 of 1983: S 1 *sv* "parent". This Act has not yet been repealed by the Children's Act 38 of 2005 (see GG 30030 dd 29 Jun 2007). S 1(1) of the Children's Act 38 of 2005, which contains a new definition of "parent" has, however, commenced and should thus be considered the applicable definition.

<sup>40</sup> 38 of 2005.

<sup>41</sup> 38 of 2005.

<sup>42</sup> Ss 19, 20 and 21 of the Children's Act 38 of 2005.

acquisition of parental responsibilities and rights by mothers and fathers.<sup>43</sup> The logical result of such a view would be, for example, that an unmarried biological father who is living with the mother in a permanent life-partnership at the time of the child's birth<sup>44</sup> would automatically acquire parental responsibilities in respect of such a child – even if the child was conceived as a result of the rape or incest of the mother.<sup>45</sup> Because of the unlikelihood of the legislator contemplating such a result one could, alternatively, read the sections pertaining to the acquisition of parental responsibilities and rights in conjunction with the statutory definition of “parent”, since mothers and fathers are after all “parents”. In this way one could argue that since, for example, the unmarried rapist or incestuous father is not considered a parent for purposes of the law, such a father is barred from automatically acquiring parental responsibilities and rights – even if the requirements of section 21 are met.<sup>46</sup> The question is then whether these excluded biological “parents”, although not *automatically*, can still acquire parental responsibilities and rights in any other way?<sup>47</sup>

Inasmuch as the Children's Act<sup>48</sup> only allows a “mother” and a “father”, *ie* a “parent”, to acquire parental responsibilities and rights automatically,<sup>49</sup> the term

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<sup>43</sup> See ss 19 to 28.

<sup>44</sup> As provided for in s 21(1)(a).

<sup>45</sup> Since the first exclusion (a) in terms of the definition of “parent” would not apply.

<sup>46</sup> The legal position of the married father is, however, dubious – would a husband be able to acquire parental responsibilities automatically in respect of a child conceived through marital rape?

<sup>47</sup> The recommendations of the SALRC in the SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.4 and SALC Report on the *Review of the Child Care Act* par 7.4. pertaining to the *automatic* acquisition of parental responsibilities and rights do not shed any light on the matter. These recommendations, like the provisions finally adopted in the Children's Act 38 of 2005, merely refer to the categories of parents that should automatically be vested with parental responsibilities and rights without giving any indication of parents that should automatically, in terms of the definition of “parent”, or otherwise be excluded from this possibility. The SALRC did, however, refer to a comment received by “some respondents” such as Ms L Opperman and her colleagues at the Christelike-Maatskaplike Raad (Belville) who were of the view that rapist or incestuous fathers should be barred from acquiring parental responsibilities and rights automatically: See SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.3. As far as the acquisition of parental responsibilities and rights in general are concerned, the SALRC referred to the definition of “parent” only once and then only in considering the possibility of *assigning* parental responsibilities and rights to an unmarried father by agreement with the mother. As far as this possibility was concerned, the SALRC recommended, with reference to the proposed definition of “parent”, that in certain exceptional cases “... such as, for example where the child was conceived through rape” this procedure should not be open to the unmarried father: See SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.4 and SALC Report on the *Review of the Child Care Act* par 7.4.

<sup>48</sup> 38 of 2005.

<sup>49</sup> See ss 19, 20 and 21 of the Children's Act 38 of 2005.

“parent”, as employed by the Children’s Act<sup>50</sup> does not generally include a “person” who can only be *assigned* parental responsibilities and rights.<sup>51</sup> This state of affairs would seem to support the view that a “parent” who does not qualify as a “parent” within the meaning of the definition in terms of the Children’s Act,<sup>52</sup> could still be assigned such responsibilities and rights as a “person”. The wording of sections 23 and 24, which provide for the assignment of parental responsibilities and rights to “... *any person* having an interest in the care, well-being and development of the child” would seem to be phrased in general enough terms to accommodate those biological parents who are disqualified from automatically being treated as parents in terms of the law.<sup>53</sup>

Seen as a whole, the new definition of “parent” does not conform to either the biological reality or the legal construct of parenthood. The rapist/incestuous father, the gamete donor and the parent whose parental responsibilities and rights have been terminated are excluded from the definition, despite the fact that they remain the biological parents of the child, while the unmarried biological father is included in the definition without *per se* qualifying as a “legal” parent.<sup>54</sup>

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<sup>50</sup> 38 of 2005.

<sup>51</sup> For example “parent” for purposes of s 7 of the Act (listing the factors that should be taken into consideration when applying the best interests of the child standard), in express terms “... includes any *person* (own italics) who has parental responsibilities and rights in respect of a child” (s 7(2)). By necessary implication in terms of the rule of interpretation *inclusio unius est exclusio alterius* (as, *inter alia*, applied in *Van Schoor v Van Schoor* 1976 2 SA 600 (A) at 609A), therefore, the term “parent” does not as a general rule include *persons* (as opposed to parents) vested with parental responsibilities and rights. A “parent” for purposes of the law thus implies a biological parent (mother or father) with parental responsibilities and rights. Any other non-parent can be vested with parental responsibilities and rights in which case the non-parent would be referred to as a “person” with parental responsibilities and rights: See discussion under 2.2.1 above.

<sup>52</sup> 38 of 2005. A parent who does not qualify as a parent for purposes of the definition of “parent” in s 1(1) of the Act, will still be the biological parent of the child but will not have any parental responsibilities and rights in respect of the child. An example of such a parent would be an unmarried biological father who does not fall within the categories mentioned in s 21 of the Act.

<sup>53</sup> S 22(1), on the other hand, specifically allows for the conclusion of a parental responsibilities and rights agreement whereby “... a biological father who does not have parental responsibilities and rights in respect of the child in terms of ss 20 or 21 or by court order” can acquire parental responsibilities and rights. It is again uncertain whether, eg a rapist father, who does not have parental responsibilities and rights in respect of the child in terms of ss 20 or 21 or by court order but who falls within the ambit of the exclusions of the definition of “parent”, can acquire responsibilities and rights by entering into an agreement with the mother of the child. S 22 is silent on the point. If this option is also available to such fathers, it would run contrary to the recommendations of the SALRC excluding rapist/incestuous fathers from acquiring parental responsibilities and rights by agreement with the mother of the child: See fn 47 above.

<sup>54</sup> This will be the case where the unmarried father does not fall within the ambit of s 21. Apart from the adoptive parent, the definition also does not seem to include other legal parents who are not biologically related to the child, such as a married man or woman who consented to the

In summation it could thus be said that while parental responsibilities and rights in respect of a naturally conceived child can only be acquired automatically by biological parents,<sup>55</sup> not all biological parents automatically acquire responsibilities and rights in respect of their children.<sup>56</sup> Although the basis for the automatic allocation of legal *paternity* has changed over time,<sup>57</sup> the determination of legal *parenthood* in general has always differed depending on the sex of the parent and now also, since the advent of new reproductive methods, on whether the child is conceived naturally or by artificial means. The remainder of the chapter has been structured to accommodate these distinctions and differences and to evaluate the constitutionality thereof.

## **4.2 ACQUISITION OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS IN CASE OF NATURAL CONCEPTION OF CHILD**

### **4.2.1 Acquisition of parental responsibilities and rights by mother of child**

#### **4.2.1.1 Children's Act 38 of 2005**

Apart from a provision in the Children's Status Act<sup>58</sup> which regulated the acquisition of parental responsibilities and rights by an unmarried mother who is still a minor,<sup>59</sup> the acquisition of parental responsibilities and rights by a mother has traditionally been founded upon the common law principle of *mater semper*

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artificial fertilization of his wife/or her partner (in terms of s 40) and a commissioning parent in the context of a fully enforceable surrogate motherhood agreement (s 297(1)(a)).

<sup>55</sup> This general rule is, of course, subject to the exception of an unmarried minor mother where the mother's guardian will assume guardianship (not care or contact) of the child if the father does not acquire guardianship: See discussion of s 19(2) in 4.2.2 below.

<sup>56</sup> See discussion in 4.2.3.2(b) and (c) below. The law in SA is in this regard similar to that found in the UK: Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 1.

<sup>57</sup> In terms of the common law the father could only acquire responsibilities and rights automatically if he was married to the mother. The Children's Act 38 of 2005 now extends this privilege to unmarried biological fathers based on the existence of a permanent life-partnership with the mother or a commitment to the child in terms of s 21.

<sup>58</sup> 82 of 1987: S 3. The Act has been repealed with effect from 1 Jul 2007 by s 313 of the Children's Act 38 of 2005.

<sup>59</sup> The same Act (s 5) also regulated the acquisition of parental responsibilities and rights in respect of a child conceived by artificial fertilisation which is, however, not relevant here.

*certa est, ie* the mother is the woman who gives birth to the child.<sup>60</sup> Section 19 of the new Children's Act<sup>61</sup> now regulates this aspect<sup>62</sup> in the following terms:

- (1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.
- (2) If-
  - (a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and
  - (b) the biological father of the child does not have guardianship in respect of the child,the guardian of the child's biological mother is also the guardian of the child.
- (3) This section does not apply in respect of a child who is the subject of a surrogacy agreement."

The section raises a number of issues and questions which require further investigation:

- (a) It is at the outset important to note that while the Children's Act<sup>63</sup> explicitly distinguishes between the acquisition (and loss) of parental responsibilities and rights of mothers and fathers, it does not expressly make the same distinction between a naturally conceived child and a child conceived by artificial fertilisation. The Act merely regulates the "[a]cquisition and loss of parental responsibilities and rights",<sup>64</sup> on the one hand, and the "[r]ights of child conceived by artificial fertilisation",<sup>65</sup> on the other hand. Despite the heading of section 40 as regulating the rights of the *child* conceived by artificial fertilisation, it is submitted that the section could just as well be said to regulate the acquisition of *parental responsibilities and rights* in the

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<sup>60</sup> *Docrat v Bhayat* 1932 TPD 125 at 127; *Dhanabakium v Subramanian and Another* 1943 AD 160 at 166; *Ex parte Van Dam* 1973 2 SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 2 SA 153 (E); *F v L* 1987 4 SA 525 (W) at 527I-J; Thomas 1988 SALJ 239; Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 391 and sources quoted in fn 205. The phrase "*eene wijf maakt geen bastaard*", often used in this context, was in fact only relevant for purposes of the Law of Succession where it implied that children born out of wedlock were usually in the same relation to their mother (and her blood relations) as her legitimate children. At the same time the phrase implied that children born out of wedlock had no such rights (of intestate succession) against their natural father and his family and *vice versa*: Davel & Jordaan *Law of Persons* 133.

<sup>61</sup> 38 of 2005.

<sup>62</sup> The section came into operation on 1 Jul 2007: GG 30030 dd 29 Jun 2007.

<sup>63</sup> 38 of 2005.

<sup>64</sup> Heading of Part I of Ch 3 of the Children's Act 38 of 2005.

<sup>65</sup> Heading of s 40 of the Children's Act 38 of 2005.

case of an artificially conceived child.<sup>66</sup> As far as children conceived by artificial fertilisation are concerned, they can either be subject to a surrogacy agreement or not. If so, the acquisition of parental responsibilities and rights by the commissioning parent or couple is determined by the provisions found in Chapter 19 of the Act.<sup>67</sup> Children born as a result of a surrogate motherhood agreement are in express terms excluded from the ambit of section 19.<sup>68</sup>

- (b) Subsection (1) allocates full parental responsibilities and rights to the “biological mother” of a child but fails to define “biological mother”.<sup>69</sup> The question that will be discussed in the following paragraph is: To what extent, if at all, does this section affect the common law maxim *mater semper certa est*, in terms of which the woman who gives birth to the child is deemed by law to be the mother of the child?
- (c) The biological mother has full parental responsibilities and rights in respect of a “child”, defined for purposes of the Act, as “a person under the age of 18 years”.<sup>70</sup>

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<sup>66</sup> S 40 has its origin in s 5 of the Children’s Status Act 82 of 1987 (now repealed) which contained similar provisions under the heading “Effects of artificial insemination”.

<sup>67</sup> Which did not come into operation with the proclamation issued on 1 Jul 2007: GG 30030 dd 29 Jun 2007.

<sup>68</sup> S 19(3) makes the absence of a legal bond arising between the donor of the gametes and the child born as a result of those gametes subject to the provisions of s 296 which regulates the artificial fertilisation of a surrogate mother in consequence of a surrogate motherhood agreement. See 6.3.4 below where it is argued that the reference to s 296 is probably a mistake and should be a reference to s 297.

<sup>69</sup> A deficiency also noted by Heaton Ch 3 in *Commentary on Children’s Act* 3-6. *Black’s Law Dictionary* defines “mother” as “[a] woman who has borne a child. A female parent”: See Wing & Weselmann 1999 *Journal of Gender, Race and Justice* 257 at 265. In terms of the Dutch *Burgerlijk Wetboek* or *BW* (Art 1:198), the mother of the child is “... de vrouw uit wie het kind is geboren”: Vlaardingerbroek *et al Het Hedendaagse Personen- en Familierecht* 170.

<sup>70</sup> S 1(1) *sv* “child”. A “person” is obviously a legal subject and does not include an unborn foetus: *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O) at 829. The court in *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T) at 1121 held, furthermore, that an unborn foetus qualified as neither a “child” for purposes of interpreting s 28 of the Constitution nor “everyone” for purposes of interpreting ss 11 and 12 etc. of the Constitution. While the High Court can interfere with the *vesting* of the mother’s parental responsibilities and rights even before the birth of the child (See *Shields v Shields* 1946 CPD 242 and *Pretorius v Pretorius* 1967 2 PH B17 (O)), it is not the upper guardian of children not yet *in esse*: See *Ex parte Watling* 1982 1 SA 936 (C). Parental responsibilities and rights by a mother are only acquired at the birth of the child. The mother’s responsibilities and rights as legal parent must, however, not be confused with her rights in respect of her as yet unborn baby. While the mother is pregnant she has full autonomy with regard to her child which includes the right to terminate her pregnancy in terms of the Choice

- (d) The marital status of the biological mother is in terms of subsection (1) made irrelevant for purposes of the acquisition or exercise of her parental responsibilities and rights. As a general principle this provision must, however, be read subject to the provisions of subsection (2) in the case of an unmarried minor mother. Subsection (2) creates the one exception to the general rule that parental responsibilities and rights can be acquired automatically only by the biological parents of a child and will be addressed separately in 4.2.2 below.

#### **4.2.1.2 Biological link and the common law**

The question that arises as a result of the codification of the acquisition of legal motherhood in general is, as pointed out above, whether there is any significance in the fact that the mother now automatically acquires parental responsibilities and rights based on her biological link to her child rather than the act of birth

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on Termination of Pregnancy Act 92 of 1996. Her right to make this choice is distinct from the parental responsibilities and rights acquired at birth. Van Oosten 1999 *SALJ* 60 at 64 puts it thus: "A human embryo ... is simply a member of the pregnant woman's body and, in that capacity, subject to her right to 'security in and control over' her body (in terms of s 12(2) of the Constitution), which includes the right to have the embryo killed". In addition Van Oosten (at 75) argues, quite convincingly, that the failure of the Choice on Termination of Pregnancy Act 92 of 1996 to "... criminalize and penalize terminations of pregnancy which fall foul of the conditions and circumstances prescribed by the Act renders these sections toothless watchdogs which serve no purpose except, perhaps, as unenforceable guidelines for the medical and nursing professions". While both men and women should have control over their reproductive capacity regardless of their marital status (Lupton Div J in *Family Law Service* 16) or age, the father relinquishes all control over the procreative process to the mother once he "plants his seed" through sexual intercourse. This means that even a husband as potential father with full parental responsibilities and rights, would not have the right to interfere with any decision made by his wife concerning issues such as sterilisation, termination of pregnancy or contraception (Lupton Div J in *Family Law Service* 16, 19 and 22; Sonnekus 1986 *De Rebus* 369). The constitutional right of a woman to make decisions concerning reproduction in terms of s 12(2)(a) of the Constitution has yet to be successfully challenged or limited. This is the case not only in SA but also in Europe and the USA: Meulders-Klein 1990 *IJLF* 131 at 134-135. For a general discussion of the position in SA, see Keightley Ch 2 in Van Heerden *et al Boberg's Law of Persons and the Family* 28 at 42 fn 24. A problem may, however, arise if a viable child survives the "termination" of the pregnancy (with eg the help of an artificial womb as envisaged by Lupton: See Lupton 1995 *TSAR* 259 at 260; 1997 *TSAR* 746 at 749). The post-abortive woman would in all likelihood be deemed the legal mother in terms of s 19 of the new Children's Act 38 of 2005, despite her decision not to have the child since she would be the biological mother of the child. If the decision to terminate the pregnancy is deemed an act of abandonment in terms of s 150(1) of the Children's Act 38 of 2005, the child could arguably either be removed to a place of safety and become the subject of a children's court inquiry as envisaged by the provisions of Ch 9, or be made available for adoption by means of an order freeing the mother from parental responsibilities and rights in terms of s 235 of the Act.



(parturition) as embodied in the common law rule, *mater semper certa est*. The answer to this question may be influenced by the interpretation given to the word “biological”<sup>71</sup> in the context of the meaning of “biological mother” which is, as already indicated, not defined in the Act.<sup>72</sup> For purposes of investigating the acquisition of parental responsibilities and rights, it is submitted that the word “biological”,<sup>73</sup> in its widest sense may include the following three distinct types of connections between mother and child:

- (a) A genetic<sup>74</sup> or blood link between the mother and the child;
- (b) a link brought about by the conception of the child, and here we have to distinguish between natural conception and conception by means of assisted reproductive methods; and
- (c) a link between mother and child brought about by the act of giving birth,<sup>75</sup> also known as parturition.<sup>76</sup>

Since the acquisition of parental responsibilities and rights of a child conceived by artificial fertilisation is dealt with separately (in section 40), “biological mother” in the present context could thus refer to either the genetic mother and/or the birth-

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<sup>71</sup> According to *Webster’s Dictionary* the word “biological” is in the first place something which is of or connected with biology and “biology” is the science of life: See *Webster’s Dictionary* sv “biological” and “biology”.

<sup>72</sup> According to Heaton Ch 3 in *Commentary on Children’s Act 3-6*, the term “... clearly refers to the child’s birth mother” and s 19 thus merely “recasts” the common law rule.

<sup>73</sup> The word “biological” in the context of the acquisition of parental responsibilities and rights is used here synonymously with the word “natural”: *Microsoft Word Thesaurus*. The word “natural” is derived from the Latin word *natura* meaning birth, nature or *naturalis* which means by birth or pertaining to nature: *Webster’s Dictionary* sv “natural”.

<sup>74</sup> The word genetic is derived from the word “gene”, explained in the following terms: “[T]heoretically each mature reproductive cell carries a gene for every inheritable characteristic, and thus an individual [child] resulting from the union of such cells receives a set of genes from each of its parents”: *Webster’s Dictionary* sv “gene”.

<sup>75</sup> Van Wyk 1988 *TSAR* 465 at 476 refers to “divided motherhood” with the birth-giving mother used synonymously with “the biological mother” on the one hand, and the genetic mother on the other hand.

<sup>76</sup> While the identification of these three types of connections was originally my own, support for such an interpretation was found in a recent article by Diduck 2007 *CFLQ* 458 at 470 confirming: “Biologists identify four biological components to parenthood. One is the genetic link but the others have a more “social” aspect to them: the coital contribution; the gestational contribution; and the post-natal care contribution”. The latter contribution would, it is submitted, not reasonably fall within the scope of the term “biological” since it has probably more to do with “nurture” or social parenting than “nature” in the ordinary sense of the word.

giving mother of a naturally conceived child. Although a woman who gives birth to a naturally conceived child will in the majority of cases also be the genetic mother of the child, it will no longer necessarily be the case. Van Wyk<sup>77</sup> mentions two examples which fell outside the scope of “artificial fertilisation” as defined in previous Acts<sup>78</sup> but which will also fall outside the definition for purposes of the Children’s Act<sup>79</sup> since the previous definitions were incorporated in the latter Act.<sup>80</sup> In both these cases the birth-giving mother would *not* be genetically related to the child:

- (a) Where the ripe *ova* from the ovaries of one woman are extracted using a laparoscopy procedure and then transferred to the uterus of another woman, followed by fertilisation of the *ova* through sexual intercourse,<sup>81</sup> or
- (b) the transfer of an embryo which has been created by natural means to the uterus of another woman who then gives birth to the child.<sup>82</sup>

If the genetic *and* the birth-giving mother are both regarded as the “biological mother” of the child born, then we must assume that a child born as a result of procedures such as those envisaged in (a) and (b) can legally have two mothers. While this eventuality has been catered for in the case of artificial fertilisation where preference is given to the gestating or birth-giving mother,<sup>83</sup> there are no guidelines for cases where the actual conception takes place naturally. It is submitted that the insertion of a definition of the term “biological mother”, indicating the same preference for the birth-giving mother, would have avoided the uncertainty which could now arise.

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<sup>77</sup> Van Wyk 1988 *TSAR* 465 at 472.

<sup>78</sup> The Children’s Status Act 82 of 1987 (repealed as from 1 Jul 2007) and the Human Tissue Act 65 of 1983 that is still applicable, despite the fact that it has formally been repealed by the National Health Act 61 of 2003: For details see 4.4.1 below.

<sup>79</sup> 38 of 2005.

<sup>80</sup> For a detailed discussion of the meaning of artificial fertilisation for purposes of the Children’s Act 38 of 2005, see 4.4.1 below.

<sup>81</sup> This procedure is referred to as a “pure” donation of an *ovum* or “suiwer ovum-skenking”: Van Wyk 1988 *TSAR* 465 at 472.

<sup>82</sup> This procedure is referred to as a “pure” embryo donation or “suiwer embryoskenking”: Van Wyk 1988 *TSAR* 465 at 472.

<sup>83</sup> S 40(2).

However, apart from the admittedly, exceptional cases described in (a) and (b) above, it can safely be presumed that section 19 is probably based on the assumption that a child who is conceived naturally can only be nurtured and borne by its genetic mother. In practice, therefore, it would make little difference whether the term “biological mother” refers to the genetic and/or the birth-giving mother of a child since they are usually one and the same woman.

As a consequence of this assumption, the legislator has in my view essentially retained the *mater semper certa est* maxim. Such an interpretation of section 19 would accord with the principle that legislation intends to deviate as little as possible from existing (common) law.<sup>84</sup> The use of the term “biological mother” should thus rather be seen as a confirmation of the fact that as far as motherhood is concerned, the law can adhere to the “biological” reality in its widest sense.<sup>85</sup>

It is, lastly, interesting to note that, despite the Act’s stated intention to regulate the “[a]cquisition ... of parental responsibilities and rights” (own emphasis),<sup>86</sup> section 19 simply provides that the biological mother of a child “has” full parental responsibilities and rights in respect the child. The provision does not expressly indicate either when or how such supposed “acquisition” would take place. The use of the verb “has” rather than “acquires” may, on the one hand, be intentional insofar as it emphasises the fact that the mother does not “acquire” parental responsibilities and rights in the strict sense of the word but rather assumes such responsibility *ex lege* at birth. On the other hand, it could be argued that the section merely intends to regulate the *exercise* of maternal responsibility and that the common law should still regulate the *acquisition* of such responsibility. Either way, it is submitted, the practical effect of the section is the same: *Mater semper certa est*.<sup>87</sup>

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<sup>84</sup> Hahlo & Kahn *South African Legal System and its Background* 202.

<sup>85</sup> Thomas 1988 *SALJ* 239.

<sup>86</sup> Heading of Part I Ch 3: Children’s Act 38 of 2005.

<sup>87</sup> In the case of *J v J* 2008 6 SA 30 (C) at [25], Erasmus J simply assumed, without questioning the wording of the section that s 19 “confers” full parental responsibilities and rights on the biological mother of the child.

In terms of the Alteration of Sex Description and Sex Status Act<sup>88</sup> parental responsibilities and rights acquired by a mother will not necessarily be adversely affected by the subsequent alteration of the sex of the mother.<sup>89</sup> A very unusual situation may arise when a woman undergoes a sex change operation to become a man without removing “her” uterus and then decides to fall pregnant. Since the sex change operation would be legally recognised in South Africa, one could argue that the biological mother of the child would be considered the “father” of the child under these circumstances.

#### **4.2.1.3 New medical developments**

Considering the biological (*ie* the birth-giving) mother as the legal parent of the child may be problematic if medical science creates the possibility of gestating a naturally conceived baby *extra utero*.<sup>90</sup> According to Lupton,<sup>91</sup> a gynaecologist at the University of Tokyo has already succeeded in creating an artificial “rubber” womb filled with amniotic fluid to incubate a goat foetus. The next objective is apparently to refine and extend this technology to incubate human foetuses.<sup>92</sup> Although the artificial womb will initially function as a rescue mechanism, for example to treat extremely premature babies as foetuses and will not be capable of housing a baby from conception to birth,<sup>93</sup> Lupton predicts an advancement in the state of technology that will eventually fundamentally challenge pregnancy and childbirth as we know it today.<sup>94</sup> Despite the advantage of creating a painless childbirth without any risks to the mother, the negative psychological effect of the absence of nurturing derived from a natural mother, may produce “emotional cripples”, according to Lupton.<sup>95</sup> As far as the acquisition of parental responsibilities and rights is concerned, the birth *via* an artificial womb could

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<sup>88</sup> 49 of 2003, which came into force on 15 Mar 2004.

<sup>89</sup> S 3(3) of the Alteration of Sex Description and Sex Status Act 49 of 2003 provides as follows: “Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration”.

<sup>90</sup> Lupton 1995 *TSAR* 259; 1997 *TSAR* 746.

<sup>91</sup> Lupton 1997 *TSAR* 746.

<sup>92</sup> *Ibid.*

<sup>93</sup> The foetus of a pregnant woman who is drug or alcohol addicted could also be transferred to an artificial womb to enable it to gestate in a drug-free environment: Lupton 1997 *TSAR* 746.

<sup>94</sup> Lupton 1997 *TSAR* 746 at 751.

<sup>95</sup> Lupton 1997 *TSAR* 746 at 747.

further diminish<sup>96</sup> the heretofore “unshakeable”<sup>97</sup> presumption of maternity encapsulated in the maxim *mater semper certa est*.<sup>98</sup> In a situation like this, the gestator and the genetic mother would once again not be one and the same entity. However, unlike the cases discussed in 4.2.1.2 above, the problem may be less complicated insofar as the artificial womb would not be in competition with the genetic mother to become the legal mother of the (naturally conceived) child that is subsequently born!<sup>99</sup>

#### **4.2.2 Acquisition of parental responsibilities and rights by guardian of biological mother**

Although it is an accepted principle of our law that a person who is a minor is disqualified from being a guardian,<sup>100</sup> some authorities seem to hold that a person under the age of majority is incompetent to act as a guardian even if the said minor has become *sui juris* by contracting a marriage.<sup>101</sup> The position with regard to the acquisition of guardianship by a minor mother who is unmarried was thus uncertain in terms of the common law.<sup>102</sup>

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<sup>96</sup> The possibility of *in vitro* fertilisation and embryo transfer has already to some extent eroded the presumption of maternity.

<sup>97</sup> Stumpf 1986 *Yale Law Journal* 187.

<sup>98</sup> Lupton 1995 *TSAR* 259 at 262.

<sup>99</sup> According to Lupton 1995 *TSAR* 259 at 262, the situation can be likened to surrogacy which would in this case amount to a real “rent-a-womb” situation.

<sup>100</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 166; *Nokoyo v AA Mutual Insurance Association Ltd* 1976 2 SA 153 (E) at 155B.

<sup>101</sup> Since the question did not specifically arise in *Dhanabakium v Subramanian and Another* 1943 AD 160 at 166, the court only referred to this point of view which, according to the court was held by “... Van der Keessel (Th 112-114), Voet (26.1.5), Van Leeuwen, *Censura Forensis* (1.1.16.13) and Lee’s note to *Grotius* (1.7.6)”. From the authorities referred to in *Dhanabakium’s* case and Voet in particular, the court in *Nokoyo v AA Mutual Insurance Association Ltd* 1976 2 SA 153 (E) at 155D deduced that “[a]ge not legal capacity, therefore seems to have been the determining factor”. The court in this case decided that although the mother (who had attained the age of majority) remained the guardian of her extra-marital child after marrying a man who was not the child’s father, she could not institute legal proceedings on the child’s behalf unassisted as the marital power of the husband was not excluded: *Nokoyo v AA Mutual Insurance Association Ltd* 1976 2 SA 153 (E) at 155H. See also Van der Vyver & Joubert *Persone-en Familiereg* 169.

<sup>102</sup> *Matthews v Haswari* 1937 WLD 110; *Dhanabakium v Subramanian and Another* 1943 AD 160 at 166; *Bethell v Bland* 1996 2 SA 194 (W) 206H-207A; Spiro *Parent and Child* 453. According to Davel & Jordaan *Law of Persons* 63 without, however, reference to any authority there is no certainty regarding the question whether a minor child can, in general, be appointed as guardian over another person. In terms of this view a minor mother would not necessarily have been incompetent to act as guardian of her child. It is submitted, as pointed out by Van der Vyver & Joubert *Persone-en Familiereg* 169-170, that the uncertainty relates only to the question whether a person who has acquired majority status in a way other than by attaining the age of majority, can act as guardian.

In the context of the acquisition of parental responsibilities and rights, which includes the acquisition of guardianship in respect of a child, the Children's Status Act<sup>103</sup> sought to clarify the issue firstly, by vesting guardianship of the child of the minor mother in the guardian of the mother<sup>104</sup> and secondly, by explicitly allowing a minor mother under the majority age who attains the status of a major (through marriage, for example) to assume guardianship in respect of her child.<sup>105</sup> The Act expressly made provision for the unmarried minor mother to acquire "custody" of her child.<sup>106</sup> The position of an unmarried minor father was not provided for, presumably because unmarried fathers had no parental responsibilities and rights until they married the mother of the child, in which case they became majors and the lack of capacity disappeared.

Subsection 19(2) of the Children's Act<sup>107</sup> now regulates the acquisition and exercise of parental responsibilities and rights by a mother who is still a "child". In keeping with the position under the previous Act, a mother is still vested with parental responsibilities and rights in respect of her child<sup>108</sup> but denied the responsibility and right to act as her child's guardian if she is an unmarried minor.<sup>109</sup> The unmarried minor mother would thus, as before, have full parental responsibilities and rights less guardianship,<sup>110</sup> which will by implication leave her with care and contact. The Act does, however, not vest such guardianship in the guardian of the minor mother if the biological father of the child has acquired guardianship in respect of the child. In this way the provisions reflect the changed position in terms of which it is now possible for a biological father, who is not married to the mother of the child, to acquire parental responsibilities and rights automatically in respect of his child at birth.<sup>111</sup> In terms of the new provision the guardian of the mother will be the guardian of the child only when the mother is an

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<sup>103</sup> 82 of 1987, repealed with effect from 1 Jul 2007 by s 313 of the Children's Act 38 of 2005.

<sup>104</sup> S 3(1)(a) of the Act.

<sup>105</sup> S 3(2).

<sup>106</sup> S 3(1)(b). Spiro was of the opinion that to do otherwise would be "... unnatural, unpractical and contrary to the best interests of the child": *Spiro Parent and Child* 422.

<sup>107</sup> 38 of 2005.

<sup>108</sup> S 19(1).

<sup>109</sup> S 19(2).

<sup>110</sup> S 19(2)(a).

<sup>111</sup> S 21 and the discussion in 4.2.3.2(b) and (c) below.

unmarried child *and* the biological father of the child does not have guardianship in respect of the child.<sup>112</sup> This means, similar to the position previously, that a mother who attains majority status through marriage<sup>113</sup> can act as the guardian of her child. It also means that until the mother marries or attains the age of 18<sup>114</sup> (whichever happens first) the biological father may exercise the responsibility and right of guardianship to the exclusion of the mother, provided he has acquired such guardianship in terms of the Act. The unmarried father may acquire guardianship automatically if, at the child's birth, he was living with the child-mother in a permanent life-partnership<sup>115</sup> or where he complies with the requirements as set out in section 21(1)(b).<sup>116</sup> Guardianship can also be granted or assigned to the biological father by order of the High Court in terms of section 24 of the Act. Since the minor mother would not have guardianship in respect of her child, she would not be able to confer guardianship on the father by means of a parental responsibilities and rights agreement in terms of section 22 of the Act.<sup>117</sup>

It should be stressed that the unmarried mother who is still a child will in all other respects acquire parental responsibilities and rights. She will thus have the care and contact of the child despite her minority. The guardian of the unmarried minor mother will thus only acquire guardianship and not full parental responsibilities and rights in the circumstances mentioned. It is interesting to note that while the lack of capacity to act as her child's guardian did not impede in any way on her right to consent to the adoption of her child in terms of the Child Care Act,<sup>118</sup>

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<sup>112</sup> S 19(2)(b).

<sup>113</sup> Majority status can no longer be obtained by order of the High Court in terms of the Age of Majority Act 57 of 1972 because the Act has been repealed.

<sup>114</sup> The Age of Majority Act 57 of 1972 has been repealed by s 17 of the Children's Act 38 of 2005 lowering the age of majority to 18 years. The latter section came into operation on 1 Jul 2007: GG 30030 dd 29 Jun 2007.

<sup>115</sup> S 21(1)(a) of the Children's Act 38 of 2005.

<sup>116</sup> See discussion in 4.2.3.2(c) below. Where the child was conceived as a result of rape or an incestuous relationship with the mother, the biological father would not automatically acquire guardianship: See definition of "parent" in s 1(1) of Children's Act 38 of 2005.

<sup>117</sup> The mother can only confer by agreement upon the father or any other person "... those parental responsibilities and rights which she ... has in respect of the child at the time of the conclusion of such an agreement": S 22(2) of the Children's Act 38 of 2005.

<sup>118</sup> 74 of 1983: S 18(4), in terms of which the consent of both the mother and the natural father is required in the case of a child born out of wedlock "... whether or not such a mother or natural father is a minor or a married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be".

section 233 of the Children's Act<sup>119</sup> now expressly requires the assistance of the guardian of the minor mother when giving consent to such an adoption.

The Children's Act<sup>120</sup> is silent on the acquisition of parental responsibilities and rights by an underage biological father.<sup>121</sup> By analogy to the position of the underage mother, it could be assumed that the same principles will apply in the case of an unmarried minor father who acquires parental responsibilities and rights, *ie* that his guardian will acquire guardianship in respect of the child unless the mother has acquired guardianship in respect of the child. Any other construction could be deemed unfair discrimination on the ground of sex and/or gender.<sup>122</sup> Where both the parents are underaged, guardianship would presumably have to be exercised jointly by the guardian or guardians of the mother and the guardian or guardians of the father.

In a comparative study regarding the rights and duties of underage parents in Belgium, Germany and the Netherlands, Willekens<sup>123</sup> draws a distinction between Germany and the Netherlands, on the one hand, that have specific statutory rules to regulate the issue, and Belgium, on the other hand, where there is no such explicit regulation. Similar to the position of the underage mother in South Africa, the underage parent in Germany can exercise parental responsibilities and rights only with respect to the "personal care" of the child, leaving the administration of the child's property and legal representation in the hands of a fully legally capable person.<sup>124</sup> This scheme would, according to Willekens<sup>125</sup> –

“... be a fine compromise if ‘personal’ and ‘patrimonial’ matters could be separated as easily as the law assumes; but this is not the case. Decisions such as having the child baptised or leaving it part of the day in a nursery or with a child-minder – which lie perfectly within the competence of the underage parent – cost money and can be put in effect only by entering

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<sup>119</sup> 38 of 2005.

<sup>120</sup> 38 of 2005.

<sup>121</sup> Specifically in cases where the minor biological father automatically acquires parental responsibilities and rights in terms of s 21.

<sup>122</sup> In terms of s 9(3) of the Constitution.

<sup>123</sup> Willekens 2004 *IJLPF* 355.

<sup>124</sup> Willekens 2004 *IJLPF* 355 at 365.

<sup>125</sup> Willekens 2004 *IJLPF* 355 at 365.



into contracts. It is exactly at this point that the German law reveals a lacuna.”

Willekens mentions a further problem that could arise if the guardian does not live with the mother and child.<sup>126</sup> In such a case there would be “... a spatial separation between the mother-child unity and the person competent to take all the decisions regarding the child”.<sup>127</sup> The same author contends that there is no solution to the problem<sup>128</sup> because if the law, on the one hand, awards full parental responsibilities and rights to underage parents it denies them the protection they might still need as minors and if the law, on the other hand, refuses parental responsibilities and rights to underage parents because of their tender age, it makes it more difficult for the young people and children to develop a family life. A compromise between these two extremes is also not satisfactory in view of the fact, as pointed out above, that the partial rights (care and contact) are not sufficient to enable the underage parent to fulfil all her parental responsibilities. Despite this unsatisfactory state of affairs the problem of underage parenting might in practice not pose such a serious problem due to the lowering of the age of majority to 18 years.<sup>129</sup>

### **4.2.3 Acquisition of parental responsibilities and rights by father of child**

#### **4.2.3.1 Background**

##### **(a) Married fathers**

A man could in terms of the common law, as already explained, acquire parental responsibilities and rights automatically only in one instance – if he was married to

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<sup>126</sup> Willekens 2004 *IJLPF* 355 at 367.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> S 17 of the Children’s Act 38 of 2005. However, according to Birenbaum 1996 *SAJHR* 485 at 495, teenage pregnancy in SA is common with statistics in 1993 showing that 29 per cent of all women interviewed who have children had their first child by the age of eighteen. The prevalence of minor pregnancy in the USA (especially in Alabama’s “Black Belt” region) is described as “astounding”. According to Crews 2004 *Law and Psychology Review* 133 at 134, one-third of all pregnancies in the Black Belt (consisting of 12 counties in the middle to southern part of Alabama, dubbed such because of the rich black soil that produces good cotton) were to teen mothers.

the mother of the child<sup>130</sup> – either at conception or birth or anytime in between<sup>131</sup> or after the birth of the child.<sup>132</sup> The common law presumption of paternity, embodied in the maxim *pater est quem nuptiae demonstrant*,<sup>133</sup> according to Davel & Jordaan,<sup>134</sup> is “... a deep-seated and widely acknowledged one ... that will remain valid until rebutted”.

## (b) Unmarried fathers

As far as unmarried fathers are concerned judicial precedent since 1903 has consistently denied such fathers an inherent right to any incident of parental responsibilities and rights in respect of his child born out of wedlock.<sup>135</sup> These judgments confirm the often referred to common law principle that a child born out of wedlock has a mother but no father<sup>136</sup> or as stated by Spiro<sup>137</sup> that an extra-marital child is in law related to its mother and her relations but not to its natural father and his relations.<sup>138</sup> Despite being criticised as a misleading

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<sup>130</sup> The biological father of a child born out of wedlock could of course be *assigned* parental responsibilities and rights in terms of the High Court’s inherent jurisdiction or the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (now repealed), for which see Ch 5 below.

<sup>131</sup> Spiro *Parent and Child* 20; Van der Vyver & Joubert *Persone-en Familiereg* 210 and 595; Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 354.

<sup>132</sup> *Legitimatio per matrimonium subsequens*: Voet 1.6.5 and 36.1.14, since codified in s 4 of the Children’s Status Act 82 of 1987 (now repealed). See Heaton Ch 3 in *Commentary on Children’s Act* 3-8.

<sup>133</sup> *Grotius* 1.12.3; Voet 1.6.6.

<sup>134</sup> Davel & Jordaan *Law of Persons* 109.

<sup>135</sup> Or, put differently, the courts have been unwilling to assign parental responsibilities and rights to a natural father based purely on his blood relationship or genetic link with his child. While the courts in both *Wilson v Eli* 1914 WR 34 and *Matthews v Haswari* 1937 WLD 110 granted access to the natural father, neither of the cases is deemed persuasive authority for the contrary view: See fn 140 below and *B v S* 1995 3 SA 571 (A) 576B.

<sup>136</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) 638E; SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 2.5; Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 405. In terms of the common law only three consequences arise from the (biological) relationship between the unmarried father and his child: (a) impediments to marriage and sexual intercourse based on the prohibited degrees of blood relationship; (b) the reciprocal duty of support between father and child born out of wedlock; (c) *locus standi* to launch an application to protect the interests of the child born out of wedlock *eg* an application to the High Court for an order granting him parental responsibilities and rights: *B v S* 1995 3 SA 571 (A) 575B-C; Lee & Honoré *Family, Things and Succession* 162 fn 3.

<sup>137</sup> Spiro *Parent and Child* 450.

<sup>138</sup> See also Van der Vyver & Joubert *Persone-en Familiereg* 218, who claim that the status of an extra-marital child – “... word kernagtig uitgebeeld met die stelling dat so ‘n kind regtens ‘n moeder het maar nie ‘n vader nie”, showing the extent to which the phrase “*eene wijf maakt geen bastaard*” referred to in fn 60 above, pervaded this area of the law: Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 390 fn 200. The term *filius nullius* has

generalisation,<sup>139</sup> the principle does accord with the general view taken in most reported cases to the effect that the biological link *per se* does not determine the legal relationship between a natural father and his child born out of wedlock.<sup>140</sup> While the cases discussed below are actually concerned with the “assignment” of parental responsibilities and rights to unmarried fathers<sup>141</sup> and, therefore, strictly speaking, not directly relevant in the present context, they do provide an overview of the relative importance of the biological link in the determination of legal paternity in the past. These cases also highlight the differential treatment between mothers and fathers as far as the *ex lege* acquisition of parental responsibilities and rights is concerned.

In *Douglas v Mayers*<sup>142</sup> the court refused to grant the natural father access to his child born out of wedlock since he had not explained in which way it would have

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been used in other common law countries to describe such children: Meulders-Klein 1990 *IJLF* 131 at 142.

<sup>139</sup> SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 2.5; Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 405.

<sup>140</sup> SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.1. See Thomas 1988 *SALJ* 239; Eckhard 1992 *TSAR* 122 at 124; Mosikatsana 1996 *CILSA* 152 and Goldberg 1996 *THR-HR* 282 at 293-294, noting a similar trend in the USA. Cf, however, Bonthuys 1997 *SAJHR* 622 at 625, who suggests the direct opposite by claiming that “[i]t would seem that in cases where the courts are willing to extend the rights traditionally accruing to such fathers [of illegitimate children], arguments of biology are more likely to be used”. Apart from the fact that natural fathers do not have rights that can be “extended” since they do not acquire any rights to begin with, it is apparent from the case law discussed by Bonthuys that her conclusion cannot be justified. Firstly, the judgment in *Van Erk v Holmer* 1992 2 SA 636 (W) did not reflect the state of the law at the time and definitely did not grant the natural father “... an inherent right of access” as alleged by the author (see discussion below). The decision in *Chodree v Vally* 1996 2 SA (W) was, as hinted to by Bonthuys (at 627), prompted primarily by the prior existence of a religious marriage with the mother of the child. The court did not, in my opinion, insist on the biological relationship between the father and the child as contended by Bonthuys, but rather emphasised the preference for the father to the grandfather or “non-parent”. See Wolhuter 1997 *Stell LR* 65 at 68 who also holds the view that the award of access to the natural father was based on the social relationship with his child and Palmer 1996 *SALJ* 579 who suggests (at 582) that the Islamic law marriage was “clearly influential” and (at 583) “considered important”. It is admitted that in *Bethell v Bland* 1996 2 SA 194 (W) the court, once again, preferred as custodian for the child, the natural father to the grandparents of the child. The court did not, however, grant custody to the natural father based only on the existence of the biological relationship but, very significantly, also because of the existence of an emotional bond and attachment between them (Bonthuys herself (at 629) admits to this). See below for further commentary on the case. Also see Goldberg 1993 *SALJ* 261 at 266-267, who contends that most cases that have been relied on by authors who maintain that the unwed father should have a right of access “... have been instances where there had been some relationship, however flimsy, between the father and the child” and “... therefore some resemblance between them and the situation in which a divorced man is granted reasonable access”.

<sup>141</sup> See Ch 5 below.

<sup>142</sup> 1987 1 SA 910 (Z).

been in the interests of the child that it should know and be acquainted with its natural father.<sup>143</sup> Muchechechere J was of the view that –

“... the application has not gone beyond saying that the applicant wants access because he is the natural father and because he pays maintenance. This ... is the same as applying for access as of right or the ground of an inherent right of access which ... is non-existent in the case of a natural father”.<sup>144</sup>

Although the court in *Van Erk v Holmer*<sup>145</sup> was prepared to grant a natural father a right of access to his child, the case is at best dubious authority for the view that the biological link between natural father and child is sufficient to vest parental responsibilities and rights in the father. In this case the application for reasonable access to the natural father was referred to the Office of the Family Advocate who recommended access. The court accepted the recommendation and the matter was settled between the parties on that basis. Because of the importance of the matter, however, the parties requested that reasons be furnished for the court's decision to accept the recommendation of the Family Advocate.<sup>146</sup> As such the judgment as a whole should really be seen as an *obiter dictum*.<sup>147</sup> Before discussing, what can only be considered the *avant-garde* views of the court *per* Van Zyl J, it is important to take cognisance of the factual scenario which gave rise to the dispute in the first place.<sup>148</sup> A child was born to the parties while living together. The parties had wanted a child, it having always been their intention to get married. The relationship, however, soured over the course of time resulting in the mother moving in with her parents, taking the child with her. The mother had thereafter refused the father any access to the child. According to the Family Advocate investigating the matter, the mother's conduct was prompted more by a

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<sup>143</sup> *Douglas v Mayers* 1987 1 SA 910 (Z) at 915C.

<sup>144</sup> *Douglas v Mayers* 1987 1 SA 910 (Z) at 915C-E. In *Wilson v Eli* 1914 WR 34 it was held that the father was entitled to reasonable access because he paid maintenance. In this case the parents had, however, lived together as man and wife for a long time being married under Muslim rites and the child had come to the father “... voluntary in rags and tatters”. The fact that a duty of support does not entitle a natural father to access was reiterated first in *F v L* 1987 4 SA 525 (W) at 527B and again in *Van Erk v Holmer* 1992 2 SA 636 (W) at 647F.

<sup>145</sup> 1992 2 SA 636 (W).

<sup>146</sup> At 637A-C.

<sup>147</sup> The same view was held in *B v S* 1995 3 SA 571 (A) at 578B-G. See also Davel & Jordaan *Law of Persons* 130.

<sup>148</sup> The salient facts relating to the application by the natural father are discussed at 637A-G.

desire to punish the father for not marrying her than furthering the best interests of the child.

Despite the presence of a bond with the mother and with the child, on grounds of which there would have been ample justification to grant access to the natural father (social connection), Van Zyl J in *Van Erk v Holmer*<sup>149</sup> seized the opportunity to make out a case for granting automatic parental rights to natural fathers based solely on the existence of a biological link between father and child. After traversing not only the common law position of natural fathers in South Africa<sup>150</sup> and the development of that position through legal precedent<sup>151</sup> but also the recommendations by the SALRC in its report on the legal position of illegitimate children,<sup>152</sup> the views of modern authors,<sup>153</sup> the absence of guidance provided by related Anglo-American sources<sup>154</sup> and the general public's views as expressed in the popular press in South Africa,<sup>155</sup> Van Zyl J came to the following conclusion, quoted here in full:<sup>156</sup>

“In my view public policy dictates that, just as there should be no distinction between a legitimate and an illegitimate child, just so there is no

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<sup>149</sup> 1992 2 SA 636 (W).

<sup>150</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 637G-638C. The court held that the fact that the common law says nothing about a father's right of access does not justify the inference that such a right does not or cannot exist (at 647B). Furthermore, where old authorities do not advert to the relevant legal issue or there is no legislation, precedent or custom in point, it falls to the judge to decide the case in accordance with the principles of reasonableness, justice and equity (at 648B). This important principle enunciated by Hahlo & Kahn *South African Legal System and its Background* 304, was, according to Van Zyl J, not considered in any of the cases dealing with the issue of access of a natural father in respect of his child born out of wedlock (at 648A) and, as expressly added by Van Zyl J (at 648B), nor was the changing *boni mores* or public policy.

<sup>151</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 640C-642B.

<sup>152</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 639E-640B. See SALC Report on the *Legal Position of Illegitimate Children* par 8.19. This report was followed by another pertaining to the *Rights of a Father in Respect of His Illegitimate Child* in Jul 1994 recommending that a natural father should have an inherent right of access to the child based on the changing mores of society and of the social realities existing in SA (for a discussion of which, see 648D-E).

<sup>153</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 642B-645A. The courts' outright denial of parental rights for fathers have been severely criticised by, *inter alia*, Boberg 1988 *BML* 35; 1988 *BML* 112 and Ohannessian & Steyn 1991 *THR-HR* 254.

<sup>154</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 645B-646J. According to Van Zyl J (at 647A), none of the foreign sources investigated explicitly deals with the rights of access of natural fathers with the notable exception of the Australian Family Law Council's suggestion that the father's *prima facie* or inherent right should not be recognised. The position of natural or putative fathers has, however, since then received much attention and has given rise to numerous changes in the laws of countries such as Australia, as will be discussed below.

<sup>155</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 649C-D.

<sup>156</sup> *Van Erk v Holmer* 1992 2 SA 636 (W) at 649D-650A.

justification for distinguishing between the fathers of such children. By this I do not propose that they should be equated with each other in one fell swoop. Certain parental rights have been legislatively enacted and will require amendments to such legislation to provide for more extended rights. It is the least of these rights – the ‘booby prize’ as Boberg calls it (*op cit*) – namely the right of access, which public policy requires should be inherently available to all fathers. In time to come further extensions may be required and public policy will no doubt play a role in regard thereto. At this stage, however, it is unnecessary to speculate on the nature and extent of the further rights which may call for consideration.

Perhaps one of the strongest motivations for an improvement in the legal position of the unmarried father is what is perceived as the gross injustice which occurs when a father is compelled to pay maintenance for a child whom he may never be able to see or visit, despite his being prepared to commit and devote himself entirely to the interests of the child. This is not simply a plea for a *quid pro quo* but a proper recognition of a biological father's need to bind and form a relationship with his own child and the child's interest that he or she should have the unfettered opportunity to develop as normal and happy a relationship as possible with both parents. This is not only in the interest of the child but it is in fact a right which should not be denied unless it is clearly not in the best interests of the child.

In view of the foregoing considerations I believe the time has indeed arrived for the recognition by our Courts of an inherent right of access by a natural father to his illegitimate child. That such a right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy. It should be removed only if the access should be shown to be contrary to the best interests of the child.”

Although the views of Van Zyl J were welcomed by some,<sup>157</sup> the case has been criticised<sup>158</sup> as having disregarded the *stare decisis* rule by not following the full bench decision of the Transvaal Provincial Decision in *B v P*.<sup>159</sup>

The Appellate Division (now the Supreme Court of Appeal) in *B v S*<sup>160</sup> to a certain extent obviated the necessity of granting natural fathers inherent parental rights by arguing that even though the natural father did not automatically have rights of access or custody to his child, it was inappropriate to talk of a parent having a legal right at all in this context since no parental right, privilege or claim will have any substance or meaning if the access (or custody) will be inimical to the welfare

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<sup>157</sup> Kruger *et al* 1993 *THR-HR* 696; Pantazis 1996 *SALJ* 8 at 11.

<sup>158</sup> *S v S* 1993 2 SA 200 (W) at 205B and *B v S* 1993 2 SA 211 (W) at 214D-E.

<sup>159</sup> 1991 4 SA 113 (T) at 117E-F.

<sup>160</sup> 1995 3 SA 571 (A).

of the child.<sup>161</sup> The entitlement is, therefore, not that of the parent but that of the child.<sup>162</sup> In summary the court concluded that South African law recognises that the child's welfare is central to the matter of access or custody and that such access is, therefore, always available to the father if it is in the best interests of the child.<sup>163</sup> According to the court there is no *onus* in the sense of an evidentiary burden or risk of non-persuasion on a natural father to show "a very strong and compelling ground" why he should have access.<sup>164</sup> Where an entitlement to access or other incident of parental responsibilities and rights is being considered, the litigation is not of the ordinary civil kind – it is not adversarial. The litigation really involves a judicial investigation and the court may call evidence *mero motu*.<sup>165</sup> The court concluded that it was consequently irrelevant in this regard whether the child concerned is legitimate or born out of wedlock.<sup>166</sup> If the settling of the dispute thus depended on what was considered in the best interest of the child, the starting position of the respective parents (having parental responsibilities and rights or not) was really irrelevant for purposes of deciding who should ultimately be vested with parental responsibilities and rights. As such a natural father of a child born out of wedlock, who has no inherent parental responsibilities and rights, is according to this view, not necessarily in a worse position than the mother<sup>167</sup> – the only question would be whether vesting parental responsibilities and rights in the particular parent wishing to acquire such responsibilities and rights, will be in the best interests of the child.<sup>168</sup> Despite the apparent simplicity of the approach suggested in the said judgment, the effect

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<sup>161</sup> *B v S* 1995 3 SA 571 (A) at 581I-J.

<sup>162</sup> *B v S* 1995 3 SA 571 (A) at 582A-B.

<sup>163</sup> *B v S* 1995 3 SA 571 (A) at 583G-H. Howie JA (at 579I-J), however, held *obiter* that "[i]f there are sound sociological and policy reasons for affording such fathers an inherent access right, in addition to the right they already have to be granted access where it is in the best interests of their children, then that is a matter that can only be dealt with legislatively".

<sup>164</sup> *B v S* 1995 3 SA 571 (A) at 584H.

<sup>165</sup> Following previous *dicta* to this effect, including the following made in the context of a post divorce dispute regarding the education of a child in *Martin v Mason* 1949 1 PH B9 (N): "Questions involving the interests of children should not be decided by the incidence of *onus* of proof" and in *Short v Naisby* 1955 3 SA 572 (N) at 574E-F in which the court held that "... the Court, in determining the question of custody of minors, is acting in its capacity as upper guardian and is not bound by the contentions of the parties, so that it may, on occasion, see fit to depart from the recognised practice in motions and applications. The Court does not decide questions involving the interests of a child by the incidence of *onus* of proof".

<sup>166</sup> *B v S* 1995 3 SA 571 (A) at 584I-585A.

<sup>167</sup> The practical effect thus being (at 582C) that "... the father of an illegitimate child is not unfairly discriminated against".

<sup>168</sup> See also *V v H* [1996] 3 All SA 579 (SE).

thereof is undeniably that a natural father would still have to prove his “worth and commitment”<sup>169</sup> to succeed in showing that the access (or other specific incident of parental responsibilities and rights) would be in the best interests of the child. Mere genetics (or the proof of paternity) will not be considered sufficient, whatever the nature of the proceedings might be.<sup>170</sup>

In settling a dispute regarding the custody of a two and a half year old boy in *Bethell v Bland*,<sup>171</sup> the court was prepared to elevate the natural father from the position of a third party on ground of his biological link to his child:<sup>172</sup>

“Matthew<sup>173</sup> is, strictly speaking, a ‘third party’ or ‘outsider’, as his fatherhood of Camdon does not create a legally recognised relationship, let alone a direct one, except for his duty of support. But it is clear from the judgment in *B v S* (*supra*<sup>174</sup>) ... that the father of an extramarital child is a ‘third party’ in a special position; and obviously the biological relationship and genetic factors must favour him over ‘outsiders’.”

The import of this statement must, however, be qualified against the complex factual circumstances of the case. The maternal grandfather of the child applied for custody after the mother had removed the child from his care and placed the child with the child’s paternal grandparents with whom the natural father also resided. The paternal grandparents subsequently launched a counter-application for custody. The natural father entered the fray with an application for custody pending adoption proceedings. It was common cause that the mother, still a minor, was not mature enough to take on the responsibility of caring for the child.<sup>175</sup> The court relied heavily on the desirability of maintaining the *status quo* when determining the best interests of the child in custody disputes, as

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<sup>169</sup> *B v S* 1995 3 SA 571 (A) at 585D.

<sup>170</sup> Kruger 1996 *THR-HR* 514 at 521 shares my opinion in this regard. Goldberg 1996 *THR-HR* 282 at 289 calls the argument naïve and Pantazis 1996 *SALJ* 8 at 19 convincingly argues that the argument is untenable on various grounds including the fact that the existence or not of an inherent right is likely strongly to influence the decision what is in the best interests of the child - in the case of illegitimate children there is a strong presumption of the father’s unsuitability while in the case of legitimate children “... the presumption is one of his parental suitability”.

<sup>171</sup> 1996 2 SA 194 (W).

<sup>172</sup> *Bethell v Bland* 1996 2 SA 194 (W) at 209F-H.

<sup>173</sup> The natural father of the boy, called Camdon.

<sup>174</sup> 1995 3 SA 571 (A).

<sup>175</sup> *Bethell v Bland* 1996 2 SA 194 (W) at 209J.



enunciated in *McCall v Mc Call*,<sup>176</sup> and the fact that the natural father had the financial and moral support of his parents.<sup>177</sup> Without the mother's unsuitability and the stability created by his parents one wonders to what extent, if at all, the court would still have favoured the natural father over the other "outsiders".<sup>178</sup> In the already referred to case of *Haskins v Wildgoose*,<sup>179</sup> the position of the natural father was, on the other hand, equated with any other outsider who seeks access against the wishes of the child's parent.<sup>180</sup> The court<sup>181</sup> was, however, prepared to accept the recommendation by the Family Advocate to grant access to the natural father because it considered the adoption by the maternal grandparents as a ploy to defeat the father's right of access<sup>182</sup> (called a "charade"<sup>183</sup>) and the fact that the father had always taken an interest in the child and would continue to do so (social criteria).<sup>184</sup>

In *Fraser v Naude*,<sup>185</sup> another case where the natural father relied solely on the genetic link for relief, not having cohabited with the mother or having had an opportunity to bond with the child, the court refused to grant an interdict preventing the mother from handing over the child to anyone other than the father. In considering whether the requirements for the granting of an interdict had been satisfied,<sup>186</sup> the court concluded that since the natural father had no parental responsibilities and rights and that none of the incidents of parental

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<sup>176</sup> 1994 3 SA 201 (C) at 208F-209D.

<sup>177</sup> *Bethell v Bland* 1996 2 SA 194 (W) at 210C.

<sup>178</sup> See Palmer 1996 SALJ 579 who draws attention to the inconsistencies in the judicial treatment of natural fathers (at 584) and explains (at 585) the conundrum caused by the judgment in *Bethell v Bland* 1996 2 SA 194 (W) as follows: "[T]he maternal grandfather is not granted custody, but retains guardianship [because of the minority of the mother]; the natural father has custody; the maternal grandmother is not granted reasonable access, but retains guardianship [for the same reason as the maternal grandfather]; the mother is deprived of custody and is granted reasonable access; upon her attaining majority she becomes the guardian of the child; the paternal grandparents are not granted custody but reasonable access, while they will be the primary caregivers".

<sup>179</sup> [1996] 3 All SA 446 (T). See 4.1 above.

<sup>180</sup> *Haskins v Wildgoose* [1996] 3 All SA 446 (T) at 452f-g. See also *Kleingeld v Heunis and Another* 2007 5 SA 559 (T) 563A.

<sup>181</sup> *Haskins v Wildgoose* [1996] 3 All SA 446 (T) at 461h-i.

<sup>182</sup> *Haskins v Wildgoose* [1996] 3 All SA 446 (T) at 459g.

<sup>183</sup> *Haskins v Wildgoose* [1996] 3 All SA 446 (T) at 460f-g.

<sup>184</sup> *Haskins v Wildgoose* [1996] 3 All SA 446 (T) at 460d-e.

<sup>185</sup> 1997 2 SA 82 (W).

<sup>186</sup> The requirements for an interdict include, (a) a clear right or *prima facie* right on the part of the applicant, (b) a well-grounded apprehension of irreparable harm to applicant if relief is not granted, (c) that the balance of convenience had to favour the granting of interim relief and (d) that the applicant had no other satisfactory remedy: *Fraser v Naude* 1997 2 SA 82 (W) 84B-C.

responsibilities and rights attached to that father, it followed that the applicant-father could not establish even a *prima facie* right.<sup>187</sup> The court also noted that the natural father had another remedy, *ie* adopting his child. In *Wicks v Fisher*<sup>188</sup> the court was, however, prepared to confirm a rule *nisi* restraining a mother from leaving the country pending institution by the father of an order for custody in respect of his child born out of wedlock. In this instance the court held<sup>189</sup> that the father did have a *prima facie* right in view of the modern trend (evidenced by the Natural Fathers of Children Born out of Wedlock Act<sup>190</sup> although it had not come into operation as at the date of the hearing) which moved away from the superior position of custodians over those of non-custodians and which now accorded natural fathers rights that were not recognised at common law. The court was also, by its own admission<sup>191</sup> heavily influenced by the interests of the child and the fact that the applicant had no alternative remedy.<sup>192</sup> Although it is not clear from the case to what extent the natural father had lived with the mother of the child, he had had regular access to the child since the latter's birth in 1994.<sup>193</sup> The judgment was in my view consequently based on the existence of a combination of biological and social connections between father and child and is, therefore, not good authority for the importance accorded to the genetic link *per se*.

In *Jooste v Botha*<sup>194</sup> the court held that section 28(1)(b) of the Constitution, entrenching a child's right to parental care, must be read as pertaining to the care by a custodian parent only.<sup>195</sup> The court was thus only prepared to recognise and enforce the right to parental care<sup>196</sup> where the parent, despite his biological connection with the child, actually had custody of the child.<sup>197</sup>

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<sup>187</sup> *Fraser v Naude* 1997 2 SA 82 (W) at 85C.

<sup>188</sup> 1999 2 SA 504 (N).

<sup>189</sup> *Wicks v Fisher* 1999 2 SA 504 (N) at 510E-F.

<sup>190</sup> 86 of 1997.

<sup>191</sup> *Wicks v Fisher* 1999 2 SA 504 (N) at 511H.

<sup>192</sup> *Wicks v Fisher* 1999 2 SA 504 (N) at 511G.

<sup>193</sup> *Wicks v Fisher* 1999 2 SA 504 (N) at 506D-H.

<sup>194</sup> 2000 2 SA 199 (T) at 208F.

<sup>195</sup> The same interpretation was given to "parent" in *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C) at 57B.

<sup>196</sup> In a negative sense by awarding damages for having failed to provide parental care.

<sup>197</sup> *Jooste v Botha* 2000 2 SA 199 (T) at 208G. The court gave another reason for denying the child such a right (at 209H): "*Lex non cogit ad impossibilia*". The law will not enforce the

In an attempt to improve and clarify the legal position of natural fathers in respect of their illegitimate children,<sup>198</sup> the SALRC investigated the possibility of law reform in this regard and concluded that "... the entire matter ... is far too complicated for simple solutions".<sup>199</sup> The SALRC was opposed to the granting of automatic parental rights to natural fathers because of the risks inherent in such an approach. First of all, the Commission felt that by vesting natural fathers with automatic rights, the mother would be put in the untenable position of bearing the onus (and the cost) to prove that the father's rights should be curtailed, suspended or terminated.<sup>200</sup> Secondly, it was felt that there is always the risk that fathers may want to exercise their rights "... for reasons which have no bearing on their true feelings and best interests of the child".<sup>201</sup> This, according to the SALRC, "... would admit the danger of established relationships being disrupted unless the mother is able to have recourse to the court".<sup>202</sup>

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impossible. It cannot create love and affection where there is none. Not between legitimate children and their parents and even less between illegitimate children and their fathers". According to Sloth-Nielsen & Van Heerden 2003 *IJLPF* 121 at 127 the case possibly "... supports the further development of the notion of care as a corollary to parental status, at least as far as natural fathers are concerned". For criticism of the judgment see Bekink & Brand Ch 9 in Davel *Introduction to Child Law* 184; Van der Linde & Labuschagne 2001 *THR-HR* 308 and sources quoted in Currie & De Waal *Bill of Rights Handbook* 608 fn 45.

<sup>198</sup> Although authors were divided on how the legislator should approach the matter, there was general consensus that law reform in this regard was essential: Nathan 1980 *THR-HR* 293 at 298; Van Onselen 1991 *De Rebus* 499 at 500; Ohannessian & Steyn 1991 *THR-HR* 254; Clark 1992 *SAJHR* 564; Eckhard 1992 *TSAR* 122 at 133; Sonnekus & Van Westing 1992 *THR-HR* 232 at 253; Goldberg 1993 *SALJ* 261 at 273; Hutchings 1993 *THR-HR* 310 at 315; Kruger *et al* 1993 *THR-HR* 696 at 703.

<sup>199</sup> SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.5.

<sup>200</sup> SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.4.

<sup>201</sup> SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.6.

<sup>202</sup> SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.6, referring to *S v S* 1993 2 SA 200 (W) at 203D-E as a good example of such a case. The fear in question has often been used to justify the denial of inherent rights to fathers: See Church 1992 *Codicillus* 32 at 36; Schäfer ID *The Law of Access to Children* 14-16; Pantazis 1996 *SALJ* 8 at 14.

It was, therefore, not surprising that, despite the promise of its original title,<sup>203</sup> the Natural Fathers of Children Born out of Wedlock Act,<sup>204</sup> which was adopted as a direct consequence of the SALRC's investigation, did not envisage an order for access, custody or guardianship being granted in favour of the natural father merely on the grounds of his genetic or biological link to his child.<sup>205</sup> The Act in fact rather confirmed the common law position, *ie* that (biological) paternity is no guarantee for acquiring parental responsibilities and rights. In terms of this Act, the High Court could only grant parental responsibilities and rights to the natural father upon being satisfied that it would be in the best interests of the child<sup>206</sup> having regard to the (predominant) social criteria mentioned in section 2(5) of the Act. The Act did not make provision for the automatic acquisition of parental responsibilities and rights by a biological father of a child.

The legal recognition of unmarried fathers as parents came under the spotlight again in the course of the SALRC's investigation on the review of the Child Care Act.<sup>207</sup> While admitting that the maternal preference in the context of the

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<sup>203</sup> The SALC Working Paper on the *Rights of a Father in Respect of His Illegitimate Child* contained two Bills (Annexures A and B) that were published for comment. Both Bills were entitled the "Rights of Fathers of their Illegitimate Children [Bill]". The SALRC in its subsequent Report recommended (in accordance with the views expressed by Sonnekus) that the name of the recommended Bill(s) be amended to the "Powers of Natural Fathers of Illegitimate Children [Bill]", since it was strictly speaking incorrect to refer to "rights" of natural fathers because "... parental powers of authority do not constitute a right because of the absence of the subject object relationship, but they do constitute a competence derived from the norms of objective law": See SALC Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.18. The Natural Fathers of Children Born out of Wedlock Act 86 of 1997 which was eventually enacted, differed markedly from the Bill proposed by the SALRC and sidestepped the problematic issue of terminology by not referring to either "rights" or "powers".

<sup>204</sup> 86 of 1997.

<sup>205</sup> Unlike the dispensation opted for, the Bill (contained in Annexure B of the SALC Working Paper on the *Rights of a Father in Respect of His Illegitimate Child*) which was eventually rejected by the SALC in its Report on the *Rights of a Father in Respect of His Illegitimate Child* par 8.4, made provision for an automatic right of access for natural fathers to their illegitimate children, subject to a court order directing otherwise. The onus would, therefore, have been on the mother to circumscribe or limit such right in the best interests of the child. In accordance with the position under the new Children's Act 38 of 2005, a donor and a rapist-father were expressly excluded from the entitlement of such access. Both the Bills contained in the Working Paper granted the natural father a so-called "preferential right" in relation to any person other than the mother to whom custody and guardianship had been granted. In the case of the adoption of the child "... by someone other than the husband of the mother", the father was given the right to be notified and heard on the matter: See Annexures A and B to the SALC Working Paper on the *Rights of a Father in Respect of His Illegitimate Child*. For a discussion on the current rights of natural fathers with regard to the adoption of their children born out of wedlock, see 7.2.3 and 7.2.5.1 below.

<sup>206</sup> S 2(2)(a) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

<sup>207</sup> 74 of 1983.

acquisition of parental responsibilities and rights appears to violate a requirement of formal equality, the SALRC supported Cockrell<sup>208</sup> insofar as he is of the opinion that it may, on the other hand, "... not violate a deeper notion of substantive equality which underpins our constitutional commitment to egalitarianism". Substantive equality would, according to the SALRC, take cognisance of the –

"... actual social and economic conditions that prevail in South Africa and, in particular, the gender based division of parenting roles and the economic subordination of women occasioned in the main by their childcare responsibilities".<sup>209</sup>

These considerations may then –

"... justify the conclusion that, at the current stage of South African societal and economic development, the *mere* existence of a biological tie should not in itself be sufficient to justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is willing to shoulder the responsibilities of the parental role."<sup>210</sup>

This view largely echoed earlier sentiments expressed by Mahomed DP in *Fraser v Children's Court, Pretoria North, and Others*:<sup>211</sup>

"A child born out of a union which has never been formalised by marriage often falls into the broad area between the two extremes expressed by the case where he or she is so young as to make the interests of the mother and the child in the bonding relationship obvious and the child who is so old and mature and whose relationship with the father is so close and bonded as to make protection of the father-child relationship equally obvious. There is a vast area between such anomalies which needs to be addressed by a nuanced and balanced consideration of a society in which the demographic picture and parental relationships are often quite different from those upon which 'first world' western societies are premised; by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to

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<sup>208</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.1.

<sup>209</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.1.

<sup>210</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.1. A number of authors share this view: See in particular Clark & Goldblatt Ch 7 in *Gender, Law and Justice* (at 227), but also Sonnekus & Van Westing 1992 *THR-HR* 232 (at 245); Church 1992 *Codicillus* 32 at 36; Kaganas in Murray *Gender and the New South African Legal Order* (at 181); Goldberg 1993 *SALJ* 261 at 274; Schweltnus 1996 *Obiter* 153 at 159; Goldberg 1996 *THR-HR* 282 at 294; Wolhuter 1997 *Stell LR* 65 at 78.

<sup>211</sup> 1997 2 SA 261 (CC) at [29].

develop and enjoy close relationships with a child and by the societal interest in recognising and seeking to accommodate both.”

While not being able to come to an agreement on other categories of unmarried fathers who should automatically be vested with parental responsibilities and rights, the SALRC<sup>212</sup> recommended the inclusion of at least the following categories in the new children’s statute:

- (i) The father who has acknowledged paternity of the child and who has supported the child within his financial means.
- (ii) The father who, subsequent to the child’s birth, has cohabitated with the child’s mother for a period or periods which amount to not less than one year.<sup>213</sup>
- (iii) The father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than twelve months, whether or not he has cohabited with or is cohabiting with the mother of the child.<sup>214</sup>

Although the abovementioned proposals elicited widely diverging comments,<sup>215</sup> the SALRC defended its proposals as “... balanced, pragmatic, and legally and constitutionally sound”.<sup>216</sup> The initial Children’s Bill proposed by the SALRC was consequently drafted in accordance with these recommendations.<sup>217</sup> While the Children’s Act<sup>218</sup> which was ultimately adopted still distinguishes between the acquisition of parental responsibilities and rights by married fathers and unmarried fathers and still requires a commitment to either the mother of the child or the child

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<sup>212</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.4.

<sup>213</sup> A proposal to the effect that the *pater est* presumption should apply in *de facto* marriages (referred to as “n geslagsgemeenskap”) was already made by Labuschagne in 1984: See Labuschagne 1984 *De Jure* 332 at 336. The rationale behind this approach, according to Labuschagne, “... is om die reg by die werklikheid uit te bring” (at 336).

<sup>214</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.4.

<sup>215</sup> SALC Report on the *Review of the Child Care Act* par 7.4.1.

<sup>216</sup> SALC Report on the *Review of the Child Care Act* par 7.4.2.

<sup>217</sup> See CI 33(1)(a) and (b) of Draft Children’s Bill [B – 2002] attached as Annexure “C” to SALC Report on the *Review of the Child Care Act*. For further information regarding the status of this Bill, see 1.3 above.

<sup>218</sup> 38 of 2005.

itself for parental responsibilities and rights to be acquired automatically, the final provisions bare little resemblance to those initially drafted and will form the focus of the remainder of this discussion.

#### **4.2.3.2 Children's Act 38 of 2005**

##### **(a) Introduction**

As in the case of mothers, the Children's Act<sup>219</sup> does not use the word "acquires" in describing the assumption of parental responsibilities and rights by a *married* father.<sup>220</sup> However, in the case of an *unmarried* father, the Act explicitly states that if he does not "have" such responsibility through marriage he will "acquire" it provided the requirements of section 21 are satisfied.<sup>221</sup> The acquisition of legal fatherhood discussed in this section is deemed automatic for purpose of this thesis because the acquisition of responsibilities and rights is not subject to the prior application of the best interests-standard by the state.<sup>222</sup>

It is at this point perhaps appropriate to discuss an objection raised by Bonthuys<sup>223</sup> to the whole scheme devised in terms of section 21 insofar as "... there appears to be a failure to take account of the best interests of children in the provisions awarding automatic rights to certain unmarried fathers".<sup>224</sup> It is submitted that the criticism does not appreciate the fact that the "automatic" award of parental responsibilities and rights is just that – automatic - and can thus, by its

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<sup>219</sup> 38 of 2005.

<sup>220</sup> S 20.

<sup>221</sup> The Act does not regulate the acquisition of parental responsibilities and rights by a biological father who is still a child: See 4.2.2 above.

<sup>222</sup> The state is represented in this context by the courts and the family advocates appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

<sup>223</sup> Bonthuys 2006 *Stell LR* 482 at 487.

<sup>224</sup> It is interesting to note that the automatic acquisition of parental responsibilities and rights by mothers has escaped the same criticism. This, despite the fact that the law presumes that all women are by reason of their giving birth to a child suitable to assume responsibility in respect of that child. A mother will thus automatically acquire parental responsibilities and rights in respect of her child irrespective of what may be her obvious unsuitability to assume such responsibilities, for eg in cases where some or even all her already born children have been removed from her care and placed in alternative care. The fact that her parental responsibilities and rights may be curtailed or even terminated at a later stage when the child's best interests demand such a course of action, does not alter the fact that she is initially vested with full parental responsibilities and rights, without any regard to what may or may not be in the best interests of the child. For a consideration of the constitutionality of the position of mothers, see 4.3.2.2 (b) below.

very nature, not expressly be made subject to the best interests of the child-standard. The best interests of the child can, and is, only relevant where parental responsibilities and rights are “assigned”.<sup>225</sup> If the automatic allocation of parental responsibilities and rights was to be made subject to the standard in question, it would mean that the anticipated award would first have to be assessed in terms of the standard, and then approved, in which case the award would not have taken place “automatically”. This, however, does not mean that the best interests of the child have been disregarded as far as the automatic allocation of parental responsibilities and rights is concerned. In fact, just the contrary. The best interests of the child are reflected and built into the criteria for the automatic acquisition of parental responsibilities and rights. Simply put, it means that the law deems it to be in the best interests of a child that its mother automatically assumes legal responsibility at birth and that the biological father only assumes such responsibilities and rights if he is married to the mother or falls within the categories of fathers described in section 21.<sup>226</sup>

As noted before, and now confirmed by the provisions of the new Act, whether married or not, only *biological* fathers can automatically acquire parental responsibilities and rights in respect of their naturally conceived child or children.<sup>227</sup> A biological father of a child conceived through the rape or incest with the child’s mother is, however, barred from qualifying as a parent for purposes of the Act.<sup>228</sup> As such he can probably not, as previously contended,<sup>229</sup> acquire parental responsibilities and rights automatically in the way that other biological fathers would be able to do.<sup>230</sup> The justification for the exclusion of these fathers

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<sup>225</sup> In terms of s 22 by agreement, where the best interests of the child standard is expressly made applicable in terms of s 22(5), or ss 23 and 24 where the standard applies in terms of s 23(2)(a) and 24(2)(a). The standard is also made expressly applicable in the case of an adoption (s 230(1)(a)) and surrogacy (s 295(e)).

<sup>226</sup> This viewpoint has now expressly been confirmed by Murphy J in *Botha v Dreyer* Unreported Case 4421/08 (T) at [43]: “The fact remains: unmarried fathers are entitled to be co-holders of those responsibilities and rights and no case needs to be made out that it will be in the best interests of the child to bestow them.”

<sup>227</sup> In the case of homologous artificial fertilisation (*ie* fertilisation using the sperm of the husband of the mother), the biological father would also acquire parental responsibilities and rights automatically in respect of the child conceived as a result of such artificial fertilisation: See s 40(1) and discussion in 4.3.3.1 below.

<sup>228</sup> S 1(1) *sv* “parent”.

<sup>229</sup> See 4.1 above.

<sup>230</sup> See (b) and (c) below.



as parents can be found in the moral indignation at the manner in which the child was conceived.<sup>231</sup> It is, however, submitted that an express exclusion inserted in sections 20 and 21<sup>232</sup> would have avoided the unnecessary speculation about the extent to which such fathers are able to acquire parental responsibilities and rights.

The term “biological” in the case of a “biological father” can, lastly, only refer to two of the three connections mentioned in the discussion of the term “biological mother” in paragraph 4.2.1 above. A biological father can thus only refer to the genetic father of a naturally conceived child or the male progenitor of a child conceived by artificial fertilisation. In contrast to the position relating to the determination of motherhood, a child conceived by natural means can as a result only have one biological father.

#### **(b) Commitment to mother**

The Children’s Act<sup>233</sup> envisages various degrees of commitment to the mother as being sufficient to vest full parental responsibilities and rights in the biological father. Not only marriage,<sup>234</sup> as the most committed relationship, but now also a permanent life-partnership is considered sufficient to confer parental responsibilities and rights on the father – responsibilities and rights that, once acquired, are exercised jointly with the mother of the child.<sup>235</sup> It is important to note that the provisions apply retrospectively, regardless of whether the child in question was born before or after the commencement of the Act.<sup>236</sup>

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<sup>231</sup> See *Fraser v Children’s Court, Pretoria North, and Others* 1997 2 SA 261 (CC) [27] where such fathers were also deemed unworthy of the right to consent to the adoption of their children.

<sup>232</sup> Similar to those found in s 26(2) (“Person claiming paternity”) and s 236(3)(b) (“When consent [to adoption] not required”).

<sup>233</sup> 38 of 2005.

<sup>234</sup> The only way in which the father could acquire parental responsibilities and rights in terms of the common law.

<sup>235</sup> This will, however, not be the case where the mother is still a child: See 4.2.2 above. Ss 30 and 31 of the Children’s Act 38 of 2005 regulate the co-exercise of parental responsibilities and rights held by co-holders.

<sup>236</sup> S 21(4), which came into operation on 1 Jul 2007.

**(i) Marriage**

Section 20 provides as follows:<sup>237</sup>

- “The biological father of a child has full parental responsibilities and rights in respect of the child-
- (a) if he is married to the child’s mother; or
  - (b) if he was married to the child’s mother at -
    - (i) the time of the child’s conception;
    - (ii) the time of the child’s birth; or
    - (iii) any time between the child’s conception and birth.”
- “Marriage” for purposes of the Children’s Act<sup>238</sup> is defined in very wide terms as including any marriage recognised in terms of South African law or customary law or a marriage concluded in accordance with a system of religious law subject to specified procedures.<sup>239</sup> This means that the biological father can acquire parental responsibilities and rights in respect of his child if he is or was married to the mother in terms of the Marriage Act,<sup>240</sup> the Recognition of Customary Marriages Act<sup>241</sup> or the Civil Union Act.<sup>242</sup> The latter Act allows parties to conclude either a marriage or a civil partnership. Since the Civil Union Act<sup>243</sup> is couched in gender neutral terms it allows for heterosexual as well as same-sex marriages or civil partnerships. Considering the fact that section 20 of the Children’s Act<sup>244</sup> explicitly refers to a “father” who is married to the “mother”, the provision is clearly not applicable in the case where a biological father marries another man. According to Bonthuys<sup>245</sup> the section will not survive constitutional scrutiny on the ground that it discriminates on the basis of sexual orientation, since it does not allow for the automatic acquisition of parental responsibilities and rights by lesbian partners of biological mothers. While this would ostensibly appear to be the case, the fact is that sections 19, 20

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<sup>237</sup> Also in operation since 1 Jul 2007.

<sup>238</sup> 38 of 2005.

<sup>239</sup> S 1(1) *sv* “marriage”.

<sup>240</sup> 25 of 1961.

<sup>241</sup> 120 of 1998.

<sup>242</sup> 17 of 2006, which came into operation on 30 Nov 2006.

<sup>243</sup> 17 of 2006.

<sup>244</sup> 38 of 2005.

<sup>245</sup> Bonthuys 2006 *Stell LR* 482 at 489.

and 21 are concerned with the acquisition of parental responsibilities and rights by biological mothers and fathers. Since same-sex couples cannot be the biological parents<sup>246</sup> of a child, they would “naturally” fall outside the scope of these provisions because of a biological impossibility. Married lesbian partners/spouses can in fact automatically acquire parental responsibilities and rights in terms of section 40 in the case of an artificially conceived child. To the extent that section 40 excludes the possibility of unmarried lesbian partners acquiring parental responsibilities and rights on the same basis as unmarried fathers in terms of section 21, the criticism would be fully justified.<sup>247</sup>

A civil union concluded between the biological father and the mother of the child, regardless of whether it is called a “marriage” or a “civil partnership”, is covered by the term “marriage” since section 13(2) of the Civil Union Act<sup>248</sup> expressly provides that any reference to marriage in any law or common law includes a civil union. Since a marriage concluded in terms of customary law is retrospectively recognised in terms of the Recognition of Customary Marriages Act<sup>249</sup>, it would be difficult to imagine a customary marriage that will not fall within the ambit of this Act. The unnecessary reference to “a marriage concluded in terms of customary law” can be explained by the fact that the definition of “marriage” found in the Child Care Act<sup>250</sup> was incorporated into the Children’s Act<sup>251</sup> without reconsideration of the changed legal position brought about by the enactment of the Recognition of Customary Marriages Act.<sup>252</sup> A religious marriage which is as yet not formally recognised in South Africa will also suffice for purposes of this section. While a couple married in terms of Muslim religious law, for example, would thus not be considered legally

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<sup>246</sup> A man and a woman are still needed if a child is to be born.

<sup>247</sup> See 4.3.2.2(a) below.

<sup>248</sup> 17 of 2006.

<sup>249</sup> 120 of 1998.

<sup>250</sup> 74 of 1983.

<sup>251</sup> 38 of 2005.

<sup>252</sup> 120 of 1998, that retrospectively gave full legal recognition to customary marriages.

married in terms of South African law in general, the couple is deemed to be married for purposes of the Children's Act.<sup>253</sup>

In terms of the proposed draft Domestic Partnerships Bill [B-2008], a recognised marriage will create an impediment to the registration of a domestic partnership.<sup>254</sup> Where a child is born into a registered partnership between persons of the opposite sex, the male partner will be deemed to be the biological father and regarded as the legal parent of the child as if he was married to the mother of the child.<sup>255</sup> The draft Bill is silent on the position of children of registered partners who are of the same sex.<sup>256</sup> Since such partners would only be able to conceive artificially, the status of the partners will ostensibly be regulated by section 40 of the Children's Act.<sup>257</sup> The problems and possible unconstitutionality of the latter section will be discussed in 4.4.2.2(a) below.

- In keeping with the common-law possibility of *legitimatio per subsequens matrimonium*,<sup>258</sup> a child born of parents who marry each other at any time after the birth of the child must in terms of section 38(1) of the Children's Act<sup>259</sup> "... for all purposes be regarded as a child born of parents married at the time of his or her birth".

As pointed out by Heaton,<sup>260</sup> section 38 recasts section 4 of the now repealed Children's Status Act,<sup>261</sup> with the significant difference that section 38 retroactively confers parental responsibilities and rights on the father of

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<sup>253</sup> 38 of 2005. It is not clear whether, or to what extent, the qualification "... subject to specified procedures" provided for in s 1(1) *sv* "marriage" will have an effect on the recognition of religious marriages.

<sup>254</sup> Cl 4(1) of the Domestic Partnerships Bill: Published for comment in GG 30663 dd 14 Jan 2008.

<sup>255</sup> Cl 17 of the Domestic Partnerships Bill. The provision clearly incorporates the *pater est* presumption in the realm of domestic partnerships that are registered.

<sup>256</sup> Although the preamble acknowledges "... that there is no legal recognition or protection for opposite-sex couples in permanent domestic partnerships", the provisions of the draft Bill are couched in gender neutral terms referring throughout to a "partner" in a domestic partnership. See cl 1 *sv* "domestic partner" and "domestic partnership".

<sup>257</sup> 38 of 2005.

<sup>258</sup> Spiro *Parent and Child* 22-23; SALC Report on the *Legal Position of Illegitimate Children* par 5.2.

<sup>259</sup> 38 of 2005.

<sup>260</sup> Heaton Ch 3 in Davel *Commentary on Children's Act* 3-40.

<sup>261</sup> 82 of 1987.

the child as if he was married to the mother at the time of the child's birth. According to Human<sup>262</sup> the provisions of section 38 should be welcomed since it resolves the "conflict" between section 4 of the Children's Status Act,<sup>263</sup> in terms of which the acquisition of parental responsibilities and rights by the father was not retrospective and section 11(1) of the Births and Deaths Registration Act,<sup>264</sup> which made it possible for such a child to be registered "... as if such child's parents were legally married to each other at the time of his or her birth". The new provision, like its predecessor, applies "... despite the fact that the parents could not have legally married each other at the time of the conception or birth of the child".<sup>265</sup> According to Van Heerden<sup>266</sup> the provision contained in the Children's Status Act<sup>267</sup> was in principle wide enough to include the legitimation by subsequent marriage of adulterine children and, in exceptional cases, legitimation of incestuous children.<sup>268</sup> A marriage between incestuous parents<sup>269</sup> can for all practical purposes be considered a legal impossibility.<sup>270</sup> While marriage to a rapist father is easily conceivable, as in the case where the child is conceived as a result of

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<sup>262</sup> Human *JQR* Children 2006(2) (Jutastat e-publications).

<sup>263</sup> 82 of 1987.

<sup>264</sup> 51 of 1992.

<sup>265</sup> S 38(2).

<sup>266</sup> Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 432.

<sup>267</sup> 82 of 1987: S 4.

<sup>268</sup> While Van Heerden admits that the possibility of legitimation of incestuous children by the subsequent marriage of their parents will be excluded in the majority of cases such as where the parents are related by consanguinity or affinity in the direct line, Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 332-333 fn 17 mentions at least the following two examples: (a) Legitimation by an incestuous putative marriage as in the case of *M v M* 1962 2 SA 114 (GW); and (b) where a child conceived by parents related by affinity in the collateral line *before* s 28 of the Marriage Act 25 of 1965 (in terms of which all remaining impediments to marriage with a divorced or deceased spouse's collaterals were removed) is legitimated by the subsequent marriage of the parents *after* the commencement of the Act: See Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 333 fn 17.

<sup>269</sup> The common law crime of incest has now been substituted with the statutory crime of incest enacted in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (in operation since 16 Dec 2007). In terms of s 12 of the Act the unlawful and intentional engagement in an act of sexual penetration by "[p]ersons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship" constitutes incest. Subs (2) specifies these prohibited degrees in accordance with the common law and the Marriage Act 25 of 1961 (s 28).

<sup>270</sup> The examples of the legitimation of incestuous children discussed by Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 332-333 fn 17 and 432 fn 348 can be ignored for present purposes since they either do not envisage the conclusion of a valid marriage (as in the case of a putative marriage such as *M v M* 1962 2 SA 114 (GW)) or no longer constitute incest (as in the case of parents related by affinity in the collateral line).

marital rape,<sup>271</sup> section 38 only regulates the acquisition of parental responsibilities and rights in the case of the “subsequent” marriage of the “parents”. Since a father who conceives a child through the rape of the mother does not fall within the definition of “parent” in terms of the Children’s Act,<sup>272</sup> it could be argued that in the unlikely event of the mother marrying the father of the child conceived as a result of the rape of the mother, subsequent to the child’s birth, the acquisition of parental responsibilities and rights will not be governed by section 38.<sup>273</sup> In terms of this view the rapist father would not automatically acquire parental responsibilities and rights in respect of the child conceived through the rape of the mother – even if he marries the mother of the child subsequent to the child’s birth. In terms of the Constitution, the differential treatment of rapist fathers under these circumstances could probably be considered “fair” discrimination on moral grounds.<sup>274</sup> On the other hand, the provision may arguably constitute an infringement of the child’s constitutional right not to be discriminated against on ground of birth and social origin.<sup>275</sup> Despite these objections, such fathers do have an alternative remedy insofar as they probably can, as argued before, be assigned parental responsibilities and rights by agreement with the mother<sup>276</sup> or by order of court<sup>277</sup> in appropriate cases where it is deemed to be in the best interests of the child.

- It is evident from the wording of section 20 that the marriage with the biological mother of the child will only bestow parental responsibilities and rights on the *biological* father. The question is whether the provision signifies a departure from the common law *pater est quem nuptiae*

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<sup>271</sup> Originally criminalised in s 5 of the Prevention of Family Violence Act 133 of 1993. The provision has since been repealed by s 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which now criminalises any non-consensual sexual penetration in s 3 of the Act (in operation since 16 Dec 2007).

<sup>272</sup> 38 of 2005: S 1(1) *sv* “parent”.

<sup>273</sup> See 4.1 above.

<sup>274</sup> The test to be applied to determine unfair discrimination is discussed in 4.3.2.2 below.

<sup>275</sup> In terms of s 9(3) of the Constitution. See also in this regard Van Heerden *et al* *Boberg’s Law of Persons and the Family* 432 fn 350. The effect of the suggested interpretation of s 38 would be a classic example of visiting “... the sins of parents upon their offspring” as suggested in the footnote.

<sup>276</sup> S 22.

<sup>277</sup> Ss 23 and 24. Adoption may theoretically also be an option for such fathers.

*demonstrant*-rule in terms of which the (legal) father is designated by the marriage to the mother and not by a biological relationship with the child? While the common law presumption of paternity creates a fiction of (biological) paternity even if it does not exist, section 20 ostensibly makes not only the marriage but also a genetic relationship with the child a precondition for the acquisition of parental responsibilities and rights.<sup>278</sup> Since paternity could not, as a matter of fact, be proved, the common law had to make use of a fiction to assign a legal father for a legitimate child.<sup>279</sup> Whether vested with parental responsibilities and rights by reason of a marriage with the mother (or, for that matter, held liable for the maintenance of a child born out of wedlock based upon having sexual relations with the mother) biological paternity was always presumed – never certain.<sup>280</sup> Now that paternity can in fact, with a DNA test, be determined with almost 100% certainty, it can be argued that it is no longer necessary to make use of a legal fiction in this regard.<sup>281</sup> The section is clearly an attempt to bring the legal presumption of paternity in line with the biological reality.<sup>282</sup>

- This insight, however, still leaves the question begging whether and to what extent the presumption of paternity still applies? The legislator could clearly not have intended to make the proof of biological paternity a

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<sup>278</sup> Cf, however, Heaton Ch 3 in *Commentary on Children's Act 3-8*, who in my opinion quite correctly, maintains that the common law rule has been left "unchanged".

<sup>279</sup> Thomas 1988 *SALJ* 239 at 247 explains the origin of the common law presumption of paternity and legal paternity embodied in the maxim *pater is est quem nuptiae demonstrant* as follows: "Since direct proof of paternity was impossible ... the father is indicated by presumptions. The law draws deductions from a known fact – the marriage or sexual intercourse. Thus paternity is based on presumptions, and the law assumes that these presumptions cover the biological reality. In the case where the presumption does not conform to the biological truth, the law makes provision for the rebuttal of the presumption. However, proof to rebut the presumption is difficult and sometimes impossible to adduce, with the result that a man is considered to be the father of the child even if he is not."

<sup>280</sup> Thomas 1988 *SALJ* 239 at 240 refers to "presumptive fathers".

<sup>281</sup> Eckhard 1992 *TSAR* 122 at 124-125. The approach adopted in this regard can thus be seen as an endeavour to oust legal presumptions in favour of biological and social realities as propagated in the ECHR's judgment of *Kroon v The Netherlands* (1995) 19 ECHR 263: "In the Court's opinion, 'respect' for 'family life' requires that biological and social reality prevail over legal presumptions which ... flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone".

<sup>282</sup> According to Altenbernd 1999 *Florida State University Law Review* 219 at 236, the common law in this way "... indirectly implemented a policy that children need families, homes, heritage, and inheritance more than biological fathers need rights or even responsibilities".

precondition for the acquisition of parental responsibilities and rights by the married father. As was the case in terms of the common law, it is submitted that the husband will be deemed to have been clothed with parental responsibilities and rights as though he is the biological father of the child.<sup>283</sup> The existence of the marriage to the mother of the child will serve as *prima facie* proof of the fact that the husband is the biological and consequently the legal father of the child until the contrary can be proved – which is exactly the same as saying *pater est quem nuptiae demonstrant*. If the husband of the mother is able to prove that he is not the biological father of the child, he will no longer be liable to support the child nor continue to be legally responsible for the child. The mother of the child (and the wife of the now unrelated husband) is then presumably in a position to prove paternity in the same way that she would have been able to do as an unmarried mother.<sup>284</sup> The proof of paternity will, however, still not automatically vest the “true” biological father with parental responsibilities and rights unless he was living in a permanent life-partnership with the married mother at the time of the birth of the child<sup>285</sup> or

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<sup>283</sup> The husband may, eg initially assume parental responsibilities and rights but then, for whatever reason, perhaps at the time of divorce or separation, start to doubt or contest paternity.

<sup>284</sup> The Children’s Act 38 of 2005 has for this purpose incorporated s 1 of the Children’s Status Act 82 of 1987 (that was repealed by the Children’s Act 38 of 2005: GG 30030 dd 29 Jun 2007) in terms of which the man with whom the mother can prove she had sexual relations with, is presumed to be the biological father of the child “born out of wedlock”. But see *F v L* 1987 4 SA 525 (W) in which the court (incorrectly it is deemed) intimated that the *pater est* presumption in the case of a married woman can also apply simultaneously with the presumption of paternity following upon a man’s admission of sexual intercourse with an unmarried mother. According to Thomas 1988 *De Jure* 161 at 163, the second (latter) presumption can only become a possibility when either the mother or her husband (and nobody else) has been successful in rebutting the *pater est* presumption. Cf, however, Boberg 1988 *BML* 112 at 114 who finds it difficult to see why the *pater est quem nuptiae demonstrant* presumption should be denied to “any” interested person, especially the would-be father. According to an international report by Schwenzler 2007 *Electronic Journal of Comparative Law*, there is a growing trend to allow the child the right to challenge the husband’s fatherhood, in line with the growing tendency to recognise the child’s right to know its origins (already possible in countries such as Belgium, China/Macau, Croatia and the Netherlands). According to Schwenzler’s report the most modern trend is, however, to allow the biological father to challenge the husband’s paternity, with Norway taking the most extensive approach by allowing the challenge without restrictions while other jurisdictions (such as Greece, USA, Denmark and the Netherlands) subject the challenge to a time limit. Under German law, a challenge by the putative biological father is, *inter alia*, only allowed if there is no longer a social relationship between the child and the presumed father. In deciding whether a putative or alleged father may apply for a blood test, the English judiciary primarily asks whether the child would benefit from having contact with him (as per the said report).

<sup>285</sup> This could be the case if the mother was separated from her husband at the time of the birth. In *Michael H v Gerald D* (491 US 110 (1989)) a man who had indisputably fathered a child during an affair with a married woman was barred from seeking to establish himself as a legal father over



has otherwise shown a commitment to the child as required by section 21(1)(b). Both the husband who assumed the role of the father without actually being the biological father and the (unmarried) biological father who does not acquire parental responsibilities and rights either in terms of section 20 or section 21, may presumably acquire responsibilities and rights in terms of a parental responsibilities and rights agreement with the mother in terms of s 22, or apply for parental responsibilities and rights to be assigned to them as persons "... having an interest in the care, well-being or development" of the child in terms of sections 23 and 24 of the Children's Act.<sup>286</sup> Once paternity is proved the biological father will, of course, be liable to contribute towards the maintenance of the child, whether or not he has automatically acquired parental responsibilities and rights as a consequence thereof.<sup>287</sup>

- The husband who suspects that he is not the biological father of the child may, however, have some difficulty in confirming his suspicions if the mother for example refuses, on her own or her child's behalf, to consent to the taking of a paternity test. While the current legal position seems to be uncertain,<sup>288</sup> it does seem as though the courts have as a general rule been

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the objections of the husband. The US Supreme Court held that the State's policy of treating the marital presumption as conclusive was justified by its interest in protecting both marriage and the child's established bonds within the intact marital family from external disruption: Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 5. See also Altenbernd 1999 *Florida State University Law Review* 219, discussing a similar problem arising in respect of what he calls "quasi-marital children" in the US cases of *Department of Health and Rehabilitative Services v Privette* (617 So 2d 305 (Fla 1993) at 308 fn 4) and *Daniel v Daniel* (695 So 2d 1253 (Fla 1997)). In both these cases the mothers were unsuccessful in shifting the legal status of the marital father to the biological father (at 220). The European Court of Human Rights, on the other hand, allowed the parents of a child born while the mother was married to another man, to amend the birth records to allow the biological father, with whom the mother had never cohabitated, to recognise the child: See *Kroon v The Netherlands* (1994) 19 EHRR 263 as discussed in Janis *et al European Human Rights Law* 387.

<sup>286</sup> 38 of 2005, which have as yet not come into operation. For a discussion of these sections, see 5.3 below.

<sup>287</sup> S 21(2) explicitly states that "[t]his section (dealing with the acquisition of parental responsibilities and rights by unmarried fathers) does not affect the duty of a father to contribute towards the maintenance of the child".

<sup>288</sup> Davel & Jordaan *Law of Persons* 118. For an overview of the most important case law on the issue, see Davel & Jordaan *Law of Persons* 113-118 and SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* pars 7.3.5 and 7.3.6.

unwilling to compel blood tests in the case of a legitimate child.<sup>289</sup> Despite the fact that most of the disadvantages and stigma clinging to a birth out of wedlock have been removed, the husband or civil union partner of the mother of the child may still be the only available sources of maintenance for the child. Especially in cases where the “true” biological father is either unknown or untraceable. In such cases the reticence of the courts “to seek the truth” (by ordering the parties to subject themselves to blood tests) may, it can be argued, still be justified as not being in the best interests of the child as “the truth” may deprive the child of a legal father if not a biological father as well (if he is unknown or untraceable). Cockrell,<sup>290</sup> on the other hand, argues that “[t]his sort of paternalism is wholly at odds with the strong idea of autonomous personhood on which Chapter 2 of the Constitution is premised ...” and that “... while a court may in principle refuse to order blood tests on the basis that these would not be in the child’s best interests, it would not be constitutionally legitimate to base such a decision on an assessment that deliberate insulation from the truth can ever be in the long-term interests of a person”. In terms of this viewpoint it would seem to be justifiable to refuse to order the blood tests based on the best interests of the child as long as the best interests are not seen as withholding the truth from the child. This argument, it is submitted, does not take the matter any further. Surely the refusal by the court to order the blood tests will necessarily have the very effect of withholding the truth from the child – a consequence which must purportedly not be the aim since it is not seen as being in the best interests of the child?<sup>291</sup> Other authors have argued that

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<sup>289</sup> *E v E* 1940 TPD 333; *Seethal v Pravitha* 1983 3 SA 827 (D); *Nell v Nell* 1990 3 SA 889 (T); *O v O* 1992 4 SA 137 (C); *D v K* 1997 2 BCLR 209 (N). Several reasons have been advanced to justify such refusal including the infringement of a person’s right to bodily integrity and lack of inherent jurisdiction. See in this regard Mooki 1997 *SAJHR* 565 at 579, who contends that the issue of compelled blood testing falls within the realm of the right to freedom and security of the person (the position in both the USA and Canada) and not privacy as held in *D v K* 1997 2 BCLR 209 (N). The majority of the courts in SA confronted with the issue have, however, justified the refusal based on the best interests of the child standard. For an overview of the position before the Children’s Act 38 of 2005, see SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* pars 7.3.5 and 7.3.6.

<sup>290</sup> Cockrell in *Bill of Rights Compendium* par 3E26 at 39.

<sup>291</sup> Although Labuschagne 1984 *De Jure* 332 is in favour of making blood tests compulsory for purposes of determining paternity, the recommendation is qualified so extensively (“... tensy een van die partye dit om mediese redes nie kan ondergaan nie of nie om (werklike) godsdienstige redes wil ondergaan nie. In laasgenoemde geval behoort die hof myns insiens nogtans die

“... justice can only be served where the truth is before the court”.<sup>292</sup> With the enactment of a provision similar to that found in the now repealed section 2 of the Children’s Status Act,<sup>293</sup> the legislator has done little to clarify the issue in the new Children’s Act<sup>294</sup> as called for by authors such as Singh<sup>295</sup> and Thomas.<sup>296</sup> Thomas<sup>297</sup> proposed the enactment of legislation allowing for legal paternity to co-exist independently with biological paternity in cases where the common law presumption of paternity is rebutted by the husband. In terms of this view a child would have a legal father, *ie* the husband of the child’s mother who would continue to exercise parental responsibilities and rights despite the absence of a genetic link with the child, as well as a biological father who would be liable to support his natural child. Although Thomas envisaged such a construction as a means to avoid a child being declared born out of wedlock retrospectively which is no longer an issue, the possibility of dual paternity may have been far more beneficial to the child. To illustrate the point one could use the example of a husband who at the time of divorce is able to prove that he is in fact not the biological father of the child. By continuing to be regarded as the legal father of the child the deleterious effect of this discovery may, in terms of the proposal by Thomas, be softened by the fact that the husband would not suddenly be deemed a stranger to the child in the divorce proceedings. If he was still regarded as the legal father he would, generally speaking, share guardianship with the mother of the child after the divorce and would have the right to maintain contact with the child – arrangements which, in view of the parental role played by the husband before the discovery would only seem natural under

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bevoegdheid te hê ... indien dit tot wesenlike voordeel van die kind is” (at 342)) as to render it nugatory.

<sup>292</sup> Taitz & Singh 1995 *THR-HR* 91 at 100.

<sup>293</sup> 82 of 1987 in terms of which a presumption is created that the refusal to submit to blood tests is aimed at concealing the truth concerning the paternity of the child. Heaton Ch 3 in Davel *Commentary on Children’s Act* at 3-40, correctly it is submitted, deems the effect of the corresponding s 37 in the Children’s Act as a weaker incentive to submit to blood tests since the Children’s Act merely compels the court to warn the party of “... the effect which such refusal (to submit to blood tests) might have on the credibility of that party”.

<sup>294</sup> 38 of 2005.

<sup>295</sup> Singh 1993 *De Jure* 115 at 125.

<sup>296</sup> Thomas 1985 *De Rebus* 336.

<sup>297</sup> *Ibid.*

the circumstances. If the “real” biological father can be identified and traced he could be held liable for the maintenance of the child and may even be assigned some parental responsibilities and rights (shared with the mother and the legal father) by agreement with the mother or by order of court if it is deemed in the child’s best interests.<sup>298</sup> Despite the challenge of co-ordinating the exercise of the parental responsibilities and rights held by the different fathers along with the mother, the Children’s Act<sup>299</sup> expressly envisages such a possibility.<sup>300</sup>

- In the recently decided case of *Botha v Dreyer*<sup>301</sup> the applicant sought an order directing the mother and her minor daughter to subject themselves to DNA tests for the purpose of determining whether he, the applicant, is the biological father of the minor daughter. The applicant and the mother were involved in an intimate relationship from February 2006 until April 2007.<sup>302</sup> The child was born on 8 November 2007, about seven months after the relationship between the parties terminated.<sup>303</sup> The mother had by that time married an old boyfriend with whom she had been intimate since early April 2007, at around the same time she fell pregnant.<sup>304</sup> The mother refused to submit herself to the DNA test, maintaining that her husband was the father of her child and that she regarded the DNA test an unnecessary invasion of her rights to privacy and dignity and that such would not be in the best interests of the child.<sup>305</sup> Admitting that “[t]he law on the topic of compulsory blood or DNA testing in parental disputes is not satisfactory”,<sup>306</sup> the court reiterated its power as upper guardian to order such tests provided it considers it to be in the best interests of the child.<sup>307</sup> Murphy J formulated the enquiry in a case such as the present “... as being

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<sup>298</sup> Provided for in ss 22, 23 and 24 of the Children’s Act 38 of 2005.

<sup>299</sup> 38 of 2005.

<sup>300</sup> The co-exercise of parental responsibilities and rights shared by “... [m]ore than one person” (s 30(1)) is regulated by the provisions contained in s 30(2) and (3) and s 31 of the Act.

<sup>301</sup> Unreported Case 4421/08 (T).

<sup>302</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [2].

<sup>303</sup> *Ibid.*

<sup>304</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [4].

<sup>305</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [15].

<sup>306</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [18].

<sup>307</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [19].

whether or not the common law jurisdiction of the High Court might be deployed to override parental privacy in the best interests of the child and/or the administration of justice”.<sup>308</sup> Referring to the new provisions in the Children’s Act<sup>309</sup> in terms of which unmarried fathers are now automatically entitled to parental responsibilities and rights once paternity is established and the requirements of section 21 are complied with, Murphy J concluded:<sup>310</sup>

“Given the extended rights and obligations of unmarried fathers it seems only right that the truth be established, as it can be, in the interests of justice, before burdening a party with responsibilities that might not be his to bear.”

- Ordering the blood tests and discovering the paternity of the child might, in addition, be the only way in which effect can be given to a child’s right to know his parents or origin as embodied in Article 7 of the UNCRC.<sup>311</sup> The right to respect for a child’s private life under Article 8 of the ECHR<sup>312</sup> has been interpreted as including the right of a child to have knowledge of his or her identity which encompasses his or her true paternity.<sup>313</sup> In the case of *Re T(A Child) (DNA Tests: Paternity)*<sup>314</sup> the biological father (or “putative father”) applied for blood tests, including DNA testing, as a preliminary to an application on his part for parental responsibilities and rights and contact orders, relying on the ECHR. While acceding to his request confirming that a child enjoyed the right to knowledge of the identity of his or her father as provided for under Article 8 of the Convention, the court also considered the child’s “competing” right to security with his then *de facto* family. In terms of this perspective the child’s mother and new partner also had a

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<sup>308</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [34].

<sup>309</sup> 38 of 2005.

<sup>310</sup> *Botha v Dreyer* Unreported Case 4421/08 (T) at [42].

<sup>311</sup> In terms of Art 7 of the UNCRC “[t]he child shall be registered immediately after birth and shall have the rights from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents”.

<sup>312</sup> In terms of this Art 8 “[e]veryone has the right to respect for his family life, his home and his correspondence”.

<sup>313</sup> See Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 9, with reference to *Re T (A Child) (DNA Tests: Paternity)* [2001] 2 FLR 1190 1197 and *Re v H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145.

<sup>314</sup> [2001] 2 FLR 1190.

right to respect for their family life free from interference from the man claiming to be the biological father of the child. In finding a balance between these competing rights the court gave the greatest weight to the child's right to know his true identity and "[c]onsequently, any interference with the rights of the mother and her new husband was justified under Article 8(2) (of the ECHR) as being proportionate to the legitimate aim of furthering T's right to certainty as to his true paternity".<sup>315</sup> Since the Constitution does not expressly protect a right to family life, it is difficult to predict with any certainty the outcome of such a case in the South African context. It is, however, apparent that the crucial issue of whether a court should have the power to compel parties to submit to paternity testing has taken on an added constitutional dimension and that the legislator has seen it fit to leave the balancing of the parent's and the child's competing constitutional rights in the discretion of the courts in South Africa.<sup>316</sup>

- A biological father will also automatically acquire parental responsibilities and rights in respect of a child conceived or born from a voidable marriage with the child's mother even if the marriage is subsequently annulled.<sup>317</sup> The continued exercise (and possible re-allocation) of such parental responsibilities and rights upon the annulment of the marriage will be determined, and the children's interests safeguarded,<sup>318</sup> in the same manner as at the time of divorce and need not be given further attention here.<sup>319</sup>
- As was the position under the Children's Status Act,<sup>320</sup> the Children's Act<sup>321</sup>

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<sup>315</sup> Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 11.

<sup>316</sup> S 37 of the Children Act 38 of 2005 pertaining to the issue of paternity testing has, at best, evidentiary value: See comments by Heaton discussed in fn 293 above.

<sup>317</sup> S 39(1) and (6) of the Children Act 38 of 2005.

<sup>318</sup> S 39(2) of the Children Act 38 of 2005.

<sup>319</sup> See s 39(3) of the Children Act 38 of 2005 in terms of which the relevant sections (ss 6 and 8) of the Divorce Act 70 of 1979 and s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 are made applicable.

<sup>320</sup> 82 of 1987.

<sup>321</sup> 38 of 2005.

is silent on the issue of the effect of a putative marriage<sup>322</sup> on the status of the father.<sup>323</sup> According to the SALRC<sup>324</sup> a child born of a putative marriage is regarded as legitimate for all purposes<sup>325</sup> and both parents, therefore, have parental “power” over the child.<sup>326</sup> The matter was given some attention in *W v S and Others* (1)<sup>327</sup> in response to a contention that the Supreme Court (as it was then called) could on the analogy of the *rescriptum principis* grant an order legitimating an illegitimate child, not only in relation to issue of a putative marriage but also to other classes of illegitimate children. Findlay AJ<sup>328</sup> came to the conclusion that the power to grant a declaration of legitimacy can only be exercised in relation to children born of a putative marriage<sup>329</sup> who, in his opinion –

“... are born in circumstances akin to any ordinary lawful marriage but for the legal failure of that union. They were children born to the parties who have to all intents and purposes continued in their union as if they were lawfully married (at least one of the parties who was *bona fide* in the belief that it was valid has done so) and would therefore, but for the operation of law, have enjoyed the benefit of being legitimate. What the law therefore is doing is no more than putting right the position of innocent parties who would otherwise enjoy full rights and status”.<sup>330</sup>

In terms of this view the biological father (with the mother) would automatically acquire full parental responsibilities and rights in respect of a

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<sup>322</sup> A putative marriage is a void marriage where one or both parties in good faith believe(s) the marriage to be validly concluded. For a general discussion of the nature, requirements and consequences of such a marriage, see Labuschagne 1989 *TSAR* 370 at 377-378; Van Schalkwyk *Family Law* 82-86.

<sup>323</sup> The mother’s position remains certain – as the birth-giving mother she automatically acquires full parental responsibilities and rights: See 4.2.1.2 above. The only question is whether she will share these responsibilities and rights with the biological father of the child.

<sup>324</sup> SALC Working Paper on the *Rights of a Father in Respect of His Illegitimate Child* par 3.1.4.

<sup>325</sup> With reference to Spiro 1979 *THR-HR* 405: See SALC Working Paper on the *Rights of a Father in Respect of His Illegitimate Child* par 3.1.4 fn 49. Labuschagne 1996 *Obiter* 30 at 37 maintains that the *pater est quem nuptiae demonstrant* presumption applies equally to voidable marriages as well as putative marriages.

<sup>326</sup> SALC Working Paper on the *Rights of a Father in Respect of His Illegitimate Child* par 3.1.4 with reference to *Engar and Engar v Desai* 1966 1 SA 621 (T) as persuasive authority (quoted in fn 50 of the Working Paper).

<sup>327</sup> 1988 1 SA 475 (N).

<sup>328</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 485I.

<sup>329</sup> With reference to the following authority: Conradie 1947 *SALJ* at 385; *M v M* 1962 2 SA 114 (GW) 116E-117A; *Moola v Aulsebrook NO and Others* 1983 1 SA 687 (N) at 690E.

<sup>330</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 485B-D.

child born from a putative marriage “... to permit the children who, after all, were entirely innocent in the matter, to benefit from it”.<sup>331</sup> Where the child is conceived during the existence of the putative marriage but born after both parents had become aware of the nullity of their union, both parents will similarly automatically acquire full parental responsibilities and rights.<sup>332</sup> If the conception of the child takes place whilst both parents are aware of the nullity of their union, the mother will automatically acquire parental responsibilities and rights and the father only if he falls within the ambit of section 21 of the Children’s Act.<sup>333</sup> Where the putative marriage is, however, void as a result of an incestuous relationship between the parents, the benefits for the child may have been eliminated by the definition of “parent” in terms of the Children’s Act.<sup>334</sup> Excluding the biological father from automatically becoming a parent in law under these circumstances seem patently unfair, especially where such father was *bona fide* unaware of the prohibited relationship when the child was conceived.<sup>335</sup>

Van Schalkwyk,<sup>336</sup> in my view, correctly argues that a child born from a putative marriage should be treated in exactly the same way as a child born from a voidable marriage that is annulled. In this way the parents’ and the children’s interests would be protected in the same way as in a divorce situation. Although the position seems to be “far from clear”,<sup>337</sup> the SALRC is of the opinion that, because the child is deemed to be legitimate, the father should have parental “power” even if he is *mala fide* in the conclusion of the putative marriage.<sup>338</sup> “Fault” on the father’s part should, as contended by the SALRC, “... not enter the picture”<sup>339</sup> since it offers the child the

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<sup>331</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 485B.

<sup>332</sup> The reasoning is analogous to that applied in the case of a valid marriage which is dissolved before the birth of the child.

<sup>333</sup> 38 of 2005. See Van Schalkwyk *Family Law* 84 fn 263.

<sup>334</sup> 38 of 2005: S 1(1) *sv* “parent”.

<sup>335</sup> See Labuschagne 1985 *THR-HR* 435 at 454 who calls for the decriminalisation of incest, especially in the case of impediments based on affinity.

<sup>336</sup> Van Schalkwyk *Family Law* 229.

<sup>337</sup> Hahlo *Husband and Wife* 496. See also Bedil 1984 *SALJ* 231 at 233-234.

<sup>338</sup> SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* par 3.1.4.

<sup>339</sup> SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* par 3.1.4.



optimum degree of protection and avoids the possibility of discriminating against children on ground of their birth and social origin as previously referred to.<sup>340</sup> If the court has to re-allocate parental responsibilities and rights at the time of the declaration of nullity, the parent who has been *mala fide* can, according to the SALRC "... easily be singled out as unfit to have the parental power because of his deception of the other parent".<sup>341</sup> To what extent these sentiments would be considered in the best interests of the children involved and pass constitutional scrutiny is arguable. Statutory guidance in this regard is necessary considering the anticipated increase in the prevalence of putative marriages as a result of the dual matrimonial system (civil as well as customary) adopted in South Africa.<sup>342</sup>

## (ii) Permanent life-partnership

In terms of section 21(1) of the Children's Act,<sup>343</sup> a biological father –

"... who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership ...".

The section extends the rights of a biological father to acquire parental responsibilities and rights automatically where he is not married to the mother of the child, provided he is involved in a permanent life-partnership with the mother at the time of the child's birth.

The original version of this condition as proposed by the SALRC<sup>344</sup> was even more problematic than the current version incorporated in the Children's Act.<sup>345</sup> In

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<sup>340</sup> The child should not be punished for having a deceitful father. See SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* par 3.1.4 for the disadvantage inherent in this point of view.

<sup>341</sup> SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* par 3.1.4.

<sup>342</sup> The issue will further be complicated once the Domestic Partnership Bill is enacted: See discussion of Bill in 4.2.3.2(b)(i) above.

<sup>343</sup> 38 of 2005, which came into operation on 1 Jul 2007.

<sup>344</sup> CI 33(1)(a)-(d) of the proposed Children's Bill [B – 2002] attached as Annexure "C" to the SALC Report on the *Review of the Child Care Act*.

terms of that version the unmarried biological father of a child could acquire parental responsibilities and rights (presumably full and automatic as the provision was not explicit in this regard) if he had lived with the mother for a period of no less than 12 months or for periods which together amount to no less than 12 months. The somewhat arbitrary choice of a period or periods of time amounting to one year was presumably intended to indicate a commitment by the unmarried father to the mother of the child. Whether the nature of such (possibly intermittent) commitment would have been comparable to that found in a marital relationship, is debatable. Although this condition was fortunately scrapped in favour of a relationship in the nature of a permanent life-partnership, the provision remains fraught with difficulties.<sup>346</sup>

- The first fundamental problem relates to the uncertainty of the concept “permanent life-partnership” which is not defined for purposes of the Act. The term “life-partnership” was first employed in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*<sup>347</sup> to describe the nature of the relationship between intimate and mutually interdependent same-sex partners.<sup>348</sup> The term has since, as noted by Schäfer,<sup>349</sup> gained acceptance as a term of art and is usually, as in the provision under discussion, qualified by the adjective “permanent”. In *Volks NO v Robinson and Others*,<sup>350</sup> the only case pertaining to a heterosexual permanent life-partnership, the court referred to the difficulty of establishing the existence of a permanent life-partnership.<sup>351</sup> Mokgoro and O’Regan JJ in a minority judgment, held the following factors to be indicative of the existence of a permanent life-partnership in that case: The length of the

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<sup>345</sup> 38 of 2005.

<sup>346</sup> As also acknowledged by Heaton Ch 3 in *Commentary on Children’s Act* 3-11.

<sup>347</sup> 2000 2 SA 1 (CC) at [86] and [88].

<sup>348</sup> It is interesting to note that while s 21(1)(a) of the Children’s Act 38 of 2005 employs the hyphenated use of the word “life-partnership”, the judiciary (eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) and *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC)) and Schäfer LI Div R *Family Law Service* refers throughout to such a partnership as a “life partnership”. In accordance with the spelling opted for in the Children’s Act 38 of 2005, the hyphenated version will be used in this thesis.

<sup>349</sup> Schäfer LI Div R *Family Law Service* 3.

<sup>350</sup> 2005 5 BCLR 446 (CC).

<sup>351</sup> *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [95].

period of cohabitation (16 years); the fact that Mrs Robinson was paid an allowance to cover household expenses and that her partner was generally responsible for the payment of all the costs of running the household; the fact that Mrs Robinson was declared a dependant for purposes of her partner's medical aid; the undisputed close and intimate relationship between the partners; and the fact that Mrs Robinson nursed her partner through bouts of ill-health.<sup>352</sup> Although not certain at all, the core quality of such a partnership, according to Schäfer,<sup>353</sup> is the presence of a *consortium omnis vitae*, ie “[a]n abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage” including intangibles such as loyalty and sympathetic care as well as the more material needs of life.<sup>354</sup> Other elements may arguably include permanency, a reciprocal duty of support and cohabitation.<sup>355</sup> The adjective “permanent” seems to be superfluous since the concept of a “life” partnership already includes the notion of permanence.<sup>356</sup>

- The second problem relates to the qualification that the life-partnership must have existed “... at the time of the child’s birth”. Since the section seems to draw a parallel between the commitment of a biological father who is married to the mother and a father who is in a marriage-like life-

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<sup>352</sup> *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [104].

<sup>353</sup> Schäfer LI Div R *Family Law Service* 4.

<sup>354</sup> *Peter v Minister of Law and Order* 1990 4 SA 6 (E) at 9G.

<sup>355</sup> Ackerman J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at [88] provided a non-exhaustive list of factors to establish the permanency of the life-partnership: The respective ages of the partners, the duration of the partnership, whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it, how the partnership is viewed by the relations and friends of the partners, whether the partners share a common abode, whether the partners own or lease the common abode jointly, whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home, whether and to what extent one partner provides financial support for the other, whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits, whether there is a partnership agreement and what its contents are, and whether and to what extent the partners have made provision in their wills for one another.

<sup>356</sup> Schäfer LI Div R *Family Law Service* 3 regards the adjective “redundant”. See also Van Schalkwyk *Family Law* 324 fn 18. Cf, however, Ackerman J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at [86] holding that: “Permanent in this context means an established intention of the parties to cohabit with one another permanently”.

partnership with the mother of the child,<sup>357</sup> it is not entirely clear why the commitment should be evident only at the time of the child's birth.<sup>358</sup> A biological father is vested with parental responsibilities and rights if he is married to the mother of the child not only at birth, but also at the time of the child's conception or any time in between the child's conception and birth (and even thereafter).<sup>359</sup> The section is thus to my mind unnecessarily limiting. In the same way that there is no justification to distinguish between the commitment displayed in a marital life-partnership and a non-marital one, there can be no rational reason for limiting the commitment of the father in this manner. The arbitrariness of the limitation is evident if one compares the situation of a biological father who lives with the mother until a day or a week before the birth of the child or starts living with the mother a day or week after the birth of the child, on the one hand, with a father who only happens to live with the mother at the time of the birth but not before or afterwards, on the other hand. Whether the words "at the birth" will be interpreted as strictly as this, remains to be seen. If the father does not fall within the ambit of the section he could of course still acquire parental responsibilities and rights automatically, provided he shows sufficient commitment to the child itself once it is born as outlined in section 21(1)(b) below.<sup>360</sup>

- In the case of a dispute between the biological parents as to whether a permanent life-partnership existed between them at the time of the child's

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<sup>357</sup> A natural father who lives in an informal life-partnership or cohabitation (defined by Schwellnus Div N in *Family Law Service 1* as "... a stable, monogamous relationship where a couple do not wish to, or are not allowed to, get married, live together as spouses") with the mother of his child is, according to Labuschagne 1996 *Obiter* 30 at 38, entitled to respect for his "family life" with his child in terms of Art 8 of the ECHR. Interestingly enough though, the protection can apparently be claimed even if the relationship had ended by the time the child is born: See in this regard Van der Linde unpublished LLD thesis UP 2001 par 6 3 2 3(a) (at 367), who refers to the case of *Keegan v Ireland* (1994) 18 ECHR 342 where the family life between the father and the child was deduced from the past relationship between the parents and the fact that they had at the time consciously chosen to conceive a child.

<sup>358</sup> It is interesting to note that the court in *F v B* 1988 3 SA 948 (D) at 950D specifically rejected the contention that where the mother and father were living together as husband and wife at the time of the birth of the child, the case should be decided on the same basis as where the father has automatic rights of "access", *ie* as in the case of a legitimate child.

<sup>359</sup> See discussion of s 20 of the Children's Act 38 of 2005 in b(i) above.

<sup>360</sup> Discussed in 4.2.3.2 below.

birth "... the matter must be referred for mediation to a family advocate,<sup>361</sup> social worker,<sup>362</sup> social service professional<sup>363</sup> or other suitably qualified person".<sup>364</sup> Any party to the mediation, ie the mother or the father of the child, may have the outcome of the mediation reviewed by a court.<sup>365</sup> "Court" is not defined, either for purposes of the Children's Act<sup>366</sup> in general or for purposes of this particular provision. Since the dispute would concern the vesting of full parental responsibilities and rights in the father, it is submitted that only the High Court would have jurisdiction to review the outcome of the mediation. The reason for this view can be found in the fact that only the High Court has jurisdiction where matters relating to the guardianship of a child are concerned.<sup>367</sup> While no fault can in principle be found with the introduction of mediation as a way of resolving family disputes, the vagueness of the section may give rise to a multitude of problems. It is, for instance, not clear who gets to choose the mediator and whether more than one mediator can be appointed for the particular purpose. The advisability of allowing a person with no legal training, such as a social service professional to mediate the dispute may be questioned.<sup>368</sup> Unless such a person is skilled in the art of mediation it may be extremely difficult to cope with the animosity which usually accompanies such disputes. Who would qualify as a "suitably qualified person"?<sup>369</sup> How would a person, even one that is "suitably qualified" (whatever that may

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<sup>361</sup> Appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987: S 1(1) of the Children's Act 38 of 2005 *sv* "family advocate".

<sup>362</sup> Defined as "... a person who is registered or deemed to be registered as a social worker in terms of the Social Service Professions Act 110 of 1978: S 1(1) of the Children's Act 38 of 2005 *sv* "social worker".

<sup>363</sup> Includes a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security worker who are registered as such in terms of the Social Service Professions Act 110 of 1978: S 1(1) of the Children's Act 38 of 2005 *sv* "social service professional".

<sup>364</sup> S 21(3)(a) of the Children's Act 38 of 2005.

<sup>365</sup> S 21(3)(b) of the Children's Act 38 of 2005.

<sup>366</sup> 38 of 2005.

<sup>367</sup> See in this regard s 45(3). A divorce court also has "exclusive" jurisdiction to consider matters relating to the guardianship of a child (s 45(3)(a)) but since the parties to the dispute in question have never been married, such jurisdiction would not be relevant in the present context.

<sup>368</sup> See in this regard Bonthuys 2001 *SALJ* 329 at 345, who is critical of the role of mental health practitioners in adjudicating matters of law "... in the area of child custody, and possibly also in other areas".

<sup>369</sup> See Heaton Ch 3 in Davel *Commentary on Children's Act* 3-13, who appears to have a similar concern, further questioning whether such a person would have to have completed a mediation course "... offered or accredited by, for example the South African Association of Mediators".

mean) be able to settle the dispute without knowing the criteria for a “permanent life-partnership”? What would the purpose of the mediation be? Would the mediator have to try and reconcile the view that no such partnership existed with the view that it in fact did exist or would the decision be made with reference to the best interests of the children born from the partnership? Hopes that the regulations to the Children’s Act<sup>370</sup> would clearly outline the procedure to be followed were dashed when the section became effective on 1 July 2007 as one of the provisions which “... do not require regulations for operationalisation”.<sup>371</sup>

- A further problem was created by making the section applicable “... whether the child was born before or after the commencement of this Act”.<sup>372</sup> The implication is that biological fathers who were living with the mother in a permanent life-partnership at the time of the child’s birth would acquire parental responsibilities and rights retrospectively as from the date of the birth of the child. In terms of this interpretation it could be argued that the unmarried father has had equal and independent<sup>373</sup> guardianship with the biological mother as from the birth of the child and as such would have had to give consent to the child’s marriage, adoption, departure from the Republic, application for a passport and the alienation or encumbrance of any immovable property of the child.<sup>374</sup> Could this mean that legal actions taken or initiated on behalf of the minor child under the previous dispensation could be invalidated due to the lack of the father’s assistance? Clearly not, since the result would be catastrophic.<sup>375</sup> In practice it will

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<sup>370</sup> 38 of 2005.

<sup>371</sup> See Statement issued by Department of Social Development on 29 Jun 2007 on [www.info.gov.za/speeches/2007/07062915151003.htm](http://www.info.gov.za/speeches/2007/07062915151003.htm).

<sup>372</sup> S 21(4).

<sup>373</sup> These are not the terms employed in s 30 of the Children’s Act 38 of 2005 relating to the co-exercise of parental responsibilities and rights but reflects the general gist of the provision in terms of which, *inter alia*, a co-holder “... may act without the consent of the other co-holder”.

<sup>374</sup> S18(5) provides that “[u]nless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c)”. The latter subsection includes all the mentioned legal actions taken on behalf of the child.

<sup>375</sup> See Hahlo & Kahn *South African Legal System and its Background* 207, who contend that even where the enactment clearly has retrospective effect “... it will be construed to keep retrospectivity to plainly applicable circumstances” because of “... the fear of injustice”. Despite the fact that the general rule of interpretation against retrospectivity has been overruled by the express words to

mean that if the father lived with the mother in a permanent life-partnership when the child was born, he will automatically have the responsibilities and rights to exercise guardianship, care and contact jointly with the mother as from 1 July 2007, even if he no longer lives with the mother in a committed relationship. The parental responsibilities and rights will have to be exercised as prescribed by sections 30 and 31. A considerable lapse of time since the birth of the child may conceivably complicate matters if a dispute regarding the existence of such a relationship should arise. The dispute will have to be dealt with as prescribed by the section, *ie* referred to for mediation and, if necessary, subjected to judicial review as outlined above.<sup>376</sup>

- With regard to transitional matters the Children’s Act<sup>377</sup> provides as follows:

“Anything done in terms of a law repealed in terms of section 313 which *can* (own emphasis) be done in terms of a provision of this Act, must be regarded as having been done in terms of that provision of this Act.”

Since the possibility of unmarried fathers acquiring automatic parental responsibilities and rights is an innovation of the new Children’s Act<sup>378</sup> for which no equivalent exists in any previous legislation, the abovementioned provision clearly finds no application in the present context. An application by the unmarried father for parental responsibilities and rights pending since 1 July 2007 would have to be determined with reference to the provisions in the Children’s Act<sup>379</sup> making provision for the assignment of contact, care and guardianship to “... any person having an interest in the care, well-being and development of the child”.<sup>380</sup>

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the contrary contained in s 21(4), it is submitted that any other interpretation, although beneficial to the unmarried father, may be seriously prejudicial to both the mother and child.

<sup>376</sup> S 21(3).

<sup>377</sup> 38 of 2005: S 314.

<sup>378</sup> 38 of 2005: S 21.

<sup>379</sup> 38 of 2005.

<sup>380</sup> Ss 23 and 24 of the Act, discussed in 5.3.3 below.

- The possibility of acquiring parental responsibilities and rights automatically by living with the mother at the time of the birth of the child may be in conflict with customary law regulating the affiliation of the child. The general rule is that children born of an unmarried woman belong to the mother's guardian or the latter's successor/heir.<sup>381</sup> Without a *lobolo* agreement, in terms of which the prospective husband or the head of his family undertakes to transfer property, in the form of cattle or cash, to the head of the prospective wife's family in consideration of a customary marriage, the husband cannot acquire parental responsibilities and rights in respect of children born to him and his prospective wife.<sup>382</sup> This general rule is, however, subject to one possible exception, *ie* if the father tendered the mother's guardian a beast (known in Xhosa as *isondlo*). According to Bennett<sup>383</sup> this payment represents, variously "... a thank-offering, a compensation for rearing the child or a physical token of the transfer of parental rights". Mere cohabitation, in the absence of a *lobolo* agreement or the payment of *isondlo* will apparently, in terms of customary law, not vest parental responsibilities and rights in the biological father.<sup>384</sup> It is submitted that in such a case<sup>385</sup> the provisions of the Children's Act<sup>386</sup> will probably override customary law, provided the automatic acquisition of parental responsibilities and rights by the biological father is deemed to be in the best interests of the child.

### (c) Commitment to child

The biological father of a child can also acquire parental responsibilities and rights automatically in terms of section 21(1)(b)<sup>387</sup> by showing a commitment to the child if he, regardless of whether he has lived or is living with the mother—

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<sup>381</sup> Maithufi 1999 *Obiter* 198 at 201; Maithufi Ch 7 in *Introduction to Child Law* 141-143

<sup>382</sup> Bennett 1999 *Obiter* 145 at 146; Maithufi Ch 7 in *Introduction to Child Law* 142 and *Mantjoze v Jaze* 1914 AD 144 at 146.

<sup>383</sup> Bennett 1999 *Obiter* 145 at 146.

<sup>384</sup> See the further discussion of *isondlo* in the context of s 21(1)(b)(i) in (c) below.

<sup>385</sup> Where the parents cohabit but have not entered into a *lobolo* agreement.

<sup>386</sup> 38 of 2005: S 21(1)(a).

<sup>387</sup> Which came into operation on 1 Jul 2007.



- “(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father or pays damages in terms of customary law;
- (ii) contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period; and
- (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.”

The subsection poses a problem at the outset insofar as it is not clear whether the requirements listed should be interpreted as being cumulative or not. The SALRC’s proposal contained in the SALC Discussion Paper on the *Review of the Child Care Act*<sup>388</sup> as well as clause 33 of the Children’s Bill [B – 2002] published as Annexure “C” to the SALC Report on the *Review of the Child Care Act*,<sup>389</sup> seem to have envisaged compliance with any one of the requirements, included in the proposal and the Bill respectively, as being sufficient to automatically vest the biological father with full parental responsibilities and rights. An interpretation along these lines, allowing compliance with the requirements in the alternative, could be supported on the basis that the Act generally, if read as a whole, endeavours to improve the legal status of fathers. As such, the aim would be to restrict the automatic acquisition of parental responsibilities and rights by the biological father as little as possible and hence to give as wide as possible interpretation to the section. The insertion of the word “and” before the last requirement in section 21(1)(b) as it now reads does, however, seem to suggest

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<sup>388</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.4. As far as it concerned the automatic acquisition of parental responsibilities and rights by an unmarried father, the SALC made the following recommendations: “Where a child’s father and mother were not married to each other at the child’s conception or birth or any time between the child’s conception or birth, but have subsequent to the birth of the child cohabited with the mother for a period or periods which amount to no less than 12 months, **or** where the father has acknowledged paternity of the child **or** has maintained the child to an extent that is reasonable, given his financial means, such father shall have acquired parental responsibilities and rights for the child, notwithstanding that a parental responsibilities and rights agreement has not been made by the mother and father of the child: provided such father has established a paternal relationship with the child”.

<sup>389</sup> CI 33 of the Children’s Bill [B – 2002] read as follows: “The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 32, acquires parental responsibilities and rights in respect of the child – (a) if at any time after the child’s birth he has lived with the child’s mother (i) for a period of no less than 12 months; or (ii) for periods which together amount to no less than 12 months; (b) if he, regardless of whether he has lived or is living with the mother, has cared for the child with the mother’s informed consent – (i) for a period of no less than 12 months; or (ii) for periods which together amount to no less than 12 months; (c) upon confirmation by a court of a parental responsibilities and rights agreement in respect of the child in terms of section 34; **or** (d) if, and to the extent that, parental responsibilities and rights have been granted to him by an order of court” (own emphasis).

that the requirements are cumulative and that the biological father will only acquire parental responsibilities and rights automatically if all three requirements have been satisfied.<sup>390</sup> It is, therefore, submitted that the requirements must be complied with cumulatively. This interpretation is supported, firstly, by the rule of the interpretation of statutes according to which the legislator does not intend to change the common law more than is necessary.<sup>391</sup> Since the section constitutes a radical departure from the common law position in terms of which a biological father can only acquire parental responsibilities and rights automatically if he is married to the mother of the child, the section should, in my view, be read restrictively as mandating compliance with all three requirements. A restrictive interpretation is furthermore favoured, if regard is had to the SALRC's stated aim of allowing unmarried fathers to acquire parental responsibilities and rights only in "certain exceptional cases"<sup>392</sup> where such fathers are not only willing to acknowledge their paternity and to contribute financially to the child's maintenance but also, very importantly, "... willing to shoulder the responsibilities of the parental role".<sup>393</sup> Any other interpretation would allow a father who has merely consented to be identified as the father or who has, alternatively, simply contributed to the maintenance of the child without ever having been involved in the upbringing of the child or sharing of the parental duties with the mother, to acquire parental responsibilities and rights automatically.<sup>394</sup>

It is evident from these comments that the legislator should provide clarity on this crucial issue, even more so considering the fact that disputes in this regard must be settled out of court as explained in 4.2.3.2(b)(ii) above. The remainder of the discussion will focus on the requirements themselves.<sup>395</sup>

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<sup>390</sup> Heaton Ch 3 in Davel *Commentary on Children's Act* at 3-11 reaches the same conclusion.

<sup>391</sup> Hahlo & Kahn *South African Legal System and its Background* 202; Botha *Statutory Interpretation* 45.

<sup>392</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.4.

<sup>393</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.1.

<sup>394</sup> For a comparison with the effect of the acknowledgement of paternity in terms of Dutch law, see Van der Linde & Davel 2002 *Obiter* 162 at 165.

<sup>395</sup> The ensuing paragraphs are numbered in accordance with the actual subsection that is being discussed. The subsections were quoted in full at the beginning of par (c) above.

**(i) Identification of the child's father<sup>396</sup>**

The Births and Deaths Registration Act,<sup>397</sup> in the first instance, allows a child born out of wedlock to be registered under the surname of the biological father at the joint request of the mother and the father who, in the presence of the person to whom the notice of birth is given, acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth.<sup>398</sup> The biological father may also simply acknowledge paternity and insert his particulars upon the notice of birth, if the mother consents thereto without the child being registered under his name.<sup>399</sup>

Section 21(1)(b)(i) requires the biological father either to consent to be identified as explained above, or successfully to apply in terms of section 26 to be identified as the father of the child. Section 26(1) of the Children's Act,<sup>400</sup> which is not yet operational, makes provision for two types of applications by an unmarried person claiming to be the biological father of the child:<sup>401</sup>

- An application to the Director-General of Home Affairs for an amendment of the birth registration to record the acknowledgement of paternity provided the mother gives her consent;<sup>402</sup> and
- an application for a court order confirming paternity if the mother –
  - refuses to consent to the amendment;<sup>403</sup>
  - is incompetent to give consent due to mental illness;
  - cannot be located; or

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<sup>396</sup> See s 21(1)(b)(i).

<sup>397</sup> 51 of 1992.

<sup>398</sup> S 10(1)(b) of the Births and Deaths Registration Act 51 of 1992.

<sup>399</sup> S 10(2) of the Births and Deaths Registration Act 51 of 1992.

<sup>400</sup> 38 of 2005.

<sup>401</sup> The provisions have been rephrased for grammatical purposes.

<sup>402</sup> In terms of s 11(4) of the Births and Deaths Registration Act 51 of 1992.

<sup>403</sup> S 11(5) of the Births and Deaths Registration Act 51 of 1992 creates a similar possibility by allowing the father of a child to apply to the High Court for a declaratory order to confirm his paternity and dispensing with the mother's consent in case of her refusal.

- is deceased.<sup>404</sup>

A biological father of a child conceived through the rape of or incest with the child's mother or any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation is prohibited from making either of the said applications to confirm his paternity.<sup>405</sup>

Subparagraph (i) requires in the alternative that the biological father pay damages in terms of customary law. The provision creates an alternative method through which a father can identify himself for purposes of automatically acquiring parental responsibilities and rights in respect of his biological child. The phrase "damages in terms of customary law", in the context of the provision, can presumably refer to the payment of damages for any of the following wrongdoings in terms of customary law:<sup>406</sup>

- The impregnation of an unmarried woman;
- intercourse resulting in the impregnation of a married woman (adultery),<sup>407</sup>
- intercourse resulting in the impregnation of an *ukungena* partner,<sup>408</sup> or
- intercourse resulting in the impregnation of a widow or erstwhile partner of

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<sup>404</sup> S 26(1)(b).

<sup>405</sup> S 26(2).

<sup>406</sup> LAWSA Vol 32 § 160.

<sup>407</sup> In the case of the birth of an adulterous child, the child would belong to the husband who can claim damages for the adultery with his wife. Damages must be paid by the wrongdoer to the husband and his family. However, if the husband rejects the child, the child belongs to the mother's father. When this happens the father of the adulterine child can identify himself and acquire parental responsibilities and rights in the same way as any other unmarried father in terms of customary law: LAWSA Vol 32 §177; Dlamini 1984 *Obiter* 8 at 14.

<sup>408</sup> A child born to a widow who is a partner to an *ukungena* relationship with a relative of her deceased husband belongs to the heir of the widow's late husband: Dlamini 1984 *Obiter* 8 at 15. The damages are claimed by the *ukungena* "husband" on behalf of the widow and transferred to her house (and therefore her late husband's heir): LAWSA Vol 32 § 187. If a child was born of such an arrangement but brought up away from the husband's family home and was not claimed by the heir before the dissolution of the union, the child belongs to the mother's guardian: Dlamini 1984 *Obiter* 8 at 15-16.

a dissolved customary marriage.<sup>409</sup>

The claim for damages arises as a result of a decreased entitlement to *lobolo* for the girl or woman. By paying the damages, the father is automatically identified.<sup>410</sup> As in the case of our common law, an unmarried father in terms of customary law<sup>411</sup> has no absolute right to his biological children.<sup>412</sup> If the pregnant mother is married the child will eventually be treated as the offspring of the husband, and if deceased then the heir of that husband.<sup>413</sup> If the mother is unmarried the child will belong to the head of the mother's family who is probably her father or guardian.<sup>414</sup> Notwithstanding these general principles, Bennett states that most systems of customary law<sup>415</sup> allow the natural father to obtain parental responsibilities and rights by tendering a consideration to the mother's guardian.<sup>416</sup> Uncertainty, however, exists as to whether the mere payment of damages is sufficient to confer such rights and what the rights are that can be conferred on the father by payment of such consideration. According to the Swazi

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<sup>409</sup> Although not certain it would seem that the payment of damages for the impregnation of a widow or divorced woman after dissolution of a customary marriage serves the same purpose and can be considered similar to the case where an unmarried woman is impregnated.

<sup>410</sup> According to Bennett *Customary Law* 314, damages for seduction and adultery (without impregnation), the tendering of a *vimba* (or *nquthu*) beast and the assumption of responsibility of maintenance and lying-in expenses may also be regarded as admissions of paternity. In the case of an unmarried girl the biological father can also be identified after the birth of the child on the ground of a physical resemblance between the child and the wrongdoer. For a detailed discussion of the notification of the pregnancy and the subsequent proof of paternity in the case of an unmarried woman in terms of customary law, see *LAWSA Vol 32 §§169-175*.

<sup>411</sup> The position of extra-marital children in terms of common law must, however, clearly be distinguished from their position in terms of customary law, recorded as follows by Jones Ch 14 in Burman & Preston-Whyte *Questionable Issue: Illegitimacy in South Africa* 251-252: "The African means of dealing with extramarital birth is essentially accommodative in intent and character; it is orientated towards social inclusivity. The mechanism of maternal-filiation provides an extramarital child with a father, with a male ritual and sponsor, with a place in a conjugal unit, and it manufactures for the child a full lineal identity. Very importantly, these attributes are socially visible – they counter what would otherwise be clearly evident deficits in an extramarital child's social make-up – and are preserved and upheld by way of taboo against reference to the child's real paternity or social position. As far as is possible within the bounds of cultural reason, the effect of the African system is therefore to ensure that an extramarital child's position is *not* compromised by the circumstances of his or her birth" (quoted with approval by Langa DCJ in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC) [58]).

<sup>412</sup> Bennett *Customary Law* 310.

<sup>413</sup> *Mthembu v Letsela* 1998 2 SA 675 (T) at 686A-B.

<sup>414</sup> See in this regard Labuschagne 1994 *De Jure* 341 at 345, referring to *Meyeki v Qutu* 1961 NAC (S) 10.

<sup>415</sup> See Dlamini 1984 *Obiter* 8 at 12 fn 28 for examples of cases where the natural father was found to have no right to the child whatsoever even after payment of the fine for pregnancy.

<sup>416</sup> Bennett *Customary Law* 310.

and the Pondo,<sup>417</sup> the mere payment of damages entitles the father to “claim” the child he procreated.<sup>418</sup> In other systems of customary law the payment of damages does not by itself appear to confer any rights on the wrongdoer or biological father. For this purpose an additional consideration, called *isondlo*,<sup>419</sup> as referred to above, is required. While *isondlo* usually signifies the transfer of at least custody to the unmarried father, its further significance and function remain uncertain. Bennett<sup>420</sup> and Maithufi<sup>421</sup> seem to support the viewpoint that *isondlo* also signifies compensation for bringing up the child which includes reimbursement for the child’s maintenance. This viewpoint is, however, in conflict with the judgments in *Gatyelwa v Ntsebenza*<sup>422</sup> and *Cele v Cele*,<sup>423</sup> in terms of which it was held that *isondlo* should not be regarded as either a payment for past maintenance nor a provision for future maintenance, but simply as a gift for the successful rearing of the child.<sup>424</sup>

If it is accepted that a father can, in terms of customary law, acquire full parental responsibilities and rights of his child by the payment of damages and *isondlo*, it would mean that customary law is also in this respect, in conflict with the provisions of the Children’s Act.<sup>425</sup> The conflict will arise as a result of the fact that a father would under customary law be able to acquire responsibilities and rights by merely complying with the identification requirement (fulfilled by payment of damages) and the requirement to contribute to the maintenance of the child (by payment of *isondlo*). A mother would consequently be able to dispute the father’s “entitlement” under customary law on the basis that he has never contributed to the upbringing of the child.<sup>426</sup> The question is then, which system of law to apply?<sup>427</sup> There seems to be general consensus that in deciding whether

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<sup>417</sup> This also appears to be the case among the Cape Nguni tribes: Dlamini 1984 *Obiter* 8 at 12.

<sup>418</sup> Bennett *Customary Law* 310; Burman 1991 *Acta Juridica* 36 at 44 and SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.3.

<sup>419</sup> Also spelt “*isondhlo*”: See Kerr Div G *Family Law Service* 75.

<sup>420</sup> Bennett *Customary Law* 310 and 312 with reference to *Hlengwa v Maphumulo* 1972 BAC 58 (NE) in fn 146.

<sup>421</sup> In a personal consultation with him on 16 Apr 2007.

<sup>422</sup> 1940 NAC (C&O) 89.

<sup>423</sup> 1947 NAC (N&T) 2.

<sup>424</sup> Dlamini 1984 *Obiter* 8 at 17 fn 68.

<sup>425</sup> 38 of 2005.

<sup>426</sup> S 21(1)(b)(ii).

<sup>427</sup> The Children’s Act 38 of 2005 only regulates conflicts with other *legislation*: S 3.

customary law is to be applied or not, a court should take the best interests of the child into consideration.<sup>428</sup>

**(ii) Contribution to the upbringing of the child<sup>429</sup>**

The vagueness of paragraph (ii), albeit probably intentional, could be problematic. Although “upbringing” is not defined in the Act, it should in this particular context probably be interpreted as pertaining only to the intangible aspects of raising the child,<sup>430</sup> such as the training, education, rearing or nurture of the child.<sup>431</sup> The tangible aspects of the relationship are dealt with in section 21(1)(b)(iii) discussed under (iii) below. While it may be difficult enough to determine whether a biological father is in fact making a contribution towards the child’s upbringing – how much more so to assess whether the father has made an *attempt in good faith* at making such a contribution, without actually having made such contribution? What is exactly meant by a “contribution in good faith” towards the upbringing of the child? How would a father prove such a contribution in real terms? Can a person contribute towards a child’s upbringing in bad faith, and if so, how? Would the good intentions of the father, the effect of the contribution on the child or the mother’s assessment of the father’s contribution serve as the

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<sup>428</sup> Kerr Div G *Family Law Service* 75. Bennett *Customary Law* 312 emphasises that customary law “... may not be asserted in the face of provisions subordinating the father’s rights to the child’s best interests”. In *Hlophe v Mahlalela* 1998 1 SA 449 (T) 459D, Van den Heever AJ, referring to a dispute whether *lobolo* was in fact paid or not, stated that “... issues relating to the custody of a minor child cannot be determined in this fashion, *ie* by the mere delivery or non-delivery of a certain number of cattle”. Any doubt as to whether the principles of the common law or customary law should apply was in the judge’s view (at 459E-G) effectively removed by the promulgation of s 30(3) of the interim Constitution of South Africa act 200 of 1993 insofar as it entrenched the best interests of the child standard (now embodied in s 28(2) of the Constitution) and s 35(3) in terms of which “... the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the chapter”, now embodied in s 39(2) of the final Constitution. As to the problem of integrating the two conflicting systems of law (customary law and common law) on the issue of legitimacy and possible solutions before the interim Constitution was enacted, see Burman 1991 *Acta Juridica* 36.

<sup>429</sup> See s 21(1)(b)(ii).

<sup>430</sup> See the remarks by Van Dijkhorst J in *Jooste v Botha* 200 2 SA 199 (T) 201D-E: “There are two aspects of a parent-child relationship. The economic aspect of providing for the child’s physical needs and the intangible aspect of providing for his or her psychological, emotional and developmental needs.” The meaning of the right and duty to “*consortium*” between spouses has similarly been interpreted as comprising of both tangible and intangible aspects: See Van Schalkwyk *Family Law* 99-100.

<sup>431</sup> *Webster’s Dictionary* sv “upbringing”. “Rearing”, in relation to children is described as to bring up or raise to maturity, to foster, to cherish, to nurse, to educate or instruct: *Webster’s Dictionary* sv “rear”. “Nurture” has a similar meaning.

criteria? It would be especially difficult to show such a contribution in the case of a new born baby and nigh impossible where the mother has refused the father any contact or access to the child.<sup>432</sup> Or would persistent attempts at sharing parental duties, even in defiance of the mother's wishes, over "a reasonable period"<sup>433</sup> of time by the father qualify as "an attempt in good faith" to contribute to the child's upbringing?

**(iii) Contribution to the maintenance of the child<sup>434</sup>**

In this case the provision only pertains to the tangible or financial burdens associated with the upbringing of the child.<sup>435</sup> In terms of the common law a biological father is obliged to contribute towards the maintenance of his child. A father's duty to support his child is based on blood relationship and is not dependent upon the acquisition of parental responsibilities and rights. This position will remain unaltered since the Act expressly confirms in section 21(2) that the automatic acquisition of parental responsibilities and rights by the biological father as provided for in section 21 "... does not affect the duty of the father to contribute towards the maintenance of the child". Despite indications to the contrary in earlier judgments like *Wilson v Eli*,<sup>436</sup> it is generally accepted that an unmarried father is not entitled to contact (or for that matter any or all incidents of parental responsibilities and rights) as a *quid pro quo* for the payment of maintenance for such a child.<sup>437</sup> This point of departure amplifies, to my mind, the fact that the requirements in terms of section 21 must be read as applying cumulatively.

A biological father would be able to satisfy the conditions contained in this subsection only by providing proof of a contribution towards the expenses or

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<sup>432</sup> The same conclusion was reached by Kruger *et al* 1993 *THR-HR* 696 at 704.

<sup>433</sup> Heaton Ch 3 in *Commentary on Children's Act* 3-11 finds the phrase "reasonable period" especially problematic.

<sup>434</sup> See s 21(1)(b)(iii).

<sup>435</sup> See fn 430 above.

<sup>436</sup> 1914 WR 34.

<sup>437</sup> *F v L* 1987 4 SA 525 (W) 527B; *Douglas v Mayers* 1987 1 SA 910 (Z) 915D and *Van Erk v Holmer* 1992 2 SA 636 (W) 647F. See also Sonnekus & Van Westing 1992 *THR-HR* 232 at 251, who emphasise that it is illogical to argue that a duty to support can give rise to another, altogether different entitlement in the form of a parental right of "access".



maintenance of the child “for a reasonable period”. It is by no means clear what would constitute “a reasonable period” of time. *Ad hoc* contributions or payments towards expenses discontinued after a short period of time will clearly not suffice. An attempt at a contribution would apparently be considered sufficient, provided it is done in good faith. The provision clearly requires the father to furnish some proof of a persistent willingness in the past to share the financial burdens associated with parenthood. Where the automatic assumption of parental responsibilities and rights of the biological father is questioned at the time of or shortly after the birth of the child, proof of compliance with this requirement might be more difficult. In this regard the payment of or a contribution towards the lying-in expenses of the mother should also be regarded in a positive light.<sup>438</sup> Heaton<sup>439</sup> points to the significance of the use of the word “contribution” insofar as “... it does not require the father to have complied with his full maintenance obligation towards the child for a reasonable period”. The word could, on the other hand, simply be indicative of the fact that parents are obliged to support their children “jointly”, “... that the respective shares of such obligation are apportioned between them according to their respective means” and that each parent is thus only obliged to make a “contribution” to the maintenance of each child.<sup>440</sup>

Even if an unmarried father satisfies the stated criteria he will only acquire parental responsibilities and rights automatically in terms of section 21(1)(b) if he is the biological father of the child. Where the paternity of the father is disputed in the abovementioned cases the provisions of sections 36 and 37 will apply since the child is born out of wedlock. This means, first of all, that if the father admits to

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<sup>438</sup> In *Card v Sparg* 1984 4 SA 667 (E), Zietsman J quoted with approval from *Lourens v Van Biljon* 1967 1 SA 703 (T) in which the court held that “... the plaintiff could claim maintenance for herself for the period immediately before and after the birth of the child. Such maintenance is regarded as being not for the benefit of the mother but for the benefit and in the interests of the child who requires the care of its mother during this period, and the amount awarded is regarded as part of the plaintiff’s lying-in expenses” (at 670F-G). With reference to *Sager v Bezuidenhout* 1980 3 SA 1005 (O) 671B it was held that the sum for the maintenance of the mother may, but will not necessarily, be equivalent to the mother’s loss of earnings during this period. The degree of commitment shown by the natural father towards the child, including “... the extent to which the applicant (father) contributed to the lying-in expenses incurred by the natural mother in connection with the birth of the child” was previously also a factor that a court had to consider in terms of s 2(5)(e) of the now repealed Natural Fathers of Children Born out of Wedlock Act 86 of 1997 when deciding whether to award any incident of parental responsibilities and rights to such a father.

<sup>439</sup> Heaton Ch 3 in Davel *Commentary on Children’s Act* 3-12.

<sup>440</sup> See wording of s 15(3)(a)(i)-(iii) of the Maintenance Act 99 of 1998.

having sexual intercourse with the mother of the child at any time when the child could have been conceived, he will be presumed to be the father of the child in the absence of evidence to the contrary.<sup>441</sup> It would also mean, for whatever it is worth,<sup>442</sup> that should the mother refuse to submit herself or cause the child to be submitted to the taking of a blood test the court must warn her of the effect of such refusal on her credibility.<sup>443</sup> Whether such diminished credibility would advance the case of the father wanting to prove his paternity is doubtful, to say the least.

It is interesting to note that although the presumption of paternity no longer applies in its common law guise in the case of a married couple,<sup>444</sup> it is still utilised (in terms of section 36) to prove paternity in the case of an unmarried mother. As pointed out before, the presumption was the only available tool at the time to designate a father for a child who by law only had a mother. Although the need for the operation of a legal presumption or fiction in this regard may be questioned in view of the scientific certainty with which paternity can nowadays be determined, it is submitted that the presumption still serves a purpose where blood tests are not possible, as for example in cases where a party, for whatever reason, refuses to submit to the taking of such tests and the courts are unwilling to compel a party or parties to submit to DNA testing.

While the Act no longer assigns parental responsibilities and rights merely on the basis of the legitimacy of the child, it still upholds the distinction between children born in or out of wedlock as far as the determination of paternity is concerned.<sup>445</sup> It is, furthermore, contended that the retention of terminology associated with the legitimacy of a child, such as “legitimate child” or “child born in wedlock” or “out of wedlock”, is to a certain extent inevitable. Such terms would always be necessary

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<sup>441</sup> See also s 1 of the repealed Children’s Status Act 82 of 1987. The presumption will also apply if the sexual intercourse with the mother is proved in any other way. In the present context where the natural father wishes to record his paternity on the birth registration his admission would be the simplest way of proving paternity.

<sup>442</sup> The evidentiary value of this negative deduction is uncertain: See Davel & Jordaan *Law of Persons* 115 fn 132 and 133.

<sup>443</sup> S 37 of the Children’s Act 38 of 2005. See comments by Heaton Ch 3 in *Commentary on Children’s Act 3-40*, referred to in fn 293 above.

<sup>444</sup> S 20 does not create a presumption, it regulates the effect of an existing fact: A husband who is also the biological father of his wife’s child has or acquires full parental responsibilities and rights automatically.

<sup>445</sup> S 36 with the heading “Presumption of paternity in respect of child born out of wedlock”.

to indicate the presence or absence of a marital bond between the parents of the child, regardless of whether, or to what extent, the law attaches any significance to such a marital bond in determining the rights and duties of the parents and/or their children born as a consequence of such matrimonial bond. The fact that unmarried parents may now, like their married counterparts, acquire parental responsibilities and rights *ex lege*, does not alter the fact that the proof and acknowledgement of such responsibilities and rights are a whole lot easier in the case of married parents than otherwise – where the submission of a marriage certificate would conclusively settle a dispute regarding the acquisition of parental responsibilities and rights in the case of a married biological father, an unmarried father would, apart from having to prove that he is indeed the biological father, still have to prove (or mediate?) compliance with the preconditions contained in section 21 of the Children’s Act.<sup>446</sup>

The fact that biological fathers will automatically assume parental responsibilities and rights, where they have identified themselves and are contributing, or have in the past contributed, towards the child’s upbringing and maintenance, can be seen as a way in which indirect recognition is given to the existence of a “family life” between such parent and child as entrenched in Article 8 of the ECHR. The European Court of Human Rights has been protective of a “family life” between an unmarried father and his child where the relationship is one of “... commitment love and dependency”.<sup>447</sup>

### 4.3 CONSTITUTIONAL ANALYSIS

Despite its increased recognition of the beneficial role that fathers can play in the lives of their children by allowing not only married fathers but also some unmarried fathers automatic parental responsibilities and rights, the new Children’s Act<sup>448</sup> has retained the *status quo* insofar as it still does not confer automatic, inherent parental rights on biological fathers on the same basis as mothers. The question

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<sup>446</sup> 38 of 2005.

<sup>447</sup> Stalford 2002 *IJLPF* 410 at 429. Also see Sonnekus & Van Westing 1992 *THR-HR* 232 at 241, who are in favour of the recognition of such a commitment. See comparative study in 4.3.1.1(b) below.

<sup>448</sup> 38 of 2005.

is whether the continued differential treatment insofar as the allocation of automatic parental responsibilities and rights is concerned, can be justified in view of international trends emphasising the importance of the role of both parents in the upbringing of their children?<sup>449</sup> An overview of these international trends is deemed important for purposes of the constitutional inquiry that is to follow.<sup>450</sup>

### 4.3.1 Comparative study

#### 4.3.1.1 *International dimension*

##### (a) **United Nations Convention on the Rights of the Child (UNCRC)**

The argument that fathers should be treated equally as there is an obligation to do so under Articles 9(3) and 18(1) of the UNCRC<sup>451</sup> has for at least two reasons not been entirely successful. First of all, despite the fact that South Africa is a State Party to the UNCRC and as such obliged to reform its laws in accordance with the Convention, South Africa has no mechanism for directly enforcing the Convention rights.<sup>452</sup> In the second place, the wide terms in which the articles in the Convention are couched have opened up the possibility of interpreting the provisions in a manner that would justify an approach that differentiates between mothers and fathers. It has been argued, for instance that “common responsibilities” as used in Article 18(1)<sup>453</sup> could be interpreted as meaning either common and equal or common but different.<sup>454</sup> Furthermore, “parents” as referred to in the Convention may be interpreted to mean only those who, as a

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<sup>449</sup> Sinclair Ch 1 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 27.

<sup>450</sup> Despite the value of such a comparison, Mahomed DP in *Fraser v Children’s Court, Pretoria North, and Others* 1997 2 SA 261 (CC) was intent on stressing the fact that “... the factual and demographic picture and parental relationships [in SA] are often quite different from those upon which ‘first world’ western societies are premised” (at [29]) and that “... the legislative approaches adopted in ‘first-world’ countries ... should be viewed with caution” because “[t]he socio-economic and historical factors which gave rise to gender inequality in South Africa are not always the same as those in many of the ‘first-world’ countries” (at [44]).

<sup>451</sup> Art 9(3) protects a child’s right to contact with both parents and Art 18(1) ensures recognition of the principle that both parents have common responsibilities for the upbringing and development of the child: See 1.4.2 above.

<sup>452</sup> The UK is in the same position: See Lowe 1997 *IJLPF* 192 at 202.

<sup>453</sup> In terms of Art 18(1) States Parties must “... use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”.

<sup>454</sup> Lowe 1997 *IJLPF* 192 at 201.

matter of national law, are treated as parents and thus exclude uncommitted unmarried fathers.<sup>455</sup> Despite the aforementioned contradictory arguments, Lowe is nevertheless of the opinion that there is a strong case for the view that the UNCRC does oblige the United Kingdom, along with all other contracting states to treat all fathers equally.<sup>456</sup>

**(b) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>457</sup>**

Opinions also differ on whether the ECHR imposes an obligation on its member states to treat fathers equally.<sup>458</sup> In this regard the following judicial pronouncements by the European Court of Human Rights can be mentioned:

- (i) Although concerned with the right of a mother to establish a legal bond with her child automatically, the Court in *Marckx v Belgium*<sup>459</sup> made a number of findings regarding Article 8 of the ECHR<sup>460</sup> which are relevant in the present context:<sup>461</sup>
- The right to respect for family life under Article 8 applies to illegitimate as well as legitimate family life;
  - Article 8 may impose positive obligations on a State pursuant to respect for family life; abstention from interference may not be enough;
  - the fact that the act of recognition (maternity) was not specifically onerous did not detract from the fact that the necessity to perform it

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<sup>455</sup> Lowe 1997 *IJLPF* 192 at 201.

<sup>456</sup> Lowe 1997 *IJLPF* 192 at 202.

<sup>457</sup> See 1.4.2 above for a general discussion of the ECHR.

<sup>458</sup> Lowe 1997 *IJLPF* 192 at 202, referring to the opinions of Norrie and Meuldere-Klein, who support such a view while Bainham and O'Donnell do not seem equally convinced.

<sup>459</sup> (1979) 2 EHRR 330.

<sup>460</sup> In terms of Art 8(1): "Everyone has the right to respect for his private and family life, his home and his correspondence".

<sup>461</sup> Branchflower 1999 *Family Law* 34 at 35; Janis *et al European Human Rights Law* 381.

flowed from the State's refusal to recognise the mother's maternity from birth;

- the desire to protect a child from the custody and authority of someone who may have no inclination to care for it, is not a legitimate aim justifying a breach of Article 8 or Article 14.<sup>462</sup>

According to Bainham<sup>463</sup> the case would support an argument that require states "... to produce laws which *positively* encourage the initial creation and, thereafter, continuation or development of family ties between an unmarried father and his child". Bainham<sup>464</sup> is also of the view that discrimination against unmarried fathers (or mothers) is necessarily discrimination against their children and that this discrimination "... arguably stands in the way of the complete abolition of the status of illegitimacy which is an international goal<sup>465</sup>".

- (ii) While the judgment in the *Marckx* case seemed to auger well for unmarried fathers in the United Kingdom who are, as in South Africa, not automatically vested with parental responsibilities and rights at birth, the European Court of Human Rights found in *McMichael v United Kingdom*<sup>466</sup> that the position of the unmarried father was *not* in conflict with the ECHR. The reasoning of the court was that the relationship of natural fathers to their children could vary from ignorance and indifference at one end of the spectrum to a close, stable relationship at the other<sup>467</sup> and as such the aim of the relevant legislation was to provide a mechanism to identify "meritorious" fathers who

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<sup>462</sup> Art 14 of the ECHR provides that the rights and freedoms under the Convention "shall be secured without discrimination on any ground such as sex ..., birth or other status".

<sup>463</sup> Bainham 1989 *IJLF* 208 at 212.

<sup>464</sup> Bainham 1989 *IJLF* 208 at 215.

<sup>465</sup> See also Bainham *Children—The Modern Law* 215-218 for a pertinent discussion on "Public policy, unmarried parenthood and human rights: Some issues for the future".

<sup>466</sup> (1995) 20 EHRR 205.

<sup>467</sup> Similar to the observations made by Mahomed J in *Fraser v Children's Court, Pretoria North, and Others* 1997 2 SA 261 (CC) [43].

might be accorded parental rights, thereby protecting the interests of the mother and the child.<sup>468</sup>

- (iii) In *Keegan v Ireland*<sup>469</sup> the court held that the adoption of an infant without the knowledge and consent of the natural father was a violation of Article 8. The applicant father had seen the baby the day after it was born but had not been allowed to see it thereafter. Article 8 applied even though the parents were not married and the father had established no personal relationship with the child. The European Court noted that *de facto* as well as marriage-based relationships<sup>470</sup> could be family life under Article 8. The fact that the family relationship had broken down shortly before the birth “does not alter this conclusion any more than it would for a couple who were lawfully married in a similar situation”.<sup>471</sup>
- (iv) In *Kroon v The Netherlands*<sup>472</sup> the court held that the refusal to allow a biological father to recognise his children born to the mother who was married to another man, violated Article 8. In this case the court gave preference to the biological and social realities over the legal presumption of paternity in the case of a married mother.<sup>473</sup>
- (v) In *Sahin v Germany*<sup>474</sup> the European Court’s Grand Chamber considered German law<sup>475</sup> in terms of which an unmarried mother could refuse a father access unless shown to be in the best interests of the child while access to a divorced father was deemed in the best interests of the child unless the contrary was shown.<sup>476</sup> The Court declined to find a violation of Article 8 holding in this particular case that the domestic judgment, to the effect that

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<sup>468</sup> Branchflower 1999 *Family Law* 34 at 35, who criticises the reasoning as “confused thinking” (at 36) and wholly at odds with the decision in the *Marckx* case.

<sup>469</sup> (1994) 18 EHRR 342.

<sup>470</sup> As in the case of *Johnston v Ireland* (1986) 9 EHRR 203. See Pantazis 1996 *SALJ* 8 12-13.

<sup>471</sup> At par 45: See Janis *et al European Human Rights Law* 386.

<sup>472</sup> (1994) 19 EHRR 263.

<sup>473</sup> Janis *et al European Human Rights Law* 387.

<sup>474</sup> [GC] (2001) 36 EHRR 43. See also judgment of European Court for Human Rights in *B, R & J v Federal Republic of Germany* (1984) as discussed by Pantazis 1996 *SALJ* 8 at 12.

<sup>475</sup> For a general discussion of the (somewhat outdated) German law relating to children born out of wedlock, see Robinson 1999 *De Jure* 259 *et seq.*

<sup>476</sup> A position very similar to SA law before the enactment of the Children’s Act 38 of 2005.

access would be harmful in the light of the tensions between the parents, was justifiable. It did, however, find that there was a violation of Article 14 (non-discrimination) insofar as the unmarried father carried a heavier burden of proof.<sup>477</sup>

- (vi) In *Haas v The Netherlands*<sup>478</sup> the court held that a claim of inheritance rights without more raised no Article 8 issue.<sup>479</sup>

Lowe<sup>480</sup> summarises the position under European Union law as follows:

“Both *Keegan* and *Kroon* lend support to the argument that the absence of automatic parental responsibility in the unmarried father who has or has had an established relationship with the mother (the so-called ‘meritorious’ father) violates Art 8. However, they do not unequivocally establish such a proposition and they certainly do not establish that responsibility ought automatically be vested in all fathers regardless of their relationship with the mother.

What can be said is that a child born of a *de facto* relationship between the parents as evidence by some constancy of cohabitation is part of a family unit from the moment of birth ...”.

In view of the foregoing discussion it should be obvious that the scheme introduced by the Children’s Act<sup>481</sup> could not be said to be in breach of the ECHR.<sup>482</sup>

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<sup>477</sup> *Janis et al European Human Rights Law* 383.

<sup>478</sup> (2004) 39 EHRR 41.

<sup>479</sup> In this case the applicant son claimed the estate of what he alleged was his biological father. The son had, however, never lived with the mother or the father and their contact had been sporadic. The Court decided that the applicant was not seeking to establish his paternity “... in order to provide him with emotional security of knowing that he was part of a family”: *Janis et al European Human Rights Law* 386.

<sup>480</sup> Lowe 1997 *IJLPF* 192 at 204-205. See also Deech 1992 *Journal of Child Law* 3 at 7 who contends that Art 8 protects living together, not status. Deech (at 8) states that if, as it appears, the message of the international instruments is that the child has a treaty right to a “normal” family of a father and a mother with whom she has a personal relationship then “... the father who will not provide this is a deviant”. It is largely for this reason that Deech (at 8) argues that the non-cohabiting unmarried father should not have full paternal rights: “Discrimination against him is rooted in the perceived habits of fathers, married or not, who are absent from home, uncommunicative and unable to give guidance even when visiting”.

<sup>481</sup> 38 of 2005.

<sup>482</sup> Lowe 1997 *IJLPF* 192 at 205, reaching a similar conclusion as far as the English (Children Act 1989) and Scottish (Children (Scotland) Act 1995) Acts are concerned.



#### 4.3.1.2 Europe and the United Kingdom

Most European countries are supportive of a system in terms of which marriage is no longer the “*centraal ordeningsprincipe*” (principle central to the order) of family law.<sup>483</sup> The judicial recognition and protection of the parent-child relationship is thus less and less dependent upon the marital status of the parents of the child. In most if not all<sup>484</sup> the common law countries investigated, the common law principle of *mater semper certa est* applies.<sup>485</sup> Biological motherhood is thus throughout equated with legal motherhood. Fathers who are married to the mother of their children are also automatically vested with parental responsibilities and rights in all the systems studied.<sup>486</sup> In most common law countries, like South Africa, unmarried fathers are not automatically vested with parental responsibilities and rights merely based on their biological link with their child.<sup>487</sup>

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<sup>483</sup> Wortman 2001 *FJR* 231 at 232 who refers to the following reforms in Dutch law as typical indications of such a shift: (i) Parental authority is since 1984 no longer coupled to the existence of a marriage; (ii) access or contact between parent and child has also been detached from marriage; (iii) the equivalent of marriage has been opened up to people of the same sex and couples now have the option of concluding a registered partnership instead of marriage; (iv) marriage is no longer a prerequisite for adoption and adoption by same-sex couples has been introduced; and (v) the content of marriage has, furthermore, been changed insofar as it no longer requires spouses to cohabit. Terminology associated with legitimacy is moreover no longer employed in the Dutch Civil Code (*Burgerlijk Wetboek* or *BW*): See also Vlaardingebroek *et al Het Hedendaagse Personen- en Familierecht* 164-165. According to Dey & Wasoff 2006 *IJLPF* 225 at 243 the long-term direction thus seems to be “... making parenthood and not marriage the central axis of family law”.

<sup>484</sup> See Schwenzer 2007 *Electronic Journal of Comparative Law* par 2.1. France, interestingly enough, recognises an *accouchement sous X*, whereby a woman may give birth anonymously. This practice not only allows the mother to escape legal motherhood, but also deprives the child of his paternal (and maternal) affiliation: Meulders-Klein 1990 *IJLF* 131 at 137. For a history of this phenomenon, see Lefaucheur 2003 *Journal of Family History* 161 at 168-174. In 2003 the European Court of Human Rights held the *accouchement sous X* to be compatible with Art 8 of the ECHR. For criticism of the judgment, see Steiner 2003 *CFLQ* 425 *et seq.*

<sup>485</sup> England and Wales: S 2(2) of the Children Act 1989; S 3(1)(a) of the Children (Scotland) Act 1995; Netherlands: Art 1: 198 *BW*. See also Lowe 1997 *IJLPF* 192 at 197.

<sup>486</sup> England and Wales: S 2(1) of the Children Act 1989; S 3(1)(b) of the Children (Scotland) Act 1995. In the Netherlands, however, the father must recognise the child to be vested with joint parental responsibilities and rights since children in the Netherlands are no longer legitimised by marriage.

<sup>487</sup> While a child will still always have a legally recognised relationship with its mother regardless of her marital status, paternity in the Netherlands, eg, will only be legally recognised if – (i) the father was married to the mother at the time of the child’s birth or his marriage to the mother is dissolved as a result of his death within 306 days prior to the child’s birth even if the mother remarried (Art 1:199(a) and (b) *BW*); (ii) the father has recognised the child (Art 1:199(c) *BW*); (iii) paternity has been established judicially (Art 1:199(d) *BW*); or (iv) the father has adopted the child (Art 1:199(e) *BW*). Access or contact (called “*omgangsrecht*”) between parent and child has for more than a decade been regulated independently from marriage. For a discussion of the acquisition of *juridische ouderschap* in Dutch law, see Vlaardingebroek *et al Het Hedendaagse Personen- en Familierecht* 170-172 and 180-197.

In England (from 2003<sup>488</sup>) and Scotland (from 2006<sup>489</sup>) parental responsibilities and rights are conferred on unmarried fathers on condition of a demonstrable commitment that requires the cooperation of the mother. In both these countries the precondition of joint birth registration, set for the acquisition of parental responsibilities and rights by unmarried fathers, will effectively confer automatic parental responsibilities and rights on the vast majority of unmarried fathers since most unmarried parents apparently already register the birth of their children jointly.<sup>490</sup> The condition is nevertheless considered necessary because it acts as the law's "symbolic message" to fathers to participate in family life and justified "... by the desire to define fatherhood in social as well as biological terms, to protect mothers (and children) from risk—and to limit the role of the courts in dispute resolution between antagonistic parents".<sup>491</sup>

It is interesting to note that the Scottish government rejected a recommendation by the Scottish Law Commission<sup>492</sup> to give automatic parental "responsibility" to unmarried fathers. The Scottish Law Commission's observations, as summarised by Lowe & Douglas,<sup>493</sup> are considered important enough to quote in full:

- “1. It was not self evident that where a child is born as a result of a casual liaison the unmarried father should not have parental responsibility. As they put it: 'some fathers ... will be uninterested

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<sup>488</sup> S 4(1)(a) of the English Children Act 1989 as amended by s 111 of the Adoption and Children Act 2002. In England and Wales an unmarried father will only be vested with parental responsibilities and rights upon being named as the father on the child's birth certificate (with the mother's consent or failing that with a court order confirming his paternity) or after making a formal "parental responsibility agreement" with the mother which is no longer subject to a formal court scrutiny (s 4(1)(b) of the Children Act 1989). The unmarried father can of course also be assigned responsibility by order of court. For an overview of the position of the father-child relationship in terms of English law, see Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 2-4. For the debate preceding the present legal position of unmarried fathers, see Lowe 1997 *IJLPF* 192 at 198.

<sup>489</sup> S 21 of the Family Law (Scotland) Act 2006 ASP 2, which came into operation on 4 May 2006, has abolished the status of illegitimacy in Scotland and negates the effect of marriage on the status of a child governed by Scots law (the Act amends c9 s 1 of the Law Reform (Parent and Child) (Scotland) Act 1986). Unmarried fathers, like their English counterparts, do not automatically have parental responsibilities and rights but can now in future (the Act is not retrospective) in terms of the same Act acquire such responsibility if they register the birth of their child jointly with the mother.

<sup>490</sup> See discussion on the different interpretations of "automatic" acquisition of parental responsibilities and rights in 3.2 fn 15.

<sup>491</sup> Dey & Wasoff 2006 *IJLPF* 225 at 232.

<sup>492</sup> Scottish Law Commission *Report on Family Law* (1992).

<sup>493</sup> See Lowe & Douglas *Bromley's Family Law* 426-428.

- but that is no reason for the law to encourage and reinforce an irresponsible attitude’.
2. The argument that conferring automatic parental responsibility on the unmarried father would cause offence to mothers struggling to bring up their children without support from the fathers was not thought to be a weighty argument for denying responsibility to all unmarried fathers for, as they observed: ‘the important point in all these cases is that it is not the feelings of one parent in a certain type of situation that should determine the content of the law but the general interests of children and responsible parents’.
  3. The Commission dismissed the argument that there might be a risk of interference and harassment by the father if he had automatic responsibility, essentially because this was a parent-centred rather than a child-centred argument. In the commission’s view it ‘seems unjustifiable to have what is in effect a presumption that any involvement by an unmarried father is going to be contrary to the child’s best interests’. In any event the Commission did not believe that the risk of harassment would be increased by the proposed change of law.
  4. The argument that it is undesirable to involve all unmarried fathers in care and adoption proceedings was countered by pointing out that it could equally be said to be a grave defect that a man who has been the social father to the child should have no legal position in such matters merely because he and the child’s mother have not married each other.”<sup>494</sup>

#### **4.3.1.3 Africa**

The SALRC referred to legislation in the following African countries to support its contention that the marital status of parents no longer affect the acquisition of parental responsibilities and rights:<sup>495</sup>

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<sup>494</sup> The stance taken by the Scottish (and English) governments not to grant equal parental rights to all fathers was later vindicated by the judgment of the European Court of Human Rights in *B v UK* [2000] 1 FLR 1 ECtHR. In this case the unmarried father complained that by only granting automatic parental rights to married fathers English law discriminated against unmarried fathers in the protection given to their relationships with their children as compared with the protection given to married fathers and was therefore in breach of Art 14 in conjunction with Art 8 of the ECHR. According to Lowe & Douglas *Bromley’s Family Law* 428 the Court of Human Rights ruled the complaint inadmissible since, given the range of possible relationships between unmarried fathers and their children, there exists “... an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights”.

<sup>495</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.2. See Bedil 1984 *SALJ* 231 at 234, who points out: “Retaining illegitimacy as a factor affecting status is being questioned in other jurisdictions as mores change and birth out of wedlock becomes socially less significant”.

- (a) The Ghanaian Children’s Act of 1998<sup>496</sup> confers parental duties and responsibilities on all parents regardless of their marital status or whether or not they are living together.<sup>497</sup>
- (b) The Children Act<sup>498</sup> of Kenya automatically vests parental responsibilities and rights in all mothers and married fathers while unmarried fathers only acquire same by cohabitating with the mother “subsequent to the child’s birth for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child”.<sup>499</sup>
- (c) One of the objectives of the Children’s Status Act<sup>500</sup> of the Republic of Namibia is to “... ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents”. “Children born outside marriage” are dealt with separately in the same Act,<sup>501</sup> in terms of which it is expressly stated: “Both parents of a child born outside marriage have equal rights to become the custodian of a child”<sup>502</sup> and “[a] person with custody of a child ... will also be the guardian of that child, unless a competent court, on application made to it, directs otherwise”.<sup>503</sup> “Perpetrators of rape<sup>504</sup>”, however, “... have no rights to custody, guardianship or access in terms of the Act”.<sup>505</sup>
- (d) The Ugandan Children Act, which commenced on 1 August 1997, confers parental responsibility on “every parent” of a child, irrespective of whether the child was born in or out of wedlock. However, a declaration of

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<sup>496</sup> Act 560 of 1998.

<sup>497</sup> S 6 of the Act, entitled “Parental Duty and Responsibility”, provides: “No parent shall deprive a child his welfare whether – (a) the parents of the child are married or not at the time of the child’s birth; or (b) the parents of the child continue to live together or not.”

<sup>498</sup> 8 of 2001.

<sup>499</sup> S 25(2) of the Children Act 8 of 2001.

<sup>500</sup> Act 6 of 2006.

<sup>501</sup> Republic of Namibia Children’s Status Act 6 of 2006: Part 4.

<sup>502</sup> S 11(1).

<sup>503</sup> S 13(1).

<sup>504</sup> For purposes of s 15, “rape” means “... the common law crime of rape and the crime of rape referred to in section 2 of the Combating of Rape Act, 2000 (Act No. 8 of 2000), where the perpetrator has been convicted of the crime”: S 15(2) of the Children’s Status Act 6 of 2006.

<sup>505</sup> S 15(1).

parentage<sup>506</sup> does not necessarily confer “rights of custody” in respect of the child upon the “declared” mother or father.<sup>507</sup>

#### **4.3.1.4 Australia**

The Australian Family Law Act 1975 (Cth) has allowed for the initial allocation of parental responsibilities and rights to both mother and father on an equal basis, based on the ground of their parentage alone, since 1988.<sup>508</sup> The provisions created rights for parents regardless of their marital status. Parental rights are automatically conferred on all unmarried fathers, including presumably a man who procreated the child through the rape of the mother<sup>509</sup> subject of course to the possibility that a court could re-allocate such “responsibility” if deemed in the best interests of the child.<sup>510</sup> Wide-ranging changes to the regulation of the parent/child relationship were again brought about by the enactment of the Family Law Reform Act 1995 (Cth) which came into operation on 11 June 1996.<sup>511</sup> Three main themes emanated from these reforms.<sup>512</sup>

- (a) The shift from the concept of parental rights to parental responsibilities;
- (b) the creation of a formal policy of joint parenting underpinned by the expressed principle that children have the right to know and be cared for by both their parents irrespective of whether they are married, separated, have never married or never lived together and the principle that children have a right of contact, on a regular basis, with both their parents; and

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<sup>506</sup> Ss 67-71 of the Children Act of Uganda.

<sup>507</sup> S 72(2) of the Act. The court has a discretion to grant custody of the child to an applicant in the same proceedings as the declaration of parentage: S 73(1).

<sup>508</sup> S 63F of the Family Law Amendment Act 1987 (Cth) which came into operation on 1 Apr 1988, for a discussion of which, see Chisholm 1988 *University of New South Wales Law Journal* 153 at 160.

<sup>509</sup> Inference by Chisholm 1988 *University of New South Wales Law Journal* 153 at 160, since “parent” is not defined in the Act.

<sup>510</sup> Chisholm 1988 *University of New South Wales Law Journal* 153 at 160; Bailey-Harris 1996 *Adelaide Law Review* 83 at 84 and 90, in which the Australian approach to the parent/child relationship is compared and distinguished from the position under the English Children Act 1989.

<sup>511</sup> Bailey-Harris 1996 *Adelaide Law Review* 83.

<sup>512</sup> Bailey-Harris 1996 *Adelaide Law Review* 83 at 84-85.

- (c) the encouragement of parental agreements as the preferred mode of resolving issues of child upbringing, expressly provided for in section 63B of the Family Law Reform Act 1995 (Cth) in terms of which parents are encouraged "... to agree about matters concerning the child rather than seeking an order from a court".<sup>513</sup>

According to the findings of a research project published in an interim report in April 1999,<sup>514</sup> the abovementioned law reforms have had an overall negative impact, including, insofar as it is relevant within the present context, –

- (a) the fact that there is no evidence of a shift towards shared parenting – "... mothers continue to do the bulk of the caregiving work after separation" and "... many fathers still do not consistently make themselves available to the children";<sup>515</sup>
- (b) the uncertainty and confusion created about the law due to a lack of clarity in the legislation;<sup>516</sup>
- (c) an increase in disputes and "an endless cycle of court orders".<sup>517</sup> The reforms have "... created greater scope for an abusive non-resident parent to harass or interfere in the life of the child's primary care-giver by challenging her decisions and choices";<sup>518</sup>

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<sup>513</sup> Bailey-Harris 1996 *Adelaide Law Review* 83 at 84-85.

<sup>514</sup> Rhoades *et al* Interim Report, Family Court of Australia (April 1999). The research was funded by an Australian Research Council grant to the University of Sydney and the Family Court of Australia. The research was undertaken during 1997 and 1998 and investigated the impact of the changes to the law dealing with children under the Family Law Act 1975 (Cth). A summary of the findings of the research project was published by Rhoades *et al* in 2001 *Australian Family Lawyer* 1. Drawing on the research done for this project all three authors have subsequently made contributions of their own: See Graycar 2000 *Melbourne University Law Review* 737; Harrison 2002 *JLPPF* 1 and Rhoades 2002 *Canadian Journal of Family Law* 76.

<sup>515</sup> Rhoades *et al* 2001 *Australian Family Lawyer* 1.

<sup>516</sup> Rhoades *et al* 2001 *Australian Family Lawyer* 1 at 2.

<sup>517</sup> Rhoades *et al* 2001 *Australian Family Lawyer* 1 at 3.

<sup>518</sup> *Ibid.*

- (d) the fact that the changed terminology has not "... permeated the consciousness of those using the Act" and parents (as well as the media) still talk about custody and access (instead of residence and contact);<sup>519</sup>
- (e) a large increase in the incidence of disputes about contact many without merit "... pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact";<sup>520</sup>
- (f) increased pressure on women who fear violence to provide contact. Interviews with parents suggested that "... unsafe contact orders are being made by consent".<sup>521</sup>

The discouraging message relayed by these findings must, however, be interpreted against the background of the legal position in Australia in terms of which no clear distinction is made between parental disputes that arise after separation or divorce and disputes between parents who have automatically been vested with parental responsibilities and rights but have never been in a relationship at all. The reason for this is that the parental responsibilities and rights initially allocated to parents in Australia remain unaffected by the subsequent separation of the parents or divorce<sup>522</sup> subject to the making of a parenting order when it is deemed to be in the child's best interests.<sup>523</sup> Although the Australian legislation does not contain the equivalent of the English "no-order principle",<sup>524</sup> it does encourage courts to make orders that will prevent future litigation.<sup>525</sup> It is thus only when practical problems arise in the exercise of joint

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<sup>519</sup> *Ibid.*

<sup>520</sup> Rhoades *et al* 2001 *Australian Family Lawyer* 1 at 6. From the review of the contravention judgments it appeared that "[a]lmost all (95%) of the applications were brought by contact parents (most of them fathers – 89%), and the majority of cases (62%) were found to be without merit".

<sup>521</sup> Rhoades *et al* 2001 *Australian Family Lawyer* 1 at 6.

<sup>522</sup> Family Law Act 1975 (Cth): S 61C(2).

<sup>523</sup> S 60CA, read with s 60CC, setting out the matters to be considered in determining the best interests of a child.

<sup>524</sup> In terms of this principle, enunciated in s 1(5) of the UK Children Act 1989, the court is expressly discouraged from making an order "... unless it considers doing so would be better for the child than making no order at all": See Bailey-Harris 1996 *Adelaide Law Review* 83 at 85.

<sup>525</sup> S 60CC(3)(l) of the Family Law Act 1975 (Cth).

responsibility<sup>526</sup> that parental disputes will have to be resolved by a court by means of a “parenting order”<sup>527</sup>.

A careful reading of the interim report referred to above seems to suggest that the research was geared more towards assessing the impact of the reforms on separated parents after the breakdown of the relationship between them than on the relationship between parent and child before such breakdown or where the parents were never in a relationship or marriage at all.<sup>528</sup> The focus on “post-separation parenting” in Australia,<sup>529</sup> seems in general to have obscured the impact of the equal allocation of parental responsibilities and rights on disputes between parents.<sup>530</sup> The probative value of the research project is, therefore, unfortunately limited in guiding South African law reform initiatives in this regard. To the extent that the research conducted in Australia may be relevant, the findings would clearly seem to militate strongly against introducing a system of equality as far as the initial allocation of parental responsibilities and rights is concerned. Subsequent to these findings Australian law underwent further major law reform with the enactment of the Family Law Amendment (Shared Parental Responsibility) Act 2006. The latest amendments carry with it strong messages about shared parenting after separation, with a shift towards consideration of

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<sup>526</sup> The exact nature of the exercise of “joint” responsibility was the subject of some debate since s 61C did not (unlike its counterpart (s 2(7)) in the UK Children Act 1989) expressly state whether the responsibility could be exercised severally as well as jointly: Bailey-Harris 1996 *Adelaide Law Review* 83 at 90. See also Finlay *et al Family Law in Australia* [7.58]. After the 2006 amendments shared parental responsibility – not shared custody – is the starting point except in cases involving violence. This means that parents share the key decisions in the child’s life, regardless of how much time the child spends with each parent: Mills *Family Law* 111.

<sup>527</sup> The 2006 amendments brought about by the Family Law Act removed the categories of orders relating to “residence” (specifying with whom the child is to live), “contact” (specifying with whom the child is to have contact) and “specific issues” (any aspect of parental responsibilities and rights not covered by the other types of parenting orders) and refer simply to parenting orders: Mills *Family Law* 110.

<sup>528</sup> See Rhoades *et al* Interim Report, Family Court of Australia (April 1999) 2.

<sup>529</sup> See abstract of Kaspiew PhD thesis University of Melbourne (2005) entitled “Mothers, fathers and parents: The construction of parenthood in contemporary family law decision making” in which Kaspiew states that the new reforms “... introduced a new legal framework for handling disputes involving children whose parents are *separated or divorced*” (own emphasis). Rhoades draws on research conducted in Australia in an effort to guide “similar” reform of Canada’s *Divorce Act*: Rhoades 2002 *Canadian Journal of Family Law* 76. According to Finlay *et al Family Law in Australia* [7.45] the report of the Australian Family Law Council “Patterns of Parenting After Separation (Canberra 1992)” was central to the reforms introduced under the Family Law Reform Act of 1995.

<sup>530</sup> A conclusion shared by Lowe 1997 *IJLPF* 192 at 201, remarking that “[i]n contrast to England and Scotland the issue of vesting automatic parental responsibilities and rights in all fathers attracted little recent debate”.



“equal time” or “substantial and significant time” for both parents where shared parental responsibility is considered. Alternative dispute resolution rather than court intervention is emphasised and encouraged. References to “residence” and “contact” have been replaced by “lives with” and “spends time with” or “communicates with”.<sup>531</sup>

#### **4.3.1.5 United States of America**

As with most other countries in the world, family law in the United States has also been undergoing a dramatic transformation. According to Meyer:<sup>532</sup>

“Gender roles within the family, once rigidly enforced by law, have been discarded, at least formally. Marriage, long exalted as ‘the foundation of the family and society’, is no longer the unquestioned gateway to family creation”.<sup>533</sup>

The wholesale exclusion of unwed fathers from being recognised as legal parents ended after the United States’ Supreme Court’s 1972 decision in *Stanley v Illinois*.<sup>534</sup> Subsequent decisions allowed that certain men – those who had failed to do what they could to develop a relationship with their offspring – could be summarily disregarded as potential fathers.<sup>535</sup> The Uniform Parentage Act,<sup>536</sup> which has been formally adopted in nearly half the states and embraced in modified form in many more, abandoned the concept of legitimacy. Marriage

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<sup>531</sup> Mills *Family Law* 110.

<sup>532</sup> Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 1.

<sup>533</sup> The transformation reflects the changes in family life in the US, described by Meyer as “... a crazy quilt of one-parent households, blended families, singles, unmarried partnerships and same-sex unions”: Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 11.

<sup>534</sup> 405 US 645 (1972): Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 5. Also see Goldberg 1993 SALJ 261 at 271-272; Mosikatsana 1996 *CILSA* 152 at 161-162; Goldberg 1996 *THR-HR* 282 at 293-294.

<sup>535</sup> *Lehr v Robertson* 463 US 248 (1983). Goldberg 1996 *THR-HR* 282 at 294 concludes that while it is clear that the US Supreme Court places great emphasis on the father’s development of a relationship with his natural child, “[r]elationships that are based purely on the biological tie ... will not be protected”. Wolhuter 1997 *Stell LR* 65 at 75 refers to the trend in the US as the “biology-plus” approach.

<sup>536</sup> As revised in 2002.

between the parents remains a relevant and important indication of biological paternity, but has no further significance.<sup>537</sup>

#### **4.3.1.6 Summary**

It is evident from the comparative study above that not all countries have responded to the obligations and norms entrenched in the UNCRC with the same degree of enthusiasm and commitment. While Australia is probably now most in line with the approach underscored by the UNCRC, other countries have, with varying degrees of success, justified a departure from such an approach.

### **4.3.2 Constitutional inquiry**

#### **4.3.2.1 Introduction**

The differentiation between mothers and fathers as far as the acquisition of parental responsibilities and rights is concerned can in principle be attacked on the following constitutional grounds:

- (a) It constitutes an infringement of the parents' right to equality in the following specific ways:
  - (i) It unfairly discriminates against *mothers* on grounds of marital status, sex and gender in terms of section 9(3) of the Constitution.
  - (ii) It unfairly discriminates against biological *fathers* in two respects:
    - In relation to biological mothers, on the grounds of sex and gender in terms of s 9(3) of the Constitution,<sup>538</sup> and

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<sup>537</sup> Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 7. See also Kaganas in Murray *Gender and the New South African Legal Order* referring to a complaint by authors that in America "... a fetish with gender neutrality has had important implications for ... the articulation of what substantively constitutes 'the best interests of the child' ... The search is ... for factors that are gender neutral" (at 173). The position in the USA is also discussed in *Fraser v Children's Court, Pretoria North, and Others* 1997 2 SA 261 (CC) [31]-[35].

- in relation to mothers and some fathers on the ground of marital<sup>539</sup> or equivalent status<sup>540</sup> or lack of commitment to their children as required by section 21(1)(b) of the Children's Act<sup>541</sup>.
- (b) It constitutes an infringement on the following constitutional rights of children:
  - (i) The right of a child not to be discriminated against on ground of social origin and birth (out of wedlock)<sup>542</sup> in terms of section 9(3) and the child's right to dignity in terms of section 10;
  - (ii) The constitutional rights of a child in terms of section 28:
    - A child's right to parental care in terms of section 28(1)(b); and
    - the right of the child to the paramountcy of his or her best interests as required by section 28(2).

While appreciating the fact that "... constitutional rights are mutually interrelated and interdependent and form a single constitutional value system",<sup>543</sup> the constitutional inquiry undertaken for present purposes will first look at the parents' position *qua* parents (as outlined in (a) above) and then proceed to consider the position of the children *vis-a-vis* their parents (as outlined in (b) above). When the respective rights are finally weighed up against each other it will be shown that the limitation of the parents' right to equality is currently justified by the child's

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<sup>538</sup> In terms of s 9(3) of the Constitution: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... gender, sex, pregnancy, marital status, ethnic or social origin ... and birth".

<sup>539</sup> As required by s 20 of the Children's Act 38 of 2005.

<sup>540</sup> As required by s 21(1)(a) of the Children's Act 38 of 2005.

<sup>541</sup> 38 of 2005.

<sup>542</sup> Currie & De Waal *Bill of Rights Handbook* 256-257; Albetyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 74; Cockrell in *Bill of Rights Compendium* par 3E24.

<sup>543</sup> As reiterated by Langa DCJ in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 1 SA 406 (CC) [55].

overriding right to parental care which, in terms of the best interests standard, is limited to committed parental care in terms of the Children's Act.<sup>544</sup> Nevertheless, it will be shown that a different approach, granting equal automatic parental responsibilities and rights to both mothers and fathers at birth, can equally well be justified as being more in line with the dictates of the UNCRC.

#### **4.3.2.2 Unfair discrimination against parents**

##### **(a) General**

As far as the right to equality in general is concerned it is important to keep in mind that section 9 of the Constitution is not aimed merely at achieving formal equality.<sup>545</sup> The section as a whole must be read as grounded on a substantive conception of equality that takes actual social and economic disparities between groups and individuals into account.<sup>546</sup> For this purpose section 9(2) of the Constitution allows for "remedial or restitutionary equality",<sup>547</sup> that recognises measures "... designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination".<sup>548</sup>

According to Albertyn & Goldblatt the test for unfair discrimination outlined in *Harksen v Lane NO and Others*<sup>549</sup> can be pared down to the following three queries:<sup>550</sup>

##### **(i) Does the differentiation amount to discrimination?**

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<sup>544</sup> 38 of 2005. See Wolhuter 1997 *Stell LR* 65 at 71 and Kaganas in Murray *Gender and the New South African Legal Order* at 179 who explains it in the following terms – "... since s 30(3) (of the interim Constitution) stipulates that the child's best interests are paramount, in all matters concerning such child, the equality rights of the parents would doubtless have to yield to the welfare principle".

<sup>545</sup> Currie & De Waal *Bill of Rights Handbook* 232: "Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike".

<sup>546</sup> Currie & De Waal *Bill of Rights Handbook* 233-234.

<sup>547</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) [61].

<sup>548</sup> See also *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) 324C-D.

<sup>549</sup> 1998 1 SA 300 (CC) [53].

<sup>550</sup> Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 43.

- (ii) If so, was it unfair?<sup>551</sup>
- (iii) If so, can it be justified in terms of the limitations clause, *ie* section 36 of the Constitution? To succeed with this enquiry the criteria in terms of section 36 must be satisfied by showing that the right has been limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive means to achieve the purpose.<sup>552</sup>

Goldstone J in *Harksen v Lane NO and Others*<sup>553</sup> describes this “final leg of the enquiry” as “... a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality”.<sup>554</sup> According to Currie & De Waal<sup>555</sup> this does not really take the matter any further. These authors express doubt as to whether section 36 has any meaningful application to section 9 because “[t]he factors taken into account when determining whether the discrimination is unfair (the impact of the discriminatory measure) are very similar to the factors that are used to assess the

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<sup>551</sup> Discrimination based on a listed ground is presumed to be unfair: S 9(5) of the Constitution. As to discrimination on an unspecified ground, the unfairness will have to be proved: Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 43.

<sup>552</sup> S 36(1) of the Constitution.

<sup>553</sup> 1998 1 SA 300 (CC).

<sup>554</sup> At [53].

<sup>555</sup> Currie & De Waal *Bill of Rights Handbook* 237.

proportionality of a limitation in terms of s 36".<sup>556</sup> Despite the overlapping of the criteria, Currie & De Waal<sup>557</sup> state that the Constitutional Court has nevertheless on each occasion when it has found a violation of the equality clause, also considered (however briefly) the effect of the limitation clause.

**(b) Unfair discrimination against mothers**

**(i) Discrimination based on marital status**

The discrimination against mothers on the ground of marital status is founded upon the fact that a married mother shares parental responsibilities and rights with the father of the child while an unmarried mother has to bear the burden on her own.<sup>558</sup> The inequality between married and unmarried mothers arises as a direct consequence of the unequal allocation of parental responsibilities and rights to mothers and fathers. The discrimination between married and unmarried mothers would automatically disappear if mothers and fathers were treated on an equal basis as far as the allocation of parental responsibilities and rights is concerned. The question whether it is constitutionally justifiable to equalise the position of mothers and fathers as far as the allocation of parental responsibilities and rights is concerned, will be canvassed in paragraph (c) below.

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<sup>556</sup> Currie & De Waal *Bill of Rights Handbook* 238. These authors find it, for instance, "... difficult to see how discrimination that has already been characterised as 'unfair' because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based on dignity, freedom and equality. Similarly, it is difficult to see how one could justify as 'reasonable' a law which differentiates for reasons not rationally related to a legitimate government purpose and which is therefore arbitrary". In a similar vein, Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* at 81 state that the relationship between unfairness and justification "... has been described as a 'paradox' since it seems impossible that something that violates the right to equality would be reasonable and justifiable in a society based on equality". Cf, however, Kriegler J in his dissenting judgment in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) at [77] suggesting that the factors of the respective enquiries should be distinguished from one another, holding that the enquiry in terms of s 36 is concerned with justification, possibly notwithstanding unfairness while the s 9 enquiry is concerned with fairness and nothing else.

<sup>557</sup> Currie & De Waal *Bill of Rights Handbook* 238.

<sup>558</sup> Heaton in *Bill of Rights Compendium* 3C42.3.

## (ii) Discrimination based on sex and gender

Various reasons can be found for the law's preferential treatment of mothers as legal parents:

- It promotes legal certainty. Since maternity<sup>559</sup> could always be established with certainty,<sup>560</sup> it made sense to allocate parental responsibilities and rights to the biological mother. In this way the legal parentage of the child could, at least as far as the mother was concerned, be determined whatever the marital status of the child's parents. Paternity, as well as legal paternity, could then be determined with reference to a certain objectively determinable fact – maternity.
  
- The importance of the mother's contribution to the child who, in the opinion of the Constitutional Court in *Fraser v Children's Court, Pretoria North*<sup>561</sup> –  
  
“... has a biological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of a father.”
  
- Lastly, the automatic allocation of parental responsibilities and rights to the unmarried mother affords the mother, as primary caretaker, a certain degree of autonomy as far as decisions regarding her child is concerned and protects her (and as a consequence presumably also the children born out of wedlock) from the unwarranted and sporadic interference by “irresponsible” fathers of such children.<sup>562</sup>

It seems, therefore, that mothers are entrusted with full responsibilities and rights<sup>563</sup> because they can give birth and as mothers are automatically presumed suitable to act in the best interests of the child. Fathers, on the other hand are

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<sup>559</sup> The woman who gave birth to the child.

<sup>560</sup> Unlike paternity.

<sup>561</sup> 1997 2 SA 261 (CC) at 274B.

<sup>562</sup> Kaganas in Murray *Gender and the New South African Legal Order* 181 contends that the mother is vulnerable to “disruptive interventions”.

<sup>563</sup> Heaton in *Bill of Rights Compendium* 3C42.3.

first subjected to a screening process. If they “pass” the screening test (by showing the necessary commitment to either the mother or the child) then, and only then, will the law accept and expect them to assume legal responsibilities and rights in respect of their child. Fathers who fail the “screening” test by not showing a sufficient degree of commitment are “spared” the burden of responsibilities automatically imposed on mothers. Since sex and gender are listed grounds of discrimination,<sup>564</sup> the discrimination is presumed to be unfair unless it can be justified in terms of the limitation clause.<sup>565</sup>

Despite the fact that the automatic allocation of parental responsibilities and rights to all mothers serves a rational purpose, it may still amount to unfair discrimination considering the unfair impact of the automatic allocation to mothers. According to Goldstone J in *President of the Republic of South Africa and Another v Hugo*:<sup>566</sup>

“For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship.<sup>567</sup> The result of being responsible for children make it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. ... It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.”

Although Goldstone J in *President of the Republic of South Africa and Another v Hugo*<sup>568</sup> was not as a general rule prepared to accept that it would be *fair* to discriminate between women and men on the basis that mothers bear an unequal share of the burden of child rearing in our society, the majority of the court ultimately found that the presidential pardon did not unfairly discriminate against fathers since it could be seen as advancing the interests of a particularly

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<sup>564</sup> See s 9(3) of the Constitution.

<sup>565</sup> S 36(1) of the Constitution: See 4.3.2.2(a) above.

<sup>566</sup> 1997 4 SA 1 (CC) at [38].

<sup>567</sup> The court in *Fraser v Children’s Court, Pretoria North, and Others* 1997 2 SA 261 (CC) at [44] also stressed the “... deep disadvantage experienced by the single mother in society”.

<sup>568</sup> 1997 4 SA 1 (CC) at [37].



vulnerable group (mothers) in society, disadvantaged by unfair discrimination in the past.<sup>569</sup>

In a dissenting judgment, Kriegler J<sup>570</sup> endorsed the general observations in the majority judgment regarding gender discrimination but submitted that the President transgressed the provisions of section 8(2) of the interim Constitution (the equivalent of section 9(2) of the final Constitution) and that the presumption of unfairness on that distinction had not been rebutted. After considering the importance of equality in the constitutional scheme as a whole<sup>571</sup> and the “persuasive”<sup>572</sup> factors that could possibly rebut the presumption of unfairness on the ground of gender, Kriegler J concluded that –

“... the President’s *ipse dixit* establishes that the decision (to implement the pardon) was founded on what has come to be known as gender stereotyping. And the Constitution enjoins all organs of state – here the President – to be careful not to perpetuate the distinctions of the past based on gender type-casting. In effect the Act put the stamp of approval of the head of State on a perception of parental roles that has been proscribed. Mothers are no longer the ‘natural’ or ‘primary’ minders of young children in the eyes of the law, whatever tradition, prejudice, male chauvinism or privilege may maintain. Constitutionally the starting point is that parents are parents”.<sup>573</sup>

Yet, it has been held that the discrimination against women in this context can be justified in terms of the view that formal equality, as far as parental roles are concerned, will not create substantial equality for women who may suffer even more if fathers are automatically given parental responsibilities and rights.<sup>574</sup> The focus of this argument is on the mother’s diminished autonomy as a result of having to share parental responsibilities and rights with the father of the child. The fear is that while mothers will still do all the parenting, fathers will acquire the

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<sup>569</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at [52], confirming *Brink v Kitshoff NO* 1996 4 SA 197 (CC) at [44].

<sup>570</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at [66].

<sup>571</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at [74].

<sup>572</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at [85]. Kriegler J, however, took care at the same time to emphasise that “... I am not suggesting that gender or sex discrimination of any kind must always and inevitably be found to be irrevocably unfair”.

<sup>573</sup> *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at [85].

<sup>574</sup> See in this regard Sloth-Nielsen & Van Heerden 2003 *IJLPF* 121 at 127.

right to interfere with the parenting. In reply to these arguments it is important to emphasise, first of all, that the law will not only confer parental rights on the father but also parental responsibilities and that while the acquisition of such responsibilities and rights will be automatic, the continued exercise thereof will be conditional upon the best interests of the child as the overriding concern. Although it is acceded that conferring rights on all fathers will not necessarily in all cases translate into an increased sharing of the duties and responsibilities pertaining to the care of the child – it must be noted, that to the extent that such duties and responsibilities are accepted and assumed by the father, it can only lessen the burden of mothers. In this way formal equality as far as the acquisition of parental responsibilities and rights are concerned could in fact contribute to substantial equality for mothers.

**(c) Unfair discrimination against fathers<sup>575</sup>**

As far as the discrimination against fathers is concerned, a distinction is drawn between the discrimination on the grounds of sex and gender in relation to biological mothers, on the one hand, and the discrimination on ground of the lack of commitment in relation to mothers and committed biological fathers, on the other hand. The discrimination in the former case is based on listed grounds (sex and gender) and presumed to be unfair unless the discrimination can be justified in terms of the limitation clause (section 36) of the Constitution. The second form of discrimination (lack of commitment) is in the first instance based on a specific ground - marital status, which often overlaps with the discrimination on the grounds of sex and gender, and is presumed to be unfair. The possible discrimination based on a lack of commitment shown by the unmarried father is an unspecified ground and does not benefit from the presumption of unfairness.<sup>576</sup> Discrimination based on a lack of commitment will thus have to be established as unfair.

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<sup>575</sup> See Deech 1992 *Journal of Child Law* 3-5, for a wonderful human rights assessment of the unmarried father's position in the UK.

<sup>576</sup> S 9(3) of the Constitution.

While it is admitted that there is a similarity and overlap between the enquiry into whether the differentiation on an unspecified ground amounts to discrimination and the unfairness enquiry (in the case of discrimination based on a specified ground), because both consider the impairment of dignity, the two enquiries apparently have different objectives: The former distinguishes differentiation from discrimination while the latter has to determine whether a particular act of discrimination was unfair.<sup>577</sup>

### **(i) Discrimination based on sex and gender**

The law as amended by the Children's Act,<sup>578</sup> differentiates in the first instance between biological fathers and biological mothers insofar as all mothers, irrespective of their marital status or commitment to their child, automatically acquire parental responsibilities and rights based exclusively on their biological relationship to their child. If fathers are denied automatic parental responsibilities and rights because only females are capable of bearing children the discrimination seems to have less to do with the law's discrimination on ground of sex than nature's discrimination against men. The discrimination against fathers has rather been found to lie in the prejudicial treatment of fathers arising out of their parenting roles, and is thus based on gender.<sup>579</sup> Assigning automatic parental responsibilities and rights to *all* mothers and not all fathers at birth is deemed discriminatory because it perpetuates harmful stereotypes and "... reinforces the message that the law (and society at large) still sends, namely that child care is a mother's duty and that fathers should not concern themselves with child care because it simply is not their job and/or because they are incapable of, or unsuited to it".<sup>580</sup> As sex (to the extent that it is applicable) and gender are both listed grounds, the discrimination would be deemed unfair unless the violation of the fathers' right to equality can be justified in terms of section 36 of the Constitution.

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<sup>577</sup> Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 49.

<sup>578</sup> 38 of 2005.

<sup>579</sup> Currie & De Waal *Bill of Rights Handbook* 251.

<sup>580</sup> Heaton in *Bill of Rights Compendium* 3C42.3. Bonthuys 1999 *THR-HR* 547 at 549 contends that "[l]aw constructs the ways in which women are different from men and thus, how mothering differs from fathering. It is in this sense that all women are defined as mothers or potential mothers and controlled through stereotypes of maternal femininity". See also minority judgment of Mokgoro J in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at [93].

The question of whether such justification exists has given rise to a range of responses from the judiciary and writers, as shown below:

- **Qualified justification for limiting father's right to equality**

Mahomed DP in *Fraser v Children's Court, Pretoria North and Others*<sup>581</sup> seemed to think that such gender discrimination could be justified, albeit only in the initial period after the child is born. The extent of the bias or preference was (further) limited by the court in *Madiehe (born Ratlhogo) v Madiehe*,<sup>582</sup> holding that a court would only *in case of doubt* favour the mother rather than the father. The court was adamant that “[c]ustody of a young child is a responsibility as well as a privilege and it has to be earned. It is not a gender privilege or right.”<sup>583</sup> The dilution of the so-called “maternal preference rule”<sup>584</sup> is also evident from cases like *Van der Linde v Van der Linde*<sup>585</sup> in which it was held that *bemoedering* or mothering is indicative of a function rather than a *persona* and that a father is as capable of mothering a child as a mother. Mindful of these judicial developments and the obligations imposed by the Constitution, Willis AJ in *Ex parte Critchfield*<sup>586</sup> was of the view that –

“... given the fact of pregnancy or, more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination (*ie* it would not be unconstitutional) for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination (and, correspondingly, be unconstitutional) if a court were to place undue (and unfair) weight upon this factor when balancing it against other relevant factors. Put simply, it seems to me that the only significant consequence of the Constitution when it

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<sup>581</sup> 1997 2 SA 261 (CC) at 274B-C.

<sup>582</sup> [1997] 2 All SA 153 (B) at 157f.

<sup>583</sup> *Ibid.*

<sup>584</sup> According to Willis AJ in *Ex parte Critchfield* 1999 3 SA 132 (W) 142B, the maternal preference “rule” has never been a rule of law but rather “... a statement of judicial preference or, if you will, a statement of the prevailing practice and, perhaps, prevailing policy”. See also Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 534 fn 145 and accompanying text for a discussion of the “rule” and examples of the application thereof in cases. Pantazis 1996 *SALJ* 8 at 9 claims it was the development of the maternal preference rule (also referred to as the “tender-years” rule) that advanced the recognition of the best interests standard.

<sup>585</sup> 1996 3 SA 509 (O) at 515B-H.

<sup>586</sup> 1999 3 SA 132 (W) 143B-D.

comes to custody disputes is that the Court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children. This, as I have indicated above, has for a long time been the position in our common law.”<sup>587</sup>

Whereas the “dynamics of pregnancy” is thus only one factor to be considered in a *custody* dispute at divorce, it is *the* determining factor in initially assigning sole *parental responsibilities and rights* to an unmarried mother of a child. Despite the fact that, save for the *Fraser* case, the abovementioned cases were all concerned with the continued *exercise* of parental responsibilities and rights *post* divorce and not with the initial *acquisition* thereof<sup>588</sup> as such, the judgments do show an increased willingness by the courts to re-evaluate the gender stereotyping of parental roles.<sup>589</sup>

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<sup>587</sup> See also *Van Pletzen v Van Pletzen* 1998 4 SA 95 (O) at 101C-D; *B v M* [2006] 3 All SA 109 (W) at [74]: “As far as parenting is concerned we have long since abandoned the ‘maternal preference rule’”; and *K v M* [2007] 4 All SA 883 (E) at 883.

<sup>588</sup> Howie JA draws attention to this fact in *B v S* 1995 3 SA 571 (A) 578B stating that the real issue in that case was “... whether access was appropriate and not whether access was the father’s inherent legal right”. Sonnekus & Van Westing 1992 *THR-HR* 232 at 244 entertain the notion of a loose analogy between granting automatic parental rights to unmarried fathers and awarding joint custody to parents after divorce. Reference is made to the diminishing enthusiasm for such orders in both Europe and America, where the experiment with joint custody orders after divorce has a longer history. The disparity between practice and theory in this regard and the negative outcomes of such orders are according to Sonnekus & Van Westing at 245 evident from authors like Wilkinson (American author of *Child Custody and Divorce* (1984)) who hold the opinion that “[w]here there is conflict joint custody is unworkable, and where there is cooperation joint custody is unnecessary”. Kaganas in Murray *Gender and the New South African Legal Order* 184 expresses similar concerns about joint custody.

<sup>589</sup> See in this regard Rosen 1978 *SALJ* 246 at 247 who concluded after an (albeit very limited) empirical study that there were no significant differences in the adjustment level of children placed in the custody of their mother or father post divorce, and Kahn 1978 *SALJ* 249 at 249-250, who commented on this article by referring to the position in Australia where the “mother principle” had come under attack by the judiciary and authors who concluded that “... there is absolutely no evidence to support the mother principle. It is belied by the evidence of infanticide, neglect and abuse, and the relative success of adopted children over their peers”. Cf, however, Goldberg 1993 *SALJ* 261 at 274 who contends that the considerations in the case of unwed parents are incomparable to those at divorce: “With divorce, what would be in the best interests of the child would be for the parents not to divorce. Yet it is a reality that we have to make the best of. Often that ‘best’ will be for the child to continue seeing his or her father after the separation. With the unwed father no such consideration applies in the majority of cases, except where the parties were cohabitants for any length of time”.

- **Limitation of father’s right to equality fully justified**

Authors like Cockrell, however, suggest that gender discrimination in the automatic allocation of parental responsibilities and rights is justified by deep notions of substantive equality and should not be held in violation of the father’s constitutional rights to equality.<sup>590</sup> To overcome the gender discrimination challenge, Currie & De Waal<sup>591</sup> favour a system in terms of which parental rights are conferred on the *de facto* parent or primary caretaker<sup>592</sup>:

“The question whether sex-specific parental rights unfairly discriminate on the basis of gender is complex. On the one hand, affording fathers of children the same rights as mothers by abolishing the maternal preference and awarding fathers of children born out of wedlock automatic parental rights may advance gender equality by encouraging fathers to take an active role in the care of their children. Moreover, awarding mothers of children a greater share of parental rights merely on the basis of their gender perpetuates harmful stereotypes which require women to shoulder the burden of childcare. On the other hand, it is well known that mothers actually continue to take the primary responsibility for childcare in our society. Awarding fathers equal rights may not contribute to actual caring by fathers, but instead award fathers legal

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<sup>590</sup> Cockrell in *Bill of Rights Compendium* 3E25. While admitting that it is essential that the law recognise the relationship between an extra-marital child and its natural father, Mosikatsana 1996 *CILSA* 152 at 165 on the other hand, contends that both formal and substantive equality between unwed parents may potentially subordinate women. Mosikatsana is of the opinion that equal treatment of unwed parents (formal equality) would only give a natural father the option of being involved without ensuring that he bears equal responsibility for child rearing. Mosikatsana (at 164) in this regard draws attention to the distinction between caring “for” and caring “about” children, pointing out that although either men or women can do both, it is typically women who do the caring “for”. This author maintains (at 164) that “[m]ost fathers will not assume equal responsibility for child rearing with the mother, no matter how many rights they are granted”, concluding (at 165) that “[g]ender neutral rules applied to situations of social and economic inequality, would perpetuate existing gender inequalities”. Rules of substantive equality would also reinforce gender stereotypes by designating women and not men as the primary care givers. According to Mosikatsana (at 165) “... the best approach would be to apply legal rules that neither apply false gender neutrality nor reinforce gender inequalities”. See also Kaganas in Murray *Gender and the New South African Legal Order* 170.

<sup>591</sup> Currie & De Waal *Bill of Rights Handbook* par 27.2(b)(ii).

<sup>592</sup> S 1(1) of the Children’s Act 38 of 2005 employs the term “care-giver” but reserves the terms for “... any person *other* than a parent or guardian” (own emphasis). As such the term “care-giver” would be inappropriate in the present context in which the possibility of a parent acting as the primary carer is specifically contemplated.

rights to interfere in mother's childcare arrangements<sup>593</sup>.... In this way, gender-neutral rules may exacerbate the actual disadvantage experienced by women in the family. Perhaps a gender neutral solution which awards parental rights on the basis of actual childcare work, like the primary caretaker standard, could avoid this problem."<sup>594</sup>

According to Clark<sup>595</sup> a primary caretaker role is established –

“... through leading evidence of various factors in relation to the child, such as, for example, the preparing and planning of meals; bathing, grooming and dressing; medical care; arranging for social interaction after school; arranging alternative care – babysitting or daycare, disciplining and education. A perceived advantage of the primary-care-taker rule is that it may reduce the likelihood of unnecessary litigation and diminish the uncertainty of a case-by-case discretionary method. From a feminist perspective the primary-care-taker rule does not give the secondary care-taker (usually the man) an opportunity to gain an unfair bargaining advantage by trading off custody against maintenance payments, and it is sex-neutral: fathers who have been the primary care-takers are not disadvantaged ...The main disadvantage ... is that the child may lose contact with the non-custodial parent which may not be in the best interest of the child.”<sup>596</sup>

Kaganas<sup>597</sup> also favours the standard of the primary caretaker, concluding<sup>598</sup> as follows:

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<sup>593</sup> This has also been a major factor preventing the creation of an automatic legal status for fathers in England: See Bainham 1989 *JLF* 208 at 226.

<sup>594</sup> Also see Kaganas in Murray *Gender and the New South African Legal Order* 183.

<sup>595</sup> Clark 2000 *Stell LR* 3 at 9-10.

<sup>596</sup> Other authors such as Wolhuter 1997 *Stell LR* 65 at 65 would rather have the law adopt a so-called *via media* “... premised upon the reformulation of a natural father's right of access to encompass both shared parenting and a social relationship with the child ...”. See Sinclair in Van Wyk *et al Rights and Constitutionalism* 537 who, indirectly rejects this *via media* approach (which she describes as the “typical panacea”) on the basis that what is required is not an approach that reformulates the existing approach or that tries to reconcile disparate views on both extremes of the spectrum, but a “comprehensive recrafting of the rights and responsibilities of parents and their children, taking into account the justification for state intervention to protect widely shared societal values, and also the diversity of cultural and religious convictions in our country” (at 539).

<sup>597</sup> Kaganas in Murray *Gender and the New South African Legal Order* at 184.

<sup>598</sup> In support of Boyd SB “From gender specificity to gender neutrality? Ideologies in Canadian child custody law” in Smart C & Sevenhuijsen S (eds) *Child Custody and the Politics of Gender* (1989) 146: See Kaganas in Murray *Gender and the New South African Legal Order* 170 fn 9 and 184 fn 119.

“Legal provisions which presume a norm of shared parenting before it has become a social reality may reinforce unequal power relations between men and women rather than encourage its demise”.<sup>599</sup>

- **No justification for limiting father’s right to equality**

Sinclair<sup>600</sup> proposes transforming the law to reflect a “... fundamental premise of equality between parents”. Sinclair, in my opinion correctly, questions women’s demands for constitutional equality while at the same time still insisting that it would be unfair to vest unmarried fathers with inherent parental responsibilities and rights.<sup>601</sup> According to this author<sup>602</sup> a preference for shared parental responsibilities and rights should only be interfered with “[w]here the interests of the child demand judicial intervention”. In this way, it is argued “[s]tereotyped assumptions that child care is woman’s work and that fathers do not want to or cannot take care of their children would be diminished” as a result of which “[t]he law would be sending the signals that conform to the letter and spirit of the Bill of Rights”.<sup>603</sup> Although equal parental rights and responsibilities would not eliminate competition and conflict between the parents, Sinclair<sup>604</sup> is convinced that where there is no “war”, which in her opinion is the norm rather than the exception, “... individual men and women would be treated alike”.

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<sup>599</sup> Kaganas in Murray *Gender and the New South African Legal Order* at 182, referring to an American author, Littleton CA “Reconstructing sexual equality” 1987 *California LR* 1279 at 1297, agrees that the “... function of equality is to make gender differences, perceived or actual, costless relative to each other so that people are enabled to follow their chosen lifestyles without being punished for following a female lifestyle or rewarded for following a male one”.

<sup>600</sup> Sinclair in Van Wyk *et al Rights and Constitutionalism* 540.

<sup>601</sup> Sinclair in Van Wyk *et al Rights and Constitutionalism* 540 fn 138.

<sup>602</sup> Sinclair in Van Wyk *et al Rights and Constitutionalism* 540.

<sup>603</sup> Sinclair in Van Wyk *et al Rights and Constitutionalism* 540. See also the proposal by Pantazis 1996 *SALJ* 8 (testing the arguments in *B v S* 1993 2 SA 211 (W) against the still then applicable, interim Constitution) to the effect that if the common law rights of a father cannot be changed by a court (because the interim Constitution may not have horizontal application) to grant a natural father an inherent right of access, the common law should be developed in accordance with the spirit, purport and objects of the Bill of Rights to proceed from an assumption of desirability of a relationship between father and child rather than the inverse (at 21) since the presumption of an unmarried father’s unsuitability strongly influences the decision of what is in a child’s interests (at 19).

<sup>604</sup> Sinclair in Van Wyk *et al Rights and Constitutionalism* 540.



## (ii) Discrimination based on lack of commitment

The discrimination based on sex and gender, as already said, often overlaps with discrimination based on marital status.<sup>605</sup> The court in *B v S*<sup>606</sup> held that insofar as the assignment of access (now contact) depends only on the best interests of the child and not the respective position of the parents, fathers of extra-marital children are in the same position as married fathers and are consequently not discriminated against. As pointed out earlier,<sup>607</sup> this proposition is unacceptable since access is presumed not to be in the best interests of the child in the case of extra-marital children, while in the case of a legitimate child the assumption is that it is in the best interests of the child. In *Fraser v Children's Court, Pretoria North, and Others*<sup>608</sup> the court recognised that the existence of marriage might have little to do with whether or not a father involved himself with his children.<sup>609</sup> Generally speaking, discriminating against parents on ground of their marital status as far as the parent-child relationship is concerned, has been found not to be constitutionally justifiable,<sup>610</sup> especially insofar as the differentiation between the child's parents also amounts to unfair discrimination against the child on the ground of social origin and birth out of wedlock.<sup>611</sup>

While most constitutional commentators<sup>612</sup> agree that the unequal allocation of parental responsibilities and rights to mothers and fathers may amount to unfair discrimination on the grounds of sex, gender and marital status, the Children's Act<sup>613</sup> no longer denies fathers equal parenting rights based merely on these

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<sup>605</sup> Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 35-59. In both the judgments of *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) and *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 621 (CC) the unfair discrimination on ground of sexual orientation overlapped with discrimination on ground of marital status.

<sup>606</sup> 1995 3 SA 571 (A).

<sup>607</sup> See comments by Pantazis 1996 *SALJ* 8 at 19, referred to in fn 170 above.

<sup>608</sup> 1997 2 SA 261 (CC) [44].

<sup>609</sup> Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 35-59.

<sup>610</sup> Heaton *South African Law of Persons* 69.

<sup>611</sup> See 4.3.2.3(a) below.

<sup>612</sup> Sinclair in Van Wyk *et al Rights and Constitutionalism* 538-539; Cockrell in *Bill of Rights Compendium* 3E25; Currie & De Waal *Bill of Rights Handbook* 607-608; Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 59; Clark & Goldblatt Ch 7 in *Gender, Law and Justice* 228; Heaton *South African Law of Persons* 69.

<sup>613</sup> 38 of 2005.

grounds.<sup>614</sup> The differentiation made in terms of the new legislative scheme is that between mothers and, what I call, “committed” biological fathers on the one side, versus other biological fathers who have not shown sufficient commitment to either the mother or the child to qualify in terms of the Children’s Act<sup>615</sup> to acquire parental responsibilities and rights automatically, on the other side.<sup>616</sup> The question of whether the law is fair insofar as it requires fathers to “qualify” to acquire parental responsibilities and rights whereas it does not do so in the case of mothers is, in my opinion, now even more complex and nuanced than before.<sup>617</sup>

While the discrimination between married parents and unmarried fathers is based on the specified grounds of gender and marital status and thus presumed to be unfair, the discrimination against fathers who lack the commitment envisaged in section 21 of the Children’s Act<sup>618</sup> is based on an unspecified or analogous ground<sup>619</sup> of which the unfairness will have to be established.<sup>620</sup> The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.<sup>621</sup>

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<sup>614</sup> The common law’s “sharp” distinction between legitimate and extra-marital children (as noted by Cockrell in *Bill of Rights Compendium* 3E25) has thus been tempered.

<sup>615</sup> 38 of 2005: Ss 20 and 21.

<sup>616</sup> Bainham 1989 *IJLPF* 208 at 228 distinguishes in this regard between so-called “first-class” fathers who are married and acquire parental responsibility as a result thereof, “second-class” fathers who are unmarried but can graduate to legal parenthood if they can convince the mother and/or the court that they deserve this, and “third-class” fathers who are unmarried and have either not tried or have failed to convince the mother and/or the court of their worth.

<sup>617</sup> According to Bainham 1989 *IJLPF* 208 at 236, the attempt to distinguish between responsible and irresponsible unmarried fathers is arbitrary since “... there is no way of proving a correlation between stable cohabitation and responsible behaviour”. Palmer 1996 *SALJ* 579 seems to sympathise with this line of thinking in her article entitled: “Are some fathers of extramarital children in a better position than others?”

<sup>618</sup> 38 of 2005.

<sup>619</sup> Currie & De Waal *Bill of Rights Handbook* 257.

<sup>620</sup> Discrimination against fathers who have not shown the necessary commitment to acquire parental responsibilities and rights automatically qualifies as an unspecified ground because it is based on “... attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable serious manner”: *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) [46] as discussed by Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 49.

<sup>621</sup> *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) [54]. See Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 75.

According to the Constitutional Court in *Harksen v Lane NO and Others*<sup>622</sup> the following factors must be considered to determine whether the discrimination has had an unfair impact.<sup>623</sup>

- **The position of the complainants in society and whether they have been victims of past patterns of discrimination**

Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than a burden that is placed on those who are relatively well-off.<sup>624</sup> While fathers, who have been denied an opportunity to develop a “family life” with either the mother herself or the child, may argue that they have always been discriminated against,<sup>625</sup> uncommitted fathers, save perhaps insofar as they have been obliged to support their children out of wedlock, have in a sense been advantaged by the law’s disregard of them by being allowed to “shirk” their parental responsibilities.<sup>626</sup> A father who is not interested in developing a relationship with his child will be able to “hide” behind the law which will not enforce parental responsibilities on him.<sup>627</sup> Where, however, the father was either unaware of his paternity or rejected by the mother, one may very well argue that such discrimination is unfair and fundamentally impairs the dignity of such fathers in being recognised as a legal parent from the birth of the child.<sup>628</sup>

Kruger<sup>629</sup> would seem to imply, at least as far as being able to acquire

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<sup>622</sup> 1998 1 SA 300 (CC) at [51].

<sup>623</sup> In stating these guidelines the court in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) [41] made use of existing equality jurisprudence as represented especially by the Constitutional Court’s judgments in *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) and *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC).

<sup>624</sup> The court in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) 324C-D, specifically referred to the judgment in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) as an example in this regard.

<sup>625</sup> See 4.2.3.1 (b) above.

<sup>626</sup> The judgment in *Jooste v Botha* 2000 2 BCLR 187 (T) can be used as a case in point: See discussion of case in 4.2.3.1(b) above.

<sup>627</sup> As was seen in the case of *Jooste v Botha* 2000 2 SA 199 (T), discussed in 4.2.3.1(b) above.

<sup>628</sup> Van Onselen 1991 *De Rebus* 499 at 501.

<sup>629</sup> Kruger 1996 *THR-HR* 514.

rights of “access” in respect of their children are concerned,<sup>630</sup> that fathers have been disadvantaged. She argues that fathers rarely succeed in their application for “access” which often involves protracted and expensive litigation.<sup>631</sup> The drawn out litigation, furthermore, has the potential to alienate and isolate the father from the child, resulting in the court ultimately denying the application on the basis that the access is no longer in the best interests of the child.<sup>632</sup> The same arguments could conceivably apply with even more force in the case of a father approaching the court for co-guardianship and co-care.<sup>633</sup> Van Onselen,<sup>634</sup> furthermore, claims that mothers are abusing the current legal position in the following ways: Firstly, the “liberated female” may elect to bear a child with no intention of permitting the father to play a role as part of the family at all. In this case the father “... is left without any rights so he cannot perform his function even if he wants to and the mother is possessed of awesome legal predominance”.<sup>635</sup> Secondly, “... some women use the weak legal position of the father to extort money from the father in exchange for so-called ‘favours’ of access to the child”<sup>636</sup> and lastly, “[t]he dominance of the mother’s legal position interferes with the development of a balanced mother/father relationship vis-à-vis the child”.<sup>637</sup>

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<sup>630</sup> While many authors are in favour of recognising an inherent *right of access* (now contact) for unmarried fathers, it is not always evident whether such recognition would be supported if extended to include the other incidents of parental responsibilities and rights, *ie* care and guardianship. Kruger *et al* 1993 *THR-HR* 696 at 703 and Pantazis 1996 *SALJ* 8 at 17 in express terms limit their support for a right of access only, while Goldberg 1996 *THR-HR* 282, on the other hand, seems to reflect on the position of the unmarried father in general. The significance of this observation lies in the fact that since the co-exercise of care and guardianship may seem far more threatening to the mother’s preferred legal position than the co-exercise of contact, it is less likely to be considered justifiable on a constitutional level.

<sup>631</sup> Kruger 1996 *THR-HR* 514 at 519.

<sup>632</sup> Kruger 1996 *THR-HR* 514 at 519, with reference to the judgment in *B v S* 1995 3 SA 571 (A) 587D wherein the judge of appeal made the following observation: “If the evidence on remittal shows that time and circumstance have driven an unshakeable wedge between [father and child], so be it”.

<sup>633</sup> Kruger 1996 *THR-HR* 514 at 522 admits to this.

<sup>634</sup> Van Onselen 1991 *De Rebus* 499 at 500.

<sup>635</sup> *Ibid.*

<sup>636</sup> *Ibid.*

<sup>637</sup> *Ibid.* Supporting this view Kruger 1996 *THR-HR* 514 at 519 contends: “Daar word vandag algemeen deur gedragwetenskaplikes aanvaar dat ‘n kind ‘n vader en ‘n moeder nodig het vir die ontwikkeling van ‘n eie persoonlikheid en identiteit”. See also Eckhard 1992 *TSAR* 122 at 125 and Labuschagne 1993 *THR-HR* 414 at 421 in this regard.

The court in *President of the Republic of South Africa and Another v Hugo*,<sup>638</sup> however, by implication found that fathers are not a vulnerable group adversely affected by discrimination.<sup>639</sup>

▪ **The nature of the discriminating law or action and the purpose sought to be achieved by it**

An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal. According to Preiss J in *Fraser v Children's Court, Pretoria North and Others*<sup>640</sup> the social origins of the rule (that natural fathers do not acquire inherent parental responsibilities and rights in respect of their children born out of wedlock) may have been based upon a desire to preserve or encourage the formation of the family unit for the benefit of children, or designed to punish profligate men or to discourage the irresponsible procreation of children. Hughes<sup>641</sup> summarises the reasons for societies wanting to channel sexuality into legitimate marriages, as threefold:

- The economic motive – to maintain property within the family group;
- the political motive – to accumulate power and influence by a carefully conducted policy of marriage alliances; and
- the moralistic motive – to enforce the primarily religious exhortations to sexual renunciation.<sup>642</sup>

As stated by Van Onselen<sup>643</sup> "... these objectives would appear to have failed largely or at least to have been ineffective".<sup>644</sup> Pantazis moreover submits that none of these reasons is an acceptable basis for treating illegitimate children different in law because it is "... unacceptable to punish

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<sup>638</sup> 1997 4 SA 1 (CC) at [52].

<sup>639</sup> See *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at [64] in which Goldstone J reviewed the reasoning in the *Hugo* case.

<sup>640</sup> 1997 2 SA 218 (T) at 234H.

<sup>641</sup> Hughes Ch 1 in Burman & Preston-Whyte *Questionable Issue* 4-6.

<sup>642</sup> See Pantazis 1996 *SALJ* 8 at 10.

<sup>643</sup> Van Onselen 1991 *De Rebus* 499 at 500.

<sup>644</sup> As also noted by Kruger 1996 *THR-HR* 514 at 519.

the child for the sin of the father”.<sup>645</sup> While the denial of granting fathers equal parental rights merely on the basis that they have not married the mothers of their children can easily be dismissed as not achieving “... a worthy and societal goal”, the question is considerably more complex in the present dispensation where all that is required from fathers is that they show some form of commitment to either the mother or the child. Is it unfair to exclude fathers who have not shown such commitment – especially given the fact that uncommitted fathers can still acquire parental responsibilities and rights by agreement or by order of court?

Albertyn & Goldblatt<sup>646</sup> suggest that the constitutionality of the mother’s preferred legal position with regard to her children may ultimately depend on the specific strategy chosen – “... whether the lack of involvement of fathers in their children’s lives should be punished by the law or whether the law should be used to encourage greater involvement” – which will of course not necessarily mean that these fathers will in fact be more involved.

It could be argued that the societal goal achieved by the Children’s Act<sup>647</sup> is, in the first place, to protect mothers who are in general still the primary caretakers of children. The problem with this argument is that it is parent-centred and, by implication gender specific. What is best for the mother will not always be best for the child. A second argument which will probably have more force, because of the obligation in terms of section 28(2) of the Constitution, is to say that excluding uncommitted fathers from automatically acquiring parental responsibilities and rights in respect of his child is generally in the best interests of the child.

However, the vagueness of the criteria for the automatic acquisition of parental responsibilities and rights by fathers makes it very difficult to determine with absolute certainty whether a particular father will fall within

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<sup>645</sup> Pantazis 1996 *SALJ* 8 at 10.

<sup>646</sup> Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 59.

<sup>647</sup> 38 of 2005.

the ambit of the section or not.<sup>648</sup> A further problem is the arbitrariness of the criteria. Requiring the father to have cohabited with the mother “at birth” would only be one such example. The uncertainty created by the provisions contained in section 21, in my opinion, outweighs the ostensible protection of children against uncommitted fathers.

The advantage of vesting parental responsibilities and rights in both parents at birth is that should the mother die or for some reason disappear the father could *automatically* act as caretaker and guardian. The present dispensation would necessitate a High Court application with its attendant costs.

The concerns that “... a capricious man would use such undeserved status to badger the woman whom he has left – perhaps happily so – to bring up his children unaided”<sup>649</sup> is at least partially dispelled by the fact that co-holders of parental responsibilities and rights can act “... without the consent of the other co-holder or holders when exercising those parental responsibilities and rights”.<sup>650</sup> It must, however, be conceded that this general principle is tempered by section 18 in terms of which co-guardians will both have to consent to the child’s marriage, adoption, relocation, passport application and alienation or encumbrance of the child’s immovable property. Major decisions involving the child will, therefore, have to be made with due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights.<sup>651</sup>

The purpose sought to be achieved by limiting a father’s right to automatic parental responsibilities and rights seems to have more to do with protecting the mother’s vested interests than putting the interests of children first. It goes without saying that formal equality between parents in this

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<sup>648</sup> See discussion in 4.2.3.2(b)(ii) and (c) above.

<sup>649</sup> Barton 1998 *Solicitors Journal* 401.

<sup>650</sup> S 30 of the Children’s Act 38 of 2005.

<sup>651</sup> S 31(2)(a). A major decision is defined as “... any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder’s exercise of parental responsibilities and rights in respect of the child”: S 31(2)(b).

respect would allow patently obvious unsuitable fathers to be vested with parental responsibilities and rights – but the same is happening at the moment in the case of mothers.

In the process of evaluating the criteria to be applied when assigning parental responsibilities and rights to the biological parents of a child by operation of law, it is considered essential to stay focused on the purpose and function of such assignment, *ie* to ensure that every child is assigned a legal parent at birth and to keep in mind that such assignment may be judicially varied, terminated or reassigned over time, depending on the best interests of the child.<sup>652</sup> It is submitted that the law should allow both parents to assume parental responsibilities and rights by operation of law since that would provide the child with the most extensive potential protective net. To allow the mother to manipulate the child's relationship with its father seems overtly unfair.<sup>653</sup> It is only when a parent fails to make use of a given opportunity to develop a relationship with his or her child that the responsibility entrusted to the particular parent should be limited or denied. In this way a negative outcome is not anticipated or prejudged – each parent would have to take responsibility for his or her own lack of commitment to the child.<sup>654</sup> It may also, in practice at least, be marginally easier to show a failure to commit to the child from birth than to prove a

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<sup>652</sup> The thoughts expressed here were at least partly inspired by the following observation of the Scottish Law Commission as quoted by Lowe 1997 *IJLPF* 192 at 199: "The question is whether the starting point should be that the father has, or has not, the normal parental responsibilities and rights. Given that about 25 percent of all children born in Scotland in recent years have been born out of wedlock, and that the number of couples cohabitating outside marriage is now substantial, it seems to us that the balance has now swung in favour of the view that parents are parents, whether married to each other or not. If in any particular case it is in the best interest of a child that a parent should be deprived of some or all of his or her parental responsibilities and rights that can be achieved by means of a court order". In this context, it is submitted, the concept of "revocable" responsibility seems to be apposite: Lowe 1997 *IJLPF* 192 at 207, referring to Conway "Parental responsibilities and rights and the unmarried father" 1996 *NLJ* 782.

<sup>653</sup> Eckhard 1992 *TSAR* 122 at 129 is of the opinion that this approach amounts to an unacceptable limitation of the discretion of the court that would be bound by what the mother sees as the future for the child. According to Meulders-Klein 1990 *IJLF* 131 at 150 an approach which focuses on the position of the father *vis-à-vis* that of the mother, in terms of their respective powers should be avoided because it is "... divisive and therefore destructive".

<sup>654</sup> This approach would also obviate the need of one parent to prove the other parent's unsuitability or incompetency in order to acquire parental responsibilities and rights. Such an attack can only increase the animosity between the already incompatible parents and make it more difficult to exercise shared parental responsibilities and rights in future: Eckhard 1992 *TSAR* 122 at 131.



commitment to the mother or the child as required by section 21 of the Children's Act.<sup>655</sup> In short, it may be easier to determine what is *not* in the child's best interests with reference to the history of the relationship between that child and its mother and father than to predict and predetermine whether such a relationship will in future be in the best interests of the child.<sup>656</sup> The only real and obvious drawback of this approach is that it may in practice mean that the mother, who generally seems to remain the primary caretaker, will have to cope with the (mostly) unwelcome involvement of the father in the life of the child,<sup>657</sup> at least as far as the responsibilities and rights of guardianship and taking major decisions concerning the child is concerned. Proponents of the "substantial equality" argument would be justified in regarding this as further discrimination against the mother based on sex and especially gender. However, if the focus is shifted to that of the child in question as required by section 28(2) of the Constitution,<sup>658</sup> then such an approach would seem the only constitutionally viable one.<sup>659</sup> After all, expecting a father who wants to develop a relationship with his child to approach the court to acquire legal recognition may seem as unreasonable as expecting a mother to prevent such legal recognition.<sup>660</sup>

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<sup>655</sup> In this regard the stated preference (in *McCall v McCall* 1994 3 SA 201 (C)) for maintaining the *status quo* insofar as the care of the child is concerned, should also be mentioned. As Bainham 1989 *IJLPF* 208 at 233 so aptly observes: "The father will almost certainly be in a weaker position in arguing that the *status quo* should be disturbed than he would be if he was instead resisting a change in the *status quo*".

<sup>656</sup> Eckhard 1992 *TSAR* 122 at 128.

<sup>657</sup> Pantazis 1996 *SALJ* 8 at 14.

<sup>658</sup> Bainham 1989 *IJLPF* 208 at 234 points out that the current protection of unmarried mothers from adverse behaviour of fathers assumes that the interests of the mother and child are synonymous which is not unlike the equally dogmatic nineteenth century attitude which equated children's interests with their fathers' and concludes that "... the principle which informs modern child law is not that the interests of mothers and fathers are paramount, but that the interests of children are".

<sup>659</sup> Apart from Art 18 of the UNCRC, the judgments of the European Court of Human Rights in *Marckx v Belgium* ((1979) 2 ECHR 330) and *Johnston v Ireland* ((1987) 9 ECHR 203) have made it clear that the fundamental rule is that "... every child has the fundamental rights to have a normal family life, that is to say, a father and a mother with whom he has a personal relationship": Meulders-Klein 1990 *IJLF* 131 at 151.

<sup>660</sup> With reference only to the natural father's right of access, Wolhuter 1997 *Stell LR* 65 at 78 is, however, of the opinion that the mother should only bear the evidential burden to prove that the father's unfitness once he "has discharged the *onus* of proving that he has a social relationship with his child and is committed to shared parenting". Despite holding that there may be serious other risks in granting fathers automatic rights (of access (at 268)), Goldberg 1993 *SALJ* 261

- **The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity<sup>661</sup>**

The legislative scheme differentiating between mothers and fathers as far as the acquisition of parental responsibilities and rights is concerned can be said to perpetuate the image of natural fathers as “fly by night” progenitors who are disinterested in their children and shirk their financial obligations.<sup>662</sup> Uncommitted biological fathers are thus by implication in law regarded as lesser parents with inherently deficient parenting skills,<sup>663</sup> while all biological mothers are initially irrebuttably presumed to be capable of assuming the role of legal parenthood. The effect of the discrimination is that the mere existence of a biological link creates a relationship of parent and child in the one case but not in another.<sup>664</sup> As such the limitation of the father’s right to be treated equally as a parent may well be an affront to his dignity. This, as stated before, will especially be so in cases where the father was not aware of his paternity or the mother has refused him the opportunity to develop a relationship with her or the child.

Despite the fact that the limitation does not negate the possibility of fathers acquiring parental responsibilities and rights, sections 20 and 21 still preclude the automatic acquisition of parental responsibilities and rights on the same basis as mothers in terms of section 19. While fathers should not

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admits that the difficulty of getting access to court “... could be equally problematic for fathers” (at 267).

<sup>661</sup> Currie & De Waal *Bill of Rights Handbook* 245.

<sup>662</sup> Goldberg 1993 *SALJ* 261 at 274 calls them “uncaring rascal(s)”.

<sup>663</sup> Mosikatsana 1996 *CILSA* 152. See also minority judgment of Mokgoro J in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) [92] who contended that not releasing fathers of children from prison on the same basis as mothers “... does not recognise the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers”. With reference to the American case of *Stanley v Illinois* 405 US 645 (1972), Pantazis 1996 *SALJ* 8 at 17 observes: “Given the importance of the parent’s interest, it is unconstitutional to presume parental unfitness; it has to be established on an individual basis”. One may then surely ask but what about the presumption of fitness in the case of a mother? Is that constitutional?

<sup>664</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) [27].

be allowed to *exercise* parental responsibilities and rights if it is detrimental to the interests of his children, they should at least be dignified with the same opportunity of *acquiring* such responsibilities and rights at the birth of the child.

#### **4.3.2.3 Constitutional rights of children**

The inequality in the *ex lege* assignment of parental responsibilities and rights may even have a more deleterious effect on the constitutional (and international) rights of children than on the rights of their parents. Denying a child the right to have both his or her parents recognised by law on an equal basis could, as indicated above, be seen as unfair discrimination, a limitation of a child's constitutional rights to parental care (embodied in section 28(1)(b)) and arguably also inhibit an approach dedicated to pursuing the best interests of the child (in terms of section 28(2) of the Constitution).

##### **(a) Unfair discrimination against children**

The possible discrimination against children on grounds of their social origin and birth is based on the differentiation between children born to parents who are either committed to each other and/or their child in a specific way and children born to parents who are not so committed. In particular the discrimination is against those children whose father is or was not married to their mother, did not live with their mother at birth or has not shown a commitment to the children themselves as prescribed by section 21. The Children's Act<sup>665</sup> has thus to a large extent minimised the possible discrimination against children since the differentiation between children is no longer made with reference only to their parents' marital status.

The Constitutional Court in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*<sup>666</sup>

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<sup>665</sup> 38 of 2005.

<sup>666</sup> 2005 1 SA 580 (CC).

found section 23 of Black Administration Act<sup>667</sup> and the customary-law rule of primogeniture, in its application to intestate succession unconstitutional insofar as it unfairly discriminated against extra-marital daughters to qualify as heirs in the intestate estate of their deceased father in terms of the Constitution's equality provisions (section 9), the right to human dignity (section 10) and the rights of children under section 28 of the Constitution.<sup>668</sup> The court held that children could not be subjected to discrimination on grounds of sex and birth in terms of section 9 of the Constitution. The customary law rule of primogeniture prevented all female children and significantly curtailed rights of extra-marital male children from inheriting.<sup>669</sup> In its consideration of the constitutional rights of children implicated in the case,<sup>670</sup> the court gave special attention to the question "... whether the differential entitlements of children born within marriage and those born extra-maritally constitutes unfair discrimination".<sup>671</sup> Insofar as the answer to this question could be based on the interpretation of section 28 and other rights in the Constitution, the court held that the provisions of international law must be considered since: "South Africa is a party to a number of multilateral agreements designed to strengthen the protection of children."<sup>672</sup> In the general context of according natural fathers equal rights to those of mothers, the court made the following important comments:<sup>673</sup>

"The European Court on Human Rights has held that treating extra-marital children differently to those born within marriage constitutes a suspect ground of differentiation in terms of art 14 of the Charter.<sup>674</sup> The United States Supreme Court, too, has held that discriminating on the grounds of 'illegitimacy' is 'illogical' and 'unjust'."

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<sup>667</sup> 38 of 1927.

<sup>668</sup> *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC) [100].

<sup>669</sup> At [88].

<sup>670</sup> At [47] to [59].

<sup>671</sup> At [54].

<sup>672</sup> At [55].

<sup>673</sup> At [56], referring to *Weber v Aetna Casualty and Surety Co* 406 US 164 (1972) at 175; *Levy v Louisiana* 391 US 68 (1968); *Glon v American Guarantee and Liability Insurance Co* 391 US 73 (1968) at 76 and *Trimble v Gordon* 430 US 762 (1977).

<sup>674</sup> Since the European Court on Human Rights does not have jurisdiction in respect of the African Charter on the Rights and Welfare of the Child, the reference to "Charter" is clearly a mistake and should have been a reference to the ECHR. The Constitutional Court's reference to the judgments of *Marckx v Belgium* [1979] EHRR 2 at [38] – [39] and *Inze v Austria* [1987] EHRR 28 at [41] in this regard confirms the mistake in the quoted judgment.

Describing the position of extra-marital children in South Africa the court concluded that<sup>675</sup> -

“... extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus when s 9(3) prohibits unfair discrimination on the ground of ‘birth’, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children’s parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed unfair unless it is established that it is not.”<sup>676</sup>

In *Petersen v Maintenance Officer, Simon’s Town Maintenance Court, and Others*<sup>677</sup> the court held:<sup>678</sup>

“I am of the opinion that this common-law rule, which differentiates between children born in wedlock and extra-marital children, not only denies extra-marital children an equal right to be maintained by their paternal grandparents, but conveys the notion that they do not have the same inherent worth and dignity as children who are born in wedlock.”

The court added that the common-law rule was also contrary to the best interests of the child and that it followed that – “... it violates the constitutional rights of extra-marital children, and in particular the rights enshrined in ss 9, 10 and 28(2) of the Constitution”.<sup>679</sup>

Although both these cases focused on the rights of children and not the rights of parents or natural fathers, these comments undeniably support an egalitarian approach which disregards sex and marital status in the determination of the parent-child relationship. Whether the judgment could be interpreted as supporting an approach in terms of which the parents of the child are placed on an equal footing as far as the automatic acquisition of parental responsibilities and rights is concerned, is debatable. The creation of such a blanket rule was not considered appropriate in the case of *Fraser v Children’s Court, Pretoria North*,

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<sup>675</sup> At [59].

<sup>676</sup> Also see Pantazis 1996 *SALJ* 8 at 12.

<sup>677</sup> 2004 2 SA 56 (C).

<sup>678</sup> At [19].

<sup>679</sup> At [21].

*and Others*<sup>680</sup> where a “nuanced’ approach was advocated. The court in that case seemed to intimate that the right to parental care should be qualified by an inference that the right should only apply to committed parental care as now embodied in sections 20 and 21 of the Children’s Act.<sup>681</sup>

## **(b) Infringement of a child’s rights in terms of section 28 of the Constitution**

If it is argued that the differentiation between mothers and fathers as far as the acquisition of parental responsibilities and rights is concerned constitutes an infringement of a child’s right to parental care,<sup>682</sup> the question would be whether such infringement can be justified in terms of section 36 of the Constitution? A further question is whether the infringement of the right to parental care can be considered as giving paramountcy to the best interests of a child?<sup>683</sup> The limitation analysis in terms of section 36 of the Constitution involves a proportionality enquiry. The balancing exercise in this case requires that the purpose, effect and importance of the denial of automatic parental responsibilities and rights to uncommitted fathers, on the one hand, be weighed up against the nature and effect of the impairment caused to the children’s rights, on the other hand. The limitation analysis will be considered with reference to the factors mentioned in section 36(1) of the Constitution<sup>684</sup> and the best interests of the child.

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<sup>680</sup> 1997 2 SA 261 (CC) [29].

<sup>681</sup> 38 of 2005.

<sup>682</sup> S 28(1)(b) of the Constitution.

<sup>683</sup> As required by s 28(2) of the Constitution. The court in *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) [8] interpreted “paramount” as it is used in s 28(2) to mean that “... the interests of the children are not merely important – they override all other considerations in cases concerning children”. The statement was later qualified by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) to the effect that “... the fact that the best interests of the child are paramount does not mean that they are absolute” (at [26]).

<sup>684</sup> See 4.3.2.2 above.

**(i) The nature of the right to parental care<sup>685</sup> and the best interests of the child**

The nature of the right to parental care is apparent from the words “parental” and “care”. It is submitted that “care” in this context should be given a wide interpretation as including both the intangible aspects of the parent-child relationship, such as “love, attention and affection”,<sup>686</sup> and the more tangible or economic aspects of the relationship of providing for the child's physical needs. While it would admittedly be difficult, if not impossible, to enforce the intangible component of the relationship between parent and child because of its highly personal nature,<sup>687</sup> this does not mean, as correctly pointed out by Heaton,<sup>688</sup> that the right should not be recognised. In fact the right and the responsibility to care as defined in the Children's Act,<sup>689</sup> seem mainly to comprise of intangibles.<sup>690</sup>

The further question important for the present investigation is whether the right to “care” also includes a right to legal “care” or assistance, *ie* a right to parental guardianship? Insofar as the right and responsibility of guardianship would be necessary to provide sufficient “care” of a child, it could be argued to fall within the ambit of the right to parental care.

The adjective “parental” means “of or characteristic of a parent or parents”.<sup>691</sup> The word “parent” means to bring forth, to bear or to beget and includes a natural or biological father and mother.<sup>692</sup> “Parental” care consequently refers to the care ordinarily associated with or similar in nature to care provided by a biological parent or the biological parents in respect of their offspring. A child would by

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<sup>685</sup> See s 36(1)(a) of the Constitution.

<sup>686</sup> *Jooste v Botha* 2000 2 BCLR 187 (T) at 201D-E.

<sup>687</sup> See *Jooste v Botha* 2000 2 BCLR 187 (T) at 209H.

<sup>688</sup> Heaton in *Bill of Rights Compendium* 3C42.3 fn 12.

<sup>689</sup> 38 of 2005.

<sup>690</sup> See definition of “care” in the Children' Act 38 of 2005: S 1(1) *sv* “care”, which includes reference to both tangible aspects (in (a)) and intangible aspects (in (b) to (j)).

<sup>691</sup> *Webster's Dictionary sv* “parental”.

<sup>692</sup> *Webster's Dictionary sv* “parent”; *Concise Oxford Dictionary sv* “parent”; *Dictionary of Legal Words and Phrases Vol 3 sv* “parent”; *Garner Handbook of Family Law Terms sv* “parent”.

necessary implication also have a right to care by a person other than a parent.<sup>693</sup> While section 28(1)(b) would thus not generally speaking necessarily include a right to parental care by *both* parents of a child, it could be seen as implicit in the section if interpreted against the backdrop of the UNCRC, from which it derives.<sup>694</sup> The use of the gender neutral term “*parent(al)*” cannot be interpreted as giving preference to either the mother or the father.<sup>695</sup> Similarly, the inference that the section only recognises the right against a parent who has custody<sup>696</sup> cannot be justified considering the absence of any qualification to the child’s right to parental care in section 28(1)(b) itself. Since a child only becomes a legal subject at birth, the child will have a right to parental care as from the moment of its birth. While it is acknowledged that families in South Africa take many different forms, children have a right not to be discriminated against on ground of their birth or social origin.<sup>697</sup> Every child should thus have a right to parental care by both his or her parents as from birth, regardless of the relationship (or lack of a relationship) between the parents themselves.

The right to parental care is, however, not absolute. It is, in the first place, dependent on the best interests of the child as provided for in section 28(2) of the Constitution. As such, the right to parental care can in a given case be limited or even denied if it is deemed in the best interests of the particular child concerned. The right to parental care can, furthermore, like any other constitutional right, be limited by a law of general application to the extent that it is reasonable and justifiable as prescribed by section 36 of the Constitution. The Children’s Act<sup>698</sup> is such a law and, while it does not limit a child’s right to *maternal* care, it limits a child’s right to *paternal* care. As far as the child’s right to *paternal* care is concerned the right is only recognised in the case of a father who has shown the necessary commitment to either the mother or the child as as provided for in sections 20 and 21. While limiting the child’s right to *paternal* care may in a given

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<sup>693</sup> The court in *SW v F* 1997 1 SA 796 (O) at 802G-H confirmed that the right to parental care not only referred to care by natural parents.

<sup>694</sup> Art 18 of the UNCRC promotes the principle that both parents have common responsibilities in raising their children. For the opinions of other authors in this regard, see 1.4.3 fn 172 above.

<sup>695</sup> Heaton in *Bill of Rights Compendium* 3C42.3.

<sup>696</sup> See *Jooste v Botha* 2000 2 BCLR 187 (T) at 208F.

<sup>697</sup> S 9(3) of the Constitution.

<sup>698</sup> 38 of 2005.



case be considered in the best interests of that particular child, the question is whether the blanket limitation (limiting all children's right to *paternal care* in this specific way) can, generally speaking, be justified in terms of section 36?

**(ii) The importance of the purpose of the limitation of the child's right to parental care<sup>699</sup> and the best interests of the child**

While the acquisition of parental responsibilities and rights is always subject to the best interests of the child concerned, it would be impracticable to delay the initial allocation of parental responsibilities and rights pending the outcome of a determination of the best interests of each child born in South Africa. In deciding who should automatically be vested with parental responsibilities and rights at birth, the law must thus, for practical reasons, make certain basic assumptions as to what would generally be in the best interests of children. The difficulty in making such assumptions is that there will always be cases where the assumption will prove to be wrong: While it may be in the best interests of one child to have two legal parents from birth, it may not always be so for another. The challenge is thus to formulate a flexible rule that allows for exceptional cases. Where the rule allows for the acquisition of responsibilities and rights by the parent by operation of law, *ie* automatically, it is very difficult to devise a mechanism in terms of which the exceptional cases can be identified and accommodated. For this reason it is my contention that the rules providing for the *ex lege* assignment of parental responsibilities and rights at the time of the child's birth should be clear and simple and provide for a method of determining legal parenthood with the utmost degree of certainty – most of which, in my opinion, is lacking in the new scheme devised by the Children's Act.<sup>700</sup>

The purpose of preventing uncommitted fathers from automatically acquiring parental responsibilities and rights is mainly to protect the stability of the relationship between children and their mothers as the primary caretakers of children. Protecting this relationship is important in circumstances where the

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<sup>699</sup> See s 36(1)(b) of the Constitution.

<sup>700</sup> 38 of 2005: Especially s 21. See discussion in 4.2.3.2(b)(ii) and (c) above.

arbitrary and inconsistent involvement of the father would be prejudicial to the child's welfare. However, it cannot be denied that while the best interests of the child are often identical to the interests of the mother, it is not always the case.<sup>701</sup> The negative effect that the sharing of parental responsibilities and rights with the father might have on the mother, must be offset against the advantages for the child in developing and maintaining a relationship with his or her father.

**(iii) The nature and extent of the limitation of the child's right to parental care<sup>702</sup> and the best interests of the child**

A child's right to parental care is limited insofar as it excludes the right of a child to have both the mother and the father of the child automatically recognised as the child's legal parents. Where a father has not shown any demonstrable commitment to his child or the mother of his child as provided for in sections 20 and 21 of the Children's Act,<sup>703</sup> he will not by law be recognised as the father of the child. The law's disregard of such fathers will thus simply reflect the reality of the situation. As far as the mother of the child is concerned, she will become the legal parent of the child even if she displays no interest at all in the child or its welfare – provided of course the mother does not decide to terminate her pregnancy.

While a father can elect not to be legally recognised as the child's parent by simply dropping out of the picture, his position is rather precarious if he wants to be legally recognised as the child's father. His recognition will to a large extent depend on the mother's co-operation. If she is willing, the father can marry the mother or live with her *at the time of the child's birth* – not before or after. If this is

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<sup>701</sup> Pantazis 1996 *SALJ* 8, referring only to the right of "access" is of the opinion that: "Given the importance of contact between child and father, it is not reasonable to generalise this potential clash into a rule of law that denies automatic access" (at 14). Bonthuys 1997 *SAJHR* 622 is, however, of the opinion that the ideologies of the new, participating father, and the need for the presence of a father in the 'family' "... are conveniently accommodated within the elastic concept of the best interests of the child" (at 631) and is critical of "[b]iological assumptions" that "... serve as authority for views about qualities deemed inherent in fatherhood and motherhood, and about the needs of all children and families for fathers" (at 632). See the discussion in 1.4.3 above in this regard. Currie & De Waal *Bill of Rights Handbook* 620 and Bonthuys 1997 *SAJHR* 622 contend that the best interests standard is simply a vehicle for parental interests.

<sup>702</sup> See s 36(1)(c) of the Constitution.

<sup>703</sup> 38 of 2005.

not possible, the father can take the steps outlined in section 21 to acquire parental responsibilities and rights. The mother can also confer parental responsibilities and rights on him by agreement. If the mother does not want the father to be recognised, she can refuse to marry him or live with him. She can refuse to allow him to develop a relationship with the child or to confer rights on him by agreement. The problem is thus not excluding uncommitted fathers from caring but allowing fathers who want to care and be legally recognised as the child's father the opportunity to do so without necessarily making it dependent on the mother's (or ultimately a court's) view of what is in the best interests of the child.

Although dealing with a same-sex partner, the following observations made by the court in *J and Another v Director-General, Department of Home Affairs and Others*<sup>704</sup> can apply with equal force in the present context as far as the disadvantages in not automatically being recognised as the parent of a child are concerned:

- If the relationship between the parents is terminated, the partner, or father in the present context, will have no automatic right of access to the child and the child would not automatically have a right of access to him.<sup>705</sup>
- A testamentary appointment as guardian after the death of the mother will not ensure that the biological father will become the guardian since the testamentary nomination can be revoked at any time in which event the child might be left without any guardian at all.<sup>706</sup>
- In cases of emergency, such as a medical emergency, it might well be vital in the interests of the children that the father be entitled to give the requisite consent if, for whatever reason, the mother becomes unavailable to give such consent.<sup>707</sup>

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<sup>704</sup> 2003 5 SA 605 (D).

<sup>705</sup> At [20].

<sup>706</sup> At [20].

<sup>707</sup> At [20].

- The court also stressed the importance of having “... two parents and guardians rather than one”.<sup>708</sup>

The court in *J and Another v Director-General, Department of Home Affairs and Others*<sup>709</sup> finally concluded that as a natural parent the partner’s right to human dignity in terms of section 10 of the Constitution and the children’s right to parental care in terms of section 28(1)(b) demand that her claim be recognised by law.<sup>710</sup> The same argument is applicable in the case of a biological father.

**(iv) The relation between the limitation of the child’s right to parental care and its purpose<sup>711</sup> and the best interests of the child**

It seems as though the legislature has opted for a compromise between the complete insulation of the mother-child relationship against outside interference, on the one hand, and the automatic recognition of all fathers as legal parents on the same (biological) basis as mothers, on the other hand. The legislation has thus attempted to adopt a more nuanced approach to the automatic acquisition of parental responsibilities and rights by acknowledging the varying degrees of commitment that can be displayed by fathers. In so doing the Act aims to *protect the stability* of the environment created by the mother as primary caretaker whilst at the same time *accommodating* the advantage that a relationship with a *committed father* may have for the child. It is submitted that the new provisions will fail on both accounts (indicated in italics) for the following reasons:

- While it is laudable that the Act no longer limits the recognition of fathers to those who have married the mothers of their children, it should be clear by now that a demonstrable commitment shown towards the *mother*, whether by means of marriage or other informal life-partnership, is no indication that the father will assume responsibility for the children born from such a union.

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<sup>708</sup> At [20].

<sup>709</sup> 2003 5 SA 605 (D).

<sup>710</sup> At [22].

<sup>711</sup> See s 36(1)(d) of the Constitution.

The degree of commitment by the father cannot be predicated on the commitment to the mother and should thus be irrelevant for purposes of bringing into life a legal relationship between child and father. The uncertainty caused by the undefined notion of a “permanent life-partnership” as an alternative to marriage merely complicates the issue and creates new problems. Whether parents are married or not, separated or not or whatever their specific family situation may be, the existence of the biological link between a parent and child raises an expectation of entitlement – for both parent and child. When such expectations are frustrated by one parent, the other parent will feel wronged irrespective of whether the initial expectations have legal backing or not.<sup>712</sup> The best interests standard is currently the only guiding principle to settle the ensuing dispute. If the starting point is the same as in case of legitimate children, *ie* that both parents automatically acquire parental responsibilities and rights at birth and that shared parental responsibilities and rights is *a fortiori* deemed to be in best interests of children, the law can, as is being done in Australia, focus on measures to mediate the disputes, if and when they arise.<sup>713</sup>

- While a commitment to the *child* is considered significant for purposes of creating a legal relationship between father and child, the criteria contained in section 21(1)(b) are so fraught with difficulties that the criteria will fail to provide a proper screening mechanism for such commitment and will only lead to increased animosity and litigation. It is submitted that the increased litigation resulting from the problems inherent in the interpretation and application of section 21 will do little to further the best interests of the child. While the initial assignment of parental responsibilities and rights to both biological parents will not be without its problems, the disputes which will inevitably arise will at least require the courts to focus on how best to further

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<sup>712</sup> Pantazis 1996 *SALJ* 8 at 13.

<sup>713</sup> Insofar as an order for joint custody at divorce is comparable to equality in the acquisition of parental responsibilities and rights, Kaganas in Murray *Gender and the New South African Legal Order* at 179 holds the view that “... given the shift in emphasis in welfare discourse towards the importance of fatherhood and shared parenting, joint custody can be perceived as serving the interests of both welfare and justice”.

the interests of the child in the particular case, rather than oblige the courts first to settle a dispute between the parents arguing about whether they in fact have the (parental) right to involve themselves in the child's interests in the first place!

- Especially disconcerting is the fact that the provision applies to children who were born before the Act came into operation. This implies that a father may now assume equal and shared parental responsibilities and rights with the mother based on circumstances that existed at the time of the birth of the child – which could be many years ago. In such a case the recognition of the father may definitely have a destabilising effect on the mother-child relationship.

**(v) Less restrictive means to achieve the purpose<sup>714</sup>**

The exclusion of uncommitted fathers to acquire parental responsibilities and rights automatically does not completely extinguish the possibility of acquiring parental responsibilities and rights – the father may still be assigned such parental responsibilities and rights by means of a parental responsibilities and rights agreement or by order of court. The court in *J and Another v Director-General, Department of Home Affairs and Others*,<sup>715</sup> however, held that the constitutionality of legislation does not depend on whether the litigant has a satisfactory alternative remedy.

#### **4.3.2.4 Conclusion**

In conclusion it is submitted that the differential treatment of mothers and fathers, as far as the acquisition of parental responsibilities and rights is concerned, is not justifiable. Conferring full parental responsibilities and rights on both parents based on their biological link to the child would not only be in line with worldwide

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<sup>714</sup> See s 36(1)(e) of the Constitution.

<sup>715</sup> 2003 5 SA 605 (D) [28].

trends,<sup>716</sup> but also meet the constitutional demands of substantive sex and gender equality. It will further place the focus on the best interests of the child, which emphasises the importance of *both* parents for the child.

#### 4.4 ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS IN CASE OF ARTIFICIAL CONCEPTION OF CHILD

##### 4.4.1 Introduction

The advent of new reproductive technologies, such as artificial insemination, *in vitro* fertilisation, embryo transfer and surrogate motherhood, have called for, if not new, then at least explicit legal rules to define and, in certain cases to redefine, legal parenthood and to regulate the acquisition of parental responsibilities and rights.<sup>717</sup> While legal paternity has always been in some doubt it is especially with regard to defining legal motherhood<sup>718</sup> that the new technologies have posed a challenge to the common law principles.<sup>719</sup> As already mentioned in 4.1 above, the possibility of a child now having more than one mother has resulted in the maxim *mater semper certa est* becoming somewhat of an anachronism, especially

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<sup>716</sup> According to Schwenger 2007 *Electronic Journal of Comparative Law* trends with regard to parentage are becoming less and less orientated towards status: “The trend is to give priority to the autonomous private regulation within the private sphere, on the one hand, and, where an amicable settlement is not possible, to take the actual relationships and not the existing status as a reference point, on the other”.

<sup>717</sup> Lupton 1985 *TSAR* 277 refers to these developments as the “new biology”, a phrase borrowed from an American author, Grad (referred to by Lupton in fn 14 at 278) who published an article in 1968 entitled “Legislative responses to the new biology: Limits and possibilities”. Lupton (at 280) feels that “[t]he sort of changes which are necessary to regulate the legal consequences of these medical techniques will require society and the law to consider the family less as a genetic or biological entity ... but rather as a consensual unit”. This approach according to which the intending parent is considered the legal parent, was adopted in the US decision *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993). In this case the court held that the commissioning parents, who were also the genetic parents of the child born in consequence of a surrogacy agreement, were the child’s legal parents because it was they who “affirmatively intended the birth of the child, and took the steps necessary to effect *in vitro* fertilisation. But for their acted-on intention the child would not exist”: See Bromley & Lowe *Family Law* 307. One problem of using the intending parent test as a general test of determining parenthood is, however, “... that it would involve accepting the corollary that lack of intention is a means of avoiding parenthood”: Bromley & Lowe *Family Law* 308. On the other hand, one could argue that the law does recognise the intention *not* to be a parent in certain circumstances – as *eg* in the case of adoption or sperm donation: Bromley & Lowe *Family Law* 308.

<sup>718</sup> Lupton 1985 *TSAR* 277 at 292 reiterates the fact that the assumption of legal motherhood (the woman who gives birth to the child is considered the mother of the child) was until the advent of the age of the “new biology” an “unchallengeable proposition”.

<sup>719</sup> Lupton 1985 *TSAR* 277 at 278.

in the field of artificial reproduction.<sup>720</sup> The acquisition of parental responsibilities and rights in the case of an artificially conceived child was, until the recent enactment of section 40 of the Children's Act,<sup>721</sup> regulated by section 5 of the Children's Status Act.<sup>722</sup> The new provisions are in all material respects identical to the provisions found in the repealed Act. The changes include the insertion of an additional subsection to create a presumption of maternity based on parturition, the use (with one exception) of gender neutral terms and the substitution of the term "insemination" with "fertilisation".

The legislation defining the scope of, and regulating the procedure relating to, artificial fertilisation is in a similar state of transition. The Human Tissue Act,<sup>723</sup> has *in toto* been repealed by section 93(1) of the National Health Act,<sup>724</sup> which came into operation on 2 May 2005. Chapter 8 (sections 53-68) of the National Health Act<sup>725</sup> which regulates sensitive issues such as the control of the use of blood, blood products, tissue and gametes<sup>726</sup> in humans as well as reproductive cloning of human beings, will come into operation at a date still to be proclaimed. Until such time as the date of commencement is proclaimed, presumably once the regulations necessary for the proper implementation of these provisions are finalised,<sup>727</sup> the corresponding provisions of the Human Tissue Act<sup>728</sup> remain applicable.

The new National Health Act<sup>729</sup> does not contain a definition of artificial fertilisation. The expectation is that the regulations will fill this void. The

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<sup>720</sup> According to the SALC Report on *Surrogate Motherhood* par 4.8.2, modern technology has "wreaked havoc" with the common law maxim. Lupton 1985 *TSAR* 277 292 submits that since the "... great *sine qua non* [the mother is the genetic parent of the child] has been disproved ... we must redefine the terms 'parent' or 'mother' and 'father' in the light of the New Biology" (referring in this instance to another article by Rosettenstein DS entitled "Defining a parent: The new biology and the rebirth of the *Filius Nullius*" 1981 *New Law Journal* 1095).

<sup>721</sup> 38 of 2005, which came into operation on 1 Jul 2007: *GG* 30030 dd 29 Jul 2007.

<sup>722</sup> 82 of 1987, repealed with effect from 1 Jul 2007 by s 313 of the Children's Act 38 of 2005.

<sup>723</sup> 65 of 1983, which came into operation on 12 Jul 1985, save and except for the provisions contained in Ch 6 and 8 of the Act.

<sup>724</sup> 61 of 2003.

<sup>725</sup> 61 of 2003.

<sup>726</sup> Defined as either of the two generative cells essential for human reproduction: See s 1 *sv* "gamete" of Human Tissue Act 65 of 1983 and National Health Act 61 of 2003.

<sup>727</sup> Draft regulations have been published for public comment: *GG* 29527 dd 5 Jan 2007.

<sup>728</sup> 65 of 1983.

<sup>729</sup> 61 of 2003.



uncertainty created by this deficiency does, however, not affect the interpretation of section 40 of the Children's Act<sup>730</sup> since artificial fertilisation is defined for purposes of this Act<sup>731</sup> as –

- “... the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including –
- (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or
  - (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person”.

It is surprising that the legislature deemed it advisable simply to incorporate the previous definitions into the new Act considering their inadequacy<sup>732</sup> to accommodate a “pure” donation of an ovum<sup>733</sup> and a “pure” embryo donation.<sup>734</sup> The SALRC<sup>735</sup> expressly recommended the reformulation of the definitions to include the mentioned procedures for purposes of inclusion in the new Children's

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<sup>730</sup> 38 of 2005.

<sup>731</sup> S 1(1) *sv* “artificial fertilisation”. Except for a shuffling in the word order, the definition mirrors the one found in the now repealed Human Tissue Act 65 of 1983 in terms of which the artificial fertilisation of a person means – “... the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including-the bringing together outside the human body of a male and a female gamete or gametes with a view to placing the product of a union of such gametes in the womb of a female person; or the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body, in the womb of a female person, for such purpose”: s 1 *sv* “artificial fertilisation of a person”. The definition of “artificial insemination” found in section 5(3) of the Children's Status Act 82 of 1987 (now repealed) did not include par (a) and meant in relation to a woman-“(a) ... the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or (b) ... the placing of the product of the union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman, for the purpose of human reproduction”. The word “insemination” used in the original definition of “artificial insemination of a person” in s 1 of the Human Tissue Act 65 of 1983, was replaced by the word “fertilisation” in terms of an amendment by s 27 of the Human Tissue Amendment Act 51 of 1989. The same amendment was, however, not made to the Children's Status Act 82 of 1987. It seems, however, that the judiciary has not adopted the changed terminology since none of the cases reported since 1989 employ the term artificial “fertilisation”: See *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D); *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 BCLR 463 (CC) and the references to these cases in *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) [41] and *Fourie and Another v Minister of Home Affairs and Another* 2005 3 SA 429 (SCA) [12].

<sup>732</sup> As pointed out by Van Wyk 1988 *TSAR* 465 at 472; Van der Walt 1987 *Obiter* 1 at 4.

<sup>733</sup> As explained in 4.2.1.2(i) above.

<sup>734</sup> As explained in 4.2.1.2(ii) above.

<sup>735</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.4 and SALC Report on the *Review of the Child Care Act* par 6.3.

Act.<sup>736</sup> Unless the word “including” in the definition is interpreted to mean that the definition is not limited to the procedures mentioned in the definition (and thus wide enough to include these procedures<sup>737</sup>), it means that if either of the two procedures is utilised, the acquisition of parental responsibilities and rights would have to be determined in terms of the common law<sup>738</sup> as now amended by the Children’s Act<sup>739</sup> as discussed in 4.2 above.

“Gamete” refers to either of the two generative cells essential for human production, *ie* sperm or *ovum*.<sup>740</sup> The definition of artificial fertilisation in the new Children’s Act<sup>741</sup> is, according to Lupton,<sup>742</sup> “... wide enough to encompass the following procedures:

- (a) Artificial fertilisation of a wife using her husband’s semen (AIH<sup>743</sup>);
- (b) artificial fertilisation of a wife using a donor’s semen (AID<sup>744</sup>);
- (c) uniting the male and female gametes outside the human body in a test tube (*in vitro*: literally, in glass) and placing the resulting embryo in the womb of a female person (IVF and ET<sup>745</sup>);

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<sup>736</sup> 38 of 2005.

<sup>737</sup> The word appears in the definition contained in the Human Tissue Act 65 of 1983 (s 1 *sv* “artificial fertilisation of a person”) but not the definition in the repealed Children’s Status Act 82 of 1987. Yet, according to Van Wyk 1988 *TSAR* 465 at 472 and Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 337 fn 32, *neither* of the definitions could be interpreted to include the two procedures.

<sup>738</sup> See SALC Discussion Paper on the *Review of the Child Care Act* par 7.3; Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 337 fn 32.

<sup>739</sup> 38 of 2005.

<sup>740</sup> S 1(1) *sv* “gamete”.

<sup>741</sup> 38 of 2005.

<sup>742</sup> Lupton Div J in *Family Law Service* 57, referring to the definitions contained in the Human Tissue Act 65 of 1983 and the Children’s Status Act 82 of 1987, from which the definition in the Children’s Act 38 of 2005 is derived.

<sup>743</sup> Also called homologous artificial fertilisation: Van Wyk 1988 *TSAR* 465 467-468; Davel & Jordaan *Law of Persons* 105.

<sup>744</sup> Called heterologous artificial fertilisation: Van Wyk 1988 *TSAR* 465 467-468; Davel & Jordaan *Law of Persons* 105. With reference to the English author Freeman (“The new birth right? Identity and the child of the reproduction revolution” 1996 *IJCR* 273 at 282-283), Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 334 fn 20 states that the preferred term is now DI or donor insemination “... supposedly to prevent confusion in the popular consciousness with AIDS”. The term ID is also employed by Lowe & Douglas *Bromley’s Family Law* 306.

<sup>745</sup> An abbreviation for “embryo transfer”.

- (d) GIFT or gamete intra-fallopian transfer and POST or peritoneal oocyte and sperm transfer. In GIFT and POST, eggs are collected and, together with sperm from the husband or donor, put directly into the woman's fallopian tubes (GIFT) or into the peritoneum (POST);<sup>746</sup>
- (e) VISPER – vaginal intro-peritoneal sperm transfer. In VISPER, only the sperm is transferred directly into the woman's peritoneal cavity. The procedures in (d) and (e) *supra* can only be utilised in women with healthy fallopian tubes;
- (f) surrogacy; that is, when a woman, other than a man's wife, is impregnated with his semen by way of artificial fertilisation or by way of IVF and ET. The child born of her pregnancy is handed over to the commissioning parents after she has given birth to it."<sup>747</sup>

Although it is important to have a good understanding of the medical procedures involved in artificial fertilisation,<sup>748</sup> it is not the main concern here. The focus of attention is rather the acquisition of parental responsibilities and rights in respect of children conceived as a result of these procedures. In the discussion that follows the effects of artificial fertilisation on the acquisition of parental responsibilities and rights by women and men are considered separately as shown in the structure as outlined in Schedule 2 below.<sup>749</sup>

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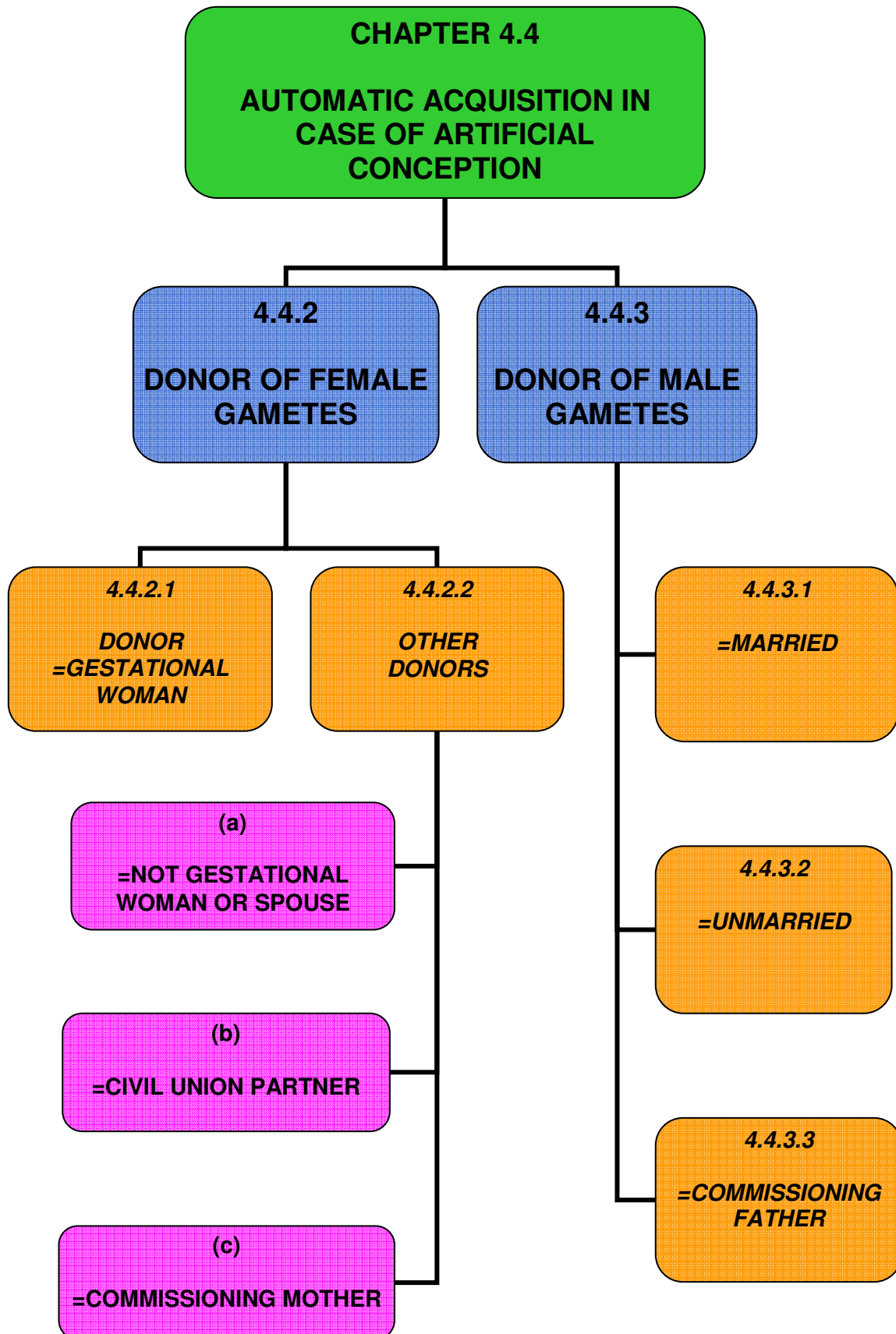
<sup>746</sup> The Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* <http://www.mrc.ac.za/ethics/ethicsbook2.pdf> also mentions the possibility of Zygote intra-fallopian transfer or ZIFT, where the zygote is transferred to the woman's fallopian tubes.

<sup>747</sup> Lupton Div J in *Family Law Service* 105. The problems which arise as a result of the definition not being wide enough to encompass all cases where the genetic mother differs from the birth-giving mother have already been discussed in par 4.2.1 above.

<sup>748</sup> See the Human Tissue Act 65 of 1983 and its accompanying regulations published in terms of s 37 of the Act in *GG 10283* dd 20 Jun 1986 and amended by *GG 18362* dd 17 Oct 1997. For a discussion of these provisions and regulations see Lupton Div J in *Family Law Service* 57-62.

<sup>749</sup> See also 3.2 above.

**SCHEDULE 2:  
AUTOMATIC ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS  
IN CASE OF ARTIFICIAL CONCEPTION**



While men can only be donors in different capacities, the effect on women acting as donors are complicated by the fact that they can also choose to gestate the child conceived as a result of the artificial fertilisation.<sup>750</sup>

Artificial or non-sexual reproduction has also given rise to a number of legal dilemmas that may be relevant to the acquisition of parental responsibilities and rights. The problems pertaining to the cryo-preservation of gametes or embryos produced for purposes of artificial fertilisation and the possible consequences of cloning are two of such examples. These contentious issues will briefly be dealt with separately at the end of the chapter.

#### **4.4.2 Donor of female gametes**

With regard to the use of female gametes for the purpose of conceiving a child through artificial fertilisation, section 40 now provides as follows:

- “(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation shall for all purposes be deemed to be the legitimate child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.
- (b) For the purposes of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
- (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
- (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-
  - (a) that person is the woman who gave birth to that child; or
  - (b) that person was the husband of such woman at the time of such artificial fertilisation.”<sup>751</sup>

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<sup>750</sup> Hence the rationale behind the structure chosen for this discussion: See Schedule 2 above.

<sup>751</sup> The corresponding section 5(1) in the Children’s Status Act 82 of 1987 read as follows: “(a) Whenever the gamete or gametes of any person other than a married woman or her husband have

The meaning of marriage and “married person” for purposes of the Act has already been discussed in 4.2.2.2(b) above. The word “spouse” in the abovementioned section must be interpreted subject to the provisions of section 13 of the Civil Union Act<sup>752</sup> which is discussed in 4.3.2.2(b) below.

Section 40(1)(a) is applicable “[w]henver the gamete or gametes of any person other than a married person *or* his or her spouse have been used” (own italics). The section clearly makes provision for a scenario where one spouse (the married woman) is artificial fertilised with gametes donated by a male donor *or* a female donor.<sup>753</sup> The section is, presumably also applicable where the child is conceived with donor gametes which neither the married woman nor her spouse “donated”.<sup>754</sup> Provided the married woman and her spouse (male or female) consent to the artificial fertilisation,<sup>755</sup> both spouses are deemed the legal parents of the resultant child in the same way that a married couple is deemed to be the “legitimate” parents of a naturally conceived child in terms of the common law.<sup>756</sup>

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been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination. (b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent. (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where-(a) that person is the woman who gave birth to that child; or (b) that person is the husband of such a woman at the time of such artificial insemination.”

<sup>752</sup> 17 of 2006.

<sup>753</sup> The original draft regulations to the Human Tissue Act 65 of 1983 seemed in effect to prohibit IVF using a woman’s own *ovum* but allowed IVF with a donated *ovum* (draft reg 2 read with draft reg 7(2)). In his discussion of these draft regulations, Schutte 1985 *De Rebus* 347 at 348 contended that this result could not have been the intention of the legislator. In accordance with this view the woman who is artificially fertilised could thus, in the case of IVF or ET (see 4.3.1 above) herself be regarded as a donor. S 40(3)(a) clearly envisages the possibility of the person whose gametes were used for the artificial fertilisation, and the woman who gave birth to the child as a result thereof, being one and the same person.

<sup>754</sup> In this case neither the mother nor her husband or same-sex civil union partner/spouse would be genetically related to the child – a situation comparable to that found in the case of adoption. Neither the Children’s Act 38 of 2005 nor its predecessor Children’s Status Act 82 of 1987 seem to prohibit such a possibility.

<sup>755</sup> The consent is presumed: S 40(1)(b). It is important to note that the consent relates to both the use of the donor gametes and the procedure itself. If the woman did not consent to being artificially fertilised, the procedure could conceivably constitute assault or even rape: See Hahlo 1957 *SALJ* 167 at 170-171.

<sup>756</sup> Before the enactment of the Children’s Status Act 82 of 1987, Lupton 1985 *TSAR* 277 at 291 anticipated a problem insofar as it was uncertain whether genetic or gestation would determine legal motherhood. Lupton argued that if the husband’s sperm and a donated *ovum* was utilised, the wife could be considered the mother of the child because she gave birth to the child or, by

The origin of the gametes used for the purpose of the artificial fertilisation and conception should thus be irrelevant. If the married father (or mother for that matter) does not consent to the artificial fertilisation or the woman is not married, the birth-giving mother will acquire parental responsibilities and rights and become the legal mother of the artificially conceived child as explicitly provided for in the newly inserted subsection 40(2). Whereas the Children's Act<sup>757</sup> has made biology a qualification for legal parenthood in the case of a naturally conceived child<sup>758</sup> it has maintained the presumption or fiction of a biological link, albeit it in a slightly modified form,<sup>759</sup> in the case of a child conceived with donor gametes. The married couple thus acquires parental responsibilities and rights on the basis of their intention to become parents and not because they are necessarily the genetic parents of the artificially conceived child (although that is of course often the case). While the presence or absence of consent would not affect the birth-giving mother's acquisition of parental responsibilities and rights,<sup>760</sup> it is crucial for purposes of determining whether the intended spouse or partner will be recognised as the legal parent of the artificially conceived child or not. It is especially significant that only a "spouse" will be able to acquire parental responsibilities and rights automatically after having given consent to the artificial fertilisation – no other life-partner<sup>761</sup> will qualify in terms of section 40(1)(a). To this extent there may be serious reservations about the constitutionality of the specific provision and could be regarded as unfair discrimination on the basis of marital status.<sup>762</sup>

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virtue of the fact that "... the oocyte, though emanating from a donor, becomes the wife's by the legal process of *accessio*". If on the other hand, the determination of motherhood was based on genetics alone then (at 291) "... the child would be the genetic product of a man and a woman to whom he was not married". It is also conceivable that the sperm of the donor and the husband could be "mixed" to bring about the conception of the child.

<sup>757</sup> 38 of 2005.

<sup>758</sup> See 4.2.2 above.

<sup>759</sup> Apart from being married to the mother, the spouse must consent to the artificial fertilisation and can be male or female.

<sup>760</sup> S 40(2) expressly provides for the birth-giving mother to be regarded as the mother "for all purposes" without mentioning anything about consent.

<sup>761</sup> The permanent life-partner in the case of a naturally conceived child, however, acquires parental responsibilities and rights for *eg* in terms of s 21(1)(a).

<sup>762</sup> S 9(3) of the Constitution.

Despite the attempt at using gender neutral terminology in section 40(1)(a), it is evident that “spouse” as in “the artificial fertilisation of one spouse” or “any child born of that spouse” can, for obvious reasons, only refer to a female spouse.

Apart from the case where a commissioning mother has donated her eggs or *ova* for purposes of the artificial conception of a child in terms of a surrogate motherhood agreement in terms of the Children’s Act,<sup>763</sup> no legal relationship will exist between the donor of the female gametes and the child born as a result of such donation except if the female donor is also the gestating mother or the latter’s “husband”. The retention of the term “husband” in paragraph (b) of subsection (3) is particularly troublesome, not only because of the substitution of “husband” with “spouse” throughout the rest of the section, but also in view of the judgment in *J and Another v Director-General, Department of Home Affairs and Others*<sup>764</sup> and the enactment of the Civil Union Act,<sup>765</sup> as discussed in 4.3.2.2(b) below.

#### **4.4.2.1 Donor is gestational woman**

Where the donor of the female gametes also acts as the gestational mother of the child, section 40(2) as well as section 40(3)(a) will be applicable and vest parental responsibilities and rights in the birth-giving mother, whatever her marital status.<sup>766</sup>

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<sup>763</sup> 38 of 2005, as discussed in Ch 6 below. The reference to s 296 is in my view a mistake and should in fact be a reference to s 297, which regulates the effect of a surrogate motherhood agreement on the status of the child, as more fully discussed in 6.3.4 below.

<sup>764</sup> 2003 5 SA 621 (CC).

<sup>765</sup> 17 of 2006.

<sup>766</sup> According to Lupton 1985 *TSAR* 277 at 294, the “... unspoken premise on which a legal tie is established between mother and child in such cases is the fact that the woman consented to conceive and give birth to the child”. As such the determination of legal motherhood would still adhere to the “consent-based” approach advocated by Lupton at 294 (before the Children’s Status Act 82 of 1987 was enacted).



#### 4.4.2.2 Other female donors

##### (a) Donor who is not gestational woman or her spouse<sup>767</sup>

In the case where an unmarried woman has donated her eggs (referred to as *ova* or oocytes<sup>768</sup>) for purposes of the artificial conception of a child,<sup>769</sup> but has not acted as the gestational or birth-giving mother of such child, an actual (as opposed to a presumed) genetic link will exist between the woman and the child but no legal relationship. The egg or *ovum* donor, whether known or unknown, will in terms of section 40(3) not acquire any rights, duties or obligations in respect of the child born as a result of the artificial conception brought about by her gametes.<sup>770</sup>

##### (b) Donor who is civil union partner of gestational woman

The Act has created two exceptions to the general rule that no rights, duties or obligations will arise between the gamete donor and the child born as a result of the artificial conception in terms of section 40(3):

- (i) If the *ovum* donor is the woman who gave birth to the child;<sup>771</sup> and
- (ii) if the donor was the “husband” of the birth-giving mother at the time of the artificial fertilisation.<sup>772</sup>

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<sup>767</sup> In this context the term is reserved for a female spouse, *ie* a civil union partner in terms of the Civil Union Act 17 Of 2006.

<sup>768</sup> The National Health Act 61 of 2003 defines this term as “... a developing human egg cell”: See s 1 *sv* “oocyte”.

<sup>769</sup> Before the *ova* (or sperm in the case of a male donor) required for the artificial fertilisation may be removed or withdrawn from the body of a living person, the written consent from the donor, if a major, must be obtained or, where the donor is still a minor (and thus under the age of 18 years), the written consent of her parents or guardian must be obtained: S 18(b) of the Human Tissue Act 65 of 1983; Lupton Div J in *Family Law Service* 106.

<sup>770</sup> Before the enactment of the Children’s Status Act 82 of 1987, Lupton 1985 *TSAR* 277 at 292 argued that if the determination of legal parenthood relied on the genetic link, a child conceived by donated sperm and *ovum* would be considered the extra-marital child of the respective gamete donors and not the birth-giving mother.

<sup>771</sup> S 40(3)(a).

<sup>772</sup> S 40(3)(b).

Since “husband” refers only to a male spouse of the birth-giving mother, the latter exception should *prima facie* not apply in the present context where only the donors of female gametes are considered. This may, however, not be a true reflection of the legal position if regard is had, firstly to the Constitutional Court judgment in *J and Another v Director-General, Department of Home Affairs and Others*<sup>773</sup> and, secondly the effect of the interpretation provision contained in section 13 of the Civil Union Act.<sup>774</sup>

In *J and Another v Director-General, Department of Home Affairs and Others*<sup>775</sup> the Constitutional Court declared the then still applicable section 5 of the Children’s Status Act<sup>776</sup> unconstitutional insofar as it unfairly discriminated against permanent same-sex life partners in the registration of the birth of a child (or children in the case under discussion). In this case a woman in a same-sex life-partnership gave birth to twins conceived artificially with male sperm obtained from an anonymous donor and female *ova* from the women’s life partner. Although there was no problem in having the birth-giving mother registered as the “mother” of the children in terms of section 32 of the Births and Deaths Registration Act,<sup>777</sup> the Department of Home Affairs refused to register the life partner as the parent of the children in view of the fact that the two women could not be regarded as father and mother or parent of the children since there was no legal marriage and neither of them could claim fatherhood of the twins.<sup>778</sup> In seeking relief from the Durban High Court, the following issues were raised for consideration:<sup>779</sup>

- (i) The manner of registration of the twins’ birth;

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<sup>773</sup> 2003 5 BCLR 463 (CC).

<sup>774</sup> 17 of 2006.

<sup>775</sup> 2003 5 BCLR 463 (CC).

<sup>776</sup> 82 of 1987 now repealed with effect from 1 Jul 2007 by s 313 of the Children’s Act 38 of 2005.

<sup>777</sup> 51 of 1992.

<sup>778</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [2].

<sup>779</sup> At [6].

(ii) the issue of parenthood, including the constitutionality of section 5 of the Children's Status Act;<sup>780</sup> and

(iii) the constitutionality of section 11(4) of the Births and Deaths Registration Act.<sup>781</sup>

With regard to the first issue, the court had to decide whether the applicants had a right to insist that the life partner of the mother be reflected on the birth certificate as the "parent" (as opposed to the "father") of the children in question.<sup>782</sup> The court, in short, concluded that there was nothing in the Births and Deaths Registration Act<sup>783</sup> or its regulations justifying the refusal to register the births of the twins as contended for by the applicants.<sup>784</sup>

The court found, without deciding on the third issue, that section 11(4) of the Births and Deaths Registration Act<sup>785</sup> was probably unconstitutional insofar as it unfairly discriminated against a same-sex life partner who was not, like a natural parent under the same circumstances, afforded the opportunity of being recorded as the parent of the twins.<sup>786</sup> Since the court granted the relief sought by the applicants under (a) above, consideration of the relief sought under (c) was no longer deemed necessary.<sup>787</sup>

For purposes of the present exposition, the trial court's discussion of the second issue pertaining to parenthood and the constitutionality of section 5 of the Children's Status Act,<sup>788</sup> is of particular importance. Under the issue of parenthood the court had to consider the wish of the mother's life partner to be recognised by law as the parent (or other mother) of the twins based on her

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<sup>780</sup> 82 of 1987.

<sup>781</sup> 51 of 1992.

<sup>782</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D)

[7].  
<sup>783</sup> 51 of 1992.

<sup>784</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [16].

<sup>785</sup> 51 of 1992.

<sup>786</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [31].

<sup>787</sup> *Ibid.*

<sup>788</sup> 82 of 1987.

genetic link to the children.<sup>789</sup> The court concluded that the life partner's right to human dignity in terms of section 10 of the Constitution and the twins' right to family and parental care in terms of section 28(1)(b) of the Constitution demanded that her rights as genetic mother and the twins' concomitant right to have a claim against her, be recognised by law.<sup>790</sup> The court criticised the Children's Status Act<sup>791</sup> as confining itself to the traditional view of the family<sup>792</sup> at the expense of other family forms and life-partnerships already recognised by the Constitutional Court in cases such as *Satchwell v President of the Republic of South Africa and Another*.<sup>793</sup>

The fact was that, since section 5(1) of the Children's Status Act<sup>794</sup> only applied to a "married woman" and her "husband" and the life partner was neither "... the woman who gave birth to that child" nor "... the husband of such a woman at the time of such artificial insemination" in terms of section 5(2), she could merely be classified as a donor with no rights, duties or obligations towards the children.

As far as the constitutionality of section 5 of the Children's Status Act<sup>795</sup> was concerned,<sup>796</sup> the court,<sup>797</sup> in applying the so-called

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<sup>789</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [19].

<sup>790</sup> At [22].

<sup>791</sup> 82 of 1987.

<sup>792</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [23].

<sup>793</sup> 2002 6 SA 1 (CC) at [11].

<sup>794</sup> 82 of 1987.

<sup>795</sup> 82 of 1987.

<sup>796</sup> The section is quoted here again for ease of reference: "5(1)(a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination. (b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent. (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where-(a) that person is the woman who gave birth to that child; or (b) that person is the husband of such a woman at the time of such artificial insemination."

<sup>797</sup> In *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D).

“*Harksen*” test,<sup>798</sup> came to the conclusion that:

“... the section differentiates between married couples and unmarried couples, whether engaged in a same-sex relationship or not; for it creates a relationship of parent and legitimate child in the one case and not in the other. For a similar reason it certainly differentiates between the children produced depending on their parentage. I do not think the differentiation can bear any rational connection to any legitimate government purpose – certainly not in relation to the children.

In my judgment, the differentiation between married and unmarried couples clearly amounts to discrimination on the grounds of marital status and probably sexual orientation. As between children born by artificial insemination to married and unmarried couples, the differentiation amounts to discrimination on the grounds of social origin and birth.”<sup>799</sup>

Finding that the section was also not justifiable in terms of section 36 of the Constitution,<sup>800</sup> the court held that the section was unconstitutional and ordered the striking out of the word “married” in section 5 and reading in the words “or permanent same-sex life partner” after the word “husband” wherever it appeared in the section.<sup>801</sup> The Constitutional Court<sup>802</sup> confirmed the High Court’s finding, but also ordered that the concluding words of section 5(1)(a) (of which section 40 (1)(a) of the Children’s Act<sup>803</sup> is the equivalent) be struck out.<sup>804</sup> Without the excision the section would have read – “... as if the gamete or gametes of that woman or her husband or her permanent same-sex life partner were used for such artificial insemination”.<sup>805</sup>

In this regard the court made the following observations:<sup>806</sup>

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<sup>798</sup> This test was formulated in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) [54], for which see 4.3.2 above.

<sup>799</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [27].

<sup>800</sup> At [29].

<sup>801</sup> At [30].

<sup>802</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 621 (CC) at [16].

<sup>803</sup> 38 of 2005.

<sup>804</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 621 (CC) at [28].

<sup>805</sup> At [17].

<sup>806</sup> *Ibid.*

“The deeming provision has reference to the legitimacy of a child born to a married couple. A child born by artificial insemination is deemed to be legitimate in a situation where the common-law would not recognise such legitimacy. In the case of a child born by artificial insemination in the context of a permanent same-sex life partnership, the deeming provision is inappropriate as a child could not be conceived using the gametes only of the same-sex partners. Furthermore, the legitimacy of such a child at common law could not arise.”

The Constitutional Court also considered but rejected a request by the Department of Home Affairs to read in words that would have made section 5 of the Children’s Status Act<sup>807</sup> applicable to unmarried heterosexual permanent life partners, because this had not been raised as an issue *in casu*.<sup>808</sup>

The case justified, in my opinion, the following deductions, conclusions and comments:

- (i) A female same-sex life partner who donated gametes for purposes of the artificial insemination of her life partner who subsequently gave birth to a child (or children as in this case) would automatically have acquired parental responsibilities and rights in respect of such child so conceived and born in terms of the new reading in of section 5(2)(b). This conclusion might have created the impression (incorrectly so) that the life partner of the birth-giving mother would have acquired parental responsibilities and rights because she was genetically linked to the artificially conceived child.
  
- (ii) It would be possible for a child conceived as a result of artificial fertilisation in law to have two mothers and no father;<sup>809</sup>

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<sup>807</sup> 82 of 1987.

<sup>808</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 621 (CC) at [19].

<sup>809</sup> The inverse situation (where a child would in law have two fathers and no mother) could only arise in the case of a surrogate mother gestating and giving birth to a child for a homosexual couple, who then subsequently adopt the child. Once Ch 19 of the Children’s Act 38 of 2005 comes into operation, the same result could be achieved by means of a valid surrogate motherhood agreement. If the woman, who is artificially fertilised, is still married to a husband while involved in a permanent same-sex life-partnership, the resulting child would by law have two mothers and a father, to none of whom the child may be genetically linked.

- (iii) Only the same-sex life partner of a woman would have been able to acquire legal parenthood after consenting to the artificial fertilisation. All male life partners and heterosexual life partners would be excluded from the section;<sup>810</sup>
- (iv) In terms of the interpretation given to section 5(1)(a) the female partners in a same-sex life-partnership would have acquired parental responsibilities and rights in respect of a child born as a result of the artificial fertilisation of one of the partners, on the same basis as a married heterosexual couple.<sup>811</sup> The partner of the birth-giving mother would, therefore, have acquired parental responsibilities and rights even if she was not genetically linked to the artificially conceived child.

Once same-sex life partners were given the option to conclude a civil union,<sup>812</sup> it became clear that the Constitutional Court's extended interpretation of section 5 in *J and Another v Director-General, Department of Home Affairs and Others*<sup>813</sup> had to be reconsidered since it was based on the premise that same-sex life partners could not conclude a legally recognised marriage. If same-sex life partners, like their heterosexual counterparts, could now also choose not to get married while being able to do so, then the striking out of the word "marriage" and the reading in of "or same-sex permanent life partner" after the word "husband" in section 5 could no longer be justified. If retained, the extended interpretation by the court

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<sup>810</sup> This deduction is justified on the basis that the child born as a result of the artificial fertilisation "... shall for all purposes be deemed the legitimate child of that woman [who was fertilised] and *her* permanent same-sex life partner" (own insertion and italics).

<sup>811</sup> Where the heterosexual couple would have acquired parental responsibilities and rights based on the existence of a marriage and consent, same-sex life partners would acquire such responsibility based on the existence of a permanent life-partnership and consent. The criteria for a same-sex permanent life-partnership was, however, not probed by either the High Court or the Constitutional Court. The permanency of the relationship seems simply to have been accepted as a matter of fact: See *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 605 (D) at [3].

<sup>812</sup> In terms of the Civil Union Act 17 of 2006, which came into operation on 1 Dec 2006. A civil union concluded in terms of this Act is in all respects recognised as being equal in status and attracts the same legal consequences as that of a marriage contemplated in the Marriage Act 25 of 1961.

<sup>813</sup> 2003 5 SA 621 (CC).

would amount to unfair discrimination against unmarried heterosexual life partners who were excluded from the ambit of the section.<sup>814</sup>

Thus was the state of the law when section 40(3)(b) of the Children's Act,<sup>815</sup> retaining the term "husband" came into operation on 1 July 2007. While it is accepted that "husband" can no longer include a permanent life partner, whether of the same or opposite sex as the mother, it is submitted that the term should be given a gender neutral interpretation as being wide enough to include a civil union partner of any sex as provided for in section 13(2) of the Civil Union Act in the following terms:<sup>816</sup>

- "... with the exception of the Marriage Act and the [Recognition of] Customary Marriages Act, any reference to –
- (a) marriage in any other law, including the common law, includes with such changes as may be required by the context, a civil union; and
  - (b) husband, wife or spouse in any other law, includes a civil union partner".

As such the same-sex civil union partner of a mother would automatically acquire parental responsibilities and rights when, in terms of section 40(1)(a), both civil union partners consented to the mother being artificially fertilised with donor gametes. The fact that the civil union partner's gametes or *ova* were used for the artificial fertilisation would not prevent such a partner from acquiring rights, duties or obligations in respect of the child since she would, in terms of section 13(2) of the Civil Union Act<sup>817</sup> fall within the ambit of section 40(3)(b).

Where a lesbian couple "conceives" a child by artificial means, they are in the same way as heterosexual parents, recognized as the legal parents of such a child in terms of section 40 of the Children's Act,<sup>818</sup> if they have concluded a civil

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<sup>814</sup> See in this regard the Constitutional Court judgment in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) [236] that overturned the High Court decision in *Robinson and Another v Volks NO and Others* 2004 6 SA 288 (C) to the effect that the word "survivor" in s 1 of the Maintenance of Surviving Spouses Act 27 of 1990 included a survivor of a permanent intimate (homosexual or heterosexual) life-partnership.

<sup>815</sup> 38 of 2005.

<sup>816</sup> 17 of 2006.

<sup>817</sup> 17 of 2006.

<sup>818</sup> 38 of 2005.



union. If they have not concluded a civil union but are involved in a permanent life-partnership, section 40 denies them automatic parental status like any other unmarried (heterosexual) couple who conceived by artificial means who are also excluded from the section. Distinguishing between married parents (including parents who have concluded a civil union) of the same or opposite sex who conceive artificially, on the one hand, and unmarried parents who do the same, on the other hand, has in principle already been found unconstitutional in the judgment of *J and Another v Director-General, Department of Home Affairs and Others*.<sup>819</sup> While the court acknowledged in that case that the equivalent of s 40 in the now repealed Children's Status Act<sup>820</sup> could, in addition to permanent same-sex life partners, also constitute unfair discrimination against permanent heterosexual life partners, the court refused to consider their plight because "... [i]t was not properly brought before us, nor did we hear argument on the complexities involved".<sup>821</sup> As far as the automatic acquisition of parental responsibilities and rights is concerned, it is submitted that section 21 could only find application in the context of artificial fertilisation if the gametes of the mother and the father were used for the artificial conception. In that case the "biological" father could automatically acquire parental responsibility if he lived with the mother in a permanent life-partnership at the birth of the child. If donor sperm is used for the fertilisation, section 21 would not be applicable since neither the lesbian partner nor the male partner would qualify as the "biological" father of the child. However, despite these technical difficulties one could perhaps argue in general that the effect of section 40 discriminates unfairly against children on the ground of their "artificial" birth or social origin.<sup>822</sup> As far as the life partners are concerned, the section may constitute a violation of their right to make decisions concerning reproduction as entrenched in section 12(2) of the Constitution since it treats unmarried life partners who conceive children naturally differently from unmarried life partners who conceive by artificial fertilisation.

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<sup>819</sup> 2003 5 SA 621 (CC). Although the judgment is only applicable to s 5 of the Children's Status Act 82 of 1987 which has now been repealed, s 40 contains almost identical provisions.

<sup>820</sup> 82 of 1987: S 5.

<sup>821</sup> *J and Another v Director-General, Department of Home Affairs and Others* 2003 5 SA 621 (CC) [19].

<sup>822</sup> In the case of a naturally conceived child, the biological father can automatically acquire parental responsibilities and rights even if he is not married to the mother, by showing the necessary commitment in terms of section 21. S 40 excludes that possibility in the case of an artificially conceived child.

All male couples are treated in the same way as any other non-parent couple or person and can be assigned parental responsibilities and rights in terms of sections 22, 23 and 24 or otherwise acquire such responsibilities and rights through adoption or surrogacy. In this regard male couples are discriminated against on the basis of their sex because they cannot be artificially fertilised as envisaged in terms of s 40.

Where a lesbian couple uses sperm from an anonymous donor to conceive, the arrangement would appear to create few problems. According to a report in the *Beeld*<sup>823</sup> with the heading “Dubbele moederliefde in huis Nagtegaal” (loosely translated “Double mother love in the Nightingale home”), one of the first lesbian couples to acquire co-parental responsibilities and rights in this manner is happy with the arrangement. Admitting that their lifestyle choice might pose challenges for “their” son, the “co-dependents”, as they call themselves, are confident that they will equip him with the necessary coping skills. As to the possible disadvantages of a son growing up without a male role model, the couple was not overly concerned saying that one of the grandfathers, “oupa Dirk”, was happy to fulfil that role.

Section 40 is progressive in its effect, especially in view of the fact that similar proposals are only now being considered in the United Kingdom, a country generally regarded as a leader in assisted reproduction and embryo research.<sup>824</sup> The provision that has been drafted<sup>825</sup> will allow not only the lesbian civil partner of the mother, but also any other woman who has met with certain parenthood conditions, to be treated as the “other parent” in law. The draft Bill and the effect of its provisions which will create a two mother family in law have caused an outcry in the United Kingdom<sup>826</sup> where Norman Wells of the Family Education Trust, amongst many others, criticised the move as “... tampering with the natural

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<sup>823</sup> Dated 28 Oct 2007.

<sup>824</sup> Foreword Human Tissue and Embryos (Draft) Bill - Draft revised legislation for assisted reproduction and embryo research presented to Parliament UK Department of Health May 2007.

<sup>825</sup> S 48 of the Human Tissue and Embryos (Draft) Bill UK Department of Health May 2007, which will ultimately amend the UK Human Fertilisation Embryology Act 1990.

<sup>826</sup> See [www.telegraph.co.uk/news/main](http://www.telegraph.co.uk/news/main).

order of things” and a “... dangerous social experiment” with “... serious consequences for individuals and society as a whole”.<sup>827</sup>

According to Dempsey,<sup>828</sup> attached to the Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, Australia, “... a degree of moral panic” has erupted in that country about the prospect of fatherless families. The concern may be understandable in the light of statistics showing that the number of lesbian women in Australia with children has increased from 14.3% in 1993 to 21.8% in 1999, giving rise to what Dempsey ingeniously refers to as a “gayby” boom. Recent research in Australia, the United States of America and New Zealand suggests that homo-nuclear family units (usually two mothers and a child or children) are an emerging phenomenon worldwide.<sup>829</sup>

The recent judgment in *Re Patrick*<sup>830</sup> by the Family Court of Australia, highlighted the dilemmas courts could soon face in the context of the homo-nuclear family.<sup>831</sup> In the case of *Re Patrick*<sup>832</sup> the court had to determine the parental status and rights of a gay man who had contributed his sperm to a lesbian biological mother by a method other than sexual intercourse but outside a clinical setting.<sup>833</sup> While the court had no problem agreeing that the mother and her lesbian partner were Patrick’s parents in law,<sup>834</sup> the court ultimately decided to uphold Patrick’s social connection with his biological (sperm donor) father by granting him fortnightly contact visits. The judge preferred the donor-father’s evidence regarding the original intention of the parties to allow him to see and be known by Patrick as his father. The judge ordered the contact to be in Patrick’s best interests for the following 2 reasons: The child appeared to interact well with his father and it was

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<sup>827</sup> See comments on [www.telegraph.co.uk/news.main](http://www.telegraph.co.uk/news.main).

<sup>828</sup> Dempsey 2004 *IJLPF* 76.

<sup>829</sup> Kelly 2004 *Canadian Journal of Family Law* 134.

<sup>830</sup> *Re Patrick (An Application for Contact)* (2002) 28 Fam LR 579 [2002] FLC 93-096 [*Re Patrick*].

<sup>831</sup> The case is discussed in Dempsey 2004 *IJLPF* 76 and Kelly 2004 *Canadian Journal of Family Law* 134.

<sup>832</sup> *Re Patrick (An Application for Contact)* (2002) 28 Fam LR 579 [2002] FLC 93-096 [*Re Patrick*].

<sup>833</sup> The Australian Family Court has held that the phrase “artificial conception procedure” includes inseminations occurring at home: Dempsey 2004 *IJLPF* 76 at 83.

<sup>834</sup> In terms of Australian law the lesbian partner of the artificially fertilised mother do not automatically acquire parental responsibilities and rights but may be recognised as a legal parent by means of a so-called parenting order. For an exposition of the position in terms of Dutch law, see Vonk 2004 *IJLPF* 103.

deemed important for him to know who had fathered him. The judgment dealt a devastating blow to the expectations of the lesbian couple with momentous emotional consequences: On 1 August 2002, in an apparent murder-suicide, mother and child were found dead in their Melbourne home. The judgment would seem to support the opinion of some authors that –

“... in cases of known donors, law operates to thwart attempts by women to create non-traditional families in circumstances even where the parties have agreed that the man will not play a role in the child’s life”.<sup>835</sup>

While section 40 of the Children’s Act<sup>836</sup> does not entertain the possibility of a gamete donor automatically acquiring any rights in respect of a child artificially conceived as a consequence of such donation,<sup>837</sup> unless he is the husband of the mother of the child, the provisions of the new Children’s Act<sup>838</sup> may arguably accommodate requests for contact or care by a known donor in the following ways:

- (i) The lesbian co-mothers, if they are married,<sup>839</sup> may agree to enter into a parental responsibilities and rights agreement with him in terms of section 22;<sup>840</sup>
- (ii) a court may assign incidents of parental responsibilities and rights to the donor-father in terms of section 23 as “... a person having an interest in the care, well-being or development of a child”.

Although an artificially conceived child will not have a right to know the identity of the sperm donor,<sup>841</sup> a court could conceivably also find that such disclosure is in

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<sup>835</sup> First expressed by Mykitiuk 2001 *Osgoode Hall Law Journal* 771 at 799 and quoted with approval by Campbell 2007 *IJLPF* 242 at 257.

<sup>836</sup> 38 of 2005.

<sup>837</sup> Unless the definition of artificial fertilisation does not encompass home inseminations.

<sup>838</sup> 38 of 2005.

<sup>839</sup> If the co-mothers are married, both women would be considered the legal parents of the child in terms of s 40(1)(a) of the Children’s Act 38 of 2005. If they are not married only the birth-giving mother would have acquired parental responsibilities and rights at the birth of the child in terms of s 40(2) of the Act.

<sup>840</sup> Children’s Act 38 of 2005.

<sup>841</sup> S 41: Children’s Act 38 of 2005.

the best interests of the child in a particular case in terms of section 28(2) of the Constitution.<sup>842</sup>

### **(c) Donor is commissioning mother**

As already indicated before, the acquisition of parental responsibilities and rights by a commissioning mother will be dealt with in Chapter 6 below.

#### **4.4.3 Donor of male gametes**

##### **4.4.3.1 Married sperm donor**

When a married man's sperm or gametes are used to artificially fertilise his wife (so-called "homologous" artificial insemination or AIH<sup>843</sup>), the husband will acquire full parental responsibility in respect of the child so conceived and born in terms of the common law presumption of paternity and section 40(3)(b) of the Children's Act.<sup>844</sup> Because of the fact that the gametes of "... any person other than a married person or his or her spouse" have not been used in this case, section 40(1)(a) can find no application. The effect of AIH will thus be no different than in the case where the husband naturally contributed to the conception of the child, as discussed in 4.2.2.2(b) above.<sup>845</sup>

The fact that section 40(1)(a) does not regulate the legal position of the sperm donor if he is married to the mother, can create problems because it ignores the issue of consent by the husband in cases of AIH, which was found to be of crucial importance in the recent English case of *Leeds Teaching Hospitals NHS Trust v*

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<sup>842</sup> Donors of sperm, eggs or embryos in the UK no longer have the right to remain anonymous. Children in the UK conceived as a result of such donation on or after 1 Apr 2005 will upon attaining the age of 18 have the right to be given identifying information provided by donors to the relevant clinic: See Lowe & Douglas *Bromley's Family Law* 310 and website of the Human Fertilisation & Embryology Authority – <http://www.hfea.gov.uk/en/368.html>.

<sup>843</sup> See Davel & Jordaan *Law of Persons* 105; Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 334-335.

<sup>844</sup> 38 of 2005. See Van Wyk 1988 *TSAR* 465 at 467, with reference to the identical provisions contained in s 5 of the now repealed Children's Status Act 82 of 1987.

<sup>845</sup> See Lupton 1985 *TSAR* 277 at 291.

A.<sup>846</sup> In this case two couples, Mr and Mrs A, a white couple, and Mr and Mrs B, a black couple, underwent sperm injection treatment (the mixing of the husband's sperm with his wife's eggs) at the same clinic. Due to a mix-up by the clinic Mr B's sperm was used to impregnate Mrs A, who later gave birth to twins. To solve the legal conundrum as to who was the father of the children, the court decided that because A did not consent to the treatment of his wife with the sperm of another man he could not be the father under section 28(2) of the Human Fertilisation and Embryology Act 1990.<sup>847</sup> On the other hand, since B did not consent to the use of *his* sperm he could not be considered a "donor" under section 28(6) of the same Act<sup>848</sup> and, thus, be excluded from the basic rule that the biological father is the child's father. Whether he was willing or not, B was consequently considered the legal father of the children in question.

In cases where the sperm of a donor (so-called "heterologous" or AID<sup>849</sup>), and not that of the husband himself are used for the artificial fertilisation of the wife, the husband was originally not considered the legal parent of the child so conceived and born. In both the judgments of *V v R*<sup>850</sup> and *L v J*<sup>851</sup> the court concluded that such children should be considered born out of wedlock since the use of donor sperm obviously rebutted the *pater est quem nuptiae* presumption.

In *V v R*<sup>852</sup> the husband had consented to the artificial fertilisation. At the time of the couple's divorce, custody of the child born as a result of the artificial fertilisation was granted to the mother while the father was given a reasonable right of access. The child was, therefore, in all respects considered and treated

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<sup>846</sup> [2003] 1 FCR 599, as discussed by both Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 4 and Lowe & Douglas *Bromley's Family Law* 312-313.

<sup>847</sup> Under s 28(2) of the HFEA 1990 the husband of a woman who gives birth as a result of assisted reproduction is presumed to be the child's father unless he shows that he did not consent and that he is not the child's biological father: See also Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 4 and Lowe & Douglas *Bromley's Family Law* 311-312.

<sup>848</sup> S 28(6) of the HFEA provides as follows: "Where (a) the sperm of a man who had given such consent as required by Schedule 3 to this Act was used for a purpose for which such consent was required ... he is not ... to be treated as the father of the child".

<sup>849</sup> See fn 744 above.

<sup>850</sup> 1979 3 SA 1006 (T). This judgment is also discussed in the context of adoption in 5.3.1.1 below.

<sup>851</sup> 1985 4 SA 371 (C). Also see Van der Vyver & Joubert *Persone- en Familiereg* 208.

<sup>852</sup> 1979 3 SA 1006 (T).

as a legitimate child born from the marriage although the mother was at all times aware<sup>853</sup> of the fact that her husband was not the biological father of the child. When her second husband wished to adopt the child, the mother contended that the child should be treated as one born out of wedlock requiring only her consent for the proposed adoption.<sup>854</sup> The court held that it would be extraordinary for a single judge *not* to follow the common law view as expressed by the old authors<sup>855</sup> and the view of modern authors<sup>856</sup> to the effect that the child in question should be considered a child born out of wedlock.<sup>857</sup> Steyn J, however, held in an *obiter* statement that the consenting (what he called a “putative”) father should be placed in a very special position to the child born as a result of the artificial fertilisation and be vested with guardianship and the duty of support in respect of such child.<sup>858</sup>

In *L v J*<sup>859</sup> the court concluded “... that the balance of probabilities is strongly against defendant having consented to the artificial insemination”.<sup>860</sup> Berman J concluded that the child was to be considered born out of wedlock and since the husband was not the natural father of the child, he was not obliged to support a child born to his wife by AID without his consent.<sup>861</sup>

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<sup>853</sup> The mother had made a statement to this effect in her sworn affidavit: See *V v R* 1979 3 SA 1006 (T) 1008F-G.

<sup>854</sup> *V v R* 1979 3 SA 1006 (T) at 1008F-G.

<sup>855</sup> At 1014H. Steyn J, however, stated (at 1015E) that: “Die regsgeleerde opinie in Suid-Afrika volg egter nog duidelik die basiese stellings wat in ons gemenerereg neergelê is deur die ou Romeins-Hollandse reg skrywers, wat egter geen oorweging gegee het aan die moontlikheid van kunsmatige inseminasie nie”.

<sup>856</sup> The opinion of the following modern authors were referred to: Gordon, Turner & Price (at 1015E); Hahlo HR (at 1015H); Masters NC (at 1016A) and Spiro E (at 1016A-B).

<sup>857</sup> At 1016D-E.

<sup>858</sup> At 1016E-F. Thus, according to Lupton 1985 *TSAR* 277 at 288, taking the first tentative steps in the direction of creating a new category of “father” in our law by extending the present definition of the term to include the consenting husband of a wife who has produced an AID child. See also SALC Working Paper on the *Investigation into the Legal Position of Illegitimate Children* par 10.1.1.

<sup>859</sup> 1985 4 SA 371 (C).

<sup>860</sup> At 377C-D. There was, according to the court (at 376F-H) no direct evidence that the husband was aware of the fact that his wife was about to submit herself to artificial fertilisation (or AID). From the testimony of the medical specialist carrying out the procedure it, furthermore, transpired that the wife had been dishonest about the consent which she claimed had been given by her husband.

<sup>861</sup> At 377H-J.

In both cases mentioned, the determination of the status of the children were made regardless of the fact that the children were born *stante matrimonio* and that both husbands treated the children as their own (social criteria).<sup>862</sup> Once it became clear that the husbands could not be the biological fathers of the children and the presumption of paternity was consequently rebutted, the courts were unwilling to vest the husbands with legal parentage despite their obvious commitment not only to the mother of the children, but also to the children themselves.<sup>863</sup>

After the unsatisfactory outcome of these cases, the South African legislature was compelled to address the issue of the parental status of husbands whose wives had been artificially fertilised by donor sperm. In terms of section 5(1) of the repealed Children's Status Act,<sup>864</sup> which was enacted in October 1987, the parental status of the husband was made dependent upon his consent to the artificial fertilisation<sup>865</sup> which was presumed in case of doubt.<sup>866</sup> No specific method of consent was required as the SALC considered it undesirable "... for, were the consent not given precisely as required, the child could be regarded as illegitimate on a mere technicality".<sup>867</sup>

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<sup>862</sup> In *V v R* 1979 3 SA 1006 (T) at 1008D this is evident from the fact that the husband was granted reasonable access to the child post divorce and in *L v J* 1985 4 SA 371 (C) at 376B-D, the court expressly gave examples of how the husband had participated in the child's life and mentioned (at 376F) that he treated the child as his own.

<sup>863</sup> The SALC Report on the *Legal Position of Illegitimate Children* 120 remarked that "... it goes against one's sense of fairness that the previous husband, who had accepted the child as his own, now had no say over the child".

<sup>864</sup> 82 of 1987.

<sup>865</sup> In terms of s 5(1)(a) of the Act, thereby following a proposal by Lupton (1985 *TSAR* 277 at 293) to the same effect. Lupton (at 289) argued that by giving consent the presumption of *pater est quem nuptiae demonstrant* became irrefutable.

<sup>866</sup> S 5(1)(b) of the Act. According to the SALC the presumption of consent will play much the same role as the presumption of paternity plays in cases where artificial fertilisation is not involved: SALC Report on the *Legal Position of Illegitimate Children* 132; Labuschagne JMT 1997 *Obiter* 117 at 122.

<sup>867</sup> SALC Report on the *Legal Position of Illegitimate Children* 132 par 10.29. In this regard also see Van der Walt 1987 *Obiter* 1 at 11, who contends that formal written consent should be required for artificial fertilisation because of the far reaching effects of such consent on the acquisition of parental responsibilities and rights and the need for legal certainty in such cases (at 12). Van der Walt (at 13) moreover proposes that revocation of consent should only be allowed if done in the same formal manner, *ie* in writing, that a time limit should be created within which consent based on misrepresentation, *iustus error* or undue influence could be contested and that ratification should be made possible subject to the mother's consents thereto and the child if older than 10 years.



Van Wyk,<sup>868</sup> who welcomed the new provisions at the time, stressed the fact that the Act left no room for any rebuttal of paternity once consent had been proved<sup>869</sup> and the fact that section 5(1) of the Act was only applicable to *artificial* fertilisation and not natural conception.<sup>870</sup> Van Wyk illustrated the relevance of the latter fact by the following example: A married woman with a sterile husband gives birth to a child by means of AID. The unnaturalness of the procedure is, however, unacceptable to her and she decides to conceive a second child naturally - and uses her elderly father in law as “donor”. When the second child is born severely disabled the husband denies paternity. In terms of section 5(1) the first child would have been considered legitimate while the second would not. Was this result justifiable if the only difference was the manner of conception? Van Wyk<sup>871</sup> could not find any fault with this seemingly contradictory result since our law followed, according to this author, a fundamental approach *in favorem matrimonii* that tried to protect the marriage as institution. Because of the obvious risk that the natural conception by a third party purportedly posed to the marriage, the child’s interest to be regarded as legitimate had to yield to the higher value of protecting the marriage.<sup>872</sup>

Section 40(1)(a) has simply re-enacted the position that applied in terms of section 5 of the Children’s Status Act,<sup>873</sup> outlined above. If the sperm donor is married to the birth-giving mother he will automatically acquire parental responsibilities and rights of the artificially conceived child provided he has consented to the artificial fertilisation of his wife. The fact that his gametes (and those of a female donor other than his wife) were used for such artificial fertilisation would not deny him the right to acquire rights, responsibility, duties or obligations in respect of the child so conceived and born since he would qualify as “... the husband of such woman at the time of the artificial fertilisation” in terms of section 40(3)(b).

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<sup>868</sup> 1988 *TSAR* 465 at 468.

<sup>869</sup> At 469.

<sup>870</sup> Van Wyk 1988 *TSAR* 465 at 469.

<sup>871</sup> Van Wyk 1988 *TSAR* 465 at 468.

<sup>872</sup> Van Wyk 1988 *TSAR* 465 at 468. Labuschagne 1997 *Obiter* 117 at 123 says of this seemingly unjustified result, the following: “Die effek hiervan is dat die reg se beheptheid met die voorkoming van owerspel, die ‘bestraffing’ van die buite-egtelike geslagsdaad dus, tot gevolg het dat die kind benadeel sou kon word”.

<sup>873</sup> 82 of 1987.

If the sperm donor is married, but not to the woman who is artificially fertilised with his sperm then, of course, he would not acquire parental responsibilities and rights or any other right, responsibility, duty or obligation in respect of the child that is subsequently born since he would not fall within the ambit of either of the exceptions created in section 40(3)(a) or (b).

#### **4.4.3.2 Unmarried sperm donor**

As was the position in terms of the now repealed Children's Status Act,<sup>874</sup> an unmarried sperm donor will not acquire any rights, responsibility, duties or obligations in respect of the child born as a result of the artificial conception brought about by his gametes in terms of section 40(3). Van Wyk,<sup>875</sup> finds the wide range of the provision interesting. Contrary to section 40(1),<sup>876</sup> section 40(3) is not dependent on the existence of a marriage or the consent of the spouse of the woman who receives the AID. By implication, therefore, the sperm donor would also not incur any legal rights or duties in the following two scenarios:

- (a) Where an unmarried woman artificially fertilises herself; and
- (b) where a married woman is artificially fertilised without her husband's consent.<sup>877</sup>

The SALRC concluded that legal ties between the child and the donor should be severed in *all* cases.<sup>878</sup> Van Wyk<sup>879</sup> regards this as the correct approach<sup>880</sup> since the donor, after all, loses control over his donated gametes after donation. Even if the sperm donor is known to the mother he would not automatically acquire

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<sup>874</sup> 82 of 1987.

<sup>875</sup> Van Wyk 1988 *TSAR* 465 at 469, referring to the equivalent section in the Children's Status Act 82 of 1987.

<sup>876</sup> Equivalent to the provisions found in section 5(1) of the repealed Children's Status Act 82 of 1987.

<sup>877</sup> SALC Report on the *Legal Position of Illegitimate Children* par 10.34.

<sup>878</sup> SALC Report on the *Legal Position of Illegitimate Children* par 10.34.

<sup>879</sup> Van Wyk 1988 *TSAR* 465.

<sup>880</sup> At 469.

parental responsibilities and rights or incur any liability (for example for maintenance) in respect of the child.<sup>881</sup>

Where an unmarried sperm donor thus donates his sperm with the express intention of becoming a parent, he will not be deemed so. The definition of “parent” in section 1(1) of the Children’s Act<sup>882</sup> excludes such fathers in express terms. From the discussion of the Australian *Re Patrick* case in 4.4.2.2(b) above, it should be abundantly clear that the provisions of section 40 could soon prove wholly inadequate to address the complexities that may arise.

The anonymity of the donor raises another related question pertaining to the child’s right to know who his genetic parent(s) is(are).<sup>883</sup> Since this thesis concentrates on the acquisition of parental responsibilities and rights and not the rights of children *per se*, it is considered outside the scope of the present investigation.<sup>884</sup>

#### **4.4.3.3 Sperm donor is commissioning father**

The acquisition of parental responsibilities and rights by a commissioning father in the context of a surrogate motherhood agreement will be dealt with in Chapter 6 below.

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<sup>881</sup> At 470.

<sup>882</sup> 38 of 2005: S 1(1) *sv* “parent”.

<sup>883</sup> In terms of the regulations to the Human Tissue Act 65 of 1983 (reg 4 read with reg 6: GG 10283 dd 20 Jun 1986 as amended), the medical practitioner who removes and withdraws a gamete may not make the donor’s file available for inspection to “... any other person ... except where any law otherwise provides or any court so orders”. In terms of these regulations, therefore, this means that information contained in the donor’s file may only be made available to the recipient, her husband and the medical practitioner performing the artificial fertilisation (in differing degrees). S 41(1) of the Children’s Act 38 of 2005, however, now expressly allows a child born as a result of artificial fertilisation to have access to any medical information concerning his or her genetic parents as well as “... any other information concerning that child’s genetic parents but not before the child reaches the age of 18 years”. The information disclosed does not include the identity of the person whose gamete was or gametes were used for such artificial fertilisation: S 41(2).

<sup>884</sup> See, however, the tentative conclusions reached by Van Wyk 1988 *TSAR* 465 at 470. Labuschagne 1997 *Obiter* 117 at 123 is of the opinion that the increased recognition of the child’s right to know his or her parents (Art 7 of the UNCRC) will eventually exclude the possibility of anonymous donors. See also the changed position under English law discussed in fn 842 above.

#### 4.4.4 Conclusion

Although the provisions of the Children's Status Act<sup>885</sup> made sense in a context where the marital status of the parents and legal presumptions determined their legal status *vis-a-vis* their children, they no longer comfortably fit into the new legislative scheme.

First of all, it seems strange that the Children's Act<sup>886</sup> differentiates between biological mothers, on the one hand,<sup>887</sup> and mothers who give birth to a child conceived by artificial means,<sup>888</sup> on the other hand, since the legal position in both cases is identical – as the woman who gives birth to the child, she is automatically regarded as the legal mother of the child with full parental responsibilities and rights. The father's position, as expected, is more complicated: In the case of natural conception he is deemed the legal parent provided he is the biological father and he has shown himself to be suitably committed to either the mother or the child in terms of sections 20 and 21. Where the child is conceived with donor sperm, only the husband of the birth-giving mother will automatically acquire parental responsibilities and rights in respect of the child so born. A permanent life partner (of the same or opposite sex) who consented to the artificial fertilisation of the birth-giving mother will not be regarded as the legal parent of the child so born.<sup>889</sup> The Act thus seems to recognise that a comparable commitment to that of a marriage (permanent life-partnership) is sufficient to confer automatic responsibilities and rights on a parent in the case of natural conception but not where the child is conceived by artificial means.

It is interesting to note that both Australian and English law recognise such a commitment in the case of an artificially conceived child. In terms of section 60H(4) of the Australian Family Law Act 1975 (Cth) a child born as a result of

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<sup>885</sup> 82 of 1987.

<sup>886</sup> 38 of 2005.

<sup>887</sup> Mothers who presumably give birth to a naturally conceived child as envisaged in s 19 of the Children's Act 38 of 2005.

<sup>888</sup> S 40(2) of the Children's Act 38 of 2005.

<sup>889</sup> Ss 40(1)(a) and 40(3)(b).

“artificial conception procedures” will be deemed the child of the woman and the man if the person “... lives with another person as the husband or wife of the ... person on a genuine domestic basis although not legally married to that person”. Section 28(3) of the United Kingdom Human Fertilisation Embryology Act 1990 provides that where donated sperm is used for a woman in the course of treatment provided for her and a man together, then the man, and no other person, shall be treated as the father of the child.<sup>890</sup> The provision has been described as unusual “... conferring the relationship of parent and child on people who are related neither by blood nor marriage”.<sup>891</sup>

#### **4.4.5 Problems incidental to artificial fertilisation<sup>892</sup>**

##### **4.4.5.1 Cryopreservation of human embryos<sup>893</sup>**

###### **(a) Introduction**

Before determining who, if anyone, acquires parental responsibilities and rights in respect of cryopreserved embryos in South Africa, it is important, first of all, to understand the circumstances in which human embryos are preserved. Lupton<sup>894</sup> explains the procedure in the following terms:

“Because the process of laparoscopy used to recover ova from a female donor involves an operation under anaesthetic, the donor is treated with gonadotrophins (HCG) in order to induce superovulation. A large number

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<sup>890</sup> For a discussion of disputes which have arisen regarding the interpretation of “treatment together”, see Lowe & Douglas *Bromley’s Family Law* 313-314. Although Annett 2006 *MedLRev* 425 at 432, in considering the future of reproductive regulation in the UK, welcomes the possibility of the phrase being replaced by “... something less open to interpretation” he admits that a fundamental change to the consent provisions relating to the use of embryos “... seems highly unlikely”.

<sup>891</sup> Lowe & Douglas *Bromley’s Family Law* 313, with reference to Hale LJ in *Re R (A Child)(IVF: Paternity of Child* [2003] EWCA Civ 182, [2003] Fam 129 at [20]. The Uniform Parentage Act 2002 (§ 703) in the USA has also been broadened in this respect to cover unmarried couples: See Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) 13.

<sup>892</sup> See Pretorius unpublished LLD thesis UNISA (1991) 378ff for a discussion on “ownership” in gametes and zygotes/embryos.

<sup>893</sup> Although the Human Tissue Act 65 of 1983 did not define “embryo”, the National Health Act 61 of 2003 now defines it as “... a human offspring in the first eight weeks from conception”: S 1 *sv* “embryo”.

<sup>894</sup> Lupton 1992 *TSAR* 466 at 469.

of ova may then be recovered by way of laparoscopy. These ova are then fertilised with male sperm, conception takes place, and the resulting zygotes (embryos) are then frozen in liquid nitrogen to preserve them for subsequent use.

Because of the low success rate of embryo transplantations the above procedure of laparoscopy and cryo-preservation has developed into standard procedure at *in vitro* fertilization units world wide.”

When the *ova* or sperm are frozen separately and preserved in their original state it is generally accepted that any future use would require the written consent of the respective donors.<sup>895</sup> The donor would, therefore, have autonomy with regard to his or her preserved gametes. Once fertilisation takes place by the fusion of the respective gametes and the resultant embryo is frozen, the mutual consent of both donors would presumably be required for the use of the embryo.<sup>896</sup> If the embryo transfer results in a pregnancy or the parties decide to abandon their attempts to procreate *via* embryo transfer (ET), the unutilised embryos may become available for donation or research. As long as the parties agree on the future disposition of these embryos no problem exists. But what if the parent-donors can no longer agree on the future use of these embryos? The problem is compounded by the fact that cryopreservation extends the viability of the embryos almost indefinitely and that circumstances and minds of the donors may change over the course of time.<sup>897</sup>

## **(b) Dissenting donors**

Nowhere is the lack of regulation of the *in vitro* fertilisation (IVF) industry more evident than when couples who have undergone *in vitro* fertilisation producing viable embryos, separate, and then seek legal determination as to which party

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<sup>895</sup> This statement is borne out by the provisions of both the Human Tissue Act 65 of 1983 (ss 18 and 19) and the National Health Act 61 of 2003 (ss 55 and 56).

<sup>896</sup> See *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* of the Medical Research Council par 2.11 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf> in terms of which written consent to use gametes or pre-embryos should be obtained from the donor(s) as well as their spouses.

<sup>897</sup> Pittman 2005 *Maine Bar Journal* 228 at 230. In terms of the UK Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations 1996 which came into operation on 1 May 1996, embryos may, subject to certain exceptions, only be stored for 10 years: See <http://www.hfea.gov.uk/en/578.html>.

gets control of the remaining embryos.<sup>898</sup> In South Africa, as is the case in the United States of America, dissenting progenitors will have to resort to litigation as the only means of delineating their rights.<sup>899</sup>

In *Davis v Davis*,<sup>900</sup> an American couple who were married in 1980 turned to IVF after several failed attempts to conceive their own genetic child. Before all nine pre-embryos could be used, the spouses divorced. The court was called upon to resolve the dispute between the wife, who wanted to use the pre-embryos herself after the divorce and the husband, who wanted to keep the pre-embryos in their frozen state as he did not want to become a parent outside the bounds of marriage.<sup>901</sup> The trial court reasoned that if there is no distinction between embryos and pre-embryos, as insisted by the French geneticist Dr Jerome Lejeune, then he must also be correct when asserting that human life begins at the moment of conception. From this proposition, the trial judge concluded that the eight-cell entities were not pre-embryos but were children *in vitro*. Applying the best interests of the child standard, the trial judge found that it was in the best interests of the child to be born rather than to be destroyed. Since the wife could provide such an opportunity the court awarded her “custody” of the “children *in vitro*”.<sup>902</sup>

Lupton<sup>903</sup> speculated that the South African courts would have followed exactly the same procedure as the Tennessee trial court and would award custody of the embryos in a Davis situation to the mother of the embryos. His conclusion was, first of all, based on the precedent created in *S v Collop*<sup>904</sup> in terms of which our

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<sup>898</sup> Pittman 2005 *Maine Bar Journal* 228.

<sup>899</sup> See Pretorius unpublished LLD thesis UNISA (1991) 441.

<sup>900</sup> 842 SW 2d 588 (Tenn 1992). See Lupton 1992 *TSAR* 466 at 469-473, where the trial case (referred to as 15 FLR 2097) is discussed. The case was taken on appeal all the way to the Supreme Court of Tennessee. See Pittman 2005 *Maine Bar Journal* 228 at 229 for a discussion of the trial case, the Court of Appeal and the Supreme Court of Tennessee cases.

<sup>901</sup> *Davis v Davis* 842 SW 2d 588 (Tenn 1992) at 591-592.

<sup>902</sup> At 594.

<sup>903</sup> Lupton 1992 *TSAR* 466 at 473.

<sup>904</sup> 1981 1 SA 150 (A). In this case council for the accused tried to argue that the accused was not guilty of the crime “abortion” created in s 2 of the Abortion and Sterilisation Act 2 of 1975, since she had not procured the abortion of a “live foetus” as required by the definition of abortion in s 1 of the said Act. On this basis a distinction was drawn between an “embryo” and a “foetus” which, it was argued, referred to “the developing young in the human uterus after the end of the second

law would consider life to commence at conception<sup>905</sup> and the genetic evidence of cell structures which indicated the creation of a unique individual.<sup>906</sup> Secondly, Lupton<sup>907</sup> submitted, the *nasciturus* fiction in terms of which the foetus can be treated as already born, would apply in this situation and, lastly, the fact that custody disputes in South Africa are decided on the basis of the best interests of the child by the High Court as upper guardian of all minors.<sup>908</sup>

Both the Court of Appeal and the Supreme Court of Tennessee, however, overturned the decision reached by the trial court.<sup>909</sup> The Tennessee Court of Appeal found that the husband had a constitutional right *not* to parent a child where no pregnancy had occurred.<sup>910</sup> The same court, furthermore, rejected the trial court's characterisation of the pre-embryos as "children" without explicitly holding that the pre-embryos were "property"<sup>911</sup> vesting the couple with "joint control ... and equal voice over their disposition".<sup>912</sup> The wife then appealed to the Supreme Court of Tennessee, contesting the validity of the constitutional basis for the Court of Appeal's decision, this time seeking to donate the pre-embryos to a childless couple instead of using them herself.

The Supreme Court of Tennessee<sup>913</sup> found the most helpful guidance on the problem of frozen embryos from the ethical standards set by the American Fertility

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month" (at 161G) and, therefore did not include an embryo. The court rejected an interpretation of the statute as distinguishing between an embryo and a foetus.

<sup>905</sup> This proposition is an inference drawn from the judgment and must be qualified. Diemont JA (at 166C) merely held that the crime of abortion could not be limited to the termination of a pregnancy "... only after the embryo has reached a certain – or uncertain – stage of maturity". By implication, therefore, the court held that the crime of abortion could be committed as from the moment of conception, and thus also in respect of an embryo (at 166B). See also Van der Vyver & Joubert *Persone- en Familiereg* 68.

<sup>906</sup> The court in the *Davis* case rejected the argument on behalf of Mr Davis, that the position of the frozen embryos was that of a group of undifferentiated cells which had no organs or nervous system and that life only commenced after development of the so-called "primitive streak": See Lupton 1992 *TSAR* 466 at 471.

<sup>907</sup> Lupton 1992 *TSAR* 466 at 473.

<sup>908</sup> Lupton 1992 *TSAR* 466 at 473.

<sup>909</sup> The appeal cases were not considered by Lupton 1992 *TSAR* 466, presumably because they were only handed down after publication of his article.

<sup>910</sup> *Davis v Davis* 842 SW 2d 588 (Tenn 1992) 589.

<sup>911</sup> At 595.

<sup>912</sup> At 589.

<sup>913</sup> At 596.



Society.<sup>914</sup> In terms of these standards<sup>915</sup> three major ethical positions have been articulated over pre-embryonic status:

- (i) At one extreme is the view of the pre-embryo as a human subject after fertilisation, which requires that it be accorded the rights of a person. In terms of this approach the pre-embryo is given more protection than a foetus which is at a far greater stage of development. According to Pittman<sup>916</sup> it produces "... the illogical result that frozen pre-embryos are more protected than pre-embryos that have been implanted in a woman's uterus and have begun developing into human form". This is also true for South African law in terms of which a woman has absolute autonomy to terminate her pregnancy<sup>917</sup> and the implanted pre-embryo is not afforded constitutional protection.<sup>918</sup> This approach is, therefore, quite rightly in my opinion, rejected as a viable option by Pittman.<sup>919</sup>
- (ii) At the other extreme is the view that the pre-embryo has a status no different from any other human tissue.<sup>920</sup> Regarding the pre-embryos as mere property would, as suggested by Pittman,<sup>921</sup> be dangerous insofar as it could well result in persons being allowed to sell their pre-embryos on the open market, a practice that admittedly "... goes against both the moral conviction that selling of human tissue is wrong and fear that creating a market for pre-embryos will result in them being cultivated for the very purpose of sale".

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<sup>914</sup> The society is now known as the American Society of Reproductive Medicine: See <http://www.asrm.org/Media/Ethics/ethicsmain.html>.

<sup>915</sup> Published in 1990 in a Report on Ethical Considerations of the New Reproductive Technologies: *Davis v Davis* 842 SW 2d 588 (Tenn 1992) 593 fn 14.

<sup>916</sup> Pittman 2005 *Maine Bar Journal* 228 at 232.

<sup>917</sup> Despite the fact that the Choice on Termination of Pregnancy Act 92 of 1996 seems to limit this possibility there are no sanctions imposed for the non-compliance of these so-called restrictions: Van Oosten 1999 *SALJ* 60.

<sup>918</sup> The unborn child is not regarded as a person in law and consequently does not have a right to life as enshrined in s 11 of the Constitution.

<sup>919</sup> Pittman 2005 *Maine Bar Journal* 228 at 232.

<sup>920</sup> *Davis v Davis* 842 SW 2d 588 (Tenn 1992) at 596.

<sup>921</sup> Pittman 2005 *Maine Bar Journal* 228 at 232.

- (iii) A third view – one that is most widely held according to the American Fertility Society – takes an intermediate position. In terms of this approach “[t]he pre-embryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The pre-embryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people.<sup>922</sup> Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.”<sup>923</sup> According to Pittman this approach “... allows parties to contract for the ultimate disposition of their frozen pre-embryos while at the same time, recognizing that the pre-embryos could possibly develop into human beings, albeit with further medical intervention”.<sup>924</sup>

Once it is admitted that couples should be allowed to enter into agreements regarding the future use of their pre-embryos, the question is still how should these contracts be enforced if the parties later disagree? Pittman<sup>925</sup> distinguishes between the following three leading theories of approach currently in existence:

- (i) The balancing test as applied in the *Davis* case;
- (ii) the contemporaneous mutual consent approach; or
- (iii) binding couples to their pre-existing contracts regarding disposition.

In terms of the balancing test the issue centres on the two aspects of procreational autonomy – the right to procreate and the right to avoid

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<sup>922</sup> The SA Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* par 2.2 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf> demands that “... the pre-embryo should be treated with the utmost respect because it is a genetically unique, viable human entity.”

<sup>923</sup> *Davis v Davis* 842 SW 2d 588 (Tenn 1992) at 596.

<sup>924</sup> Pittman 2005 *Maine Bar Journal* 228 at 232.

<sup>925</sup> *Ibid.*

procreation.<sup>926</sup> In weighing up these rights against each other, several factors, including the burdens that will be imposed on each party in either situation, are considered. Both rights have been recognised by the United States' Supreme Court.<sup>927</sup> The balancing test has elicited, to my mind, justified criticism including the fact that the test is considered inappropriate for pre-embryo disposition disputes "... because it thus far has favoured the party not wishing to procreate ...".<sup>928</sup> Furthermore, as Pittman<sup>929</sup> rightly points out, "[n]o court can properly give more weight to one right over the other, nor is it fair to allow the court to substitute itself as the decision maker over the progenitors who may have a very different set of moral and ethical codes".<sup>930</sup>

The contemporaneous mutual consent approach proceeds from the, somewhat illogical, premise that both parties must agree on the future disposition of the pre-embryos at the time of disagreement.<sup>931</sup> In terms of this approach the *status quo* will have to be maintained until such time as the parties can agree once more on their disposition. Yet again this would mean that the party wishing to avoid procreation will always triumph and thus create the impression that the right not to procreate is of greater weight than the right to procreate.<sup>932</sup> Supporters of this

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<sup>926</sup> *Davis v Davis* 842 SW 2d 588 (Tenn 1992) at [12]. See also Pittman 2005 *Maine Bar Journal* 228 232.

<sup>927</sup> The right to procreate was held to be one of the "most basic civil rights of man" in *Skinner v Oklahoma* 316 US 535 (1942), and the right not to procreate was considered in *Griswold v Connecticut* 381 US 479 (1945) in terms of which it was held that married couples had an absolute right to contraception thereby avoiding procreation: Pittman 2005 *Maine Bar Journal* 228 at 232.

<sup>928</sup> Pittman 2005 *Maine Bar Journal* 228 at 232.

<sup>929</sup> *Ibid.*

<sup>930</sup> The court in *Davis v Davis* 842 SW 2d 588 (Tenn 1992) at [13][14][15] finally provided the following guidelines for the settlement of disputes concerning pre-embryos: (i) First of all, the preferences of the progenitors should be considered; (ii) if their wishes cannot be ascertained, or if there is a dispute, then their prior agreement concerning disposition should be carried out; (iii) if no prior agreement exists, then the relative interests of the parties in using or not using the embryos must be weighed; (iv) ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the embryos in question; (v) if no other reasonable alternatives exist, then the argument in favour of using the embryos to achieve the pregnancy should be considered; (vi) however, if the party seeking control of the embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail; (vii) the rule does, however, not contemplate the creation of an automatic veto.

<sup>931</sup> This approach is embodied in the consent provisions of Schedule 3 to the English HFEA of 1990.

<sup>932</sup> Pittman 2005 *Maine Bar Journal* 228 at 232. In *JB v MB* 783 A 2d 707 (NJ 2001) the husband sought an order to enforce an alleged oral agreement to use or donate their pre-embryos while the wife disputed the existence of any such agreement and wished the remaining pre-embryos to be discarded. The Supreme Court of New Jersey upheld the decision of the lower court and the

approach place great emphasis on the fact that the original contract between the parties may no longer reflect their intentions since they were drawn up at a time “... when the couple is emotionally vulnerable and hungry for treatment that might produce the child they so desperately want”.<sup>933</sup> But Pittman<sup>934</sup> points out that in general –

“... courts do not void contracts simply because they are made in emotional times. Were that the case, all contracts relating to divorce, prenuptial agreements or wills would potentially be voidable by the courts. No one could enter into an agreement without fear that, years down the line, one party could simply change his mind.”

Despite its progressiveness Britain’s Human Fertilization and Embryology Act 1990 (HFEA) has been criticised as being ill-equipped to deal with disputes regarding the disposition of frozen embryos,<sup>935</sup> primarily, because it embodies the contemporaneous mutual consent approach. In the first case of its kind in *Evans v Amicus Healthcare Ltd*,<sup>936</sup> a betrothed couple had some fertilised embryos frozen at a clinic, fearing that cancerous ovarian tumours would make natural procreation impossible at a later stage. After assurance by her fiancé that they were not going to split up and that he wanted to be the father of her children, the couple entered into the necessary consent for the creation, storage and use of the embryos in accordance with the HFEA. Sometime after the successful removal of the tumours the relationship between the couple ended. The man notified the clinic in writing that the relationship had ended and withdrew his consent for the use and storage of the embryos. The woman sought an injunction requiring her ex-partner to honour his original consent and allow her to use the embryos during the remainder of the 10 year storage period. She claimed<sup>937</sup> that the consent provisions of Schedule 3 to the HFEA violated her rights in terms of Article 8 of the ECHR and that she had suffered discrimination contrary to Article 14 in the

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Appellate Division granting the wife’s motion. The Supreme Court held that agreements would be enforced only if they were initially entered into at the time the IVF is begun, subject to the right of either party to change his or her mind about the disposition up until the point the pre-embryos are used or destroyed. The court admitted that in the case of a dispute arising because of one party’s change of mind, the party choosing not to become the biological parent will ordinarily prevail.

<sup>933</sup> Pittman 2005 *Maine Bar Journal* 228 at 232.

<sup>934</sup> *Ibid.*

<sup>935</sup> Alghrani 2005 *MedLRev* 244; Annett 2006 *MedLRev* 425 at 432.

<sup>936</sup> [2004] EWCA Civ 727 [2005] Fam 1.

<sup>937</sup> See Annett 2006 *MedLRev* 425 at 426.

enjoyment of her right to respect for private and family life, in comparison to a woman with intact ovaries who could (a) conceive without assistance, or (b) produce sufficient eggs for repeated attempts at IVF. Ms Evans also claimed that the embryos were entitled to protection under Article 2 (right to life) of the ECHR. The Court of Appeal held, in the first place, that the couple only gave consent to the use of the embryos for “treatment together”. The court held that the fertility treatment services are provided to a man and woman “together” if the couple is united in pursuit of treatment. As the couple were no longer so united, the consent of the man was no longer valid. Secondly, Schedule 3 of the HFEA gave the man an unconditional right to withdraw his consent to the transfer of the embryos as well as the continued storage up until the point of “use” of the embryos. The court held that the embryos are only “used” for the purposes of the Act once they are transferred into the woman. The man was, therefore, still entitled to withdraw his consent. The statutory requirement of continued consent was, lastly, not considered in breach of Articles 8 and 14 of the ECHR, since the requirement of mutual consent to implantation is proportionate to the legislative aim of protecting the rights and freedoms of both parties.<sup>938</sup> Moreover, a non-viable embryo does not have a qualified right to life under Article 2 of the Convention.<sup>939</sup>

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<sup>938</sup> Alghrani 2005 *MedLRev* 244 at 245. According to the American case of *Kass v Kass* 696 NE 2d 174 (NY 1998) at 177, a woman’s right to privacy and bodily integrity are not implicated prior to implantation.

<sup>939</sup> Alghrani 2005 *MedLRev* 244 at 246 argues that by declining to authorise the exercise of one party’s reproductive choice to have embryos implanted where the parties are no longer receiving services “together”, the Court of Appeal indicated that it preferred a notion of “... joint reproductive autonomy/enterprise to the development of a notion of individual reproductive autonomy”. To overcome these problems Alghrani 2005 *MedLRev* 244 at 255 recommends legislation to the effect that upon creation of an embryo, consent becomes irrevocable for a reasonable period, say, for example nine months, to track the normal course of pregnancy and advises couples in the meantime to store gametes rather than embryos to avoid a battle upon dissolution of the relationship. An application against the UK to the European Court of Human Rights has since also failed: See *Evans v United Kingdom* [2006] 1 FCR 588 ECHR; Lowe & Douglas *Bromley’s Family Law* 314 fn 80; Annett 2006 *MedLRev* 425 at 433.

Pittman<sup>940</sup> favours the third approach in terms of which courts are called upon to uphold any contract concluded prior to the onset of the IVF arguing that this would ensure that "... couples carefully consider their options since any decision they make will be binding on them in future". In order to implement this approach, Pittman<sup>941</sup> calls for legislation that would require, in the first place, counselling of the parties before starting any of the procedures involved in the IVF. Such counselling would serve to alert the parties, not only to the risks involved in the process but also to the possibility of leftover pre-embryos. Pittman<sup>942</sup> recommends that the parties conclude a separate contract, outside of the clinic with separate legal counsel, to deal with the future disposition of unused pre-embryos. In recognising that circumstances do indeed change, Pittman<sup>943</sup> proposes further that these disposition contracts be renewed every five years. While admitting that uniform legislation will not solve every problem of this increasingly visible dilemma in the world of IVF, Pittman<sup>944</sup> is of the opinion that "... by laying out some general guidelines with a directive to adhere to the written contract, both the IVF clinics and the parties trying to conceive will have a much clearer understanding of their rights and responsibilities".<sup>945</sup>

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<sup>940</sup> Pittman 2005 *Maine Bar Journal* 228 at 233. The New York's Court of Appeals (inadvertently) followed this approach in *Kass v Kass* 696 NE 2d 174 (NY 1998) when it enforced a prior agreement between the parties to the effect that their unused or unwanted pre-embryos should be given to the IVF clinic for research purposes and their ultimate destruction. Cf, however *AZ v BZ* 725 NE 2d 1051 (Mass 2000) in which the court refused to enforce a consent form that would give the wife custody of the remaining pre-embryos four years after the husband had signed it blank and was filled out by his wife afterwards.

<sup>941</sup> Pittman 2005 *Maine Bar Journal* 228 at 233.

<sup>942</sup> Pittman 2005 *Maine Bar Journal* 228 at 233.

<sup>943</sup> *Ibid.*

<sup>944</sup> Pittman 2005 *Maine Bar Journal* 228 at 233. Pretorius unpublished LLD thesis UNISA (1991) at 442 also recommends a binding written contract to be drawn up between the parties wherein clear instructions should be included regarding the destiny of the embryos in case of death or divorce as well as time limits for storage. On expiry an agreement should be reached regarding any further action, failing which the right of determination should pass to the storage facility/clinic.

<sup>945</sup> The Ethics Committee of the American Society for Reproductive Medicine, has suggested that it is ethically acceptable "... to consider embryos to have been abandoned if more than five years have passed since contact with a couple, diligent efforts have been made by telephone and registered mail to contact the couple at their last known address, and no written instruction from the couple exists concerning disposition". Should embryos deem to have been abandoned under this standard the Ethics Committee "... concludes that the program [storage facility] may dispose of the embryos by removal from storage and thawing without transfer. According to this directive, however, "[i]n no case without prior consent, should embryos deemed abandoned be donated to other couple or be used in research": See "Disposition of Abandoned Embryos" (reviewed Jul 2006) Ethical Considerations of Assisted Reproductive Technologies: ASRM Ethics Committee Reports and Statements at <http://www.asrm.org/Media/Ethics/ethicsmain.html>.

It is evident that the increased use of IVF in South Africa will necessarily create increasing numbers of unused preserved embryos and increased possibilities for disputes regarding their future disposition. In the light of the abovementioned discussion and the convincing arguments by Pittman, it is recommended that the regulations to the new National Health Act<sup>946</sup> provide clear guidelines with regard to the storage of preserved embryos and their future disposition.<sup>947</sup>

#### **4.4.5.2 Cloning**

The question that arises in this regard is what impact will human reproductive cloning have on the acquisition of parental responsibilities and rights, once it becomes a viable option and is legally permitted? While it is admitted that human reproduction *via* cloning is currently, and will probably for the foreseeable future, not become an option for infertile couples, the effect thereof on family relationships may be devastating. According to Rose:<sup>948</sup>

“... cloning has the potential to destabilize our definitions of ‘mother’ and ‘father’ and to present parentage questions that go beyond what our courts would have the ability to answer.”

Before considering these far-reaching effects, it is important, first of all to consider the constitutionality of cloning and then to look at the current and proposed future regulation thereof in South Africa.

##### **(a) Constitutional right to cloning**

Section 12(2) of the Constitution guarantees every person the right to bodily and psychological integrity including the right “... to make decisions concerning

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<sup>946</sup> 61 of 2003.

<sup>947</sup> See Lupton 1985 *THR-HR* 210 at 215-216, who calls for the strict control of cryostorage of embryos and criminal law sanctions by way of heavy fines or imprisonment for deliberate contravention of regulations. S 68 of the National Health Act 61 of 2003 specifically empowers the Minister of Health to make regulations regarding: “(k) the bringing together outside the human body of male and female gametes, and research with regard to the product of the union of those gametes; (l) the artificial fertilisation of persons”; and “(p) the acquisition, storage, harvesting, utilisation or manipulation of ... gametes”.

<sup>948</sup> Rose 1999 *Duke Law Journal* 1133 at 1155.

reproduction”.<sup>949</sup> Decisions concerning reproduction must necessarily include decisions relating to the way in which a person chooses to reproduce. As such Jordaan<sup>950</sup> is of the opinion that a prospective parent has a *prima facie* right to decide to use cloning as his or her means of reproduction.<sup>951</sup> This fundamental right,<sup>952</sup> like all other human rights, is not absolute and can be limited but only “... in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all factors ...”.<sup>953</sup> According to Jordaan<sup>954</sup> there are four main objections to human reproductive cloning that could possibly be used to argue for the limitation of the right of parents to reproduce by means of cloning. These objections are that reproductive cloning –

- (i) will deny a person a right to his or her own unique genetic identity since the clone will be genetically identical to the person who was cloned,<sup>955</sup>
- (ii) will inevitably lead to a decrease in genetic diversity which is considered functional since it enhances human diversity and maximises human adaptability,<sup>956</sup>
- (iii) is unethical because it treats humans as a means and not an end, thereby denying a person his or her autonomy which is the basis of human dignity;<sup>957</sup> and

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<sup>949</sup> S 12(2)(a) of the Constitution.

<sup>950</sup> Jordaan 2002 SALJ 294 at 297.

<sup>951</sup> Jordaan 2002 SALJ 294 at 297 also argues that “... if a person can, for purposes of reproduction, choose to use an equal combination of a random assortment of his or her own genetic material and that of a chosen or consenting partner of the opposite sex, a prospective parent should, *prima facie*, also be permitted to choose to use only his or her own exact assortment of genetic material, or that of a consenting donor, for reproduction”.

<sup>952</sup> The US Supreme Court has also recognised this fundamental right to procreative liberty in cases like *Skinner v Oklahoma* 316 US 535 (1942) and *Griswold v Connecticut* 381 US 479 (1945) referred to in fn 927 above.

<sup>953</sup> S 36(1) of the Constitution.

<sup>954</sup> Jordaan 2002 SALJ 294 at 297-302.

<sup>955</sup> Jordaan 2002 SALJ 294 at 298. See also Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* par 3.4.4.1.1.2 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf>.

<sup>956</sup> Jordaan 2002 SALJ 294 at 299.

<sup>957</sup> At 300-302. See also *Ethics in Genetic Research and Practice* on [www.sahealthinfo.org/ethics/book2cloning.htm](http://www.sahealthinfo.org/ethics/book2cloning.htm) par 3.4.4.1.1.2.



- (iv) is unsafe because the effects thereof are uncertain and might carry the risk of birth defects or have a negative effect on the health or lifespan of the cloned human being.<sup>958</sup>

Jordaan<sup>959</sup> comes to the conclusion that the only valid objection to human reproductive cloning is the matter of safety<sup>960</sup> but as research might invalidate this objection in the near future, he proposes only a temporary moratorium on cloning subject to compulsory legislative revision after a few years.<sup>961</sup> The South African Medical Research Council<sup>962</sup> states:

“The risk attached to the use of the technique on humans carries the possibility of hormonal manipulation in the egg donor, multiple miscarriages in the birth mother, and possible severe developmental abnormalities in any resulting child. The potential harms outweigh the potential benefits, and until studies in animal systems reverse this circumstance, it is recommended that the use of human nuclear transfer cloning to create new life be prohibited.”

## (b) Regulation of cloning in South Africa

While the Human Tissue Act<sup>963</sup> does not address the issue of cloning specifically, section 57 of the new National Health Act<sup>964</sup> will expressly prohibit the

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<sup>958</sup> Jordaan 2002 *SALJ* 294 at 302.

<sup>959</sup> Jordaan 2002 *SALJ* 294 at 303.

<sup>960</sup> Rose 1999 *Duke Law Journal* 1133 at 1148 contends that cloning should be banned in the interest of promoting core family values. This author is of the opinion that human cloning should not be considered a fundamental right since it represents too great a departure from sexual reproduction and from the assisted reproductive technologies which have gained constitutional protection. According to Rose (at 1151) cloning is asexual by nature and does not implicate “... the privacy values associated with the intimacy of a sexual relationship nor does it trigger those values associated with ‘self-expression through human sexuality’ ...”, referred to in American case law. The Medical Research Council echoes these concerns by stating, firstly, that “[t]he greatest fears regarding cloning are in respect of its impact on the psyche of the cloned child, the manner in which the child will be nurtured in society, and the moral, religious and cultural values of that society” and, secondly, that the strength of public reaction to cloning “... reflects a deep concern that important social values will be harmed if cloning is widely used”: See Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* par 3.4.4.2 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf>.

<sup>961</sup> Rose 1999 *Duke Law Journal* 1133 at 1148.

<sup>962</sup> Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* par 3.4.4.1.2 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf>.

<sup>963</sup> 65 of 1983.

<sup>964</sup> 61 of 2003.

reproductive cloning of human beings<sup>965</sup> once the provision comes into operation.<sup>966</sup> For purposes of the interpretation of section 57, “reproductive cloning of a human being” is defined as “... the manipulation of genetic material in order to achieve the reproduction of a human being and includes nuclear transfer or embryo splitting for such purpose”.<sup>967</sup> The absolute prohibition on reproductive cloning has been welcomed by Van Wyk<sup>968</sup> who regards this as the correct approach in view of “... the many ethical and medical arguments against reproductive cloning”.<sup>969</sup>

However, until section 57 of the National Health Act<sup>970</sup> comes into operation the legality of reproductive human cloning will have to be determined in terms of the provisions of the Human Tissue Act.<sup>971</sup> Lupton and Jordaan,<sup>972</sup> albeit for different reasons, submit that human reproductive cloning is not prohibited by section 39A of this Act, which states:

“Notwithstanding anything to the contrary contained in this act or any other law, no provision of this Act shall be so construed as to permit genetic manipulation outside the human body of gametes or zygotes.”<sup>973</sup>

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<sup>965</sup> In terms of s 57(1) of the National Health Act 61 of 2003, “[a] person may not- (a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or (b) engage in any activity, including nuclear transfer or embryo splitting, for the purpose of the reproductive cloning of a human being”.

<sup>966</sup> The commencement of the provisions contained in Ch 8 of the National Health Act 61 of 2003 is yet to be proclaimed and did not become law with the rest of the Act on 2 May 2005.

<sup>967</sup> S 57(6)(a) of the National Health Act 61 of 2003.

<sup>968</sup> Van Wyk 2004 *THR-HR* 1 at 21.

<sup>969</sup> Van Wyk 2004 *THR-HR* 1 at 21. Jordaan’s proposal in 2002 *SALJ* 294 at 303, that the prohibition be made temporary and subject to later review was, however, clearly not incorporated in the National Health Act 61 of 2003. See also Carstens & Pearmain *South African Medical Law* 185.

<sup>970</sup> 61 of 2003.

<sup>971</sup> 65 of 1983.

<sup>972</sup> See Jordaan 2002 *SALJ* 294 at 303.

<sup>973</sup> Lupton argues that nuclear substitution (one of the two techniques associated with cloning, the other being cell mass division) does not involve the use of gametes or zygotes and is, therefore, outside the scope of s 39A. According to Jordaan this argument is factually wrong since nuclear substitution does involve the use of egg cells which are gametes. Jordaan is, therefore, of the opinion that s 39A is inapplicable because of its vagueness brought about by the fact that the key concept “genetic manipulation” in the provision is not defined in the Act. For a full discussion of this argument and the argument by Lupton, see Jordaan 2002 *SALJ* 294 at 303.

The Medical Research Council acknowledges in its ethical guidelines<sup>974</sup> that reproductive cloning is a technique that can potentially be used in assisted reproduction for the purpose of enhancing the reproductive potential of a human being. The Medical Research Council also recognises<sup>975</sup> that reproductive cloning gives effect to the constitutional right to reproductive freedom contained in section 12(2) of the Constitution and that this right includes not only the right to choose not to reproduce (or to terminate a pregnancy) but also the right to choose how to reproduce. The Medical Research Council feels that the strongest case for permitting reproductive cloning is where this potential application "... is a necessary means for procreation by that individual".<sup>976</sup> The quoted phrase seems to suggest that reproductive cloning would be permissible if that were the only means of reproducing offspring. The council, furthermore, recommends<sup>977</sup> that in making use of reproductive cloning the reproductive needs of the individual should not override the best interests of the child so produced.

**(c) Effect of reproductive cloning on the acquisition of parental responsibilities and rights**

Although the use of current assisted reproductive technologies has already created a need to redefine traditional parental roles,<sup>978</sup> Rose<sup>979</sup> holds the view that a simple adaptation of existing law would not be sufficient to address the problems that will arise in the context of reproductive cloning. Rose<sup>980</sup> describes, what in his opinion, is the considerable effect of cloning on the assignment of parental responsibilities and rights in the following terms:

"As an overarching consideration, cloning raises many unanswered questions concerning the legal status of clones. The asexual nature of

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<sup>974</sup> See Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* par 3.4.4.1.1.2 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf>.

<sup>975</sup> *Ibid.*

<sup>976</sup> *Ibid.*

<sup>977</sup> See Medical Research Council: *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* par 3.4.4.1.1.2 at <http://www.mrc.ac.za/ethics/ethicsbook2.pdf>.

<sup>978</sup> The law has, for example, been obliged to take cognisance of the fact that the gestating mother may no longer be the genetic mother and, in the case of surrogacy, that the mother who gives birth to the child does not intend to become the mother of the child.

<sup>979</sup> Rose 1999 *Duke Law Journal* 1133 at 1154.

<sup>980</sup> *Ibid.*

cloning raises the question of whether the offspring that results from the cloning is the child or the sibling of the cell donor. Further, if parents ... made a clone of a dying child,<sup>981</sup> would the dying child be considered the parent of the resulting clone? In this situation would the dying child and his or her mother be considered the parents of the clone?<sup>982</sup> Beyond these unanswered questions, there are other issues that have implications for the determination of parental rights. A clone may share 'genetic material from as many as four individuals,'<sup>983</sup> and the resulting clone's parents can be defined in a variety of conflicting ways – biologically, gestationally, or socially (based on intent).<sup>984</sup> In addition, cloning has the potential to result in thirteen different parental configurations.<sup>985</sup> Ultimately, cloning raises questions concerning parental rights that extend beyond the guidance provided by the assisted reproductive technology cases.<sup>986</sup>

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<sup>981</sup> Rose 1999 *Duke Law Journal* 1133 at 1142 speculates that cloning would permit couples to motivate procreation in a variety of new and unique ways, for example to duplicate an existing child that has "turned out well" or "replace" a terminally ill child, or to raise a clone of a much loved wife.

<sup>982</sup> According to Jordaan 2002 *SALJ* 294 at 296, a distinction must be drawn between intra-generational cloning, that is when individuals with the same genetic identity are born in the same generation, and inter-generational cloning, referring to the situation where such individuals are born in different generations.

<sup>983</sup> These individuals may all be contributors to the cloning process, explained as follows by Jordaan 2002 *SALJ* 294 at 296: "There are two techniques associated with human cloning, namely 'cell mass division' and nuclear substitution'. Cell mass division, also called 'embryo splitting' ... involves the splitting of early two- to eight-cell embryos into single embryo cells. Each of these embryos can then develop independently to become fully-fledged human beings. Cell mass division is nothing more than a mimicking of the *spontaneous* splitting of an embryo in a mother's body that produces monozygotic twins ... Nuclear substitution ... involves deleting the nucleus of an egg cell and substituting it with a nucleus taken from the cell of another individual, who can be an adult member of the species. An embryo created with this technique will therefore possess the same genotype as the nucleus donor." Rose is presumably referring to this last technique where the egg may be contributed by either the mother intending to reproduce or a donor, and the nucleus be contributed by the "intended" mother, "intended" father or donor.

<sup>984</sup> This problem, it is submitted, is not unique to human cloning and also arises in the context of existing non-sexual reproductive techniques.

<sup>985</sup> Rose does not describe the thirteen configurations, simply stating that they are produced by the interaction of the various contributors: Rose 1999 *Duke Law Journal* 1133 at 1142 fn 65.

<sup>986</sup> Rose 1999 *Duke Law Journal* 1133 at 1154-1155.

**SECTION B: THE VARIOUS WAYS IN WHICH FULL PARENTAL RESPONSIBILITIES AND RIGHTS CAN BE ACQUIRED**

**CHAPTER 5: ASSIGNED ACQUISITION OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS**

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## 5.1 INTRODUCTION

In terms of section 28(1)(b) of the Constitution, children have a right not only to parental care and *family* care but also to “... appropriate alternative care when removed from the family environment”.<sup>1</sup> As already pointed out in 1.4.3 above, the right to family care includes care by the extended family and gives recognition to the fact that many children are not brought up by their biological parents.<sup>2</sup> Describing the position regarding the extent to which the law at the time recognised the diversity of family forms found in South Africa, the SALRC<sup>3</sup> made the following observations:

“South African law has no single definition of a “family”. Different pieces of legislation recognise individual relationships for particular purposes. It is, however, abundantly clear that the ‘traditional nuclear family form’, based on the relationship of a married man and woman and their biological or adopted children, does not reflect the reality of South African society. ... Th[e] diversity of family forms is not unique to South Africa or even the African continent, but is increasingly encountered throughout the world. Rising divorce rates and an increase in the number of children born out of wedlock have resulted in a growing number of children living in single-parent households or with one biological parent (usually the mother) and another person who is either married to that parent (a step-parent) or cohabitating with him or her. In addition, in South Africa, apartheid policies such as the migrant labour system and influx control measures had a devastating effect on family life, particularly as regards African families, resulting in the emergence of so-called ‘social families’, viz. Family units in which children are brought up wholly or partly by persons who are not biological or legal parents, including relatives such as grandparents, and other persons who are not related to the child in question.”

In order to address the stated reality in the changing composition of South African families, the SALRC proposed a two-pronged approach:<sup>4</sup>

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<sup>1</sup> According to Currie & De Waal *Bill of Rights Handbook* 608 the right to alternative care “... includes the right to adoptive or foster care and the right to be cared for by the state where the child is in need of care”.

<sup>2</sup> See SALC Discussion Paper on the *Review of the Child Care Act* par 8.2.1 for statistics on the composition of SA households.

<sup>3</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.2.1.

<sup>4</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.2.4. Recent legislative developments have given some recognition to the different family forms in SA. These include – (a) the creation of a “child support grant” (s 6) and a “care-dependent grant” (s 7) of the Social Assistance Act 13 of 2004, payable to the child’s “primary care giver” (defined in s 1 of that Act as,

- (a) An amendment and extension of section 9(3) of the Constitution to prohibit unfair discrimination on the additional grounds of "... family status, health status, socio-economic status, HIV-status or nationality of the child or of his or her parents, legal guardian, primary care-giver or any of his or her family members"; and
- (b) the inclusion of a "relationship-focussed" definition of "family member" into the new Children's Act<sup>5</sup> to entrench a "... non-traditional approach to family relations".

The final version of the definition of "family member" found in the Children's Act<sup>6</sup> reads as follows:

"family member', in relation to a child, means—

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child;
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship."<sup>7</sup>

"... a person older than 16 years, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child"); (b) the possibility of obtaining a family violence protection order in terms of s 4 of the Domestic Violence Act 116 of 1998 against a person with whom the applicant is in a "domestic relationship", defined in s 1 of that Act in very broad terms; and lastly, (c) the broad definition of "parent" in s 1 of the South African Schools Act 84 of 1996, as including a person who undertakes to fulfil the obligations of a parent, guardian or person legally entitled to the custody of the learner: See SALC Discussion Paper on the *Review of the Child Care Act* par 8.2.1. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 contains interesting definitions (in s 1) with regard to, firstly, "family responsibility", which is defined as the "... responsibility in relation to a complainant's spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support" and, secondly, "family status" which "... includes membership in a family and the social, cultural and legal rights and expectations associated with such status".

<sup>5</sup> 38 of 2005.

<sup>6</sup> 38 of 2005: S 1(1) sv "family member".

<sup>7</sup> Contrary to the originally drafted versions found in the Draft Children's Bill [B – 2002] and the Children's Bill [B – 2003], the final version of the definition does not include "a primary care-giver of the child" as a family member. All references to "primary care-giver", in the definition of family member and elsewhere, have been removed and replaced with "care-giver" where appropriate: See Jamieson & Proudlock "Children's Bill progress update" (2005) par 4. "Care-giver" for purposes of the Children's Act 38 of 2005 is defined in s 1(1) as "... any person other than a parent or guardian, who factually cares for a child and includes – (a) a foster parent; (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child; (c) a person who cares for a child whilst the child is in temporary safe care; (d) the person at the head of



The idea that a “family member” may also include a non-biological care-giver is significant in at least two interrelated respects:

- (a) It emphasises the importance of “social” or *de facto* relationships for a child by giving legal recognition to them.<sup>8</sup> The intention of the legislature is clearly to move away from the idea that only biological ties are deserving of protection.<sup>9</sup>
- (b) The recognition of social caregivers as “family” may, furthermore, bolster their position when application is made by them for the assignment of parental responsibilities and rights.<sup>10</sup>

While non-biological caregivers, who were not automatically vested with parental responsibilities and rights in terms of the common law, have always been able to

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a child and youth care centre where a child has been placed; (e) the person at the head of a shelter; (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and (g) the child at the head of a child-headed household.

<sup>8</sup> Such a relationship may be found between a child and, eg a stepparent, a grandparent or a foster parent.

<sup>9</sup> Cf, however, DeWitt Gregory 1999 *FLQ* 833 at 840-841, who views the invention of “novel and eccentric” definitions of family and parent as a way of diminishing traditional notions of family autonomy and parental authority. According to this author the increasing recognition of legal strangers to other peoples children (such as “psychological parents, coparents [co-parents *sic*], functional parents, *de facto* parents, and parents by estoppel”), all of whom may enjoy judicially bestowed rights that may be equal to or superior to those of a child’s natural parents, invades the prerogatives of parents in a way that will ultimately lead to the destruction of whatever remains of family autonomy and parental authority. The interests at stake when involving a non-parent in the parenting role, specifically in the case of allowing contact with such persons, are described by Labuschagne & Van der Linde 2003 *De Jure* 344 at 346 in the following terms: “Eerstens het ouers belang daarin om konflikomstandighede, soos dié geskep deur byvoorbeeld ‘n vyandige grootouer, te minimaliseer en onverdeelde gesag oor hulle kinders uit te oefen. Tweedens is daar die belange van verwante, soos grootouers, om betekenisvolle verhoudinge met die kinders te handhaaf. Derdens het die staat ‘n belang om ‘n sterk harmonieuse gesinslewe te bevorder. Geeneen van dié belange beklee uiteraard ‘n hoër status as die van die betrokke kinders self nie.”

<sup>10</sup> The European Court of Human Rights has also given recognition to the existence of “family life” in cases such as *Marckx v Belgium* (1979) 2 ECHR 330 at 333 par 45 “... between near relatives, for instance, those between grandparents and grandchildren” as envisaged by Art 8 of the ECHR: See Labuschagne & Van der Linde 2002 *Stell LR* 415 at 425. Mere biological bonds are, however, not deemed sufficient (at 426). See also Van der Linde in Boezaart & De Kock *Vita perit, labor non moritur Liber memorialis: PJ Visser* 260-261.

acquire responsibilities and rights in respect of a child if it was deemed in the best interests of the child, the courts have generally been hesitant in this regard as will become evident from the case law discussed in 5.2.2 below.

Before discussing the impact of the new provisions of the Children's Act<sup>11</sup> on the current practice in the assignment of parental responsibilities and rights, it is once again necessary to emphasise the limited scope in which this topic will be discussed. First of all, *assigned* acquisition stands in contrast to the "automatic" acquisition of parental responsibilities and rights insofar as the latter occurs by operation of law while the former is subject to the scrutiny or approval by the state as being in the best interests of the child.<sup>12</sup> The second point to remember is that the acquisition must qualify as a *first* acquisition of parental responsibilities and rights.<sup>13</sup> Since a woman who gives birth to a child<sup>14</sup> automatically acquires parental responsibilities and rights at birth, a court would not "assign" parental responsibilities and rights to her "for the first time".<sup>15</sup> A court may, however, assign parental responsibilities and rights to a biological *father* for the first time in cases where such a father never acquired parental responsibilities and rights before, whether automatically or otherwise.<sup>16</sup> The assignment of parental responsibilities and rights to a person or persons *other than the parents* of a child is possible and may be appropriate where it is deemed to be in the best interests of the child concerned. In such cases the assignment could also qualify as a "first" acquisition of parental responsibilities and rights by such persons. Lastly, only the assignment of *full* parental responsibilities and rights is addressed in this chapter. While incidents of parental responsibilities and rights, that is guardianship<sup>17</sup> or care (previously custody)<sup>18</sup> or contact (previously access)<sup>19</sup> may be assigned to a father of a child or other person for the first time, only the

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<sup>11</sup> 38 of 2005.

<sup>12</sup> See 3.2 above.

<sup>13</sup> See 1.3 above.

<sup>14</sup> Regardless of whether the child is conceived naturally or by artificial means: See 4.2.1 and 4.4.2.1 above.

<sup>15</sup> See 5.3.2(b) below.

<sup>16</sup> *Ibid.*

<sup>17</sup> See 5.3.2(a)(i) below.

<sup>18</sup> See 5.3.2(a)(ii) below.

<sup>19</sup> *Ibid.*

assignment of *full* parental responsibilities and rights,<sup>20</sup> *ie* guardianship *and* care (which includes “access” or contact) will be dealt with in this chapter.<sup>21</sup> As such, the discussion that follows is distinguishable from most other sources dealing with the issue.<sup>22</sup>

## **5.2 OVERVIEW OF ASSIGNMENT OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS BEFORE THE CHILDREN’S ACT 38 OF 2005**

### **5.2.1 Introduction**

Before the enactment of the Children’s Act,<sup>23</sup> full parental responsibilities and rights could be assigned to a parent or person in terms of –

- (a) a court order vesting guardianship and “custody”<sup>24</sup> in the successful applicant;<sup>25</sup> or

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<sup>20</sup> Although s 18(2) of the Children’s Act 38 of 2005 also includes the responsibility and right to contribute to the maintenance of the child as an incident of parental responsibilities and rights, it is not considered here for purposes already explained elsewhere: See 2.3 above.

<sup>21</sup> See 3.3 and Schedule 1 to Ch 3 above.

<sup>22</sup> See the sources quoted in fn 33 below.

<sup>23</sup> 38 of 2005.

<sup>24</sup> The term “custody” is still used because the discussion deals with the legal position *before* the Children’s Act 38 of 2005. The inverted commas draw attention to the fact that the term has been substituted with the term care. The same reasoning is behind the use of the term “access” that has now been replaced by the term contact.

<sup>25</sup> Either in terms of the High Court’s common law or statutory jurisdiction. Lower courts have never had the jurisdiction to make orders relating to the *guardianship* of a child. While lower courts in general have never had the power to make orders relating to the *care* of minor children either (see *Sati v Kitsile* 1998 3 SA 602 (EC) 605G), the children’s court (as a specialised lower court) was given express statutory powers to interfere with the exercise of parental “authority” (as it was then still called) in the case of a child in need of care: Ss 11 to 16 of the Child Care Act 74 of 1983. In terms of these provisions (that are still applicable since the provisions in the Children’s Act 38 of 2005 dealing with children in need of care and protection have not come into operation yet) a child who is found to be in need of care in terms of s 14(4) can be placed in alternative care, *ie* with foster parents, in a children’s home or school of industries (s 15(1)). Such alternative carers are, however, only vested with “custody” (s 53(1) and (3)). Since the foster parent in whose care the child is placed or the management of the institution to which the pupil is sent can therefore not acquire *full* parental responsibilities and rights, the acquisition of parental responsibilities and rights *via* a children’s court order falls outside the scope of this thesis: See 5.1 above. However, where a lower court functions as a divorce court, such a court is competent to assign the care and guardianship of a child in divorce proceedings to non-parents: See 5.2.3.2 below. The re-allocation of guardianship and care between the divorcing parents is not considered here since it does not qualify as a “first” acquisition of parental responsibilities and rights.

(b) an adoption order granted by the children's court.<sup>26</sup>

The effect of an adoption order is to completely sever the legal relationship between the child and any person who was such child's parent immediately before the adoption, as well as between the child and all the relatives of such parents.<sup>27</sup> An order assigning full parental responsibilities and rights to a parent or person, on the other hand, does not have the same far-reaching consequences.<sup>28</sup> Adoption, including the distinction between adoption and an order for guardianship and care,<sup>29</sup> is discussed in Chapter 7,<sup>30</sup> and will consequently not receive detailed attention here.<sup>31</sup>

As far as the assignment of full parental responsibilities and rights is concerned, the position before the enactment of the Children's Act<sup>32</sup> is usually discussed in terms of the courts' power to interfere with the exercise of parental responsibilities and rights.<sup>33</sup> These powers derived either from the common law or legislation will be canvassed briefly below. The overview is considered of special importance considering the fact that the common law jurisdiction of the High Court as well as the jurisdiction of the High Court to make orders in terms of the Matrimonial Affairs

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<sup>26</sup> Adoption will continue to be regulated by Ch 4 of the Child Care Act 74 of 1983 until the new provisions of the Children's Act 38 of 2005 (Ch 15) come into operation.

<sup>27</sup> S 20(1) of the Child Care Act 74 of 1983, to be replaced by s 242(1) and (2) of the Children's Act 38 of 2005 once the provision becomes operational.

<sup>28</sup> See SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.1.

<sup>29</sup> Which also include an order for sole guardianship and sole care: See 7.1.4 below.

<sup>30</sup> Ch 7 deals with the acquisition of parental responsibilities and rights by means of an adoption order.

<sup>31</sup> A brief reference to these issues are made in fn 77 below.

<sup>32</sup> 38 of 2005.

<sup>33</sup> Visser & Potgieter *Introduction to Family Law* 214-217; Bosman & Van Zyl Ch 2 in Robinson *Law of Children and Young Persons* 56; Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 497-644 and 559-561; Cronjé & Heaton *South African Family Law* 280-282; Schäfer LI Div E in *Family Law Service* E32-E36; Van Schalkwyk *Family Law* 310-311. According to Spiro *Parent and Child* (at 265, 326 and 339-340) the interference amounts to an "extraordinary termination of parental power". Van der Vyver & Joubert *Persone-en Familiereg* 620-626, however, include most aspects of the topic under the heading "Oppervoogdy van die Hof".

Act<sup>34</sup> and the Divorce Act<sup>35</sup> have been left unaffected by the new provisions of the Children's Act.<sup>36</sup>

## 5.2.2 Common law jurisdiction

### 5.2.2.1 Introduction

The power of the High Court to assign full parental responsibilities and rights to a parent (more specifically the father of child born out of wedlock) or other third party stems in the first place from its inherent common law jurisdiction as upper guardian of all minors to make any order that is deemed to be in the best interests of the child.<sup>37</sup> According to Foxcroft J in *Kotze NO v Santam Insurance Ltd*:<sup>38</sup>

“It has always been clear that the Supreme Court exercises inherent jurisdiction as the upper guardian of all minors, but it is interesting to note that the notion of the Court's upper guardianship dates from the period of the Frankish empire - fifth to ninth century AD - when minors, widows and other unfortunates (*personae miserabiles*) might petition the king for relief. Tired of dealing with such requests himself, the king delegated the task to his chancellor and through him the Court, to which the present day Supreme Court regards itself as the successor. (See Boberg *The Law of Persons and the Family* at 412 n 2, and Hahlo and Kahn *The South African Legal System and its Background* at 386; *South Africa: The Development of its Laws and Constitution* at 369.) The grouping of such persons together seems obvious, since they are all persons who either through lack of capacity or by reason of inexperience are unable to perform juristic acts.”

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<sup>34</sup> 37 of 1953

<sup>35</sup> 70 of 1979.

<sup>36</sup> 38 of 2005. In terms of s 45(4): “Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardians of all minors.” Neither the Matrimonial Affairs Act 37 of 1953 nor the Divorce Act 70 of 1979 has been repealed by the Children's Act 38 of 2005: Schedule 4.

<sup>37</sup> Van Heerden Ch 18 in Van Heerden *et al* Boberg's *Law of Persons and the Family* 504; Schäfer LI Div E in *Family Law Service* 24; Van Schalkwyk *Family Law* 311. The principle has been described as “trite law” in *De Gree and Another v Webb and Others* (*Centre for Child Law as Amicus Curiae*) 2007 5 SA 184 (SCA) [4] and confirmed by the Appellate Division on numerous occasions: *Shawzin v Laufer* 1968 4 SA 657 (A) 662G-H; *Bailey v Bailey* 1979 3 SA 128 (A) 692A; *Stock v Stock* 1981 3 SA 1280 (A) 1290C; *Van Oudenhove v Gruber* 1981 4 SA 857 (A) 859E; *Byliefeldt v Redpath* 1982 1 SA 702 (A) 712B. See also *Du Toit and Another v Minister of Welfare and Population Development and Others* (*Lesbian and Gay Equality Project as Amicus Curiae*) 2003 2 SA 198 (CC) at [36].

<sup>38</sup> 1994 1 SA 237 (C) at 244F-H.

Spiro<sup>39</sup> is of the opinion that the law of parent and child at common law is subject to two fundamental rules, the first being that the parental “power” does not allow for any interference (which is not wanted), and the second is that the state (High Court) is the upper guardian of all minors.<sup>40</sup> Whenever a clash arises between the two rules, interference with the parental “power” is sanctioned, but only in the following two cases, seen by Spiro<sup>41</sup> as exceptions to the first rule in favour of the second rule:

- (a) Where the court authorises the parents to have a separate home as in the course of a matrimonial cause, the court is also competent to regulate the exercise of the parental “power” by the separated parents;<sup>42</sup> and
- (b) if parental power is exercised by a parent in a manner which constitutes a danger to the minor’s life, health or morals.<sup>43</sup>

Spiro<sup>44</sup> states that the remedies available at common law were not too often resorted to because there was legislation which covered much of the ground. Van Heerden<sup>45</sup> goes further: “Being more extensive, the statutory powers of the courts – especially those under the Matrimonial Affairs Act and the Divorce Act – have

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<sup>39</sup> Spiro *Parent and Child* 257 *et seq.*

<sup>40</sup> In English law called the *parens patriae*: Spiro *Parent and Child* 257.

<sup>41</sup> Spiro *Parent and Child* 258.

<sup>42</sup> *Calitz v Calitz* 1939 AD 56 63; *Fletcher v Fletcher* 1948 1 SA 130 (A).

<sup>43</sup> A firmly established principle laid down by Tindall JA in *Calitz v Calitz* 1939 AD 56 at 63: “In my judgment the Court has no jurisdiction, where no divorce or separation authorising the separate home has been granted, to deprive the father of his custody except under the Court’s power as upper guardian of all minors to interfere with the father’s custody on special grounds, such for example as danger to the child’s life, health or morals.” Although cited often as authority for the power of a court to interfere with parental responsibilities and rights in general, the case in fact only concerned interference with the “custody” of a legitimate child where one of the two parents was unfit to have “custody” of the child (the mother had unlawfully deserted her husband). Spiro *Parent and Child* (at 259) is of the opinion that a child with one parent requires at least the same protection as a child with two parents and where that (only) parent is also unfit, the court should be competent to award “custody” of the child to third persons. On this basis Spiro *Parent and Child* (at 259) submits “.. a strong case for extending the rule in the *Calitz* case to children who only have one parent”. A danger to the child’s property would also warrant interference according to Spiro *Parent and Child* 258 fn 6, with reference to, *inter alia*, *Van Rooyen v Werner* 1892 9 SC 425 at 428.

<sup>44</sup> Spiro *Parent and Child* 259.

<sup>45</sup> Van Heerden Ch 18 in Van Heerden *et al Boberg’s Law of Persons and the Family* 499.

virtually superseded the common law ones, particularly as regards legitimate children”.<sup>46</sup>

While children born out of wedlock have always had to be dealt with in terms of the High Court’s common law jurisdiction because statutes such as the Matrimonial Affairs Act<sup>47</sup> and the Divorce Act<sup>48</sup> did not apply to such children,<sup>49</sup> the position changed in 1998 with the enactment of the Natural Fathers of Children Born out of Wedlock Act<sup>50</sup> in terms of which jurisdiction was conferred on the High Court to assign “... access rights to or custody or guardianship”<sup>51</sup> to fathers of children born out of wedlock.

Despite the increasing importance of legislation, the common law jurisdiction of the High Court has remained the sole basis for allocating parental responsibilities and rights in the following cases:<sup>52</sup>

- (a) The assignment of parental responsibilities and rights in the case of a child with only one living parent;
- (b) the assignment of parental responsibilities and rights in the case of a legitimate child whose parents are still married to each other and not “living apart”,<sup>53</sup>
- (c) the assignment of parental responsibilities and rights to a person other than the child’s parent(s); and

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<sup>46</sup> See also Cronjé & Heaton *South African Family Law* 281.

<sup>47</sup> 37 of 1953.

<sup>48</sup> 70 of 1979.

<sup>49</sup> See *Desai v Engar and Engar* 1965 4 SA 81 (W) 84B-G.

<sup>50</sup> 86 of 1997, which came into operation on 4 Sept 1998. See also SALC Discussion Paper on the *Review of the Child Care Act* par 8.7.1. The Act has since been repealed by the Children’s Act 38 of 2005: See GG 30030 dd 29 Jun 2007. For a discussion of the provisions of the Act, see 5.2.3.3 below.

<sup>51</sup> Natural Fathers of Children Born out of Wedlock Act 86 of 1997: S 2(1).

<sup>52</sup> Van Heerden Ch 18 in Van Heerden *et al Boberg’s Law of Persons and the Family* 510.

<sup>53</sup> Where the child’s parents are living apart or getting divorced the jurisdiction of the High Court is regulated by the Matrimonial Affairs Act 37 of 1953: See 5.2.3.1 below.

- (d) the assignment of parental responsibilities and rights in the case of a child born out of wedlock<sup>54</sup> until 1998.

For purposes of the present limited discussion,<sup>55</sup> the abovementioned categories can be reduced to the following two categories:

- (a) The assignment of parental responsibilities and rights to a person other than the child's parent;<sup>56</sup> and
- (b) the assignment of parental responsibilities and rights to the unmarried father of a child born out of wedlock until 1998.<sup>57</sup>

The first category subsumes categories (a) and (b) listed in the previous paragraph, because in cases where a child has only one living parent (as in (a) above) or both parents who are married and not living apart (as in (b) above), only non-parents can acquire parental responsibilities and rights "for the first time".<sup>58</sup> This category also includes those cases where both the child's parents have died and no testamentary guardian and custodian have been duly nominated and appointed for such child.<sup>59</sup>

Each of these categories will forthwith be dealt with separately.

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<sup>54</sup> Kruger 1994 *THR-HR* 304 at 311 is of the opinion that the importance of the High Court's common law jurisdiction should not be underestimated given the number of cases in which the court has been called upon to exercise its inherent jurisdiction, especially in disputes regarding "access" rights of fathers of children born out of wedlock and paternity.

<sup>55</sup> See 5.1 above.

<sup>56</sup> See Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 401 fn 236. Where the parents have nominated a person or persons to act as guardian and custodian for the child in their will, such a person or persons will acquire parental responsibilities and rights upon the death of the parents by accepting the testamentary appointment – not by order of court. The acquisition of parental responsibilities and rights by testamentary guardians and custodians will receive further attention in Ch 8 below.

<sup>57</sup> The common law jurisdiction of the High Court was encapsulated in the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, which came into operation on 4 Sept 1998.

<sup>58</sup> See 5.1 above.

<sup>59</sup> See Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 323 fn 32.



### **5.2.2.2 The assignment of full parental responsibilities and rights to a person other than the child's parent**

The SALC recommended in its Report on *Access to Minor Children by Interested Persons*<sup>60</sup> that the *visitation rights*<sup>61</sup> of grandparents and other interested persons in respect of minor children should be regulated by statute.<sup>62</sup> Although the investigation only focused on one aspect of parental responsibilities and rights, namely “access” (now contact),<sup>63</sup> the Report<sup>64</sup> included the following general observations regarding the common law jurisdiction of the Supreme Court (now the High Court) as upper guardian of all minors:

- (a) The court has the authority to interfere with the exercise of parental “powers” if it is of the opinion that such interference will be in the child’s best interests.<sup>65</sup>
- (b) In the exercising of these powers the court may deprive any of the parents of their parental responsibilities and rights and may vest them in the other parent or even a third party.<sup>66</sup>

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<sup>60</sup> SALC Report on *Access to Minor Children by Interested Persons*.

<sup>61</sup> The term used in the USA for rights of contact (or “access”).

<sup>62</sup> The Commission came to the conclusion that “... the present common law position in terms of which parents have the exclusive right to decide whom and under what circumstances to grant access rights or visitation rights, does not in all cases meet the current needs of society” coupled with the fact that “... South African courts in the past have been reluctant to interfere with ... parental powers”, made it necessary to adjust the law by way of legislation: See SALC Report on *Access to Minor Children by Interested Persons* pars 5.1-5.4; SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.1. Despite these recommendations, the proposed “Child Visitation Rights Bill”, attached as Annexure A to the SALC Report on *Access to Minor Children by Interested Persons*, was never enacted.

<sup>63</sup> The investigation was initially limited to the visitation rights of *grandparents* only but was later extended to any “interested person” with whom the child had developed a “special relationship”: SALC Report on *Access to Minor Children by Interested Persons* pars 5.5 and 5.6 to 5.8.

<sup>64</sup> SALC Report on *Access to Minor Children by Interested Persons* pars 2.9 to 2.21.

<sup>65</sup> For a critical discussion of the best interests of the child standard before the enactment of the Children’s Act 38 of 2005 relevant in the present context see, *inter alia*, Heaton 1990 *THR-HR* 95; Fick 1991 *Koers* 37; Van Heerden Ch 18 in Van Heerden *et al Boberg’s Law of Persons and the Family* 529-534; Bonthuys 1997 *SAJHR* 622; Clark 2000 *Stell LR* 3; Bonthuys 2001 *SALJ* 329 at 341-342; Bekink & Bekink 2004 *De Jure* 21. For a discussion of the best interests standard after the commencement of the Children’s Act 38 of 2005, see 5.3.2(d) below.

<sup>66</sup> SALC Report on *Access to Minor Children by Interested Persons* par 2.19, with reference to *Short v Naisby* 1955 3 SA 572 (D) and *Wehmeyer v Nel en ‘n Ander* 1976 4 SA 966 (W). However, the court will not lightly prefer a third party to a parent, as pointed out by Van Heerden

- (c) From studying the case law<sup>67</sup> it is clear that, although the circumstances under which a court will interfere with the parental responsibilities and rights will mainly be cases where the child's life, health and morals are endangered, the court's powers are not limited to these grounds and "... any ground that relates to the child's welfare can serve as a reason for the court's interference".<sup>68</sup>
- (d) The court's powers in this regard are, however, not unlimited and the court cannot intervene simply because the court is of the opinion that it differs from the decision of the parent.<sup>69</sup>

Apart from orphans,<sup>70</sup> the High Court has considered – but not necessarily granted – the assignment of "custody" (now care)<sup>71</sup> and "access"

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Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 504 fn 19 and the cases cited there; Schäfer LI Div E in *Family Law Service* 26 fn 17. See also cases discussed in fn 71 and 72 below.

<sup>67</sup> *Calitz v Calitz* 1939 AD 56; *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW); *Rowan v Faifer* 1953 2 SA 705 (E); and *Petersen en 'n Ander v Kruger en 'n Ander* 1975 4 SA 171 (C).

<sup>68</sup> SALC Report on *Access to Minor Children by Interested Persons* par 2.11. It is once again important to mention that according to *B v S* 1995 3 SA 571 (A) at 584I-585A the determination of the best interests of the child involves a "judicial investigation" that is "... not of the ordinary civil kind": See the discussion of *B v S* 1995 3 SA 571 (A) in 4.2.3.1(b) above and the cases referred to in fn 165. The court has "... extremely wide powers in establishing what is in the best interests of minor dependent children. It is not bound by procedural strictures or by limitations of the evidence presented or contentions advanced by the respective parties: *Per Van Zyl J in Terblanche v Terblanche* 1992 1 SA 502 (W) at 504C-D. See also Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 509; Schäfer LI Div E in *Family Law Service* 25.

<sup>69</sup> SALC Report on *Access to Minor Children by Interested Persons* par 2.18, with reference to *S v L* 1992 3 SA 713 (E).

<sup>70</sup> While the position of orphans could partially have been dealt with under this heading, since the High Court has inherent jurisdiction to assign "custody" and "guardianship" to other persons when a child is orphaned, the assignment of parental responsibilities and rights at the death of one or both parents of a child will be dealt with in Ch 8 below for reasons outlined in 3.2 above.

<sup>71</sup> In *Edwards v Fleming* 1909 TH 232 the court considered and granted an application by the mother of a child for the return of her child who was in the custody of third parties (Mr and Mrs Fleming) under an informal adoption agreement. The claim of the Flemings failed because the mother, as the natural guardian, was deemed to have a superior claim to the child as against third parties unless her character was such as to endanger the welfare of the child. The court in *Babic v Babic* 1946 2 PH B79 (D & CLD) awarded the "custody" of children to their maternal grandmother in circumstances where the mother was herself in ill-health and the father, who was divorced from the mother, not considered fit to assume the custody of the children. In *Bam v Bhabha* 1947 4 SA 798 (A) the "custody" of the child was awarded to the mother because she was not found to be unfit, despite the fact that the child had been living with the maternal grandparents all her life. In *Blume v Van Zyl and Farrell* 1945 CPD 48 a "custody" order in favour of the maternal grandmother at divorce was varied to award custody to the mother (at 50 *per* Newton-Thompson AJ): "It seems

(now contact)<sup>72</sup> to a third party in a number of cases in terms of its inherent

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to me in a contest between a mother and a grandmother for a child, that the facts must be very strong either against the mother or in favour of the grandmother before one would give the grandmother the custody in preference to the mother". A similar argument was used in relation to an aunt of children after the death of their mother in *Spence-Liversedge v Byrne* 1947 1 SA 192 (N) at 194, to award "custody" to the father of the children. As in the case of *Edwards v Fleming* 1909 TH 232 mentioned above, the court in *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) at 121A held that an agreement, in terms of which third parties (a couple who was unrelated to the child) were given custody of a child pending an adoption order, was unenforceable. The couple was consequently ordered to return the child to their widowed mother (at 121D) in the absence of exceptional circumstances indicating that the life, health or morals of the child was in danger (at 120H). In *Short v Naisby* 1955 3 SA 572 (N) the paternal grandmother applied for the "custody" of or, failing that, "access" to her two grandchildren born to her deceased son, alleging that their mother had deserted them and took little or no interest in them until shortly before the application (at 575E-F). The mother objected *in limine* on the grounds that (a) the applicant's affidavit showed no cause of action, and (b) that the proceedings should never have been brought by way of notice of motion. The court overruled both objections. As far as not showing a cause of action was concerned the court held that although it has no jurisdiction to deprive a surviving parent of her "custody" at the instance of a third party except under its power as upper guardian and then only on special grounds, it had a duty to investigate allegations making a *prima facie* case and then to decide what is in the best interests of the child (at 576C-D). As to the objections regarding the method of proceedings chosen, the court considered motion proceedings the "normal" method for "custody" proceedings despite the possibility of *viva voce* evidence having to be heard (at 576H). The court (*per* Henochsberg AJ at 576D) concluded in this case: "In my judgment, applicant has alleged special circumstances ... and those facts might - I expressly refrain from saying would - at the hearing be considered by a Court as sufficient to constitute good cause for interference by it as upper guardian". The court in *Horsford v De Jager and Another* 1959 2 SA 152 (N) ordered an uncle and aunt to hand the children over to their mother after the children had lived with their uncle and aunt for a number of years since the divorce of their parents (*per* Fannin AJ at 154 C-D): "In the present case the question ... is whether the interests of the children demand that I should vary the order of Court in the appellant's [mother's] favour, deprive her of the custody of the children and leave them where they are. That would amount to good cause or 'special grounds'." In *September v Karriem* 1959 3 SA 687 (C) a Christian mother's application for "custody" was refused on the basis of the best interests of the child, who did not know his mother and whose life, spent for the most part with Muslim caretakers, would have been revolutionised by the return to his mother. In *Naude v Naude* 1968 1 SA 116 (O) the court refused to incorporate an agreement in a divorce settlement in terms of which the parties had agreed that in the event of the mother dying before their minor daughter reaches the age of 21 years, the "... care, custody and guardianship" (translated Headnote) of such child would be awarded to the mother's sister. The decision was based on the fact that there was no evidence to suggest that the father was not a fit person to take over the control and "custody". In *Kaiser v Chambers* 1969 4 SA 224 (C) the *interim* "custody" of two small girls was awarded to their grandmother instead of their father after the death of their mother, pending determination of the children's ultimate care (at 233B).

<sup>72</sup> In *Townsend-Turner v Morrow* 2004 2 SA 32 (C) the maternal grandmother applied for "access" to her only grandson born to her only daughter who had since died of cancer. While the father had allowed "access" to the grandparents (the grandmother's former husband was joined as an applicant) and had tried to maintain a healthy relationship between the child and his grandparents, the relationship deteriorated after the father became involved with another woman with whom the child in time also became very close. While being sympathetic to the plight of the grandparents (at 48G), Knoll J ultimately had to dismiss the application "... in the light of the conflict within the family and the difficult relationships at present" (at 48G-H) which would place the child "... in the middle of a situation which will confuse him and lead him to feel guilt and divided loyalties" that could not possibly be in his best interests (at 48H). Knoll J admonished the grandmother for trying to interfere with the family and work life of her son-in-law (at 48E) and advised her to "... accept that her role in G's life is ancillary to that of the nuclear family" (at 48F) and to "... trust that the

common law jurisdiction.<sup>73</sup> Joint guardianship (without care or contact) was assigned to a third party in the very unusual case of *Ex parte Kedar and Another*.<sup>74</sup> Full parental responsibilities and rights were assigned to third parties in *Ex Parte Sakota*<sup>75</sup> and *P and Another v P and Another*<sup>76</sup> and the assignment of sole guardianship and sole “custody”<sup>77</sup> to persons intending to adopt the child in

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respondent’s [the father’s] decisions for his family and for G are taken in the best interests of that family and G and she must show respect for his decisions” (at 48D-E). Zaal & Pillay 2005 SALJ 300 at 303 considered the judgment significant because it is the first reported SA case in which it was held that a grandparent may apply to court for an “access” order to a grandchild that was in the “custody” of a biological parent. The maternal grandfather also failed with an application for “access” to his grandchildren in *Kleingeld v Heunis and Another* 2007 5 SA 559 (T) as *per* Mavundla J at [12]: “The courts must be slow in substituting themselves as the parents of the children, especially where the parents are still alive and are staying with their children and there is nothing before the court placed that shows that the parents are not exercising their parental rights over the children in the best interest of the said minor children”.

<sup>73</sup> The assignment of full parental responsibility to non-parents in the context of a divorce action is discussed in 5.2.3.2 below.

<sup>74</sup> 1993 1 SA 242 (W). In this case the employer of a single mother was appointed as joint guardian of the child on the basis of special circumstances and the best interests of the child (at 244B). Having satisfied itself that there was no desire on the part of the mother to divest herself of her guardianship and that the applicant was “eminently suitable” (at 244F) to act as guardian, the court concluded (at 244G) that it was “... not merely in the best interests of the minor that an award of joint guardianship should ... be made, but it would appear to be essential that this be done lest the minor be deprived of the opportunity of undergoing proper schooling”.

<sup>75</sup> 1964 3 SA 8 (W).

<sup>76</sup> 2002 6 SA 105 (N).

<sup>77</sup> The concepts of “sole guardianship” and “sole custody” were introduced by s 5 of the Matrimonial Affairs Act 37 of 1953 (see Van Heerden Ch 19 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 660 and 5.2.3.1 below). The general effect of an order for sole guardianship and sole “custody”, as opposed to an order for guardianship and “custody” “*simpliciter*” (Cronjé & Heaton *South African Family Law* 162) is that the parental responsibilities and rights previously vested in one parent are terminated, not merely suspended (“... displaced without being extinguished”: *Dreyer v Lyte-Mason* 1948 2 SA 245 (W) at 251), and do not automatically revive at the death of the parent vested with sole guardianship and sole “custody”. The excluded parent will only be vested with guardianship and “custody” again if the court decides to vary or rescind the order to that effect: See *Wehmeyer v Nel en ’n Ander* 1976 4 SA 966 (W) at 968. The parent with sole guardianship and sole “custody” may by testamentary disposition appoint another person as guardian and custodian as his or her successor to the exclusion of the surviving parent (s 5(1) of the Matrimonial Affairs Act 37 of 1953 and s 6(3) of the Divorce Act 70 of 1979). Before the enactment of the Children’s Act 38 of 2005, the parent vested with sole guardianship could also act without the consent of the other parent, even in respect of those acts for which both parents’ consent would normally have been required. In terms of s 2 of the now repealed Guardianship Act 192 of 1993 the consent of both parents was required in respect of the following acts, unless a competent court ordered otherwise: (a) The marriage of the child; (b) the adoption of the child; (c) the removal of the child from SA by a parent or anyone else; (d) the application for a passport for the child. These provisions have now been re-enacted in s 18(3)(c) of the Children’s Act 38 of 2005, in terms of which “... consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection 3(c)”. Despite an order for sole guardianship to one parent, both parents will, however, still have to consent to the adoption of the child because of the express wording of s 18(4)(d) of the Child Care Act 74 of 1983, that requires the consent of both the “mother” and “father” of the child: Cronjé & Heaton *South African Family Law* 162 fn 37. With certain exceptions this remains the position under s 233(1)(a) of the Children’s Act 38 of 2005, in terms of which the consent of “each parent” is

another country was considered in *De Gree and Another v Webb and Others* (Centre for Child Law, University of Pretoria, Amicus Curiae)<sup>78</sup>.

In the case of *Ex Parte Sakota*,<sup>79</sup> the court awarded the “custody” and guardianship of two minor sons to their uncle.<sup>80</sup> The children’s father had killed his wife, the children’s mother; he had been convicted by a High Court in Yugoslavia and sentenced to 20 years’ imprisonment; by the same sentence he was deprived of his civic rights and of his natural guardianship over his children.<sup>81</sup> The children had come to South Africa on a temporary permit with their grandparents and had been living with their uncle ever since.<sup>82</sup> The court had no trouble in granting the order, reasoning:<sup>83</sup>

“There are three possible relationships of control over minors in South African law: guardianship, custody and also *de facto* possession and control, this latter one can also be protected in law ... In the present case this *de facto* care and possession has for some years been exercised by the grandparents and now by the applicant. There is a great deal of

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required: See 7.2.4 below. Since s 5(1) of the Matrimonial Affairs Act 37 of 1953 and 6(3) of the Divorce Act 70 of 1979) only regulate the effect of an order for sole guardianship and sole “custody” in favour of one of the *parents*, it is not certain whether a third party or parties vested with sole guardianship and sole care would have the same additional powers conferred on a parent with sole guardianship and sole care in terms of these statutes. Although an order for sole guardianship and sole care in favour of a third party or parties would terminate the guardianship and care vested in the parents, the effect of such an order would be different from an adoption order. An adoption order not only has the effect of terminating all parental responsibilities and rights vested in the parents of the child – the adopted child is “for all purposes” in law regarded as the child of the adoptive parents (s 20(2) of the Child Care Act 74 of 1983 and its equivalent s 242(3) of the Children’s Act 38 of 2005). Where third parties are vested with sole guardianship and sole care, the parents of the child will continue to have claims for contact with the child, will remain liable for the maintenance of the child and will still qualify as the parents of the child for purposes of s 1(1)(d) of the Intestate Succession Act 81 of 1987: See 7.1.4 below. Moreover, the High Court as upper guardian will always have the power to reconsider the order conferring sole guardianship and sole care on the third party provided it is deemed in the best interests of the child, whereas the possibility of rescinding an adoption order is circumscribed by statute: S 21 of the Child Care Act 74 of 1983, as will be substituted by s 243 of the Children’s Act 38 of 2005.

<sup>78</sup> 2006 6 SA 51 (W).

<sup>79</sup> 1964 3 SA 8 (W).

<sup>80</sup> At 9E.

<sup>81</sup> At 8D-E.

<sup>82</sup> At 8F.

<sup>83</sup> At 9B-C.

authority in South African law that the custody of minor children can be given to persons other than the parents, even if the parents are alive and objecting.”

In *P and Another v P and Another*<sup>84</sup> the uncle and aunt of a retarded child applied for “custody” and guardianship after having taken care of the child for a continuous period of four years before the application. The care arrangement was agreed upon when the mother admitted she was unable to look after her child. The formal resolution of the guardianship and “custody” of, and “access” to, the child became necessary as a result of the possible relocation of the child’s uncle to the United States of America for a period of four years. Fearful that they would not be able to maintain the bonds of the parent/child relationship, the child’s mother and her husband (the stepfather of the child) opposed the move to the United States. Hurt J<sup>85</sup> defined the issue in question in hypothetical terms: “If the defendants [mother and stepfather] had sought an order for custody of G to be restored to them now, would I have been disposed to grant them such an order?” Despite the fact that the biological bonds between parent and child “... have, since Roman times, been regarded as almost sacrosanct only to be disrupted or affected by the intervention of the Court in its capacity as the upper guardian where the interests of the child, and not the parents, so dictate”, Hurt J<sup>86</sup> could find no evidence to answer the question positively.<sup>87</sup> The court, furthermore, decided that if the child were to be precluded from travelling with her uncle and aunt, it would be tantamount to restoring “custody” to the mother and her husband – an option that was already ruled out as not being in her best interests. The court thus, in this rather roundabout fashion, concluded that it would be in the best interests of the child to travel with her relatives since it was not in her best interests to stay behind with her mother. The decision to vest joint/shared guardianship in the uncle and aunt was considered a “peripheral requirement”, to make the trip possible<sup>88</sup> and based on the unfitness of the mother (and her

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<sup>84</sup> 2002 6 SA 105 (N).

<sup>85</sup> At 109H.

<sup>86</sup> At 108 B.

<sup>87</sup> At 109I.

<sup>88</sup> Insofar as the acquisition of a passport and the admission as a temporary resident to the USA as concerned: *P and Another v P and Another* 2002 6 SA 105 (N) at 111B.

husband) to assume “custody” of the child.<sup>89</sup> “Custody” and guardianship of the child was granted to the uncle and aunt and the exercise of the parent’s guardianship suspended until revived by order of court at a later stage.<sup>90</sup> Contact arrangements were left to be defined and agreed upon with the help of the Family Advocate.<sup>91</sup> The order thus effectively conferred full parental responsibilities and rights on the uncle and aunt, subject to contact being maintained between the child and her mother and stepfather.<sup>92</sup>

Where the ultimate aim of the assignment of full parental responsibilities and rights to non-parents is adoption in another country, the High Court would ordinarily not have jurisdiction to entertain the application for sole guardianship and sole “custody”.<sup>93</sup> In terms of the Constitutional Court judgment in *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)*<sup>94</sup> which confirmed the decisions of both the High Court, *ie De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)*<sup>95</sup> and the Supreme Court of Appeal, *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)*<sup>96</sup>, such applications should be treated as inter-country adoptions<sup>97</sup> and

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<sup>89</sup> In this regard Schäfer LI Div E in *Family Law Service* 32 points out that “... orders wholly displacing a parent’s guardianship in favour of a non-parent are rare and will generally only be made where the latter has a specific need for the augmented capacity conferred by guardianship”.

<sup>90</sup> At 1111.

<sup>91</sup> At 112H-I.

<sup>92</sup> Had the uncle and aunt wanted to adopt the child, it would have been interesting to consider whether the mother’s refusal to allow the adoption could have been considered unreasonable (see 7.2.5 below) based on the fact that she herself could not care for the child and the chances of doing so in the foreseeable future appeared to be slim?

<sup>93</sup> Where the ultimate aim is not adoption in a foreign country, the High Court would in terms of its inherent common law jurisdiction definitely have jurisdiction to grant sole guardianship and sole “custody” to the father of a child born out of wedlock or a third party “for the first time”: See Van der Vyver & Joubert *Persone-en Familiereg* 621-622. An order for sole guardianship and sole “custody” was required in the case of *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) to terminate, and not merely to suspend, the parental responsibilities and rights of the parents of the child that was to be adopted: See fn 77 above and 7.1.4 below.

<sup>94</sup> 2008 3 SA 183 (CC).

<sup>95</sup> 2006 6 SA 51 (W).

<sup>96</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA).

<sup>97</sup> Now regulated by Ch 16 of the Children’s Act 38 of 2005, that is not yet in operation.

processed through the children's court.<sup>98</sup> The High Court would retain jurisdiction in such matters only in "exceptional" cases where by-passing the children's court procedure could be justified.<sup>99</sup> The Constitutional Court, however, refrained from providing examples of such cases.<sup>100</sup> The case concerned an American couple who sought sole guardianship and "custody" of an abandoned South African child with the intention of permanently removing the child from South Africa to adopt her in the United States of America. In order to ensure that the best interests of the child would be protected in the absence of any opposition to the application, the Centre for Child Law at the University of Pretoria was appointed as *amicus curiae*.<sup>101</sup> Relying heavily on the submissions of the *amicus*<sup>102</sup> and the Constitutional Court judgment in *Minister of Welfare and Population Development v Fitzpatrick and Others*,<sup>103</sup> the High Court dismissed the application on the basis that the High Court could not usurp the functions of the children's court in giving consideration to what was in the court's opinion, essentially, an application for the adoption of the child. Representing the majority judgment on appeal, Theron AJA dismissed the contention that the High Court as upper guardian of all minors was ideally suited to consider the permanent placement of children<sup>104</sup> since it would sanction an inter-country adoption procedure which is in conflict with international treaties that South Africa has ratified and which are designed to safeguard the best interests of the child.<sup>105</sup> The confirmation of the decision on appeal<sup>106</sup> was, however, not unanimous. Heher JA argued that the High Court, as upper guardian of all minors –

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<sup>98</sup> See also Schäfer LI Div E in *Family Law Service* 32.

<sup>99</sup> *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) [34].

<sup>100</sup> *Ibid.*

<sup>101</sup> *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 6 SA 51 (W) at 52B-C.

<sup>102</sup> *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 6 SA 51 (W) at 52D and the extensive verbatim reference to the arguments from 59G to 66B.

<sup>103</sup> 2000 3 SA 422 (CC) [30]-[34].

<sup>104</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [16] and [17].

<sup>105</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [17] and [27].

<sup>106</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA).



“... is empowered and under a duty to enquire into all matters concerning the interest of children. It may make orders for custody and guardianship and does so on a daily basis. The children’s court, a creature of statute, is expressly empowered to make orders for adoption. One may infer from the detail in which the exercise of its powers are circumscribed in the Child Care Act that the Legislature intended it to exercise the power of adoption to the exclusion of a High Court. However no powers to make orders for sole custody or guardianship are expressly included in its enabling legislation nor, I think are to be implied.”<sup>107</sup>

Having found the necessary jurisdiction to grant the order, Heher JA proceeded to describe the test to be applied in determining the best interests of a child who is the subject of an application like the present one, where “... the applicants sought an order which would enable them to control the future of the child beyond the protection of South African law”.<sup>108</sup> In this regard Heher JA stated that the case of the applicants should be measured against the standards they would have been obliged to meet if they had applied for an order of adoption<sup>109</sup> and thus, in a sense, confirmed exactly what Goldblatt J<sup>110</sup> originally sought to avoid – the High Court being placed in the position of having to fulfil the functions of a commissioner of child welfare. In delivering a separate judgment supporting the majority view that the appeal should fail, Ponnar JA<sup>111</sup> confirmed the jurisdiction of the High Court to grant the relief sought, but distinguished the present application on the basis that it not merely sought to vest sole “custody” and guardianship in the applicants but sought to give them the right to acquire full and effectively permanent parental responsibilities and rights in respect of the child. Ponnar JA<sup>112</sup> held that insofar as the court was in fact being asked to grant an adoption order to foreign nationals, the High Court did not have jurisdiction to

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<sup>107</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [36].

<sup>108</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [38].

<sup>109</sup> *Ibid.*

<sup>110</sup> *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 6 SA 51 (W) at 66D.

<sup>111</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [82].

<sup>112</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [96].

entertain the application.<sup>113</sup> According to Ponnan JA,<sup>114</sup> an evaluation of the best interests of this child –

“... must of necessity entail an enquiry into both her long-term and short-term best interests and the interplay between the two. Undoubtedly a difficulty in applying the standard is the impossibility of predicting whether certain decisions will in the long term benefit a particular child.”

And while “... the immediate allure of her being placed with the appellants is seductively appealing”, succumbing to that allure is –

“... to distort the enquiry and to subvert the long-term interests of the child to the immediate gratification that a placement with the appellants provides. ... Those temptations must however be tempered by the important consideration that an inter-country adoption is an alternative means of child care foundational to which is the principle of subsidiarity.”<sup>115</sup>

It is interesting to note that Ponnan AJ also deemed the appointment of a *curator ad litem* to represent the interests of the child “indispensable”<sup>116</sup> for the proceedings.

The Constitutional Court<sup>117</sup> granted leave to appeal against two interrelated constitutional issues that were raised:

- (a) The question whether the High Court has jurisdiction to hear an application for sole guardianship and “custody” where the ultimate purpose is for the child to be adopted in another country; and

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<sup>113</sup> It would seem to be an anomaly in our law that an inferior court (*ie* the children’s court) has jurisdiction to extinguish a parent’s responsibilities and rights by granting an adoption order, but not the High Court.

<sup>114</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [96].

<sup>115</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [96]. The principle of subsidiarity presupposes that a child’s prospects to be placed in suitable care locally be canvassed before making the child available for adoption by non-citizens.

<sup>116</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [95].

<sup>117</sup> *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [18].

- (b) the question of how section 28(2) of the Constitution should be interpreted in the context of a proposed inter-country adoption.

Since only the first question is relevant for purposes of considering the assignment of sole guardianship and “custody” to third parties, the second issue will be ignored for present purposes.<sup>118</sup>

The Constitutional Court<sup>119</sup> held that the High Court was correct in holding *in casu* that the application for sole guardianship and sole “custody” should not have been pursued in the High Court but rather the children’s court as the appropriate forum to consider the proposed inter-country adoption. The court was, however, careful not to completely exclude the jurisdiction of the High Court in such matters.<sup>120</sup> Sachs J<sup>121</sup> intimated that in “exceptional cases” where the children’s court route would not be in the best interests of the child, the High Court could still be approached for sole guardianship and sole “custody” even if the applicants were desirous of effecting an adoption in a foreign jurisdiction. Since this was not one of those very exceptional cases the consideration of the best interests of the child in question was a matter to be evaluated by the children’s court and not the High Court.<sup>122</sup>

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<sup>118</sup> Inter-country adoptions are not discussed separately: See 7.1.3 below. The paramountcy of the best interests of the child (in s 28(2) of the Constitution) in the context of adoptions in general has been encapsulated in s 230(1)(a) of the Children’s Act 38 of 2005.

<sup>119</sup> *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [29].

<sup>120</sup> *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [31].

<sup>121</sup> *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [32].

<sup>122</sup> *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [34].

### **5.2.2.3 The assignment of full parental responsibilities and rights to the unmarried father of a child born out of wedlock until 1998**

In its general comments regarding the common law jurisdiction of the High Court, the SALRC<sup>123</sup> made the following observations regarding the assignment of parental responsibilities and rights to the father of a child born out of wedlock:

- (a) A father of a child born out of wedlock, like any other party,<sup>124</sup> may approach the court for an order to gain “access” to the child,<sup>125</sup> thereby limiting the mother’s “custody” of the child;<sup>126</sup> and
- (b) the court will not interfere with the parental responsibilities and rights of the mother<sup>127</sup> of a child born out of wedlock except in exceptional cases.<sup>128</sup>

Despite the recognition of the *locus standi* of natural fathers to approach the court for parental responsibilities and rights,<sup>129</sup> the High Court has yet to assign full parental responsibilities and rights, *ie* guardianship and care (including contact) to

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<sup>123</sup> SALC Report on *Access to Minor Children by Interested Persons* pars 2.12 and 2.13.

<sup>124</sup> See *Docrat v Bhayat* 1932 TPD 125 at 127 where the court intimated that the aunt of the child is *also* a stranger to the child and that in law “... she is in no better position than the father” as far as the “custody” of the child was concerned; *Haskins v Wildgoose* [1996] 3 All SA 448 (T) at 452f where the court equated the position of the father to “... any other outsider” with regard to rights of “access”; and *Townsend-Turner v Morrow* 2004 2 SA 32 (C) at 44B: “In common law, apart from the direct blood relationship between father and child, the father of an illegitimate child is in no different position to any third party seeking access to a child”. Cf, however, *Bethell v Bland* 1996 2 SA 194 (W) at 209G in which the court deduced from the judgment in *B v S* 1995 3 SA 571 (A) that the father of an extramarital child is a “third party” in a special position. See also Schäfer LI Div E in *Family Law Service* 24.

<sup>125</sup> See comments pertaining to the limited scope of the SALRC’s investigation in fn 63 above.

<sup>126</sup> SALC Report on *Access to Minor Children by Interested Persons* par 2.12, with reference to *B v P* 1991 4 SA 113 (T).

<sup>127</sup> The Commission referred to the “parental authority” of the mother: SALC Report on *Access to Minor Children by Interested Persons* par 2.13.

<sup>128</sup> SALC Report on *Access to Minor Children by Interested Persons* par 2.13, with reference to *F v B* 1988 3 SA 948 (D). The fact that courts will not lightly interfere with the parental responsibilities and rights was evident from case law: SALC Report on *Access to Minor Children by Interested Persons* pars 2.15 and 2.16, with reference to *Bam v Bhabha* 1947 4 SA 798 (A); *Horsford v De Jager and Another* 1959 2 SA 152 (N) and *Petersen en ‘n Ander v Kruger en ‘n Ander* 1975 4 SA 171 (C). For a discussion of the uncertainty regarding the father’s burden of proof in applications for (incidents of) parental responsibilities and rights, especially contact: Van Heerden Ch 15 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 401 fn 236 and the authority quoted therein; Kruger 1994 *THR-HR* 304 at 310.

<sup>129</sup> See cases referred to in Van Heerden Ch 15 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 406 fn 250 and accompanying text.

a natural father in terms of its inherent common law jurisdiction as upper guardian of all minors.<sup>130</sup> In *W v S and Others* (1),<sup>131</sup> a father approached the High Court for an order granting him co-guardianship with the mother, certain rights pertaining to the “custody” of the child and “access”. The application was rejected in its entirety.<sup>132</sup> The court acknowledged the power of the court as upper guardian of minors to award “... not only custody but also guardianship to a person other than the natural guardian and natural custodian” from which it followed, according to Findlay AJ,<sup>133</sup> that –

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<sup>130</sup> The assignment of full parental responsibility in terms of an adoption order is not considered here.

<sup>131</sup> 1988 1 SA 475 (N).

<sup>132</sup> By far the majority of reported judgments concern a request for “access” rights by fathers of children born out of wedlock: *Wilson v Eli* 1914 WR 34; *Douglas v Mayers* 1987 1 SA 10 (Z); *F v L* 1987 4 SA 525 (W); *F v B* 1988 3 SA 948 (D); *B v P* 1991 4 SA 113 (T); *Van Erk v Holmer* 1992 2 SA 636 (W); *S v S* 1993 2 SA 200 (W); *B v S* 1995 3 SA 571 (A); *Chodree v Vally* 1996 2 SA 28 (W); *Haskins v Wildgoose* [1996] 3 All SA 446 (T); *V v H* [1996] 3 All SA 579; *T v M* 1997 1 SA 54 (A); *Davy v Douglas* 1999 1 SA 1043 (N); *I v S* 2000 2 SA 993 (C); *Narodien v Andrews* 2002 3 SA 500(C). Applications for “custody” have been less common: *Davids v Davids* 1914 WR 142; *Docrat v Bhayat* 1932 TPD 125; *Matthews v Haswari* 1937 WLD 110; *Rowan v Faifer* 1953 2 SA 705 (E); *Bethell v Bland* 1996 2 SA 194 (W); *Coetzee v Singh* 1996 3 SA 153 (D); *Krasin v Ogle* [1997] 1 All SA 557 (W); *Wicks v Fisher* 1999 2 SA 504 (N). The assignment of guardianship to a natural father of a child born out of wedlock has, as far as could be ascertained, only been considered in the following cases: *Yu Kwam v President Insurance Company Limited* 1963 1 SA 66 (T) and *Ex Parte Van Dam* 1973 2 SA 182 (W). In *Yu Kwam v President Insurance Company Limited* 1963 1 SA 66 (T) the natural father who acted as guardian in the belief that he was indeed the guardian of a child, applied for the ratification of his acts in claiming compensation for injuries sustained in a motor vehicle accident on his daughter’s behalf. The *bona fide* mistake in the procedure was overcome by allowing the father to be appointed as *curator-ad-litem* to his daughter. Margo J, by his own admission, describes the application in *Ex parte van Dam* 1973 2 SA 182 (W) as “unusual” (at 182E). In this case a father who had continued to live with his ex-wife after their divorce, applied for an order appointing him as guardian of his youngest child who was born of the “extra-marital ménage” (at 182F). The question was thus whether the mother’s guardianship of the illegitimate child could be transferred to the father (at 183E). After finding that the question had to be decided with reference to the common law, the court acknowledged the absence of any direct authority on the point in either Roman-Dutch law or case law (at 183F). Referring to the approach followed in the case of a legitimate child (185A) and to *Rowan v Faifer* (1953 2 SA 705(E) 710A-E, for which see fn 156 below), in terms of which a father had *locus standi* not only to appear on the question of “custody” at (184G), but probably also guardianship (at 185A), the court concluded that the natural guardian of an illegitimate child could be deprived of guardianship where there are special grounds for doing so as enunciated in *Calitz v Calitz* (1939 AD 56 at 63) (at 183H). *In casu* the special grounds were found in the fact that the mother wanted guardianship (which did not include “custody” (at 185E)) to be conferred on the natural father (at 185C), that the father had hitherto acted as *de facto* guardian and that it would be in the best interests of the child (at 185D). The court consequently appointed the father as guardian of the child “... provided the mother of the said child is given the right to apply for a variation of this order on good cause shown” (at 185F).

<sup>133</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 487F-G.

“... although the Courts may not be disposed to grant full guardianship or custody to a person other than the natural guardian or custodian, any one of the incidences thereof may be so awarded should the case merit it”.

From these comments one could infer that the courts would not easily award care *and* guardianship to a person other than the natural guardian, such as the father of an illegitimate child. The court also outlined the test to be applied when determining whether the best interests of the child merit the assignment of incidences of parental responsibilities and rights to the natural father or anybody else, described as follows by Findlay AJ:<sup>134</sup>

“I accept that any investigation into the well-being of children carried out by the Court when functioning as upper guardian should be aimed at a determination of what is in the child’s best interests and, although in respect of certain matters this may relate to a present-day situation, the Court must not ignore likely future developments, as shown by the evidence, which may indicate a need to look to the long-term benefit rather than short-term. Any fetter unduly limiting the Court’s power of investigation or excluding what might otherwise be a relevant factor should therefore be viewed with circumspection and be applied in circumstances in which a rule of law may so dictate or the Court is clearly satisfied that it is proper to do so. Clearly that is why Courts have avoided rigid classifications and speak of tests such as ‘good cause’ or ‘best interests of the child’ in such investigations. Whether, therefore, the rule in *Calitz*’ case [*Calitz v Calitz*<sup>135</sup>], is one intended to limit the enquiry by requiring the natural father (or for that matter, any other third party seeking to deprive the mother of her natural guardianship or natural custody) to prove one or more of the circumstances which fall within the category of ‘special grounds’ as enunciated by Tindall JA or as widened by Henochsberg AJ (in Short’s case) [*Short v Naisby*<sup>136</sup>], it seems to me that Bam’s case [*Bam v Bhabha*<sup>137</sup>] permits the Court of a fuller and more wide-ranging enquiry; in any such enquiry, should the evidence establish that the mother should not be so deprived, it then becomes unnecessary to take the matter further, which situation arises only where the Court may well have misgivings as to whether she should continue to exercise such rights. In those circumstances, it may well be necessary to add back into the scale in her favour as a much weightier and stronger factor the circumstances that she is the natural guardian and natural custodian in order to test the other evidence at a higher level so as to decide whether or not grounds are in

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<sup>134</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 489F-490C.

<sup>135</sup> 1939 AD 56 at 63.

<sup>136</sup> 1955 3 SA 572 (D) at 575.

<sup>137</sup> 1947 4 SA 798 (A) at 806.

fact established which can be classified as ‘special’ and which merit deprivation”.<sup>138</sup>

Findlay AJ<sup>139</sup> concluded:

“Despite the pleas ... to the effect that where a natural father does care for his child, his position should be given greater weight, I have doubts as to the desirability of making parents joint and equal guardians where they do not live together in relative harmony. The potential for disagreement and conflict as to decision-making and temptation to use the child as a weapon against each other seem to me, having regard to human nature, to be real difficulties which can militate against such a regime being in the best interests of the child; the more so where the parents may not have parted on good terms and there may be a measure of friction between them. This danger is, in my view, heightened where the parents come from different racial, cultural and social backgrounds and may therefore be, to some extent, subject to the pressures of their respective environments. A further factor which may also serve to complicate such a situation would be that of a child who is manipulative and seeks to play off one parent against another. I do not say that there may not be instances where such an order may merit serious consideration but, given the circumstances to which I have referred, it seems to me that such instances would be rare indeed.”

In Findlay AJ’s opinion the fact that the parties “... may well disagree as to what may be in M’s best interests when it comes to the exercise of this power” was on its own sufficient to refuse the relief sought.<sup>140</sup> The expressed desire by the father to have a more meaningful participation in the life of his son, despite being hailed

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<sup>138</sup> Eckhard 1992 *TSAR* 122 at 131 had a problem with the fact that courts made no distinction between a father’s application for “custody” or guardianship, on the one hand, and an application for “access”, on the other. Since the aim of an application for the guardianship or “custody” of a child is to deprive the mother of those responsibilities and rights, it is in Eckhard’s view understandable that the father would have to prove the mother’s unfitness or unworthiness to exercise those responsibilities and rights. However, in the case of an application for contact, Eckhard (at 131) observed, the aim is not deprivation but merely an opportunity to build a relationship with the child. Contact with the father in this way fulfils the child’s needs for a father. Requiring the father to attack the mother’s fitness in all cases could only lead to a deterioration in the relationship between mother and father that could again, on its part, jeopardise the exercise of the contact rights at a later stage (at 131-132). For this reason Eckhard (at 133) proposed granting fathers inherent rights of at least contact, if not care and guardianship as well. In the absence of such rights, it was suggested, a presumption in favour of contact rights should be applied. The idea that a father (or any other person) should not have to attack the fitness of the mother (or any parent) when applying for a sharing of parental responsibilities and rights could be significant for the change in approach required by the Children’s Act 38 of 2005: See discussion in 5.3.5.3 and 5.3.7(c) below.

<sup>139</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 491D-F.

<sup>140</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 491J.

as laudable, also did not “... constitute any proper basis ... for granting to him either full joint guardianship or any lesser form thereof”.<sup>141</sup>

The hesitancy of the courts to order a *sharing* of parental responsibilities and rights has not been restricted to guardianship nor unmarried parents.<sup>142</sup> Awarding joint “custody”<sup>143</sup> to parents in the case of divorce was for a long time considered undesirable<sup>144</sup> until De Vos J proclaimed its virtues in *Krugel v Krugel*<sup>145</sup> as not only contributing to the promotion of the right of children to know and be cared for by both parents<sup>146</sup> but also helping to reshape the gender roles within parenthood.<sup>147</sup> Being of the opinion that the hostility between the parents would not cease should the joint “custody” order be changed to a sole “custody” order,<sup>148</sup> De Vos J believed that “... general hostility between the parents should [not] be a bar to a joint custody order”<sup>149</sup> and that –

“[u]nless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to

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<sup>141</sup> *W v S and Others* (1) 1988 1 SA 475 (N) at 492B.

<sup>142</sup> See *W v S and Others* (1) 1988 1 SA 475 (N) at 491G.

<sup>143</sup> According to Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 551 “joint custody” is not easily definable because it can take many forms. The term “joint custody” is used for joint legal and joint physical “custody”: Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 551; Cronjé & Heaton *South African Family Law* 165. Joint legal “custody” presumably relates only to joint decision-making about important issues (also called “joint parenting” in *Jackson v Jackson* 2002 2 SA 303 (SCA) at [25]) while joint physical “custody” would seem to entail an arrangement by which actual physical care of the child is shared between the parents. For potential benefits and practical problems raised by an award of joint “custody”, see Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 554-558; Cronjé & Heaton *South African Family Law* 165-166. See also Bonthuys 2006 *Stell LR* 482 at 490-493 who is especially critical of such an award.

<sup>144</sup> See *Edwards v Edwards* 1960 2 SA 523 (D) *per* Jansen J at 524G: “It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals”; *Kastan v Kastan* 1985 3 SA 235 (C) at 236E-F; *Schlebusch v Schlebusch* 1988 4 SA 548 (E) at 551D-E; *Venton v Venton* 1993 1 SA 763 (D) 764H-I; *Pinion v Pinion* 1994 2 SA 725 (D) at 730C-D; *V v V* 1998 4 SA 169 (C) at 179. See also Kaganas in Murray *Gender and the New South African Legal Order* 177-178; Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 551 and 551 fn 183. Cf, however, *Venton v Venton* 1993 1 SA 763 (D) 767C-H for circumstances in which the court considered an award of joint “custody” appropriate.

<sup>145</sup> 2003 6 SA 220 (T).

<sup>146</sup> *Krugel v Krugel* 2003 6 SA 220 (T) at [19].

<sup>147</sup> *Krugel v Krugel* 2003 6 SA 220 (T) at [20].

<sup>148</sup> For a discussion of the difference between a custody order and a sole custody order, see fn 77 above.

<sup>149</sup> *Krugel v Krugel* 2003 6 SA 220 (T) at [21].



learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input”.<sup>150</sup>

Although each and every case confronted with the issue of assigning parental responsibilities and rights to the father of a child born out of wedlock has emphasised the importance of the best interests of the child, there has been a discernible shift of emphasis in the approach followed by the courts, at least as far as the assignment of *contact* to fathers of children born out of wedlock is concerned. While many of the older cases, such as *Douglas v Mayers*,<sup>151</sup> *F v B*<sup>152</sup> and *S v S*<sup>153</sup> emphasised the rights of the mother as custodian and guardian and

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<sup>150</sup> *Krugel v Krugel* 2003 6 SA 220 (T) at [22]. The judgments in *Krugel v Krugel* 2003 6 SA 220 (T) and *W v S and Others* (1) 1988 1 SA 475 (N) are also indicative of the diverging approaches followed in the case of a legitimate child and a child born out of wedlock, respectively.

<sup>151</sup> 1987 1 SA 910 (Z). In this case the father who was paying maintenance for the child believed that he was entitled to “access”. The application was refused on the basis that he could not satisfy the court that it was in the best interests of child to interfere with the custodial rights of the mother. The court held that the application had not gone beyond saying that the father wanted “access” because he was the father and paying maintenance (at 915D). This argument was in the court’s view tantamount to applying for “access” as of a right or ground of an inherent right of “access” which was non-existent in the case of a natural father (at 915D). The court held that it was not in the interests of the child to get to know her father because it could jeopardise the mother’s future efforts to get the child adopted by her future husband (at 915E). The court, furthermore, held that the discretion of the mother as custodian and guardian to decide with whom the child should or should not associate with an unrepentant seducer should remain unfettered (at 915F).

<sup>152</sup> 1988 3 SA 948 (D). In this case the father applied for “access” to his child born out of wedlock. He had lived with the mother as husband and wife when the child was born and was allowed access even after they had parted ways. A year later the mother refused the father access. The court dismissed the application as not being in the best interests of the child because the re-bonding of father and child would be traumatic after suffering the “loss” of the father (at 953C). Moreover, the mother and her husband (whom she had married after terminating the relationship with the father) were not willing to do anything to facilitate the bonding (at 953C). The court felt that the mother’s attitude, however unreasonable, should be given due weight since she was the sole guardian and custodian of the child (at 953D). If “access” was granted the child would probably become the victim of the acrimony and animosity between its parents which in the court’s view would be immeasurably more harmful to him than the permanent severance of the bond with his father (at 953F). “Access” to the father would introduce into the child’s life “... at least a potential source of conflict and tension which can only cause him serious psychological harm. There can be no basis whatever for any finding that it is in J’s interests that applicant be allowed access to him” (at 953G).

<sup>153</sup> 1993 2 SA 200 (W). In this case the mother’s pregnancy was discovered after the father had already become engaged to another girl and the mother had become involved in another relationship. The father refused to break off his engagement but the mother broke off her relationship with her boyfriend. Despite this state of affairs the parties lived together but the mother was subjected to cruel behaviour on the part of the father who, *inter alia*, forced her to look at pornographic videos and had fondled another girl in her presence (at 202I-J). The father’s interest in the child was at the outset minimal and sporadic. He even disputed paternity of the child (at 203A-C). According to the mother he now wanted “access” as a *quid pro quo* for having to pay maintenance and not because he really desired to see his child (at 203D). “Access” was refused on the ground that despite the father having *locus standi* in such matters (at 208A), the mother had exclusive parental “authority” and “... has the right to create own access to the child

attached considerable weight to the effect that the assignment of contact would have on her rights,<sup>154</sup> the judgments since *B v S*<sup>155</sup> have tried to detach the judicial investigation into the best interests of the child from the respective legal positions of the *parents* and have tried to equate it with the approach followed in the case of a legitimate *child*.<sup>156</sup> A number of authors thought the equation between the approach followed in the (re)assignment of parental responsibilities and rights in the case of a legitimate child and the assignment of contact, more apparent than real<sup>157</sup> – whereas an ongoing and uninterrupted relationship between the non-custodial father and the child has increasingly been considered important in the case of a legitimate child,<sup>158</sup> courts were generally not persuaded of such benefits

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and to control access by others” (at 204E). The court emphasised the fact that due weight should be given to the fact that the mother and not the court was vested with the discretion (at 208C), declaring that at the end of the day it must be satisfied that an order will not constitute “undue interference with the mother’s right” (at 208C), continuing: “The best interests of the child is the yardstick. But, unlike a custody dispute between spouses or ex-spouses, the issue is not which of two parents it is best to choose to benefit the child most. The issue is whether it is established that the interests of the child require that there must be access to a specific person (someone who has no parental authority). Otherwise ... the position in regard to legitimate and extra-marital children is equated” (at 208E-F).

<sup>154</sup> See also *B v P* 1991 4 SA 113 (T) at 117 E-F in which the court explained its approach as follows: “My conclusion is that the Court’s approach, when considering an application such as this, will be similar to that in *Oudenhove v Gruber (supra)*; an applicant must prove on a preponderance of probability that the relief sought, *ie* access, is in the best interest of the illegitimate child (the paramount consideration) and that such relief will not unduly interfere with the mother’s right of custody.”

<sup>155</sup> 1995 3 SA 571 (A), discussed in 4.2.3.1(b) above.

<sup>156</sup> The court in *Rowan v Faifer* 1953 2 SA 705 (E) 711C-E seems to have anticipated such an approach – “... the Court’s powers to deprive the natural guardian of custody are those as Upper Guardian of all minors, and seems to be confined to ‘... special grounds, such, for example, as danger to a child’s life, health or morals ... So, the Court having the power to act on special grounds in the case of legitimate children, there appears to be no reason why the Court should not act similarly in the case of illegitimates”. See also, *eg Coetzee v Singh* 1996 3 SA 153 (D) 154C-D; *T v M* 1997 1 SA 54 (A) 57H-I where the court puts it thus: “While at common law the father of an illegitimate child, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child’s welfare which is the central and constant consideration”; and *Wicks v Fisher* 1999 2 SA 504 (N) at 510E.

<sup>157</sup> See Van Heerden Ch 15 in Van Heerden *et al Boberg’s Law of Persons and the Family* 411 fn 266 and 4.2.3.1(b) above. Eckhard 1992 *TSAR* 122 at 131 summarised the legal position of the father in cases where he applies for “access” as follows: “Alhoewel die hof dus ‘n omvattende ondersoek moet onderneem en daar by die ondersoek streng gesproke nie van ‘n bewyslas sprake is nie, sal die vader nogtans, as die een wat ‘n verandering in die *status quo* wil meebring, ‘n *prima facie* saak vir verandering in die bestaande posisie moet uitmaak.”

<sup>158</sup> The importance attached to this relationship lead the court in *Ford v Ford* [2004] 2 All SA 396 (W) (that was confirmed on appeal in *F v F* 2006 3 SA 42 (SCA)) to reject an application for relocation by the custodian mother. The dispute arose as a result of the mother’s wish to relocate to the UK. Proceeding, as is customary in cases like these, from the premise of the best interests

in the case of children born out of wedlock.<sup>159</sup> In cases where the father of the child born out of wedlock did succeed with his application for care or contact, the father had a strong bond with the child,<sup>160</sup> which in some cases was established as a result of being married to the mother in terms of Muslim law.<sup>161</sup> In other cases where the father was successful, the mother supported the application,<sup>162</sup> was deceased<sup>163</sup> or deemed unfit to care for the child in question.<sup>164</sup>

The equation between the position of legitimate children and children born out of wedlock as far as the determination of their best interests are concerned, was given further impetus by the court in *Bethell v Bland*.<sup>165</sup> Wunsh J<sup>166</sup> found the judgment in *McCall v McCall*<sup>167</sup> "... an instructive and valuable guide" to how a case such as "this", ie a case concerning the assignment of parental responsibilities and rights in respect of a *child born out of wedlock*, should be approached.<sup>168</sup> The relevant part of the dictum of King J in *McCall v McCall*<sup>169</sup> is considered important enough to quote in full:

"In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of

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of the child, the court indicated that, all things being equal, the mother had not established "... the immediate, medium and long-term advantages" of relocating (at 414d), that "[t]he interests of the non-custodian parent and the obvious interruption to the relationship with the child have largely been ignored until the decision in the Jackson case" (another relocation case: *Jackson v Jackson* 2002 2 SA 303 (SCA)), and that "[i]t has now been accorded its proper place in being a priority in decisions of this nature" (at 415e).

<sup>159</sup> See *eg Docrat v Bhayat* 1932 TPD 125; *Douglas v Mayers* 1987 1 SA 910 (Z); *F v L* 1987 4 SA 525 (W); *F v B* 1988 3 SA 948 (D); *S v S* 1993 2 SA 200 (W) and *V v H* [1996] 3 All SA 579 (SE).

<sup>160</sup> *B v P* 1991 4 SA 113 (T); *Van Erk v Holmer* 1992 2 SA 636 (W); *B v S* 1995 3 SA 571 (A); *Haskins v Wildgoose* [1996] 3 All SA 446 (T); *T v M* 1997 1 SA 54 (A); *Krasin v Ogle* [1997] 1 All SA 557 (W); *Davy v Douglas* 1999 1 SA 1043 (N); *Wicks v Fisher* 1999 2 SA 504 (N).

<sup>161</sup> *Wilson v Eli* 1914 WR 34; *Davids v Davids* 1914 WR 142; *Chodree v Vally* 1996 2 SA 28 (W).

<sup>162</sup> *Ex parte Van Dam* 1973 2 SA 182 (W); *Krasin v Ogle* [1997] 1 All SA 557 (W).

<sup>163</sup> *Spence-Liversedge v Byrne* 1947 1 SA 192 (N).

<sup>164</sup> *Bethell v Bland* 1996 2 SA 194 (W).

<sup>165</sup> 1996 2 SA 194 (W).

<sup>166</sup> *Bethell v Bland* 1996 2 SA 194 (W) at 208F.

<sup>167</sup> 1994 3 SA 201 (C), a case concerning a disputed custody award of a legitimate child to the mother in terms of a divorce order.

<sup>168</sup> *Bethell v Bland* 1996 2 SA 194 (W) at 208G-209D.

<sup>169</sup> 1994 3 SA 201 (C) at 204J-205G.

unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and
- (m) any other factor which is relevant to the particular case with which the Court is concerned."<sup>170</sup>

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<sup>170</sup> The list of criteria has been accepted in several cases in the application of the best interests standard, such as *Krasin v Ogle* [1997] 1 All SA 557 (W) at 567 i-j, dealing with an application by a single father for the "custody" of his illegitimate child. See also Van Heerden J in *Lubbe v Du Plessis* 2001 4 SA 57 (C) at 66G-67H who refers to the case of *Fitschen v Fitschen* [1997] JOL 1612 (C) in which the court expressed the view that, in addition to the factors listed in the *McCall*-case, SA courts would in future have to give more prominence to the recognition of the rights of the child and that, therefore, a parent's willingness to recognise such rights would also have to be considered, especially in respect of children old enough to form informed opinions in this regard.

#### 5.2.2.4 Conclusion

The preference given to the natural parents of a child over non-parents in the assignment of parental responsibilities and rights before the Children's Act<sup>171</sup> is evident from the following comments by the SALRC:<sup>172</sup>

“South African case law illustrates that it is only in exceptional circumstances that the High Court will be prepared to award guardianship or custody of a child to a non-parent to the *exclusion* of the natural parents and that it is highly unusual for the court to appoint non-parents as guardians or custodians to act as such *together* with the parents of the child in question. Legal recognition of the parenting role of ‘social’ or ‘psychological’ parents in this country thus appears to be fairly limited, despite the wide diversity of family forms referred to above.”

#### 5.2.3 Statutory powers of the High Court

##### 5.2.3.1 Under the Matrimonial Affairs Act 37 of 1953

Section 5(1) of the Matrimonial Affairs Act<sup>173</sup> provides:

“Any provincial or local division of the Supreme Court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would in the interests of such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.”<sup>174</sup>

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<sup>171</sup> 38 of 2005.

<sup>172</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.2.1.

<sup>173</sup> 37 of 1953.

<sup>174</sup> For a detailed background of the provision, see Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 511-513. The court in *Hassan v Hassan* 1955 4 SA 388 (N) at 393C-D held that s 5 of the Matrimonial Affairs Act 37 of 1953 was intended “... to give the Court the jurisdiction which *Calitz v Calitz supra*, held it had not got, namely the jurisdiction to deprive the father of the custody of his minor child if it be in the interests of the minor to do so, notwithstanding the absence of any legal warrant (in the form of a decree of divorce or separation) for making a separate home”. See *Leonard v Leonard* 1943 NPD 288 at 289 as an example of a

If the parents of the minor become reconciled and live together again, the order made under section 5(1) of the Matrimonial Affairs Act<sup>175</sup> will lapse "... with effect from the date on which the parents commence to live together again".<sup>176</sup>

Sections 5(3), (5) and (6) of the Matrimonial Affairs Act<sup>177</sup> allow for the possibility of a third party acquiring full parental responsibilities and rights by testamentary disposition of a parent vested with sole guardianship or a parent who is the sole natural guardian of a minor. The acquisition of parental responsibilities and rights by testamentary disposition will be addressed in Chapter 8 below.

It is evident that the provisions of section 5(1) of the Matrimonial Affairs Act<sup>178</sup> are applicable only to parents of a minor that were married but are divorced or parents who are married but living apart.<sup>179</sup> The Act does not apply to unmarried parents.<sup>180</sup> The wide discretionary powers conferred on the court to "... make any order which it may deem fit" would seem to allow the court to confer guardianship<sup>181</sup> and "custody" or sole guardianship and sole "custody" on a

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case where the court found it had no power to deprive the husband of the custody of the child except under the court's powers as upper guardian of all minors to interfere with the father's custody on special grounds.

<sup>175</sup> 37 of 1953.

<sup>176</sup> S 5(2) of Matrimonial Affairs Act 37 of 1953.

<sup>177</sup> 37 of 1953.

<sup>178</sup> 37 of 1953.

<sup>179</sup> Caney J in *Hassan v Hassan* 1955 4 SA 388 (N) at 392G considered the reference to "living apart" wide enough "... to include a cessation of the state of cohabitation from any cause whatever" and "... embrace all parents who are living apart in the sense that consortium has been determined or suspended" (at 393A). See also *Mashaoane v Mashaoane* 1962 1 SA 628 (N) at 635G-H. The court in *Desai v Engar and Engar* 1965 4 SA 81 (W) at 84D-E held that the reference to parents living apart in s 5(1)(b) does not include a reference to parents of a putative marriage.

<sup>180</sup> *Ex parte Van Dam* 1973 2 SA 182 (W) at 183E. The provisions of s 5(1) can also not be invoked in the event of the termination of a same-sex partnership: *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at [35].

<sup>181</sup> Although the Act mentions the appointment only of a sole guardian it was held in *Hornby v Hornby* 1954 1 SA 498 (O) at 500H (where it was not deemed necessary to explain fully what is meant by the expression "sole guardianship") that the Act "... implicitly empowers also the appointment of a guardian who unlike the sole guardian has not the additional powers above referred to".

person or persons other than the parents of the minor.<sup>182</sup> Despite the theoretic possibility one could, however, assume that an order vesting guardianship and care or sole guardianship and sole care in a third party or parties would not easily be considered in the best interests of a child and will only be granted in exceptional circumstances – even more so given the fact that both the parents of the child that are affected by proceedings in terms of the Matrimonial Affairs Act<sup>183</sup> are still alive.<sup>184</sup>

It must also be remembered that the context within which section 5(1) of the Matrimonial Affairs Act<sup>185</sup> is discussed here envisages only the assignment of full parental responsibilities and rights to *non-parents*. The assignment of sole guardianship and “custody” to one parent is nothing more than the re-assignment of parental responsibilities and rights already acquired at the birth of the legitimate child and consequently does not qualify as a “first” acquisition of parental responsibilities and rights on the part of that parent.

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<sup>182</sup> See Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 513 and the sources quoted in fn 61. Cf, however, Schäfer LI Div E in *Family Law Service* 30, who (incorrectly in my opinion) contends that: “No statutory provision is made for an order of care or guardianship in favour of a third person while both parents are alive”. The Act does not define “sole custody” or “sole guardianship”. According to De Villiers J in *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O) at 497G-H the legislature intended a person to whom “sole custody” is awarded in terms of s 5 of the Act “... to have all the powers and be subject to the duties imposed by the common law, with the additional power, subject to any order of the Court (cf. sec. 5(5)) of appointing by testamentary disposition, any person to be vested with sole custody of such minor (cf. sec 5(3)(a))” and a person to whom sole guardianship is awarded to have the same powers and duties with regard to the appointment of a sole guardian “... and with the further additional power of alone consenting to the marriage of the said minor”. See also *Mashaoane v Mashaoane* 1962 1 SA 628 (N) at 632B-F and fn 77 above. The Act as a whole has been criticised by the judiciary to the effect that “... half of its provisions are impracticable and the other half unintelligible” and that “... it gives rise to difficulties which, with slightly more imaginative draftmanship, could easily have been avoided” – a statement which was considered “no malicious exaggeration” considering “... the numerous reported decisions in our case law occasioned by enquiries into the correct interpretation of various sections of the statute and the volume of literature written on the conundrums arising out of the language employed”: *per* Van Heerden J in *Joss v Board of Executors* 1978 1 SA 1106 (C) at 1107F-G.

<sup>183</sup> 37 of 1953.

<sup>184</sup> The fact that the possibility of making such an award is remote does not, however, exclude the possibility of the court making such an order as contended for by Schäfer LI Div E in *Family Law Service* 30: See fn 182 above.

<sup>185</sup> 37 of 1953.

Unlike the position under the Divorce Act,<sup>186</sup> the Matrimonial Affairs Act<sup>187</sup> does not make provision for an enquiry by the Family Advocate into matters concerning the welfare of the child in terms of the Mediation in Certain Divorce Matters Act.<sup>188</sup> Van Heerden<sup>189</sup> submits that given "... the singular nature of legal proceedings in matters concerning custody of or access to minor children", proceedings under section 5(1) of the Matrimonial Affairs Act<sup>190</sup> would involve a "judicial investigation" into the best interests of the child, similar to that outlined in *B v S*.<sup>191</sup>

### **5.2.3.2 Under the Divorce Act 70 of 1979**

Since the divorcing parents would already have acquired parental responsibilities and rights automatically at the birth of their child, the re-assignment of one or more of the incidents of parental responsibilities and rights at divorce would not constitute an acquisition of such incidents "for the first time".<sup>192</sup> In the context of divorce, full parental responsibilities and rights can only be acquired "for the first time" when the court ordering the decree of divorce assigns full parental responsibilities and rights (*ie*, care (including contact) and guardianship) to a third party or parties.<sup>193</sup>

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<sup>186</sup> 70 of 1979.

<sup>187</sup> 37 of 1953.

<sup>188</sup> 24 of 1987. Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 513 fn 61 is of the opinion that even if such an enquiry has been made, "... there is no obligation imposed on the court by the Matrimonial Affairs Act to consider any report or recommendation made by the Family Advocate. Compare the position under the Divorce Act 70 of 1979, discussed in 5.2.3.2 below.

<sup>189</sup> Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 513 fn 61.

<sup>190</sup> 37 of 1953.

<sup>191</sup> 1995 3 SA 571 (A) at 584J-585D, as discussed in 4.2.3.1(b) above. See also in the recent case of *B v M* [2006] 3 All SA 109 (W), in which a divorced mother applied for substitute consent to remove the children from Johannesburg to Cape Town, (at [6]): "This court sits as the upper guardian of minors. The discretion which we exercise is not circumscribed in the narrow or strict sense of the word. It requires no onus, in the conventional sense, to be satisfied."

<sup>192</sup> Even where both the "custody" and the guardianship of one parent are terminated and vested in the other parent, the latter would not acquire such parental responsibility "for the first time" since the latter would already have acquired such responsibility automatically at the birth of the child: See 1.3 above.

<sup>193</sup> It seems as though full parental responsibilities and rights cannot be assigned to a non-parent in preliminary matrimonial actions in terms of Rule 43 of the Uniform Rules of Court since Rule 43 does not make provision for interim relief pertaining to guardianship. Rule 43 only refers to interim relief with regard to maintenance, costs, interim "custody" of a child and interim "access" to any child. See Kruger Div F in *Family Law Service* 53-54.



Section 6(3) of the Divorce Act<sup>194</sup> is almost identical to section 5 of the Matrimonial Affairs Act<sup>195</sup> except that the court's powers are restricted to proceedings in terms of which it is "granting a decree of divorce" between the parents of the child.<sup>196</sup> While it is thus theoretically possible to assign guardianship and "custody" to third parties or non-parents in terms of these provisions, no reported case could be found in which a divorce court deprived both parents of their rights and responsibilities and vested it in third parties<sup>197</sup> or ordered the divorcing parents to share parental responsibilities and rights with third parties.<sup>198</sup>

Insofar as the granting of such an order remains a possibility, the following general observations are deemed sufficient. The Divorce Act<sup>199</sup> defines "court" as any High Court or a divorce court established under section 10 of the Administration Amendment Act.<sup>200</sup> The latter Act created special divorce courts for black people. These special divorce courts were opened up to all in terms of the Divorce Courts Amendment Act in 1997.<sup>201</sup> The special divorce courts, which are lower courts, now have concurrent jurisdiction with the High Court as far as divorce actions are concerned.<sup>202</sup> It is also important to note that courts may grant

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<sup>194</sup> 70 of 1979.

<sup>195</sup> 37 of 1953.

<sup>196</sup> S 6(3): See Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 559.

<sup>197</sup> See, however, *Edge v Murray* 1962 3 SA 603 (W) at 607F where Trollip J admonished the parents for their "implacable hostility" towards one another and warned of the possibility of "custody" being awarded to "some suitable third person" should the matter come before the court again.

<sup>198</sup> See Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 559 fn 199, who submits that the circumstances in *Hoyi v Hoyi* 1994 1 SA 89 (E) (child effectively abandoned by both parents) "... *might have been* appropriate for an award of custody to a third party" (own italics for emphasis).

<sup>199</sup> 70 of 1979.

<sup>200</sup> 9 of 1929.

<sup>201</sup> Act 65 of 1997.

<sup>202</sup> For a discussion of the position once the Jurisdiction of Regional Courts Amendment Act 31 of 2008 comes into operation, see 5.3.2(h) below. The fact that there is no legislative obligation on the Family Advocate to become involved in (the mostly uncontested) proceedings in the special divorce courts has apparently given rise to serious problems regarding the protection of the interests of children in divorce proceedings in such courts: See *Narodien v Andrews* 2S002 (3) A 500 (C) at 513A-F. Once the Jurisdiction of Regional Courts Amendment Act 31 of 2008 comes into operation Family Advocates will be deemed also to have been appointed in respect of the regional divisions. See further comments in fn 210 regarding the rights and duties of the Family Advocate in divorce proceedings.

a decree of divorce in respect of a “marriage” which, although not expressly defined in the Divorce Act,<sup>203</sup> now includes a civil marriage,<sup>204</sup> a customary marriage<sup>205</sup> and a civil union.<sup>206</sup>

In terms of section 6(1) of the Divorce Act<sup>207</sup> a decree of divorce may not be granted until the court –

- “(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; and
- (b) if an enquiry is instituted by the Family Advocate in terms of section 4(1)(a) or 2(a) of the Mediation in Certain Divorce Matters Act, 1987,<sup>208</sup> has considered the report and recommendations referred to in the said section 4(1).”

Although an enquiry by the Family Advocate<sup>209</sup> is evidently not obligatory in all divorce actions,<sup>210</sup> it is highly unlikely that the High Court or a special divorce court would assign guardianship and “custody” to a third party at divorce without the

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<sup>203</sup> 70 of 1979.

<sup>204</sup> Concluded in terms of the Marriage Act 25 of 1961.

<sup>205</sup> Concluded in terms of the Recognition of Customary Marriages Act 120 of 1998: S 8.

<sup>206</sup> Concluded in terms of the Civil Union Act 17 of 2006.

<sup>207</sup> 70 of 1979.

<sup>208</sup> Act 24 of 1987. For a discussion of the functions of the office of the Family Advocate and the dissimilar positions occupied by the Family Advocate and the legal representative of any party, see *Soller NO v G and Another* 2003 5 SA 430 (W) at [22]-[27].

<sup>209</sup> For a detailed and critical discussion of the provisions of the Mediation in Certain Divorce Matters Act 24 of 1987, see Van Heerden Ch 18 in Van Heerden *et al Boberg's Law of Persons and the Family* 516-523. For a discussion of the “multi-faceted” role of the Family Advocate, see *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC) at [22] to [23].

<sup>210</sup> S 6(1)(b) only obliges the court to consider the report and recommendations by the Family Advocate “if” an enquiry was conducted. Reg 2(3) of the Regulations in terms of s 5 of the Mediation in Certain Divorce Matters Act 24 of 1987 (GN R2385 in GG 12781 of 3 Oct 1990, as amended) compels the Registrar of the Divorce Court in which the divorce action is instituted to transmit to the Family Advocate a copy of the summons and a completed form corresponding substantially to Annexure A setting out the arrangements regarding dependent and minor children *post* divorce. The Family Advocate is obliged to institute an enquiry into any matter concerning the welfare of the child if so requested by any party to the divorce or the court concerned: S 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987. The Family Advocate may *mero motu* request authorisation for such an enquiry to be instituted: S 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987. The transmission of the prescribed form containing details regarding the anticipated arrangements of the divorcing parties’ minor children to the Family Advocate is thus obligatory but not the ensuing enquiry into such arrangements. See *Venton v Venton* 1993 1 SA 763 (D) at 764C-D for an example of a case where the court requested the Family Advocate to initiate an enquiry after it became known that the prescribed form was never served on the Family Advocate in terms of reg 2(3).

input of the Family Advocate. The Family Advocate may be requested by the court or any of the parties involved in the divorce proceedings to institute an enquiry and furnish the court with a report and recommendations.<sup>211</sup> Even if no such request has been made the Family Advocate should, according to the judgment in *Van Vuuren v Van Vuuren*,<sup>212</sup> initiate an enquiry<sup>213</sup> where there is an intention, *inter alia*, to award the custody of a child to a person other than the parents.<sup>214</sup> A decision to assign guardianship and “custody” or even sole guardianship and sole “custody”<sup>215</sup> to a third party would clearly constitute a radical departure from what is generally believed to be in the best interests of the child and would thus only be considered in very exceptional circumstances.<sup>216</sup>

### **5.2.3.3 Under the Natural Fathers of Children Born out of Wedlock Act 86 of 1997**

Although it is generally agreed that the Natural Fathers of Children Born out of Wedlock Act<sup>217</sup> encapsulated the previous, exclusively common law, powers of the High Court,<sup>218</sup> it was never clear whether this Act allowed the court to award guardianship *and* “custody” (including “access” or contact), as opposed to guardianship *or* “custody” *or* “access” to a natural father of a child born out of wedlock. In terms of section 2(1) of the said Act, a court could make an order granting the natural father “... access rights to *or* custody *or* guardianship” (own emphasis) of the child, while section 2(6) gave the court the power to “... 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

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<sup>211</sup> Mediation in Certain Divorce Matters Act 24 of 1987: S 4(1). See also fn 210 above.

<sup>212</sup> 1993 1 SA 163 (T).

<sup>213</sup> See, *eg Van den Berg v Le Roux* [2003] 3 All SA 599 (NC) at [21] in which the Family Advocate appeared *mero motu*.

<sup>214</sup> *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) at [166].

<sup>215</sup> See comments in fn 77 above.

<sup>216</sup> Although the SALRC considered the protection of children caught up in the divorce of their parents in their investigation into the *Review of the Child Care Act*, the Discussion Paper does not mention or outline the circumstances in which full parental responsibility could or should be awarded to non-parents or third parties at divorce: See SALC Discussion Paper on the *Review of the Child Care Act*: Ch 14. See also SALC First Issue Paper on the *Review of the Child Care Act* par 6.4.2 where some of the issues pertaining to children caught up in divorce were initially raised.

<sup>217</sup> 86 of 1997. For the background to the Act, see discussion in 4.2.3.1(b) above.

<sup>218</sup> Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 401.

guardianship ... *or* (own emphasis) the sole custody of the child". While the Act thus accorded the court wide discretionary powers, the mention of the various incidents of parental responsibilities and rights in the alternative seems to suggest that the Act might not have envisaged the courts granting "custody" simultaneously with guardianship to the natural father outside the parameters of an adoption. If this was the case (which is not at all certain since it was never formally questioned or disputed in a court of law), a natural father would still have had to rely on the common law jurisdiction of the High Court to succeed with an order for guardianship *and* "custody" in his favour, even after the promulgation of the Natural Fathers of Children Born out of Wedlock Act.<sup>219</sup>

In terms of section 2(1) of the Act, the High Court could not grant an application by the natural father unless it was satisfied that –

- (a) assigning parental responsibilities and rights<sup>220</sup> to the natural father was in the best interests of the child; and
- (b) the report and the recommendations by the Family Advocate, if the latter had investigated the matter,<sup>221</sup> had been considered.

In determining whether the assignment was in the best interests of the child, the court had to take the following circumstances into account,<sup>222</sup> summarised here for ease of reference:

- (a) The relationship between the natural father and the mother and any history of violence against or abuse between them or the child;

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<sup>219</sup> 86 of 1997.

<sup>220</sup> The Act does not employ the term. S 2(1) refers to the incidences of parental responsibilities and rights, being "access rights", "custody" and "guardianship".

<sup>221</sup> S 2(2) of the Act. Where an application for the adoption of the child was pending such an enquiry was obligatory: S 2(4).

<sup>222</sup> S 2(5).

- (b) the relationship of the child with the natural father and/or the mother or proposed adoptive parents or any other person;
- (c) the effect of separating the child from any of these persons was likely to have on the child;
- (d) the attitude of the child towards the assignment of the parental responsibilities and rights to the father;
- (e) the degree of commitment that the father had shown towards the child, especially his financial contributions towards the mother's expenses incurred in connection with the birth of the child and the maintenance of the child;
- (f) whether the child was born of a customary union or religious marriage not yet recognised as a legal marriage;<sup>223</sup> and
- (g) any other fact that, in the opinion of the court, had to be taken into account.

Assuming that the Act in fact did make provision for awarding guardianship *and* "custody" to a natural father, the question was whether he could convince the court in the light of these factors that it would be in the child's best interests to assign guardianship *and* "custody" to him. In addition to what has already been said about the success of such applications, considered by the High Court in its common law capacity as upper guardian of all minors in 5.2.2.1 above, judicial precedent created after the enactment of the Natural Fathers of Children Born out of Wedlock Act<sup>224</sup>, although none directly on the point, does not seem encouraging.

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<sup>223</sup> The Act was passed before the Recognition of Customary Marriages Act 120 of 1998 came into operation.

<sup>224</sup> 86 of 1997.

In *Jappie v Cooper*<sup>225</sup> the biological father of an extra-marital child brought an application to the High Court in terms of the Natural Fathers of Children Born out of Wedlock Act<sup>226</sup> to define his rights of access and to assign him joint guardianship with the mother of the child. Although the parties had been involved in a relationship for approximately a year, they had separated by the time of the birth of the child due to irreconcilable differences, especially as far as their respective religions were concerned.<sup>227</sup> Access with the applicant had established a fairly close relationship between father and child before it was suddenly terminated ostensibly because "... it no longer served Damian's best interests".<sup>228</sup> In considering whether the father should be awarded *joint guardianship*, the court reiterated the common law position<sup>229</sup> and confirmed the fact that the Natural Fathers of Children Born out of Wedlock<sup>230</sup> did not change this position except for elevating biological fathers into a position *vis-à-vis* their children born of extra-marital relationships.<sup>231</sup> The court also intimated that it was clear from the said Act that it could order joint guardianship as contended for by the applicant provided it was in the best interests of the child taking the factors mentioned in section 2(5) of the Act into consideration.<sup>232</sup>

The court held that the elements of commitment demonstrated by the father over an extended period was an important feature and that –

"[t]here can be no justification, if one has regard to his (the child's) best interests, why his illegitimate status in law, in this matter, should deprive him of the benefit of assistance from both his natural parents".<sup>233</sup>

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<sup>225</sup> [2003] JOL 12375 (W).

<sup>226</sup> 86 of 1997.

<sup>227</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 2.

<sup>228</sup> *Ibid.*

<sup>229</sup> In terms of which "... there is no relationship between a father and his illegitimate child except that he was obliged to maintain those children and the children had a right to claim maintenance from him": *Jappie v Cooper* [2003] JOL 12375 (W) at 5.

<sup>230</sup> 86 of 1997.

<sup>231</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 8.

<sup>232</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 8. See also *I v S* 2000 2 SA 993 (C) at 995H: "The interests of the children must, therefore, be the focus of the enquiry." The court in this case dismissed the natural father's application for "access" in terms of the Act, giving weight to the children's expressed wish not to see their father (at 997H).

<sup>233</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 14.

Insofar as guardianship in respect of the child was concerned the court found that the child "... should have the same benefits as a child born in wedlock".<sup>234</sup>

It is interesting to note that, while the court was content with an award of joint guardianship and "wide rights of access", it was considerably less enthusiastic about the possibility of the father exercising joint "custody" with the mother, insisting:

"The court will not lightly interfere with a custodian's decision in this regard [referring to the personal life of the child]. In the present matter, the religious issues is [*sic*] apparently a major source of friction between the parties. Even were the applicant to be awarded joint guardianship of Damian, the respondent remains the custodian and the applicant would not thereby gain the right to interfere with the respondent's decisions in regard thereto."<sup>235</sup>

While the "fairly limited"<sup>236</sup> practical effects of joint guardianship and wide rights of "access" exercised by the father<sup>237</sup> could thus be tolerated, a "custody" order would, by implication, have given the father the right to "interfere" with the mother's rights, thereby making the possibility of granting an order for joint "custody" *and* guardianship in favour of the father, to say the least, remote. The court deemed it appropriate to order the respondent mother to pay 50% of the father's costs.

In *S v H*,<sup>238</sup> the unmarried mother had without prior notification to the father removed the child from South Africa to Switzerland. At the time of the removal a counterclaim by the father was pending before the High Court for co-guardianship and joint "custody" of the child and the right jointly to determine the child's place of residence. In anticipation of launching an application in Switzerland under the

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<sup>234</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 14. However, contrary to the position of a child born in wedlock as provided for in the (now repealed) Guardianship Act 192 of 1993 (giving parents equal an independent rights of guardianship), the order made *all* decisions arising from the exercise of guardianship (and not only those listed in s 1(2)(a)-(d) of the Guardianship Act 192 of 1993) to be made jointly by the parents of the child: *Jappie v Cooper* [2003] JOL 12375 (W) at 16.

<sup>235</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 12.

<sup>236</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 10.

<sup>237</sup> *Jappie v Cooper* [2003] JOL 12375 (W) at 13.

<sup>238</sup> 2007 3 SA 330 (C).

Hague Convention on the Civil Aspects of International Child Abduction (1980) for the return of the child to him in South Africa, the father approached the High Court for an order declaring that for purposes of article 3(a) of the Convention, the High Court was “an institution or any other body” to which rights of custody of a minor child could be attributed. The court ultimately granted the order concluding that “... where a court was seized with custody proceedings, the pending proceedings could give rise to a right of custody in the court itself”.<sup>239</sup> The case is, however, of no assistance in the present context since the merits of the father’s application were not considered at all. The court refused to develop the common law by taking cognisance of the more favourable position of biological fathers which would be created by the Children’s Act<sup>240</sup> once it came into operation, commenting that to do so would be “... to usurp the powers of the Legislature and to act contrary to the doctrine of the separation of powers, on which the whole constitutional scheme is based”.<sup>241</sup>

In *K v M*,<sup>242</sup> the court once again dismissed an application for “custody” by the natural father, referring not only to the criteria mentioned in section 2(5) of the Natural Fathers of Children Born out of Wedlock Act<sup>243</sup> but also the list of criteria mentioned in *McCall v McCall*<sup>244</sup> as being “... an instructive and valuable guide”.<sup>245</sup> However, Leach J<sup>246</sup> added:

“Each case is of course unique and must be determined by its own particular facts and circumstances. Ultimately, the court is called upon to make a value judgment bearing all relevant considerations in mind, as to what is in the best interest of the child – that being the so-called ‘golden thread’ enshrined in section 28(2) of the Constitution of the Republic of South Africa, 1996 which runs through the fabric of our law relating to children. But the court must take account of all relevant factors, and not approach the matter by elevating any particular factor to a level of

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<sup>239</sup> *S v H* 2007 3 SA 330 (C): Headnote.

<sup>240</sup> 38 of 2005.

<sup>241</sup> *S v H* 2007 3 SA 330 (C) [39].

<sup>242</sup> [2007] 4 All SA 883 (E).

<sup>243</sup> 86 of 1997.

<sup>244</sup> 1994 3 SA 201 (C) at 202.

<sup>245</sup> See *K v M* [2007] 4 All SA 883 (E) at 891d and *Bethell v Bland* 1996 2 SA 194 (W) at 208G.

<sup>246</sup> *K v M* [2007] 4 All SA 883 (E) at 891d-f.



paramount importance, overriding all other considerations. To do so would give rise to a warped consideration of what is in the child's best interest."

The Natural Fathers of Children Born out of Wedlock Act<sup>247</sup> is no longer in force since it was repealed as a whole as from 1 July 2007 in terms of Schedule 4 of the Children's Act.<sup>248</sup> Biological fathers and non-parents or third parties alike may now approach the High Court for parental responsibilities and rights in terms of section 23 and 24 of the Children's Act,<sup>249</sup> as discussed in 5.3 below.

#### **5.2.3.4 Conclusion**

Although the High court has statutory jurisdiction to confer full parental responsibilities and rights on a third party, circumstances have not arisen in which the courts had to consider such a possibility. One can only assume that it would be a rare case indeed that would require a court to make use of its statutory jurisdiction to confer *full* parental responsibilities and rights on a person "for the first time".

### **5.3 ASSIGNED ACQUISITION OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS IN TERMS OF THE CHILDREN'S ACT 38 OF 2005**

#### **5.3.1 Introduction**

Sections 22, 23 and 24 of the Children's Act,<sup>250</sup> which have as yet not come into operation, form the basis of the discussion in this chapter. These sections are quoted in full below for ease of reference:

- (a) Section 22 concerns parental responsibilities and rights agreements and provides:

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<sup>247</sup> 86 of 1997.

<sup>248</sup> 38 of 2005. See GG 30030 dd 29 Jun 2007.

<sup>249</sup> 38 of 2005.

<sup>250</sup> 38 of 2005.

- “(1) Subject to subsection (2), the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with-
- (a) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order; or
  - (b) any other person having an interest in the care, well-being and development of the child
- (2) The mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement upon a person contemplated in subsection (1) those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such an agreement.
- (3) A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.
- (4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if –
- (a) registered with the family advocate; or
  - (b) made an order of the High Court, a divorce court in a divorce matter or the children’s court on application by the parties to the agreement.
- (5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.
- (6) (a) A parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application-
- (i) by a person having parental responsibilities and rights in respect of the child;
  - (ii) by the child, acting with leave of the court; or
  - (iii) in the child’s interest by any other person, acting with leave of the court.
- (b) A parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application-
- (i) by a person having parental responsibilities and rights in respect of the child;
  - (ii) by the child, acting with leave of the court; or
  - (iii) in the child’s interest by any other person, acting with leave of the court.
- (7) Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.”

(b) Section 23 regulates the assignment of contact and care to interested persons by order of court and provides:

- “(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children’s court for an order granting to the applicant, on such conditions as the court may deem necessary-
  - (a) contact with the child; or
  - (b) care of the child.
- (2) When considering an application contemplated in subsection (1), the court must take into account-
  - (a) the best interests of the child;
  - (b) the relationship between the applicant and the child, and any other relevant person and the child;
  - (c) the degree of commitment that the applicant has shown towards the child;
  - (d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
  - (e) any other fact that should, in the opinion of the court, be taken into account.
- (3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court-
  - (a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and
  - (b) may suspend the first-mentioned application on any conditions it may determine.
- (4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.”

(c) Section 24 regulates the assignment of guardianship by order of court and provides:

- “(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.
- (2) When considering an application contemplated in subsection (1), the court must take into account-
  - (a) the best interests of the child;
  - (b) the relationship between the applicant and the child, and any other relevant person and the child; and
  - (c) any other fact that should, in the opinion of the court, be taken into account.

- (3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child’s existing guardian is not suitable to have guardianship in respect of the child.”

### 5.3.2 Overview of relevant provisions

Some general remarks regarding the relevant provisions dealing with the assignment of parental responsibilities and rights (the most important of which are quoted in 5.3.1 above) are deemed necessary by way of introduction to the more detailed discussions that follow in the paragraphs hereafter.

- (a) Assignment of full parental responsibilities and rights only

As far as the acquisition of parental responsibilities and rights is concerned, the Children’s Act<sup>251</sup> makes a distinction between full parental responsibilities and rights and specific parental responsibilities and rights.<sup>252</sup> For reasons already explained,<sup>253</sup> the present discussion will focus on the assignment of full parental responsibilities and rights only. The assignment of full parental responsibilities and rights in terms of the Children’s Act<sup>254</sup> means the simultaneous assignment of the following specific responsibilities and rights in respect of a child to a father<sup>255</sup> or other person for the first time.<sup>256</sup>

- (i) The guardianship of the child;<sup>257</sup> and

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<sup>251</sup> 38 of 2005.

<sup>252</sup> In terms of s 18(1) of the Children’s Act 38 of 2005 a person may have “... either full or specific parental responsibilities and rights in respect of a child”. The assignment of specific parental responsibilities and rights means the assignment of guardianship *or* care *or* contact to a parent or person.

<sup>253</sup> See 3.3 and 5.2.1 above.

<sup>254</sup> 38 of 2005.

<sup>255</sup> A father who has not acquired parental responsibility automatically as envisaged in s 20 or 21 of the Children’s Act 38 of 2005.

<sup>256</sup> See 1.3 above, discussing the scope of the thesis which is limited to a “first” acquisition of parental responsibilities and rights.

<sup>257</sup> A person who acts as guardian must – (a) administer and safeguard the child’s property and property interests; (b) assist or represent the child in administrative, contractual and other legal matters; or (c) give or refuse any consent required by law in respect of the child, including – (i)

(ii) the care of the child<sup>258</sup> which includes maintaining contact with the child.<sup>259</sup>

(b) Persons who can acquire parental responsibilities and rights by assignment

In cases where parental responsibilities and rights are not acquired automatically, a parent or person can only acquire parental responsibilities and rights if it is assigned to that parent or person, either by agreement or by order of court. Since mothers still acquire full parental responsibilities and rights automatically<sup>260</sup> after the enactment of the Children's Act,<sup>261</sup> parental responsibilities and rights, as a general rule,<sup>262</sup> are not "assigned"

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consent to the child's marriage; (ii) consent to the child's adoption; (iii) consent to the child's departure or removal from the Republic; (iv) consent to the child's application for a passport; and consent to the alienation or encumbrance of any immovable property of the child: S 18(3) of the Children's Act 38 of 2005. See also fn 100 in 2.3 above. The responsibility to contribute to the maintenance of the child, despite being included as a component of parental responsibilities and rights (in s 18(2)(d)), is excluded from the ambit of parental responsibilities and rights for present purposes, as explained in 2.3 above.

<sup>258</sup> In terms of s 1(1) of the Children's Act 38 of 2005 "care" in relation to a child, includes – (a) within available means, providing the child with – (i) a suitable place to live; and (ii) living conditions that are conducive to the child's health, well-being and development; (b) safeguarding and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical and moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act; (e) guiding and directing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development; (f) guiding, advising and assisting the child in decisions to be taken by the child, taking into account the child's age, maturity and stage of development; (g) guiding the behaviour of the child in a humane manner; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have and (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child. See also fn 98 in 2.3 above.

<sup>259</sup> "Contact" in relation to a child, means – (a) maintaining a personal relationship with the child; and (b) if the child lives with someone else – (i) communication on a regular basis with the child in person, including – (aa) visiting the child; or (bb) being visited by the child; or (ii) communication on a regular basis with the child in any other manner, including – (aa) through the post; or (bb) by telephone or any other form of electronic communication: Children's Act 38 of 2005 s 1(1) sv "contact". See also fn 99 in 2.3 above. While the "care" of a child would necessarily imply that "contact" is maintained with the child, the reverse is not always true. In the case of a divorce the court may deprive the parents of the "care" of their child in favour of a third party or parties while retaining the parents' specific responsibility and right to communicate with the child in person or in any other way (s 1(1) sv "care" and "contact").

<sup>260</sup> See 5.2.1 above.

<sup>261</sup> 38 of 2005: S 19(1). This will be the case even if the child is conceived by artificial means: S 40(2) of the Children's Act 38 of 2005. See also 4.2.1 and 4.3.2 above.

<sup>262</sup> Except of course if a woman acts as a surrogate mother in terms of an enforceable surrogate motherhood agreement in terms of Ch 19 of the Children's Act 38 of 2005, in which case the

to a mother for the first time. This means that as far as mothers (or her guardian if she is a minor<sup>263</sup>) are concerned, the acquisition of parental responsibilities and rights is not initially subject to the approval or scrutiny by the state.<sup>264</sup> The position of fathers, on the other hand, is different. Although the Children's Act<sup>265</sup> now extends the possibility of acquiring parental responsibilities and rights automatically to unmarried fathers, not all fathers will do so.<sup>266</sup> In cases where he does not acquire parental responsibilities and rights automatically, *full* parental responsibilities and rights can be assigned to the biological *father* of a child for the first time in terms of a parental responsibilities and rights agreement<sup>267</sup> or by order of court.<sup>268</sup> Any other person "... having an interest in the care, well-being and development" of the child may also acquire full parental responsibilities and

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commissioning parent(s) will become the legal parents of the child. Ch 19 of the Children's Act 38 of 2005 regulating surrogate motherhood, has, however, not yet come into operation. Although the commissioning parents will, at least in the case of full surrogacy, acquire parental responsibilities and rights immediately "from the moment of the birth of the child" (s 297(1)(a)), the surrogate motherhood agreement must be confirmed by the High Court (s 292(1)(e)) and is thus subject to the scrutiny and approval of the state. The commissioning parents, therefore, do not acquire parental responsibilities and rights "automatically". Where the surrogate motherhood agreement has not been confirmed by the court, the woman who gave birth to the child will be considered the legal mother of the child with full parental responsibilities and rights (s 297(2)). In the case of a partial surrogate motherhood agreement the surrogate mother may terminate the agreement in which case she will acquire parental responsibility of the child (s 298(1) and 299(a)): See discussion in Ch 6 below.

<sup>263</sup> S 19(2) of the Children's Act 38 of 2005, discussed in 4.2.2 above.

<sup>264</sup> This includes the automatic acquisition of parental responsibilities and rights by the lesbian spouse of the birth-giving mother (or second "mother" of the child).

<sup>265</sup> 38 of 2005.

<sup>266</sup> A biological father will acquire parental responsibility automatically if he is or was married to the mother (s 20), or if not, complies with the requirements in terms of s 21: See 4.2.3.2 above.

<sup>267</sup> S 22(1)(a).

<sup>268</sup> Ss 23(1) and 24(1). In terms of these sections the biological father would qualify as a person "... having an interest in the care, well-being and development" of the child. The father can, of course also adopt the child but this option is for reasons outlined in 5.2.1 above, considered in 7.2.3 below.

rights by agreement<sup>269</sup> or order of court.<sup>270</sup>

(c) State assigned acquisition

In all cases where parental responsibilities and rights are assigned, either by agreement or by order of court, the assignment is subject to the approval or scrutiny by the state as being in the best interests of the child. Where the assignment of the parental responsibilities and rights takes place by *agreement*, the state is represented by either the Family Advocate<sup>271</sup> or the courts.<sup>272</sup> The parental responsibilities and rights agreement can only be registered by the Family Advocate or be made an order of court if it has been confirmed as being in the best interests of the child. Where full parental responsibilities and rights are assigned by agreement, it will necessarily include the assignment of guardianship. In terms of section 22(7) only the High Court has jurisdiction to "... confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child".<sup>273</sup>

If parental responsibilities and rights are assigned by *order of court*, the state is represented by the High Court, a divorce court in divorce matters or the children's court.<sup>274</sup> Where *contact and care* are assigned in terms of section 23, any of these courts will have jurisdiction<sup>275</sup> but only the High

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<sup>269</sup> S 22(1)(b).

<sup>270</sup> Ss 23(1) and 24(1).

<sup>271</sup> S 22(4)(a). The Family Advocate is appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987: S 1 of the Children's Act 38 of 2005 *sv* "family advocate".

<sup>272</sup> The High Court, a divorce court in divorce matters or the children's court: S 22(4)(b).

<sup>273</sup> S 22(7).

<sup>274</sup> S 23(1).

<sup>275</sup> However, the children's court may not deal with any proceeding arising out of the application of the Administration Amendment Act 9 of 1929, the Divorce Act 70 of 1979, the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998 and the Recognition of Customary Marriages Act 120 of 1998, insofar as these Acts relate to children: S 1(4) of the Children's Act 38 of 2005. While the phrase "any proceeding arising out of" may possibly be subject to interpretation, the provision would *prima facie* seem to exclude the jurisdiction of the children's court in applications for the variation or suspension of care or contact orders made upon divorce. If this is the case, it means that an unmarried father can approach the children's court for care or contact (or a variation of a previous order in this regard) but not a divorced father, who will have to approach the divorce court that originally made the order (bar the exceptions mentioned in s 8(2) of the Divorce Act 70 of

Court may in terms of section 24(1) consider an application relating to the assignment of *guardianship* for a child.<sup>276</sup> Since only the assignment of full parental responsibilities and rights (*ie* guardianship, care and contact) by order of court is considered here, the High Court will consequently be the only court with jurisdiction to grant such an order.<sup>277</sup> However, in terms of section 45(3) of the Children's Act<sup>278</sup> jurisdiction is conferred on both the "High Courts and Divorce Courts" in matters pertaining to, *inter alia*, "... the guardianship of a child"<sup>279</sup> and the "... assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child".<sup>280</sup> Since section 24 makes no mention of divorce courts it would mean that while the divorce courts would be able to assign guardianship to a parent or parents or even a third party in divorce proceedings in terms of section 6 of the Divorce Act,<sup>281</sup> divorce courts would generally not have jurisdiction to hear an application for guardianship by a person "... having an interest in the care, well-being and development" of the child in terms of section 24. The origin and nature of the divorce courts will thus be discussed later in the context of the assignment of full parental responsibilities and rights in terms of the Divorce Act.<sup>282</sup>

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1979 giving another High Court or divorce court jurisdiction to hear the matter). It is debatable whether the ensuing discrimination against divorced fathers can be considered justifiable on a constitutional basis.

<sup>276</sup> This interpretation is deemed to be correct despite the provisions of s 29(1) in terms of which an application in terms of section 24 may be brought before "... the High Court, a divorce court in divorce matters or the children's court". The words "... as the case may be" directly following the list of courts that would have jurisdiction, in my opinion, restricts the interpretation of s 29(1) to the limitation imposed on the jurisdiction of these courts by s 24(1). See Heaton Ch 3 in *Commentary on Children's Act* 3-19 who in my view therefore correctly argues (although for a different reason), that s 29(1) does not extend the jurisdiction in an application for the assignment of guardianship.

<sup>277</sup> Heading of s 24. S 24(1) expressly bestows exclusive jurisdiction on the High Court to hear applications relating to the assignment of guardianship. Where an application for the adoption of a child is to be considered, the children's court, and not the High Court will be the appropriate forum, despite the fact that the adoption order will also confer guardianship on the adoptive parents: S 239(1). The High Court may, however, rescind an adoption order: S 243(1). While the High Court does not have jurisdiction to grant adoption orders in terms of the Children's Act 38 of 2005, it will ostensibly still retain its common law jurisdiction in so-called "meritorious" cases: See *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) [29] and [56] discussed in 5.2.2.2 above.

<sup>278</sup> 38 of 2005.

<sup>279</sup> S 45(3)(a).

<sup>280</sup> S 45(3)(b).

<sup>281</sup> 70 of 1979.

<sup>282</sup> 70 of 1979.



Section 45(3) of the Children's Act<sup>283</sup> confers jurisdiction with regard to the guardianship of a child on the High Court and the divorce courts "... pending the establishment of family courts by an Act of Parliament". In view of the persistent failure to establish family courts in South Africa despite various efforts to that effect,<sup>284</sup> it seems highly unlikely that the condition upon which exclusive jurisdiction is conferred on the High Court in terms of section 24 and the High Courts and divorce courts in terms of section 45(3) will materialise any time soon. This means that the ostensibly temporary conferral of jurisdiction on the High Court *in lieu* of a family court may very likely remain unchanged for the foreseeable future.<sup>285</sup>

(d) Best interests of the child

While it is evident that full parental responsibilities and rights will only be assigned to a parent or person if the court considers it to be in the best interests of the child<sup>286</sup> concerned, the factors to be considered in reaching

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<sup>283</sup> 38 of 2005.

<sup>284</sup> These efforts included (a) a commission of inquiry headed by Hoexter J (Hoexter Commission of 1983) that came to the conclusion that there was a pressing need for such specialised courts, (b) the promulgation of "an Act of Parliament", *ie* the Magistrates' Courts Amendment Act 120 of 1993 providing for the establishment of such courts, (c) the launching of a Pilot Project Family Courts to implement the provisions of that Act almost 10 years ago, (d) a second commission of inquiry (Hoexter Commission of 1997) that confirmed the need for family courts in its report published in 1997; and (e) Draft legislation proposing the creation of child and family courts on district and regional level that was excised from the final version of the Children's Act 38 of 2005: See Ch 6 of Draft Children's Bill [B – 2002] attached as Annexure "C" to the SALC's Report on the *Review of the Child Care Act*. For a discussion of the scope of these provisions and the reasons for their excision, see Gallinetti Ch 4 in *Commentary on Children's Act* 4-3 to 4-7.

<sup>285</sup> In the absence of a family court system with both judicial and counselling components, Van Heerden & Clark 1995 *SALJ* 140 at 150-151 propose an extension of the sphere of operation of the Family Advocates and Family Counsellors (appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987) to cover the provision of counselling services to parents in disputes involving children and even make such counselling obligatory before the parties have recourse to the courts, as is the case in Australia. A similar solution was suggested by Bekker & Van Zyl 2003 *THR-HR* 146 at 151.

<sup>286</sup> See Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 502-3. With reference to the best interests standard (called the "welfare test") found in the Children Acts of Scotland, England and Australia, Norrie 2002 *SALJ* 623 at 625 attacks the test as being "paternalistic", "entirely subjective" and "entirely meaningless on its own terms", commenting (at 632) that "[e]ven the re-emergence of parental rights is being presented as necessary for children's welfare" and concluding (at 633) that "[t]he rhetoric of child law is that the child's interests are paramount; the reality is that paramountcy belongs to parents. Child law is parents' law". See also DeWitt Gregory 1999 *FLQ* 833 at 840 referred to in 1.4.3 fn 129 and other sources referred to in 5.2.2.2(a) fn 62.

this conclusion deserves closer attention. One of the stated objects of the Children's Act<sup>287</sup> in terms of section 2 of the Act is to give effect to the constitutional rights of children including, *inter alia*, the right that the best interests of the child be given paramountcy in every matter concerning the child as reflected in section 28(2) of the Constitution. Section 29(4)<sup>288</sup> provides in general that the High Court in considering an application for the assignment of parental responsibilities and rights<sup>289</sup> should be guided by the general principles set out in Chapter 2<sup>290</sup> of the Children's Act<sup>291</sup> "... to the extent that those principles are applicable to the matter before it". In terms of the general principles underlying the Children's Act,<sup>292</sup> the standard of the child's best interests must be applied in all matters concerning the care, protection and well-being of the child.<sup>293</sup> Similar to the international trend adopted in this regard,<sup>294</sup> section 7(1) now provides a so-called "check-list" of factors for courts applying the standard of the best interests of the child.<sup>295</sup> While the considerably more extensive list of factors included in both the Children's Act<sup>296</sup> and the Australian Family Law Act 1975 (Cth) purportedly aims to give content to the best interests of the

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<sup>287</sup> 38 of 2005: S 2(b)(iv).

<sup>288</sup> S 29 has not yet come into operation.

<sup>289</sup> In terms ss 22, 23 and/or 24 or an application for the termination, extension, suspension or restriction of parental responsibility in terms of s 28.

<sup>290</sup> Apart from s 12, dealing with social, cultural and religious practices, the whole of Ch 2 (ss 6 to 17) of the Children's Act 38 of 2005 came into operation on 1 Jul 2007: GG 30030 dd 29 Jun 2007.

<sup>291</sup> 38 of 2005.

<sup>292</sup> 38 of 2005.

<sup>293</sup> S 9.

<sup>294</sup> See s 1(3) of the English Children Act 1989 and s 60CC(2) and (3) of the Australian Family Law Act 1975 (Cth). According to SALC Discussion Paper on the *Review of the Child Care Act* par 5.3 similar guidelines have been adopted in some African countries such as Uganda (Children Act 1996).

<sup>295</sup> *McCall v McCall* 1994 3 SA 201 (C) 205B-G was the first SA case in which such a checklist of factors was provided: See Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 552-553. The Child Care Act 74 of 1983 (in s 18(4) setting out the factors to be considered before making an adoption order) and the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (s 2(5) listing the factors to be taken into consideration when deciding whether to grant the natural father parental responsibilities and rights, as discussed in 5.2.3.3) contained "checklists of sorts": Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 532 fn 141.

<sup>296</sup> 38 of 2005.

child standard, the checklist in the English Children Act 1989 rather aims to “... structure judicial discretion”.<sup>297</sup> According to Lowe & Douglas<sup>298</sup> –

“... the object is not to redefine what is meant by ‘welfare’<sup>299</sup> but to provide a means by which greater homogeneity can be achieved in exercising the court’s undoubtedly wide discretion in determining what is best for the child. The inestimable advantage of a list is that it enables everyone from the judge to the litigant ... to focus on the same issues at the same time”.

It is also interesting to note that while consideration of the wishes and feelings of the child is included as a factor in both the English and Australian checklists,<sup>300</sup> the right of a child to participate in “... any matter concerning that child” (and thus presumably also in deciding whether parental responsibilities and rights should be assigned to a parent or other person), is regulated separately in section 10 of the South African Children’s Act.<sup>301</sup> In view of the SALRC’s earlier recommendations to give special consideration to the interests of grandparents,<sup>302</sup> it is also deemed of some significance that the checklist in terms of the Australian Family Law Act 1975 (Cth) expressly includes as a consideration the likely effect on the child of any separation from either of his or her parents and any other child or other person “... including any grandparent or other relative of the child” with whom the child has been living.<sup>303</sup>

Where full parental responsibilities and rights are assigned in terms of a parental responsibilities and rights agreement, the High Court must be

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<sup>297</sup> Bainham *Children–The Modern Law* 41. For a comparison between s 7 and the open-ended list of factors proposed in *McCall v McCall* 1994 3 SA 201 (C) 205B-G, see Davel Ch 2 in *Commentary on Children’s Act 2-8*. According to Davel Ch 2 in *Commentary on Children’s Act 2-8* judicial officers can and should use their inherent discretion to consider other factors not mentioned in the section.

<sup>298</sup> Lowe & Douglas *Bromley’s Family Law* 468.

<sup>299</sup> The precursor of the expression “best interests”: Dickey *Family Law* 291.

<sup>300</sup> In s 1(3)(a) of the English Children Act 1989 and s 60CC(3)(a) of the Australian Family Law Act 1975 (Cth), respectively.

<sup>301</sup> 38 of 2005.

<sup>302</sup> SALC Report on *Access to Minor Children by Interested Persons*.

<sup>303</sup> Family Law Act 1975 (Cth): S 60CC(3)(d)(ii).

satisfied that the agreement is in the best interests of the child.<sup>304</sup> Since the assignment of the parental responsibilities and rights is based on consensus between the parties, the exercise of the court's discretion in this regard could probably be compared to that exercised by a divorce court in relation to the approval of a divorce settlement pertaining to the children of the spouses.<sup>305</sup> Section 22 provides no further guidelines in this regard and it is, therefore, to be assumed that the factors mentioned in section 7(1) should find application.

In the assignment of full parental responsibilities and rights by order of court to a person "... having an interest in the care, well-being and development" of the child, the provisions of both section 23 (assignment of contact and care) and section 24 (assignment of guardianship) will have to be applied. The sections are similar to the extent that when the courts consider an application in terms of either section, but presumably also both sections simultaneously when an application for the assignment of care *and* guardianship is considered, the court must take into account –

- (i) the best interests of the child; and
- (ii) any other fact that should, in the opinion of the court, be taken into account.

In both sections 23 and 24 the possible hurdle foreseen by the *numerus clausus*-list in terms of section 7<sup>306</sup> is thus overcome by opening it up to include the consideration of any relevant factor. In addition to factors (i) and (ii) mentioned above, sections 23 and 24, however, also include other factors that have to be taken into account in assigning contact and care, on the one hand, and guardianship on the other.

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<sup>304</sup> S 22(5). In the case where the agreement only purports to assign the contact and/or care of the child, the Family Advocate will have to satisfy himself or herself on this score: S 22(5) read with s 22(7).

<sup>305</sup> See s 6(1)(a) of the Divorce Act 70 of 1979.

<sup>306</sup> Alluded to by Davel Ch 2 in *Commentary on Children's Act 2-8*.

The relationship between the applicant and the child, and any other relevant person and the child is expressly mentioned in both sections 23 and 24 as such an additional factor.<sup>307</sup> A similar consideration is mentioned in section 7(1)(a). Why this factor should have been reiterated in sections 23 and 24 when it already forms part of the factors that have to be considered in determining the best interests of the child in terms of section 7, is not entirely clear. Although this factor could simply have been inserted *ex abundante cautela*, the express restating thereof may be justified in terms of its particular significance when determining whether a parent or other significant person should be awarded care, contact or guardianship or, in the present context, both care (including contact) *and* guardianship of a child.

In the assignment of contact and care in terms of section 23 the court must also consider –

- (i) the degree of commitment that the applicant has shown towards the child,<sup>308</sup> and
- (ii) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.<sup>309</sup>

These factors are not included in section 24. As far as these factors are concerned it is, first of all, reasonable to assume (since it is not expressly stated in the provision) that they have to be considered in addition to those factors mentioned in section 7. While consideration of the degree of commitment shown by the applicant is not expressly mentioned in section 7(1), it could perhaps be seen as implied in the section 7-factor referring to "... the attitude of the parents, or any specific parent, towards – (i) the child;

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<sup>307</sup> S 23(2)(b) and s 24(2)(b).

<sup>308</sup> S 23(2)(c).

<sup>309</sup> S 23(2)(d).

and (ii) the exercise of parental responsibilities and rights in respect of the child”.<sup>310</sup> But since the latter provision is only concerned with the attitude of the parents or one of the parents of the child, it would not have been applicable where the applicant (in terms of section 23) is not a parent of the child. This could partly explain why it was deemed necessary to include this factor in section 23 – to make it applicable to all applicants, including non-parent applicants. Another reason might be the fact that the provision needed to be more specific with regard to the type of attitude that would be required to grant an order for contact or care, *ie* a special commitment to the child.

In considering whether the assignment of *contact or care* is in the best interests of the child the court must, as already indicated, also consider the financial commitment shown by the applicant, not only towards the child but also towards the mother with regard to “... expenses in connection with the birth”.<sup>311</sup> If the biological father of the child wants to be assigned the contact and care (in addition to guardianship) of his child, it would be reasonable to expect from such a father, who is legally liable to maintain his child, to have made some financial contribution in the past. However, if the applicant is a non-parent, such as a stepparent or uncle with no such duty, financial contributions as mentioned in the provision might be considered particularly significant inasmuch as it would be indicative of the extent of the commitment towards the child.

If in the course of the proceedings to assign the contact or care to an applicant, the court is informed that an application for the adoption of the child has been made by another applicant, the Family Advocate must advise the court as to what would be in the best interests of the child.<sup>312</sup> Since the provision is not more specific on the issue, it is reasonable to

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<sup>310</sup> S 7(1)(b).

<sup>311</sup> S 23(2)(d).

<sup>312</sup> S 23(3)(a). The Family Advocate must furnish the court with a report and recommendations in this regard and the court may then suspend the application for contact and/or care on conditions it may determine: S 23(3)(b).

assume that the factors mentioned in section 7 should, where relevant, be considered for this purpose.

In summary it could thus be said that while section 7 provides a general guideline for purposes of determining the best interests of the child, other factors should, if specifically mentioned and may, if considered relevant, be considered for purposes of assigning parental responsibilities and rights to a parent or other person. While the need to give specific content to the best interests-standard is understandable and laudable, it is evident that doing so in absolute terms would be wholly at odds with the very essence of the standard as being adaptable depending on the circumstances of a particular case.<sup>313</sup>

- (e) Assignment of guardianship distinguished from assignment of care and contact

A distinction between the assignment of care and contact on the one hand (in section 23) and the assignment of guardianship on the other (in section 24) became necessary as a result of the policy decision to retain the exclusive jurisdiction of the High Court in matters relating to the guardianship of children.<sup>314</sup> The differential treatment of care and contact,

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<sup>313</sup> Bainham *Children—The Modern Law* 42, furthermore, contends that “... while checklists or statutory criteria may serve the limited function of trying to ensure that all relevant factors are taken into account, they cannot affect the fundamentally indeterminate nature of concepts like ‘welfare’, ‘best interests’, ‘significant harm’, ‘children in need’, and so on”.

<sup>314</sup> The Draft Children’s Bill [B – 2002] attached as Annexure “C” to the SALC Report on the *Review of the Child Care Act* originally envisaged the creation of a child and family court with jurisdiction to adjudicate, *inter alia*, “... any matter involving (a) the care or guardianship of, or contact with, a child; (b) the assignment, exercise, restriction, suspension or termination of parental responsibilities and rights. Cl 35(1) of the same Bill simply provided for the assignment of “... full or any specific parental responsibilities and rights” in respect of a child that would “... not affect the parental responsibilities and rights that any other person may have in respect of the same child” (cl 35(4)). What was originally one section became two: See cl 23 of the Children’s Bill [B – 2003] and cls 23 and 24 of the Children’s Bill [B70D – 2003]. The clause that originally regulated the *effect* of the assignment of care, contact and/or guardianship on a person was retained in the section concerning the assignment of care and contact but not in the section concerning the assignment of guardianship. The provision allowing for a *combined application* in the case of care and contact was only inserted at a later stage (cl 28(2) of the Children’s Bill [B70D – 2003]). According to Gallinetti Ch 4 in *Commentary on Children’s Act* 4-6 to 4-7, the decision to retain the exclusive jurisdiction of the High Court over certain matters, especially those dealing

on the one hand, and guardianship on the other, has given rise to a number of puzzling provisions and anomalies:

- (i) In terms of section 23(4) the granting of *contact and care* to one person does not affect the parental responsibilities and rights that any other person may have in respect of the same child<sup>315</sup> but a similar provision is not found in relation to the granting of guardianship in section 24.

Does that mean that when *guardianship* is assigned to one person it will affect the existing parental responsibilities and rights held by another parent or person? In this regard section 24(3) prescribes that if a child already has a guardian, the person applying for the assignment of guardianship must give reasons why the child's existing guardian is not suitable to have guardianship. Heaton<sup>316</sup> proposes two alternative interpretations of this provision:

- If the court assigns guardianship to the applicant the existing applicant "loses" guardianship:

This interpretation is, according to Heaton,<sup>317</sup> strengthened by two other provisions, *ie* section 23(4) mentioned above and section 29(2),<sup>318</sup> in terms of which an application for guardianship must contain reasons as to why the applicant is

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with guardianship, was prompted mainly by two considerations: (a) The risk of establishing a new court structure that had not been altogether successful on an experimental level shown by the Family Court Pilot Project (see discussion in (h) below); and (b) the enormous financial implications of creating a new court structure brought about, *inter alia*, by staff training requirements, new appointments of judicial and administrative staff and the provision of legal representation at state expense.

<sup>315</sup> In the context of divorce Bonthuys 2006 *Stell LR* 482 at 490 argues that the cumulative effect of ss 23 and 28 "... seems to be that, unless a parent applies for the termination of the other parent's rights to care and contact, an award of parental rights at divorce would not generally terminate the other parent's rights. In other words, the Bill [now the Children's Act 38 of 2005] seems to contemplate a default position of joint custody after divorce".

<sup>316</sup> Heaton Ch 3 in *Commentary on Children's Act* 3-19.

<sup>317</sup> *Ibid.*

<sup>318</sup> S 29 is not yet in operation.



not applying for the adoption of the child. The latter provision in Heaton's<sup>319</sup> view –

“... suggests that, insofar as guardianship is concerned, the consequences of adoption and an order in terms of s 24 are similar, if not the same. Adoption normally terminates the guardianship any person exercised prior to the adoption and confers it upon the adoptive parent. Section 29(2) therefore seems to lend further support – albeit oblique – to the argument that assignment of guardianship in terms of s 24 terminates the existing guardian's guardianship”.

This proposed interpretation by Heaton is problematic insofar as it equates the effect of an order assigning guardianship to a person with an adoption order which confers full parental responsibilities and rights on the adoptive parents.<sup>320</sup> The SALRC<sup>321</sup> deemed the provision necessary to prevent an applicant from misusing the procedure for obtaining guardianship to circumvent the rigorous adoption procedure. This fear seems to be largely unfounded. It is only when the applicants apply for sole guardianship *and* sole care that the problem could arise.<sup>322</sup> Be that as it may, the purpose of the provision is evidently to ensure that the applicant only wants to acquire guardianship and not anything more. Seen in this light the provision does not attempt to equate the application for guardianship and the application for the adoption of the child – the provision instead requires the applicant to distinguish between the two applications insofar as he has to justify why he is “only” applying for the assignment of guardianship. The contention that the existing guardian

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<sup>319</sup> Heaton Ch 3 in *Commentary on Children's Act* 3-19.

<sup>320</sup> The effect of the orders are distinguishable as already pointed out in fn 77 above and fully discussed in 7.1.4 below.

<sup>321</sup> SALC Report on the *Review of the Child Care Act* par 7.4.2.

<sup>322</sup> See *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC), discussed in 5.2.2.2 above.

automatically ceases to be the guardian of the child when another guardian is appointed can also not be accepted. When an application for, *inter alia*, the termination of parental responsibilities and rights is made in terms of section 28(1)(a),<sup>323</sup> the court must take into account<sup>324</sup> –

- the best interests of the child;
- the relationship between the child and the person whose parental responsibilities and rights are being challenged;
- the degree of commitment that the person has shown toward the child; and
- any other factor deemed relevant by the court.<sup>325</sup>

The automatic termination of the existing guardian's guardianship without due regard to these factors would thus be in direct conflict with the provisions of section 28(4).

- The applicant acquires equal, concurrent guardianship.<sup>326</sup>

In terms of this interpretation the applicant only has to show that the existing guardian is unsuitable to such a degree that the court should assign an additional guardian to the child. However, Heaton<sup>327</sup> admits this makes the purpose for inclusion of section 29(2) (requiring reasons why application is not made for adoption) unclear. It is my submission that an application for the assignment of guardianship can take two

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<sup>323</sup> S 28 is not yet in operation.

<sup>324</sup> S 28(4) of the Children's Act 38 of 2005.

<sup>325</sup> Insofar as these factors would determine whether guardianship should be terminated they would also indicate when an existing guardian could be said not to be suitable to have guardianship and thus also answer the second issue raised by Heaton Ch 3 in *Commentary on Children's Act 3-19*.

<sup>326</sup> Heaton Ch 3 in *Commentary on Children's Act 3-19*.

<sup>327</sup> *Ibid.*

forms: An application for co-guardianship and an application to substitute the existing guardian. In the latter case the application for assignment will have to be combined with an application to terminate the existing guardian's guardianship.<sup>328</sup>

- (ii) A person (including, presumably, the biological father of a child) who applies for the assignment of *contact and care* may, in terms of section 28(2), combine that application with an application for an order –
- suspending or even terminating any or all parental responsibilities and rights which a specific person has in respect of a child;<sup>329</sup> or
  - extending or circumscribing the exercise by that person of any or all parental responsibilities and rights that person has in respect of a child.<sup>330</sup>

The said applications can thus presumably only be combined with an application for *care and contact* and not an application for *guardianship*. The possible inference is that a person applying for *guardianship* cannot at the same time combine his or her application with an application to suspend, terminate or circumscribe any or all of the parental responsibilities and rights that another person has in respect of the same child. If the application is for the suspension, termination or circumscription of contact and care, it is possible that the applicant would have to make two separate applications – the first one to the children's court that has jurisdiction in respect of matters relating to the care and contact of a child and the second

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<sup>328</sup> See the discussion of combined applications in (ii) followed by (f) below.

<sup>329</sup> S 28(1)(a) read with s 28(2) of the Children's Act 38 of 2005.

<sup>330</sup> S 28(1)(b) read with s 28(2) of the Children's Act 38 of 2005.

application to the High Court for the assignment of guardianship. The legislator could, however, clearly not have intended an applicant applying for the termination of the existing guardian's guardianship and the assignment of guardianship to himself or herself to make two separate applications. It would, in my opinion, be better to read section 28(2) as an express amplification of the jurisdiction of the children's courts rather than a limitation of the High Court's jurisdiction. While section 45(1) empowers children's courts to adjudicate matters involving the care of or contact with a child, section 28(2) amplifies this jurisdiction by allowing children's courts to hear an application for the termination, extension, suspension or restriction of care or contact combined with an application for the assignment of care or contact. Whether the children's court would be empowered to hear an application for the termination of "all" parental responsibilities, *ie* including guardianship, as implied by section 28(2) is, however, arguable given the exclusive jurisdiction of the High Court in this regard. Being creatures of statute, the children's courts' jurisdiction is limited to those matters circumscribed by the Children's Act<sup>331</sup> – hence the necessity for an express provision in this regard. No such provision was needed in respect of the High Courts because apart from the High Court's inherent jurisdiction<sup>332</sup> to hear combined applications of the type envisaged by section 28(2), section 45(3)(b) expressly confers exclusive jurisdiction on the High Courts and the Divorce Courts to hear matters relating to "... the assignment, exercise extension, restriction, suspension or termination of guardianship in respect of a

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<sup>331</sup> 38 of 2005.

<sup>332</sup> The Children's Act 38 of 2005 expressly acknowledges and in no way limits the High Court's inherent jurisdiction as upper guardian of all children: S 45(4) of the Children's Act 38 of 2005. The precedents discussed in 5.2.2 above are thus presumably as relevant as before or, one may also say as "irrelevant" as before, since the courts have reiterated on numerous occasions that as far as determining the best interests of the child is concerned each case should be considered on its own merits.

child”.<sup>333</sup> It would probably have been less confusing if the provision contained in section 28(2) had been inserted in section 45(1) dealing with the jurisdiction of children’s courts, in the same way that section 45(3) has done in respect of the jurisdiction of the High Courts and the Divorce Courts.

(f) Combined applications

If the interpretation suggested in (e)(ii) above is accepted as correct it would mean that an application to extend, restrict, suspend or terminate any or all of the parental responsibilities and rights vested in a person (presumably including a parent) in terms of section 28(1) of the Children’s Act<sup>334</sup> may in express terms be combined with an application for the assignment of contact and care to another person<sup>335</sup> but may also be combined with an application for the assignment of guardianship. The question is whether an application for the suspension or termination of *all* parental responsibilities and rights vested in a parent can be combined with an application for care (including contact) *and* guardianship to be awarded to another person? It is submitted that where an application is made for the assignment of care *and* guardianship in respect of a child simultaneously with an application for the termination of all parental responsibilities and rights vested in the parents of that same child, the court should regard the application as being tantamount to applying for the adoption of the child and hence refer it to the children’s court for consideration. Support for this view is found in the provisions of section 29(2) in terms of which an application in terms of section 24 for guardianship must contain the reasons why the applicant is not applying for the adoption of the child. While an application for guardianship *and* care, coupled with an application for the termination of such parental responsibilities and rights would thus probably not be granted in terms of sections 23 and 24, the suggested interpretation would arguably

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<sup>333</sup> S 45(3)(b).

<sup>334</sup> 38 of 2005.

<sup>335</sup> In terms of s 28(2) of the Children’s Act 38 of 2005.

allow the court to effectively award sole guardianship or sole care to the applicant – if guardianship or care is vested in the applicant and the guardianship or care vested in the co-holder or co-holders of such guardianship or care is terminated at the same time, the effect would be similar in nature to an award of sole guardianship or sole care.

(g) Court proceedings

In terms of section 29,<sup>336</sup> the following provisions apply to all court proceedings in terms of sections 22(4)(b),<sup>337</sup> 23 or 24 that are discussed in this section:

- (i) The area within which the child is ordinarily resident determines the jurisdiction of the relevant court;<sup>338</sup>
- (ii) in granting the order applied for, the court has a discretion to grant the application unconditionally or on such conditions as it may determine, or may refuse the application;<sup>339</sup>
- (iii) the court may order that for purposes of the hearing<sup>340</sup> –
  - a report and recommendations of a Family Advocate, a social worker or other suitably qualified person be submitted to the court;
  - a matter specified by the court be investigated by a person designated by the court;

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<sup>336</sup> S 29 is also not yet in operation.

<sup>337</sup> Where the parties to a parental responsibilities and rights agreement apply to the High Court, divorce court or children's court to have their agreement made an order of court.

<sup>338</sup> S 29(1).

<sup>339</sup> S 29(3). The provision concludes with, what to my mind appears to be a completely superfluous, qualification "... but may be granted only if it is in the best interests of the child".

<sup>340</sup> S 29(5)(a) to (d).

- a person specified by the court appear before it to give or produce evidence; or
  - the applicant or any party opposing the application pay the costs of any such investigation or appearance.
- (iv) The court may also<sup>341</sup> –
- appoint a legal practitioner to represent the child at the court proceedings; and
  - order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.
- (v) If it appears to a court<sup>342</sup> in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation.<sup>343</sup>
- (h) Jurisdiction in terms of the Matrimonial Affairs Act 37 of 1953 and the Divorce Act 70 of 1979

The provisions of the Children's Act<sup>344</sup> do not alter or abolish the High Court's express jurisdiction in terms of the Matrimonial Affairs Act<sup>345</sup> or the Divorce Act.<sup>346</sup> The provisions of the respective Acts thus remain applicable as outlined and discussed in 5.2.3.1 and 5.2.3.2 above.

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<sup>341</sup> S 29(6)(a) and (b).

<sup>342</sup> S 29(7).

<sup>343</sup> In terms of s 155(2).

<sup>344</sup> 38 of 2005.

<sup>345</sup> 37 of 1953.

<sup>346</sup> 70 of 1979.

However, as promised earlier,<sup>347</sup> it is at this stage necessary to say something more about the courts that have jurisdiction to assign full parental responsibilities and rights to a person in the course of divorce proceedings in terms of the Divorce Act.<sup>348</sup> A “court” for purposes of the Divorce Act<sup>349</sup> includes both the High Court and a divorce court established under section 10 of the Administration Amendment Act<sup>350</sup>. “Divorce court” for purposes of the Children’s Act<sup>351</sup> is defined in the exact same terms. Although the divorce courts under the Administration Amendment Act<sup>352</sup> were originally established exclusively for black people, these courts were made accessible to all races in 1997.<sup>353</sup> At the recommendation of a Task Team appointed by the Minister of Justice,<sup>354</sup> some of these deracialised divorce courts became part of a Family Courts Pilot Project aimed at initiating the establishment of a family court structure in South Africa as initially envisaged by the Hoexter Commission<sup>355</sup> and later provided for in the Magistrates’ Courts Amendment Act,<sup>356</sup> which had never been put into operation. To this end the designated Pilot Project venues<sup>357</sup> were meant to become Family Court Centres where all matters relating to the family could be dealt with in a holistic manner. The idea was to incorporate the deracialised divorce courts into an existing court structure comprising the maintenance court, the children’s court, the court dealing with domestic violence, and the courts dealing with inquiries in terms of the Mental Health

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<sup>347</sup> See 5.3.2(c) above.

<sup>348</sup> 70 of 1979.

<sup>349</sup> 70 of 1979: S 1 *sv* “court”

<sup>350</sup> 9 of 1929.

<sup>351</sup> 38 of 2005: S 1(1) *sv* “divorce court”.

<sup>352</sup> 9 of 1929.

<sup>353</sup> Divorce Courts Amendment Act 65 of 1997: S 1(a).

<sup>354</sup> The Family Court Task Team was appointed in Feb 1997. For a detailed discussion of the events leading up to the launching of the Pilot Project and the scope of the task team’s assignment, see Burman *et al* 2000 *SALJ* 111 at 113. See also Goldblatt 1997 *SAJHR* 373 at 387ff; Van Heerden “The family courts”: Paper presented at RAU Seminar (1999); Whittle 1998 *De Rebus* 10. See also discussion by Van Heerden J in *Narodien v Andrews* 2002 3 SA 500 (C) at 512J-513G.

<sup>355</sup> Hoexter Commission of 1983. For a discussion of the first investigation and recommendations by the Hoexter commission regarding the establishment of family courts in SA, see Bosman & Van Zyl Ch 2 in Robinson *Law of Children and Young Persons* 66-68.

<sup>356</sup> 120 of 1993.

<sup>357</sup> Established in Cape Town, Port Elizabeth, Durban, Johannesburg and Lebowakgoma, as a rural pilot court.



Act.<sup>358</sup> Observations of the Cape Town divorce court between January and August 1999 revealed that the court was being used extensively by a racial diversity of clients of all socio-economic backgrounds, both represented and unrepresented.<sup>359</sup> *Burman et al*<sup>360</sup> nevertheless concluded that the Pilot Project Family Courts was, amongst other shortcomings, a failure insofar as the integration of the separate courts into a composite unit was concerned.<sup>361</sup> For purposes of the present discussion the significance of these divorce courts, however, lies in the fact that as lower courts, albeit on a regional magistrate's level, they exercise concurrent jurisdiction with the High Court<sup>362</sup> in divorce actions.<sup>363</sup> However, once the Jurisdiction of Regional Courts Amendment Act<sup>364</sup> comes into operation, all regional magistrate's courts will assume jurisdiction in divorce cases<sup>365</sup> and each court established under section 10 of the Administration Amendment Act<sup>366</sup> will become a court of the regional division designated by the Minister in respect of that court.<sup>367</sup>

(i) Informal assignment

Even after the enactment of the Children's Act,<sup>368</sup> a parent with parental responsibilities and rights can still not confer those responsibilities and rights or any of its incidents upon the other parent lacking such responsibilities and rights or a third party on a permanent basis by mere

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<sup>358</sup> 18 of 1973, now the Mental Health Care Act 17 of 2002.

<sup>359</sup> *Burman et al* 2000 SALJ 111 at 122.

<sup>360</sup> See *Burman et al* 2000 SALJ 111 at 114.

<sup>361</sup> They found that the divorce court component continued to operate as a separate entity without any of the counselling, mediation and support services envisaged by its progenitors: *Burman et al* 2000 SALJ 111 at 117.

<sup>362</sup> Administration Amendment Act 9 of 1929: Ss 10(1)(b) and 3(b)(ii).

<sup>363</sup> Defined in s 1 of the Divorce Act 70 of 1979 as "... an action by which a decree of divorce or other relief in connection therewith is applied for".

<sup>364</sup> 31 of 2008, which was assented to on 1 November 2008 and will become operational at a date to be proclaimed: See GG 31579 of 5 Nov 2008.

<sup>365</sup> The Act will amend the definition of "court" for purposes of the Divorce Act 70 of 1979 to include any High Court or a court for the regional division contemplated in section 29(1B) of the Magistrates' Courts Act 32 of 1944 which has jurisdiction with respect to a divorce action.

<sup>366</sup> 9 of 1929.

<sup>367</sup> S 9(2)(a) of the Jurisdiction of Regional Courts Amendment Act 31 of 2008.

<sup>368</sup> 38 of 2005.

private agreement between them.<sup>369</sup> If a parent or person who does not have parental responsibilities and rights in respect of the child *exercises* an incidence or full parental responsibilities and rights on behalf of another parent or person, the former is acting *in loco parentis*. Such a parent or person does not in this way acquire parental responsibilities and rights in the strict sense of the word but acquires certain responsibilities towards the child, even without an agreement to that effect.<sup>370</sup> The rights and duties acquired by these carers are discussed separately in Chapter 8.

(j) Equal status for all applicants

While it was previously necessary to make a distinction between the assignment of full parental responsibilities and rights to the natural father of a child born out of wedlock and the assignment of such responsibilities and rights to a person other than the child's parent, the Children's Act<sup>371</sup> warrants no such distinction. As far as the assignment of parental responsibilities and rights is concerned, the Act treats all applicants the same.<sup>372</sup> The only difference is that because some unmarried fathers may now acquire full parental responsibilities and rights automatically,<sup>373</sup> such fathers would no longer – as they were obliged to do before the enactment of the Children's Act<sup>374</sup> – have to approach the High Court for this purpose.

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<sup>369</sup> *South African Orphanage v De Villiers* 1914 CPD 555 at 557; *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) 120; Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 322 fn 30 and accompanying text. A parental responsibilities and rights agreement must be sanctioned by the court or the Family Advocate to take effect: S 22(4) of the Children's Act 38 of 2005.

<sup>370</sup> S 32 of the Children's Act 38 of 2005.

<sup>371</sup> 38 of 2005.

<sup>372</sup> As recommended by the SALC Discussion Paper on the *Review of the Child Care Act* Par 8.5.3.4. See ss 22(5), 23(1) and (2) and 24(1) and (2) of the Children's Act 38 of 2005. South African law is thus different from English law in this regard. In England, applicants (other than parents, guardians and stepparents) do not have an automatic right to apply for a residence or contact order but must obtain the leave of the court or the consent of the parents to make such an application (ss 10(1)(a), 10(5)(b) and 10(5)(c) of the English Children Act 1989). For a comparative review of this issue, see SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.2.

<sup>373</sup> In terms of either s 20 or 21, discussed in 4.2.3.2(b) and (c) above.

<sup>374</sup> 38 of 2005. See 5.2.1 above.

(k) Different ways of assignment

In terms of the Children's Act<sup>375</sup> a person can be assigned *full* parental responsibilities and rights in two ways:

- (i) A parental responsibilities and rights agreement; and
- (ii) an order by the High Court.<sup>376</sup>

Since the principles and conditions applicable to the assignment of parental responsibilities and rights vary according to the specific mode of assignment used, the two ways will be discussed separately.

### **5.3.3 Assignment of full parental responsibilities and rights in terms of a parental responsibilities and rights agreement**

#### **5.3.3.1 Background**

The acquisition of parental responsibilities and rights by agreement has its origins in English law<sup>377</sup> in terms of which it constitutes one of the ways in which a father, who is not married to the mother of the child, can acquire parental "responsibility".<sup>378</sup> Before the latest amendments to the English Children Act 1989, a "parental responsibility agreement" was the only way in which unmarried

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<sup>375</sup> 38 of 2005.

<sup>376</sup> Excluding of course the assignment of full parental responsibilities and rights in terms of surrogate motherhood agreement and by means of an adoption order as discussed separately below in Ch 6 and Ch 7 respectively.

<sup>377</sup> See SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.2.2.

<sup>378</sup> The other ways are in terms of a "parental responsibility order" or a "residence order" (but then a separate parental responsibility order must be made), upon taking office as formally appointed guardian of the child and, most recently, by jointly registering the birth of the child with the mother: Amendment to the Children Act 1989 brought about by the Adoption and Children Act 2002, which came into operation on 1 Dec 2003. See discussion of "Acquisition of parental responsibility by the unmarried father" in Lowe & Douglas *Bromley's Family Law* 409-422; Bainham *Children—The Modern Law* 201. English law employs the term "responsibility" instead of "responsibilities and rights" to encapsulate the concepts of what was previously known as guardianship and "custody". See also 2.2.2.2(a) above.

parents could share parental “responsibility” without the necessity of going to court. While the idea of parental responsibility agreements was originally rejected on the basis that it “... had the potential for eroding the institution of marriage by ‘blurring the legal distinction between marriage and other relationships’”,<sup>379</sup> the English Law Commission<sup>380</sup> was ultimately persuaded of the benefits of such agreements as a means of “... allowing ‘meritorious’ fathers in stable relationships to acquire parental status while excluding ‘unmeritorious’ men from parental participation”.<sup>381</sup> In terms of English law, the agreement only takes effect if it complies with certain formalities, *ie* if it is made in the prescribed form and recorded in the prescribed manner.<sup>382</sup> The court’s function is a purely administrative one and the court has no power to question the desirability of the agreement for the welfare or best interests of the child.<sup>383</sup> According to Bainham<sup>384</sup> the parental responsibility agreement was primarily designed for unmarried couples in stable relationships who wished to bring the legal situation in line with the factual position in which they were effectively raising a child together. Another consideration was limiting applications for parental “responsibility” orders to the courts. However, misgivings existed at the outset regarding the extent of the use of these agreements in practice. Some of these included the following:<sup>385</sup>

- (a) Parents living together might see no advantage in formalising their arrangements, especially since some people choose to cohabit precisely because of their dislike of the formalities which attach to marriage.
- (b) People might also be unaware of the father’s legal position *vis-à-vis* his child or be unaware of the provision for such agreements.

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<sup>379</sup> Bainham *Children—The Modern Law* 205.

<sup>380</sup> Law Com Report No 172 *Guardianship and Custody* (1988) par 2.18, as referred to by Bainham *Children—The Modern Law* 205 fn 6.

<sup>381</sup> Bainham *Children—The Modern Law* 205.

<sup>382</sup> S 4(2) of the Children Act 1989. Both the prescribed form and manner of recording are provided for by the Parental Responsibility Agreement Regulations 1991 (as amended): See Lowe & Douglas *Bromley’s Family Law* 411.

<sup>383</sup> Bainham *Children—The Modern Law* 206.

<sup>384</sup> Bainham *Children—The Modern Law* 206.

<sup>385</sup> Discussed by Bainham *Children—The Modern Law* 206.

- (c) The mother may not be sufficiently confident about the relationship, or the father's parenting role, that she would wish to dilute her own legal control by sharing parental responsibility.
- (d) The danger of undue pressure being exerted upon mothers to make such agreements extra-judicially.<sup>386</sup>

The reservations about parental responsibility agreements proved to be warranted – after an initial surge of interest led to the registration of over 5,000 agreements in 1994, by 1996 there were only around 3,000 such agreements in the United Kingdom.<sup>387</sup> Even taken together with parental responsibility orders issued by the court, the total of 9,000 agreements and orders made in 1996 accounted for only a fraction of the 232,663 births out of wedlock in England and Wales in that year.<sup>388</sup> Despite the slight increase in later years (7514 in 1999), the overwhelming majority of unmarried fathers evidently did not acquire parental responsibility in this manner. Allowing fathers to acquire shared parental responsibility by jointly registering the child with the mother would seem to have had a far greater effect on the legal position of fathers in the United Kingdom.<sup>389</sup>

It is important to note that, in terms of English law, a parental responsibility agreement confers parental “responsibility” upon the unmarried father. This means that the unmarried father acquires the responsibilities and rights similar to those included in the exercise of guardianship in South African terms,<sup>390</sup> as well as –

- (a) the right to appoint a guardian for the child;

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<sup>386</sup> See Lowe & Douglas *Bromley's Family Law* 412.

<sup>387</sup> Lowe & Douglas *Bromley's Family Law* 413.

<sup>388</sup> Bainham *Children—The Modern Law* 207.

<sup>389</sup> Bainham *Children—The Modern Law* 201.

<sup>390</sup> In terms of s 18(3) of the Children's Act 38 of 2005. These include the responsibility and the right to consent to the child's marriage, adoption, departure or removal from the country and application for a passport: Lowe & Douglas *Bromley's Family Law* 420.

- (b) being able to give valid consent to the child’s medical treatment and to require full details from the child’s medical practitioner;
- (c) being empowered to express a preference as to the school at which he wishes the child’s education to be provided; and
- (d) being considered to have “rights of custody” for the purposes of the Hague Convention on International Child Abduction.<sup>391</sup>

According to Lowe & Douglas<sup>392</sup> the mother, on the other hand “... loses relatively little” by entering into the agreement. As long as the child is living with her the father has no right to interfere with the day-to-day management of the child’s life. What the mother undoubtedly loses is “... the *unilateral* right to remove the child from the UK and, more controversially it may be that she needs to consult the father about a change of school, or surname”.<sup>393</sup>

In Australia each parent of a child who has not attained the age of 18 years has full parental “responsibility”.<sup>394</sup> In contrast to the position in England, there was thus presumably no need for the law to create the possibility of conferring parental “responsibility” on an *unmarried father*. The Australian Family Law Act 1975 (Cth) only makes provision for the private *re-allocation* of parental “powers and responsibilities” by agreement – called “parenting plans”.<sup>395</sup> These private written agreements have since 2004 no binding force. Parenting plans simply set out the arrangements that parents have come to concerning their parental responsibilities.<sup>396</sup> A parenting plan may, however, be made in favour of a non-parent as well as a parent.<sup>397</sup> Although a parenting plan must always be made

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<sup>391</sup> The Convention has been incorporated into SA domestic law by s 275 of the Children’s Act 38 2005. The Convention itself can be found in Schedule 2 of the Children’s Act 38 of 2005. The “right to custody” became an issue in *S v H* 2007 3 SA 330 (C), discussed in 5.2.3.3 above.

<sup>392</sup> Lowe & Douglas *Bromley’s Family Law* 421.

<sup>393</sup> Lowe & Douglas *Bromley’s Family Law* 421. She also loses the right to appoint a guardian to take effect upon her death, unless she has a so-called “residence order” in her favour.

<sup>394</sup> Family Law Act 1975 (Cth): S 61(C)(1).

<sup>395</sup> Family Law Act 1975 (Cth): S 63C. See in general Dickey *Family Law* 260-263.

<sup>396</sup> Dickey *Family Law* 260.

<sup>397</sup> Family Law Act 1975 (Cth): S 63C(2A).

between the parents of a child, others may thus be parties to the plan. In Australia parental “responsibility” can be conferred on a parent or another person only by means of a formal “parenting order” made by the family court.<sup>398</sup> When it is making a parenting order, the court must have regard to the most recent parenting plan, if any, that the child’s parents have entered into, if doing so would be in the best interests of the child.<sup>399</sup> A parenting order is, furthermore, ordinarily taken to include a provision that the order is subject to contrary provisions in a *subsequent* parenting plan that is entered into by the child’s parents and any other person to whom the parenting order applies.<sup>400</sup> This, according to Dickey,<sup>401</sup> “... enables the child’s parents in effect to vary the order by private agreement between themselves and any other person to whom the order applies”.<sup>402</sup>

### **5.3.3.2 Parental responsibilities and rights agreements in terms of the Children’s Act 38 of 2005: Content and commentary**

In terms of section 22(1) of the Children’s Act,<sup>403</sup> not only the mother of the child but any “... other person who has parental responsibilities and rights in respect of a child”, may enter into an agreement “... providing for the acquisition of such parental responsibilities and rights ... as set out in the agreement”. The mother or other person may enter into such an agreement not only with the biological father

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<sup>398</sup> The nature and effect of these orders will be discussed under 5.3.4 below.

<sup>399</sup> Family Law Act 1975 (Cth): S 65DAB.

<sup>400</sup> Family Law Act 1975 (Cth): S 64D(1).

<sup>401</sup> Dickey *Family Law* 263.

<sup>402</sup> The court may, however, in exceptional cases include a provision in the parenting order that the parenting order may only be varied by a subsequent parenting order and not by a parenting plan: Dickey *Family Law* 263. The aim of parenting plans entered into in terms of ss 33 and 34 of the Children’s Act 38 of 2005 is to determine the exercise of co-holders’ parental responsibilities and rights. Parenting plans in SA, as in Australia, cannot confer parental responsibilities and rights on a person who is not a co-holder of such responsibilities and rights. A person can thus not *acquire* parental responsibilities and rights in terms of a parenting plan in SA. For a discussion of parenting plans in terms of the Children’s Act 38 of 2005, see Heaton Ch 3 in *Commentary on Children’s Act 3-32 to 3-37*.

<sup>403</sup> 38 of 2005.

of the child,<sup>404</sup> but with “... any other person having an interest in the care, well-being and development of the child.”<sup>405</sup>

It is interesting to note that the legislator deviated from a recommendation by the SALRC, supporting the position in England, that no person other than the father of the child should be able to acquire parental responsibilities and rights by concluding an agreement to this effect with the mother of the child.<sup>406</sup> The SALRC apparently came to this conclusion in view of the abuse of the then existing guardianship provisions that made it possible to circumvent adoption requirements.<sup>407</sup> The reason for opening up the possibility of such agreements to non-parents can perhaps be found in the fact that the Children’s Act<sup>408</sup> has now effectively closed these loopholes which allowed the abuse of the guardianship provisions: Section 24(3) requires a person applying for guardianship in respect of a child who already has a guardian to motivate why the child’s existing guardian is not suitable to have guardianship, section 29(2) obligates a person applying for the guardianship of a child to provide reasons why the applicant is not applying for the adoption of the child, while an application for guardianship by a non-South African citizen will henceforth be regarded as an inter-country adoption in terms of section 25.

Section 30(3) expressly prohibits a co-holder of parental responsibilities and rights to “.... surrender or transfer those responsibilities and rights to another co-holder or any other person”. A co-holder of parental responsibilities and rights may, however, in terms of the same section “... by agreement with that other co-holder

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<sup>404</sup> A father who has not acquired parental responsibilities and rights either automatically in terms of ss 20 or 21 or by assignment in terms of a court order: S 22(1)(a). It is interesting to note that the SALRC originally thought that incestuous/rapist fathers, for example, should not be able to avail them of this option: SALC Report on the *Review of the Child Care Act* par 7.4. The Children’s Act 38 of 2005 has evidently not acted upon this recommendation. Even if it is argued that the biological father as a “parent” cannot enter into such an agreement with the mother in terms of s 22(1)(a), he would surely be competent to do so in terms of s 22(1)(b) as “... any other person having an interest in the care, well-being and development of the child”.

<sup>405</sup> S 22(1)(b).

<sup>406</sup> SALC Report on the *Review of the Child Care Act* par 7.5.

<sup>407</sup> *Ibid.*

<sup>408</sup> 38 of 2005.



or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf”.<sup>409</sup>

According to the Children’s Act<sup>410</sup> an agreement as envisaged by section 30(3) does not, therefore, divest a co-holder of his or her parental responsibilities and rights and the co-holder remains competent and liable to exercise those responsibilities and rights.<sup>411</sup> A mother may thus, for example, allow the father of the child to exercise guardianship *with* her if the High Court confirms their parental responsibilities and rights agreement to that effect, but may not *transfer* guardianship to the father by such an agreement.<sup>412</sup> A transfer or surrender of parental responsibilities and rights to someone else in effect amounts to a termination of such responsibilities and rights vested in the person wishing to transfer it and can only be brought about by the amendment or termination of the parental responsibilities and rights agreement<sup>413</sup> or an order of court.<sup>414</sup>

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<sup>409</sup> S 30(3). These provisions were taken over almost in identical form from the English Children Act 1989: S 2(9).

<sup>410</sup> 38 of 2005.

<sup>411</sup> S 30(4). According to Erasmus J in the case of *J v J* 2008 6 SA 30 (C) at [32] this provision “... is in line with the common law principle that the award of custody [in the context of divorce] to (for example) the mother of a child does not diminish the natural guardianship of the father”. In the words of Van den Heever JA in *Edelstein v Edelstein NO and Others* 1952 3 SA 1 (AD) at 10C: “An order awarding custody of a minor to the mother merely suspends in the interests of the minor certain of the incidents of parental authority and does so for the rest *sine diminutione patriae potestatis*”. The provision has its equivalent in s 2(11) of the English Children Act 1989.

<sup>412</sup> Unless, of course, the mother and the father agree that the father should exercise such guardianship on behalf of the mother in terms of s 30(3).

<sup>413</sup> S 22(6). Where the agreement relates to the guardianship of the child the agreement must have been made an order of the High Court who alone will have jurisdiction to amend or terminate the said agreement: S 22(6)(b) read with s 22(7).

<sup>414</sup> S 28(1). Where an application for the suspension or termination of care *and* guardianship is contemplated only the High Court will have jurisdiction in the matter: S 45(3)(b) read with s 28(1)(a). An adoption order granted by the children’s court also terminates all parental responsibilities and rights any person had in respect of the child immediately before the adoption: S 242(1)(a). In *Ex parte Van Dam* 1973 2 SA 182 (W) the mother and father of an extra-marital child entered into an agreement in terms whereof, *inter alia*, the mother was to have “custody” and the father the guardianship of the child. The father approached the court to have the agreement as a whole made an order of court. Although the court (at 185C) was adamant in stating “[i]t is plainly not competent for a natural guardian to renounce guardianship in favour of a third person at will”, the court (at 185D) was prepared to grant the order under the “special circumstances” and the fact that “... it will be in the best interests of the child that the applicant as its father and *de facto* guardian hitherto should continue to occupy a position of parental authority”. Since the agreement in the *Van Dam* case proposed to *transfer* guardianship to the father, it would not have qualified as a parental responsibilities and rights agreement in terms of s 22 of the Children’s Act 38 of 2005.

It could thus be argued, on the one hand, that in cases where the parental responsibilities and rights agreement seeks to confer or bestow guardianship on another party, the latter will be in the same onerous position as a person applying for the guardianship of a child. As such the relevant court<sup>415</sup> would then have to scrutinise the agreement with the same circumspection as exercised by the High Court in considering an application for guardianship. The Family Advocate or relevant court would then have to ensure that the agreement is not being used to side-step an adoption procedure. This would be true especially where the proposed agreement intends to bestow, as envisaged here, guardianship as well as contact and care on the father or other person. On the other hand, it could be argued that since a parental responsibilities and rights agreement is not intended to *transfer* parental responsibilities and rights from one person to another as in the case of adoption, but merely intended to create a *sharing* of parental responsibilities and rights (or incidence of such responsibilities and rights), the considerations in terms of section 24(3) and 29(2) should not apply. In terms of this viewpoint a mother would, for example, be able to bestow care and guardianship on the biological father without the High Court questioning her or the father's motives for doing so or her competency to exercise guardianship. In view of the fact that such agreements are based on consensus between the parents or parties and must, in addition be confirmed by the High Court as being in the best interests of the child, the latter viewpoint is in my opinion the better one.

The mother or other person may only confer those parental responsibilities and rights which she or he has in respect of the child at the time of the agreement upon the father or other person.<sup>416</sup> This provision clearly accords with the well-known principle *nemo plus juris ad alium transferre potest quam ipse habet*.<sup>417</sup> A

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<sup>415</sup> Or the Family Advocate where care and/or contact is conferred in terms of s 23.

<sup>416</sup> S 22(2).

<sup>417</sup> No one may transfer to another a greater right than he has himself, referred to in *Hirschowitz v Moolman and Others* 1983 4 SA 1 (T) at 8D; *Vrystaat Lewendehawe Koöperasie Bpk v De Klerk en Zinman NNO en 'n Ander* 1989 1 SA 632 (O) at 634I; *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK en Andere* 2002 3 SA 653 (NC) at 673D.

minor parent automatically vested only with the *care* of a child will thus not be competent to confer *guardianship* on another in terms of a parental responsibilities and rights agreement.<sup>418</sup>

As in the case of English law, the parental agreement must comply with certain formal requirements to become effective, namely:

- (a) The agreement must be in the prescribed format and contain the prescribed particulars,<sup>419</sup> and
- (b) registered with the Family Advocate or made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.<sup>420</sup>

As already pointed out above, the High Court may only confirm the parental responsibilities and rights agreement if it is satisfied that the agreement is in the best interests of the child.<sup>421</sup> The position is thus markedly different from that found in English law where the court merely acts as a rubberstamp for the parents' agreement.<sup>422</sup> The underlying approach manifested in the English

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<sup>418</sup> As far as the position in terms of English law is concerned, Lowe & Douglas *Bromley's Family Law* 412 contend "... there is no reason to suppose that valid agreements cannot be made by parents under the age of 18". These authors are of the opinion (in fn 354) that an analogy should not be drawn with capacity to make contracts: "[P]arental responsibility agreements are probably best regarded as being agreements *sui generis* and not strict contracts, since it is difficult to see what consideration is given by the father when making the agreement."

<sup>419</sup> S 22(3). In terms of the Consolidated Draft Regulations to the Children's Act 38 of 2005 published in Feb 2008 for comment, the agreement must substantially be in the form of Form 5, be in writing, signed by and include identifying details of the mother and any other person or persons having parental responsibility and the biological father or any other person or persons upon whom parental responsibility is being conferred as well as the child concerned (reg 10(1)). Reg 11(1) prescribes the content of such agreements, which should include particulars relating to the following aspects – the care of, contact with, financial responsibility for, and incidental matters related to the upbringing of the child and must be specified on Form 5 or attached to the application for registration as prescribed and outlined in reg 11(2). Where the parental responsibilities and rights agreement is to be confirmed by the High Court, "... such agreement may contain particulars relating to the guardianship of the child" (reg 11(3)).

<sup>420</sup> S 22(4)(a) and (b).

<sup>421</sup> S 22(5).

<sup>422</sup> Lowe & Douglas *Bromley's Family Law* 413: The applicants must "... take their completed agreement form to a local family proceedings court or county court or to the Principal Registry, where a justice of the peace, a justices' clerk or court officer authorised by a judge to administer

Children Act 1989 is a preference for less state intervention in the privacy of the family – parents are trusted to take decisions for and about their children without undue scrutiny by a court.<sup>423</sup> The fact that a parental responsibilities and rights agreement in terms of South African law may be concluded by *any person* holding parental responsibilities and rights in respect of a child with *any significant other person* and not, as in English law only between the mother and father of the child, may justify the more restrictive approach adopted in the Children’s Act.<sup>424</sup>

The following persons may apply for the amendment or termination of a parental responsibilities and rights agreement relating to the guardianship of the child (in addition to the care and contact of the child) that was made an order of court –

- (a) a person having parental responsibilities and rights in respect of the child;
- (b) the child, acting with leave of the court; or
- (c) in the child’s interest, by any other person, acting with leave of the court.<sup>425</sup>

### **5.3.4 Assignment of full parental responsibilities and rights by order of the High Court**

#### **5.3.4.1 South Africa**

In addition to what has been said in 5.3.1 above, it seems logical to conclude that the High Court will in general only be approached for full parental responsibilities and rights if a parent or person failed to acquire parental responsibilities and rights in any of the other ways provided for in the Children’s Act.<sup>426</sup> An application for

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oaths will witness the parents’ signature and sign the certificate of the witness.” The duly completed form, together with two copies must then be taken or posted to the Principal Registry.

<sup>423</sup> Lowe & Douglas *Bromley’s Family Law* 10.

<sup>424</sup> 38 of 2005.

<sup>425</sup> S 22(6)(b)(i)-(iii). The same persons are entitled to apply for the amendment or termination of an agreement relating to the care of and/or contact with the child that was registered by the Family Advocate.

<sup>426</sup> 38 of 2005.

full parental responsibilities and rights by order of court could thus be considered a last option for some parents<sup>427</sup> or other persons,<sup>428</sup> as far as the acquisition of parental responsibilities and rights is concerned. If this is true, the provisions of the Children's Act<sup>429</sup> would seem to exhibit a logical sequence insofar as the acquisition of parental responsibilities and rights is concerned – section 19, 20 and 21, making provision for the *automatic* acquisition of full parental responsibilities and rights by the biological parents of the child at birth, section 22 creating the possibility for a parent or other person to acquire full or specific parental responsibilities and rights by *agreement* and sections 23 and 24 allowing a parent or any other interested person to approach the *court* for full or specific parental responsibilities and rights.

It is interesting to note that the provisions, in the first place, allow for an application by “any person” to be assigned parental responsibilities and rights. “Person” in this context would presumably include a parent as well<sup>430</sup> but not a child or a court as originally proposed.<sup>431</sup> Also in accordance with the SALRC's initial proposals, no differentiation is made in the manner in which the different categories of applicants (either biological parents or non-biological caregivers) may acquire parental responsibilities and rights by order of court.<sup>432</sup> An unmarried

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<sup>427</sup> If the parent has not acquired parental responsibilities and rights automatically (in terms of ss 19, 20 or 21) and has not been able to acquire parental responsibilities and rights by means of a parental responsibilities and rights agreement (in terms of s 22), an application in terms of ss 23 and 24 would be the last option.

<sup>428</sup> Any person having an interest in the welfare and development of the child may acquire parental responsibilities and rights by agreement with the mother of the child or other person holding such parental responsibilities and rights (in terms of s 22(1)(b)). If the mother or other co-holder of parental responsibilities and rights is not willing to bestow parental responsibilities and rights on the interested person, an application in terms of ss 23 and 24 would be the last option.

<sup>429</sup> 38 of 2005.

<sup>430</sup> While “parent” would not generally include any “person” unless otherwise specified as in s 7(2), “person”, as a non-specific term, would in my opinion include a “parent”. In the first round of statutory proposals “any person” expressly included the father of the child: See SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.4.

<sup>431</sup> The SALC recommended at this early stage that the child himself or herself should have the right to apply for an order conferring parental responsibility on a particular parent or person and that a court should have the jurisdiction *mero motu* in the course of any proceedings before that court, to make such an order: See SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.4; SALC Report on the *Review of the Child Care Act* par 7.4.

<sup>432</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.4; SALC Report on the *Review of the Child Care Act* par 7.4. Cf, however, Zaal & Pillay 2005 *SALJ* 300 at 306-307 who

father, stepparent, grandparent or any other *de facto* caregiver or “social” parent would thus have to follow the same procedure for making the application to the appropriate forum.<sup>433</sup> This approach is in accordance with the constitutionally entrenched requirement of giving paramountcy to the best interests of the child.<sup>434</sup> It also confirmed the view expounded by the Appellate Division in *B v S*,<sup>435</sup> that the decision whether to bestow parental responsibilities and rights on an applicant requires an investigation into the best interests of the child and that –

“... there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial.”<sup>436</sup>

The ultimate decision will thus, at least in principle, have to be made with reference to the circumstances of each individual case depending on the merits of the application, regardless of the status of the applicant.

However, the following circumstances may conceivably have a negative impact on an application for the assignment of full parental responsibilities and rights:

- (a) The fact that the holder of parental responsibilities and rights refused to bestow parental responsibilities and rights on the applicant by means of a parental responsibilities and rights agreement. The reason or reasons for refusing to conclude a parental responsibilities and rights agreement with an applicant could be relevant in terms of sections 23 and 24 as “... any other fact that should, in the opinion of the court, be taken into account” when considering the application for full parental responsibilities and rights.

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propose the insertion of a provision placing members of the extended family (such as grandparents) in a stronger position, at least as far as contact rights are concerned.

<sup>433</sup> Although a foster parent may be assigned parental responsibilities and rights over and above those normally necessary for a foster parent in cases where the child has been abandoned or orphaned or family reunification is not in the best interests of the child (s 188(3) of the Children’s Amendment Act 41 of 2007), it would seem as though a foster parent could still not be assigned guardianship in respect of the child. The reason for this is that s 188 only allows for such orders to be made by the children’s court – a lower court that does not have jurisdiction in matters relating to guardianship (s 45(3) read with ss 46 and 48 of the Children’s Act 38 of 2005).

<sup>434</sup> S 28(2) of the Constitution.

<sup>435</sup> 1995 3 SA 571 (A), discussed in 4.2.3.1(b) above.

<sup>436</sup> *B v S* 1995 3 SA 571 (A) 584l.

(b) Opposition to the order being granted – especially where a significant relationship has not developed between the child and the applicant. In this regard the case of *In re: Minor Child: Miane Kemp*,<sup>437</sup> may serve as an example. In this case the paternal grandparents of a child, born to their deceased son and his girlfriend, applied for an order allowing them extensive contact with their granddaughter. Although Seriti J felt that there was a need for the applicants to keep in contact with their granddaughter, he considered the contact applied for inappropriate for the very young age of the child and anticipated that allowing the applicants extensive contact would be “... very cumbersome on the respondent, her mother and grandmother”,<sup>438</sup> would interfere and “undermine the parental responsibilities and rights of the guardian of the child”.<sup>439</sup> The tense and very limited relationship between the applicants and the young mother was also considered a factor militating against the granting of the order.<sup>440</sup> The court’s conclusion is, in my view, justified given the particular (albeit very tragic) circumstances of the case. As far as the child was concerned, appropriate contact with his grandparents was considered important and encouraged insofar as it would not interfere with the young mother’s (and her guardian’s) responsibilities and rights. No significant relationship had developed either between the mother and the grandparents nor the child and the grandparents. However much one could sympathise with the grandparents in their desire to nurture a relationship with their deceased son’s biological child, the extensive contact applied for could not be considered appropriate. The mother had never refused the grandparents contact with their granddaughter. The court was thus not in principle opposed to the application for contact but rather the type of contact applied

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<sup>437</sup> Unreported Case 11871/08 (T).

<sup>438</sup> At 11 of the transcript of the judgment.

<sup>439</sup> At 12.

<sup>440</sup> At 11.

for which was considered inappropriate for the age of the child in question.<sup>441</sup>

#### **5.3.4.2 England**

Unlike South African, Scottish and Australian law,<sup>442</sup> English law does not vest in the courts a general power to make parental “responsibility” orders. In terms of the English Children Act 1989 only unmarried fathers may apply to court for a “parental responsibility order”.<sup>443</sup> Parental “responsibility” acquired by the father in this way has the same effect as “responsibility” acquired by a “parental responsibility agreement”, as explained in 5.3.3.1 above. A “residence order” in terms of section 8 of the Children Act 1989 will not confer full parental “responsibility” on the father as explained below. While the English Children Act 1989 originally made no special provision for stepparents to acquire parental “responsibility”, the reforms introduced by the Adoption and Children Act 2002 now make provision for a stepparent who is married<sup>444</sup> to or is a civil partner<sup>445</sup> of the parent who has parental “responsibility” of the child<sup>446</sup> to obtain parental “responsibility” either by agreement or court order.<sup>447</sup> The intention of the provision is –

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<sup>441</sup> The courts have in the past persistently failed to confirm or extend the rights of grandparents where parents have opposed the application: See *Short v Naisby* 1955 3 SA 572 (N); *Townsend-Turner v Morrow* 2004 2 SA 32 (C) and *Kleingeld v Heunis and Another* 2007 5 SA 559 (T). Even in the US, where state statutes conferring visitation rights for grandparents are commonplace, the courts have nevertheless preferred the rights of parents to decide with whom the child is to associate: Dey & Wasoff 2006 *IJLPF* 225 at 238. In Scotland the government argued that “... it would be a recipe for confusion and disputes if a range of family member could acquire PRRs [parental responsibility and rights] by some automatic or agreement procedure”: Dey & Wasoff 2006 *IJLPF* 225 at 239. See also Kaganas 2007 *CFLQ* 17 who concludes: “It appears still to be the case that in official discourse, there exists a hierarchy of relationships with children, with parents outranking grandparents.” Kaganas (at 41) predicts that the consequence of the greater recognition of grandparents will be “... to increase pressure on caretaking mothers to agree to contact, not only in cases involving fathers, but those involving grandparents too”.

<sup>442</sup> See s 11(2) of the Children (Scotland) Act 1995 and s 64B of the Australian Family Law Act 1975 (Cth).

<sup>443</sup> Children Act 1989: S 4(1)(a).

<sup>444</sup> Cohabitation is not sufficient.

<sup>445</sup> In terms of the Civil Partnership Act 2004: S 75(2).

<sup>446</sup> See Lowe & Douglas *Bromley's Family Law* 422.

<sup>447</sup> Children Act 1989: S 4A(1). See Dey & Wasoff 2006 *IJLPF* 225 at 233 for a discussion of the position in Scotland where stepparents can apply for parental “responsibility” in terms of s 11 of the Children (Scotland) Act 1995.



“... to provide an alternative to adoption where a step-parent wishes to acquire parental responsibility for his or her step-child. It has the advantage of not removing parental responsibility from the other birth parent and does not legally separate the child from membership of the family of the other birth parent”.<sup>448</sup>

Other individuals may also acquire parental “responsibility” in terms of the Children Act 1989 in any of the following ways:

- (a) A person who takes the office of guardian;<sup>449</sup>
- (b) a person in whose favour a residence order has been made,<sup>450</sup> but only for the duration of the order and not for the consent to an adoption or the appointment of a guardian;<sup>451</sup>
- (c) persons who are appointed as special guardians who may exercise parental “responsibility” to the exclusion of anybody else apart from another special guardian.<sup>452</sup> Special guardians can also appoint another guardian and have a right to consent or refuse to consent to an adoption (although not to the exclusion of the parent’s right to do so);<sup>453</sup>

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<sup>448</sup> Extract from the Explanatory Notes to the Adoption and Children Act 2002: Lowe & Douglas *Bromley’s Family Law* 423. These authors, however, find it ironic that cohabitating partners are not included in the ambit of the provision since the 2002 Act permits joint adoptions by couples whether or not they are married.

<sup>449</sup> Children Act 1989: S 5(6). The term “guardian” in English law is confined to those non-parents formally appointed to take the place of the deceased parent or parents: Lowe & Douglas *Bromley’s Family Law* 439.

<sup>450</sup> Children Act 1989: S 12(2). A residence order is an order in terms of s 8 of the Children Act 1989 and means “... an order settling the arrangements to be made as to the person with whom the child is to live”. Residence orders are not primarily regarded as a means of conferring parental “responsibility” on a parent or other person. “But even where the making of a residence order does have the effect of conferring parental responsibility, as it does when made in favour of those who do not already have it, it is normally inappropriate to make such an order *solely* for that purpose”: Lowe & Douglas *Bromley’s Family Law* 515. Other orders that can be made in terms of s 8 include a contact order, a prohibited steps order and a specific issues order.

<sup>451</sup> Children Act 1989: S 12(3)(b) and (c).

<sup>452</sup> Children Act 1989: S 14C(1).

<sup>453</sup> Lowe & Douglas *Bromley’s Family Law* 425.

- (d) persons who are granted an emergency protection order who will only be entitled to take "... such action in meeting his responsibility for the child as is reasonably required to safeguard or promote the welfare of the child";<sup>454</sup> and
- (e) local authorities to the same extent as those persons mentioned in (d) above.

### **5.3.4.3 Australia**

In Australia "parenting orders" substituted guardianship and "custody" orders. A parenting order in terms of the Australian Family Law Act 1975 (Cth) can deal with any aspect of parental "responsibility" for a child<sup>455</sup> and can allocate parental "responsibility" to a parent or other person or between parents or other people.<sup>456</sup> From 1996 to 2006, there were four categories of parenting orders that an Australian family court could grant<sup>457</sup> –

- (a) a residence order – which dealt with the person with whom the child is to live;
- (b) a contact order – which dealt with contact between the child and another person;
- (c) a child maintenance order; and
- (d) a specific issues order – which dealt with any other aspect of parental "responsibility" for the child.

In 2006 these orders were expanded and elucidated –

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<sup>454</sup> Children Act 1989: S 44(4)(c) and 44(5)(b): Lowe & Douglas *Bromley's Family Law* 425.

<sup>455</sup> Family Law Act 1975 (Cth): S 64B(1) and (2).

<sup>456</sup> Family Law Act 1975 (Cth): S 64B(2)(c).

<sup>457</sup> See Dickey *Family Law* 267.

“... not only to make quite clear the variety of orders that can be made as parenting orders but also to enable the court to require parties to follow certain out-of-court or pre-trial procedures before instituting further court proceedings in relation to the orders”.<sup>458</sup>

In terms of section 64B(2) of the Family Law Act 1975 (Cth) a parenting order may now deal with any of the following matters:

- (a) The person or persons with whom the child is to live;
- (b) the time a child is to spend with another person or persons;
- (c) the allocation of parental “responsibility” for a child;
- (d) if two or more persons are to share parental “responsibility” for a child – the form of consultations those persons are to have with one another about decisions to be made in the exercise of that “responsibility”;
- (e) the communication a child is to have with another person or other persons;
- (f) maintenance of a child;
- (g) the steps to be taken before an application is made to the court for a variation of the order to take account of the changing needs or circumstances of
  - (i) a child to whom the order relates; or
  - (ii) the parties to the proceedings in which the order is made;
- (h) the process to be used for resolving disputes about the terms or operation of the order; and

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<sup>458</sup> See Dickey *Family Law* 267.

- (i) any aspect of the care, welfare or development of the child or any other aspect of parental “responsibility” for a child.

Apart from the child’s parents, the child himself or herself, a grandparent of the child or any other person “... concerned with the care, welfare or development of the child” may institute proceedings for a parental order.<sup>459</sup> An order allocating parental “responsibility” can confer “responsibility” on a person for all aspects of either the short-term or long-term care, welfare and development of a child or both.<sup>460</sup> A parenting order, like a guardianship and “custody” order before it, is never final and it is always possible for the matter to be re-litigated when the order no longer appears to serve the best interests of the child.<sup>461</sup> A parenting order confers aspects of parental “responsibility” on another person to the extent of the parenting order.<sup>462</sup> It follows that the parenting order takes away, or diminishes, a person’s parental “responsibility” for a child to the extent that it confers aspects of parental “responsibility” on another person. However, the Family Law Act<sup>463</sup> makes it clear that a parenting order does not take away or diminish any aspect of the parental “responsibility” of a person except to the extent that it is expressly provided for in the order or is necessary to give effect to the order in question.<sup>464</sup>

### 5.3.5 Sharing of parental responsibilities and rights

Although a discussion of the sharing of parental responsibilities and rights between the various co-holders of such responsibilities and rights really relates to the *exercise* of parental responsibilities and rights rather than the *acquisition* thereof, it is considered necessary in the present context to appreciate the full impact of the provisions relating to the assignment of parental responsibilities and rights. Furthermore, the question of how best to regulate the co-exercise of parental responsibilities and rights, not only between parents but also between

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<sup>459</sup> Family Law Act 1975 (Cth): S 65C.

<sup>460</sup> Dickey *Family Law* 270.

<sup>461</sup> Dickey *Family Law* 272.

<sup>462</sup> Family Law Act 1975 (Cth): S 61D(1).

<sup>463</sup> Family Law Act 1975 (Cth): S 61D(2).

<sup>464</sup> Dickey *Family Law* 273.

parents and significant other persons in the child's life, has become the main focus point in countries like Australia where parents are automatically vested with parental "responsibility" at birth.

### **5.3.5.1 England<sup>465</sup>**

In terms of section 2(5) of the Children Act 1989 more than one person may have parental "responsibility" for the same child at the same time. Section 2(6) provides furthermore that a person with parental "responsibility" does not cease to have it solely because some other person subsequently acquires it. Where parental "responsibility" is shared, section 2(7) allows each person in whom it is vested to act alone and without the other (or others) in meeting that "responsibility" except where a statute expressly requires the consent of more than one person in a matter affecting the child. The power to act independently is, however, limited by section 2(8) to the extent that a person with parental "responsibility" may not act in any way that is incompatible with a court order. According to Lowe & Douglas<sup>466</sup> the ability to act independently was intended to mean not simply that neither parent (and/or person vested with "responsibility") has a right of veto, but also that there is no legal duty upon parents (and/or persons vested with "responsibility") to consult each other. Despite the clear wording of section 2(7) of the Children Act 1989, the English Court of Appeal in *Re G (A Minor)(Parental Responsibility: Education)*<sup>467</sup> seemed to have assumed that there remains a duty to consult, at any rate over long-term decisions – *in casu* the choice of school for the child.<sup>468</sup> What these long-term decisions might be remains, however, a matter of speculation.<sup>469</sup> The effect of these provisions is, for

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<sup>465</sup> See in general Lowe & Douglas *Bromley's Family Law* 432-434.

<sup>466</sup> Lowe & Douglas *Bromley's Family Law* 432.

<sup>467</sup> [1994] 2 FLR 964 CA.

<sup>468</sup> Lowe & Douglas *Bromley's Family Law* 433. The failure to provide for consultation in the Children Act 1989 had been criticised on the basis that it was difficult to see how failing to provide for consultation, at any rate with respect to serious or long-term decisions affecting the child, could promote joint parenting following breakdown – the court in *Re G* evidently sympathised with this view: Lowe & Douglas *Bromley's Family Law* 433.

<sup>469</sup> Lowe & Douglas *Bromley's Family Law* 434.

example that upon divorce a father does not lose “responsibility” even if a step-father also acquires it under a court order or agreement.<sup>470</sup>

“In this situation the mother, step-father and father all share parental responsibility for the child and, subject to not acting incompatibly with a court order and, subject to the case law [*Re G-case*]<sup>471</sup> each can exercise their responsibility independently of the others. A similar situation arises if grandparents or other relations or foster parents have residence orders or even special guardianship orders made in their favour.”

### **5.3.5.2 Australia**

If a parenting order is made that two or more persons share parental “responsibility” for a child, and the exercise of this responsibility involves making a decision about a major long-term issue in relation to a child, that decision must be made jointly.<sup>472</sup> The shared parental “responsibility” order is taken as to require the persons concerned to consult each other on the matter and make a genuine effort to come to a joint decision on it.<sup>473</sup> Unless a court orders otherwise, when a child is simply spending time with a parent or person, the latter need not consult any other person who has parental “responsibility” on any matter that is not a long-term matter<sup>474</sup> – implying the use of a so-called “weak” consultative model.<sup>475</sup> “Major long-term issues” are defined in section 4(1) to mean issues about the care, welfare and development of a child of a long-term nature and to include issues about:

- (a) The child’s present and future education;
- (b) the child’s religion and cultural upbringing;
- (c) the child’s health;

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<sup>470</sup> Lowe & Douglas *Bromley’s Family Law* 434.

<sup>471</sup> Other case law has identified a change in the surname of the child, the circumcision of the child and immunisation as matters requiring consultation: Lowe & Douglas *Bromley’s Family Law* 433.

<sup>472</sup> Family Law Act 1975 (Cth): S 65DAC(1) and (2).

<sup>473</sup> Family Law Act 1975 (Cth): S 65 DAC(3).

<sup>474</sup> Family Law Act 1975 (Cth): S 65 DAE.

<sup>475</sup> See Ryrstedt 2003 *Australian Journal of Family Law* 9 at [\*39].

- (d) the child's name: and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.<sup>476</sup>

### **5.3.5.3 South Africa**

The co-exercise of parental responsibilities and rights is regulated by the provisions contained in sections 30 and 31 that create a more extensive consultative model than the one found in Australia.<sup>477</sup> Section 30(1) states categorically that more than one person may hold parental responsibilities and rights in respect of the same child. Section 18(4), furthermore, envisages a situation where "... more than one person has guardianship of a child", while section 18(5) refers to "... all the persons that have guardianship of a child". Section 30(2) gives co-holders with the same parental responsibilities and rights the power to act without the consent of the other co-holders "... except where this Act, or any other law or an order of court provides otherwise".<sup>478</sup> A person with parental responsibilities and rights must consider the view and wishes of the *child*<sup>479</sup> when taking a major decision involving the child, which is defined as a decision –

- (a) in connection with the child's marriage, adoption, departure from the republic, application for passport and alienation or encumbrance of immovable property belonging to the child;<sup>480</sup>

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<sup>476</sup> Dickey *Family Law* 270.

<sup>477</sup> While a consultative model was opted for by both South Africa and Australia, England regarded such a model both "unworkable and undesirable":Lowe & Douglas *Bromley's Family Law* 433. See also the comparative study by Ryrstedt 2003 *Australian Journal of Family Law* 9 at [\*8] to [\*28].

<sup>478</sup> See Van Heerden & Clark 1995 *SALJ* 140 at 142 *et seq* for a discussion of "equality and independence" under the now repealed Guardianship Act 192 of 1993 that contained a similar provision regulating the exercise of guardianship between the parents of a legitimate child.

<sup>479</sup> Children's Act 38 of 2005: S 31(1)(a).

<sup>480</sup> Children's Act 38 of 2005: S 31(1)(b)(i) read with s 18(3)(c).

- (b) affecting contact between the child and a co-holder of parental responsibilities and rights;<sup>481</sup>
- (c) regarding the assignment of guardianship or care in respect of the child to another person at the death of that person;<sup>482</sup> or
- (d) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.<sup>483</sup>

A person with parental responsibilities and rights must, in addition, also give due consideration to any views and wishes expressed by any *co-holder* of such responsibilities and rights before taking a decision in respect of a child.<sup>484</sup> The decision in this context includes "... any decision which is likely to change significantly, or to have a significant effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child".<sup>485</sup>

According to *J v J*,<sup>486</sup> – the first case in which the court had to interpret section 31(2)(a), "due consideration" does not mean that the decision-making party (in this case the mother to whom "custody" was awarded at divorce) is bound to give effect to the wishes and views of the other co-holder of parental responsibilities and rights: "Once she has given such consideration, she may act independently".<sup>487</sup>

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<sup>481</sup> S 31(1)(b)(ii)

<sup>482</sup> S 31(1)(b)(iii) read with s 27.

<sup>483</sup> S 31(1)(b)(iv).

<sup>484</sup> Children's Act 38 of 2005: S 31(2)(a).

<sup>485</sup> Children's Act 38 of 2005: S 31(2)(b).

<sup>486</sup> 2008 6 SA 30 (C) at [33].

<sup>487</sup> *J v J* 2008 6 SA 30 (C) at [35].



### **5.3.6 Constitutionality of the provisions concerning the assignment of parental responsibilities and rights**

The constitutionality of providing and extending the possibility for parents and other interested persons to acquire parental responsibilities and rights by agreement or order of court seems to be incontrovertible – provided of course the assignment of the parental responsibilities and rights is deemed to be in the best interests of the child or children concerned. The possibility of assigning parental responsibilities and rights to persons (including parents and other family members who did not acquire such responsibilities and rights before) gives effect to a child's right to family care or parental care as enshrined in s 28(1)(b) and, insofar as such assignment is made subject to the best interests of the child in question, section 28(2) of the Constitution as well.

### **5.3.7 Conclusion**

It is my contention that the express statutory provision for and regulation of the co-exercise of parental responsibilities and rights by parents and non-parents alike would seem to inaugurate a new approach insofar as the assignment of parental responsibilities and rights is concerned. While the common law allowed for the sharing and co-exercise of parental responsibilities and rights in respect of the same child, the courts only made such orders in exceptional circumstances. The sharing of parental responsibilities and rights is no longer seen as a remote possibility – it is clearly envisaged as a viable option. Where the joint responsibility for a child was previously awarded and exercised in the discretion of the High Court and then only in exceptional circumstances, it is now regulated in general terms and applicable to all co-holders of parental responsibilities and rights alike. The inclusion of these provisions could be seen as an attempt by the legislator to address the growing problem of providing a legal parent for every child in South Africa. Considering the toll taken by the current HIV and Tuberculosis-epidemics, the challenge is to prevent a child from becoming a legal “orphan” as far as the exercise of parental responsibilities and rights is concerned. If successful, any one or more of these persons and/or parents endowed with parental responsibilities and rights, may exercise such parental responsibilities

and rights without the consent of the other co-holders of parental responsibilities and rights,<sup>488</sup> although they must, as already indicated, give due consideration to any views expressed by the child<sup>489</sup> and any views and wishes expressed by any co-holder of parental responsibilities and rights.<sup>490</sup>

It must, however, be noted that sections 24(3) and 29(2) are in my opinion clearly at odds with the new approach, at least as far as the assignment of co-guardianship is concerned. The latter provisions, as indicated above, require applicants to respectively submit reasons as to "... why the child's existing guardian is not suitable to have guardianship"<sup>491</sup> and "... why the applicant is not applying for the adoption of the child".<sup>492</sup> Apart from the fact that these provisions place a heavier burden on an applicant wishing to acquire guardianship than on one applying for care and contact, they could create the impression –

- (a) as was the position in terms of common law, that the existing guardian's position is inviolable unless he or she is shown to be unsuitable or unfit to act as guardian; and
- (b) that an applicant for guardianship, like an adoptive parent, should really be willing to assume full parental responsibilities and rights of the child, which is absurd since the reasons for and effect of an application for guardianship or co-guardianship *sans* care and contact as envisaged by section 24(1) are in no way comparable to those of an application for the adoption of a child.

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<sup>488</sup> S 30(2) of the Children's Act 38 of 2005, except where the Act, any law or an order of court provides otherwise. According to the judgment in *J v J* 2008 6 SA 30 (C) at [27] the section allows the holders of parental responsibilities and rights to enjoy "a large measure of autonomy". This autonomy is, however, to a certain extent restricted by the views and wishes expressed by the child (s 31(1)(a)) and the views and wishes of any co-holder of parental responsibilities and rights (s 31(2)(a)).

<sup>489</sup> S 31(1)(a) of the Children's Act 38 of 2005.

<sup>490</sup> S 31(2)(a) of the Children's Act 38 of 2005.

<sup>491</sup> S 24(3).

<sup>492</sup> S 29(2).

The practicality of this “multiple parenting” system has been questioned.<sup>493</sup> It will be interesting to see, in the first instance, whether and under which circumstances the courts would become more willing to order a sharing of parental responsibilities and rights, and secondly, how the co-assignment of parental responsibilities and rights will affect the exercise of such responsibilities and rights. It will especially be interesting to see how the courts will in future resolve a dispute regarding the co-assignment of responsibilities and rights to, for example, a grandmother or uncle of a child to be shared with the biological parent(s) of the child? Will the courts still regard the co-assignment as an intrusion upon the biological parent’s exercise of those responsibilities and rights<sup>494</sup> –or would the benefit for a child to have as many persons as possible assuming a parenting role override the interests of the parents to create what can rightfully be regarded as a new “democracy of parenthood”?<sup>495</sup>

If compared to the position before, the Children’s Act<sup>496</sup> has generally speaking attempted to open up the possibility of assigning parental responsibilities and rights to “social” parents and any other person with whom the child has developed

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<sup>493</sup> See Van Heerden & Clark 1995 *SALJ* 140 at 144 and 147 who, with reference to the “equal and independent” provision in the now repealed Guardianship Act 192 of 1993, concluded that “... a legal duty of consultation is regarded as “unworkable”, “undesirable” and “impractical” “... in both South Africa and England, even in cases where the parents are not divorced or separated from each other”.

<sup>494</sup> As would seem to be the trend in England as well: Steiner unpublished National Report of England 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006): Par II. With reference to the importance of a parent’s biological relationship with a child to the child’s welfare, Diduck 2007 *CFLQ* 458, discussing the recognition of lesbians as legal parents in England, remarks: “Once again ... I must emphasise that I am not necessarily suggesting that biological links between parents and children are unimportant. They may provide a certain means to ascribe legal parenthood at birth when certainty is necessary to protect both the child and the parent. They may also be a convenient basis for making decisions when all else is equal between disputing parents... I wish simply to highlight the potential complications of subsuming unreflectively biological links within the concept of welfare” (at 471).

<sup>495</sup> Schwenger 2007 *Electronic Journal of Comparative Law* par C VI summarises the developments in the Western world with regard to the acquisition of parental responsibilities and rights as follows: “Concerning the tension between biological and social conceptions of parentage in the field of parental responsibility, biological – or, at least presumed biological – ties often take priority over the lived-out reality of social parentage, although a slow abandonment of this concept can be observed in circumstances where the best interests of the child dictate otherwise.”

<sup>496</sup> 38 of 2005.

a significant relationship.<sup>497</sup> The retention of the exclusive jurisdiction of the High Courts with regard to issues relating to the guardianship of the child will, however, in my opinion prove to be the greatest stumbling block in the assignment of parental responsibilities and rights to *de facto* social parents. The prohibitive costs of proceedings in the High Court will deny most relatives and other significant persons caring for children the opportunity to acquire guardianship in respect of those children. The inaccessibility of these courts will cause hardship to children who are most in need of substitute parenting, such as AIDS orphans. Without the assignment of guardianship, relatives or “significant others” caring for these children will lack the necessary competency to protect them adequately. The decision to uphold the exclusive jurisdiction of the High Court will, in my view, ultimately prove to be more expensive in every sense of the word than the creation of a specialist family court.<sup>498</sup>

The courts’ heretofore hesitancy to assign the sharing of parental responsibilities and rights is also a cause for concern. The idea that a sharing of parental responsibilities and rights is, or at least can be beneficial to a child, will require a definite mind-shift on the part of the courts in general, and the High Court in particular.

The lack of special measures to protect the position of stepparents and grandparents in particular may perhaps be seen as a deficiency of the Children’s Act<sup>499</sup> if compared to the English Children Act 1989 and the Australian Family Act 1975 (Cth). In defence of the Children’s Act<sup>500</sup> it could, however, be argued that sections 23 and 24 are at the same time wide enough to accommodate both stepparents and grandparents and specific enough to give special recognition to the relationship between a child and his or her stepparent or grandparent.

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<sup>497</sup> The approach accords with the idea that “... parenting is a good thing, and children need as much of it as they can have, unless there are strong contra-indications”: Dey & Wasoff 2006 *IJLPF* 225 at 245, quoting from another source.

<sup>498</sup> See Gallinetti Ch 4 in *Commentary on Children’s Act* 4-4 to 4-5. See also Van Heerden & Clark 1995 *SALJ* 140 at 147-150.

<sup>499</sup> 38 of 2005.

<sup>500</sup> 38 of 2005.

## **SECTION B: THE VARIOUS WAYS IN WHICH FULL PARENTAL RESPONSIBILITIES AND RIGHTS CAN BE ACQUIRED**

### **CHAPTER 6: ASSIGNED ACQUISITION OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS IN THE CASE OF SURROGATE MOTHERHOOD<sup>1</sup>**

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<sup>1</sup> The research for this chapter was originally done for inclusion in a looseleaf publication by Juta which was finalized in 2007: See Louw Ch 19 in *Commentary on Children's Act*. The chapter in this thesis is an adaptation of the said Ch 19 in *Commentary on Children's Act* and included here with written consent by Juta.

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## 6.1 INTRODUCTION

Although surrogacy is not a new phenomenon<sup>2</sup> it has only in recent times become a viable option for the increasing number of infertile couples and individuals who are longing to have children of their own. The main reason for this is the development of new reproductive techniques that have made it possible for a woman to give birth to a genetically unrelated child without actually engaging in *coitus* with the donor of the gametes.<sup>3</sup> Until the enactment of Chapter 19 of the Children's Act<sup>4</sup> the birthgiving mother was deemed the legal mother of the child and the commissioning parents<sup>5</sup> obliged to adopt the child to acquire parental responsibilities and rights. This was the case even if the commissioning parent or couple had contributed 100% of the child's genetic material *via* artificial fertilisation. The new provisions have now created the possibility for a commissioning parent or couple to acquire parental responsibilities and rights immediately upon the birth of the child, provided the commissioned birth takes place in terms of a valid surrogate motherhood agreement. The acquisition is not automatic since the commissioning parent or couple will only acquire full parental responsibilities and rights in respect of the child if the surrogate motherhood agreement, in terms of which the child is to be conceived, has been approved and confirmed by the High Court as being in the best interests of the child and complies with the strict requirements in terms of Chapter 19 of the Children's Act.<sup>6</sup>

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<sup>2</sup> Cf, however, the claim that surrogacy "... is not a new technology, but a new phenomenon that was made possible by new medical technology": SALC Report on *Surrogate Motherhood* par 8.1.2. Surrogate motherhood can as a matter of fact be traced back to biblical times: See Tager 1986 *SALJ* 381 at 383 and 384. A practice akin to surrogacy is also found in South African Customary Law in terms of which a husband, married to a barren woman, may take a seed-raiser into his house for purposes of bearing an heir for the main house: Bekker *Seymour's Customary Law in Southern Africa* 279ff and SALC Report on *Surrogate Motherhood* par 4.9.

<sup>3</sup> Originally, in biblical times, such births were of course achieved through ordinary sexual intercourse with a concubine. The classical examples being the transaction between Abraham, his wife Sarah, and Hagar the Egyptian, which resulted in the birth of Ishmael (Gen 16:1-4) and that between Jacob, his wife Rachel, and Bilhah her maid, which led to the births of Dan and Naphtali (Gen 30:1, 3). These arrangements were examples of partial (or traditional) surrogacy arrangements where the surrogate is not only the gestating mother but also related to the child: Gordon 1993 *Saint Thomas Law Review* 191 at 193 fn 17; Garrity 2000 *Louisiana Law Review* 809; Bainham *Children—The Modern Law* 255 fn 3 and accompanying text.

<sup>4</sup> 38 of 2005, which has as yet not come into operation.

<sup>5</sup> The parent or couple who enters into a surrogate motherhood agreement with the surrogate mother and who intends to raise the child: See 6.3.2 below.

<sup>6</sup> 38 of 2005.

The rest of this chapter will be devoted to explaining how this part of the Children's Act<sup>7</sup> came about, what the impact of these provisions will be on the acquisition of parental responsibilities and rights once they become operational and whether or to what extent the provisions will be able to withstand constitutional scrutiny.

## 6.2 BACKGROUND

Before the enactment of the Children's Act,<sup>8</sup> South Africa had no legislation which regulated or even dealt with surrogacy arrangements. The Regulations in terms of the Human Tissue Act<sup>9</sup> that provide extensively for the procedures to be followed in the case of the artificial fertilisation of a woman, were apparently not intended to be applicable in the context of a surrogacy arrangement, but nevertheless did not preclude it.<sup>10</sup> Similarly, while the Children's Status Act,<sup>11</sup> now formally repealed,<sup>12</sup> regulated the consequences of artificial fertilisation, the Act was also not intended to address surrogacy.<sup>13</sup> The result was that the status of the parties and the child born in consequence of a surrogacy arrangement, which was evidently not banned outright, would have had to be determined in terms of laws which did not give effect to the intention of the parties, namely to vest the commissioning parent(s) with legal parenthood.<sup>14</sup> The only way in which the commissioning couple could become the legal parents and acquire full parental responsibilities and rights in respect of the child was to adopt the child in terms of the Child Care Act.<sup>15</sup> The commissioning parents could conceivably also approach the High Court for guardianship and custody of, or access to the child.<sup>16</sup> If the surrogate mother reneged on the agreement, the commissioning couple or

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<sup>7</sup> 38 of 2005.

<sup>8</sup> 38 of 2005.

<sup>9</sup> 65 of 1983, published in terms of s 37 of the Act: GG 10283 dd 20 Jun 1986 and amended by GG 18362 dd 17 Oct 1997.

<sup>10</sup> Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 342 and authority quoted in fn 54.

<sup>11</sup> 82 of 1987.

<sup>12</sup> In terms of Schedule 4 of the Children's Act 38 of 2005: GG 30030 dd 29 Jun 2007.

<sup>13</sup> Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 342. See discussion in 4.4.1 above.

<sup>14</sup> For a discussion of the acquisition of parental responsibilities and rights in terms of the repealed Children's Status Act 82 of 1987 and the Human Tissue Act 65 of 1983, as now amended by the Children's Act 38 of 2005, see 4.4.1, 4.4.2 and 4.4.3 above.

<sup>15</sup> 74 of 1983.

<sup>16</sup> In terms of the court's inherent jurisdiction as upper guardian of all minors.



person would probably not have been able to enforce the contract since it would in all likelihood have been considered *contra bonos mores* on the grounds that it "... constitute[d] a possible devaluation or distortion of the concept of the family and the marriage relationship".<sup>17</sup> The SALC<sup>18</sup> in its *Report on Surrogate Motherhood*<sup>19</sup> sought to remedy the inadequacy of the law in this regard by recommending that the practice of surrogacy be formally regulated<sup>20</sup> by the enactment of specific legislation in terms of which the commissioning parents would acquire parental responsibilities and rights of a child born in consequence of a valid court confirmed surrogate motherhood agreement.<sup>21</sup> The SALC's "Proposed Bill on Surrogate Motherhood",<sup>22</sup> however, restricted the availability of surrogate motherhood to surrogate mothers who were either married, divorced or widowed<sup>23</sup> and only commissioning parents who were married.<sup>24</sup> The SALC's *Report on Surrogate Motherhood* was subsequently referred to a Parliamentary *Ad Hoc* Select Committee for further investigation and report.<sup>25</sup> After consolidating the

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<sup>17</sup> See in this regard Tager 1986 *SALJ* 381 at 395; SALC Report on *Surrogate Motherhood* par 4.7.3; SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>18</sup> Now the SALRC, but see 1.3 fn 24 above.

<sup>19</sup> SALC Report on *Surrogate Motherhood*.

<sup>20</sup> The Commission shared the view with other opinions that the "... present law is inadequate and uncertain, and would, subject to judicial interpretation, remain that way": SALC Report on *Surrogate Motherhood* par 7.2.1, referring in this instance to Lupton specifically. The Law Commission (par 7.2.2) furthermore felt that "[i]f existing law were to be applied it would mean that the court would have to intervene *ex post facto* when problems arise". This was found to be unacceptable since judicial involvement would come at a time when it was too late to protect the parties concerned. The Commission concluded that the regulation of surrogacy would achieve certainty and restrict the abuses that go hand in hand with commercial surrogate motherhood. The Commission (par 7.3) argued that in the absence of formal regulation, a *laissez-faire* approach would necessitate the application of the law of contract to surrogacy agreements which was thought to be undesirable. An outright ban on surrogacy was considered "short-sighted and self-defeating" (par 7.4.1) because it would drive the practice underground (par 7.4.2).

<sup>21</sup> The much publicised birth in Tzaneen of the Ferreira-Jorges surrogate triplets in Oct 1987 sparked fears of an increasing prevalence of surrogacy in SA as a result of which the SALRC initiated its investigation. The increased use of surrogacy as another assisted reproductive method was also anticipated as a result of, *inter alia*, the increasing number of women who are or become infertile, the diminishing number of children available for adoption as a result of the widespread use of contraceptives and the legalisation of abortion in terms of the Choice on Termination of Pregnancy Act 92 of 1996: SALC Report on *Surrogate Motherhood* par 2.1.1, 4.6.2 and 4.6.3; Pretorius unpublished LLD thesis UNISA (1991) 3.

<sup>22</sup> Attached as Schedule A to the SALC Report on *Surrogate Motherhood*.

<sup>23</sup> CI 3 of the Proposed Bill on Surrogate Motherhood: Attached as Schedule A to the SALC Report on *Surrogate Motherhood*.

<sup>24</sup> CI 4 of the Proposed Bill on Surrogate Motherhood: Attached as Schedule A to the SALC Report on *Surrogate Motherhood*.

<sup>25</sup> It was decided that the terms of reference used as a basis for the report of the SALC had to be expanded upon because (a) the SALC was inappropriately constituted in terms of gender and race at time of the investigation; (b) some of the recommendations were not in line with the final Constitution; and (c) the consultation process followed was inadequate: Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par 2A4.

input of a variety of role players through written representations, public hearings, study tours conducted through South Africa and in the United States of America and the United Kingdom, the Committee completed its final report in 1999. The Report of the *Ad Hoc* Committee on *Report of the SA Law Commission on Surrogate Motherhood*<sup>26</sup> was tabled in Parliament on 19 March 1999 and referred to the Minister of Justice for further action. In the meantime the SALRC had launched its investigation into the *Review of the Child Care Act* with the publication of a *First Issue Paper* in April 1998.<sup>27</sup> To give effect to the vision of a single comprehensive children's statute, the SALRC ultimately recommended in its Report and Draft Children's Bill on the *Review of the Child Care Act* that the provisions contained in the previously "Proposed Bill on Surrogate Motherhood" be incorporated in the new children's statute, duly amended as suggested by the *Ad Hoc* Select Committee and the Law Commission itself.<sup>28</sup> The final provisions contained in the Children's Act,<sup>29</sup> are therefore the result of a protracted process of investigation and evaluation, the details of which will be discussed in the remainder of this chapter.

## **6.3 ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS BY MEANS OF A SURROGATE MOTHERHOOD AGREEMENT**

### **6.3.1 Introduction**

An exposition of the ethical and social arguments against and in favour of the practice of surrogacy as a whole is beyond the scope of this discussion.<sup>30</sup> Suffice

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<sup>26</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood*.

<sup>27</sup> The SALC First Issue Paper on the *Review of the Child Care Act* par 6.4.3 acknowledged the fact that surrogacy arrangements were not adequately covered by the provisions of the Children's Status Act 82 of 1987 and invited comment on whether a comprehensive children's statute should regulate such arrangements. The Issue Paper was followed up with the publication of the SALC Discussion Paper on the *Review of the Child Care Act* in Dec 2001, in which it was observed that the determination of legal parenthood had become increasingly problematic and in particular in the context of surrogate motherhood. The SALRC recognised the "... host of difficult legal, moral, religious and philosophical questions" that surrogate motherhood raises and the importance of determining – (a) the legal effect of a surrogacy agreement on the acquisition of parental responsibilities and rights; and (b) the extent to which a surrogate motherhood agreement should be enforceable in SA courts, including the qualifications required for a surrogate mother and a commissioning parent or couple (par 7.5).

<sup>28</sup> SALC Report on the *Review of the Child Care Act* par 6.4.

<sup>29</sup> 38 of 2005.

<sup>30</sup> For an in-depth discussion, see SALC Report on *Surrogate Motherhood* par 2.2 – 2.4.

it to say that despite the multitude of objections<sup>31</sup> to the practice, many surrogacy arrangements have been concluded in South Africa and fulfilled without problems and publicity.<sup>32</sup> The reason for this is presumably because such agreements are mostly entered into for altruistic purposes between family or friends.<sup>33</sup> This worldwide trend has resulted in there being far more law review articles on the topic of surrogacy than court decisions.<sup>34</sup> South African courts have, despite predictions and warnings to the contrary,<sup>35</sup> never had the opportunity of considering the effect of a surrogate motherhood agreement on the legal status of the participants and the child. In the absence of legal precedent, the new Children's Act<sup>36</sup> can thus, at least as far as the regulation of surrogate motherhood is concerned, for once be considered anticipatory rather than reactionary, as is so often the case with new law. Although the provisions relating to surrogate motherhood in Chapter 19 of the Act have not come into operation yet, there is every indication that they will become operational in the near future. The following comments must be read as referring to the legal position once the Chapter has come into operation.

The provisions regulating surrogate motherhood can be summarised as referring to:

- (a) The legal requirements of a valid surrogate motherhood agreement;
- (b) the effect of a valid surrogate motherhood agreement;

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<sup>31</sup> Including, *inter alia*, the view that surrogacy is degrading to the surrogate mother in that it amounts to "womb-leasing" (SALC Report on *Surrogate Motherhood* par 2.2.4), that it fails to respect the human dignity of the child insofar as it ignores the importance of the development of the child *in utero* (par 2.2.3) and that it generally depersonalises reproduction (par 2.2.3). The majority of churches finds surrogacy unacceptable because it is regarded as an infringement upon the monogamous nature of marriage (par 2.2.7). According to Islamic law, surrogacy is tantamount to adultery (par 2.2.8). Surrogacy has also been compared to prostitution as constituting similar commercial usages of the body (par 2.2.11).

<sup>32</sup> The Ferreira-Jorges Tzaneen triplets and the surrogacy arrangement entered into by Dr Vosloo, a neurosurgeon in Cape Town, being the notable exceptions.

<sup>33</sup> Report of *Ad Hoc* Committee on *Surrogate Motherhood* par E4(b)(iii).

<sup>34</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5 fn 67.

<sup>35</sup> Tager 1986 *SALJ* 381 at 404, thought at the time that there was some urgency in regulating surrogate motherhood because "[t]omorrow our courts could be faced with the problem, and they should be equipped to provide the answers".

<sup>36</sup> 38 of 2005.

- (c) the termination of the surrogate motherhood agreement;
- (d) the effect of the termination of the surrogate motherhood agreement;
- (e) prohibitions relating to surrogacy; and
- (f) access to information.

Before discussing the provisions themselves it is, first of all, necessary to explain a few of the terms associated with this field of the law.

### 6.3.2 Terminology

Section 1(1) of the new Children’s Act<sup>37</sup> defines a “surrogate motherhood agreement” as–

“... an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised<sup>38</sup> for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent<sup>39</sup> upon its birth, or within reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent”.<sup>40</sup>

It is important to note that that the surrogate motherhood agreement envisages the conception of the child by means other than natural sexual intercourse.<sup>41</sup>

“Surrogate mother”<sup>42</sup> is defined as “... an adult woman who enters into a

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<sup>37</sup> 38 of 2005.

<sup>38</sup> For a detailed discussion of the term “artificial fertilisation” see 4.4.1 above.

<sup>39</sup> Defined as “... a person who enters into a surrogate motherhood agreement with a surrogate mother”: S 1(1) *sv* “commissioning parent”.

<sup>40</sup> According to Tager 1986 *SALJ* 381 at 382, this definition might have to be adapted sometime in the future to accommodate the possibility of a man acting as the surrogate, not for another woman but for another man who some scientists believe will in future be able to give birth by Caesarean section as a result of embryo implantation in the bowel.

<sup>41</sup> A surrogacy arrangement brought about by a “pure” *ovum* donation or a “pure” embryo donation (see 4.2.1.2 above) and the transfer of an embryo (which has been created by natural means through fertilisation *in vivo*) would therefore be invalid. An undertaking by a married surrogate to surrender a child naturally conceived with her husband’s gametes would have the same fatal result: SALC Report on *Surrogate Motherhood* par 2.1.3.

<sup>42</sup> S 1(1) *sv* “surrogate mother”.

surrogate motherhood agreement with the commissioning parent” and refers to the woman who gestates and bears the child<sup>43</sup> rather than to the woman who intends to rear the child.<sup>44</sup> A distinction is generally drawn between “full” surrogacy and “partial” surrogacy. Where the surrogate mother merely acts as the gestational mother without being genetically linked to the child that she gives birth to, the arrangement is referred to as “full” or “gestational” surrogacy.<sup>45</sup> If, on the other hand, the surrogate mother’s own *ovum* is fertilised using the sperm of the commissioning man or of a donor, the process is referred to as “partial” surrogacy.<sup>46</sup> In this case the surrogate mother not only acts as the gestational mother but is also genetically linked to the child that she bears. Thus depending on the technique applied,<sup>47</sup> a child born as a result of a surrogate agreement could have as many as six different “potential” parents, namely the genetic parents (the donors of the sperm and *ovum*), the commissioning parents, the surrogate mother who carries the baby to term and, if she is married, the surrogate’s husband or partner.<sup>48</sup>

### **6.3.3 The legal requirements for a valid surrogate motherhood agreement**

#### **6.3.3.1 Formalities and confirmation by High Court**

Section 292 provides:

“(1) No surrogate motherhood agreement is valid unless—

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<sup>43</sup> Referred to in Afrikaans as “instaan-moeder”, “gasmoeier” or even “leenma”: Pretorius unpublished LLD thesis UNISA (1991) 15.

<sup>44</sup> Also referred to as the intentional mother.

<sup>45</sup> See Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par C6(1)–(4) for a detailed exposition of circumstances that will give rise to full surrogacy.

<sup>46</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par C7. The *Ad Hoc* Committee refers to another type of partial surrogacy referred to as “informal” surrogacy that is allegedly performed privately by the parties according to accepted customary practices without the intervention of medical doctors or clinics (par C8).

<sup>47</sup> According to the SALC Report on *Surrogate Motherhood* (par 2.1.3), it is in theory possible to have any of the following types of surrogate agreements: (a) the *in vitro* or *in vivo* fertilisation of the commissioning woman’s *ovum* and the transplantation thereof into the uterus of the surrogate - the fertilisation can be done with sperm from the commissioning woman’s husband or a donor; (b) the surrogate’s *ovum* can be fertilised *in vitro* or *in vivo* with sperm from the commissioning husband or a donor; or (c) an embryo is created by using a male and female donor’s gametes and it is implanted in the surrogate’s womb.

<sup>48</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

- (a) the agreement is in writing and is signed by all the parties thereto;
  - (b) the agreement is entered into in the Republic;
  - (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
  - (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic;
  - (e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.
- (2) A court may, on good cause shown, dispose with the requirement set out in subsection (1)(d)."

The requisite of a prior formally approved surrogate motherhood agreement has always been considered essential in order to minimise the risks inherent in a surrogate motherhood arrangement and to ensure that the agreement gives effect to the best interests of all concerned with the interests of the child as the overriding factor.<sup>49</sup> The *Ad Hoc* Committee also thought that the agreement was important to establish the intention of the parties as to parental responsibilities and rights and their willingness to proceed with this intention.<sup>50</sup> The SALRC opined that the general principles of the law of contract are insufficient to exclusively regulate the responsibilities and rights of the parties concerned.<sup>51</sup> It was felt that however important, the agreement between the parties should merely be the point of departure indicating a certain intention, after which the entire procedure, the responsibilities and rights of the parties and the legal consequences should be determined by legislation.<sup>52</sup> The idea is to allow the parties to provide for matters not regulated by legislation in optional clauses in the agreement, as long as such clauses are not *contra bonos mores*.<sup>53</sup>

Surrogate motherhood agreements concluded in other countries will not be enforceable in South Africa in terms of section 292(1)(b). According to Pretorius<sup>54</sup> the underlying aim of the provision is to prevent couples from concluding

<sup>49</sup> See SALC Report on *Surrogate Motherhood* par 8.3 and Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par 2F7.

<sup>50</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par 2F7.

<sup>51</sup> SALC Report on *Surrogate Motherhood* par 8.3.

<sup>52</sup> SALC Report on *Surrogate Motherhood* par 8.3.

<sup>53</sup> SALC Report on *Surrogate Motherhood* par 8.3.1.

<sup>54</sup> Pretorius 1996 *De Rebus* 114 at 117.

surrogacy contracts in other jurisdictions where the procedure is less cumbersome.<sup>55</sup> The domicile requirement applies at the time of the conclusion of the agreement and thus also excludes the possibility of foreigners abusing legalised surrogate motherhood in South Africa. The *lex loci contractus* will be South African law. Although the SALRC<sup>56</sup> originally intended the legislation to regulate surrogacy “... for South Africans within the South African context”, the current provision allows the court to dispose of the domicile requirement for good reason in the case of the surrogate mother or her partner. Where the commissioning parent or couple can only find a relative who is not domiciled in South Africa willing to act as a surrogate, it may perhaps provide justification to dispense with the domicile requirement. The domicile requirement does not, however, prevent the pregnant surrogate mother from leaving the country to evade the legal consequences of the valid surrogate motherhood agreement.

### **6.3.3.2 Consent requirements**

Section 293 provides:

- “(1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.
- (2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement.
- (3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.”

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<sup>55</sup> According to Krim 1996 *Annals of Health Law* 193, the lack of surrogacy regulation in many countries around the world will give rise to an increasing number of international surrogacy arrangements that promise to raise additional burdens on courts to decide on the applicable law governing the agreement (at 219). The provision in the Children’s Act 38 of 2005 will thus prevent SA courts from having to decide jurisdictional questions in a case such as the following mentioned in the said article (at 220): Sperm of a Japanese husband was airlifted to a San Fransisco fertility clinic and used to inseminate 17 eggs donated by a 21 year old Chinese American student. Six of the eggs were subsequently implanted in the womb of a 30 year old American Caucasian woman. The arrangement was said to have resulted in the first surrogacy delivery involving three mothers on both sides of the pacific ocean – the legal mother in Japan, the US donor of the eggs and another American woman who gave birth to the baby!

<sup>56</sup> SALC Report on *Surrogate Motherhood* par 8.3.7.

Both the commissioning parent and the surrogate mother must obtain the written consent of their spouse or permanent partner before the court will confirm the surrogate motherhood agreement. In terms of section 1(1) of the Children's Act,<sup>57</sup> "marriage" means a marriage recognised in terms of South African law or customary law or a marriage concluded in accordance with a system of religious law subject to specified procedures.<sup>58</sup> The provision under discussion, however, extends the consent requirement to a partner of a "permanent relationship". As to the criteria of such a relationship, it can be argued to be less restrictive than that of a "permanent life-partnership"<sup>59</sup> which requires at least the presence of a *consortium omnis vitae* and presumably also cohabitation.<sup>60</sup> Whatever the qualifying requirements for a "permanent relationship" may be, it is reasonable to assume that the court will give a wide rather than a narrow interpretation to the term in order to involve and commit all persons to the agreement who might possibly later claim parental rights contrary to the intention of the parties as reflected in the surrogate motherhood agreement. It is not clear who should decide whether the relationship is permanent enough to warrant consent by the partner of the commissioning parent or surrogate mother. The commissioning parent and surrogate mother will supposedly both have to give particulars regarding their marital status and the nature of an existing relationship, if unmarried. The court will then presumably deduce from this information whether the partner should give consent and become a party to the agreement. It must be remembered that unless the unmarried biological father of the child born in consequence of the agreement, is made a party to the surrogate motherhood agreement, he will in terms of the Children's Act<sup>61</sup> automatically acquire full parental responsibilities and rights in respect of the child if he lives in a "permanent life-partnership" with the surrogate mother at the time of the child's birth.<sup>62</sup>

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<sup>57</sup> 38 of 2005.

<sup>58</sup> For a discussion of the term "marriage" for purposes of the Children's Act 38 of 2005, see 4.2.3.2(b)(i) above.

<sup>59</sup> Employed in s 21(1)(a) of the Act with regard to the automatic acquisition of parental responsibilities and rights by an unmarried biological father, for a discussion of which, see 4.2.3.2(b)(ii) above.

<sup>60</sup> Neither of the two terms is defined in the Act. As to the difficulties in defining the term "permanent life-partnership" see 4.2.3.2(b)(ii) above.

<sup>61</sup> 38 of 2005.

<sup>62</sup> In terms of s 21(1)(a) of the Children's Act 38 of 2005.



In terms of subsection (1) the commissioning parent must obtain the written consent of his or her husband, wife or partner to the agreement. “Commissioning parent” is defined<sup>63</sup> as “... a person who enters into a surrogate motherhood agreement with a surrogate mother”. But who is the commissioning parent if the person who enters into the agreement is married or in a permanent relationship?<sup>64</sup> One could argue that it makes no real difference which one of the spouses or partners of the commissioning couple enters into the agreement and which one consents, since both parties must ultimately become parties to the agreement. The question is then why the legislator would require the spouse or partner to consent to the agreement if the spouse or partner in any case has to become a party to the agreement as well? The consent requirement presumably limits the commissioning parent’s capacity to enter into a fully enforceable surrogate motherhood agreement in the same way that the capacity to act of a spouse married in community of property is curtailed.<sup>65</sup> Joining the spouse or partner as a party to the agreement ensures that such a party acquires all the rights, duties and obligations arising from the agreement as such. Consent by the spouse or partner is thus necessary to ensure full capacity to act on the part of the (other) contracting spouse or partner and joining such a consenting spouse or partner as a party ensures that the agreement is binding on both spouses or both partners.

In terms of subsection (2) the husband or partner of the surrogate mother must likewise give written consent and be joined as a party to the agreement before the court may confirm the agreement. It is submitted that the restriction to a “husband” in this context must be considered outdated in the light of the enactment of the Civil Unions Act.<sup>66</sup> Since a surrogate mother may now legally also marry another woman the provision should be amended to read “spouse”.

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<sup>63</sup> S 1(1) *sv* “commissioning parent”.

<sup>64</sup> The SALRC recommended that “commissioning parent” not be defined in the singular since it is both the husband and wife who enter into the agreement with the surrogate mother: SALC Report on *Surrogate Motherhood* par 6.7.1. This proposal was probably ignored since it was made in the context of a proposed legislative scheme that only allowed married spouses to enter into surrogate motherhood agreements (par 8.2.2). The *Ad Hoc* Committee concluded that surrogacy should be available to any competent person or persons: Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F4(2)(d).

<sup>65</sup> S 15(2) of the Matrimonial Property Act 88 of 1984.

<sup>66</sup> 17 of 2006.

The words “consent to the agreement” would, furthermore, ostensibly also include consent to the artificial fertilisation of the surrogate mother.<sup>67</sup>

Subsection (3) creates an exception to the requirement of consent by the spouse or partner of the surrogate mother. Where such a spouse or partner unreasonably withholds consent the court may nevertheless confirm the agreement without such consent. What is not at the outset clear is whether the exception only applies where the *spouse or partner* is not the genetic parent of the child or whether the *surrogate mother* is not the genetic parent of the child. If the latter interpretation is accepted as correct, it would lead to the result that the consent of the spouse or partner of a full surrogate mother<sup>68</sup> can be dispensed with if unreasonably withheld, but not the consent of a spouse or partner of a partial surrogate mother.<sup>69</sup> While the latter interpretation was originally rejected,<sup>70</sup> it now seems to be the only logical one considering the distinction between the position of a full surrogate and a partial surrogate throughout the chapter. The provision should thus, it is submitted, be read as allowing the consent by the spouse or partner to be dispensed with if the *surrogate mother* is unrelated to the child, but not otherwise. Consequently, a partial surrogate motherhood agreement would be invalid<sup>71</sup> without the consent of the spouse or partner of the surrogate mother.

It can be assumed, although not stated in so many words in the section, that the refusal to consent must in the opinion of the court be deemed reasonable or not. The circumstances in which the refusal to consent to the surrogacy agreement will be deemed unreasonable can only be guessed at.<sup>72</sup> It is important to note, as

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<sup>67</sup> If the spouse of the surrogate mother does not consent to the *artificial fertilisation* of his wife where there is no surrogate motherhood agreement, parental responsibilities and rights will exclusively vest in the surrogate mother: S 40(1)(a) of the Children’s Act 38 of 2005. Consent is, however, presumed until the contrary is proved: S 40(1)(b). In this respect it is interesting to note that while “written” consent is required in the case of a surrogate motherhood agreement, no formalities are required for the consent to be granted in the case of the artificial fertilization of a woman in terms of s 40. For criticism of the latter position, see Van der Walt 1987 *Obiter* 1 at 10.

<sup>68</sup> Who is not the genetic parent of the child.

<sup>69</sup> Who is genetically related to the child.

<sup>70</sup> Louw Ch 19 in *Commentary on Children’s Act* 19-10.

<sup>71</sup> In terms of s 297(2) due to non-compliance with the provisions of s 293(2).

<sup>72</sup> A provision (s 19 of the Child Care Act 74 of 1983) which allowed the children’s court to dispense with parental consent on the same ground in the case of an adoption, has been problematic. The issue has now been addressed in the case of adoption by the insertion of a separate section (s 241) in the Children’s Act 38 of 2005, prescribing that in determining whether consent is being withheld unreasonably in the case of an adoption, the court must consider the

originally recommended by the *Ad Hoc* Committee,<sup>73</sup> that the same exception does not apply to the spouse or partner of a commissioning parent as well. When the spouse or partner of a commissioning parent refuses to consent to the surrogate motherhood agreement, whether reasonably or not, the court may not confirm the agreement.

### **6.3.3.3 Genetic origin of child**

Section 294 provides:

“No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.”

This section reflects the generally assumed purpose of surrogacy enabling a childless couple to have a child that will be genetically related to at least one of them. The use of donor gametes has been a particularly thorny issue in the regulation of surrogate motherhood. The section gives effect to the view expressed by both the SALRC and the *Ad Hoc* Committee that donor gametes should not be permitted where it is possible to use the gametes of the commissioning parents.<sup>74</sup> The SALRC, however, recommended a further restriction on the use of donor gametes by prohibiting the use of the gametes of the surrogate mother and, if married, her husband’s gametes as well.<sup>75</sup> The SALRC justified the complete ban on partial surrogacy in this way on two grounds:

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relationship between the child and the person withholding consent in the past and the prospects of a sound relationship developing between them in the immediate future. It is questionable whether the same considerations could be applied in the context of a surrogacy agreement. It would, first of all, be impossible to assess the past relationship since the consent relates to a child or children as yet to be born. Secondly, in terms of the surrogacy agreement the intention is to bear a child for the commissioning couple or parent who will become the legitimate parent(s) of such a child and not for the child to develop a relationship with either the surrogate mother or her spouse or partner. The prospects of such a relationship can consequently not be a relevant factor in determining whether the consent is being unreasonably withheld.

<sup>73</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 4(2)(e).

<sup>74</sup> SALC Report on *Surrogate Motherhood* par 8.2.6 and Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F3(2).

<sup>75</sup> Cl 4 of the Proposed Bill on Surrogate Motherhood discussed in SALC Report on *Surrogate Motherhood* par 8.2.7.

Experience overseas has shown that most problems relating to the enforcement of surrogate motherhood agreements arose as a result of the fact that the gametes of the surrogate mother was used for the conception of the child;<sup>76</sup> and

- (a) it would be unconscionable to force a mother to part with her natural child and that a surrogate mother who is not genetically related to the child would be able to relinquish him or her more easily.<sup>77</sup>

The SALRC in its Discussion Paper on the *Review of the Child Care Act*,<sup>78</sup> however, observed that –

“... this reasoning<sup>79</sup> has been convincingly criticized – not only does it suggest (without any real substantiation) that it is genes rather than gestation which create a bond between mother and child, but it also fails to take account of the fact that full surrogacy ‘may be potentially more exploitive of poorer women than partial surrogacy and at the same time more attractive to the wealthier couple who can obtain a child who is genetically their own’.<sup>80</sup> Furthermore, because full surrogacy entails complex and very expensive medical and surgical procedures with a relatively low success rate (particularly in cases where the commissioning woman is infertile and a donated *ovum* has to be used),<sup>81</sup> partial surrogacy will in many cases be the only practically and financially feasible option open to the commissioning person or couple”.

According to the research results of the *Ad Hoc* Committee,<sup>82</sup> most commentators opposed an arrangement in terms of which the embryo for purposes of the surrogacy is created exclusively with donor gametes since it would result in a situation similar to adoption. The *Ad Hoc* Committee felt that in cases where the

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<sup>76</sup> SALC Report on *Surrogate Motherhood* par 8.2.7.

<sup>77</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>78</sup> *Ibid.*

<sup>79</sup> Mentioned in (b) above.

<sup>80</sup> Quoting from Clark 1993 *SALJ* 769 at 773.

<sup>81</sup> The SALC Report on *Surrogate Motherhood* par 7.5 explains the position as follows: “*Ovum* donation requires risky hormone treatment and surgical extraction of the *ovum*. And even if the commissioning woman is fertile and merely needs the surrogate mother to carry the baby to term, the embryo (‘created’ either naturally or *in vitro*) will still have to be implanted in the surrogate mother after artificially manipulating her cycle.” This operation is also “... prohibitively expensive, high-tech, and usually unsuccessful”: Meyerson in Murray *Gender and the New South African Legal Order* 138.

<sup>82</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par E 1(2)(e).

single commissioning parent is, or both commissioning parents are, infertile, an “ordinary” adoption will adequately serve the needs of the person or couple concerned. Against this argument is the view that adoption will not always be possible in such cases due to the shortage of new born babies and age disqualifications, to name but two examples.<sup>83</sup> It is further argued that adoption –

“... attempts to address an already existing situation whereas a surrogate motherhood agreement creates a situation that is prone to all kinds of problems. In contrast to adoption surrogacy deliberately brings into the world a child whose genealogy is blurred”.<sup>84</sup>

Section 294 clearly does not prohibit the use of the gametes of the surrogate mother or her spouse or partner for the conception of the child contemplated in the surrogate motherhood agreement, provided only that the commissioning parent, if single, or at least one of the commissioning parents, if a couple, is genetically related to the child. The exclusive use of donor gametes are, however, prohibited thus preventing what has been referred to as a “commissioned adoption”.<sup>85</sup>

The *Ad Hoc* Committee recommended that legislation should permit both types of surrogacy but regarded full surrogacy as the preferred option only to be abandoned “... where it is not possible, for biological or medical reasons, to use the female gamete of the commissioning parent for the purpose of artificial insemination”.<sup>86</sup> The restriction in this regard was also rejected by the SALC in its Discussion Paper on the *Review of the Child Care Act*<sup>87</sup> on the basis that it could, for example, be problematic in cases where the commissioning parent or couple simply cannot afford the procedures required for full<sup>88</sup> surrogacy, even though it is biologically and medically possible to use the *ovum* of a commissioning parent. Hence the inclusion of the words “or other valid reason” in the section.

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<sup>83</sup> Pretorius 1991 *De Jure* 52 at 59-61; Pretorius 1996 *De Rebus* 114 at 117-119.

<sup>84</sup> SALC Report on *Surrogate Motherhood* par 2.3.2.

<sup>85</sup> Meyerson in Murray *Gender and the New South African Legal Order* 123.

<sup>86</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 3(2).

<sup>87</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>88</sup> The SALC Discussion Paper on the *Review of the Child Care Act* par 7.5, inadvertently referred to “partial” surrogacy, which can clearly not have been the intention since it is full surrogacy that is expensive.

#### 6.3.3.4 Prerequisites for confirmation by High Court

Section 295 provides:

- “A court may not confirm a surrogate motherhood agreement unless—
- (a) the commissioning parent or parents are not able to give birth to a child and the condition is permanent and irreversible;
  - (b) the commissioning parent<sup>89</sup> or parents –
    - (i) are in terms of this Act competent to enter into the agreement;
    - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and
    - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
  - (c) the surrogate mother –
    - (i) is in terms of this Act competent to enter into the agreement;
    - (ii) is in all respects a suitable person to act as surrogate mother;
    - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;
    - (iv) is not using surrogacy as a source of income;
    - (v) has entered into the agreement for altruistic reasons and not for commercial purposes;
    - (vi) has a documented history of at least one pregnancy and viable delivery; and
    - (vii) has a living child of her own;
  - (d) the agreement includes adequate provisions for the custody, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child’s position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child;
  - (e) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.”

In terms of the SALRC’s view, surrogate motherhood should only be available for a heterosexual legally married couple,<sup>90</sup> the original proposal was that the agreement should not be permitted unless it is proved, in the first place, that the

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<sup>89</sup> Despite the possibility of a single commissioning parent envisaged by s 295, the singular verb “is” has been omitted as an alternative form in par (i), (ii) and (iii) of subs (b).

<sup>90</sup> SALC Report on *Surrogate Motherhood* par 8.2.2.

commissioning *wife* is unable to give birth to a child.<sup>91</sup> The requirement has now been extended to “the commissioning parent or parents”, presumably giving recognition to the possibility of not only married couples of the same or opposite sex acting as commissioning parents but also partners of the same or opposite sex in a permanent relationship doing so.<sup>92</sup> It is, furthermore, important to note that the commissioning parent or parents must not merely be “infertile” – a condition that is normally defined as the inability to conceive after twelve months of unprotected coitus<sup>93</sup> that can be addressed by making use of artificial fertilisation as prescribed by the Human Tissue Act<sup>94</sup> – but must be unable to give birth. The limitation imposed on the commissioning parent(s) is justified insofar as surrogacy should be seen as a last option and not merely a way for women to avoid the rigours of pregnancy *ie* for the sake of expediency.<sup>95</sup> Moreover, the limitation might be justified on more than moralistic grounds as studies now emerging<sup>96</sup> indicate that an emphasis on infertility (including here the inability to gestate a pregnancy to term<sup>97</sup>) may further the best interests of the child who results from the surrogacy arrangement. Some of these studies suggest that children born of a surrogate parenting arrangement<sup>98</sup> may face significant risks of major birth defects – risks that arguably could be avoided if the commissioning parents can otherwise conceive.<sup>99</sup> Other studies suggest that the child born to commissioning parents who later conceive may “... like Cinderella, face reduced parental investment after a genetic child enters the previously nongenetic household”.<sup>100</sup>

The SALRC, in the second place, proposed that a surrogate motherhood agreement “... should not be permitted unless it is proved that owing to a *medical situation* the commissioning wife is unable to give birth to a child” (own italics for

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<sup>91</sup> SALC Report on *Surrogate Motherhood* par 8.2.4.

<sup>92</sup> This is also evident from the terms employed in the consent provisions under s 293: See 6.3.3.2 above.

<sup>93</sup> Pretorius unpublished LLD thesis UNISA (1991) 5; Wilson 2003 *American Journal of Law and Medicine* 337 at 354.

<sup>94</sup> 65 of 1983. See SALC Report on *Surrogate Motherhood* par 8.2.4.

<sup>95</sup> SALC Report on *Surrogate Motherhood* par 8.2.1.

<sup>96</sup> As shown by Wilson 2003 *American Journal of Law and Medicine* 337.

<sup>97</sup> Wilson 2003 *American Journal of Law and Medicine* 337 at 339.

<sup>98</sup> Some of these problems stem from the process by which such children may be conceived – *in vitro* fertilisation (IVF): See Wilson 2003 *American Journal of Law and Medicine* 337 at 343-346.

<sup>99</sup> Wilson 2003 *American Journal of Law and Medicine* 337 at 338.

<sup>100</sup> *Ibid.*

emphasis).<sup>101</sup> The provision as it now reads is not prescriptive insofar as the cause of the inability to give birth is concerned.<sup>102</sup> As long as the condition is permanent and irreversible, presumably as testified to by a medical practitioner, the commissioning parent or parents will have satisfied the requirement in terms of this section. The question is, however, whether the requirement will be deemed to have been satisfied in cases where the commissioning parents are physically able to give birth but suffer from a hereditary disease such as Tay-Sachs<sup>103</sup> that will inevitably result in the birth of a child with a fatal genetic disorder?<sup>104</sup>

Where the commissioning parent is a single man or the commissioning parents or couple a same-sex male couple, such persons would obviously fall within the ambit of the section because of biological realities.<sup>105</sup>

In addition to having full capacity to act, competency “in terms of this Act”, as required by subsection (b)(i) would presuppose:

- (a) That the commissioning parent (if single), or at least one of the commissioning parents, is domiciled in the Republic at the time of entering into the surrogate motherhood agreement;<sup>106</sup>

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<sup>101</sup> SALC Report on *Surrogate Motherhood* par 8.2.4.

<sup>102</sup> The SALRC’s recommendation that the commissioning couple should moreover, as a general rule, have no other living issue born from their marriage unless the non-material interests of the living descendants or adopted child will not be prejudiced by the addition of a child through a surrogacy arrangement was, however, not approved by the *Ad Hoc* Committee (Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 4(2)(h)). This prerequisite was found to be unacceptable since adoptive parents are not subject to the same restriction and unmarried persons and other single persons that are already allowed to adopt are discriminated against: SALC Report on *Surrogate Motherhood* par 6.7.1.

<sup>103</sup> Tay-Sachs disease (abbreviated as TSD) is a genetic disorder for which there is currently no cure or treatment. Children with Infantile TSD usually die before the age of 4 or 5. Historically speaking Eastern European people of Jewish descent (Ashkenazi Jews) have a high incidence of Tay-Sachs. In the USA about 1 in 27 to 1 in 30 Ashkenazi Jews is a recessive carrier. French Canadians and the Cajun community of Louisiana have an occurrence similar to Ashkenazi Jews. Irish Americans have a 1 in 50 chance of a person being a carrier. In the general population, the incidence of carriers is about 1 in 300: See [http://wikipedia.org/wiki/Tay-Sachs\\_](http://wikipedia.org/wiki/Tay-Sachs_)

<sup>104</sup> Pretorius unpublished LLD thesis UNISA (1991) 19 seems to support the view that the requirements will have been satisfied in such cases.

<sup>105</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>106</sup> S 292(1)(c).



- (b) that the commissioning parent has obtained the written consent to the agreement from his or her spouse or partner if married or involved in a permanent relationship;<sup>107</sup>
- (c) that the commissioning parent, if single, or at least one of the commissioning parents in the case of a commissioning couple, is genetically related to the child;<sup>108</sup>
- (d) that the commissioning parent is or commissioning parents are not able to give birth to a child and the condition is permanent and irreversible.<sup>109</sup>

In the unlikely event of a commissioning parent or parents being minors,<sup>110</sup> such a parent will have to obtain the consent from his or her guardian. Despite such assistance, a court will probably not easily be satisfied that a minor will be a suitable person to accept parenthood of any child, let alone one born as a result of a surrogate motherhood agreement with its additional risks.

With regard to the suitability of the commissioning parent(s) to accept the parenthood of the child mentioned in sub-section (b)(ii), the *Ad Hoc* Committee<sup>111</sup> concurred with the SALRC's recommendation<sup>112</sup> that all parties to a surrogate agreement should be subjected to a strict screening process before the agreement is implemented and a continuous process of counselling before and after the conclusion and implementation of the agreement. Since the majority of the problems emanating from surrogacy agreements have, according to the findings of the *Ad Hoc* Committee, been brought about by insufficient screening,<sup>113</sup> it was recommended that all parties be screened six months prior to the conclusion of the agreement so as to ensure that the parties' social and

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<sup>107</sup> S 293(1).

<sup>108</sup> S 294.

<sup>109</sup> S 295(a).

<sup>110</sup> The age of majority is now 18 years in terms of s 17 of the Children's Act 38 of 2005, which came into operation on 1 Jul 2007.

<sup>111</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F6.

<sup>112</sup> SALC Report on *Surrogate Motherhood* par 8.2.3.

<sup>113</sup> According to the research results of the *Ad Hoc* Committee, the importance of the screening and counselling of parties to the surrogacy arrangement was stressed in both the USA and Britain: Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par E7(6).

psychological backgrounds were compatible and to determine their suitability for a surrogate agreement. Compulsory HIV testing of all the parties involved in the surrogacy arrangement for a period of twelve months before the artificial fertilisation is attempted, was considered essential.<sup>114</sup> The *Ad Hoc* Committee also recommended<sup>115</sup> that the screening be carried out by a State body or private bodies approved by legislation. It was suggested that the body should consist of, *inter alia*, a social worker, psychologist, psychiatrist, lawyer and a minister of religion who would appoint a panel of experts to handle the counselling of the intended parties to the agreement while the focus should remain the best interests of the child or children. The *Ad Hoc* Committee felt that the submission of a report prepared by such a screening body, attesting to the suitability and fitness of the parties to the surrogate agreement, be made compulsory for the final confirmation of the agreement by the court.<sup>116</sup> These recommendations have, however, regrettably not been incorporated into the final Children's Act.<sup>117</sup> One can only hope that the regulations to the Act will address this *lacuna*.

Subsection (b)(iii) is crucial insofar as the aim of eliminating the most obvious risks inherent in surrogate motherhood arrangements are concerned. Again there is no indication as to who bears the burden of enlightening the parties about the legal consequences of the agreement. One would assume, although not expressly required by the Act, that a legal practitioner (ideally one who specialises in such matters) would generally assist parties in drafting the agreement and thus be able to explain and clarify the legal consequences to all the parties concerned to prevent any misunderstanding. A clause to the effect that the parties understand and accept the legal consequences of the agreement should not automatically be deemed sufficient. The court should moreover *mero motu* be able to satisfy itself on this score.

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<sup>114</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 6(2).

<sup>115</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 6(3).

<sup>116</sup> See recommendations in Report of the *Ad Hoc* Committee on *Surrogate Motherhood* (par F6(6)) on evidence that should be contained in the report. It is submitted that a report compiled by a screening panel rather than a privately appointed professional who is remunerated by the commissioning parent or couple would go a long way to ensure an objective assessment of the commissioning parent or couple.

<sup>117</sup> 38 of 2005.

As far as the competency of the surrogate mother in terms of subsection (c)(i) is concerned, the Act requires –

- (a) the surrogate mother to be an adult woman of sound mind;<sup>118</sup>
- (b) the surrogate mother and her spouse or partner, if any, to be domiciled in the Republic at the time of entering into the surrogate motherhood agreement unless good cause is shown to dispense with this requirement;<sup>119</sup>
- (c) the surrogate mother to obtain the written consent of her spouse or partner to the agreement if married or involved in a permanent relationship respectively,<sup>120</sup> unless the court has dispensed with this requirement because the spouse or partner is withholding his or her consent unreasonably.<sup>121</sup>

What has been said of the screening of the commissioning parent or parents apply with even more force to the screening of the surrogate mother in order to ensure her suitability to act as surrogate mother in terms of subsection (c)(ii). The successful execution of the surrogate motherhood agreement is to a large extent depended upon the surrogate mother being physically and psychologically suited to act as surrogate mother.

It is perhaps even more important that the surrogate mother and her spouse or partner, if any, understand and accept the legal consequences of the surrogate motherhood agreement as stated in subsection (c)(iii). Not only is the surrogate mother exposed to all the risks inherent in the conclusion of a surrogate motherhood agreement but she is also subjecting herself to the physical risks of an artificially induced pregnancy. If she complies with the provisions of the Act she will have to give up her child – at least if she is not genetically related to the

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<sup>118</sup> S 1(1) *sv* “surrogate mother”.

<sup>119</sup> Ss 292(1)(d) and 292(2).

<sup>120</sup> S 293(2).

<sup>121</sup> S 293(3).

child.<sup>122</sup> If she fails to comply with the Act,<sup>123</sup> or decides to terminate the agreement as one of the genetic parents of the child,<sup>124</sup> she (and her spouse or partner, if any) might have to assume responsibility for a child without having originally planned or intending to do so.<sup>125</sup>

With regard to the motivation behind the surrogate mother's willingness to act as a surrogate, a distinction is generally drawn between surrogacy arrangements which are altruistic by nature and commercial surrogacy. In the former kind of arrangement the surrogate mother is not motivated to enter into the arrangement by the prospect of financial gain but by the altruistic desire to assist another person or couple to have a genetically linked child of his or her or their own. In most of these cases the surrogate mother is a friend or relative of the commissioning parent or couple. Commercial surrogacy, on the other hand, is undertaken in exchange for payment – the commissioning person or couple undertake to pay the surrogate mother a fee which is greater than the costs incurred (and the income lost) in conceiving and bearing the child. According to the SALRC the latter is criticised as “womb leasing” or trading in children and is looked on less favourably than altruistic surrogacy. Altruistic surrogacy is, according to this view, “... more socially acceptable as it displays socially accepted virtues such as generosity, selflessness, concern and sacrifice”.<sup>126</sup>

Subsections (c)(iv) and (v) address the most virulent objection to surrogacy, *ie*, that it would lead to the commodification of babies because it could amount to baby selling if the surrogate mother stands to gain financially from the arrangement.<sup>127</sup> Ensuring that the surrogate mother is not motivated by purely financial considerations at least limits the possible exploitation of economically disadvantaged women by the wealthier members of the community<sup>128</sup> and pre-empts problems from arising in the event of the commissioning person or couple

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<sup>122</sup> S 297.

<sup>123</sup> S 297(2).

<sup>124</sup> In terms of s 298.

<sup>125</sup> S 299.

<sup>126</sup> SALC Report on *Surrogate Motherhood* par 2.1.6; SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>127</sup> SALC Report on *Surrogate Motherhood* par 2.5 and 8.2.8.

<sup>128</sup> SALC Report on *Surrogate Motherhood* par 2.4.5.

refusing to pay the agreed amount or to take the child, leaving the surrogate mother with an extra mouth to feed.<sup>129</sup>

The qualifications in terms of subsections (c)(vi) and (vii) are rather puzzling to say the least. In the first place it is uncertain what is meant by a “viable delivery”? Should it be interpreted as a delivery which produced a viable child? Secondly, if the surrogate mother has a living child of her own, would she not necessarily have a documented history of a pregnancy and a “viable” delivery/birth? According to the SALRC<sup>130</sup> the fact that the surrogate mother has children could be an advantage and a disadvantage. On the one hand the surrogate mother, having given birth to a child, would be able to appreciate the risks associated with pregnancy and the implications of surrendering a child upon birth.<sup>131</sup> On the other hand the children of the surrogate mother could be traumatised upon surrender of the child, fearing that they too will be given away.<sup>132</sup> However, the fact that a woman has previously been pregnant and given birth to a child will, according to the SALRC,<sup>133</sup> undoubtedly, be an indication of a reasonable measure of physical suitability, if not also a favourable psychological disposition.

The reasoning behind the requirement that the surrogate mother must have a *living* child may be found in the argument that a woman who no longer has a living child of her own may be more inclined to bond with the child born in consequence of the surrogate motherhood agreement and more reluctant to relinquish it.<sup>134</sup>

Anticipating the eventualities catered for in subsection (d) can only improve the general efficacy of the surrogate motherhood agreement and moreover insulate the parties, and especially the child, from protracted litigation in an attempt to bring legal certainty to their status. The superfluous verbiage referring to parental responsibilities and rights or aspects thereof found in the first part of the section itself is, however, troublesome. Why refer to the “custody, care, upbringing and

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<sup>129</sup> *Ibid.*

<sup>130</sup> SALC Report on *Surrogate Motherhood* par 2.6.1.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> SALC Report on *Surrogate Motherhood* par 8.2.9.

<sup>134</sup> SALC Report on *Surrogate Motherhood* par 8.2.9. If the surrogate has already completed her family it would, moreover, be a positive recommendation.

general welfare” of the child? The term “custody” has ostensibly formally been replaced by the term “care” in the new Children’s Act.<sup>135</sup> In terms of the definitional section, “care” includes, *inter alia*, “... safeguarding and promoting the well-being of the child”. It is submitted that a simple reference to the “care” of the child would have implied all the other aspects mentioned in the provision. While it is obviously the ideal for the child to be raised in a stable home environment, it is not certain how provisions to this effect can be included in the agreement. The stability of the commissioning parent or couple’s home environment must surely be assessed through the screening process which is not dealt with in this provision. The aim of the provision is to ensure that the parties consider the care of the child to be born - especially in the event of the *status quo* changing due to the death or divorce of the commissioning parents before the completion of the contract or the birth of the child. Although subsection (d) obliges the parties to reach consensus on the care of the child to be born, the word “including” would seem to allow the parties to provide for matters not regulated by the Act. The examples provided for in the provision should, therefore, not be considered a *numerus clausus*. Other important aspects could, for example, include:

- (a) The health and insurance policies to be maintained by all parties throughout the agreement;
- (b) the financial responsibility of the parties requiring funds to be placed in trust to cover all anticipated expenses;
- (c) the creation of a trust for the child;
- (d) an undertaking by the commissioning couple that they will accept the child despite any physical or mental handicaps;<sup>136</sup>
- (e) dealing with the eventualities which could lead to the surrogate mother or the commissioning parents requesting a termination of the pregnancy;

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<sup>135</sup> 38 of 2005.

<sup>136</sup> Pretorius 1996 *De Rebus* 114 at 117.

- (f) specific arrangements regarding the child or children including custody in the case of the divorce or death of the commissioning parents and visitation rights, if any, of the surrogate mother;
- (g) a clause reflecting the decision of the parties whether to publicise their surrogacy agreement or not;<sup>137</sup> and
- (h) a provision requiring that social disease testing (including HIV) be performed on all parties as well as a provision that the surrogate mother be medically examined and declared suitable.<sup>138</sup>

Subsection (e) is evidently a catch-all provision obliging the court to consider whether, in the light of all the circumstances of the parties concerned, the confirmation of the agreement would probably be in the best interests of the child to be born. It reiterates and confirms the paramountcy of the child's best interests.<sup>139</sup>

### **6.3.3.5 Artificial fertilisation of surrogate mother**

Section 296 provides:

- “(1) No artificial fertilisation of the surrogate mother may take place—
  - (a) before the surrogate motherhood agreement is confirmed by the court;
  - (b) after the lapse of 18 months from the date of the confirmation of the agreement in question by the court.
- (2) Any artificial fertilisation of a surrogate mother in the execution of an agreement contemplated in this Act must be done in accordance with the provisions of the National Health Act, 2003 (Act No. 61 of 2003).”

The section seeks to prevent the artificial fertilisation of the surrogate mother before the agreement is confirmed by the court and after the lapse of more than

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<sup>137</sup> The *Ad Hoc* Committee (Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F(4)(i)) was, however, of the view that even if the parties agreed to reveal their agreement they should not be allowed to reveal the names of the child or children.

<sup>138</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F7(4)(j).

<sup>139</sup> As entrenched in s 28(2) of the Constitution and reaffirmed expressly in s 9 of the Children's Act 38 of 2005.

18 months from the date of confirmation of the agreement. Without the court's confirmation the agreement will be invalid and unenforceable.<sup>140</sup> A child born as a result of any action taken in execution of such an invalid arrangement will for all purposes be deemed to be the child of the surrogate mother<sup>141</sup> and not the commissioning parents.<sup>142</sup> Section 303, furthermore, prohibits any person from artificially fertilising a woman "... in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act". A person who contravenes the provisions of s 303 is guilty of an offence and liable to a fine or imprisonment for a period not exceeding ten years or both a fine and such imprisonment.<sup>143</sup> Medical practitioners (and their assistants) should consequently satisfy themselves on this score before artificially fertilising a woman. The Act is silent on the question of whether a medical practitioner, who artificially fertilises a woman without prior authorisation by the court, would attract criminal liability if he or she was negligent in ascertaining that the artificial fertilisation was being executed in terms of a surrogate motherhood agreement.<sup>144</sup>

Restricting the artificial fertilisation of the surrogate mother to within a period of 18 months<sup>145</sup> from the date of the confirmation of the surrogate motherhood agreement could be regarded as a way of preventing the circumstances of the parties involved to change so drastically over time that the agreement no longer reflects the real circumstances and or intentions of the parties involved. Under such changed circumstances the chances of "successfully" executing the agreement could be seriously compromised. In spite of the fact that the agreement may include provisions which cater for changed circumstances, such as death or divorce, the desire to limit the chances of too many changes occurring, seems reasonable. Although, on the other hand, the choice of a period of 18 months may, if imposed for this reason, be considered arbitrary since the

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<sup>140</sup> S 292(1).

<sup>141</sup> S 297(2).

<sup>142</sup> The child is in a sense then punished as the unwanted child of the surrogate mother.

<sup>143</sup> S 305(1)(b) read with s 305(6). A person convicted of this offence more than once can be imprisoned for 20 years: S 305(7).

<sup>144</sup> A *bona fide* oversight would probably not attract liability.

<sup>145</sup> The Proposed Bill on Surrogate Motherhood (cl 7(1)(b)) restricted the impregnation to 12 months after the court's confirmation: See Schedule A to the SALC Report on *Surrogate Motherhood*.



personal circumstances of the parties may of course change drastically overnight, as it were. Despite this reality 18 months can probably be considered a reasonable period of time taking into account the success rate of these procedures in general. Since “no conception” can take place after the said 18 months, it must be assumed that if the child is not conceived within that period of time, the agreement will lapse.

The intention with subsection (2) is that the provisions and requirements in terms of the National Health Act<sup>146</sup> must apply to the procedure of artificial fertilisation. By referring to the National Health Act,<sup>147</sup> the assumption is obviously that the relevant provisions of that Act have come into operation which is as yet not the case. The provisions contained in Chapter 8 relating to the control and use of, *inter alia*, gametes in humans<sup>148</sup> did not come into operation on 2 May 2005 with the other provisions of the Act.<sup>149</sup> Regulations prescribing the procedures to be followed in the case of artificial fertilisation have also not been enacted. The provisions of the Human Tissue Act<sup>150</sup> and the regulations published in terms of that Act<sup>151</sup> are, therefore, currently still in operation and should be adhered to until ultimately replaced by the new provisions.<sup>152</sup> The requirement clearly excludes so-called “self-inseminations”,<sup>153</sup> apparently more popular in lesbian relationships.<sup>154</sup>

#### **6.3.4 Effect of surrogate motherhood agreement**

Section 297 provides:

“(1) The effect of a valid surrogate motherhood agreement is that—

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<sup>146</sup> 61 of 2003.

<sup>147</sup> 61 of 2003.

<sup>148</sup> Ss 53-68.

<sup>149</sup> GG No 26595 dd 23 Jul 2004.

<sup>150</sup> 65 of 1983.

<sup>151</sup> GN R1182 in GG 10283 dd 20 Jun 1986 as amended by GN R1354 in GG 18362 dd 17 Oct 1997.

<sup>152</sup> The expectation is probably that by the time the consolidated Children’s Act comes into operation, the relevant provisions of the National Health Act 61 of 2003 as well as the regulations published in terms thereof, will already be operative.

<sup>153</sup> Where a woman inseminates herself with sperm without the assistance of a medical practitioner.

<sup>154</sup> See Pretorius unpublished LLD thesis UNISA (1991) 421-422.

- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;
  - (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
  - (c) the surrogate mother or her husband, partner or relatives have no rights of parenthood or custody of the child;
  - (d) the surrogate mother or her husband, partner or relatives have no right of access to the child unless provided for in the agreement between the parties;
  - (e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and
  - (f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.
- (2) Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.”

The section can be considered crucial as far as the acquisition of parental responsibilities and rights is concerned. In terms of this section legal effect is given to the intention of the parties to allow the commissioning parent(s) to acquire full parental responsibilities and rights in respect of the child born at their behest. It is, however, important to note that while the section ostensibly regulates the effect of a valid surrogate motherhood agreement, whatever the type of surrogacy contemplated, it must be read in conjunction with and subject to the provisions of sections 298 and 299. In terms of the latter provisions a partial surrogate mother may terminate and withdraw from a fully enforceable surrogate motherhood agreement – an option which is by implication not available to a (full) surrogate mother who is not genetically related to the child. The effect of a surrogate motherhood agreement is thus in fact depended on whether the parties have contemplated a full or a partial surrogacy agreement.<sup>155</sup>

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<sup>155</sup> This approach accords with the recommendation by the *Ad Hoc* Committee (Report on *Surrogate Motherhood* par F9(1)) that as far as the effect of a surrogate motherhood agreement is concerned a distinction be made between full and partial surrogacy and the recommendation by the SALC Discussion Paper on the *Review of the Child Care Act* par 7.6 that the distinction be maintained.

Generally speaking a valid surrogate motherhood agreement will then, automatically confer full parental responsibilities and rights on the commissioning parent(s) from the moment of birth in terms of this section.<sup>156</sup> Contrary to the common law rule identifying the mother as the woman who gave birth to the child encapsulated in the maxim *mater semper certa est*,<sup>157</sup> the surrogate mother or her spouse or partner does not acquire any “rights of parenthood”<sup>158</sup> and is obliged to hand over the child “... as is reasonably possible after birth”. While the surrogate mother or her spouse or partner does not acquire guardianship or care in respect of the child, contact with the child may be negotiated but not enforced.<sup>159</sup> The fact that the child is for all purposes in law deemed to be the child of the commissioning parent(s) creates a reciprocal duty of support between the child and the commissioning parent(s). The claim for maintenance against the child’s natural relations<sup>160</sup> is thus extinguished when the surrogate motherhood agreement takes effect. The child will also not be deemed a descendant of the surrogate mother<sup>161</sup> for purposes of the law of intestate succession.<sup>162</sup>

The prohibition against the termination of a valid surrogate motherhood agreement as described in paragraph (e) is made subject to the provisions of sections 292 and 293. Since section 297 as a whole regulates the effect of a *valid* surrogate motherhood agreement, the validity of the agreement must clearly be assumed for purposes of this section. It makes little sense, therefore, to make the prohibition against termination subject to the validity requirements contained in section 292 and the consent requirement in section 293. In an effort to ascertain the reasoning behind the provision it was discovered that in a previous version of section 297, contained in clause 290 of a Children’s Bill published for commentary

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<sup>156</sup> The provision has retained much of its original form as recommended by the SALRC: See cl 8 of the Proposed Bill on Surrogate Motherhood attached as Schedule A to the SALC Report on *Surrogate Motherhood*. The only exception to this rule is when the partial surrogate terminates the agreement before the birth of the child in terms of s 299(b).

<sup>157</sup> This common law rule has been codified in the case where the woman gives birth to an artificially conceived child: S 40(3) of the Children’s Act 38 of 2005 discussed in 4.4.2.1 above.

<sup>158</sup> Where the surrogate mother is married it will thus also neutralise s 40(1)(a) in terms of which the husband who consents to the artificial fertilisation of his wife is regarded as the legal father of the child thus conceived and born.

<sup>159</sup> As already mentioned a visitation rights clause could be one of the optional clauses included in the surrogate motherhood agreement.

<sup>160</sup> In terms of the common law: See Van Schalkwyk Ch 2 in Davel *Introduction to Child Law in South Africa* 45.

<sup>161</sup> Or her spouse, partner or relative, as the case may be.

<sup>162</sup> S 1 of the Intestate Succession Act 81 of 1987.

in August 2003,<sup>163</sup> the prohibition on termination was made subject to clause 291 of the said Bill, which allowed for the termination of the agreement by a partial surrogate mother, and clause 293, which confirmed the right of the surrogate mother to terminate her pregnancy in terms of the Choice on Termination of Pregnancy Act.<sup>164</sup> In view of the relevancy of the latter two provisions it seems far more reasonable to assume that the legislator intended to make paragraph (e) subject to the provisions of sections 298 and 300.<sup>165</sup> This means that apart from a partial surrogate mother who may terminate the agreement in terms of section 298 and the right of any surrogate mother to terminate the agreement by terminating her pregnancy in terms of the Choice on Termination of Pregnancy Act,<sup>166</sup> the surrogate motherhood agreement may not be terminated after the surrogate mother has been artificially fertilised.<sup>167</sup> Save for the two exceptions mentioned, any attempt by either the surrogate mother or the commissioning parent(s) to rescind the agreement after fertilisation will have no legal effect. In the case of full surrogacy the agreement thus becomes irrevocable once the surrogate mother has been impregnated whereas in the case of partial surrogacy the agreement will remain revocable until sixty days after the birth of the child.

Despite the importance of this provision and the need for clarity and precision in the wording thereof, the use of the phrase “rights of parenthood” is regrettable.<sup>168</sup> Since the section was intended to bestow full parental responsibilities and rights on the commissioning parent or couple and at the same time to deprive the surrogate mother and her family of all such responsibility (*ie* guardianship, care, contact and maintenance), the correct term would have been “parental responsibilities and rights” as defined in section 18 of the Children’s Act.<sup>169</sup> The use of this term obviates the necessity of referring to “care” since it is included in the concept of “parental responsibilities and rights”. Otherwise, it can be argued, the provision should have listed all the incidents of parental responsibilities and

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<sup>163</sup> Children’s Bill [B70 – 2003]: GG No 25346 dd 13 Aug 2003.

<sup>164</sup> 92 of 1996.

<sup>165</sup> These sections represent the equivalent of cls 291 and 293 of the Children’s Bill [B70 – 2003], respectively.

<sup>166</sup> 92 of 1996.

<sup>167</sup> While not absolutely clear from the provision, the legislator’s intention must have been to refer to a successful fertilisation that has resulted in the conception of a child.

<sup>168</sup> The phrase is also used in s 299(d) where the same criticism applies.

<sup>169</sup> 38 of 2005.

rights *in lieu* of the phrase “rights of parenthood”. The reference to “husband” is, furthermore, incorrect and should be amended to read “spouse”, as previously noted.<sup>170</sup>

The effect of subsection (2) is that an invalid surrogate motherhood agreement will reinstate the ordinary rules to determine the status of the child and the acquisition of parental responsibilities and rights and, subject to the provisions of section 40 of the Children’s Act,<sup>171</sup> will vest parental responsibilities and rights in the surrogate mother who gave birth to the child. The Act is silent on the legal position of the spouse or partner of the surrogate mother, giving no indication whether the provisions of section 40, applicable in the case of a child conceived by artificial fertilisation, will apply.<sup>172</sup>

Van Heerden,<sup>173</sup> correctly in my view, submits:

“Although the provision is clearly designed to serve as a deterrent for prospective surrogate mothers and commissioning parents who might contemplate non-compliance with the proposed regulatory scheme, ... it is unduly rigid and will in many cases cause grave injustice to parties involved, especially the surrogate mother (who may be saddled with the responsibility for the child she has carried for the commissioning couple).”

### 6.3.5 Termination of surrogate motherhood agreement

Section 298 provides:

“(1) A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty

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<sup>170</sup> As explained in 4.4.2.2(b) above.

<sup>171</sup> 38 of 2005.

<sup>172</sup> The provisions of s 40(2) and (3) (discussed in 4.4.2 above) are made subject to s 296, which prohibits the artificial fertilisation of a surrogate mother before confirmation of the surrogate motherhood agreement and after the lapse of eighteen months from the date of confirmation of the surrogate motherhood agreement. The relevance of s 296 to s 40 seems questionable. In the Children’s Bill [B70 – 2003], the provisions of cl 40 were made subject to cl 290, regulating in that Bill the effect of a surrogate motherhood agreement on the status of the child – to my mind a more plausible reference. As a result it is submitted that the reference to s 296 in s 40 of the Children’s Act 38 of 2005 is a mistake and should be amended to be a reference to s 297. See also 4.4.2 fn 763 above.

<sup>173</sup> Van Heerden Ch 15 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 352 fn 92.

- days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.
- (2) The court must terminate the confirmation of the agreement in terms of section 285 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order if it is in the best interest of the child.
  - (3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 294.”

In contrast to the so-called “direct-parentage” model generally approved of in the case of full surrogacy, the *Ad Hoc* Committee originally recommended a fast-track adoption procedure,<sup>174</sup> or so-called “transfer of parentage”<sup>175</sup> model, in cases of partial surrogacy. In terms of this recommendation the child born as a result of a partial surrogacy arrangement would be regarded as the child of the *surrogate mother* (and her husband, if married) and would be registered as such. The surrogate mother would be obliged to hand over the child to the commissioning parents immediately after birth. The commissioning parent(s) would then have the opportunity to apply for the transfer of parental responsibilities and rights to them after six weeks, but within six months of the birth of the child. If successful, this would entail that the baby be given a new birth certificate naming the commissioning parent(s) as the parent(s) of the child. The unconditional consent of the surrogate mother would be compulsory but ineffective if given less than six weeks after the birth of the child. According to the *Ad Hoc* Committee the “six-week-rule” flowed from the conviction that the surrogate mother should only finally decide to give up her parental responsibilities and rights six weeks after the birth of the child.<sup>176</sup> A guardian *ad litem* would, in addition, be appointed to protect the interests of the child pending the transfer of parental responsibilities and rights to the commissioning parents.<sup>177</sup> Failing the unconditional consent of the surrogate mother, the *status quo* would remain.<sup>178</sup>

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<sup>174</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* (par F9(2)) and SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>175</sup> This model is utilised in the UK in terms of the Human Fertilisation and Embryology Act (HFEA) 1990: See 6.4.1 below

<sup>176</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 9(2)(d).

<sup>177</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 9(2)(b).

<sup>178</sup> Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F 9(2)(e).

The SALRC rejected the “transfer of parentage” or “fast-track adoption” approach in favour of a more child-centred approach, while at the same time acknowledging that “... the child’s best interests are closely linked to those of his or her parents and the interests of the family as a whole”.<sup>179</sup> The legislator finally adopted the “delayed direct parentage” model in the case of partial surrogacy as recommended by the SALRC. In terms of this model the effects of the direct parentage model are postponed until sixty days after the birth of the child unless the surrogate mother decides not to relinquish the child as agreed upon. The acquisition of parental rights and responsibilities by the commissioning parent(s) is therefore merely delayed by a “cooling-off period” or *spatium deliberandi*<sup>180</sup> within which time a surrogate mother who is genetically related to the child has the right to resile from the agreement and keep the child.<sup>181</sup>

As previously mentioned, the section also has the effect of diluting the general prohibition on the termination of the surrogate motherhood agreement<sup>182</sup> in the case of partial surrogacy. While the commissioning parent(s) and a full surrogate mother may only terminate the agreement before the artificial fertilisation of the surrogate mother, a surrogate mother who is genetically related to the child may change her mind and decide to keep the child “at any time” until sixty days after the birth of the child. Because of the far reaching effects that such a termination may have on the status of all the parties concerned it is only reasonable to expect that the procedure for the termination is clearly and adequately outlined. Notification of the termination must be made by filing written notice with the court. Since the High Court must confirm the agreement in terms of section 295(e), it must be assumed that “court” refers to a High Court<sup>183</sup> in this section as well. The section is silent on the question of the basis for founding jurisdiction. A number of possibilities exist, *ie* the domicile or habitual residence of the commissioning parent(s), or the domicile or habitual residence of the surrogate mother or the court which confirmed the agreement in the first place. Upon receipt of the notice

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<sup>179</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>180</sup> Which also applies in the case of adoption: See *J v Commissioner of Child Welfare* [1996] 2 All SA 259 (W) 270.

<sup>181</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.6.

<sup>182</sup> Created in s 297(1)(e) discussed in 6.3.4 above.

<sup>183</sup> The Children’s Act 38 of 2005 does not define the term “court” in s 1(1).

of termination the court is obliged to notify the parties to the agreement and to hold a hearing. The court will presumably have to notify the commissioning parent(s) of the termination and notify the commissioning parent(s) and the surrogate mother of the date and time of the hearing. The purpose of the hearing is twofold:

- (a) to determine whether the surrogate mother has taken the decision to keep the child of her own free will and has not been pressurised or coerced into changing her mind about relinquishing the child; and
- (b) to ensure that the surrogate mother understands the effects of the termination of the agreement as set out in section 299.

Once the court has satisfied itself on these scores it must confirm the termination. The court does, however, have a discretion to make any additional order as a consequence of the termination, provided only that it is deemed in the best interests of the child.

Subsection (2) insulates the surrogate mother who decides to terminate the agreement from any civil liability to the commissioning parent(s), save and except for compensation relating to the expenses or payments authorised in terms of section 301. The protection afforded by this section may also ensure that financial concerns do not unnecessarily inhibit the surrogate mother in her decision not to honour the agreement and keep the child.

### **6.3.6 Effect of termination of surrogate motherhood agreement**

#### **6.3.6.1 Status of parties**

Section 299 provides:

“The effect of the termination of a surrogate motherhood agreement in terms of s 298 is that—

- (a) where the agreement is terminated after the child is born, any parental rights established in terms of section 290 are terminated



- and vest in the surrogate mother and her husband or partner, if any, or if none, the commissioning father;
- (b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother and her husband or partner, if any, or if none, the commissioning father, from the moment of the child's birth;
  - (c) the surrogate mother and her husband or partner, if any, or if none, the commissioning father, are obliged to accept the obligation of parenthood;
  - (d) subject to paragraphs (a) and (b), the commissioning parents have no rights of parenthood and can only obtain such rights through adoption;
  - (e) subject to paragraphs (a) and (b), the child has no claim for maintenance or of succession against the commissioning parents or any of their relatives.”

The section regulates the effects once the partial surrogate mother has exercised her right to terminate the agreement in terms of section 298. The effect of the termination is, to a certain extent, the reversal of the effects of a valid surrogate motherhood agreement as outlined in section 297. If the partial surrogacy agreement is terminated *after* the child is born (but still within sixty days from the date of birth), the parental rights conferred on the commissioning parent or couple<sup>184</sup> are terminated and vested in the surrogate mother and her spouse<sup>185</sup> or partner. If the surrogate mother dies after terminating the agreement but before effect can be given to the termination, her spouse if married, or her partner will be vested with the parental responsibilities and rights of the child. If the surrogate mother dies as a single woman who was not involved in a permanent relationship, the commissioning father will acquire parental responsibilities and rights. The rationale behind this provision stems from the fact that in the case of partial surrogacy the child will be genetically related to the surrogate mother and the commissioning father, since the child must at least be related to one of the commissioning parents.<sup>186</sup> The idea is then to ensure that the child grows up with at least one genetic parent. The only problem with this reasoning is that the spouse or partner of the surrogate mother will, of course in a strict sense not be the genetic parent of the child. If a mother gives birth to an artificially conceived child with the consent of her spouse, such spouse will acquire parental

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<sup>184</sup> In terms of s 297.

<sup>185</sup> The restriction to the “husband” of the surrogate mother is no longer justified: See 6.3.3.2 above.

<sup>186</sup> S 294.

responsibilities and rights of the child jointly with the mother “... as if the gamete or gametes of those spouses had been used for such artificial fertilisation”.<sup>187</sup> The consenting spouse will thus, as in the case of the natural conception of the child, in law be deemed the genetic parent of the child although he or she is not.<sup>188</sup> The same fiction cannot be applied to the permanent partner of the surrogate mother. Even under ordinary circumstances, where the child has been conceived naturally, such a partner would not automatically acquire parental responsibilities and rights of the child.<sup>189</sup> In order of the preference prescribed in the section an unrelated partner will be given preference to a genetically related commissioning father as far as the parental rights of the child are concerned. Whether this result can be deemed in the best interests of the child must surely be debatable. A further interesting aspect is that the surrogate mother and her spouse or partner are, or the commissioning father is, obliged to accept the obligation of parenthood. Would this mean that if the unmarried surrogate mother dies after termination her permanent partner would be obliged to accept parental responsibilities and rights even if the commissioning father is willing to assume the obligation? It is not clear from the section whether the effects of the termination can be negotiated and incorporated as an agreed term in the confirmed surrogate motherhood agreement. It could perhaps be argued that opening up the possibility of negotiating the effects of the termination could lead to uncertainty with regard to the rights and obligations of the parties and is therefore not advisable. The words “obliged to accept” in paragraph (c) would also seem to rule out such a possibility.

If the agreement is terminated *before* the child is born, the child will be deemed the child of the surrogate mother and her spouse or partner from the moment of the child’s birth. In this case the direct parentage model does not take effect at all. The commissioning parents never assume “rights of parenthood” upon the birth of the child and will have to apply for the adoption of the child through the normal channels<sup>190</sup> to acquire parental responsibilities and rights. An exception to this

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<sup>187</sup> S 40(1)(a).

<sup>188</sup> The origin of the fiction is of course the common law principle of *pater est quem nuptiae demonstrant*.

<sup>189</sup> Only the biological father of a child will automatically acquire parental responsibilities and rights in respect of his child if he is living with the mother (surrogate mother in this case) in a permanent life-partnership: S 21(1)(a).

<sup>190</sup> Ch 15 of the Children’s Act 38 of 2005.

rule will, however, arise when the commissioning father has to accept responsibility for the child because neither the surrogate mother, spouse or partner is able to do so. If the surrogate mother and her spouse or partner assume parental responsibilities and rights, the child has no claim for maintenance or right of succession against the commissioning parent(s). This, despite the fact that the commissioning father is the genetic father of the child and thus in terms of the common law under a duty to support him or her.

The section does not regulate the acquisition and exercise of parental responsibilities and rights from the time of the artificial conception of the child to the birth of the child for the simple reason that the surrogate mother has autonomy over the commissioned child until the moment of its birth.

### **6.3.6.2 Termination of pregnancy**

Section 300 provides:

- “(1) A surrogate motherhood agreement is terminated by a termination of pregnancy that may be carried out in terms of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).
- (2) For the purposes of the Choice on Termination of Pregnancy Act, 1996, the decision to terminate lies with the surrogate mother, but she must inform the commissioning parents of her decision prior to the termination and consult with the commissioning parents before the termination is carried out.
- (3) The surrogate mother incurs no liability to the commissioning parents for exercising her right to an abortion pursuant to this section except for compensation for any payments made by the commissioning parents in terms of section 301 where the decision to terminate is taken for any reason other than on medical grounds.”

The section recognises the right<sup>191</sup> of a woman to terminate her pregnancy in terms of the Choice on Termination of Pregnancy Act,<sup>192</sup> even after undertaking to carry and give birth to the child on behalf of the commissioning parent(s). Should

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<sup>191</sup> The constitutional right of a woman to make decisions concerning reproduction in terms of s 12(2)(a) of the Constitution has yet to be successfully challenged or limited. For a general discussion of the issue, see Keightley Ch 2 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 42 fn 24.

<sup>192</sup> 92 of 1996.

the surrogate mother decide to end the pregnancy she is obliged to notify and consult with the commissioning parent(s) before proceeding with the termination. It can, however, be argued that since the commissioning parent(s) cannot prevent the termination of the pregnancy because the decision lies with the mother, and since the failure to comply with the requirements in terms of this section is ostensibly not penalised,<sup>193</sup> the duty to inform and consult with the commissioning parent(s) before terminating the pregnancy is unenforceable. The obligation placed on the surrogate mother will thus, despite the peremptory language employed in the section, in practice amount to no more than a courtesy gesture towards the commissioning parents. It is further submitted that a right to terminate the pregnancy necessarily includes the right to refuse to terminate the pregnancy, even at the risk of giving birth to a child with severe physical or mental abnormalities.<sup>194</sup>

As in the case of the termination of the agreement in terms of section 298, the surrogate mother incurs no liability to the commissioning parent(s) if she decides to make fulfilment of the surrogate motherhood agreement impossible by terminating her pregnancy. The only exception would be if the pregnancy is terminated "... for any reason other than on medical grounds", in which case she would be liable for compensating the commissioning parent(s) as provided for in section 301.<sup>195</sup> In terms of the Choice on Termination of Pregnancy Act<sup>196</sup> the following reasons may be regarded as "other than medical":

(a) Requesting the termination of the pregnancy;<sup>197</sup> and

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<sup>193</sup> In terms of neither the section itself nor s 305.

<sup>194</sup> Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 350 n 87, suggests that if the surrogate mother decides to continue with the pregnancy and the child is eventually born with severe abnormalities the commissioning parent(s) should continue to bear their responsibilities towards the child. Since this eventuality is not expressly catered for in the Act it is probably advisable for the parties themselves to clarify the issue in the terms of their agreement: See Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F11(1).

<sup>195</sup> In the present context the surrogate mother could probably be held responsible for repaying and reimbursing all the necessary expenses incurred by the commissioning parents in respect of her pregnancy: Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par F7(4)(g).

<sup>196</sup> 92 of 1996.

<sup>197</sup> S 2(1)(a) of the Choice on Termination of Pregnancy Act 92 of 1996. Termination of the pregnancy on demand is ostensibly available to the surrogate mother only during the first 12 weeks of pregnancy, but cf Van Oosten 1999 *SALJ* 60 at 75.

- (b) social and economic circumstances.<sup>198</sup>

### 6.3.7 Prohibitions relating to surrogacy

#### 6.3.7.1 *Payments in respect of surrogacy*

Section 301 provides:

- “(1) Subject to subsections (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in money or in kind.
- (2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for—
- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;
  - (b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement;
  - (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.
- (3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefore.”

The section gives effect to the generally held view that surrogacy should not be commercialised<sup>199</sup> by allowing the surrogate mother to gain financially from the surrogate agreement. The prohibition against the giving or receiving of a reward or compensation in connection with a surrogate motherhood agreement is tempered by the exceptions<sup>200</sup> created in subsection (2) to the effect that compensation may be claimed for actual expenses incurred in connection with the conception and birth of the child and the confirmation of the surrogate agreement,

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<sup>198</sup> S 2(1)(b)(iv) of the Choice on Termination of Pregnancy Act 92 of 1996.

<sup>199</sup> But for an opposing view, cf Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par E3(b); Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 348 fn 80 and Meyerson in *Murray Gender and the New South African Legal Order* 126ff.

<sup>200</sup> The SALRC considered an outright criminal law ban on compensation of the surrogate mother impractical and unfeasible: SALC Report on *Surrogate Motherhood* par 8.4.2.

loss of earnings suffered by the surrogate mother and insurance payments. Another exception in terms of subsection (3) relates to the reasonable compensation of any person who renders a *bona fide* professional, legal or medical service with a view to the confirmation or execution of the surrogate motherhood agreement. The SALRC held the view that the mere fact that compensation is only enforceable in the case of legal surrogate motherhood, and then only to actual expenses and losses relating to the fulfilment and execution of the surrogate agreement, is already a strong disincentive for a prospective surrogate mother who is profit-orientated.<sup>201</sup>

A person who contravenes this provision commits a criminal offence<sup>202</sup> and if found guilty is liable on conviction to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.<sup>203</sup>

### **6.3.7.2 Identity of parties**

Section 302 provides:

- “(1) The identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned.
- (2) No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement.”

The section aims to protect the privacy of the parties involved in the surrogate motherhood agreement as well as the identity of the child born in consequence thereof. A report publishing details regarding a dispute between parties involved in a surrogate motherhood arrangement may not reveal the identity of the parties without their written consent. A failure to comply with this restriction and prohibition in terms of subsection (2) is a punishable offence and subject to the imposition of the same sentence as in section 301 mentioned above.<sup>204</sup>

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<sup>201</sup> SALC Report on *Surrogate Motherhood* par 8.4.2.

<sup>202</sup> S 305(1)(b).

<sup>203</sup> S 305(6).

<sup>204</sup> S 305(1)(b) read with s 305(6).

### **6.3.7.3 Miscellaneous**

Section 303 provides:

- “(1) No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act.
- (2) No person may in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement.”

The prohibitions contained in these provisions are to a large extent self explanatory. Subsection (1) has already been discussed in the context of the requirements for the validity of a surrogate motherhood agreement.<sup>205</sup> A contravention of these provisions constitutes a criminal offence, and is upon conviction subject to the same penalty as in the case of a contravention of section 301.<sup>206</sup>

### **6.3.8 Access to information**

The following provisions in terms of section 41, regarding the right of a child born as a result of artificial fertilisation in general, and surrogacy in particular, to have access to information regarding his or her genetic origins, must be read as part of the Chapter on surrogate motherhood. Section 41 provides:

- “(1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to -
  - (a) any medical information concerning that child’s genetic parents; and
  - (b) any other information concerning that child’s genetic parents but not before the child reaches the age of 18 years.
- (2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.
- (3) The Director-General: Health or any other person specified by regulation may require a person to receive counselling before any information is disclosed in terms of subsection (1).”

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<sup>205</sup> In 6.3.3.5 above.

<sup>206</sup> S 305(1)(b) read with s 305(6).

In accordance with the general trend, both in South Africa<sup>207</sup> and abroad,<sup>208</sup> recognising a child's right to genetic identity<sup>209</sup> and on the recommendation of the SALRC,<sup>210</sup> a child born as a result of a surrogacy arrangement has access to the surrogate motherhood agreement and all biographical and medical information concerning his or her generic parents from the date on which he or she reaches the age of 18 years.<sup>211</sup> The information, irrelevant of its nature, may, however, not reveal the identity of the gamete donors or the surrogate mother. The relevant authorities may require a person to receive counselling prior to disclosure in the interest of the sensitive nature of the information being revealed.

#### 6.4 COMPARATIVE STUDY

While many countries in the world now address surrogacy, and more specifically the acquisition of parental responsibilities and rights in the case of surrogate motherhood arrangements, to a greater or lesser extent, whether directly or by implication, an extensive comparative study is not deemed functional for present purposes.<sup>212</sup> Once Chapter 19 of the Children's Act<sup>213</sup> comes into operation, South Africa will rank among the few countries in the world with a comprehensive legislative scheme that attempts to regulate all aspects of surrogate motherhood arrangements. Since the law in the United States of America and the United Kingdom informed the provisions which were eventually enacted in the Children's Act,<sup>214</sup> an overview of surrogacy law in these countries is deemed relevant.<sup>215</sup> The comparative study will direct its attention to the way in which provision is made in these two countries for the acquisition of parental responsibilities and rights in the context of a surrogacy arrangement.

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<sup>207</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.3 n 34 and the authority there cited.

<sup>208</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.3 n 35 and the authority there cited.

<sup>209</sup> For a detailed discussion of this right in the context of adoption, see Louw 2003 *De Jure* 252.

<sup>210</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.6; SALC Report on the *Review of the Child Care Act* par 6.4.

<sup>211</sup> A similar restriction is placed on access to adoption information in terms of s 248.

<sup>212</sup> For such an extensive comparative study, see SALC Report on *Surrogate Motherhood* par 3.

<sup>213</sup> 38 of 2005.

<sup>214</sup> 38 of 2005. See 6.2 above.

<sup>215</sup> See Pretorius *Surrogate Motherhood* 25.



### 6.4.1 United Kingdom<sup>216</sup>

Surrogacy agreements came into prominence in the United Kingdom as a result of the much publicised “Baby Cotton” case,<sup>217</sup> which is believed to be the first case in the United Kingdom of a commercially arranged surrogacy agreement. Following an in-depth investigation by the Warnock Committee in 1984, the Surrogacy Arrangements Act 1985 was enacted in terms of which it is a criminal offence for a person to be involved in negotiating or making a surrogacy arrangement on a commercial basis.<sup>218</sup> While the Surrogacy Arrangements Act of 1985 originally left the question of the enforceability of surrogate motherhood agreements uncertain, the matter has now been put beyond doubt by section 1A of the Surrogacy Arrangements Act 1985<sup>219</sup> which states that: “No surrogacy arrangement is enforceable by or against any of the persons making it.”<sup>220</sup> Although an offence may have been committed and the arrangement may be unenforceable, the English courts have exercised jurisdiction to determine in accordance with the welfare principle,<sup>221</sup> who acquires parental “care” of the child. This could lead to a decision in favour of the commissioning parents, thereby achieving indirectly the intended result of the agreement.<sup>222</sup> The commissioning parents could also be allowed to adopt the child or, if the commissioning parents are married, confer parental “responsibility” on them by means of a “parental order” in terms of the Human Fertilisation and Embryology Act 1990<sup>223</sup> if certain conditions are met.<sup>224</sup>

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<sup>216</sup> See Pretorius unpublished LLD thesis UNISA (1991) 53-65 and 90-95; SALC Report on *Surrogate Motherhood* par 3.15-3.17; Pretorius *Surrogate Motherhood* 26-27, 40-42 and 48-50; Garrity 2000 *Louisiana Law Review* 809 at 817-820; Bainham *Children—The Modern Law* 256-259; Schwenzer 2007 *Electronic Journal of Comparative Law* 2; Lowe & Douglas *Bromley’s Family Law* 318-320.

<sup>217</sup> Reported as *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

<sup>218</sup> S 2(1) of the Act: Bainham *Children—The Modern Law* 256; Lowe & Douglas *Bromley’s Family Law* 318.

<sup>219</sup> Introduced by s 36(1) of the HFEA 1990.

<sup>220</sup> Lowe & Douglas *Bromley’s Family Law* 319.

<sup>221</sup> Referred to in SA as the best interests of the child principle or standard.

<sup>222</sup> Bainham *Children—The Modern Law* 256.

<sup>223</sup> S 30 of the HFEA 1990.

<sup>224</sup> These conditions include that at least one of them must be genetically related to the child, the child must be resident with them, there must be no payment involved (although the court can authorise this and allow the reasonable expenses of the surrogate) and the surrogate mother and the legal father must have agreed unconditionally to the order: Bainham *Children—The Modern Law* 257. A surrogate mother’s agreement to the making of the order is ineffective if given less than six weeks after the child’s birth: S 30(6). For criticism of this rule, see 6.5(b) below.

The power to make a parental order does not arise in the case where the child is conceived naturally through sexual intercourse between the surrogate and the commissioning father or where the commissioning couple are unmarried.<sup>225</sup> In these instances the parties will have to rely on the inherent jurisdiction or the more general discretion of the court to make orders relating to the regulation of the exercise of a particular aspect of parental responsibility.<sup>226</sup>

According to Bainham<sup>227</sup> –

“English law is frankly ambivalent about surrogacy ... Whilst the initial agreement is not considered to be in the best interests of the *intended* child, when the *actual* child is born it may be, at that point, that it is in his best interests (perhaps as the lesser of the two unsatisfactory alternatives) to be with the commissioning parents rather than the surrogate mother. The solutions adopted at this stage is not very different to other substitute care arrangements which the court can sanction where the natural or ‘normal’ family fails.”

The appropriateness of applying the best interests standard under these circumstances has been questioned.<sup>228</sup>

## 6.4.2 United States of America<sup>229</sup>

### 6.4.2.1 Introduction

Although the Constitution of the United States of America does not contain an explicit confirmation of the right to procreation, a series of Supreme Court cases have recognised fundamental rights associated with parenting. The court locates the right to privacy, which includes the rights of procreation and parenting, in the

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<sup>225</sup> Bainham *Children–The Modern Law* 257.

<sup>226</sup> S 8 of the Children Act 1989; Bainham *Children–The Modern Law* 257.

<sup>227</sup> Bainham *Children–The Modern Law* 259.

<sup>228</sup> Lowe & Douglas *Bromley’s Family Law* 320.

<sup>229</sup> Gleaned from the following sources: Pretorius unpublished LLD thesis UNISA (1991) 65-77, 95-108, 127 and 135-139; SALC Report on *Surrogate Motherhood* par 3.18-3.20; Goodwin 1992 *FLQ* 275; Russel-Brown 1992 *Columbia Human Rights Law Review* 525; Gordon 1993 *Saint Thomas Law Review* 191; Pretorius *Surrogate Motherhood* 30-35; 42-47 and 54-58; King 1995 *UCLA Women’s Law Journal* 329; Pierce-Gealy 1995 *Akron Law Review* 535; Krim 1996 *Annals of Health Law* 193; Lascarides 1997 *Hofstra Law Review* 1221; Garrity 2000 *Louisiana Law Review* 809; Liliith 2001 *American University Journal of Gender, Social Policy and the Law* 207; Storrow 2002 *Hastings Law Journal* 597; Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006).

liberty provision of the Due Process clause of the Fifth Amendment.<sup>230</sup> Surrogacy law in the United States of America is not uniform since the protection of procreative liberty is a state matter and not a federal responsibility.<sup>231</sup> Some states have chosen to grant more protection to this right, while other states have chosen laws that limit or regulate procreative rights.<sup>232</sup> There is thus a vast array of surrogacy laws in the United States ranging from States that have designed surrogacy statutes to eliminate all forms of surrogacy,<sup>233</sup> others that have enacted statutes to severely limit the terms and enforcement of surrogacy contracts,<sup>234</sup> while certain states, such as California, have yet to enact any legislation addressing surrogacy.<sup>235</sup>

#### **6.4.2.2 Legislation**

The Uniform Parentage Act (UPA) 2000, a United States Federal Act, which has not been enacted by all states, provides for surrogate motherhood agreements, called “gestational agreements” in Article 8 of the Act. Section 801 provides:

- “(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:
- (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
  - (2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and
  - (3) the intended parents become the parents of the child.

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<sup>230</sup> Lilit 2001 *American University Journal of Gender, Social Policy and the Law* 207 at 228-229. The US Supreme Court recognised the right to privacy as a fundamental right protected by the US Constitution (*Skinner v Oklahoma* 316 US 535 (1942)) in such areas as the right to procreate (*Eisenstadt v Baird* 405 US 438 (1972 at 453) in which the court states: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”: Gordon 1993 *Saint Thomas Law Review* 191; Lascarides 1997 *Hofstra Law Review* 1221 at 1223 fn 5.

<sup>231</sup> Garrity 2000 *Louisiana Law Review* 809 at 812.

<sup>232</sup> Garrity 2000 *Louisiana Law Review* 809 at 812.

<sup>233</sup> Such as Arizona, Indiana and North Dakota. New York, Utah, Kentucky, Louisiana, Nebraska and Washington all declare surrogacy contracts for compensation void and unenforceable while Michigan has gone one step further and actually criminalised surrogacy contracts that involve compensation to the surrogate but only in the case of gestational surrogacy: Garrity 2000 *Louisiana Law Review* 809 at 813-814.

<sup>234</sup> Florida, New Hampshire and Virginia: Garrity 2000 *Louisiana Law Review* 809 at 813-814.

<sup>235</sup> Garrity 2000 *Louisiana Law Review* 809 at 812-813.

- (b) The intended parents must be married, and both spouses must be parties to the gestational agreement.
- (c) A gestational agreement is enforceable only if validated as provided in Section 803.
- (d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.
- (e) A gestational agreement may provide for payment of consideration.
- (f) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.”

In terms of section 803 of the Act the court may validate the gestational agreement and declare that the intended parents will be the parents of a child born during the term of the agreement provided certain requirements are satisfied. These requirements include, *inter alia* –

- (a) that medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child;
- (b) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of fitness applicable to adoptive parents;
- (c) all parties have voluntarily entered into the agreement and understand its terms;
- (d) the prospective gestational mother has had at least one pregnancy and delivery and her bearing another child will not pose an unreasonable health risk to the unborn child or to the physical or mental health of the prospective gestational mother;
- (e) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and

- (f) the consideration, if any, paid to the prospective gestational mother is reasonable.

The decision to validate a gestational agreement is within the discretion of the court, subject to review only for abuse of discretion.<sup>236</sup>

Section 806 makes provision for the termination of the agreement after validating the agreement, but before the prospective gestational mother becomes pregnant by means of assisted reproduction. The termination may be requested by the prospective gestational mother, her husband, or either of the intended parents. The court for good cause shown may also terminate the gestational agreement. Neither a prospective gestational mother nor her husband, if any, is liable to the intended parents for terminating a gestational agreement pursuant to this section. Section 807 regulates the acquisition of parental responsibilities and rights in the case of a valid gestational agreement and is thus the most important provision for purposes of this discussion:

- “(a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:
  - (1) confirming that the intended parents are the parents of the child;
  - (2) if necessary, ordering that the child be surrendered to the intended parents; and
  - (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.
- (b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.”

It is clear from the abovementioned provisions that the Uniform Parentage Act 2000 allows for both traditional (partial) and gestational (full) surrogacy but does not require that at least one intending parent be the genetic parent. The Uniform Parentage Act 2000 does require, however, that the intending parents be married. The rationale for this is said to be that, given the controversial nature of surrogacy

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<sup>236</sup> S 803(c).

contracts, "... the most worthy fact circumstances meriting legal recognition is the plight of childless married couples".<sup>237</sup>

While it is possible for an unmarried person in South Africa (and certain other state statutes in the United States<sup>238</sup>) to be vested with parental responsibilities and rights *via* surrogacy, there must be a genetic connection with at least one of the commissioning parents in terms of the Children's Act.<sup>239</sup> The Uniform Parentage Act 2000, on the other hand, requires no such genetic connection but requires the "intended" parents to be married. This approach to surrogacy can be understood in one of two ways, both of which, according to Storrow,<sup>240</sup> is plausible

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- (a) the arrangement of the intending parents for genetic contributions by third-party donors is considered the intending parents' constructive genetic contribution; or
- (b) the fact of the intending parents' marriage acts as a suitable substitute for any genetic contribution".<sup>241</sup>

Storrow,<sup>242</sup> who argues for an approach that would recognise intention, rather than genetics, gestation or marital presumptions, as the deciding factor in determining legal parenthood, is critical of the fact that –

"... intentional parenthood [in the USA] has been a status accorded only to married couples who are incapable of bearing children by traditional means. This approach to intentional parenthood is perpetuated in the revised UPA".

### **6.4.2.3 Case law**

In those states, such as California and Ohio, where the UPA has not been incorporated, the courts in the United States have had to settle surrogacy disputes either by applying the UPA by default or using the UPA as a guideline for the

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<sup>237</sup> Storrow 2002 *Hastings Law Journal* 597 at 645-646.

<sup>238</sup> Such as Arkansas and Florida: Storrow 2002 *Hastings Law Journal* 597 at 646.

<sup>239</sup> 38 of 2005: S 294.

<sup>240</sup> Storrow 2002 *Hastings Law Journal* 597 at 646.

<sup>241</sup> Storrow 2002 *Hastings Law Journal* 597 at 646.

<sup>242</sup> Storrow 2002 *Hastings Law Journal* 597 at 678.

disputes in question.<sup>243</sup> In South Africa, Chapter 19 of the Children's Act,<sup>244</sup> will determine the effect of a surrogate motherhood agreement on the acquisition of parental responsibilities and rights once the chapter comes into operation. Until then, South African courts will be in the same position as those states in the United States where no specific legislation regulating surrogacy is in force. The judgments from California and Ohio may also be of value to South African judges in cases where the agreement of the parties falls outside the parameters of the Children's Act.<sup>245</sup> Apart from indicating who should be regarded as the legal mother of a child,<sup>246</sup> the Act does not provide any guidance with regard to the settling of a dispute about a child born in consequence of an invalid surrogate motherhood agreement.

Generally speaking, the courts in California and Ohio have been willing to enforce surrogate agreements in the case of full or gestational surrogacy agreements but not in the case of partial or "traditional" surrogacy agreements, as they are referred to in American literature.

- (a) In *Johnson v Calvert*,<sup>247</sup> the first decision to uphold a surrogate contract, an infertile couple (Mr and Mrs Calvert) signed a surrogate motherhood agreement in 1990 with Anna Johnson, a single mother of a 3-year-old daughter, who volunteered to act as the Calverts' surrogate because she was in need of money.<sup>248</sup> The embryo that was implanted was produced with the married couple's gametes. In return for relinquishing parental rights the Calverts agreed to pay the surrogate \$10 000 in instalments, the last of which was to be paid six weeks after the birth of the intended child and to take out a life insurance policy on the surrogate's life for \$200 000.<sup>249</sup> While the *in vitro* fertilisation of the surrogate was successful, the pregnancy was a difficult one, resulting in the deterioration of the

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<sup>243</sup> *In Re Marriage of Moschetta* 30 Cal Rptr 2d 893 (Ct App 1994) at 903.

<sup>244</sup> 38 of 2005.

<sup>245</sup> 38 of 2005: Ch 19.

<sup>246</sup> S 297(2).

<sup>247</sup> 5 Cal 4<sup>th</sup> 84 (1993).

<sup>248</sup> At 87.

<sup>249</sup> At 87.

relationship between the surrogate and the Calverts.<sup>250</sup> In addition, Johnson found out that no insurance policy had been taken out on her life. On their part the Calverts discovered that Johnson had not disclosed several miscarriages and stillbirths in the past. Johnson sent a letter to the Calverts demanding the outstanding payments in order to pay her rent, threatening to breach contract and to refuse to give up the child if her demands were not met.<sup>251</sup> The Calverts approached the court for the enforcement of the contract and a declaratory order confirming that they were the legal parents of the child. In a counterclaim Johnson sought to invalidate the contract and to be declared the legal mother of the child. The California Supreme Court<sup>252</sup> asserted that either a genetic contribution or a gestational contribution could support a declaration of maternity under Californian law<sup>253</sup> and could find no preference for either one.<sup>254</sup> The court decided to render intention, as manifested in the surrogacy agreement, the dispositive factor.<sup>255</sup> Absent the Calverts' intent, declared the court, the child would never have existed.<sup>256</sup> The lone dissenting judgment<sup>257</sup> was, however, of the view that gestation, while not decisive, was nonetheless a more significant factor than the majority was willing to admit.<sup>258</sup> In particular, the dissent, believing it inappropriate to analyse a family law dispute with concepts borrowed from tort, property or contract law, was concerned that this substantial contribution to procreation was devalued by the court's analysis.<sup>259</sup> Instead the dissent advocated applying, in the

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<sup>250</sup> At 87.

<sup>251</sup> At 88.

<sup>252</sup> At 92.

<sup>253</sup> The California Civil Code (effective 1 Jan 1994) ss 7000-7021, in terms of which the provisions of the federal Uniform Parentage Act regulating the parent –child relationship were incorporated: See *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 88-89. These provisions were subsequently repealed and replaced with equivalent provisions (ss 7600-7650) in the Family Code of California with effect from 1 Jan 1994: *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 89 fn 5.

<sup>254</sup> The court had to decide whether the genetic mother or the birth mother (surrogate) should be deemed the legal mother of the child.

<sup>255</sup> *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 93.

<sup>256</sup> See Storrow 2002 *Hastings Law Journal* 597 at 606.

<sup>257</sup> Delivered by Kennard J: *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 102-121.

<sup>258</sup> *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 115.

<sup>259</sup> *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 114.



absence of clear legislative guidance, a best interests of the child standard to resolve maternity disputes in gestational surrogacy cases.<sup>260</sup>

- (b) In the case of *In Re Marriage of Moschetta*<sup>261</sup> the surrogate mother also changed her mind during her pregnancy and decided to assert parental rights in conflict with the agreement.<sup>262</sup> In contrast to *Johnson*,<sup>263</sup> *Moschetta* involved traditional (partial) surrogacy. The court refused to enforce the agreement because there was no doubt as to the identity of the biological mother in such cases – there was thus “no ‘tie’ to break” as in the case of full surrogacy because the surrogate was both the genetic and the birth-giving mother.<sup>264</sup>
- (c) Following these decisions the California Court of Appeal in *In re Marriage of Buzzanca*<sup>265</sup> again scrutinised the allocation of parental responsibilities and rights in the context of gestational (full) surrogacy. In this case<sup>266</sup> Mr and Mrs Buzzanca, a married couple, contracted with a surrogate to gestate an embryo they had acquired but to which neither had contributed genetic material. The couple separated and Mrs Buzzanca petitioned to be named the mother of the child. The identities of the gamete donors were not known and the surrogate made no claim to the child. The trial court absolved the surrogate and her husband of parental “responsibility”, as they were not the genetic parents of the child. The court then concluded that the commissioning mother was not truly a mother because she had no genetic connection to the child, she had not adopted the child, nor had she given birth to the child.<sup>267</sup> Since she was declared not to be the child’s mother, her husband was not the father either. In essence the trial court decided

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<sup>260</sup> *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993) at 118, discussed by Storrow 2002 *Hastings Law Journal* 597 at 606.

<sup>261</sup> 30 Cal Rptr 2d 893 (Ct App 1994).

<sup>262</sup> For the facts of the case, see *In Re Marriage of Moschetta* 30 Cal Rptr 2d 893 (Ct App 1994) at 895.

<sup>263</sup> *Johnson v Calvert* 5 Cal 4<sup>th</sup> 84 (1993).

<sup>264</sup> *In Re Marriage of Moschetta* 30 Cal Rptr 2d 893 (Ct App 1994) at 900. See Storrow 2002 *Hastings Law Journal* 597 at 607.

<sup>265</sup> 72 Cal Rptr 2d 280 (Ct App 1998).

<sup>266</sup> For facts, see *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 282-283.

<sup>267</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 283.

the child was a legal orphan.<sup>268</sup> Eventually the Court of Appeal overturned the decision of the trial court and declared the commissioning parents, called the “intended” parents, the legal parents of the child.<sup>269</sup> Although the court found *Johnson* instructive, it could not find it dispositive, since in *Buzzanca* there was also no tie for motherhood and thus no reason to use to break it.<sup>270</sup> Instead the court found statutory authority for an intentional mother’s claim to legal motherhood in California’s statute governing the parentage ramifications of artificial insemination.<sup>271</sup> Similar to section 40(1)(a) of the Children’s Act,<sup>272</sup> the Californian statute provides that a husband who consents to the artificial insemination of his wife is deemed the father of the resulting child.<sup>273</sup> The court saw a clear parallel between a husband and Mrs Buzzanca - “...the two kinds of artificial reproduction are exactly analogous in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie”.<sup>274</sup> Like a husband who consents to his wife’s artificial insemination, Mrs Buzzanca arranged for a medical procedure to be performed on the surrogate that resulted in her pregnancy and the eventual birth of the child.<sup>275</sup> The court described this view of intentional parenthood as applicable “... to any situation where a child would not have been born but for the efforts of the intended parents”.<sup>276</sup>

- (d) The Supreme Judicial Court of Massachusetts in *RR V MH and Another*<sup>277</sup> refused to apply the artificial insemination statute<sup>278</sup> in a traditional

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<sup>268</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 283 and see Varnado 2006 *Louisiana Law Review* 609 at 625.

<sup>269</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 293.

<sup>270</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 288, as discussed by Storrow 2002 *Hastings Law Journal* 597 at 607.

<sup>271</sup> S 7613 of the California Family Code which is an enactment of s 5 of the Uniform Parentage Act: *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 285 fn 6.

<sup>272</sup> 38 of 2005.

<sup>273</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 286: Storrow 2002 *Hastings Law Journal* 597 at 608.

<sup>274</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 286.

<sup>275</sup> Storrow 2002 *Hastings Law Journal* 597 at 608.

<sup>276</sup> *In re Marriage of Buzzanca* 72 Cal Rptr 2d 280 (Ct App 1998) at 291 (internal quotation marks omitted).

<sup>277</sup> 689 NE 2d 790 (Mass 1998).

surrogacy context<sup>279</sup> because a literal application of it would have rendered the surrogate's husband the legal father of the child, a result the legislature could not have intended.<sup>280</sup> The court found the comparison between a surrogate mother and sperm donor unconvincing, "... because surrogate motherhood is never anonymous and her commitment and contribution is unavoidably much greater than that of a sperm donor".<sup>281</sup> The court concluded that the statute was not meant to apply to children born of a married surrogate mother but was meant to apply to a fertile mother whose infertile husband consented to her artificial insemination.<sup>282</sup> In this way the court suggested the analogy between surrogacy and artificial insemination was inappropriate in both traditional and gestational surrogacy cases.<sup>283</sup>

- (e) In *Belsito v Clark*<sup>284</sup> Mrs Belsito had no uterus but still had ovaries to produce eggs.<sup>285</sup> Clark, Mrs Belsito's sister, agreed to act as surrogate without any compensation.<sup>286</sup> The embryo resulting from the Belsito couple's gametes was successfully transferred to Clark. As a result of problems with the registration of the birth – the birth mother would be regarded as the legal mother and because Clark was unmarried the child would have been deemed illegitimate – the Belsitos approached the court for confirmation of the status of the child in order to make an adoption unnecessary. The court held<sup>287</sup> that as a result of their genetic contribution plus their intention to parent they were not only the natural parents of the child, but also the legal parents.<sup>288</sup> The court declared gestation "... subordinate and secondary to genetics"<sup>289</sup> and rejected the intentional-parent approach of *Johnson*, even though the application of that test would

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<sup>278</sup> In this case the Massachusetts General Laws c 46 (s 4B): *RR v MH and Another* 689 NE 2d 790 (Mass 1998) at 795.

<sup>279</sup> The agreement made provision for compensation in the amount of \$10 000 to the surrogate mother, who entered into the contract without the support of her husband: *RR v MH and Another* 689 NE 2d 790 (Mass 1998) at 792-793.

<sup>280</sup> *RR v MH and Another* 689 NE 2d 790 (Mass 1998) at 795.

<sup>281</sup> At 795.

<sup>282</sup> At 795-796.

<sup>283</sup> Storrow 2002 *Hastings Law Journal* 597 at 609.

<sup>284</sup> 644 NE 2d 760 (1994).

<sup>285</sup> *Belsito v Clark* 644 NE 2d 760 (1994) at 761.

<sup>286</sup> The facts of the case can be found in *Belsito v Clark* 644 NE 2d 760 (1994) at 761-762.

<sup>287</sup> *Belsito v Clark* 644 NE 2d 760 (1994) at 768.

<sup>288</sup> Storrow 2002 *Hastings Law Journal* 597 at 617.

<sup>289</sup> *Belsito v Clark* 644 NE 2d 760 (1994) at 767.

have produced the same result.<sup>290</sup> The end result was “... a test for natural parentage driven solely by genetic contribution” which “... renders gestational surrogates no contenders at all for parenthood, since they contribute no genetic material to the creation of the child”.<sup>291</sup>

## 6.5 CONSTITUTIONALITY OF SURROGATE MOTHERHOOD AGREEMENTS

According to Cockrell,<sup>292</sup> referring to the scheme in terms of the Proposed Bill on Surrogate Motherhood,<sup>293</sup> the regulation of surrogacy “... will no doubt involve an interference with the constitutional right ‘to make decisions concerning reproduction’”.<sup>294</sup> The right to make decisions concerning reproduction, often associated only with the decision to terminate an unwanted pregnancy, in fact encompasses a broader range of issues<sup>295</sup> and is also deemed to be integrally related to the right to equality and the prohibition of unfair sex and gender discrimination<sup>296</sup> –

“... women’s equal participation in South African society cannot be achieved without South African women having control over their reproductive lives, and woman’s reproductive freedom and autonomy

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<sup>290</sup> Storrow 2002 *Hastings Law Journal* 597 at 617.

<sup>291</sup> Storrow 2002 *Hastings Law Journal* 597 at 618: See *Belsito v Clark* 644 NE 2d 760 (1994) at 767.

<sup>292</sup> Cockrell in *Bill of Rights Compendium* 3E28.

<sup>293</sup> Attached as Schedule A to the SALC Report on *Surrogate Motherhood*.

<sup>294</sup> As entrenched in s 12 of the Constitution as the “right to freedom and security of the person” including in subs (2): “... the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent”. See Carstens & Pearmain *South African Medical Law* 182 who contend that: “Surrogate motherhood in constitutional terms, amounts to the exercise of the right to freedom and security of the person for the benefit of a third party. These authors (at 184-185) further submit that: “The techniques used in surrogate motherhood such as artificial insemination by donor and *in vitro* fertilisation are also ... more suited to discussions of section 12 rights than section 27 rights” but that they must “... in principle be included within the scope of the right of access to reproductive care bearing in mind the qualifications of section 27(2) of the Constitution with regard to progressive realisation and the availability of resources” (at 185).

<sup>295</sup> For women, according to Birenbaum 1996 *SAJHR* 485, it also involves the ability to freely obtain birth control and to choose to undergo sterilisation without interference, to have authority over decisions such as how a baby should be delivered (by Caesarian or natural childbirth), to make reproductive decisions uncoerced and freely and to receive substantial support for the decision to carry a pregnancy to term. Also see O’Sullivan M Ch 37 in Woolman *et al Constitutional Law of South Africa* 37-1.

<sup>296</sup> Albertyn & Goldblatt Ch 35 in Woolman *et al Constitutional Law of South Africa* 35-57.

cannot be attained without women achieving a level of equality in both their private and public relationships with men”.<sup>297</sup>

While one can generally agree with Cockrell<sup>298</sup> that “... the state’s legitimate interest in the regulation of surrogate motherhood agreements is sufficiently weighty to suggest that most aspects of the proposed scheme will survive constitutional scrutiny”, there are a number of provisions which may be constitutionally suspect.<sup>299</sup> The following provisions are in my opinion most likely to attract constitutional scrutiny:

- (a) Surrogate motherhood is only permitted if the child born in consequence of the surrogate motherhood agreement is related to the commissioning parent, if single, and at least one if not both of the commissioning parents, if married or in a permanent relationship<sup>300</sup> –

Despite the fact that the provision may be justified for a number of reasons, including the fact that it is in the best interests of the child to promote the bond between the child and the commissioning parents, and that it will also “... restrict undesirable practices such as shopping around with a view to creating children with particular characteristics”,<sup>301</sup> it may arguably be considered unconstitutional<sup>302</sup> insofar as it violates the rights of an infertile person to make decisions concerning reproduction<sup>303</sup> as well as such person’s right to dignity and privacy.<sup>304</sup>

- (b) Prohibition of commercial surrogacy –

Lupton is of the opinion that it is unfair and paternalistic for the law to deny women the freedom to decide how best to utilise their procreative ability

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<sup>297</sup> Birenbaum 1996 *SAJHR* 485 at 486.

<sup>298</sup> Cockrell in *Bill of Rights Compendium* 3E28.

<sup>299</sup> See Van Heerden Ch 15 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 345-352 commenting on the proposals contained in the Proposed Bill on Surrogate Motherhood (attached as Schedule A to the SALC Report on *Surrogate Motherhood*).

<sup>300</sup> As discussed in 6.3.3.3 above.

<sup>301</sup> SALC Report on *Surrogate Motherhood* par 8.2.6.

<sup>302</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>303</sup> As entrenched in s 12(2)(a) of the Constitution.

<sup>304</sup> Protected in terms of ss 10 and 14 of the Constitution, respectively.

and to fulfil their role in life.<sup>305</sup> Despite baby selling being one of the most common objections to commercial surrogacy, Meyerson<sup>306</sup> has argued quite forcefully that this requirement enforces moralistic beliefs that pose no real risk of harm to children and deems it an unjustifiable limitation on the surrogate mother's freedom of choice. Meyerson does, however, propose<sup>307</sup> that any fee paid to the surrogate should be approved by the state to prevent exploitation.

Cockrell,<sup>308</sup> moreover, has argued that the prohibition on commercial surrogacy might amount to an unjustified restriction on the constitutional right of the potential surrogate mother to engage in "economic activity" which was provided for in section 26(1) of the interim Constitution. Despite the fact that the final Constitution now only recognises a right of every citizen "... to choose their trade, occupation or profession",<sup>309</sup> it does not detract from what Van Heerden<sup>310</sup> regards as the main point made by Cockrell, that –

"... any restriction on the right to engage in a surrogacy agreement must be justified on some basis other than pure moralism or paternalism<sup>311</sup> if it is to survive constitutional scrutiny. It has been forcefully argued that the prohibition on paid surrogacy is in fact difficult to justify on any such basis".<sup>312</sup>

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<sup>305</sup> Lupton 1988 *De Jure* 36 at 40. Clark 1993 *SALJ* 769 does not support the blanket prohibition of commercial surrogacy either suggesting (at 776) that: "With careful court monitoring and scrutiny for possible bribery and exploitation, the potential threat of abuse ... might be averted".

<sup>306</sup> Meyerson in Murray *Gender and the New South African Legal Order* 132.

<sup>307</sup> Meyerson in Murray *Gender and the New South African Legal Order* 143.

<sup>308</sup> Cockrell in *Bill of Rights Compendium* 3E38.

<sup>309</sup> In s 22 of the Constitution.

<sup>310</sup> Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 348 fn 80.

<sup>311</sup> See Meyerson in Murray *Gender and the New South African Legal Order* 123-134 taking great pains to show the ineffectiveness of these kinds of arguments.

<sup>312</sup> In the USA, New Jersey became the first state to address commercial surrogacy in the case of *In re Baby M* 537 A2d 1227 (1988). The New Jersey Supreme Court ruled in this case that "... the payment of money to a 'surrogate' mother was illegal, perhaps criminal, and potentially degrading to women" (at 1234). The extent to which commercial surrogacy is recognised and regulated in the USA is canvassed by Drabiak *et al* 2007 *Journal of Law, Medicine and Ethics* 300 who calls (at 308) for uniform federal standards to "... prevent harmful jurisdictional-forum shopping by decreasing the possibility for agencies to exploit potential surrogates, parents, and discrepancies in the law for their own financial gain". For a comparative analysis of surrogacy law in the USA and the UK for purposes of a proposed model statute for Louisiana, see Garrity 2000 *Louisiana Law Review* 809.

- (c) Enforceability of the surrogate motherhood agreement<sup>313</sup> coupled with the differentiation between gestational (full) and partial surrogacy<sup>314</sup> –

The “direct parentage” model<sup>315</sup> described above<sup>316</sup> has come under attack on the following grounds as indicated in the Discussion Paper on the *Review of the Child Care Act*:<sup>317</sup>

- (i) It is argued that to compel the surrogate mother to surrender the child is to “... sacrifice a woman’s reproductive autonomy to the principle of ‘*pacta servanda sunt*’<sup>318</sup>;
- (ii) it is felt that the physiological and psychological changes experienced by the surrogate mother during pregnancy, coupled with her exposure to the physical risks of pregnancy and the fact that it is her body that enables the child to develop, generally justify a

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<sup>313</sup> In terms of s 297, as discussed in 6.3.4 above.

<sup>314</sup> Specifically in the following ways: The dispensing of consent of the spouse or partner of the surrogate mother in the case of full surrogacy but not partial surrogacy (discussed in 6.3.3.2 above); and the possibility of terminating a surrogate motherhood agreement only in the case of partial surrogacy (as discussed in 6.3.5 above).

<sup>315</sup> Discussed in both the Report of the *Ad Hoc* Committee on *Surrogate Motherhood* par E5(3) and the SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>316</sup> In 6.3.4.

<sup>317</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>318</sup> Clark 1993 *SALJ* 769 at 777 is of the opinion that “[i]f we are genuinely concerned about the exploitation of women” then “... the interests of the surrogate [mother] demand that she be given a breathing space to decide whether to go through with the contract” and contends (at 778) that the transaction should not be immediately enforceable against the wishes of the woman who has borne the child, even if the child is not genetically related to her. A similar policy adopted in the UK (HFEA 1990 s 30(6)) in terms of which a surrogate has a period of grace of six weeks after the birth to make up her mind and her agreement is ineffective if given before the time has, however, been criticised (with reference at 777 to Field “Reproductive technologies and surrogacy: Legal issues” 1992 *Creighton Law Review* 1589 at 1591) as conveying “... a patronizing attitude to women, belittling their ability to make their own decisions about the use of their bodies”. The conflict between the principles of freedom of contract and the court’s desire to protect women from exploitation is aptly portrayed in the following extract referred to in an article by Munyon 2003 *Suffolk Law Review* 717: “[A]re women who contract to be surrogates as a means to earn money simply exercising their right to self-determination? If society cannot trust an individual woman to assess her situation and make this reproductive and economic choice how can any woman claim autonomy in freedom of choice in any situation? Further, if a surrogate is released from her agreement because she could not assess what her emotions would be at the end of the pregnancy, how can any person be held to any agreement when their emotions may change over time? What does this rationale for validating breach of the surrogacy agreement say about women’s capabilities and trustworthiness?” Carstens & Pearmain *South African Medical Law* 183 suggest that the validity and enforceability of a surrogate motherhood agreement may depend on the question whether, or to what extent a surrogate mother may agree to waive or limit her constitutional rights to freedom and security of the person.

more flexible approach which would allow the surrogate mother to reconsider her decision, even in the case of full surrogacy,<sup>319</sup> and

- (iii) the specific enforcement of the agreement against the surrogate mother could be considered unconstitutional on grounds of constituting an infringement of the surrogate's rights to dignity, privacy and reproductive autonomy<sup>320</sup> as well as the child's right to dignity.<sup>321</sup>

Despite these objections, the SALRC<sup>322</sup> justified the retention of an undiluted direct parentage model in the case of full surrogacy on the basis of the best interests of the child, who will grow up with at least one genetic parent if given up to the commissioning parent(s),<sup>323</sup> while the child will not grow up with any genetic parent at all if the surrogate mother is allowed to refuse to relinquish the child. Enforcing the surrogate motherhood agreement against the commissioning parent(s) evidently does not present the same problems as enforcing it against the surrogate mother since it can be argued that "... it would be grossly unfair to the surrogate mother (and her husband, if she is married), allowing those who commissioned the child to abdicate responsibility for it to the detriment of the surrogate mother and her family".<sup>324</sup>

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<sup>319</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5.

<sup>320</sup> Protected in ss 10, 14 and 12(2) of the Constitution, respectively.

<sup>321</sup> Cockrell in *Bill of Rights Compendium* 3E28.

<sup>322</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.6.

<sup>323</sup> In terms of s 294 the child must at least be genetically related to one of the commissioning parents, and if the commissioning parent is single, to that parent.

<sup>324</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 7.5; Van Heerden Ch 15 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 351 n 90. Meyerson in Murray *Gender and the New South African Legal Order* 139-142 summarises (at 143) her stance on the issue as follows: "... the surrogate mother should have the right to perform in terms of the contract unless the child is born handicapped due to fault on her side; ... the commissioning parents should not be able to insist on specific performance, though they should be able to bring a claim for damages [if the surrogate decides not to relinquish the child]; ... the biological parent(s) [as the commissioning parents] should have the right to apply for transfer of the parental power to themselves if the surrogate should have a change of heart and they believe her unfit to look after the child".



The differentiation between the position of a gestational and partial surrogate mother has been described as illogical and unjustifiable.<sup>325</sup> Such an approach accords undue weight to the genetic contribution and devalues the contribution by the gestating mother.<sup>326</sup>

## 6.6 CONCLUSION

While surrogate motherhood agreements are effected by means of artificial fertilisation, the legal rules pertaining to the acquisition of parental responsibilities and rights in the case of the artificial conception of a child<sup>327</sup> cannot comfortably be utilised to choose between the wide variety of parents in cases of surrogacy arrangements. The strict regulation of surrogacy has placed South Africa at the forefront of developments in this area of the law as far as the protection of the parties to such agreements are concerned. In my opinion the weakest point in the legislative scheme envisaged in Chapter 19 is the pervasive distinction between partial and full surrogate motherhood agreements.

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<sup>325</sup> Clark 1993 *SALJ* 769 at 773; Meyerson in Murray *Gender and the New South African Legal Order* 137.

<sup>326</sup> Clark 1993 *SALJ* 769 at 773. Also see Van Heerden Ch 15 in Van Heerden *et al Boberg's Law of Persons and the Family* 345 at 347 fn 76.

<sup>327</sup> As discussed in 4.4 above.

**SECTION B: THE VARIOUS WAYS IN WHICH FULL PARENTAL RESPONSIBILITIES AND RIGHTS CAN BE ACQUIRED**

**CHAPTER 7: ASSIGNED ACQUISITION OF FULL PARENTAL RESPONSIBILITIES AND RIGHTS BY MEANS OF AN ADOPTION ORDER**

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## 7.1 INTRODUCTION

### 7.1.1 Definition and sources

The SALRC<sup>1</sup> describes adoption as “... a process by which society provides a substitute family for a child whose natural parents are unable or unwilling to care for a child”. It is thus seen “... primarily as a device for imitating nature in respect of the rearing of a child” but may also be used “... simply as a means of altering legal relationships, particularly for the purpose of the law of succession”.<sup>2</sup> An adoption order confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parents and thus falls within the scope of the thesis as outlined in Chapter 1<sup>3</sup> above.

As a means of acquiring parental responsibilities and rights by order of court, adoption has always been regulated by statute – first by the Adoption of Children Act in 1923,<sup>4</sup> later repealed and incorporated in the Children’s Act of 1937<sup>5</sup> and then by the Children’s Act of 1960.<sup>6</sup> The adoption of children has since February 1987 been regulated by Chapter 4 of the Child Care Act.<sup>7</sup> Several provisions of the latter Act have been declared unconstitutional on the ground that they, above all, violate the right to equality in terms of section 9 of the Constitution.<sup>8</sup> Although Chapter 15 of the new Children’s Act<sup>9</sup> has not yet come into operation, it will in

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<sup>1</sup> SALC Report on the *Review of the Child Care Act* par 17.1.

<sup>2</sup> *Ibid.*

<sup>3</sup> More specifically 1.3.

<sup>4</sup> Act 25 of 1923.

<sup>5</sup> Act 31 of 1937 (Ch VII ss 68-79).

<sup>6</sup> Act 33 of 1960 (Ch VII ss 70-82A).

<sup>7</sup> 74 of 1983, which only came into operation on 1 Feb 1987.

<sup>8</sup> S 18(4)(d), in terms of which only the consent of the mother was required for the adoption of a child born out of wedlock, was declared unconstitutional in *Fraser v Children’s Court, Pretoria North, and Others* 1997 2 SA 261 (CC) because it discriminated unfairly against fathers on grounds of gender and marital status, while s 17, insofar as it excluded permanent same-sex life partners from adopting a child jointly on the same basis as a “husband and his wife”, was declared unconstitutional in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) because it discriminated unfairly against same-sex partners on the ground of their sexual orientation and infringed on the partners’ right to dignity in terms of s 10 of the Constitution and the child’s right to parental care in terms of s 28(1)(b) of the Constitution. S 18(4)(f), requiring prospective adoptive parents to be SA citizens, was also found unconstitutional in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) but on another ground, *ie* as not being in the best interests of a child in terms of s 28(2) of the Constitution: See 7.1.3 below.

<sup>9</sup> 38 of 2005.

due course replace the existing provisions of the Child Care Act<sup>10</sup> *in toto*. While the Child Care Act<sup>11</sup> thus still governs the position, the position under the Child Care Act<sup>12</sup> is only discussed in the context of the provisions of the Children's Act.<sup>13</sup>

### 7.1.2 Retention of adoption as a form of substitute parental care

There seems to be general consensus about the fact that adoption alone will not be able to meet the ever increasing need to provide substitute parental care for the rising number of abandoned and orphaned babies in South Africa. Several reasons have been advanced to explain the limited use of adoption as a means of providing permanent alternative care for children. In the first place, adoption seems to be underutilised, especially amongst the black communities to whom the formal adoption procedure is foreign.<sup>14</sup> The fragmentation of adoption services, coupled in most cases with an intrusive screening process that is usually followed by a protracted waiting period, have not helped to promote adoption amongst prospective adoptive parents either. Moreover, the formalistic adoption procedure prescribed by statute seems to be superfluous to the majority of people who are more familiar with a parallel system of informal customary law adoption that has on occasion been recognised by the judiciary.<sup>15</sup> In addition to these failings the availability of new, more successful, artificial reproductive techniques (ART), the possibility of entering into a surrogate motherhood agreement<sup>16</sup> and access to safe terminations of pregnancy<sup>17</sup> have all impacted negatively on the need for adoption as a means of acquiring parental responsibilities and rights.

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<sup>10</sup> 74 of 1983.

<sup>11</sup> 74 of 1983.

<sup>12</sup> 74 of 1983.

<sup>13</sup> 38 of 2005. See also 7.2.1 below.

<sup>14</sup> These statements are supported in the submission and recommendations of the National Adoptive Parents' Institute: See SALC Discussion Paper on the *Review of the Child Care Act* par 18.5.

<sup>15</sup> See *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) and *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T). For discussion of adoption in customary law, see SALC Discussion Paper on the *Review of the Child Care Act* par 18.3.12. The legal recognition of customary law adoptions is considered more fully in 7.2.2 below.

<sup>16</sup> Surrogate motherhood agreements will become enforceable once Ch 19 of the Children's Act 38 of 2005 comes into operation, provided the requirements in terms of the Act are complied with.

<sup>17</sup> In terms of the Choice on Termination of Pregnancy Act 92 of 1996.

In response to various submissions calling for the abolition of adoption,<sup>18</sup> the SALRC questioned the viability and desirability of retaining adoption as a form of substitute family care in general.<sup>19</sup> The SALRC<sup>20</sup> supported the idea that adoption “... is a familiar, well-understood and uniquely valued concept accepted both nationally and internationally”, that “[l]ong experience has shown that adoption is a successful way of caring for a child away from his or her birth parents” and “[n]o other form of permanent placement has demonstrated that it can be more beneficial than the established system of adoption”.<sup>21</sup> The SALRC<sup>22</sup> consequently recommended that the concept of adoption be maintained but that the criticisms underlying the abolitionist position “... need to be kept carefully in mind when approaching particular aspects of the law and practice”.<sup>23</sup>

### 7.1.3 Inter-country adoptions

As far as the acquisition of parental responsibilities and rights through the adoption of a child is concerned, a distinction must at the outset be drawn between national or *intra*-country adoptions and so-called *inter*-country adoptions.<sup>24</sup> Mosikatsana<sup>25</sup> defines *intra*-country adoption as *in*-country or domestic adoption – a practice in which adoptive parents adopt a child of the

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<sup>18</sup> According to the SALRC the abolitionists argue that the concept of adoption is so fundamentally flawed that no statutory amendments to the Child Care Act 74 of 1983 could overcome these essential faults, including the fact that – (a) the legal fiction about the adopted child’s parentage is gradually being eroded by developments regarding openness in adoption; (b) in order to promote the legal fiction that the adoptive parents are the child’s only parents, children have been denied access to information about family origins and the circumstances of their birth and denies birth parents any relationship with their child; (c) since the traditional concept of adoption has already been greatly compromised by developments such as “open adoption”, increased access to information and the declining numbers of adoptions, the abolition of adoption would represent a culmination of these trends rather than a radical departure from it; (d) medium or long-term caregivers of children can be given the powers and responsibilities of biological parents without any need to pretend that they are the biological parents of the child and that the child’s birth family has ceased to exist: SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.1.

<sup>19</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.1.

<sup>20</sup> *Ibid.*

<sup>21</sup> Quoted from par 3.5 of the new South Wales Law Reform Commission Discussion Paper 34: *Review of the Adoption of Children Act 1965* (NSW) (Apr 1994): SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.1.

<sup>22</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.1.

<sup>23</sup> See discussion in 7.2.13 below for ways in which the Children’s Act 38 of 2005 has dealt with some of these criticisms.

<sup>24</sup> For the history of *inter*-country adoption, see *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) [40] to [43].

<sup>25</sup> Mosikatsana 2000 *SAJHR* 46 fn 3.

same nationality and country of residence as theirs. An inter-country adoption, on the other hand, takes place whenever a child, habitually resident in one country is moved to another country, after or for the purpose of his or her adoption, by adoptive parents who are habitually resident in that other country.<sup>26</sup> Inter-country adoption only became a form of “alternative care” in South Africa<sup>27</sup> when the Constitutional Court abolished the citizen requirement for prospective adoptive parents in the judgment of *Minister of Welfare and Population Development v Fitzpatrick and Others*<sup>28</sup> in 2000.<sup>29</sup> Since then, inter-country adoptions have, despite the increased risks associated with the practice, been dealt with on exactly the same basis as intra-country adoptions – that is in terms of the provisions of Chapter 4 of the Child Care Act.<sup>30</sup> The Children’s Act<sup>31</sup> has now addressed the issue by incorporating specific provisions to regulate inter-country adoptions in Chapter 16 of the Act. The Children’s Act<sup>32</sup> has, furthermore, incorporated the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry<sup>33</sup> Adoption (1993)<sup>34</sup> into domestic law, thereby giving the Convention force of law in South Africa. While inter-country adoptions constitute a separate form of adoption and would, therefore, strictly speaking, fall within the ambit of this thesis, it will not be dealt with separately for the following reasons:

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<sup>26</sup> Art 2(1) of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993). An inter-country adoption must, furthermore, not be confused with an international adoption, a practice in terms of which adoptive parents adopt a child of a nationality that is different from theirs.

<sup>27</sup> The status of inter-country adoption in SA is discussed in *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [52] to [53].

<sup>28</sup> 2000 3 SA 422 (CC).

<sup>29</sup> It is, therefore, more correct to say that SA prohibited international adoptions rather than inter-country adoptions – SA citizens living abroad have always been able to adopt a SA child living in SA.

<sup>30</sup> 74 of 1983.

<sup>31</sup> 38 of 2005.

<sup>32</sup> 38 of 2005: Schedule 1.

<sup>33</sup> It is interesting to note that the words “inter-country” are hyphenated in the provisions regulating inter-country adoption in the Children’s Act 38 of 2005 itself but not in the wording of the Convention as incorporated in the said Schedule. The hyphenated version used in this discussion thus accords with the spelling found in the Children’s Act 38 of 2005.

<sup>34</sup> The Convention was ratified by SA on 21 Aug 2003: See Human Ch 16 in *Commentary on Children’s Act* 16-3. The justification for and objectives of the Hague Convention are discussed in *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [44] to [48]. For a general discussion of the provisions of the Hague Convention see, *inter alia*, Nicholson Ch 14 in Davel *Introduction to Child Law* 246ff and Human Ch 16 in *Commentary on Children’s Act*. The Hague Convention itself, as well as detailed information regarding the status of member states can be found on [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=70](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=70).

- (a) Inter-country adoptions are processed in an international context requiring research into, and the evaluation of, international norms (the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)) which fall well outside the scope of the present research topic;
- (b) the scope of inter-country adoption is consequently so wide as to justify a thesis on its own;
- (c) despite the fact that children's courts regularly grant inter-country adoption orders, South Africa operates largely as a *sending* country<sup>35</sup> rather than a *receiving* country.<sup>36</sup> This means that in most cases South African children have been adopted by persons from other countries and not the other way around.<sup>37</sup> The improbability of South African parents adopting a foreign child, coupled with the fact that the screening of the applicants for eligibility to adopt will generally be done by the Central Authority of the receiving state and not by the Central Authority in South Africa,<sup>38</sup> would seem to militate against special treatment of the topic in this thesis.

The regulation of inter-country adoption in South Africa has recently come under the spotlight after the High Court refused to grant an order for sole "custody" and guardianship in respect of an abandoned child to an American couple with a view

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<sup>35</sup> In terms of Art 2 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) the sending country is referred to as "the State of origin", *ie* the State in which the child to be adopted is habitually resident.

<sup>36</sup> Art 2 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) employs the term "the receiving State", *ie* the State to which the child has been, is being or is to be moved after his or her adoption.

<sup>37</sup> For eg's see *Fitzpatrick and Others v Minister of Social Welfare and Pensions* 2000 3 SA 139 (C) and *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 6 SA 51 (W).

<sup>38</sup> Once the adoption order is granted by the children's court, non-citizens who adopt a SA child will, however, acquire full parental responsibilities and rights in the same way that any SA citizen would have acquired upon adoption. The SA adoption order will be recognised by operation of law in the receiving state, provided the state has ratified the Convention (and is, therefore, a "Contracting State"): See Art 23 and Art 26 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).



to adopting the child in the United States of America.<sup>39</sup> Theron AJA<sup>40</sup> dismissed an appeal against the judgment of the court *a quo*,<sup>41</sup> finding that the appellants were not justified in approaching the High Court for relief which would circumvent the adoption procedure provided for in the Child Care Act.<sup>42</sup> While in principle in agreement with the Supreme Court of Appeal, the Constitutional Court<sup>43</sup> was less dogmatic in its approach, concluding that –

“... from start to finish the forum most conducive to protecting the best interests of the child had been the Children’s Court. Although the jurisdiction of the High Court to hear the application for sole custody and guardianship had not been ousted as a matter of law, this was not one of those very exceptional cases where by-passing the Children’s Court procedure could have been justified. It follows that the question of the best interests of Baby R in relation to adoption was not one to be considered by the High Court, nor at a later stage by the Supreme Court of Appeal, but a matter to be evaluated by the Children’s Court. The question was not strictly one of the High Court’s jurisdiction, but of how its jurisdiction should have been exercised.”

The loophole, allowing prospective adoptive parents from other countries to approach the *High Court* to acquire guardianship and “custody” for the purpose of adoption,<sup>44</sup> will effectively be closed by the provisions of section 25 of the Children’s Act:<sup>45</sup>

“When application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act.”

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<sup>39</sup> *De Gree and Another v Webb and Others* (Centre for Child Law, University of Pretoria, Amicus Curiae) 2006 6 SA 51 (W), for a discussion of which, see 5.2.2.2. above.

<sup>40</sup> *De Gree and Another v Webb and Others* (Centre for Child Law as Amicus Curiae) 2007 5 SA 184 (SCA) at [15] and [20].

<sup>41</sup> *De Gree and Another v Webb and Others* (Centre for Child Law, University of Pretoria, Amicus Curiae) 2006 6 SA 51 (W).

<sup>42</sup> 74 of 1983.

<sup>43</sup> *AD and Another v DW and Others* (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party) 2008 3 SA 183 (CC) at [34].

<sup>44</sup> For a discussion of this loophole and other defects in the inter-country adoption practice under the Child Care Act 74 of 1983 highlighted by SA cases, see Louw 2006 *De Jure* 503 at 512-520.

<sup>45</sup> 38 of 2005.

#### 7.1.4 Adoption as distinct from the assignment of full parental responsibilities and rights

The possibility of acquiring full parental responsibilities and rights by means of a guardianship and care order has already been canvassed in Chapter 5 above.<sup>46</sup> Since both an order for sole guardianship and sole care and an adoption order confer full parental responsibilities and rights on the applicants, the question is to what extent do the two orders differ?

The Supreme Court of Appeal addressed the issue for the first time (and, as far as could be ascertained, the only time) in *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)*.<sup>47</sup> The appellants in this case tried to equate an order for sole “custody” and sole guardianship with an adoption order, arguing that since the same legal consequences flow from such orders,<sup>48</sup> the High Court could just as well “grant the adoption”<sup>49</sup> in the exercise of its jurisdiction as upper guardian of all minors. While both Heher JA and Hancke AJA sympathised with this view in their respective minority judgments,<sup>50</sup> Theron AJA<sup>51</sup> disagreed with the appellants’ contention, taking pains to distinguish between an order of adoption and an order for sole “custody” and guardianship. The reasons for the distinction between the respective orders are listed in the table below (with own emphasis in bold) for the sake of convenience:

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<sup>46</sup> See 5.2.2.2 fn 77 and 5.3.4.1.

<sup>47</sup> 2007 5 SA 184 (SCA).

<sup>48</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [13].

<sup>49</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [14].

<sup>50</sup> According to Heher JA the decision of the court *a quo* (as confirmed by the majority viewpoint) was “... an unsatisfactory triumph of form over substance”: *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [34]. Heher JA (at [77]) felt “... wholly unpersuaded that an inflexible insistence on strict compliance with every procedural aspect laid down for a formal adoption according to the supervision of a children’s court would have strengthened or weakened the applicants’ case in any material respect”. Hancke AJA was similarly persuaded that “... the best interests of the child are served by relying on the case presented by the applicants and not by deferring a decision on the merits”: *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [105].

<sup>51</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [13].

Adoption order	Order for sole “custody” (care) and sole guardianship
<b>The effect of the order is permanent</b> – the adopted child is deemed in law to be the legitimate child of the adopted parents. <sup>52</sup>	The <b>permanency of the order is not guaranteed</b> – especially in the case where the receiving foreign country ( <i>in casu</i> the USA) does not convert the order to an adoption order. <sup>53</sup>
<b>A mutual claim for support</b> arises between the child and the adoptive parents, which also extends to adoptive relations such as grandparents and siblings. <sup>54</sup>	No automatic reciprocal duty of support arises between the child and the persons vested with “custody” and guardianship. <b>Biological parents may still be required to support child</b> or at least to make a contribution towards the child’s maintenance. <sup>55</sup>
Adoption <b>terminates all rights</b> and obligations existing between the child and the pre-adoptive parents and their relatives. <sup>56</sup>	<b>Only those responsibilities and rights mentioned in the order</b> will be terminated. Parents may thus still retain a right of contact with the child.
Adoption creates <b>rights of intestate succession between the child and the adoptive parents</b> , which rights extend to adoptive relatives. <sup>57</sup>	The child will not inherit from persons vested with care and guardianship unless <b>specifically named in their will</b> . <sup>58</sup>
The child’s biological parents can <b>withdraw consent</b> to the adoption and apply for rescission within the time frames set by the Child Care Act. <sup>59</sup>	If the child still has parents the court will interfere with the exercise of parental responsibilities and rights only in extreme cases and then obviously <b>not necessarily with the consent</b> of those parents who might be unwilling or unable to provide care. The <b>High Court may review, amend or terminate the order</b> at any stage depending on the best

<sup>52</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [13].

<sup>53</sup> *Ibid.*

<sup>54</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [13].

<sup>55</sup> The biological parents will remain liable for the maintenance of their child until such time as the adoption order terminates the obligation: Van der Vyver & Joubert *Persone-en Familiereg* 630.

<sup>56</sup> See s 20(1) of the Child Care Act 74 of 1983 and its equivalent in s 242(1)(a) of the Children’s Act 38 of 2005. However, see the possibility of post-adoption contact now introduced by s 234 of the Children’s Act 38 of 2005, as discussed in 7.2.6 below.

<sup>57</sup> See s 20(1) of the Child Care Act 74 of 1983 and its equivalent in s 242(1)(a) of the Children’s Act 38 of 2005.

<sup>58</sup> A child can only inherit intestate from his natural parents or adoptive parents: See s 1(4)(e) of the Intestate Succession Act 81 of 1987.

<sup>59</sup> 74 of 1983: *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [13].

	interests of the child that may change over time. <sup>60</sup>
When the adoption is concluded in South Africa, it must by law be registered with the Registrar of Adoptions, which allows, <i>inter alia</i> , for the child to <b>trace the details</b> surrounding his or her adoption at a later stage. <sup>61</sup>	The <b>child's biological parents are completely excluded</b> from the adoption process if that process happens in another country. <sup>62</sup>
The <b>status of the child</b> in the foreign country would be more <b>secure</b> if already adopted – the child would then normally qualify for <b>automatic citizenship</b> . <sup>63</sup>	The <b>status of the child</b> in the foreign country is <b>precarious</b> and would merely qualify the child for a permanent residence permit which will have to be renewed periodically failing which the <b>child could be deported</b> . <sup>64</sup>
The prescribed adoption procedure has <b>built-in safeguards to protect the interests of the child</b> . <sup>65</sup>	An application to the High Court for the purpose of adoption <b>circumvents the local adoption law</b> <sup>66</sup> that ensures the protection of children as required by domestic and international law relating to inter-country adoptions. <sup>67</sup>
The <b>proper forum</b> is the <b>children's court</b> . <sup>68</sup>	Although the <b>High Court</b> as upper guardian of all minors has inherent jurisdiction <sup>69</sup> it is <b>not the appropriate forum</b> .
An adoption application in the <b>children's court provides a cost-effective</b> mechanism. <sup>70</sup>	An application to the High Court requires <b>considerable financial resources</b> . <sup>71</sup>

<sup>60</sup> See in general Van Heerden Ch 18 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 504.

<sup>61</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [13].

<sup>62</sup> *Ibid.*

<sup>63</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [14].

<sup>64</sup> *Ibid.*

<sup>65</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [14] and [15].

<sup>66</sup> As embodied in UNCRC and the African Charter on the Rights and Welfare of the Child: *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [15].

<sup>67</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [16] and [17].

<sup>68</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [20].

<sup>69</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [19].

<sup>70</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) at [21].

<sup>71</sup> *Ibid.*

The most distinguishing factor between the two orders would thus seem to lie in the extent of the automatic legal consequences of the respective orders – while an order for sole care and sole guardianship terminates the care and guardianship of the biological parents, it does not necessarily terminate those parents’ right to contact with the child, nor does it extinguish the parents’ duty of support and the right of the child to inherit intestate from its parents, as in the case of an adoption.<sup>72</sup> The consequences of an order for sole care and sole guardianship and an adoption order will, however, become less distinct once the pre-adoptive parents of a child are allowed to retain contact with the child after adoption *via* a post-adoption agreement.<sup>73</sup>

## **7.2 IMPACT OF CHILDREN’S ACT 38 OF 2005**

### **7.2.1 Introduction**

In terms of section 229 of the Children’s Act<sup>74</sup> the purposes of adoption are twofold, *ie*–

- (a) to protect and nurture children by providing a safe, healthy environment with positive support; and
- (b) to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.

According to Mosikatsana & Loffell,<sup>75</sup> the Children’s Act<sup>76</sup> has not only infused “... a democratic and child-centred ethos”<sup>77</sup> into South African adoption law but has also incorporated both the constitutionally based decisions<sup>78</sup> and the legal

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<sup>72</sup> See s 20(1) of the Child Care Act 74 of 1983 with its equivalent provision in s 242(1)(a) of the Children’s Act 38 of 2005.

<sup>73</sup> In terms of s 234 of the Children’s Act 38 of 2005, discussed in 7.2.6 below.

<sup>74</sup> 38 of 2005.

<sup>75</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-2 to 15-3.

<sup>76</sup> 38 of 2005: Ch 15.

<sup>77</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-2.

<sup>78</sup> Presumably referring to the judgments in *Fraser v Children’s Court, Pretoria North and Others* 1997 2 SA 261 (CC) and *Du Toit and Another v Minister of Welfare and Population Development*

principles and values contained in international instruments.<sup>79</sup> The same authors furthermore contend that the Act has removed the restrictions which have limited the use of adoption in the past, yet hasten to add that the Act does not promote adoption as the only option. The Act, according to these authors, enjoins the children's court to consider adoption merely as one of the options in the course of securing stability in the child's life.<sup>80</sup>

While it may be true that adoption law is now on a much sounder constitutional footing, the impact of the new provisions should not be overrated. Apart from certain new features,<sup>81</sup> the Children's Act<sup>82</sup> has enhanced rather than radically transformed adoption law in South Africa. As such this chapter will investigate the impact of the innovations and changes, more specifically as far they affect the position of prospective adoptive *parents*, rather than revisit the whole area of adoption law again.<sup>83</sup> Those provisions that are deemed relevant will be quoted in full even if they are not canvassed in detail.

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*and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC), referred to in fn 8 above.

<sup>79</sup> According to Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-2, the following international instruments are relevant in this regard: the UNCRC, the Hague Convention on the Civil Aspects of International Child Abduction (applicable in SA since the enactment of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, which is to be repealed by Schedule 4 of the Children's Act 38 of 2005 – the Convention will be (re)incorporated by Schedule 2 of the Children's Act 38 of 2005) and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (incorporated into domestic law in terms of Schedule 1 of the Children's Act 38 of 2005, but not yet in force).

<sup>80</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-3. See also 7.2.13 fn 298 below.

<sup>81</sup> Most notably the introduction of the Register on Adoptable Children and Prospective Adoptive Parents (RACAP) (s 232), post-adoption agreements (s 234) and the possibility of obtaining a freeing order that terminates a parent's parental responsibilities and rights before the adoption of the child (s 235).

<sup>82</sup> 38 of 2005.

<sup>83</sup> Adoption in terms of the Child Care Act 74 of 1983 has been dealt with extensively by various authors in the field, including – Louw in *Forms and Precedents*; Schäfer ID Ch 3 in Robinson *Law of Children and Young Persons* par 2.3; Mosikatsana Ch 16 in Van Heerden *et al Boberg's Law of Persons and the Family*; Human Ch 5 in Davel *Introduction to Child Law*; Schäfer LI Div E in *Family Law Service* E108-E131. Cronjé & Heaton *South African Family Law* 275 briefly outline the consent requirements and discuss the possibility of obtaining freeing orders as proposed in the Children's Bill 70 of 2003 while the adoption provisions in the new Children's Act 38 of 2005 are discussed by Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-1 to 15-29. The research methodology in this chapter consequently differs from that adopted in the previous chapter dealing with surrogate motherhood: See 1.2 above in this regard.

## 7.2.2 Informal adoptions

In terms of section 228 a child is adopted "... if the child has been placed in the permanent care of a person in terms of a court order that has the effects contemplated in section 242".<sup>84</sup> The Children's Act<sup>85</sup> does not expressly address the possibility of recognising customary law adoptions or any other informal or *de facto* adoptions. The necessary implication is thus that the adoptive parent will acquire full parental responsibilities and rights on a permanent basis, only if an adoption order is granted in terms of legislation (in terms of the Child Care Act<sup>86</sup> or the Children's Act<sup>87</sup> once it becomes operational).<sup>88</sup> Despite the importance of customary law for a very large portion of the people in South Africa, the SALRC<sup>89</sup> refrained from expressly regulating customary law relating to children, including customary law adoptions, given the fact that customary law is recognised only within the parameters set by the Constitution, in terms of which the best interests of the individual child supersedes that of the cultural or religious group.<sup>90</sup> The Children's Act<sup>91</sup> does, however, contain a general non-discrimination provision protecting all children in South Africa from unfair discrimination "... on any ground".<sup>92</sup>

The Transkei Appellate Division in *Kewana v Santam Insurance Co Ltd*<sup>93</sup> confirmed on appeal that the public ceremony held to announce the adoption of

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<sup>84</sup> In terms of s 242(1)(b) an adoption order generally terminates all parental responsibilities and rights of the pre-adoptive parents and confers same on the adoptive parents.

<sup>85</sup> 38 of 2005.

<sup>86</sup> 74 of 1983.

<sup>87</sup> 38 of 2005. In their commentary on s 228 of the Children's Act 38 of 2005, Mosikatsana & Loffell refer to the practice of informal adoptions without expressing an opinion on the validity or legal consequences of such adoptions: Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-3.

<sup>88</sup> The court in *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW), *eg* refused to regard an informal agreement giving a married couple the care of a child binding upon a mother of such child, declaring at 121B – "... buitendien het volgens ons reg 'n onderhandse aanneming wat betref die sogenaamde pleegouer nie 'n wettige verhouding van oer teenoor kind geskep nie".

<sup>89</sup> SALC Report on the *Review of the Child Care Act* par 20.1. See also SALC Discussion Paper on the *Review of the Child Care Act* par 18.3.12 where adoption in customary law is discussed.

<sup>90</sup> The SALRC reached this conclusion based on the best interests of the child principle in s 28(2) of the Constitution and the individualistic nature of human rights protection: SALC Report on the *Review of the Child Care Act* par 20.1.

<sup>91</sup> 38 of 2005.

<sup>92</sup> S 6(2)(d).

<sup>93</sup> 1993 4 SA 771 (TkA).

the child should be recognised as an adoption under customary law<sup>94</sup> and that such an adoption created a legal duty of support for the purpose of claiming compensation for the loss of support resulting from the negligent killing of the deceased pursuant to the provisions of the Transkei Compulsory Motor Vehicle Insurance Act.<sup>95</sup> As far as the recognition of a parallel system of adoption is concerned, the court rejected the view that because the child was not adopted under the Children's Act,<sup>96</sup> there was no duty of support and added:<sup>97</sup>

“This legislation therefore introduced a right which did not exist. It filled a vacuum in the common law, but there is no basis for holding that it also modified or replaced adoption under customary law which remains enforceable under s 53 of the Constitution [Transkei Constitution Act 1976] while adoption under the Children's Act is governed by the provisions of that Act. It cannot be said that only an adoption under the Children's Act is recognized in Transkei. A child adopted according to the law of any other country, say England or Germany, would not be precluded from enforcing a right to be maintained by his adoptive parent in Transkei.”

Olmesdahl<sup>98</sup> welcomed the decision on the following basis:

“For too long, South African law has refused to recognise the social reality of relationships created by Customary law and for many years customary spouses and children have suffered under a rigid application of the technicalities of Roman Dutch Law”.<sup>99</sup>

In *Thibela v Minister van Wet en Orde en Andere*<sup>100</sup> the court considered an agreement in terms of which a husband paid *lobola* for his wife and her illegitimate son sufficient to create a duty of support between the husband and the illegitimate son in terms of *Pedi* custom.<sup>101</sup> Expert evidence attested to the fact that such

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<sup>94</sup> *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) at 776C.

<sup>95</sup> 25 of 1977 (Tk): *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) at 778D.

<sup>96</sup> 33 of 1960, the predecessor of the Child Care Act 74 of 1983.

<sup>97</sup> *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) at 776C-D

<sup>98</sup> Olmesdahl Ch 2 in *South African Human Rights Yearbook 1994* at 23. The decision is also in line with Maithufi's view that the adoption should be regarded as valid even in the absence of a court order: See SALC Discussion Paper on the *Review of the Child Care Act* par 18.3.12.

<sup>99</sup> The remark by Olmesdahl seems strange considering the fact that adoption in SA has always had to be regulated by statute because the Roman law of adoption was not received in Roman Dutch law. It is, therefore difficult to see how the rigid application of Roman Dutch law could have contributed to the suffering of children: See *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) at 776B and Joubert 1983 *De Jure* 129 at 130-131.

<sup>100</sup> 1995 3 SA 147 (T).

<sup>101</sup> *Thibela v Minister van Wet en Orde en Andere* 1995 3 SA 147 (T) at 150E-F.



payment would result in the child becoming a “child” of the husband.<sup>102</sup> The court consequently held that the damages suffered by the child arising out of the death of his deceased “father”, who could no longer fulfill his duty of supporting him, must be included in the mother’s claim for damages.<sup>103</sup>

In *Metiso v Padongelukkefonds*<sup>104</sup> the court was, as in the *Kewana* case,<sup>105</sup> called upon to decide whether a customary law adoption was valid and thus created a legally recognisable duty of support for purposes of a claim against the Road Accident Fund. The court<sup>106</sup> held that customary law adoption should in the interest of the children be considered valid despite its possible lack of publication as prescribed by custom. The court<sup>107</sup> opined that the deceased’s promise to care for the children, even if not a completed adoption in terms of customary law, was sufficient to create a legally recognisable duty of support towards the children – if not in terms of the common law then a logical extension thereof.<sup>108</sup> Bertelsmann J<sup>109</sup> argued that to deny the legality of such an undertaking would be contrary to –

“... the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993”.<sup>110</sup>

The court in *Flynn v Farr NO and Others*,<sup>111</sup> on the other hand, refused to recognise a *de facto* adoption (an informal adoption that was not an adoption in terms of customary law) for purposes of establishing a right to intestate

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<sup>102</sup> *Thibela v Minister van Wet en Orde en Andere* 1995 3 SA 147 (T) at 150B. See also in this regard the effect of the payment of *isondlo* under customary law, discussed in 4.2.3.2(c)(i) above.

<sup>103</sup> *Thibela v Minister van Wet en Orde en Andere* 1995 3 SA 147 (T) at 150G.

<sup>104</sup> 2001 3 SA 1142 (T).

<sup>105</sup> *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA).

<sup>106</sup> *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T) at 1150C-D.

<sup>107</sup> *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T) at 1150H.

<sup>108</sup> *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T) at 1150I. In a certain sense the undertaking could perhaps be compared to what may be called a putative adoption, where the caretakers *bona fide* assume parental responsibilities and rights in a manner befitting adoptive parents while being unaware of the fact that the “adoption” has not in fact created the said responsibilities and rights (and is consequently void and without legal effect).

<sup>109</sup> *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T) at 1150E.

<sup>110</sup> Referring to *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) at 1328B.

<sup>111</sup> 2009 1 SA 584 (C).

succession. In this case the executrix of the estate of the late Flynn<sup>112</sup> brought an application for an order declaring the words “adopted child” in the Intestate Succession Act<sup>113</sup> to be interpreted to include both *de lege* adopted children and *de facto* adopted children, alternatively, that the definition in the said Act be declared unconstitutional and amended to include both forms of “adoption”.<sup>114</sup> The application was prompted by the fact that although Flynn – himself deceased at the time of the application – was during his lifetime regarded and treated by his stepfather, Farr, as a son, Flynn had never formally been adopted, and was thus not entitled to inherit intestate from Farr’s estate as a “descendent” of the deceased.<sup>115</sup> Based on the provisions of section 1(4)(e) of the Intestate Succession Act<sup>116</sup> in terms of which an adopted child shall be deemed to be a descendent of his adoptive parent or parents and not his natural parent or parents,<sup>117</sup> read together with the provisions of section 1(5) of the same Act<sup>118</sup> and the provisions of the Child Care Act,<sup>119</sup> the court<sup>120</sup> found that the Intestate Succession Act<sup>121</sup> made no provision for *de facto* adoptions.<sup>122</sup> Davis J<sup>123</sup> continued to consider the constitutionality of the differentiation between factually adopted children and legally adopted children as far as their right to be considered a descendant for purposes of the Intestate Succession Act<sup>124</sup> is concerned. With reference to the equality clause (section 9) in the Constitution and the stages of enquiry prescribed by the *Harksen* case,<sup>125</sup> the court held that since the differentiation was not based on a listed ground mentioned in section 9(3) of the

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<sup>112</sup> Described by the court (at [6]) as “... one of the greatest actors who ever graced the South African stage”.

<sup>113</sup> 81 of 1987.

<sup>114</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [2].

<sup>115</sup> Intestate Succession Act 81 of 1987: S 1(4)(a).

<sup>116</sup> 81 of 1987.

<sup>117</sup> Except in the case where the natural parent is also the adoptive parent or was at the time of the adoption married to the adoptive parent of the child: S 1(4)(e) of the Intestate Succession Act 81 of 1987; *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [15].

<sup>118</sup> Providing: “If an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.”

<sup>119</sup> 74 of 1983: S 20(2), in terms of which an adopted child is for all purposes whatever deemed to be the legitimate child of the adopted parent.

<sup>120</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [20].

<sup>121</sup> 81 of 1987.

<sup>122</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [21].

<sup>123</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [22].

<sup>124</sup> 81 of 1987.

<sup>125</sup> *Harksen v Lane NO and Others* 1998 1 SA 300 (CC).

Constitution, it could not be presumed to be unfair and as a result: “Critically the issue is whether the differentiation may be said to unreasonably impair the human dignity of that person affected by this differentiation”.<sup>126</sup> Following indications from a letter to his attorney that supported a conclusion that the legal treatment of Flynn had had a negative impact on him,<sup>127</sup> the court nevertheless proceeded to consider the second question, *ie* “... whether on the assumption that the differentiation is discrimination, it is fair discrimination”.<sup>128</sup> In this regard the court considered the impact that the discrimination may have had on the affected person and the question whether there is a rational reason for allowing *de lege* adopted children to inherit and not extending the same benefits to *de facto* adopted children.<sup>129</sup> The court, first of all, rejected an analogy to the decision of the Constitutional Court in *Daniels v Campbell NO and Others*<sup>130</sup> dealing with the same section of the Intestate Succession Act,<sup>131</sup> where it was held that the word “spouse” should be interpreted widely so as to include a *de facto* husband or wife married in accordance with Muslim rites. Davis J<sup>132</sup> distinguished the cases on the following basis:

“In Daniels the parties were ‘married in terms of the legal system’. The failure to employ the ordinary meaning of spouse emanated from a ‘linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it’. (See Daniels, para 19 at 342A/B.) This presents a significant distinction from the case of Flynn, who was a stepchild of Farr but where the latter could, but did not, institute legal proceedings to adopt him.”

While the phrase “married in terms of the legal system” seems to be a quote from the *Daniels* case, the words could not be found in paragraph 19<sup>133</sup> nor anywhere else in that judgment. Davis J would seem to imply that the distinction between the two cases lies in the fact that the parties in the *Daniels* case at least

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<sup>126</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [24]. See 4.3.2.2(c)(ii) above for another example of how the test for unfairness in the case of an unlisted ground is applied.

<sup>127</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [26].

<sup>128</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [26].

<sup>129</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [28].

<sup>130</sup> 2004 5 SA 331 (CC).

<sup>131</sup> 81 of 1987: S 1.

<sup>132</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [43].

<sup>133</sup> See reference to par 19 of *Daniels* case in quotation above.

concluded some form of marriage (in terms of, what should probably have read, the “Muslim legal system”), even though it was not recognised as a legal marriage, whereas Farr never instituted any proceedings to adopt Flynn at all.<sup>134</sup> To include women married in terms of Muslim rites within the definition of “spouse” was thus not only considered fair but also “... accord[ed] with the common linguistic interpretation of the word ‘spouse’”.<sup>135</sup>

Davis J<sup>136</sup> was also not inclined to take more seriously a judgment of the High Court of American Samoa<sup>137</sup> that gave legal recognition to a so-called “equitable adoption”, *ie* an adoption that exists “... when a child has stood from an early age of tender years in the position exactly equivalent to a formally adopted child”,<sup>138</sup> because of an equally compelling precedent from British Columbia “... that goes the other way”.<sup>139</sup> In the latter judgment the court found that the failure of the relevant legislation to recognise *de facto* adoptees did not violate “... essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice”.<sup>140</sup>

Davis J<sup>141</sup> found the underlying premises of the judgment in *Volks NO v Robinson and Others*<sup>142</sup> “... far closer to this dispute than is the factual matrix set out by Sachs J in *Daniels, supra*”.<sup>143</sup> Discussing the case at some length, Davis J<sup>144</sup>

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<sup>134</sup> In terms of the analogy drawn between the interpretation of the word “spouse” and the words “adopted child” this distinction may then also explain why the courts have been willing to give some recognition to customary law adoptions but not other factual adoptions – the reason being that customary law adoptions qualify as some sort of adoption while in the case of other factual adoptions no steps at all were taken to adopt the child in question. Whether this provides a constitutionally justified basis for distinguishing between children adopted informally in terms of customary law and other informally or factually adopted children, however, remains to be seen.

<sup>135</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [32].

<sup>136</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [51].

<sup>137</sup> *Estate of Tuinanau Fuinaono (deceased)* PR Nos 13-86 & 23-86, discussed in *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [44].

<sup>138</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [44].

<sup>139</sup> A judgment by the Alberta Court of Queen’s Bench in *McNeil v Mac Dougal* 1999 ABQB 945 (CanLII) ([2000]) 256 AR 289; [2000] 2 WWR 729; 72 CRR (2d) 321; (1999) 74 Alta LR (3d) 359, as discussed in *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [36].

<sup>140</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [36].

<sup>141</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [43].

<sup>142</sup> 2005 5 BCLR 446 (CC).

<sup>143</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [42] to [44].

<sup>144</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [39] to [41].

refers to the facts in *Volks NO v Robinson and Others*<sup>145</sup> in which the surviving life partner of a deceased man applied for an order declaring her to qualify as a “surviving spouse” in terms of the Maintenance of Surviving Spouses Act.<sup>146</sup> The Constitutional Court in that case<sup>147</sup> dismissed the application, arguing that there is a fundamental difference between the position of surviving life-partners and surviving spouses. A wide range of legal privileges and obligations are triggered by the contract of marriage, most importantly for purposes of that case the reciprocal duty of support, which does not arise by operation of law in the case of unmarried cohabitants.<sup>148</sup> The court,<sup>149</sup> furthermore, found in that case that the Maintenance of Surviving Spouses Act<sup>150</sup> applies “... to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died”. Of special importance to Davis J<sup>151</sup> was the fact that the Constitutional Court in *Volks NO v Robinson and Others*<sup>152</sup> also found that the provisions of the Maintenance of Surviving Spouses Act<sup>153</sup> did not amount to an infringement of Mrs Robinson’s right to dignity:<sup>154</sup>

“On the evidence there is no sustainable legal basis by which to conclude that Mrs Robinson’s dignity, in that case, was offended any less than that of Flynn. Therefore, the central holding of *Volks*, *supra*, must be applicable in the present dispute.”

On behalf of the respondents in *Flynn v Farr NO and Others*<sup>155</sup> it was argued that the legislator’s purpose in differentiating between legally adopted children on the one hand and stepchildren on the other “... was directed at bringing certainty and predictability to the law of intestate succession” and was thus neither arbitrary nor

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<sup>145</sup> 2005 5 BCLR 446 (CC) at [3] to [11]. See discussion of case in 4.2.3.2(b)(ii) above.

<sup>146</sup> 27 of 1990.

<sup>147</sup> *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [60].

<sup>148</sup> *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [58].

<sup>149</sup> *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [56].

<sup>150</sup> 27 of 1990.

<sup>151</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [41].

<sup>152</sup> 2005 5 BCLR 446 (CC).

<sup>153</sup> 27 of 1990.

<sup>154</sup> *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [62] quoted by Davis J in *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [41].

<sup>155</sup> 2009 1 SA 584 (C) at [35].

irrational. In this regard the court was referred to the following questions that could arise if factually adopted children were to be recognised as being adopted.<sup>156</sup>

- (a) What would the minimum length of time be during which the person concerned would have had to act as stepparent?
- (b) Would all the stepchildren have rights upon intestacy of the stepparent?
- (c) What would the position be where a child's natural parents had had multiple marriages?
- (d) Would a stepchild retain entitlement to claim under the intestacy of his or her natural *and* substitute parent? If so, this would allow for multiple rights of inheritance known as "double dipping"<sup>157</sup> with clearly unsatisfactory consequences.

The court<sup>158</sup> also referred to an affidavit by the Chief Director of the National Department of Social Development (DSD), providing the following "... compelling reasons for the insistence upon a process of legal adoption"<sup>159</sup>:

- (a) The inability to keep track of "factual adoptions" that cannot be recorded formally and to provide a child with information regarding his or her origins should the child make enquiries later in life;

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<sup>156</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [36].

<sup>157</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [36].

<sup>158</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [46] and [47].

<sup>159</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [46].

- (b) the lack of regulation of *de facto* adoptions in circumstances where rights and obligations flow from such a relationship in a manner sought by the applicant;<sup>160</sup>
- (c) the inability, for example, to monitor inter-country adoptions, both inward and outward and the difficulty of ensuring the protection of children, especially from drug and child trafficking, were this to be extended to categories of factually adopted children across the border whereas the legal adoption within the statutory framework provides certainty to the child and provides proof that the child is indeed yours on adoption; and
- (d) the indeterminacy of the relationship between the child and the biological parents, on the one hand, and the adoptive parents, on the other.<sup>161</sup>

On the basis of these submissions the court, in my opinion quite correctly, came to the conclusion that there is justification for the present legal dispensation only recognising formal adoptions which is "... manifestly rational and connected to a legitimate purpose".<sup>162</sup>

In summary it could be said that while the judiciary has been willing to recognise an uncompleted adoption in terms of customary law for purposes of creating a duty of support between parent and child (and thus for purposes of claiming compensation for the loss of such support) if the parent undertook to care for the child as his or her own, it has not been willing to recognise other informal or *de facto* adoptions for the purpose of the law of intestate succession. In view of the

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<sup>160</sup> In this regard the Director's affidavit acknowledges the increasing prevalence of informal adoptions by family members (including grandparents) or concerned community members in general and in terms of customary law where "... a family may take in a child with no intention to adopt".

<sup>161</sup> In this regard reference is made to the possibility in terms of the Children's Act 38 of 2005 of allowing for the continuance of contact with the biological parent *post* adoption, which "... in the absence of a legal adoption would place the adoptive parents in a precarious legal position and may result in them discouraged from adopting a child in the first instance. It would also not result in the termination of the legal relationship between parent and child when it comes to matters where consent is required by a parent".

<sup>162</sup> *Flynn v Farr NO and Others* 2009 1 SA 584 (C) at [49].

judgment in *Flynn v Farr NO and Other*<sup>163</sup> it is unlikely that the courts would be willing to consider the recognition of informal adoptions outside the parameters of customary law on an *ad hoc* basis for any purpose whatsoever.<sup>164</sup> Whether the courts would be willing to extend the recognition of *customary law adoptions* beyond the scope of the duty of support for other purposes such as the acquisition of parental responsibilities and rights or rights of succession are as yet uncertain but not inconceivable. In this regard it may be noted that if the proposed Reform of Customary Law of Succession and Regulation of Related Matters Bill is enacted, section 1(4)(e) of the Intestate Succession Act<sup>165</sup> will be amended to expressly include "... a child adopted in accordance with customary law".<sup>166</sup> Despite the fact that the recognition of customary law adoptions may be justified on a constitutional basis as being in the best interests of the child so "adopted", the uncertainty relating to the requirements for such an adoption may create a number of problems not unlike those alluded to in the case of *Flynn v Farr NO and Other*.<sup>167</sup> Moreover, the parallel recognition of adoptions in terms of customary law may hamper the development of a *uniform* approach towards the care and protection of children as envisaged by section 5 of the Children's Act.<sup>168</sup>

### 7.2.3 Qualifications of prospective adoptive parents

Section 231 provides:

- "(1) A child may be adopted –
- (a) jointly by –
    - (i) a husband and wife;
    - (ii) partners in a permanent domestic life-partnership; or
    - (iii) other persons sharing a common household and forming a permanent family unit;
  - (b) by a widower, widow, divorced or unmarried person;

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<sup>163</sup> 2009 1 SA 584 (C) at [36], [46] and [47].

<sup>164</sup> See also *Edwards v Fleming* 1909 TH 232 and *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) in which the courts were unwilling to recognise or enforce informal agreements purporting to bring about the adoption of the child in question.

<sup>165</sup> 81 of 1987.

<sup>166</sup> See cl 8 and Schedule (Amendment of laws) of the Bill.

<sup>167</sup> 2009 1 SA 584 (C).

<sup>168</sup> 38 of 2005. Bekker supports the view that a customary law adoption should comply with the relevant statutory requirements: See SALC Discussion Paper on the *Review of the Child Care Act* par 18.3.12.



- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
  - (d) by the biological father of a child born out of wedlock; or
  - (e) by the foster parent of the child.
- (2) A prospective adoptive parent must be –
- (a) fit and proper to be entrusted with full parental responsibilities and rights in respect of the child;
  - (b) willing and able to undertake, exercise and maintain those responsibilities and rights;
  - (c) over the age of 18 years; and
  - (d) properly assessed by an adoption social worker for compliance with paragraphs (a) and (b).
- (3) In the assessment of a prospective adoptive parent, an adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parent into consideration.
- (4) A person may not be disqualified from adopting a child by virtue of his or her financial status.
- (5) Any person who adopts a child may apply for means-tested social assistance where applicable.
- (6) A person unsuitable to work with children is not a fit and proper person to adopt a child.
- (7) (a) The biological father of a child who does not have guardianship in respect of the child in terms of Chapter 3 or the foster parent of a child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption.
- (b) A person referred to in paragraph (a) must be regarded as having elected not to apply for the adoption of the child if that person fails to apply for the adoption of the child within 30 days after a notice calling on that person to do so has been served on him or her by the sheriff.
- (8) A family member of a child who, prior to the adoption, has given notice to the clerk of the children’s court that he or she is interested in adopting the child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption.”

The Children’s Act<sup>169</sup> has extended the categories of persons that may adopt jointly to include “... partners in a permanent domestic life-partnership” and “... other persons sharing a common household and forming a permanent family unit”.<sup>170</sup> A person whose permanent domestic life-partner is the parent of a child

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<sup>169</sup> 38 of 2005.

<sup>170</sup> In view of the primacy of the child’s best interests (and the way in which it has been interpreted and applied in cases) the SALRC concluded that the existence of a conjugal relationship should not be required for adoption by two or more persons: SALC Discussion Paper on the *Review of the Child Care Act* 18.6.3. The SALRC (in the same paragraph) conceived of the following examples to show the need for such adoptions: (a) Adoption by members of the extended family or kinship

and the foster parent of a child are also now expressly given the right to adopt a child. The new provision clearly remedies the constitutional defect recognised in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*<sup>171</sup> by providing for the joint adoption by same-sex life partners.<sup>172</sup> The provision also eliminates the possible discrimination against heterosexual life partners to adopt jointly.<sup>173</sup> The provision has, however, become so extensive as to render the value thereof questionable. Apart from indicating which applicants may adopt jointly, the section does little more than saying any person or persons may in principle adopt a child. The provision could easily be simplified by merely indicating that a child may be adopted by any person or persons who is or are deemed suitable to adopt in terms of the provisions of the Act. The section could then be qualified by a provision to the effect that where the prospective adoptive parents are life-partners (which include spouses<sup>174</sup>) or other persons sharing a common household who form a permanent family unit, the applicants may apply jointly for the adoption of the child.

Whereas the special interest of a foster parent in the adoption of the foster child was recognised under the Child Care Act,<sup>175</sup> section 231(7) now extends that recognition to a biological father "... who does not have guardianship in respect of the child". Both such father and foster parent acquire the right to be considered a prospective adoptive parent upon the child becoming available for adoption. The father and the foster parent thus acquire what can be termed "a first right of

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group in the interests of securing the future of such child, lest a single caregiver later be affected by HIV/AIDS; and (b) adoption by the husband (head of the kraal) and his three or four wives in a customary setting in a practical application of the spirit of *ubuntu*.

<sup>171</sup> 2003 2 SA 198 (CC).

<sup>172</sup> Same-sex couples in England can now also adopt in terms of ss 49(1) and 144(4) of the Adoption and Children Act 2002.

<sup>173</sup> The judgment in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) did not deal with the position of heterosexual life partners. In view of the *Du Toit* judgment and the judgment in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at [54] and [58] heterosexual partners thus probably did not have the right to adopt jointly because they chose not to formalise their relationship despite being able to do so – an option that was not available to same-sex partners at the time (the Civil Union Act 17 of 2006 only came into operation on 30 Nov 2006).

<sup>174</sup> For the meaning of "spouses", see discussion of "marriage" in 4.2.3.2(i) above.

<sup>175</sup> 74 of 1983: S 18(4)(g).

refusal” as far as the adoption of the child is concerned.<sup>176</sup> The value of section 231(7) lies then in its regard for the special interest of such fathers and foster parents in the child to be adopted while at the same time ensuring, by means of the time constraints, that the adoption process is not hijacked by such persons. While a family member’s expressed willingness to adopt a child (mentioned in section 231(8)) will give that family member the right to be considered a prospective adoptive parent at a later stage when the child becomes available for adoption, such a family member would not seem to be entitled to a notice in this regard nor subject to the same time constraints to respond to such a notice. Since the expressed willingness to adopt the child would, in my opinion, create a special interest in the child, comparable to that of a biological father without guardianship or a foster parent, it is difficult to conceive of a reason why such a family member should be treated differently.

Subsection (3) gives the adoption social worker a discretion to consider the “cultural and community diversity” of the adoptable child and prospective adoptive parent in the process of matching the child with suitable adoptive parents. The children’s court, on the other hand, “must” take into account the “religious and cultural background” of the child, the child’s parents and the prospective adoptive parents, when considering the application for adoption.<sup>177</sup> While community diversity probably includes religious diversity, it is not certain why the factors that should be considered by the social worker and the children’s court should differ.

In addition to the well known requirements of having to be found “fit and proper” and “willing and able”,<sup>178</sup> a person may in terms of the new provisions not be disqualified from adopting a child by virtue of his or her financial status<sup>179</sup> and may, for the purpose of remedying such lack of resources, apply for means-tested

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<sup>176</sup> Cf, however reg 112(3)(b) of the Consolidated Draft Regulations to the Children’s Act 38 of 2005 including Regulations pertaining to Bill 19 of 2006 published in Feb 2008 in terms of which only a declaration by the *foster parent* to the effect that he or she does not wish to adopt the child must accompany the application for adoption. A similar declaration is required from any other person who holds guardianship (reg112(3)(d)). However, no mention is made of a father who does *not* have guardianship.

<sup>177</sup> S 240, quoted in full in 7.2.8.3 below.

<sup>178</sup> In terms of s 18(4)(b) of the Child Care Act 74 of 1983 the applicants must have been “... of good repute” and “... fit and proper to be entrusted with the custody of the child”.

<sup>179</sup> S 231(4).

social assistance where applicable.<sup>180</sup> The viewpoint underlying these provisions is that a person may be suitable to adopt without being "... possessed of adequate means to maintain and educate the child".<sup>181</sup> The aim is thus to prevent the exclusion of poor applicants from the adoption process. While it is acknowledged that a state assisted private adoption is, generally speaking, to be preferred to institutionalised care<sup>182</sup> because of the obvious benefits for the child, one should not ignore the very real risks associated with lowering the qualifications for prospective adoptive parents in the (heretofore) absence of a system that provides for the careful monitoring of adoptions. Admittedly then "... the problem of the discrimination against poorer people wishing to adopt must be balanced against the need to ensure that the child is adequately cared for".<sup>183</sup>

Section 231(6) also excludes "... a person unsuitable to work with children" as a prospective adoptive parent, *ie* a person listed in Part B of the National Child Protection Register.<sup>184</sup> Part B of the Register records the details of persons who have been found unsuitable to work with children on conviction of murder, attempted murder, rape, indecent assault or assault to do grievous bodily harm with regard to a child or a finding of incompetency to stand trial or to be held accountable for any of these crimes on the ground of mental illness or mental defect in terms of the Criminal Procedure Act.<sup>185</sup>

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<sup>180</sup> In terms of s 231(5). For a discussion of the initial proposals for and ultimate exclusion of social security measures in the Children's Act 38 of 2005, see Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-9.

<sup>181</sup> A requirement under the Child Care Act 74 of 1983: S 18(4)(a). The new provisions are in line with a proposal by Sloth-Nielsen & Van Heerden 1996 *SAJHR* 247 at 255 who suggested a constitutionally more correct test, *ie* establishing whether the proposed adoptive parents are willing and able to carry out their parental responsibilities and rights, if necessary with appropriate State aid.

<sup>182</sup> Apart from the plight of children in institutionalised care, the SALRC believed that a means-tested state grant for adoptive parents would provide a greater sense of security to especially those children currently in long-term foster care: See SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.7. The resolutions on the introduction of financial support to adoptive parents adopted unanimously at the focus group discussion in Bantry Bay, *inter alia*, noted the disadvantages of long-term foster care "... which exists extensively because no financial support exists for adoptive parents": SALC Discussion Paper on the *Review of the Child Care Act* par 18.4.13.

<sup>183</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-8, quoting from recommendations made by Van Heerden B during a conference in September 1996.

<sup>184</sup> To be created in terms of s 111 of the Children's Act 38 of 2005 and regulated in accordance with the provisions contained in ss 112-128.

<sup>185</sup> 51 of 1977: Ss 77(6) and 78(6), read with s 120(4)(a) and (b).

It is noteworthy that section 231 makes no mention of RACAP, the register that will, *inter alia*, keep a record of fit and proper prospective adoptive parents, *ie* persons who comply with the requirements for adoptive parents as provided for in section 231(2). The omission of registration in RACAP as a qualifying prerequisite for adoptive parents would seem to allow for an adoption by prospective adoptive parents who have not been so registered. Because of the anticipated central role that is to be played by RACAP in matching prospective adoptive parents with adoptable children in future, the omission of RACAP as a prerequisite could be seen as an oversight. On the other hand, making registration in RACAP a qualifying prerequisite for prospective adoptive parents would have meant that the children's court would not have been able to consider<sup>186</sup> the adoption application until such registration had been effected – a hurdle that could have caused an unnecessary delay. The problem would have been acute especially in the early stages while the RACAP databasis is being set up.

#### **7.2.4 Register on adoptable children and prospective adoptive parents (RACAP)**

Section 232 provides:

- “(1) The Director-General must keep and maintain a register to be called the Register on Adoptable Children and Prospective Adoptive Parents for the purpose of –
  - (a) keeping a record of adoptable children; and
  - (b) keeping a record of fit and proper adoptive parents.
- (2) The name and other identifying information of a child may be entered into RACAP if the child is adoptable as contemplated in section 230(3).
- (3) The name and other identifying information of a child must be removed from RACAP if the child has been adopted.
- (4) A person may be registered in the prescribed manner as a prospective adoptive parent if –
  - (a) section 231(2) has been complied with; and
  - (b) the person is a citizen or permanent resident of the Republic.
- (5) Registration of a person as a prospective adoptive parent –
  - (a) is valid for a period of three years;
  - (b) may be renewed as prescribed;
  - (c) ceases –

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<sup>186</sup> In terms of s 240(2)(b).

- (i) on written notice of withdrawal being given to the Director-General;
  - (ii) on the death of the registered person;
  - (iii) on cancellation by the Director-General if the registered person is no longer –
    - (aa) a fit and proper person to be entrusted with full parental responsibilities and rights in respect of a child; and
    - (bb) willing and able to undertake, exercise and maintain those responsibilities and rights.
  - (iv) if the registered person is no longer a citizen or permanent resident of the Republic;
  - (v) if a child contemplated in section 150 is removed from the care of that registered person; or
  - (vi) if the registered person is convicted of an offence involving violence,
- (6) Only the Director-General and officials in the Department designated by the Director-General have access to RACAP, but the Director-General may, on such conditions as the Director-General may determine, allow access to –
- (a) a provincial head of social development or an official of a provincial department of social development designated by the head of that department;
  - (b) a child protection organisation accredited in terms of section 251 to provide adoption services; or
  - (c) a child protection organisation accredited in terms of section 259 to provide inter-country adoption services.

Mosikatsana & Loffell,<sup>187</sup> quite appropriately, refer to the creation of the register as envisaged by section 232 as “... a major innovation” of the Children’s Act.<sup>188</sup> The register of adoptable children and fit and proper adoptive parents will, if implemented, in the first place ensure that the principle of subsidiarity is upheld in cases where inter-country adoption is being considered. This principle, enshrined in Article 21(b) of the UNCRC provides:

“States parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be

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<sup>187</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act 15-10*.

<sup>188</sup> 38 of 2005.

placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".<sup>189</sup>

RACAP will for the first time provide a means of ascertaining whether there is any suitable placement for the child in South Africa.<sup>190</sup> RACAP will also facilitate the matching process locally in the process of seeking a compatible match between fit and proper adoptive parents and adoptable children,<sup>191</sup> especially as far as their religious and cultural backgrounds are concerned.<sup>192</sup> It is interesting to note that the legislator has seen it fit to make citizenship, or at least permanent residence, a requirement for the registration of a prospective adoptive parent in RACAP.<sup>193</sup> Since South African citizenship<sup>194</sup> is no longer a prerequisite for the adoption of a South African child,<sup>195</sup> it is difficult to see why it should be required for registration in RACAP. The logical consequence of the requirement is that a foreigner cannot be registered in RACAP as a prospective adoptive parent. The requirement may perhaps be explained by the fact that prospective adopters from other countries should be screened for suitability, not by the South African authorities, but by the competent authorities in *their* country of origin in accordance with the dictates of Article 5 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).

## 7.2.5 Consent requirements

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<sup>189</sup> See discussion in *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) at [38] and Louw 2006 *De Jure* 503 at 516 *et seq.*

<sup>190</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-10.

<sup>191</sup> Defined in s 230(3) in the following terms: "A child is adoptable if – (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child; (b) the whereabouts of the child's parent or guardian cannot be established; (c) the child has been abandoned; (d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or (e) the child is in need of a permanent alternative placement.

<sup>192</sup> The children's court must take these factors into consideration when considering an application for the adoption of a child: S 240(1)(a). See Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-10.

<sup>193</sup> See s 232(4).

<sup>194</sup> S 18(4)(f) of the Child Care Act 74 of 1983 in the alternative also makes provision for an applicant who has or applicants who have "... the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act 44 of 1949), of a certificate or certificates of naturalization as a South African citizen or South African citizens and has or have made application for such a certificate or certificates".

<sup>195</sup> The requirement was found to be unconstitutional in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) and has been omitted from s 231(2).

### 7.2.5.1 Consent to adoption

Section 233 provides:

- (1) A child may be adopted only if consent for the adoption has been given by –
  - (a) each parent of the child, regardless of whether the parents are married or not: Provided that, if the parent is a child, that parent is assisted by his or her guardian;
  - (b) any other person who holds guardianship in respect of the child; and
  - (c) the child, if the child is –
    - (i) 10 years of age or older; or
    - (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent.
- (2) Subsection (1) excludes a parent or person referred to in section 236 and a child may be adopted without the consent of such parent or person.
- (3) If the parent of a child wishes the child to be adopted by a particular person the parent must state the name of that person in the consent.
- (4) Before consent for the adoption of the child is granted in terms of subsection (1), the adoption social worker facilitating the adoption of the child must counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption.
- (5) The eligibility of the person contemplated in subsection (3) as an adoptive parent must be determined by a children’s court in terms of section 231(2).
- (6) ...
- (7) ...
- (8) A person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.”

The importance of obtaining a parent’s consent to the adoption of his or her child has been noted in case law. Commenting on the “... irrevocable extinction of the parental relationship” when a child is adopted, Gubbay J in *Re J (An Infant)*<sup>196</sup> did not regard it an exaggeration to say that “... it must be a rare case in which the judicial mind is satisfied that such a momentous change should be brought about against the will of a parent”. The provisions outlining the consent requirements in the case of the adoption of a child should, therefore, be drafted with special care

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<sup>196</sup> 1981 2 SA 330 (Z) at 335G.



considering the enormous impact and effect of such consent and resultant adoption on the parent-child relationship.

Section 18(4)(d) of the Child Care Act<sup>197</sup> originally provided for the consent of both parents only in the case of a legitimate child. Where the child to be adopted was born out of wedlock, only the mother's consent was required. The Constitutional Court in *Fraser v Children's Court, Pretoria North and Others*<sup>198</sup> found the provision unconstitutional on the ground that it unfairly discriminated against unmarried fathers who, in terms of the provision, had no say in the adoption of their children. Section 18(4)(d) was subsequently amended<sup>199</sup> to require that consent be given –

“... by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of a child, whether or not such mother or natural father is a minor or a married person and whether he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the natural father of the child and has made his identity and whereabouts known, as contemplated in section 19A”.

The consent of the natural father of the child born out of wedlock was thus required if the father qualified in terms of the *proviso* to the section, despite the fact that an unmarried father was at the time not automatically recognised *ex lege* as a legal parent of the child and did not have any parental responsibilities and rights in respect of the child. Moreover, the need for the assistance of a guardian was in express terms excluded in the case of a minor parent giving or refusing consent to the adoption. The right to consent to an adoption was thus not predicated on the parent holding parental responsibilities and rights. However, in cases where the parent did not have parental responsibilities and rights, as in the case of an unmarried father, the biological bond between father and child was not deemed sufficient and the father had to show some kind of additional commitment

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<sup>197</sup> 74 of 1983.

<sup>198</sup> 1997 2 SA 261 (CC) at [28].

<sup>199</sup> Adoption Matters Amendment Act 56 of 1996.

(by acknowledging paternity and making his identity and whereabouts known) to qualify for the right to veto the adoption of his child.<sup>200</sup>

Parental responsibilities and rights are also not a prerequisite for the right to consent to the adoption of a child under of the Children's Act.<sup>201</sup> In terms of section 233(1)(a), a child may be adopted only with the consent by "... each parent of the child, regardless of whether the parents are married or not". Despite the apparent simplicity of the provision, its full impact can only be understood if interpreted in conjunction with –

- (a) the definition of "parent" in section 1(1) of the Children's Act,<sup>202</sup>
- (b) section 236, outlining the circumstances in which a parent's consent can be dispensed with,<sup>203</sup> and
- (c) the *proviso* to section 233(1)(a), in terms of which the guardian of the parent must assist that parent in giving consent to the adoption, if the parent is a child.

The definition of "parent"<sup>204</sup> excludes a rapist or incestuous father, a gamete donor and a parent whose parental responsibilities and rights have been terminated.<sup>205</sup> In terms of this definition a rapist or incestuous father, a gamete donor and a parent whose parental responsibilities and rights have been terminated will not qualify as a "parent" for purposes of the Act and will thus not be required to consent to the adoption of a child in terms of section 233(1)(a). Section 236(3)(b) and (c) amplify the exclusion of a rapist and incestuous father from the adoption process in express terms. Furthermore, the fact that a gamete donor does not have the right to consent to an adoption, correlates with the provisions of section 40(3) in terms of which "... no right, responsibility, duty or obligation" arises

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<sup>200</sup> See s 18(4)(d) as amended.

<sup>201</sup> 38 of 2005.

<sup>202</sup> 38 of 2005.

<sup>203</sup> S 233(2) expressly excludes a parent or person referred to in s 236.

<sup>204</sup> Children's Act 38 of 2005: S 1(1) sv "parent".

<sup>205</sup> See 4.1 above.

between a child born as a result of artificial fertilisation and the person whose gametes have been used for such artificial fertilisation except the mother who gave birth to the child or the husband of such mother.

As far as the biological *mother* is concerned, she has to consent to the adoption unless her parental responsibilities and rights have been terminated or she falls within any of the categories mentioned in section 236(1), *ie* if she<sup>206</sup> –

- (a) is mentally ill;
- (b) has abandoned the child;<sup>207</sup>
- (c) has abused or deliberately neglected the child or has allowed the child to be abused or deliberately neglected;
- (d) has consistently failed to fulfil her parental responsibilities towards the child during the last twelve months;
- (e) has been divested by an order of court of the right to consent; and
- (f) has failed to respond to a notice of the proposed adoption within 30 days of the notice.<sup>208</sup>

If the mother is a minor she will have to be assisted by her guardian in terms of the *proviso* to section 233(1)(a), as discussed below.

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<sup>206</sup> S 236(1)(a) to (f).

<sup>207</sup> “Abandoned”, in relation to a child, means a child who – (a) has obviously been deserted by the parent, guardian or care-giver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months: S 1(1) of the Children’s Act 38 of 2005 *sv* “abandoned”. See also reg 115 read with reg 62 of the Consolidated Draft Regulations to the Children’s Act 38 of 2005 including Regulations pertaining to Bill 19 of 2006 published in Feb 2008, in terms of which certain express requirements (such as the placement of an advertisement in a national and local newspaper) will have to be complied with before a child will be considered abandoned.

<sup>208</sup> Consent is, of course, also not required if the child is an orphan and has no guardian or care-giver who is willing and able to adopt the child and the court is provided with certified copies of the child’s parent’s or guardian’s death certificate or such other documentation as may be required by the court: S 236(2)(a) and (b).

The position of the biological *father* appears to be as follows: As a “parent” in terms of section 233(1)(a), his consent will be required unless he is a rapist or incestuous father or his parental responsibilities and rights have been terminated in terms of the definition of “parent” in section 1(1) of the Act. His consent will also be unnecessary if he falls within any of the categories of parents listed in section 236(1) as referred to in (a) to (f) above. As a parent, the biological father will ostensibly have to consent “... whether ... married or not”. An unmarried father may qualify as a parent within the meaning of “parent” in section 1(1) even if he has not acquired parental responsibilities and rights. Whether the consent of such a father would be necessary must, however, be determined with reference to section 236(3)(a), in terms of which the consent of a biological father is not necessary if–

“... that biological father is not married to the child’s mother or was not married to her at the time of conception or at any time thereafter, and has not acknowledged in a manner set out in subsection (4) that he is the biological father”.

While Mosikatsana & Loffell<sup>209</sup> simply assume that section 236(3)(a) refers in the alternative to a married biological father, on the one hand, and one that is not married but has acknowledged paternity, on the other hand, the conjunction “and” within the paragraph may cast some doubt on the interpretation of the provision. Since another interpretation of the provision would make consent by any father other than a married one unnecessary, I am prepared to accept the interpretation assumed by Mosikatsana & Loffell<sup>210</sup> as the legislator’s intended interpretation – even if not borne out by the wording of the provision. On the assumption that this interpretation is correct, it means that the consent of an unmarried biological father (whether or not he has acquired parental responsibilities and rights) is required, provided he has acknowledged paternity in any of the ways prescribed in terms of s 236(4), *ie* –

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<sup>209</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-17.

<sup>210</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-17.

- (a) in writing to the mother or clerk of the children’s court before the child reaches the age of six months; or
- (b) by voluntarily paying maintenance for the child;
- (c) by paying damages in terms of customary law; or
- (d) by causing particulars of himself to be inserted in the registration of birth of the child in terms of section 10(1)(b) or section 11(4) of the Births and Deaths Registration Act.<sup>211</sup>

The Children’s Act<sup>212</sup> has thus retained the principle incorporated in the Child Care Act<sup>213</sup> that an unmarried father may give or withhold consent to adoption only if he has acknowledged paternity of the child and taken some responsibility for the child,<sup>214</sup> but has expanded and clarified the criteria in terms of which he will be considered to have done so.<sup>215</sup>

As far as consent to adoption in the case of a minor parent in terms of the *proviso* to section 233(1)(a) is concerned, two divergent approaches emanated from the judgment in *Dhanabakium v Subramanian and Another*.<sup>216</sup>

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<sup>211</sup> 51 of 1992, for a discussion of which, see 4.2.3.2(c)(i) above.

<sup>212</sup> 38 of 2005.

<sup>213</sup> 74 of 1983.

<sup>214</sup> See Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-17. In proposing amendments to the consent provision in the Child Care Act 74 of 1983, the Constitutional Court in *Fraser v Children’s Court, Pretoria North and Others* 1997 2 SA 261 (CC) at [28] considered – “... a blanket rule which either automatically gives both parents [and thus even a rapist-father] of a child a right to veto an adoption or a blanket rule which arbitrarily denies such a right to all fathers who are or were not married to the mother of the child concerned” undesirable. The court suggested (at [43]) that the statutory and judicial responses should be “nuanced” having regard to the duration of the relationship between the parents, the intensity or otherwise of the bonds between the father and the child in these circumstances, the legitimate needs of the parents, the reason why the relationship between the parents has not been formalised by a marriage ceremony and generally what is in the best interests of the child. With reference to these factors it could be argued that the court considered a commitment on the part of the father (either to the mother or the child) a precondition to him having the right to veto an adoption. The legislator attempted to incorporate some notion of this commitment in the amendments to section 18(4)(d) of the Child Care Act 74 of 1983 (*via* the Adoption Matters Amendment Act 56 of 1996) in terms of which an unmarried father would be given the right to consent to the adoption of his child provided he acknowledged paternity and his identity and whereabouts were known.

<sup>215</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-17.

<sup>216</sup> 1943 AD 160.

- (a) An approach in terms of which the importance of the biological bond between the minor parent and child is appreciated but not regarded as sufficient for acquiring the responsibility and the right to consent or veto the adoption of the child, with the result that the assistance of the guardian of the minor parent is required to supplement the minor parent's limited capacity to act. This approach was supported by the majority of the court of appeal in *Dhanabakium v Subramanian and Another*<sup>217</sup> where, in reply to a contention that the word "consent" in section 69(2)(d)(i) of the Children's Act of 1937<sup>218</sup> means no more than "... an intimation of the mother's inclination in the matter", Tindall JA<sup>219</sup> held:

"I cannot agree, however, that the word 'consent' is used ... in the sense contended for. In consenting to an order of adoption a parent not only takes a step which is of great importance as regards the welfare of the child but also agrees to give up important rights. In the case of an illegitimate child there is always the danger that the mother will hasten to bring about an adoption for her own convenience and that in the adoption proceedings her attitude will be influenced by purely selfish motives. The younger the mother the greater risk that in the adoption the illegitimate child's interests will suffer. The Legislature may have been alive to such considerations. The language of paragraph (d)(i), in my opinion, does not justify the inference that the Legislature intended that the mother who is a minor should be competent, without the assistance of her guardian, to agree to the order of adoption."

The minor mother's consent was consequently deemed of no effect and the rescission order granted by the children's court restored.

- (b) Alternatively, an approach that considers it an inherent right of each parent *qua* parent to consent to the adoption of a child—irrespective of whether such parent holds parental responsibilities and rights. In terms of this approach the consent by a minor parent would be deemed sufficient

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<sup>217</sup> 1943 AD 160.

<sup>218</sup> Act 31 of 1937. S 69(2) enacted that a children's court shall not grant an application for an order of adoption unless it is satisfied, (d) that consent to the adoption has been given: (i) by both parents of a child, or, if the child is illegitimate, by the mother of the child". The provision was silent on the question of the consent if the mother was till a minor.

<sup>219</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167.

without the assistance of his or her guardian. This approach was adopted by Centlivres JA in a dissenting judgment in *Dhanabakium v Subramanian and Another*.<sup>220</sup> Although in agreement with the ultimate decision of the court, Centlivres JA<sup>221</sup> was unable to agree that the mother's consent was ineffective on the ground that, being a minor at the time she gave her consent, she was not assisted by her guardian. Centlivres JA<sup>222</sup> argued that the matter could not be decided with reference to the contractual capacity of the minor mother since the adoption of a child is not effected by means of a contract between the parents of the child and the prospective adoptive parents but by an application to the children's court. Centlivres JA<sup>223</sup> interpreted "consent" in the applicable section of the Act as implying "... a willingness on the part of the person whose consent is required that an order of adoption should issue". Apart from certain other provisions of the Children Act<sup>224</sup> that are no longer relevant, support for this interpretation was found<sup>225</sup> in the fact that the provision required the consent of both parents of a legitimate child despite the fact that the mother may, for example, still at that time have been married under the marital power of her husband, and the fact that the provision also required the child over 10 years of age to consent to his or her own adoption. Further support for the view that the consent of the guardian of the minor parent was not required was found in the fact that the Act did not give the parents, as guardians of the minor parent, the right to apply for the rescission of the adoption order.<sup>226</sup> Moreover the view taken by the majority of the court that the consent of the minor parent must be fortified by the consent of her guardian produced various practical problems as discussed by Centlivres JA, including the necessity of having to incur the considerable expense of a High Court application to appoint a guardian for the purpose of consenting to the adoption in cases where the minor parent is orphaned.<sup>227</sup>

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<sup>220</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 168.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 169.

<sup>223</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 170.

<sup>224</sup> 31 of 1937.

<sup>225</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 170.

<sup>226</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 170.

<sup>227</sup> *Dhanabakium v Subramanian and Another* 1943 AD 160 at 171.

The provision in the Children's Act,<sup>228</sup> requiring the assistance of the guardian in the case of a minor parent, has revived the legal position enunciated in the judgment of *Dhanabakium v Subramanian and Another*.<sup>229</sup> This, despite the fact that until now, the legislator has sought it fit to suppress the effect of that precedent in express terms by legislation.<sup>230</sup> The concerns about the provision raised by Mosikatsana & Loffell<sup>231</sup> are in my view not misplaced. The provision requiring the assistance of the minor parent's guardian could be regarded as being at odds with the provisions of the Choice on Termination of Pregnancy Act<sup>232</sup> giving full autonomy to a girl of any age to make the decision to terminate her pregnancy.<sup>233</sup> What is also not clear is how the absence of the guardian's consent in the case of a minor parent will affect the validity of the adoption? If the majority in *Dhanabakium v Subramanian and Another*<sup>234</sup> is anything to go by, it seems that the unassisted consent by the minor parent would have "no effect" – implying that the adoption will be deemed to have taken place without parental consent, which in turn may possibly be considered a ground for rescission in terms of section 243(3)(b).<sup>235</sup> It is also significant that any other *person* who holds *guardianship* must consent to the adoption of a child.<sup>236</sup> This provision is clearly meant to refer to persons (other than parents) who are assigned guardianship in terms of section 24 of the Act and correlates with section 18(3)(c)(ii) that requires

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<sup>228</sup> 38 of 2005.

<sup>229</sup> 1943 AD 160.

<sup>230</sup> The Adoptions Validation Act 30 of 1943: S 1, followed by the Children's Act 33 of 1960 (s 71(2)(d)(i)) and the Child Care Act 74 of 1983 (s 18(4)(d)).

<sup>231</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-12.

<sup>232</sup> 92 of 1996: S 5(3).

<sup>233</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-12. A contrasting view is that there is no correlation between the termination of a pregnancy and the adoption of a child since the former act concerns a foetus that is not yet a separate legal subject deserving of the same protection as a child already *in esse*.

<sup>234</sup> 1943 AD 160 at 168.

<sup>235</sup> As was the case under the Children Act 31 of 1937, section 243(3)(b) of the Children's Act 38 of 2005 does not give a guardian of a minor parent the right to apply for the rescission of the adoption order. To refer to a "void" adoption when the required consent was not obtained would in my view serve no purpose. It is true that an adoption order may not be granted without the required consent. But if the adoption order should be granted in the absence of the required consent, the adoption cannot without further ado be considered void *ab initio* – an application to rescind (in terms of s 243) the adoption order is necessary to reverse the effects of the adoption (s 244). Moreover, the children's court may in its discretion decide *not* to rescind the adoption despite the fact that the necessary consent was not obtained. In terms of s 243(3) an adoption order may be rescinded only if the rescission of the order is in the best interests of the child: See *T v C* 2003 2 SA 298 (W), as discussed by Louw 2004 *THR-HR* 102.

<sup>236</sup> S 233(1)(b).



a parent *or other person* who acts as guardian to consent to the child's adoption. The "grave problems" that may arise in practice as a result of the guardian-assisted requirement,<sup>237</sup> may perhaps be addressed by giving the Minister of Social Development the power to appoint any suitable person to be the guardian of the child instead of necessitating an application to the High Court.<sup>238</sup>

As was the case under the Child Care Act,<sup>239</sup> a person who consented to the adoption of a child as required by section 233(1), may withdraw the consent within 60 days after having signed the consent. Until the lapsing of the 60 days *spatium deliberandi*<sup>240</sup> the consent is, therefore, revocable.<sup>241</sup>

### **7.2.5.2 Unreasonable withholding of consent**

Section 241 provides:

- "(1) If a parent or person referred to in section 233(1) withholds consent for the adoption of a child a children's court may, despite the absence of such consent, grant an order for the adoption of the child if the court finds that –
  - (a) consent has unreasonably been withheld; and
  - (b) the adoption is in the best interests of the child.
- (2) In determining whether consent is being withheld unreasonably, the court must take into account all relevant factors, including –
  - (a) the nature of the relationship during the last two years between the child and the person withholding consent and any findings by a court in this respect; and
  - (b) the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future."<sup>242</sup>

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<sup>237</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-12.

<sup>238</sup> S 70 of the Children's Act 31 of 1937 made provision for such an appointment in cases where an adoption application had been made in respect of a child (a) whose parents were dead and over whom no guardian had been appointed; (b) whose parents had deserted the child; and (c) whose parents were, by reason of "... mental disorder or defect" incapable of consenting. See also *Engelbrecht NO v Fourie and Others* 1958 2 SA 201 (T) where such an appointment was made in respect of three orphaned children.

<sup>239</sup> 74 of 1983: S 18(8).

<sup>240</sup> See Louw 1999 *De Jure* 124 at 134-137.

<sup>241</sup> See *Re J (An Infant)* 1981 2 SA 330 (Z) at 334A and 335G, stressing the importance of preserving the right of the parent to veto an adoption.

<sup>242</sup> See fn 72 in 6.3.3.2 for a consideration of this provision in the case of a husband or partner of a surrogate mother unreasonably refusing to consent to a surrogate motherhood agreement.

Although the Child Care Act<sup>243</sup> also provided for the dispensing of consent where the parent unreasonably withheld consent,<sup>244</sup> no guidelines were provided to determine what would be considered “unreasonable” in a particular case. In *SW v F*<sup>245</sup> the court decided to dispense with the consent of a mother on the basis, *inter alia*, that the court considered her refusal to consent unreasonable on account of the fact that she had made no effort to establish a bond with her child, even after being released from prison, and the adoption was clearly in the best interests of the child.<sup>246</sup> Because the provision in the Child Care Act<sup>247</sup> left the commissioner of child welfare with “... virtually unrestricted discretion”, Bosman-Swanepoel & Wessels<sup>248</sup> recommended that the decision to dispense with consent should preferably not exclusively be based on the unreasonability of a particular parent but should rather be combined with one or more of the other grounds mentioned in section 19(b) of the Child Care Act.<sup>249</sup> The Children’s Act<sup>250</sup> has addressed the problem by providing objective criteria, almost identical to those considered material in *SW v F*,<sup>251</sup> to ascertain whether the refusal to consent could be considered “unreasonable”.<sup>252</sup>

## 7.2.6 Post-adoption agreements

Section 234 provides:

- “(1) The parent or guardian of a child may, before an application for the adoption of a child is made in terms of section 239, enter into a post-

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<sup>243</sup> 74 of 1983.

<sup>244</sup> S 19(b)(vi).

<sup>245</sup> 1997 1 SA 796 (O) at 805C-D.

<sup>246</sup> The court in *S v S* 1956 1 SA 66 (SR) at 70B-C found that the refusal of a mother to consent to the adoption of her children by the father was not unreasonable and that “... her refusal to subordinate her own natural rights to considerations of their advantage is not proof of a personal defect or disqualification”.

<sup>247</sup> 74 of 1983.

<sup>248</sup> Bosman-Swanepoel & Wessels *A Practical Approach to the Child Care Act* 56.

<sup>249</sup> 74 of 1983. See also Sloth-Nielsen & Van Heerden 1996 *SAJHR* 247 at 257 calling for clear guidelines in this regard.

<sup>250</sup> 38 of 2005.

<sup>251</sup> 1997 1 SA 796 (O) at 805C-E and 806I-807B.

<sup>252</sup> See Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-21 who contend that the aim of the provision is to prevent “... those circumstances where the parent withholding consent does not have an abiding interest in the child’s welfare but only withholds consent with a view to retaining abusive control over the child or the other parent, or has no prospects of being able to meet the needs of the child within a reasonable period of time”.

- adoption agreement with a prospective adoptive parent of that child to provide for –
- (a) communication, including visitation between the child and the parent or guardian concerned and such other person as may be stipulated in the agreement; and
  - (b) the provision of information, including medical information, about the child, after the application for adoption is granted.
- (2) An agreement contemplated in subsection (1) may not be entered into without the consent of the child if the child is of an age, maturity and stage of development to understand the implications of such an agreement.
  - (3) The adoption social worker facilitating the adoption of the child must assist the parties in preparing a post-adoption agreement and counsel them on the implications of such an agreement.
  - (4) A court may, when granting an application in terms of section 239 for the adoption of the child, confirm a post-adoption agreement if it is in the best interests of the child.
  - (5) A post-adoption agreement must be in the prescribed format.
  - (6) A post-adoption agreement –
    - (a) takes effect only if made an order of court;
    - (b) may be amended or terminated only by an order of court on application –
      - (i) by a party to the agreement; or
      - (ii) by the adopted child.”

Despite the fact that the whole idea of creating a mechanism to formalise post-adoption contact is very new to South African adoption law and should be loudly applauded for reasons canvassed at length in an earlier article,<sup>253</sup> it is of little importance in the present context where the *acquisition* of parental responsibilities and rights *via* an adoption order is being investigated. While a post-adoption agreement may avert a complete *termination* of the parental responsibilities and rights vested in the parent or guardian of the adopted child in terms of section 242(1),<sup>254</sup> at least as far as contact is concerned, such an agreement will not hamper the adoptive parents’ *acquisition* of *full* parental responsibilities and rights in respect of the adopted child.<sup>255</sup>

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<sup>253</sup> See Louw 2003 *De Jure* 252 at 262 *et seq.* Mosikatsana & Loffell also discuss the general impact of the provision: See Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-14.

<sup>254</sup> S 242(1), regulating the effect of an adoption order, provides: “Except when provided otherwise in the order or post-adoption agreement confirmed by the court an adoption order terminates – (a) all parental responsibilities and rights any person, including a parent, stepparent or partner in a domestic life partnership, had in respect of the child immediately before the adoption”.

<sup>255</sup> 38 of 2005: S 242(2).

## 7.2.7 Freeing orders

Section 235 provides:

- “(1) The court, on application by the Department, a provincial department of social development, a child protection organisation accredited in terms of section 251 to provide adoption services or an adoption social worker may issue an order freeing a parent or person whose consent to the adoption of the child is required in terms of section 233 from parental responsibilities and rights in respect of the child pending the adoption of the child.
- (2) The parent or person whose consent to the adoption of the child is required in terms of section 233 must support an application for a freeing order.
- (3) A freeing order must authorise a child protection organisation accredited in terms section 251 to provide adoption services or a person to exercise parental responsibilities and rights in respect of the child pending the adoption of the child.
- (4) A freeing order lapses if –
  - (a) the child has not been adopted within a period of 12 months and there is no reasonable prospects that the child will be adopted;
  - (b) the order is terminated by the court on the ground that it is no longer in the best interests of the child; or
  - (c) the child, parent or person who consented to the adoption withdraws such consent in terms of section 233(8).
- (5) A freeing order relieves a parent or person from the duty to contribute to the maintenance of the child pending the adoption, unless the court orders otherwise.”

The possibility of obtaining a freeing order in respect of a child is relevant in the present context insofar as it has the effect of transferring full parental responsibilities and rights to a child protection organisation or other person on a temporary basis pending the adoption of the child in question. The introduction of this extraordinary measure has its origins in England where a similar procedure (referred to as a mini-adoption) provided for in the Children Act 1989 has been judged a failure.<sup>256</sup> Some of the shortcomings of freeing in terms of English law identified by Lowe & Douglas<sup>257</sup> include:

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<sup>256</sup> Lowe & Douglas *Bromley's Family Law* 837.

<sup>257</sup> *Ibid.*

- (a) There was no compulsion upon agencies to use freeing. While the legislator's intention and expectation was that it would commonly be used, not least because that is what the birth parents (particularly mothers) would wish, in practice "... the frequency varied from agency to agency, with some not using it at all and others using it some of the time".<sup>258</sup>
- (b) Instead of being the speedy process that it was intended to be, it was in practice a lengthy process "... riddled with delay", largely causing its infrequent use.
- (c) Because of the length of the freeing process, agencies sometimes used the mechanism to free children already placed with prospective adoptive parents. The agencies' motive for doing so was apparently "... to shield the would-be adopters from the stress of taking on the contest with the birth parents".<sup>259</sup> However, not everyone agreed that this was a legitimate use of the process and, the prospective adoptive parents could in any event be joined as parties in the freeing proceedings.
- (d) There was the unsatisfactory result that upon a freeing order being made the child was placed "... in what had been memorably described as 'adoption limbo' and became a 'statutory orphan'".<sup>260</sup>

After earlier proposals for reform of the English law were met with considerable criticism, a revised "placement scheme" proposed in 1994 provided "... for a more flexible approach which it felt more appropriately dealt with, on the one hand, babies whose birth parents had requested adoption and, on the other, older children removed or kept from their parents against the latter's wishes".<sup>261</sup> These proposals were incorporated in the Adoption and Children Act 2002 and is described as "... a key innovation" by Lowe & Douglas.<sup>262</sup> In general the

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<sup>258</sup> *Ibid.*

<sup>259</sup> Lowe & Douglas *Bromley's Family Law* 837.

<sup>260</sup> Lowe & Douglas *Bromley's Family Law* 838.

<sup>261</sup> Lowe & Douglas *Bromley's Family Law* 838.

<sup>262</sup> Lowe & Douglas *Bromley's Family Law* 842. For a discussion of the scheme, see Lowe & Douglas *Bromley's Family Law* 838-843.

placement scheme allows for only two routes: Placement with consent and placement authorised by court order.<sup>263</sup> An adoption agency may only place a child with prospective adoptive parents where each parent or guardian has consented to the placement or, if a local authority is making the placement, where it has obtained a placement order.<sup>264</sup> Unlike freeing, the birth parents retain parental “responsibility” notwithstanding a placement, an authorisation to place or a placement order, until the final adoption order is granted, although it is shared with the adoption agency and prospective adopters with whom the child is placed.<sup>265</sup>

Mosikatsana & Loffell<sup>266</sup> welcome the provision in the Children’s Act<sup>267</sup> and the possibility of accelerating the termination of parental responsibilities and rights prior to the granting of the adoption order. For these authors “... the continued guardianship status of the biological parents while the order is awaited is a source of insecurity and stress for all concerned”.<sup>268</sup> I do not share their enthusiasm. While support for a freeing order would generally indicate a willingness on the part of the parent to consent to the adoption of the child, a freeing order does not obviate the necessity to obtain such consent.<sup>269</sup> The freeing order will thus not

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<sup>263</sup> Adoption and Children Act 2002: S 18.

<sup>264</sup> Adoption and Children Act 2002: S 18(1). S 10 of the Child Care Act 74 of 1983 contained a different but comparable scheme in terms of which no person other than the managers of a maternity home, hospital, place of safety, or children’s home could receive a child under the age of seven years or “... any child for the purpose of adopting him or her or causing him or her to be adopted” and care for that child apart from his or her parents or guardian for a period longer than 14 days unless the person in whose care the child was placed had applied for the adoption of the child or had obtained the written consent of the commissioner of child welfare or was a close or designated relative of the child concerned. Because of the impracticality of the provision in terms of which *eg* one would not have been able to leave one’s five year old with a good friend while attending a conference overseas for more than two weeks without written consent of the commissioner, a similar provision was omitted from the Children’s Act 38 of 2005: See SALC Discussion Paper on the *Review of the Child Care Act* par 18.3.11 and the comments by respondents referred to in par 18.4.15. Where a person wishes to receive a child who stands to be adopted into his or her care, the draft regulations to the Children’s Act 38 of 2005 do, however, require a report from an adoption social worker “... to the effect that the applicant is a potentially suitable adoptive parent”: See reg 112(3)(e) of the Consolidated Draft Regulations to the Children’s Act 38 of 2005 including Regulations pertaining to Bill 19 of 2006 published in Feb 2008, that still employs the term “custody”.

<sup>265</sup> Adoption and Children Act 2002: S 25.

<sup>266</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-15.

<sup>267</sup> 38 of 2005.

<sup>268</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-15.

<sup>269</sup> Ss 235(1) and (2) both refer to a parent or person “... whose consent to the adoption is *required*” (own emphasis). The consent to the adoption will presumably (since the provision is unclear in this regard) have to be obtained at the same time as the consent to the freeing order. If

bring certainty in this regard because even if the birth parents consent to the adoption, they may still withdraw their consent within 60 days. A freeing order is, furthermore, not permanent. Apart from the power of the court to terminate the freeing order, the order will lapse after a year "... if there are no reasonable prospects that the child will be adopted". The question is who will have to decide on the prospects of the child to be adopted in future and when and how will the freeing order lapse? While a parent cannot himself or herself apply for a freeing order, it is not inconceivable that a parent (such as a natural father of a child born out of wedlock) who no longer wishes to exercise parental responsibilities and rights in respect of the child, may initiate such an application by approaching an adoption social worker to make the application on his or her behalf. The fact that a freeing order will automatically relieve the parent from the duty to contribute to the maintenance of the child may motivate a number of parents to pursue the granting of such an order. The court will thus have to assess the circumstances of the child carefully since it may be of questionable benefit to the child to relieve, for example, the natural father from his maintenance obligation without at the same time imposing a maintenance obligation on a prospective adoptive parent. The provision, to my mind, generally holds little benefit for the child and it is debatable whether the whole concept of freeing could be considered to be in the best interests of a child.

## **7.2.8 Adoption Procedure**

### ***7.2.8.1 Upon child becoming available for adoption***

Section 237, regulating the gathering of information for the proposed adoption, and section 238, regulating the notice to be given for the proposed adoption, are relevant in this regard. Section 237 provides:

- "(1) When a child becomes available for adoption, the clerk of the children's court must take –

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the consent is not obtained at the same time, it would mean that a parent who no longer has parental responsibilities and rights would still have to consent to the adoption.

- (a) the prescribed steps to establish the name and address of each person whose consent for the adoption is required in terms of section 233; and
  - (b) reasonable steps to establish the name of any person whose consent would have been necessary but for section 236, and the grounds on which such person's consent is not required.
- (2) A person who has consented to the adoption of a child in terms of section 233 and who wants the court to dispense with any other person's consent on a ground set out in section 236, must submit a statement to that effect to the clerk of the children's court.
  - (3) A clerk of the children's court may request the Director-General: Home Affairs to disclose any information contained in the registration of birth of a child, including the identity and other particulars of a person who has acknowledged being the father or the mother of the child.
  - (4) If a social worker involved in the proposed adoption of a child obtains information regarding the identity and whereabouts of a person contemplated in subsection (l), the social worker must without delay submit a report containing that information to the clerk of the children's court."

Section 238 provides:

- "(1) When a child becomes available for adoption, the presiding officer must without delay cause the sheriff to serve a notice on each person whose consent to the adoption is required in terms of section 233.
- (2) The notice must –
  - (a) inform the person whose consent is sought of the proposed adoption of the child; and
  - (b) request that person either to consent to or to withhold consent for the adoption, or, if that person is the biological father of the child to whom the mother is not married, request him to consent to or withhold consent for the adoption, or to apply in terms of section 239 for the adoption of the child.
- (3) If a person on whom a notice in terms of subsection (1) has been served fails to comply with a request contained in the notice within 30 days, that person must be regarded as having consented to the adoption."

The provisions are to a large extent self explanatory. Section 237(1) is a welcome addition insofar as it now expressly places the clerk of the children's court under an obligation to obtain information regarding the name of each person whose



consent to the adoption is required.<sup>270</sup> It is, however, not clear what the “prescribed” or “reasonable” steps are that the clerk of the children’s court has to take since the proposed regulations to the Act are silent on the issue. Mosikatsana & Loffell<sup>271</sup> propose an expansion of the database recorded in RACAP to facilitate the gathering of information as required by this section. The right to be notified of the proposed adoption in terms section 238 is once again based on the knowledge regarding each person whose consent is required.

### **7.2.8.2 Application for adoption order**

Section 239 provides in this regard:

- “(1) An application for the adoption of a child must –
  - (a) be made to a children’s court in the prescribed manner;
  - (b) be accompanied by a report, in the prescribed format, by an adoption social worker containing –
    - (i) information on whether the child is adoptable as contemplated in section 230(3);
    - (ii) information on whether the adoption is in the best interests of the child; and
    - (iii) prescribed medical information in relation to the child.
  - (c) be accompanied by an assessment referred to in section 231(2);
  - (d) be accompanied by a letter by the provincial head of social development recommending the adoption of the child; and
  - (e) contain such prescribed particulars.
- (2) When an application for the adoption of a child is brought before a children’s court, the clerk of the children’s court must submit to the court –
  - (a) any consent for the adoption of the child filed with a clerk of the children’s court in terms of section 233(6);
  - (b) any information established by a clerk of the children’s court in terms of section 237(2);
  - (c) any written responses to requests in terms of section 237(2);
  - (d) a report on any failure to respond to those requests; and
  - (e) any other information that may assist the court or that may be prescribed.
- (3) An applicant has no access to any documents lodged with the court by other parties except with the permission of the court.”

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<sup>270</sup> See Louw 2004 *THR-HR* 102 at 106-108 for a discussion of the uncertainty which existed in this regard under the Child Care Act 74 of 1983.

<sup>271</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-18.

The only novelty in this section is the requirement that the provincial head of social development must also recommend the adoption of the child. The necessity for such a recommendation is not entirely clear and could cause considerable delay in the finalisation of the adoption. In all other respects the section simply ensures that the requirements in terms of the Act are complied with.<sup>272</sup>

### **7.2.8.3 Consideration of adoption application**

Section 240 provides:

- “(1) When considering an application for the adoption of a child, the court must take into account all relevant factors, including-
  - (a) the religious and cultural background of-
    - (i) the child;
    - (ii) the child’s parent; and
    - (iii) the prospective adoptive parent;
  - (b) all reasonable preferences expressed by a parent and stated in the consent; and
  - (c) a report contemplated in section 239(1)(b).
- (2) A children’s court considering an application may make an order for the adoption of a child only if-
  - (a) the adoption is in the best interests of the child;
  - (b) the prospective adoptive parent complies with section 231(2);
  - (c) subject to section 241, consent for the adoption has been given in terms of section 233;
  - (d) consent has not been withdrawn in terms of section 233(8); and
  - (e) section 231(7) has been complied with, in the case of an application for the adoption of a child in foster care by a person other than the child’s foster parent.”

The section does not alter the existing position in any material respect.<sup>273</sup>

### **7.2.8.4 After adoption order has been granted**

In this regard the following sections are relevant:

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<sup>272</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-19 to 15-20.

<sup>273</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act* 15-20.

- (a) Section 245 provides with regard to the recording of the adoption in the births register:

- “(1) After an adoption order has been made by a children’s court in respect of a child whose birth has been registered in the Republic, the adoptive parent of the child must apply in terms of the applicable law to the Director-General: Home Affairs to record the adoption and any change of surname of the child in the births register.
- (2) An application in terms of subsection (1) must be accompanied by –
- (a) the relevant adoption order as registered by the adoption registrar;
  - (b) the birth certificate of the child;
  - (c) the prescribed birth registration form; and
  - (d) a fee prescribed in terms of any applicable law, if any.”

- (b) Section 246 provides with regard to the registration of the birth and recording of the adoption of a child born outside Republic:

- “(1) After an adoption order has been made by a children’s court in respect of a child born outside the Republic, the adoptive parent of the child must apply in terms of any applicable law to the Director-General: Home Affairs to register the birth of the child and to record the adoption of the child in the birth register.
- (2) An application in terms of subsection (1) must be accompanied by –
- (a) the relevant adoption order as registered by the adoption registrar;
  - (b) the birth certificate of the adopted child or, if the birth certificate is not available –
    - (i) other documentary evidence relating to the date of birth of the child; or
    - (ii) a certificate signed by a presiding officer of a children’s court specifying the age or estimated age of the child;
  - (c) the prescribed birth registration form, completed as far as possible and signed by the adoptive parent; and
  - (d) a fee prescribed in terms of any applicable law, if any.”

- (c) Section 247 provides with regard to the adoption register:

- “(1) A person designated by the Director-General as the adoption registrar must, in the prescribed manner, record information pertaining to and keep a register of –
- (a) the registration numbers allocated to records of adoption cases;
  - (b) the personal details of adopted children, of their biological parents and of their adoptive parents;

- (c) particulars of successful appeals against and rescissions of adoption orders; and
  - (d) all other prescribed information in connection with adoptions.
- (2) A clerk of the children’s court must –
- (a) keep a record of all adoption cases by a children’s court, including all adoption orders issued by the court, in the prescribed manner;
  - (b) as soon as is practicable after an adoption order has been issued, forward the adoption order, a copy of the record of the adoption inquiry and other prescribed documents relating to the adoption to the adoption registrar; and
  - (c) in the case of an inter-country adoption, forward copies of the documents referred to in paragraph (b) to the Central Authority.”

These provisions reflect the existing position.<sup>274</sup>

### 7.2.9 Effect of adoption

Section 242 provides:

- “(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates –
- (a) all parental responsibilities and rights any person, including a parent, stepparent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;
  - (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
  - (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
  - (d) any previous order made in respect of the placement of the child.
- (2) An adoption order –
- (a) confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent;
  - (b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;
  - (c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; and
  - (d) does not affect any rights to property the child acquired before the adoption.

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<sup>274</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children’s Act 15-24 to 15-26*.

- (3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.”

The effect of the provision is identical to that brought about by section 20 of the Child Care Act.<sup>275</sup> Although perhaps not strictly relevant to the *acquisition* of parental responsibilities and rights, it is important to note that a spouse or a domestic life-partner as envisaged in section 231(1)(c) are not exempted from the effects of an adoption order.<sup>276</sup> This means that unless the adoption order provides otherwise, the adoption will terminate the parental responsibilities and rights of the spouse or the life partner who was the child’s parent before the adoption.<sup>277</sup>

### 7.2.10 Rescission of adoption order

Section 243 provides:

- “(1) A High Court or children’s court may rescind an adoption order on application by –
  - (a) the adopted child;
  - (b) a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption; or
  - (c) the adoptive parent of the child.
- (2) An application in terms of subsection (1) must be lodged within a reasonable time but not exceeding two years from the date of the adoption.
- (3) An adoption order may be rescinded only if –
  - (a) rescission of the order is in the best interests of the child; and
  - (b) the applicant is a parent of the child whose consent was required for the adoption order to be made, but whose consent was not obtained; or
  - (c) at the time of making the adoption order the adoptive parent did not qualify as such in terms of section 231.

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<sup>275</sup> 74 of 1983.

<sup>276</sup> After its amendment by the Constitutional Court in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at [44], s 20(1) of the Child Care Act 74 of 1983 read as follows: “An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (*other than a spouse or permanent same-sex life partner contemplated in section 17(c)*) immediately prior to such adoption, and that parent’s relatives” (own emphasis).

<sup>277</sup> See Cronjé & Heaton *South African Family Law* 234.

- (4) Notice of an application for rescission of an adoption order must be given to –
  - (a) the adoptive parent of that child, if any other person brings the application;
  - (b) all persons who have consented to the adoption in terms of section 233 or who have withheld consent to the adoption in terms of section 241, if the child or the adoptive parent brings the application;
  - (c) the Central Authority in the case of an inter-country adoption; and
  - (d) any other person whom the court finds has a sufficient interest in the matter.”

Section 244 outlines the effect of a rescission order:

- “(1) As from the date on which the rescission of an adoption order takes effect –
  - (a) the effects of the adoption order as set out in section 242(2) and (3) no longer applies in respect of the child concerned; and
  - (b) all responsibilities, rights and other matters terminated by section 242(1) in respect of the child are restored.
- (2) When rescinding an adoption order the court may –
  - (a) make an appropriate placement order in respect of the child concerned; or
  - (b) order that the child be kept in temporary safe care until an appropriate placement order can be made.”

Section 243 has simplified the grounds upon which, and the time frames within which an adoption order can be rescinded.<sup>278</sup> The provision also makes it possible for the adopted child himself or herself to apply for the rescission of the

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<sup>278</sup> Under the Child Care Act 74 of 1983 the parent or guardian of the child could apply for the rescission of the order on the ground that his or her consent to the adoption was not obtained as required (s 21(1)(a)), in which case the application had to be made within six months of becoming aware of the order but not later than two years from the date of the order (s 21(2)(a)). If, for reasons set out in the application, the adoption was to the detriment of the child or the adoptive parent did not qualify in terms of s 17 of the Act for obtaining the order of adoption, the parent or guardian or the children's court assistant (only with the consent of the minister) could apply for the rescission of the order not later than two years from the date of the order (S 21(1)(c) and s 21(2)(c)). The adoptive parent could apply to have the order rescinded on the grounds that – (a) his or her adoption of the child was induced by fraud, misrepresentation or *justus error*; or (b) the child was, at the time of the order, and still is, mentally ill; or (c) the child suffered from a congenital disorder or injury of a serious nature at the time of making the order (s 21(1)(b)). An application for the rescission could be made on the grounds mentioned in (b) and (c) above only if the applicant was ignorant of the mental illness or genetic disorder at the time of the making of the order and such ignorance was not due to any failure of the adoptive parent to exercise reasonable care in examining the child or causing it to be examined (s 21(3)(a) and (b)). In all these cases the application had to be made within six months of becoming aware of the specific ground (s 21(2)(b)).

adoption order<sup>279</sup> – an option that was considered lacking in the equivalent provision under the Child Care Act.<sup>280</sup> With regard to the notification of the intended rescission required in terms of section 243(4) and the effects of a rescission order outlined in section 244, the provisions are substantially the same as that found in the Child Care Act.<sup>281</sup>

Section 243(3), however, deserves some further consideration. In terms of this paragraph the adoption order can only be rescinded if the order of rescission is deemed in the best interests of the child *and* the adoption order was made without the required parental consent *or* the prospective adoptive parents did not qualify to adopt in terms of section 231. Notwithstanding the absence of parental consent or the unsuitability of the adoptive parents, the adoption order can thus only be rescinded if the order of rescission is deemed to be in the best interests of the child. This was also the effect of the provisions under the Child Care Act.<sup>282</sup> In *T v C*,<sup>283</sup> a case in point, the court refused to rescind the adoption order despite the absence of the father's consent, finding that it would not be in the best interests of the child to grant the rescission. While the decision could be considered an excellent example of the application of the primacy of the best interests of the child in terms of section 28(2) of the Constitution,<sup>284</sup> the overall effect thereof may be less than salutary – why make parental consent a requirement if non-compliance with the requirement does not result in the setting aside of the adoption order? The rights of the parents (and persons vested with guardianship) whose consent is required for the adoption is thus clearly only enforceable insofar as they do not conflict with what the court considers to be in the best interests of

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<sup>279</sup> According to Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15-23 this makes the provision "child-centred" in contrast to s 21 of the Child Care Act 74 of 1983 that was "parent-centred".

<sup>280</sup> 74 of 1983: S 21. It is now generally accepted that a presiding officer (as the commissioner of child welfare is now called: Children's Act 38 of 2005 s 1(1) *sv* "presiding officer") has *locus standi* to approach the High Court in its capacity as upper guardian to set aside an adoption order, provided that all interested parties consent to such proceedings or are at least given due notice: *Kommissaris van Kindersorg, Krugersdorp, Ex parte: In re JB Ex parte Kommissaris an Kindersorg, Oberholzer: In re AGF* 1973 2 SA 699 (T) at 709D-E.

<sup>281</sup> 74 of 1983.

<sup>282</sup> See s 21(1)(a) read with s 21(7).

<sup>283</sup> 2003 2 SA 298 (W) 302C.

<sup>284</sup> Louw 2004 *THR-HR* 102 at 109.

the child.<sup>285</sup> The same can be said for the rights of prospective parents as far as their eligibility to adopt in terms of section 231 is concerned. The permanency of the adoption placement will generally be given more weight than the rights of the parents, especially when some time has lapsed since the granting of the adoption order and the child has bonded with the adoptive parents. The time to protect the interests of parents in the adoption process is thus clearly prior to the granting of the adoption order and not thereafter.<sup>286</sup>

In terms of section 51:

- “(1) Any party involved in a matter before a children’s court” may appeal against any order made or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High court having jurisdiction.”<sup>287</sup>

## **7.2.11 Prohibitions relating to the adoption of a child**

### ***7.2.11.1 No consideration in respect of adoption***

Section 249 provides:

- “(1) No person may –
- (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in terms of Chapter 15 or Chapter 16; or
  - (b) induce a person to give up a child for adoption in terms of Chapter 15 or Chapter 16.
- (2) Subsection (1) does not apply to –
- (a) the biological mother of a child receiving compensation for –
    - (i) reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment;
    - (ii) reasonable expenses incurred for counselling; or
    - (iii) any other prescribed expenses;
  - (b) a lawyer, psychologist or other professional person receiving fees and expenses for services provided in connection with an adoption;

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<sup>285</sup> Louw 2004 *THR-HR* 102 at 110.

<sup>286</sup> See Louw 2004 *THR-HR* 102 at 114.

<sup>287</sup> The appeal must be noted and prosecuted as if it were an appeal against a civil judgment of a magistrate’s court: S 51(2).



- (c) the Central Authority of the Republic contemplated in section 257 receiving prescribed fees;
- (d) a child protection organisation accredited in terms of section 251 to provide adoption services, receiving the prescribed fees;
- (e) a child protection organisation accredited to provide inter-country adoption services receiving the prescribed fees;
- (f) an organ of state; or
- (g) any other prescribed persons.”

The section provides a welcome clarification of the concept “consideration” for purposes of the adoption of a child,<sup>288</sup> especially in relation to those payments that are permissible in terms of subsection (2). In terms of the draft regulations under the Children’s Act<sup>289</sup> the biological mother of a child who is being adopted may now also receive consideration for lying-in expenses, consideration for any costs incurred at a pregnancy crisis centre and traveling expenses.

### **7.2.11.2 Advertising**

Section 252 provides:

- “(1) No person may publish or cause to be published in any form or by any means an advertisement dealing with the placement or adoption of a specific child.
- (2) Subsection (1) does not apply in respect of –
  - (a) the publication of a notice in terms of this Act or a court order;
  - (b) an advertisement by a child protection organisation accredited to provide adoption services for purposes of recruitment, according to prescribed guidelines; or
  - (c) other forms of advertisements specified by regulation.”

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<sup>288</sup> S 24(1) of the Child Care Act 74 of 1983 prohibited any person to give, undertake to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child except as prescribed under the Social Work Act 110 of 1978 (now the Social Service Professions Act 110 of 1978). Apart from the uncertainty surrounding the precise meaning of the “consideration” that was prohibited, the efficacy of the provision was also hampered by the fact that accredited social workers in private practice still received their remuneration from the prospective adoptive parents. The SALRC noted that the prohibition as provided for in s 24 “... is regularly flouted with impunity”: SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.6. A proposal by Sloth-Nielsen & Van Heerden 1996 *SAJHR* 649 at 652 that social workers in private practice should only be allowed to render adoption services under contract to a prescribed welfare organisation or a state department, was however, not implemented – s 250(1)(b) read with the definition of “adoption social worker” in s 1 of the Children’s Act still makes it possible for a specialised social worker in private practice to provide adoption services.

<sup>289</sup> 38 of 2005: See reg 124 of the Consolidated Draft Regulations to the Children’s Act 38 of 2005 including Regulations pertaining to Bill 19 of 2006 published in Feb 2008.

This is a new provision and deemed necessary to prevent unethical practices, especially insofar as it prohibits internet-facilitated adoptions through the placement of advertisements on the Internet.<sup>290</sup>

### 7.2.12 Access to adoption information

Section 248 provides:

- “(1) The information contained in the adoption register may not be disclosed to any person, except –
  - (a) to an adopted child after the child has reached the age of 18 years;
  - (b) to the adoptive parent of an adopted child after the child has reached the age of 18 years;
  - (c) to the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18 years, but only if the adoptive parent and the adopted child give their consent in writing;
  - (d) for any official purposes subject to conditions determined by the Director-General;
  - (e) by an order of court, if the court finds that such disclosure is in the best interests of the adopted child; or
  - (f) for purposes of research: Provided that no information that would reveal the identity of an adopted child or his or her adoptive or biological parent is revealed.
- (2) The Director-General may require a person to receive counselling before disclosing any information contained in the adoption register to that person in terms of subsection (1)(a), (b), (c) or (e).
- (3) Notwithstanding subsection (1), an adopted child or an adoptive parent is entitled to have access to any medical information concerning –
  - (a) the adopted child; or
  - (b) the biological parents of the adopted child, if such information relates directly to the health of the adopted child.
- (4) Notwithstanding subsection (1), parties to a post-adoption agreement as contemplated in section 234 are entitled to have access to such information about the child as has been stipulated in the agreement.”

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<sup>290</sup> Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act 15-29*.

The provision extends regulation 28 under the Child Care Act<sup>291</sup> by giving an adopted child and an adoptive parent the right to medical information as provided for in subsection (3) and the birth parents the right to the information as agreed upon in the post-adoption agreement as provided for in subsection (4).<sup>292</sup>

### 7.2.13 Constitutionality of adoption provisions

The court in *SW v F*<sup>293</sup> held that a child's right to parental care in terms of section 30 of the interim Constitution<sup>294</sup> – the equivalent of section 28 of the Constitution – does not only refer to the care of natural parents and that such a right was not a bar to an adoption order. With reference to a child's right to family care or parental care in terms of section 28(1)(b) of the Constitution, Skweyiya J in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*<sup>295</sup> recognised that adoption "... is a valuable way of affording children the benefits of family life which might not otherwise be available to them". Providing for the adoption of a child is thus constitutionally justifiable insofar as it gives effect to a child's right to family care or parental care by the adoptive parents. The interests of prospective adoptive parents are expressly made subordinate to the best interests of the child to be adopted,<sup>296</sup> thereby giving paramountcy to the best interests of the child as required by section 28(2) of the Constitution – further evidence of the constitutionality of the adoption provisions in the Children's Act.<sup>297</sup>

As far as the adoptive parents are concerned, the Constitution does not create a right to adopt a child.<sup>298</sup> However, where persons are expressly given the right to *apply* to adopt, such persons may not be discriminated against on grounds, for

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<sup>291</sup> 74 of 1983: Regulations in terms of s 60 of the Child Care Act 74 of 1983: GN R2612 in GG 10546 of 12 Dec 1986 (as amended).

<sup>292</sup> For a discussion of the constitutionality of these provisions, as far as the rights of children are concerned, see Louw 2003 *De Jure* 252 at 260-262.

<sup>293</sup> 1997 1 SA 796 (O) at 799B.

<sup>294</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>295</sup> 2003 2 SA 198 (CC) at [18].

<sup>296</sup> S 240(2)(a) allows for an adoption to be granted "... only if ... the adoption is in the best interests of the child".

<sup>297</sup> 38 of 2005.

<sup>298</sup> S 28(1)(b) of the Constitution thus creates, in appropriate circumstances, a right to be adopted but not a right to adopt.

example, of sexual orientation or marital status as mentioned in section 9(3) of the Constitution. The provisions of the Children's Act<sup>299</sup> satisfy this requirement by extending the categories of persons who may adopt (jointly) beyond the confines of marriage to permanent domestic life-partners and even persons who only share a common household, whether of the same or opposite sex.

Could an adoption order be considered an unjustified interference into the exercise of parental responsibilities and rights by the parents of the child? While it is admitted that an adoption order is the most drastic interference with the responsibilities and rights of parents, adoption is only used where the circumstances of the particular child dictate that it is necessary and when it has been considered critically against all other possible arrangements for the particular child.<sup>300</sup> The SALRC<sup>301</sup> was also adamant that "[t]here be no infringement of the human rights of birth parents either prior to the consideration of any kind of alternative parental care for children or at any stage of the adoption process". To this end the interests of parents with parental responsibilities and rights are safeguarded by requiring their consent to the adoption, which may only be dispensed with on a balance of probabilities by the children's court.<sup>302</sup> Even unmarried fathers who have acknowledged paternity but have not acquired parental responsibilities and rights are protected in the adoption process.

Lastly, the SALRC<sup>303</sup> considered it important that children to be adopted should be recognised as individuals who have valuable ties with people, by virtue of their birth, that cannot be eradicated. Insofar as these valuable ties could create a family life, comparable to that protected under Article 8 of the ECHR, Lowe & Douglas<sup>304</sup> foresee the possibility that –

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<sup>299</sup> 38 of 2005: S 231(1).

<sup>300</sup> See s 157(1)(b) in terms of which the children's court is obliged to consider adoption merely as one of the various ways in which the stability of the child can be secured.

<sup>301</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.1.

<sup>302</sup> S 236(5) of the Children's Act 38 of 2005 provides: "A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this section from giving consent to the adoption of a child."

<sup>303</sup> SALC Discussion Paper on the *Review of the Child Care Act* par 18.6.1.

<sup>304</sup> Lowe & Douglas *Bromley's Family Law* 821.

“... the adopted child and possibly other members of the birth family, particularly siblings and grandparents, c[ould] claim a breach of their Art 8 rights by the severance of the legal ties with the whole family resulting from the adoption”.

Lowe & Douglas<sup>305</sup> do not regard it as “beyond argument” that the complete severance of legal ties with the whole family is a disproportionate effect of adoption. The Children’s Act<sup>306</sup> has even in this regard seen it fit to provide for the protection of such valuable ties – in terms of section 234(1)(a) the parent or guardian of the child to be adopted may enter into a post-adoption agreement with a prospective adoptive parent to provide for “... communication ... between the child and the parent or guardian concerned *and such other person* as may be stipulated in the agreement” (own emphasis).

#### **7.2.14 Conclusion**

While the provisions in the Children’s Act<sup>307</sup> providing for the acquisition of parental responsibilities and rights by means of an adoption order can overall be regarded as an improvement on the provisions under the Child Care Act,<sup>308</sup> there are a few provisions which have unfortunately created new uncertainties and problems. Examples of provisions which have brought about an improvement on the existing law include section 232 (providing for the creation of RACAP), section 234 (allowing for post-adoption agreements), section 241 (providing guidelines for determining when consent should be considered to have been unreasonably withheld), section 243 (simplifying the rescission of an adoption order) and section 249 (giving content to the concept of “consideration” that is prohibited). Notable exceptions to this category include the unnecessarily complicated consent provision (section 233) and the provision allowing for freeing orders (section 235).

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<sup>305</sup> Lowe & Douglas *Bromley’s Family Law* 821.

<sup>306</sup> 38 of 2005: S 234.

<sup>307</sup> 38 of 2005.

<sup>308</sup> 74 of 1983.

**SECTION B: THE VARIOUS WAYS IN WHICH FULL PARENTAL RESPONSIBILITIES AND RIGHTS CAN BE ACQUIRED**

**CHAPTER 8: DIVERSE ASPECTS RELATING TO THE ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS**

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## 8.1 INTRODUCTION

This Chapter will address two diverse issues:

- (a) The acquisition of full parental responsibilities at the death of one or both parents of a child; and
- (b) the *quasi*-acquisition of parental responsibilities and rights.

## 8.2 THE ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS AT THE DEATH OF ONE OR BOTH PARENTS OF A CHILD

### 8.2.1 Introduction

The acquisition of full parental responsibilities at the death of one or both parents of a child can either occur automatically or by assignment in terms of the definition of those terms in this thesis outlined in 3.2 above. Strictly speaking, therefore, the topic as a whole falls within the scope of both Chapters 4 and 5. As pointed out earlier,<sup>1</sup> the acquisition of parental responsibilities and rights at the death of one or both parents of a child is discussed separately here to avoid further fragmentation of a topic that is already made complicated enough by the assortment of sources that informs it.<sup>2</sup> Since the legal position regarding this aspect is largely governed by country specific legislation, as in the case of adoption, a comparative study was not deemed “functional”.<sup>3</sup>

The acquisition of parental responsibilities and rights in the event of the death of a parent of a child will occur automatically in cases where the deceased parent has by will nominated and appointed a person to act as guardian and to be vested with

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<sup>1</sup> See 3.2 above.

<sup>2</sup> Apart from the common law, the following statutes have to be considered: Matrimonial Affairs Act 37 of 1953; the Divorce Act 70 of 1979; the Administration of Estates Act 66 of 1965; the Child Care Act 74 of 1983 (insofar as it is still applicable) and the Children’s Act 38 of 2005. Within the Administration of Estates Act 66 of 1965 itself a certain degree of cross-referencing is required: See s 73(2) providing for the *mutatis mutandis* application of certain provisions relating to the appointment of executors (in s 18 of the Act) to the appointment of tutors and curators.

<sup>3</sup> See also 1.2 above.



the care of the child in the event of his or her death.<sup>4</sup> The acquisition in this instance is categorised as automatic since it occurs upon acceptance of the appointment, without first ascertaining whether the appointment is in the best interests of the child.<sup>5</sup> Where the parent has not by will or other instrument indicated who should acquire parental responsibilities and rights after his or her death, a suitable person may by law be appointed as explained below. Since the last mentioned appointment must be based on the best interests of the child or children in question, it qualifies as assigned acquisition. A person<sup>6</sup> can thus acquire parental responsibilities and rights in the event of the death of one or both parents of a child in one of two ways –

- (a) by being nominated and appointed as testamentary guardian and vested with the care by the deceased parent in a will; or
  
- (b) by being appointed as a tutor<sup>7</sup> *dative* by the Master of the High

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<sup>4</sup> The nomination of a tutor (or guardian) by a parent who is entitled to do so is regarded as an *exercise* of that parent's responsibilities and rights and does not, it is considered, amount to a transfer of parental responsibilities and rights: *Spiro Parent and Child* 44.

<sup>5</sup> The person nominated must, however, not be incapacitated to act as tutor: S 72(1)(e) of the Administration of Estates Act 66 of 1965.

<sup>6</sup> While the singular will be used in the rest of the discussion, it will automatically include the plural "persons", since more than one person can be appointed (whether by testamentary disposition or not) as guardian and vested with the care of a child in the event of the death of one or both of the child's parents.

<sup>7</sup> It is at the outset important to note that while the term "tutor" was replaced by "guardian" in the Matrimonial Affairs Act 37 of 1953, the Administration of Estates Act 66 of 1965 still employs the term "tutor". The unsigned Afrikaans text of the Act, strangely enough, does not use the term "tutor" but employs the term "voog" – the Afrikaans translation of "guardian". The reason for the use of "tutor" (and "curator") in the Act can probably be traced back to the origins of the institution of legal guardianship (as opposed to natural guardianship) in Roman and Roman-Dutch law. According to Van der Vyver & Joubert *Persone-en Familiereg* 634-635, the *patria potestas* of the *paterfamilias* in terms of Roman law came to an end at the death of the head of the family. At the same time the sons of the deceased became *sui iuris*, irrespective of their age, unless they were under the authority of someone else, for example as a result of adoption. If the sons were not old enough to look after their own affairs, the institutions of *tutela* and *cura* could assist them – children under the age of puberty could be placed under the control of a *tutor* and, upon reaching the age of puberty, could be assisted by a *curator minoris* until the child attained the age of majority at 25 years. In terms of Roman-Dutch law the testamentary guardian incorporated both the institutions of *tutela* and *cura*: Van der Vyver & Joubert *Persone-en Familiereg* 635. See also Conradie 1948 *SALJ* 396 at 399-407; *Spiro Parent and Child* 212; Cockrell Ch 21 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 764. Both the Children's Acts of 1937 and 1960 (Children's Act 31 of 1937 and Children's Act 33 of 1960, respectively) defined "guardian" as including "... a *tutor* testamentary, *tutor dative* or assumed *tutor* to whom letters of confirmation have been granted under the law relating to the administration of estates" (own emphasis): Children's Act 31 of 1937: S 1 *sv* "guardian"; Children's Act 33 of 1960: S 1 *sv* "guardian". The Child Care Act 74 of 1983, however, did not retain the definition. The term "tutor" as used in the

Court<sup>8</sup> or appointed as guardian dative and vested with the care<sup>9</sup> of the child by order of court.

It goes without saying at this point that only the *first* acquisition of *full* parental responsibilities and rights, *ie* the acquisition of guardianship (in the strict sense of the word) and care, is envisaged here. Generally speaking, that would include only the position of a person, other than the parent of a child,<sup>10</sup> who is nominated and/or appointed simultaneously as guardian and vested with the care of a child<sup>11</sup> upon the death of the child's parent.<sup>12</sup> Scenarios (a) and (b), mentioned above, will be discussed separately.

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Administration of Estates Act 66 of 1965 has nevertheless continued to be equated with "guardian": See *Spiro Parent and Child* 213 and *Engelbrecht NO v Fourie and Others* 1958 2 SA 201 (T) at 204D.

<sup>8</sup> For the appointment, jurisdiction and varied functions of the Master of the High Court, see *Abrie et al Deceased Estates* 89-94.

<sup>9</sup> While s 5 of the Matrimonial Affairs Act 37 of 1953 and s 6(3) of the Divorce Act 70 of 1979 still use the term "custody", the term has been substituted with the term "care" in accordance with the dictates of the Children's Act 38 of 2005 (s 1(2)).

<sup>10</sup> "Person" in this context would generally exclude a "parent" since the surviving parent of a child will seldom acquire parental responsibilities and rights "for the first time" upon the death of the first-dying parent – especially where the mother is the surviving parent of the child. The mother will acquire parental responsibilities and rights at the birth of the child, whether or not she has been appointed as guardian and vested with the care of the child in the father's will, or whether the father dies before or after the birth of the child. The biological *father*, on the other hand, may under certain circumstances acquire parental responsibilities and rights "for the first time" at the death of the mother. This will be the case when, at the time of the death of the mother, the father has not already acquired such responsibilities and rights in another way, be it automatically in terms of s 20 or 21 or by assignment in terms of s 22 or 23 and 24 of the Children's Act 38 of 2005.

<sup>11</sup> Although a parent may appoint one person to become the guardian of the child and another to be vested with the care of the child, that possibility is not considered here since the discussion is only concerned with the case where the same person is vested with both the guardianship and the care of the child at the death of the child's parent. The possibility of vesting both guardianship and care in the same person must be inferred since all the statutory provisions refer to a person being appointed as either guardian or vested with the care of the child: See s 72(1)(a) of the Administration of Estates Act 66 of 1965 referring to a person nominated "... to administer the person as tutor, or to take care of or administer his property as curator" (own emphasis); s 5(3) of the Matrimonial Affairs Act 37 of 1953 in terms of which the parent to whom sole guardianship or "custody" has been granted may appoint any person "... to be the sole guardian or to be vested with the sole custody of the minor" (own emphasis); s 27(3) of the Children's Act 38 of 2005, providing for a person to acquire "... guardianship or care". While it is appropriate to refer to the person vested with guardianship at the death of a parent as the legal guardian of the child, it is more difficult to name the person vested with the care of the child. A substitution of the term "custodian" with "carer" was considered but rejected on account of the strangeness of the term "carer". The term "care-giver" would be appropriate but only in those cases where the person vested with the guardianship and the care of the child is not a parent: See definition of "care-giver" in 8.3 below.

<sup>12</sup> The possibility of a parent appointing by will a person as *curator* to administer any property which the minor has inherited from that parent (s 72(1)(b) of the Administration of Estates Act 66 of 1965) will thus not be considered.

## **8.2.2 Acquisition of parental responsibilities and rights by testamentary disposition**

### **8.2.2.1 *At the death of a parent vested with the sole guardianship and care of the child***

Section 5 of the Matrimonial Affairs Act<sup>13</sup> provides:

- “(3) Subject to any order of court –
  - (a) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) or the Divorce Act, 1979, may by testamentary disposition appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be.”

Section 72 of the Administration of Estates Act<sup>14</sup> provides:

- “(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), or any order of court made under any such provision or any provision of the Divorce Act, 1979, on the application of any person –
  - (a) who has been nominated by will or written instrument-
    - (iii) by the parent to whom sole guardianship of a minor has been granted under subsection (1) of the said section 5 or under the Divorce Act, 1979, to administer the person as tutor, or to take care of or administer his property as curator;  
... grant letters of tutorship or curatorship, as the case may be, to such person.”

A person appointed in the will of the first-dying parent of a legitimate child can only acquire guardianship and care to the exclusion of the surviving parent if the deceased parent was awarded the sole guardianship and the sole care in respect

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<sup>13</sup> 37 of 1953.

<sup>14</sup> 66 of 1965.

of the child.<sup>15</sup> Apart from the High Court's inherent jurisdiction to make such an order,<sup>16</sup> the High Court may grant sole guardianship and sole care to the parent of a legitimate child if that parent is divorced or living apart from the other parent in terms of section 5(1) of the Matrimonial Affairs Act.<sup>17</sup> Section 6(3) of the Divorce Act<sup>18</sup> authorises the court to do the same in divorce proceedings between married parents.<sup>19</sup> If the sole guardianship and care order lapses or is rescinded or is varied in such a manner that the parent is no longer the sole guardian or vested with the sole care of the minor, any such testamentary disposition by that parent also lapses.<sup>20</sup>

Upon granting sole guardianship and care to a parent, the High Court may in terms of section 5(1) of the Matrimonial Affairs Act<sup>21</sup> and section 6(3) of the Divorce Act<sup>22</sup> order that "... on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent".

Section 5 of the Matrimonial Affairs Act<sup>23</sup> furthermore provides:

- (5) The court or a judge may, where a parent has appointed a guardian or custodian as provided in paragraph (a) of subsection (3), upon the

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<sup>15</sup> See *Wehmeyer v Nel en 'n Ander* 1976 4 SA 966 (W) at 968C, in which the court confirmed that where the mother was awarded sole guardianship, the father's guardianship could only be revived by order of court or in terms of s 5(2) of the Matrimonial Affairs Act 37 of 1953 if the parents commence to live together again (see 5.2.2.2 fn 77 and 5.2.3.1 above). See s 72(1)(a)(iii) of the Administration of Estates Act 66 of 1965. See also Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 320 and Cronjé & Heaton *South African Family Law* 299.

<sup>16</sup> See 5.2.2.2 above.

<sup>17</sup> 37 of 1953: See 5.2.3.1 above.

<sup>18</sup> 70 of 1979.

<sup>19</sup> See 5.2.3.2 above. It is debatable whether the court could also award sole guardianship *and* sole "custody" to the father of the child born out of wedlock in terms of s 2(6) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 before its repeal on 1 Jul 2007: See 5.2.3.3 above. While the court would probably not be willing to grant an order which has the effect of vesting sole guardianship *and* sole care in the applicant under ss 23 and 24 of the Children's Act 38 of 2005 (because it would be tantamount to granting an adoption order), the court may arguably be willing to grant an order which has the effect of vesting *either* sole guardianship *or* sole care in the applicant: See 5.3.2(f) above, in which the possibility of combining applications for guardianship or care with applications for terminating guardianship and care is considered.

<sup>20</sup> S 5(6) of the Matrimonial Affairs Act 37 of 1953.

<sup>21</sup> 37 of 1953: S 5(3) and (5).

<sup>22</sup> 70 of 1979.

<sup>23</sup> 37 of 1953.

application of the other parent, made after the death of the testator, make such order in regard to the guardianship or custody of the minor as the court or judge may deem in the interests of the minor.”

This provision gives the High Court the discretion to overrule a testamentary disposition of a parent in the interests of the child.<sup>24</sup> If the court exercises its discretion in this manner it would result in the acquisition of guardianship and care in the same way that such acquisition would occur in the absence of a testamentary disposition as outlined in 8.2.3 below.

### **8.2.2.2 At the death of a parent not vested with the sole guardianship and care of the child**

In this regard section 5 of the Matrimonial Affairs Act<sup>25</sup> provides:

- “(3) Subject to any order of court –
  - (b) a parent of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or the Divorce Act, 1979, shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor unless such parent was the sole natural guardian immediately before his death.”

Section 72 of the Administration of Estates Act<sup>26</sup> provides:

- “(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), or any order of court made under any such provision or any provision of the Divorce Act, 1979, on the application of any person –
  - (a) who has been nominated by will or written instrument-
    - (i) by the parent of a legitimate minor who has not been deprived, as a result of an order under subsection (1) of the said section 5 or under the Divorce Act, 1979, of the guardianship of such minor and who immediately before his death was the sole natural guardian of such minor; or

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<sup>24</sup> Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 661. The court in *Wehmeyer v Nel en 'n Ander* 1976 4 SA 966 (W) at 969B-C considered the section but could not apply it since the will in which the nomination was made, was invalid.

<sup>25</sup> 37 of 1953.

<sup>26</sup> 66 of 1965.

- (ii) by the mother of a minor born out of wedlock who has not been so deprived of the guardianship of such minor or of her parental powers over him or her;  
... grant letters of tutorship or curatorship, as the case may be, to such person.”

A person nominated by will as the guardian and care-giver of a child cannot ordinarily oust the surviving parent as far as the guardianship and the care of the child is concerned. Upon the death of either of the parents of a legitimate child, the other parent, in the ordinary course of events, becomes the sole natural guardian of the child.<sup>27</sup> If a mother of a child born out of wedlock nominates a person as guardian and care-giver, the nomination will evidently be considered as if made by the sole natural guardian of the child. The implication is thus that the person appointed in the will of the mother of a child born out of wedlock will acquire guardianship and care in the event of the death of such mother to the exclusion of the surviving natural father of the child. The provision in the Administration of Estates Act<sup>28</sup> clearly reflects the legal position of the mother before the enactment of the Children’s Act<sup>29</sup> as being the sole guardian of her child born out of wedlock with the unmarried father having no automatic rights in respect of the child. This provision will in future have to be read with the provisions of the Children’s Act<sup>30</sup> as explained in 8.2.2.3 below.

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<sup>27</sup> Fathers and mothers were not always placed on the same footing as regards the appointment of testamentary guardians to succeed them. Prior to the commencement of the Matrimonial Affairs Act 37 of 1953 a father could, by nominating a testamentary guardian, deprive the surviving mother of her guardianship (in the strict sense of the word) of the couple’s children (in terms of s 71 of the Administration of Estate Act 24 of 1913) though he could not deprive her of the “custody” of the children. The appointment of a testamentary guardian could thus not exclude the surviving parent from the personal control of the child: *Landman v Mienie* 1944 OPD 59 at 68 (in which it was held that the mother to whom the “custody” had been awarded by order of court could not, by appointing a tutor, exclude the father upon her death from the “custody” of the children); *Bloem and Another v Vucinovich* 1946 AD 501 at 517 (in which the court refused to deprive the mother of the “custody” of a child in similar circumstances). See also *Weepner v Warren and Van Niekerk NO* 1948 1 SA 898 (C) at 901. S 5(3)(b) of the Matrimonial Affairs Act 37 of 1953 originally curtailed the right of the father to exclude the mother as far as the guardianship of the children was concerned by allowing him only the power to appoint a testamentary guardian to act *jointly* with the mother: See Van Heerden Ch 14 in Van Heerden *et al Boberg’s Law of Persons and the Family* 323 fn 32; Van Heerden Ch 19 in Van Heerden *et al Boberg’s Law of Persons and the Family* 659 fn 6.

<sup>28</sup> 66 of 1965.

<sup>29</sup> 38 of 2005.

<sup>30</sup> 38 of 2005.

### **8.2.2.3 In terms of section 27 of the Children's Act 38 of 2005**

Section 27 of the Children's Act<sup>31</sup> now provides with regard to the "assignment of guardianship and care"<sup>32</sup>:

- "(1) (a) A parent who is the sole guardian of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent.
- (b) A parent who has the sole care of a child may appoint a fit and proper person to be vested with care of the child in the event of the death of the parent."

Section 27 came into operation on 1 July 2007.<sup>33</sup> The provisions of this section will apply in addition to the already mentioned provisions of the Matrimonial Affairs Act,<sup>34</sup> the Divorce Act<sup>35</sup> and the Administration of Estates Act<sup>36</sup> since the Children's Act<sup>37</sup> does not repeal any of these provisions. In terms of section 27(1) of the Children's Act<sup>38</sup> the parent who is the "sole guardian" and<sup>39</sup> has the "sole care" of the child can appoint by will a testamentary guardian to be vested with the guardianship and care of the child after the parent's death. "Sole" in this context presumably refers to the sole surviving parent with guardianship or care or a parent to whom sole guardianship or sole care has been awarded by order of court. Section 72(1)(a)(ii), that provides for the granting of letters of tutorship to a person nominated "... by the mother of a child born out of wedlock who has not been so deprived of the guardianship of such minor or of his or her parental powers over him or her", will have to be read with section 27(1) of the Children's Act.<sup>40</sup> In this way the mother of a child born out of wedlock will only be able to appoint a guardian who is also vested with the care of the child in the event of her death to the exclusion of the surviving father if she is the sole guardian and has

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<sup>31</sup> 38 of 2005.

<sup>32</sup> Heading of s 27.

<sup>33</sup> See proclamation 13 of 2007: GG 30030 dd 29 Jun 2007.

<sup>34</sup> 37 of 1953: S 5(3) and (5).

<sup>35</sup> 70 of 1979.

<sup>36</sup> 66 of 1965: Ss 18 and 71 to 76.

<sup>37</sup> 38 of 2005.

<sup>38</sup> 38 of 2005.

<sup>39</sup> The possibility of simultaneously appointing a person as guardian and care-giver is inferred as explained in fn 11 above.

<sup>40</sup> 38 of 2005.

the sole care of the child. The same rule will now apply to the father of a child born out of wedlock.<sup>41</sup>

#### **8.2.2.4 At the death of the only surviving parent of the child**

Being appointed by the “sole natural guardian”<sup>42</sup> means that the person appointed as the guardian and vested with the care of the child by the surviving parent will acquire full parental responsibilities and rights upon accepting the appointment. If the will of the deceased parent makes no mention of the personal care of the child, it appears as though an appointment as “guardian” will also entitle the person to the care of the child.<sup>43</sup>

#### **8.2.2.5 General requirements**

Although a person appointed as guardian and vested with the care in the will of the child’s deceased parent will *acquire* parental responsibilities and rights upon acceptance of the nomination without scrutiny by the courts, the Administration of Estates Act<sup>44</sup> prohibits such a tutor from administering any property belonging to the minor or carrying on any business or undertaking of the minor until his or her appointment has been confirmed by the Master of the High Court by letters of tutorship.<sup>45</sup> Thus, in the admittedly unlikely event of the child *not* being possessed of any property, business or undertaking, it must be assumed that the testamentary guardian or tutor will upon acceptance of the appointment acquire and be able to exercise parental responsibilities and rights without the endorsement of the Master or the courts. Ordinarily, however, persons who acquire parental responsibilities and rights by testamentary disposition will for purposes of proof apply to the Master of the High court for letters of tutorship which the Master must grant on application by any person lawfully nominated as

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<sup>41</sup> Cronjé & Heaton *South African Family Law* 299.

<sup>42</sup> S 5(3)(a) of the Matrimonial Affairs Act 37 of 1953; s 72(1)(a)(i) of the Administration of Estates Act 66 of 1965 (quoted in 8.2.2.1(b) above) and s 27(1) of the Children’s Act 38 of 2005.

<sup>43</sup> Guardianship in this context is interpreted in its widest sense: Cronjé & Heaton *South African Family Law* 299. As to the various interpretations of “guardianship”, see 2.3 above.

<sup>44</sup> 66 of 1965.

<sup>45</sup> Administration of Estates Act 66 of 1965: S 71. The Act also makes provision for the endorsement of the nomination of an assumed tutor or curator: S 72(2). See in general Spiro *Parent and Child* 219.



testamentary tutor or assumed tutor to administer the property of the child or to care for the minor's person.<sup>46</sup> The Master will only grant letters of tutorship if the appointed testamentary tutor is not incapacitated from being a tutor and has complied with the provisions of the Administration of Estates Act.<sup>47</sup> A person may only act as testamentary guardian if he or she is over the age of 18,<sup>48</sup> not under curatorship, has not been a witness to the will in which he or she was nominated, has not been declared incapable of holding the office of guardian by the court, and has provided the necessary financial security for the performance of his or her functions.<sup>49</sup>

In addition to the provisions of section 27 of the Children's Act<sup>50</sup> already referred to in 8.2.2.3 above, section 27 also provides:

- “(2) An appointment in terms of subsection (1) must be contained in a will made by the parent.
- (3) A person appointed in terms of subsection (1) acquires guardianship or care, as the case may be, in respect of a child-
  - (a) after the death of the parent; and
  - (b) upon the person's express or implied acceptance of the appointment.
- (4) If two or more persons are appointed as guardians or to be vested with the care of the child, any one or more or all of them may accept the appointment except if the appointment provides otherwise.”

While the provisions under the Administration of Estates Act<sup>51</sup> allow for the nomination of testamentary tutors in a will *or written instrument*,<sup>52</sup> section 27(2) restricts the appointment of a guardian or person vested with care to an

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<sup>46</sup> Administration of Estates Act 66 of 1965: S 72(1)(a). See Spiro *Parent and Child* 218.

<sup>47</sup> 66 of 1965: S 72(1)(e).

<sup>48</sup> Since the age of majority has been lowered to the age of 18 years (s 17 of the Children's Act 38 of 2005), it is reasonable to assume that a person will acquire full capacity to act at the age of 18 years and, therefore, be competent to assume the responsibilities and rights of guardianship in respect of a minor: See 4.2.2 above.

<sup>49</sup> See Spiro *Parent and Child* 220 and Van der Vyver & Joubert *Persone-en Familiereg* 637.

<sup>50</sup> 38 of 2005.

<sup>51</sup> 66 of 1965: S 72(1)(a).

<sup>52</sup> Such as a divorce settlement: See *Naude v Naude* 1968 1 SA 116 (O) at 118A in which a divorcing couple approached the court to incorporate a paragraph in their divorce settlement to the effect that a third party (the wife's sister) would be awarded full parental responsibilities and rights in the event of the wife dying before the child reaches the age of 21. The court refused the application because there was no indication that the father was incompetent or unfit to assume the responsibilities and rights in question.

appointment in a will.<sup>53</sup> The testamentary guardian acquires guardianship and/or care upon the mere acceptance of the appointment. Section 71 of the Administration of Estates Act,<sup>54</sup> however, requires a tutor to obtain an endorsement of his or her appointment in the form of letters of tutorship issued by the Master of the High Court before he or she may administer the property of the minor or carry on any business or undertaking of the minor.<sup>55</sup> Section 27 thus only allows the guardian to *acquire* guardianship and not to *exercise* such guardianship (as defined in section 18(3) of the Children's Act<sup>56</sup>) upon the acceptance of the appointment. Unlike an executor, whose office is created by the issuing of letters of executorship,<sup>57</sup> the guardian's "office" is created by the *will* in which the appointment is made and filled thereby or by the Court.<sup>58</sup> Section 27(3) of the Children's Act<sup>59</sup> thus unequivocally puts a guardian in the same position as a trustee<sup>60</sup> appointed in terms of section 6(1) of the Trust Property Control Act.<sup>61</sup> The Administration of Estates Act,<sup>62</sup> like the Trust Property Control Act<sup>63</sup> in the case of the trustee, merely acts as a "regulatory and control measure"<sup>64</sup> in terms of which the *existing* guardian would not be competent to act without authorisation by the Master.

### **8.2.3 Acquisition of parental responsibilities and rights in the absence of a testamentary appointment**

The Administration of Estates Act<sup>65</sup> prescribes the procedure to be followed in cases where no tutor has been nominated or appointed or where the nominated tutor is either absent, dead, refuses to accept the nomination or is incapacitated to

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<sup>53</sup> S 5(3) of the Matrimonial Affairs Act 37 of 1953 is equally restrictive: See Spiro *Parent and Child* 213.

<sup>54</sup> 66 of 1965.

<sup>55</sup> Before the enactment of the Children's Act 38 of 2005, there may have been some uncertainty

<sup>56</sup> 38 of 2005.

<sup>57</sup> *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 554 (T) at 557E.

<sup>58</sup> *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 554 (T) at 557G-H.

<sup>59</sup> 38 of 2005.

<sup>60</sup> For the position of the trustee, see Abrie Graham & Van der Linde *Estate- & Financial Planning* 99.

<sup>61</sup> 57 of 1988.

<sup>62</sup> 66 of 1965: S 71.

<sup>63</sup> 57 of 1988.

<sup>64</sup> *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 554 (T) at 557H.

<sup>65</sup> 66 of 1965: S 73 read with s 18(1), (2), (5) and (6).

act as tutor: If it comes to the knowledge of the Master that any minor is the owner of any property<sup>66</sup> which is not under the care of any “guardian, tutor or curator”<sup>67</sup> or if any of the eventualities mentioned before occurs with reference to a nominated tutor,<sup>68</sup> the Master may call upon the relatives of the minor and upon all persons having an interest in the care or administration of the property to recommend a person or persons for appointment as tutor(s).<sup>69</sup> The Master is not obliged to accept the recommendation – if the Master does not do so or if no recommendation is made, the Master may appoint such person or persons as the Master deems fit.<sup>70</sup> These tutors are referred to as tutors dative. The Master may generally authorise a tutor by the letters of tutorship to administer the property of the minor and carry on any business or undertaking of the minor.<sup>71</sup>

While the Administration of Estates Act<sup>72</sup> expressly makes provision for the appointment of a tutor by the Master to administer the property of a minor, a certain degree of uncertainty exists as to whether the Master is also authorised to appoint a tutor dative for the personal care of the child. In *Goodrich v Botha and Another*<sup>73</sup> the court had to decide on the “custody” of a minor child whose parents were killed in an air accident who had not nominated a testamentary guardian in their will. The child’s paternal step-grandmother applied for an order “... appointing herself or such other person as the Court might consider suitable as

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<sup>66</sup> S 73 (1)(a)(i).

<sup>67</sup> The fact that the minors are under the natural guardianship of a surviving parent precludes the appointment of a tutor dative by the *Master* as envisaged under s 73(1): See *Ex parte Misselbrook NO: In re Estate Misselbrook* 1961 4 SA 382 (N) at 390H in which the *court* (as opposed to the *Master*) appointed a tutor dative to administer and manage the inheritances of minors to the exclusion of the surviving parent “... as though the testatrix [the minor’s grandmother] had nominated a curator to administer and manage the inheritance of each minor”. The court (at 391B) also refers to Voet 26.4.4 who “... writes of joining another guardian to a surviving parent if the children whilst below puberty come into another inheritance, presumably one in addition to that from the first-dying parent”. The court will, however, “... only in exceptional circumstances, in the exercise of its discretion, make such an appointment where there is a guardian available”: *Ex parte Oppel and Another*, 2002 5 SA 125 (C) at 128l.

<sup>68</sup> S 73(1)(c).

<sup>69</sup> S 73(1).

<sup>70</sup> Ss 73(1) and (2) read with ss 18(1), (2) (5) and (6). If the value of the minor’s property is less than R 5 000 the Master may without any notice to anyone appoint and grant letters of tutorship or curatorship to such person or persons as he or she deems fit and proper: S 73(4).

<sup>71</sup> S 76(1)(a) and (b). For a discussion of these provisions, see Van der Vyver & Joubert *Persone-en Familiereg* 636-640; Van Heerden Ch 14 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 323 fn 32 and Cronjé & Heaton *South African Family Law* 299-304.

<sup>72</sup> 66 of 1965: S 73 read with s 18(1), (2), (5) and (6).

<sup>73</sup> 1952 4 SA 175 (T).

guardian over the infant with rights of custody; alternatively (2) an order awarding her the custody of the child”.<sup>74</sup> To these claims counsel for the respondents, the maternal grandparents of the child, made an objection *in limine* that the court had no jurisdiction to grant either of the claims on the basis that the power to make such orders vested in the Master in terms of section 76 the 1913 Administration of Estates Act<sup>75</sup> – the predecessor of the 1965 Act currently in operation which contains a similar provision<sup>76</sup> – and the jurisdiction of the Court only arises by way of appeal from or review of a decision of the Master. As a result of this objection, counsel for the petitioner withdrew the first claim thereby, in the court’s opinion,<sup>77</sup> effectively admitting that “... it is for the Master to appoint a guardian or guardians to a minor in the circumstances referred to in the section, and that the Court has no jurisdiction to make such an appointment”. Not wishing to express any opinion on whether the admission was made correctly or not,<sup>78</sup> the court focused its attention on the question whether “... the Court, as upper guardian of all minors, has jurisdiction to make an order for the personal custody of the minor ... that power being distinct from the power to appoint guardians which is vested in the Master by Statute”.<sup>79</sup> While conceding that the functions of the Orphan Chambers which existed in the Netherlands from the fifteenth to the eighteenth century were transferred to the Master of the Cape Supreme Court and the Masters in other provinces,<sup>80</sup> the court rejected the contention that these powers extended to decisions regarding “... who was to have personal custody and care of the person of a minor who had no parents to act as his natural guardians”.<sup>81</sup> The court<sup>82</sup> concluded:

“In my view, therefore, sec. 76 of Act 24 of 1913 when it authorises the Master of the Supreme Court to appoint tutors dative does not vest in that official power to decide who is to have personal custody of an orphan child, as distinguished from the guardianship of it, and the preliminary objection

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<sup>74</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 177G.

<sup>75</sup> Act 24 of 1913.

<sup>76</sup> S 76 of the Administration of Estates Act 24 of 1913 corresponds loosely with s 73 of the Administration of Estates Act 66 of 1965.

<sup>77</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 178B.

<sup>78</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 178C.

<sup>79</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 178C-D.

<sup>80</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 178D-G.

<sup>81</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 178E-F.

<sup>82</sup> *Goodrich v Botha and Another* 1952 4 SA 175 (T) at 181B.

by Mr. Hiemstra fails in so far as the petitioner's alternative claim is concerned."

The application for an appointment of a "guardian" to an orphan was considered *res nova* in *Lord v Johnson and Another*.<sup>83</sup> In this case the child's parents had also not appointed any testamentary guardian by last will.<sup>84</sup> Beadle CJ was called upon to consider "... points of practice of some considerable difficulty"<sup>85</sup> raised by the application, including the alleged practice in the past, in cases such as this, of the Master of the High Court (in Rhodesia) "... to appoint a tutor dative who assumed *all* the powers of guardianship" (own emphasis).<sup>86</sup> After canvassing the Roman-Dutch authorities on the issue,<sup>87</sup> Beadle CJ<sup>88</sup> summarised the law of Holland on the issue as follows:

"That where an Orphan Chamber existed at the place, the appointment was made by the Orphan Chamber in consultation with the relatives; where no Orphan Chamber existed the appointment was made by the Court, also after consulting the relatives; the guiding principle always being what was considered to be best in the interest of the minor."

As to whether *in casu* an Orphan Chamber existed that could make the appointment, the court found in support of *Goodrich v Botha and Another*,<sup>89</sup> "... that it must not be assumed that the office of the Master in South Africa corresponds to the Old Orphan Chamber of Holland, or that the Master has assumed the functions of the Orphan Masters of the old Orphan Chambers",<sup>90</sup> and concluded that the exact function of the Master was something which was regulated by statute "... and it is from the statute, and the statute alone, that the court must look to determine his powers".<sup>91</sup> In this regard the court<sup>92</sup> clearly distinguished between the wording of the Rhodesian statute and the South African

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<sup>83</sup> 1965 3 SA 768 (SR) at 768H.

<sup>84</sup> *Lord v Johnson and Another* 1965 3 SA 768 (SR) at 768E.

<sup>85</sup> *Lord v Johnson and Another* 1965 3 SA 768 (SR) at 768H.

<sup>86</sup> *Ibid.*

<sup>87</sup> At 769C-770D, referring to Van Leeuwen, Voet, Van der Keessel, Van der Linden and Grotius.

<sup>88</sup> At 770E-F.

<sup>89</sup> 1952 4 SA 175 (T) at 179A.

<sup>90</sup> *Lord v Johnson and Another* 1965 3 SA 768 (SR) at 770G-H.

<sup>91</sup> *Lord v Johnson and Another* 1965 3 SA 768 (SR) at 770H.

<sup>92</sup> At 771F-G.

Administration of Estates Act of 1913.<sup>93</sup> In terms of section 86 of the latter Act the tutor dative appointed by the Master was vested with all the powers of a tutor testamentary at common law and as such, in the court's opinion,<sup>94</sup> was possessed of more extensive powers than those of their counterparts in Rhodesia (now Zimbabwe). The court consequently found "little guidance"<sup>95</sup> from the South African decisions based on the 1913-Act. The Administration of Estates Act of 1965,<sup>96</sup> however, does not contain a similar provision equating the position of a tutor dative with that of a testamentary tutor at common law and could thus be interpreted as supporting the view taken in *Goodrich v Botha and Another*<sup>97</sup>.

The Zimbabwe High Court in *In re Gonyora*<sup>98</sup> overturned an award of "custody" by the Zimbabwe Juvenile Court to the paternal uncle of an orphaned child and vested it in the grandmother of the child, pending the appointment of a guardian for the child. The court found that it was apparent that the Juvenile Court had not taken into account the relevant principles when it ordered that the child be uprooted from his home with his grandmother and that a more extensive investigation was required before deciding who should be awarded guardianship.<sup>99</sup> The court<sup>100</sup> referred to the dictum of Beadle CJ in *Lord v Johnson and Another*<sup>101</sup> but did not address the question of the jurisdiction of the High Court to make orders of guardianship and whether such orders included orders as to the "custody" of the child.

The Children's Act<sup>102</sup> only makes provision for the appointment of substitute guardians and care-givers in terms of a testamentary disposition. Where no such nomination or appointment is made, the High Court would, apart from its inherent

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<sup>93</sup> Act 24 of 1913.

<sup>94</sup> *Lord v Johnson and Another* 1965 3 SA 768 (SR) at 771F-G.

<sup>95</sup> *Lord v Johnson and Another* 1965 3 SA 768 (SR) at 771G.

<sup>96</sup> Act 66 of 1965.

<sup>97</sup> 1952 4 SA 175 (T).

<sup>98</sup> [2002] JOL 9394 (ZH).

<sup>99</sup> *In re Gonyora* [2002] JOL 9394 (ZH) at 17.

<sup>100</sup> *In re Gonyora* [2002] JOL 9394 (ZH) at 13.

<sup>101</sup> 1965 3 SA 768 (SR).

<sup>102</sup> 38 of 2005.

jurisdiction as upper guardian, be competent to assign care and guardianship to a person in terms of section 23 coupled with section 24 of the Act.<sup>103</sup>

#### 8.2.4 Conclusion

The law relating to legal guardianship, which includes the law governing the acquisition of parental responsibilities and right in the event of the death of a parent of a child, is fragmented and marred by the inconsistent use of outdated terminology. The provisions of the Administration of Estates Act,<sup>104</sup> in particular, are in dire need of revision – not only to update the terminology employed in the Act but also to abolish marital status as the basis for nominating guardians in the event of death. It is, furthermore, recommended that the overlapping provisions in the Matrimonial Affairs Act<sup>105</sup> and the Divorce Act,<sup>106</sup> allowing for the appointment of guardians and persons vested with the care of the child, should be repealed, leaving section 27 of the Children’s Act<sup>107</sup> to apply to all parents, whatever their marital status or living arrangements. Regulating the appointment of parent-substitutes in a single provision will provide a welcome simplification of the law in this regard.

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<sup>103</sup> Van Heerden Ch 14 in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 323 fn 32; SALC Discussion Paper on the *Review of the Child Care Act* par 8.5.3.1. While the order vesting guardianship in the person must be made by the High Court, the children’s court would have concurrent jurisdiction in the case of a child in need of care “who has no parent or guardian” (s 14(4)(a) of the Child Care Act 74 of 1983) to place the child in alternative care in terms of s 15 of that Act, that is still in operation. Once s 45(1)(b) of the Children’s Act 38 of 2005 becomes operational, the children’s court would have general jurisdiction to “adjudicate” the care of the child and to make any of the care orders listed in s 46.

<sup>104</sup> 66 of 1965.

<sup>105</sup> 37 of 1953: s 5(3).

<sup>106</sup> 70 of 1979: S 6(3).

<sup>107</sup> 38 of 2005.

## 8.3 THE *QUASI*-ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS

### 8.3.1 Introduction

The Children's Act<sup>108</sup> expressly authorises *de facto* care-givers, including a child heading a household, to exercise parental responsibilities and rights to protect the children in their care. Such care-givers are given the right to *exercise* parental responsibilities and rights as though they have acquired such responsibilities and rights even if that is not the case – hence the classification of this kind of acquisition as the “*quasi*” acquisition of parental responsibilities and rights. While this aspect actually falls outside the parameters of this thesis as pointed out earlier,<sup>109</sup> a brief outline of the relevant provisions are nevertheless deemed pertinent.

### 8.3.2 Care of child by person not holding parental responsibilities and rights

What was previously trite law has now been confirmed by the enactment of section 30(3) of the Children's Act<sup>110</sup> which has already come into operation<sup>111</sup> – a co-holder of parental responsibilities and rights may not surrender or transfer his or her parental responsibilities and rights to another co-holder of parental responsibilities and rights or any other person.<sup>112</sup> A co-holder of parental responsibilities and rights may, however, in terms of the same subsection “... by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf”. An agreement in terms of which responsibilities and rights are so delegated “... does not divest the co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and

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<sup>108</sup> 38 of 2005.

<sup>109</sup> And consequently did not warrant a detailed analysis or comparative study: See 1.2 above.

<sup>110</sup> 38 of 2005.

<sup>111</sup> The section came into operation on 1 Jul 2007: GG 30030 dd 29 Jun 2007. See 5.3.3.2 above.

<sup>112</sup> *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) at 120; Van Heerden Ch 14 in Van Heerden *et al* *Boberg's Law of Persons and the Family* 322.



rights”.<sup>113</sup> Whether or not a person is expressly placed *in loco parentis* as envisaged by section 30(3), he or she is authorised to *exercise* such responsibilities and rights as is necessary to safeguard and protect the child in his or her care as outlined in section 32 below, which is not yet in operation:

- (1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person’s care –
  - (a) safeguard the child’s health, well-being and development; and
  - (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.
- (2) Subject to section 129,<sup>114</sup> a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.
- (3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).
- (4) A person referred to in subsection (1) may not –
  - (a) hold himself or herself out as the biological or adoptive parent of the child; or
  - (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.”

“Care-giver”<sup>115</sup> means –

- “any person other than a parent or guardian, who factually cares for a child and includes –
- (a) a foster parent;
  - (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
  - (c) a person who cares for a child whilst the child is in temporary safe care;
  - (d) the person at the head of a child and youth care centre where a child has been placed;
  - (e) the person at the head of a shelter;

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<sup>113</sup> Sections 2(9) and 2(10) of the English Children Act 1989 contain similar provisions: See Lowe & Douglas *Bromley’s Family Law* 434.

<sup>114</sup> S 129 provides for the consent to medical treatment and surgical operation of a child.

<sup>115</sup> S 1(1) *sv* “care-giver”.

- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (g) the child at the head of a child-headed household.”

A person who contravenes the prohibition created in section 32(4) commits an offence<sup>116</sup> and is liable on conviction to a fine or imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.<sup>117</sup> The equivalent provision of section 32 in the English Children Act 1989<sup>118</sup> has been interpreted as “... cloth[ing] the *de facto* carers with the *minimum* power necessary to provide for the day-to-day care of the child”.<sup>119</sup> The provision does, for example not give the care-giver the right to consent to any of the incidences of guardianship listed in section 18(3) of the Children’s Act.<sup>120</sup> While it is conceivable that the section may entitle the care-giver to give consent to the child’s medical treatment in the case of an accident or other emergency, he or she will probably not be able to consent to major elective surgery.<sup>121</sup> It is arguable whether a greater latitude should be given to the care-giver of orphans.<sup>122</sup>

### 8.3.3 Care by head of household

“Child-headed household” means a household recognised as such in terms of section 137 of the Children’s Amendment Act<sup>123</sup> that provides:

- “(1) A provincial head of social development may recognise a household as a child-headed household if –
  - (a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;

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<sup>116</sup> S 305(1)(b).

<sup>117</sup> S 305(6). Any further conviction could attract a sentence of a fine and/or imprisonment not exceeding 20 years: S 305(7). A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person – (a) abuses or deliberately neglects the child; or (b) abandons the child: s 305(3).

<sup>118</sup> S 3(5).

<sup>119</sup> Lowe & Douglas *Bromley’s Family Law* 435.

<sup>120</sup> 38 of 2005.

<sup>121</sup> Lowe & Douglas *Bromley’s Family Law* 435.

<sup>122</sup> *Ibid.*

<sup>123</sup> 41 of 2007. S 3 of the Act amends s 1 (which should actually read s 1(1)) of the principal Act (Children’s Act 38 of 2005) by inserting the definition of “child-headed household”.

- (b) no adult family member is available to provide care for the children in the household;
  - (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and
  - (d) it is in the best interest of the children in the household.
- (2) A child-headed household must function under the general supervision of an adult designated by –
- (a) a children’s court; or
  - (b) an organ of state or a non-governmental organisation determined by the provincial head of social development.
- (3) The supervising adult must –
- (a) perform the duties as prescribed in relation to the household; and
  - (b) be a fit and proper person to supervise a child-headed household.
- (4) A person unsuitable to work with children is not a fit and proper person to supervise a child-headed household.
- (5) (a) The child heading the household or the adult contemplated in subsection (2) may collect and administer for the child-headed household any social security grant or other grant in terms of the Social Assistance Act, 2004 (Act No. 13 of 2004) or other assistance to which the household is entitled.
- (b) An adult that collects and administers money for a child-headed household as contemplated in paragraph (a) is accountable in the prescribed manner to the organ of state or the non-governmental organisation that designated him or her to supervise the household.
- (6) The adult referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting –
- (a) the child heading the household; and
  - (b) given the age, maturity and stage of development of the other children, also those other children.
- (7) The child heading the household may take the day-to-day decisions relating to the household and the children in the household.
- (8) The child heading the household or, given the age, maturity and stage of development of the other children, such other children, may report the supervising adult to the organ of state or non-governmental organisation referred to in subsection (2)(b) if the child or children are not satisfied with the manner in which the supervising adult is performing his or her duties.
- (9) A child-headed household may not be excluded from any grant, subsidy, aid, relief or other assistance or programmes provided by an organ of state in the national, provincial or local sphere of government solely by reason of the fact that the household is headed by a child.”

The recognition and supervision of child-headed households can be considered a truly South African innovation insofar as it aims to keep such households intact

despite the demise of the parents in the household. While the supervising adult may receive state grants, a guardian will have to be appointed to administer any property belonging to the minors in the household. Recognising *de facto* caring in this manner may be an important step towards ensuring the protection of those countless children who have not been placed in formalised alternative care by the children's courts.

## **SECTION C: CONCLUSION**

### **CHAPTER 9: CONCLUDING REMARKS**

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## **9.1 INTRODUCTION**

The thesis explores the impact of the new Children's Act<sup>1</sup> on the law pertaining to the acquisition of parental responsibilities and rights and proposes a new structure within which the law in this regard can be accommodated. An assessment of the overall impact of the Children's Act<sup>2</sup> has shown that although the Act has enhanced and improved most aspects of the law relating to the acquisition of parental responsibilities and rights, a number of provisions are questionable and may need to be reconsidered for further reform. In hindsight it would, furthermore, appear as though the new proposed structure can successfully be applied to reflect and accommodate the innovations brought about by the Act. The abovementioned conclusions and recommendations are discussed in more detail below under different headings for ease of reference.

## **9.2 THE NEW LAW PERTAINING TO THE ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS IS PROGRESSIVE AND TRANSFORMATIVE**

The Children's Act<sup>3</sup> has fundamentally changed the way in which legal parentage is determined. The new legislative scheme for the acquisition of parental responsibilities and rights for the most part reflects the constitutional values of equality and non-discrimination and protects a child's right to parental care and to the paramountcy of his or her interests.<sup>4</sup> The most obvious evidence of the transformation is the implementation of new terminology to signify the shift from parental power to parental responsibilities and children's rights.<sup>5</sup> The use of gender neutral terminology, such as "spouse", "permanent life-partner" "parent" and "co-holder of parental responsibilities and rights", wherever possible, is furthermore testimony to the legislature's commitment to equality and non-discrimination on grounds of sex, gender, marital status and sexual orientation.

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<sup>1</sup> 38 of 2005.

<sup>2</sup> 38 of 2005.

<sup>3</sup> 38 of 2005.

<sup>4</sup> See 5.3.6, 6.5 and 7.2.13.

<sup>5</sup> See 2.2.4 above.

Instead of marriage being the only recognised commitment worthy of conferring parental responsibilities and rights on the father of a child, actual commitment, whether shown towards the mother or the child itself, is now regarded as the definitive criterion for legal paternity.<sup>6</sup> Except for section 40, which still requires the couple conceiving by artificial means to be married,<sup>7</sup> the diminishing role of marital status as a determining factor for legal parenthood is pervasive in all the relevant provisions – section 21, giving the unmarried father automatic rights under certain circumstances,<sup>8</sup> sections 23 and 24, omitting any reference to marital status in allowing for the assignment of parental responsibilities and rights by order of court,<sup>9</sup> section 295(a) that makes no reference to marriage as a prerequisite for the conclusion of a surrogate motherhood agreement<sup>10</sup> and section 231, that provides for the adoption of a child by permanent life partners and even persons who only share a common household.<sup>11</sup>

The transformation of the law as referred to above has resulted in the creation of a progressive statutory scheme for the allocation of parental responsibilities and rights that gives recognition to the different family forms found in South Africa today.<sup>12</sup> While the position of the mother in terms of the common law remains unchanged under the Children's Act<sup>13</sup> – as the birth-giving mother she is automatically vested with full parental responsibilities and rights irrespective of her marital status or whether the child is conceived naturally or by artificial means<sup>14</sup> – a biological father no longer needs to be married to, or even be living with, the mother of the child to acquire parental responsibilities and rights automatically. No longer only the preserve of heterosexual married parents in a nuclear family, parental responsibilities and rights can now automatically be acquired by a committed biological father<sup>15</sup> and a married lesbian couple conceiving by artificial

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<sup>6</sup> See 4.2.3.2.

<sup>7</sup> See 4.4.2 and 4.4.2.2(b).

<sup>8</sup> See 4.2.3.2.

<sup>9</sup> See 5.3.2(j).

<sup>10</sup> See 6.3.3.4.

<sup>11</sup> See 7.2.3.

<sup>12</sup> See 5.2.2.4.

<sup>13</sup> 38 of 2005.

<sup>14</sup> See 4.2.1.1 and 4.4.2.1

<sup>15</sup> See 4.2.3.2.

means.<sup>16</sup> Apart from authorising courts to assign parental responsibilities and rights,<sup>17</sup> the Children's Act<sup>18</sup> allows any holder of parental responsibilities and rights to confer such responsibilities and rights on another by prior approved agreement.<sup>19</sup> While the introduction of the multiple-parenting scheme may be difficult to implement in practice, it does create a continuum of legal parenting for children who are at risk of becoming legal orphans.<sup>20</sup> The inclusion of specific provisions in the Act to regulate surrogate motherhood agreements should be regarded as a bold step into uncharted waters. These provisions seek to give effect to the intention of the commissioning parents to raise a child born to a surrogate mother without having to adopt the child.<sup>21</sup> Although it is generally assumed that the enforcement of a pre-approved surrogate motherhood agreement will secure the best outcome for the child born in consequence of such an agreement, the courts will be forced to intervene in the most private of domains – the right to make decisions regarding reproduction.<sup>22</sup> Besides opening up adoptions to domestic life-partners in general and even persons who share the same household,<sup>23</sup> the Children's Act<sup>24</sup> has also introduced a number of innovations that will improve the provision of adoption services.<sup>25</sup> Of these the most important is probably the creation of an adoption database (RACAP) to facilitate the matching process and to ensure compliance with the subsidiarity principle.<sup>26</sup>

### **9.3 THE NEW STRUCTURE REFLECTS THE TRANSFORMATION OF THE LAW**

Despite its complexity, the structure developed for the research topic can successfully accommodate all forms of acquisition of parental responsibilities and

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<sup>16</sup> See 4.4.2.2(b).

<sup>17</sup> See 5.3.

<sup>18</sup> 38 of 2005.

<sup>19</sup> See 5.3.3.2.

<sup>20</sup> See 5.3.7.

<sup>21</sup> See 6.3.4.

<sup>22</sup> See 6.5.

<sup>23</sup> See 7.2.3.

<sup>24</sup> 38 of 2005.

<sup>25</sup> See 7.2.14.

<sup>26</sup> See 7.2.4.



rights. The structure also reflects the transformation of the law by making the application of the best interests-standard, rather than the marital status of the child's parents, the distinguishing feature of the subdivision between automatic and assigned acquisition.<sup>27</sup> While the rules governing the automatic acquisition of parental responsibilities and rights are presumed to be in the best interests of children in general,<sup>28</sup> the assignment of such responsibilities and rights cannot take place unless the assignment has been shown to be in the best interests of the particular child in question.<sup>29</sup> The structure in this way is an embodiment of the paramountcy of the best interests principle in section 28(2) of the Constitution. The structure at the same time highlights the shortcomings of the law pertaining to the acquisition of parental responsibilities and rights insofar as it still requires a distinction to be made between a biological mother and a biological father, on the one hand, and a naturally conceived and an artificially conceived child, on the other. The distinction between a naturally conceived child and a child conceived by artificial means is necessary because in the case of a naturally conceived child both mother and father may acquire parental responsibilities and rights automatically even if they are not married<sup>30</sup> while in the case of an artificially conceived child the parents must be married.<sup>31</sup> The structure is necessarily complicated by the need to distinguish between the acquisition of care, on the one hand, and guardianship, on the other. The distinction between care and guardianship, in turn, is directly related to the retention of the exclusive jurisdiction of the High Court to decide on matters relating to guardianship.<sup>32</sup>

#### **9.4 THE UNCOMPLETED SHIFT TOWARDS GENDER EQUALITY IS A CAUSE FOR CONCERN**

Whereas the new provisions are, where possible, gender neutral, the uncommitted biological father is still not treated the same as the mother as far as the acquisition of parental responsibilities and rights is concerned. In this regard,

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<sup>27</sup> See 3.2.

<sup>28</sup> See 4.2.3.2.

<sup>29</sup> See 5.3.2(d).

<sup>30</sup> See 4.4.2.2(b).

<sup>31</sup> See 4.4.4.

<sup>32</sup> See 5.3.2(e).

it is submitted, the Children's Act<sup>33</sup> has not been progressive enough. The somewhat arbitrary distinction between biological mothers who automatically acquire parental responsibilities and rights, on the one hand, and biological fathers, who still have to show their worth, on the other hand, is a serious shortcoming of the Act that will, in my opinion, have to be addressed again at a later stage. While the Children's Act<sup>34</sup> aims to protect the stability of the environment created by the mother as primary caregiver whilst at the same time accommodating the advantage that a relationship with a committed father may have for the child, the new provisions will arguably fail on both accounts and result in unnecessary disputes and litigation.<sup>35</sup> The discrimination against fathers in this respect is unjustifiable and in my opinion unconstitutional.<sup>36</sup> Conferring full parental responsibilities and rights on both parents based on their biological link to the child would not only be in line with worldwide trends, but also meet the constitutional demands of substantive sex and gender equality. It will further place the focus on the best interests of the child, which emphasises the importance of *both* parents for the child.<sup>37</sup>

## **9.5 THE TENSIONS BETWEEN THE BIOLOGICAL AND THE SOCIAL CONSTRUCTS OF PARENTHOOD MAY HAMPER THE IMPLEMENTATION OF THE NEW PROVISIONS**

Although only biological parents can automatically acquire parental responsibilities and rights, not all biological parents are treated in law as parents. While a mother's biological connection to her child is deemed sufficient for the automatic assumption of responsibilities and rights (because she embodies both biological and care-giving or social aspects of parenthood through gestating and giving birth to the child),<sup>38</sup> the biological connection between the father and his child is not deemed sufficient to establish legal paternity. The father's genetic connection must exist in combination with an element of commitment in relation to the child or

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<sup>33</sup> 38 of 2005.

<sup>34</sup> 38 of 2005.

<sup>35</sup> See 4.3.2.3(b)(iv)

<sup>36</sup> See 4.3.2.1(c).

<sup>37</sup> See 4.3.2.4.

<sup>38</sup> See 4.2.1.1.

the mother to establish parenthood.<sup>39</sup> In addition to biological parents who may qualify as the legal parents of a child, the Children's Act<sup>40</sup> makes it possible for any person who has an interest in the care, well-being or development of the child, such as a grandparent or *de facto* care-giver, to be vested with parental responsibilities and rights. In considering whether assigning such responsibilities and rights to the applicant is in the best interests of the child, the court must take into account the relationship between the applicant and the child and the degree of commitment shown towards the child. The question is whether the psychological bond existing between the child and the person with whom the child is emotionally attached is to be considered as important as the link with the biological parents?<sup>41</sup> The fact that the Children's Act<sup>42</sup> expressly provides that more than one person may hold parental responsibilities and rights in respect of the same child,<sup>43</sup> would seem to encourage the legal recognition of social parents alongside the biological parents of the child. However, the courts have in the past been hesitant to assign parental responsibilities and rights to third parties in the absence of parental unfitness or consent.<sup>44</sup> Although the Children's Act<sup>45</sup> provides for a parent to confer responsibilities and rights on another by agreement,<sup>46</sup> it does not expressly require the court to consider the wishes of the biological parents in the assignment of the parental responsibilities and rights – unless it is included as a factor which should, in the opinion of the court, be taken into account.<sup>47</sup> While unfitness does not seem to be a prerequisite for the assignment of care,<sup>48</sup> section 24(3) places an onus on an applicant applying for guardianship to prove unfitness on the part of the existing guardian. Insofar as guardianship then is concerned, the Act would seem to endorse the traditional approach by the courts in giving preference to the biological link between the child and his or her existing natural guardian. The application of the best interests-standard will, in my opinion, not necessarily overcome the ambivalence of the Act

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<sup>39</sup> See 4.2.3.2.

<sup>40</sup> 38 of 2005.

<sup>41</sup> See 5.3.7.

<sup>42</sup> 38 of 2005.

<sup>43</sup> S 30.

<sup>44</sup> See 5.2.3.3 and 5.2.3.4.

<sup>45</sup> 38 of 2005: Ss 23 and 24.

<sup>46</sup> S 22.

<sup>47</sup> See s 23(2)(e) and 24(2)(c).

<sup>48</sup> S 23.

in ensuring that social parents are legally recognised, especially in cases where the biological parent is opposed to the granting of the order.<sup>49</sup> The weight accorded to the genetic contribution of a partial surrogate mother has also resulted in the unjustified differentiation between full and partial surrogacy.<sup>50</sup>

Concerns have been expressed about the directions that family law has taken, at least in the United States of America, in trying to adapt legal understandings of parenthood and parental rights to evolving social conditions. For all their differences, these critics –

“... share a fundamental worry that in its rush to be adaptable, family law will end up going too far and damaging traditions that are of profound and perhaps irreplaceable value to society – either traditional family ideals, like marriage or the nuclear family, or traditional family prerogatives, such as parental autonomy. For now, there is no consensus about just how to balance respect for tradition with the need to take account of the ‘changing realities of American family’. It is clear only that there is no going back, and that society itself comes to a clearer resolution of its own ambivalence about the respective roles of biology, caregiving, contract, and tradition in defining parenthood, family law is unlikely to do much better.”<sup>51</sup>

## **9.6 THE RETENTION OF A TWO-TIERED COURT SYSTEM MAKES FOR BAD LAW**

The retention of the exclusive jurisdiction of the High Court to make orders arising out of a divorce and matters relating to the guardianship of children has seriously compromised the provisions underpinning the acquisition of parental responsibilities and rights. The retention of the two-tiered court system has necessitated the separate treatment of care and guardianship in the Act, resulting in an inevitable fragmentation of the law.<sup>52</sup> Not only will it cause considerable hardship to those wishing to assume guardianship to, for example, protect the property interests of an orphan, it will also discriminate between persons applying

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<sup>49</sup> See 5.3.4.1.

<sup>50</sup> See 6.5.

<sup>51</sup> Meyer unpublished Paper presented at the 17<sup>th</sup> Congress of the International Academy of Comparative Law, Utrecht (2006) at 26-27. See also Storrow 2002 *Hastings Law Journal* 597 and Campbell 2007 *IJLPF* 242 at 264.

<sup>52</sup> See 5.3.2(e).

for the care of a child – an unmarried father may channel his request through the children’s court while a divorced father has to approach the High Court at great expense. While the considerations of cost and capacity may continue to inhibit the creation of family courts,<sup>53</sup> there can be no question that without such courts the transformation brought about by the Act will remain incomplete.<sup>54</sup>

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<sup>53</sup> See 5.3.2(c) and (h).

<sup>54</sup> See 5.3.7.

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### (i) Journals

<i>BML</i>	<i>Businessman's Law</i>
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
<i>Conn LR</i>	<i>Connecticut Law Review</i>
<i>Duke LJ</i>	<i>Duke Law Journal</i>
<i>CFLQ</i>	<i>Child and Family Law Quarterly</i>
<i>FJR</i>	<i>Tijdschrift voor Familie-en Jeugdrecht</i>
<i>FLQ</i>	<i>Family Law Quarterly</i>
<i>IJCR</i>	<i>International Journal of Children's Rights</i>
<i>IJLF</i>	<i>International Journal of Law and the Family</i>
<i>IJLPF</i>	<i>International Journal of Law, Policy and the Family</i>
<i>JQR</i>	<i>Juta's Quarterly Review of South African Law</i>
<i>LQR</i>	<i>Law Quarterly Review</i>
<i>MedLRev</i>	<i>Medical Law Review</i>
<i>NLJ</i>	<i>New Law Journal</i>
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
<i>FJR</i>	<i>Tijdschrift voor Familie-en Jeugdrecht</i>
<i>THR-HR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>TRW</i>	<i>Tydskrif vir Regswetenskap</i>
<i>TSAR</i>	<i>Tydskrif vir Suid-Afrikaanse Reg</i>

### (ii) Law Reports

All ER	All England Law Reports
All SA	All South African Law Reports
BCLR	Butterworths Constitutional Law Reports
EHRH	European Human Rights Reports
PH	Prentice Hall
SA	South African Law Reports

### (iii) Other

<i>BW</i>	<i>Burgerlijk Wetboek</i>
1996 Hague Convention	Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children
AJ	Acting Judge
AJA	Acting Judge of Appeal
Ch	Chapter
CJ	Chief Justice
Constitution	Constitution of the Republic of South Africa
dd	dated



ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights
ed	edition/editor
<i>et seq</i>	and the following
eg	example
fn	footnote
GG	Government Gazette
GN	Government Notice
Hague Convention in Respect of Intercountry Adoption	Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993
HFEA	Human Fertilisation and Embryology Act 1990
J	Judge
JA	Judge of Appeal
JP	Judge President
par(s)	paragraph(s)
reg	regulation
s(s)	section(s)
SA	South Africa/South African
SALC	South African Law Commission
SALRC	South African Law Reform Commission
UNCEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations Children's Education Fund
UPA	Uniform Parentage Act

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