

PARENTAL AND GRANDPARENTAL RIGHTS AND RESPONSIBILITIES IN LIGHT
OF THE BEST INTERESTS OF THE CHILD PRINCIPLE

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SUMMARY

Parental rights and responsibilities refer to the rights a parent has to act on behalf of their child. Section 7 of the Children's Act 38 of 2005, alludes that it is the duty to provide care, contact and guardianship to the child. Mothers have automatic parental responsibilities whilst fathers, have to meet the requirements in Section 21 of the Act to attain these rights. The Act does not expressly mention grandparental rights and responsibilities but these fall under Section 23 and 24 where any care givers get guardianship if they meet the criteria. Moreover, Section 28(1) (b) of the Constitution speaks of the right of the child to family care. This goes beyond just the father and mother. Whatever decision should be made about this should be in the best interests of the child. Parental rights can be limited as there is no absolute right. They are limited if it is in the best interests of the child. The best interests of the child is also not absolute and can be limited.

KEYWORDS

1. Parental rights and responsibilities
2. Best interests of the child
3. Child
4. Unmarried fathers
5. Guardianship

LIST OF ABBREVIATIONS AND ACRONYMS

1. NFA – Natural fathers of Children born out of Wed-lock Act
2. BOR- Bill Of Rights

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1) CHAPTER 1: CONCEPTUALISATION OF RESEARCH PROBLEM AND CONTEXTULISATION OF RESEARCH THEMES

1.1 Introduction

In *FS V JJ*¹ the Supreme Court of appeal held that a parent's rights and responsibilities surpasses that of a grandparent. In *Barnes V Union and South West Africa Insurance Co Ltd*,² the court confirmed that there is an order of priority when it comes to parental rights and responsibilities. Parents have a preference and if they are not able to support their children, the duty to support falls on paternal and maternal grandparents. The question that remains pending in most circumstances is the exact meaning of the term 'parental rights and responsibilities' and what this term entails. Another point that needs emphasis on is whether or not parents and grandparents have these rights in regard to a child of unmarried parents.

This research focus intends to provide an in-depth account of what is meant by parental rights and responsibilities, what it entails and whether or not it applies to unmarried fathers as well as grandparents. If parents and grandfathers are also entitled to these, are these rights automatic or there are certain requirements and or circumstances that have to exist first.

This research document shall explore and shed more light on the 'best interests of the child' principle as enshrined in the South African Constitution.³ It has become more like a slogan that is chanted whenever children are concerned. However, this research will unmask the true meaning of the term and what exactly it entails.

Section 28 of the Constitution advocates for the best interests of the child in all matters concerning the minor. This implies that some parents may be denied parental rights if the court believes that it is in the best interests of the child to do so. Moreover, no right is absolute as evidenced by the mere existence of the limitation clause in Section 36 of the Constitution.

1 *FS V JJ 2011 (3) SA 126 (SCA)*

2 *Barnes V Union and South West Africa Insurance Co Ltd 1977 (3) SA 502 (E)*

3 Constitution of the Republic of South Africa, 1996. Here on referred to as the Constitution

The research paper will explore how parental rights are acquired and limited to reflect the best interests of the child principle. A non-empirical approach shall be used to compare parental responsibilities before the Children's Act ⁴and after the Act.

The research is qualitative in nature and is based on the desktop method of research. The research will be based on legislation, textbooks, law reports and journal articles. It will critically investigate and scrutinize selected provisions of the Children's Act, the constitution as well as the judgment in *FS V JJ*⁵ and other related judgments. In the next chapter, focus shall be on the term parental rights and responsibilities.

4 Children's Act 38 of 2005. From here on referred to as the Children's Act

5 *FS V JJ Supra*

2) CHAPTER 2: PARENTAL RIGHTS AND RESPONSIBILITIES

2.1 Introduction

It goes without saying that when a person has a child, he or she becomes a parent and legally, he or she has to take care of the child. The Children's Act speaks of parental rights and responsibilities but these are on different levels. People who take care of children in the place of parents, and people who take care of children for a short time when parents are unable to, all have parental rights and responsibilities, just on different levels.¹ There are mothers and fathers who are married and raising their children together. There are single mothers and single fathers also, who were either never married or got divorced. These different categories of parents do not always have the same rights and responsibilities and the Children's Act explains these differences.

Generally, parental rights and responsibilities refer to a parent's right to make essential decisions for the child, represent the child and take certain actions on behalf of the child as enshrined in the Children's Act. Section 18(2) of this Act, provides that parental rights and responsibilities include the responsibility and right to care, keep contact, act as a guardian and to contribute to the maintenance of the child. Care is providing for the child to the best of your means. Contact is maintaining a personal relationship and communicating with the child. Guardianship in terms of Section 18(2) means to safeguard and administer the child's interests and property, to represent the child in administrative, contractual and legal matters. It also includes giving or withholding consent in regards to the child's marriage, adoption, alienation of property, departure from the Republic and application for a passport.² In terms of Section 18(3) both parents have equal rights and responsibilities, but when they are not living together, specific rights and responsibilities may be given to one parent, either by court order or a parental agreement.

2.2 Historical background

In the past, parental rights and responsibilities referred to powers of the parents. They had total authority over their children and the children, in turn, had a mere duty of submission.³ The court could only intervene when required to, otherwise it respected the sanctity of parental authority.

1 UNICEF "Little Book of rights and responsibilities" www.unicef.org (Accessed 2 October 2018)

2 Heaton J The South African Law of persons 4th ed (Lexis Nexus 2012)

3 Bekink M "Child divorce –A break from parental responsibilities and rights due to traditional socio-cultural practices and beliefs of parents" THRHR 15-17

The term “parental rights and responsibilities” was brought about by the Children’s Act hence replacing the common law term “parental authority”. The current position in our law regarding parental rights and responsibilities is child centered.

Previously, children were recognized as ‘legitimate’ or ‘illegitimate’ based on the marital status of their parents. The Children’s Act has removed the labelling of children and has instead labelled the marital status of their parents.⁴ The correct terms are now, children born of married parents and children born of unmarried parents.

In regards to unmarried fathers, initially, they had no rights at all. Prior to the promulgation of the Children’s Act, their rights in respect of their children, were regulated by the NFA of 1997. In terms of this Act, the mother of the child was the sole guardian of the child, and if she herself was a minor, her guardian became the child’s guardian. The father had to make a court application for access, custody or guardianship. This entire Act has now been repealed by the Children’s Act.

At common law, the child’s father had no automatic parental rights and responsibilities.⁵ He merely had a duty to maintain the child. The children’s Act has maintained the status quo. When a biological father is not married to the mother he does not assume automatic parental responsibilities and rights but is still liable for half of the maintenance for his child.⁶ A married father is put on the same footing as a biological mother.

2.3 FS V JJ

C was born when the appellant (C’s father) was living with C’s mother with the intention to marry. The first respondent was C’s maternal grandmother who was married to the second respondent. A custody battle arose. The appeal was against a series of judgments that were made in the Northern Cape High Court and Western Cape High Court. Initially, the appellant was given custody because he had lived with C’s mother in a life partnership in terms of Section 21 of the Children’s Act. Secondly, the respondents were given custody in terms of Section 18 of the Act. The legal questions the Supreme Court of Appeal was faced with were: Whether or not unmarried fathers have parental rights, whether grandparents also have parental rights and the best interests of the child principle.

With regards to the rights of unmarried fathers, the court held that when C was born, the NFA was in operation. It did not confer custody and guardianship of an unmarried father, even on the death and incapacity of the mother but the law had changed under the children’s Act.

In regard to grandparents, the court held that grandparents had parental rights and responsibilities in terms of Section 23 and 24 of the Act which govern non-parental rights to care and guardianship. Prior to this, grandparents had no inherent rights and

4 Louw A “the constitutionality of a biological father’s recognition as a parent” 2010 13 (3) PER 155-206

5 Heaton *The South African Law of persons* (4)

only the High Court could confer guardianship on them, if it is in the best interests of the child. The first respondent was held to be the holder of full parental rights and responsibilities and given custody of C, the appellant would have access

2.4 Who is entitled to parental rights and responsibilities?

Section 18 of the Children's Act alludes parental rights in respect of a child may be full or specific. The Act further goes on to specify who can have these rights as shall be discussed below. Moreover, Section 28(1) (b) of the Constitution speaks of the right of the child to family care. This clearly goes beyond just the father and mother.

2.4.1 Parental rights in regard to mothers

In terms of Section 19 of the Children's Act, biological mothers, with the exception of surrogate mothers, acquire full parental responsibilities and rights in respect of children as soon as they give birth. In *Fraiser V Children's court*⁶ the court mentioned that mothers have this automatic right because of the biological relationship they have with their children. They nurture them during pregnancy and breast feed them after birth. The court also seemed to have the view that giving mothers automatic parental rights, protects the children from irresponsible fathers.

2.4.2 Parental rights in regard to grandparents

In *FS V JJ*, the appeal was against a series of orders made in the Northern Cape High Court where custody of a minor child was awarded to the grandparents. The court held that grandparental rights and responsibilities were from 1 April 2010 governed by Section 23 and 24 of the Children's Act which governs non-parental rights to care and guardianship. These two sections generalize that whoever is interested in the care and well-being of the child may apply to the high court for an order of care and contact with the child. Section 28(1) (b) gives children the right to either family care or parental care. Preference is given to family care which includes extended family and even grandparents.

Moreover, if an unmarried mother dies, the maintenance of the child ought to be paid by her estate. However, if the estate cannot cater for the maintenance of the child, the duty passes on to the child's grandparents. In *Motan V Josub*⁷ only maternal parents could be liable, but in *Petersen V Maintenance officer*⁸, Motan was dismissed as being discriminatory on the birth and child's dignity. It was also said to be not in the best

6 *Fraiser V Children's court* ZACC 1 1996 (8) BCLR 1085, 1997 (2) SA 218 7

7 *Mo1utan V Joosub* 1930 AD 61 102

8 *Petersen V Maintenance Officer and others* (2004) 1 All SA 117 (C)

interests of the child. This brings us to yet another component of parental rights and responsibilities, namely parental rights and responsibilities being awarded to grandparents.

South African statistics have shown that one in every three children stay with their grandparents.⁹ Grandparents are care givers but no special status has been awarded to them. The Child Visitation Bill of 1996 gave grandparents access to the children when a person with parental rights and responsibilities was denied. However, the Bill never really turned into an Act. Besides there being no direct law that grants grandparents parental rights and responsibilities, the general conception is that children and their grandparents have an essential relationship and to disregard it, is detrimental to the child's best interests which is an infringement of Section 28(2).

2.4.3 Parental Rights and Responsibilities with regards to fathers

In *FS V JJ*¹⁰ the grandparents acquired custody soon after the mother died and questions have been posed about what a father has to do to get custody. Some unmarried fathers want to have a relationship with their child and the law says these fathers can claim some rights but they need to satisfy certain requirements first. One may question if this means that unmarried fathers have no parental rights and responsibilities. In terms of Section 21 of the Children's Act, unmarried fathers do have parental rights but only if they can meet the requirements stated in the provision. These are, he has to prove that either he: was living with the child's mother in a serious, long term relationship at the time of the child's birth, wants to claim paternity of the child, is choosing to pay customary law damages and contributes to the child's upbringing, or contributes or tries to contribute to the maintenance of the child. Fathers who do not qualify under Section 21 can acquire parental rights and responsibilities by concluding a Parental Responsibilities and Rights agreement with the child's mother or any other person with parental rights and responsibilities under Section 22 of the Act.

Moreover, a father can also acquire parental rights through a court application. The court application can be made to a high court, divorce court in divorce matters or the children's court. Section 20 of the Children's Act further gives a married father

9 Louw A "Children and grandparents: An overrated attachment?" 2013 STELL LR 618-637

10 *FS V JJ* Supra

father automatic rights and responsibilities, putting him in the same position as the child's mother.

2.4.4 Parental Rights and responsibilities with regards to any other party

In Section 27 of the Children's Act there are two ways in which a person can become a child's guardian and therefore have parental rights and responsibilities when he or she is not the child's parent. The first one is by a decision of the High Court acting as the 'supreme guardian' of all minors. The second one is through a will that was written by a sole parent or sole caregiver who passed away. The person named in the will must be a 'fit and proper' person.¹¹

Conclusively, parental rights and responsibilities entail care, contact, guardianship and ensuring the maintenance of the child. Biological mothers excluding surrogates have automatic parental rights whilst fathers (particularly unmarried fathers), grandparents and other parties have to fulfil certain requirements to attain parental rights and responsibilities. In the next chapter, the best interests of the child principle shall be explored as well as whether or not giving parental rights and responsibilities to the people discussed above is in the best interests of the child.

¹¹ Adams L Challenges unmarried fathers face in respect of the right to contact and care of their children: can amendments to current law make enforcement of these rights more practical (LLM thesis University of Pretoria 2014) 19

CHAPTER THREE: THE BEST INTERESTS OF THE CHILD PRINCIPLE

The best interests of the child principle is mentioned in Section 28(2) of the Constitution which reads, “A Child’s best interests are of paramount importance in every matter concerning the child” Paramount is defined as more important than anything else, or rather supreme¹ This implies that the best interests of the child principle is a principle that advocates for preference of the child’s best interest at all times.

Our constitution is child centered, but even before the constitutional dispensation, this principle was already in place as evidenced by its application in *Fletcher V Fletcher*, a 1948 Appellate Division case. ² In *Sonderup V Tondeli*, ³the court mentioned that Section 28 of the Constitution exists to guarantee that the child’s best interests are made the first priority. The principle is also contained in the United Nations Convention ⁴ as one of the rights of a child. Article 3 of the Convention document reads, “All actions concerning the child shall take full account of his or her best interests. The State shall provide the child with adequate care when parents, or others charged with parental responsibility, fail to do so.”

In *Fitzpatrick*,⁵ in an obiter dictum, it was said that the best interests of the child principle is not exhaustive , there are so many factors that have to be looked at to determine if the principle has been upheld.

Section 7 of the Children’s Act provides factors that have to be looked at to tell if the principle has been adhered to. These are, the nature of the personal relationship between the child and the adult in question, the attitude of the adult towards the child, the capacity to provide and fend for the child. Other factors that need to be considered are the age, the gender and the background of the child and whether the child has any disability, illness or any special needs, the child’s age, maturity, development and any other characteristic of the child. The need to protect the child from maltreatment, abuse, family violence and any other turmoil that is not good for child development, also has to be looked at.

Section 7 has a wide application and also extends to any care giver, it is not strictly limited to parents. In *S V M* ⁶, it was held that the best interests of the child should be the standard norm for all courts and that it overrides all other legitimate interests of parents, siblings and third parties. Interpretation of statutes and common law development must favor protection of a child’s interest. It sets a standard for the rights of all children in South Africa.

1 Miriam Webster Dictionary 3rd edition 1961

2 *Fletcher V Fletcher* 1948 (1) SA 130 (A)

3 *Sonderup V Tondeli & Another* 2001 (1) SA 117

These rights are contained in the BOR in the Constitution. The Constitution clearly states that children's rights must be promoted, protected and respected. The dignity and worth of the child must be upheld. The best interests principle is every child's constitutional right.

The best interests of the child is used to interpret other children's rights in Section 28 of the constitution as well as other legislation applicable to a child, children, a specific group of children or just children in general. It is also a constitutional value, similar to other constitutional values such as human dignity, equality and freedom.⁷

In a nutshell, the best interests of the child is a principle that advocates for prioritization of the best interests of the child above everything else. Section 7 of the Children's Act states factors that have to be considered to determine if the principle has been upheld. In chapter 4, the research paper will focus on the limitation of parental rights and responsibilities and the best interests of the child principle.

4 United Nations Convention on the Rights of Children

5 *Minister for Welfare and Population development V Fitzpatrick ZACC 6; 2000 (7) BCLR 713 2000 (3) SA 422 (CC) (31 May 2000)*

6 *S V M 2008 (3) SA 232 [33] (CC)*

7 Aantikeneng " some ideas on the "bests interests of a child" principle in the context of public schooling" 2007 (70) THRHR 457

8 Bonthuys E (*The best interests of children in the South African Constitution*) 24-25

CHAPTER FOUR: LIMITATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE BEST INTERESTS OF THE CHILD PRINCIPLE

As evidenced by Section 36 of our constitution, no right is absolute, rights are subject to limitation if there is a compellingly good reason to. Such limitation should be of a general application and justifiable in an open democratic society based on human dignity, equality and freedom. In *Centre for child law V Minister of Justice and Constitutional Development*,¹ it was said that by saying the best interests of the child is paramount, it means it is important, but it does not mean everything else is less important as this would render all other individual rights useless. This brings us to a point where parental rights have to be limited.

Not giving unmarried fathers automatic parental rights is a form of limitation of the right. Some have argued and asked if this is not a discrimination based on marital status.² However, Section 9 of the Constitution is not substantive and in *Harksen*³ the court set guidelines of determining discrimination as first determining whether or not differentiation amounted to discrimination, whether or not it was unfair and whether it was justifiable under Section 36 of the constitution. Parental rights must be limited so as to uphold the best interests of the child. This limitation must be measured against Section 7 of the Children's Act. If the requirements of Section 7 are not fulfilled, it is in the best interests of the child to not give parental rights and responsibilities to the adult in question.

In *S V M*⁴ the Constitutional Court found that the best interests principle is not absolute. The unique circumstances of a particular child will determine the different factors to consider in order to secure the best interest of that child.⁵ In *De Reuke V the Director of Public Prosecutions*⁵ the court emphasized that the best interests of the child is subject to reasonable and justifiable limitation in accordance with Section 36 of the constitution.

Moreover, section 28 of the Children's Act contains a provision that may suspend, terminate, or restrict parental rights and responsibilities. Parental rights are not absolute, the court may terminate them but they should consider 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 towards the child and any other factor that should, in the opinion of the court, be taken into account.

¹ *Centre for child law V Minister of Justice 2009 (2) SACR 477 (CC)*

² *Louw 2013 STELL LR 35*

Conclusively, parental rights and responsibilities are not absolute, they can be limited, subject to Section 36 of the constitution and in terms of Section 28 of the Children's Act.

3 *Harksen V Lane NO & Others (CCT 9/97) [1997] ZACC 12 1997 (11) BCLR 1489 1998 (1) SA 300*
4 *S V M Supra*
5 *De Reuke V Director of Public Prosecutions 2004 1 SA 406 (CC)*

CHAPTER 5: CONCLUSION AND RECOMENDATIONS

Conclusively, parental rights and responsibilities refer to a parent's right to make essential decisions for the child, represent the child and take certain actions on behalf of the child. They entail the duty to care for the child, maintain contact with the child and be a guardian of the child and his or her interests.

Whilst, parental rights and responsibilities come *ex lege* for some parents, this is not the case for all parents. Unmarried fathers have to comply with the requirements of Section 21 of the Children's Act so as to acquire parental rights and. Some other interested parties including grand parents may apply to the court to attain parental rights and responsibilities in terms of Section 18, 23 and 24. Mothers with the exception of surrogate mothers have full inherent rights from the moment they give birth to the child.

The distinction between married and unmarried father looks *prima facie* discriminatory. Besides being discriminatory, the best interests of the child in my opinion includes growing up with love from both parents whether the parents are married or not. Unmarried fathers should also get full parental rights and responsibilities if the child is not a product of rape. Moreover, it seems as if the common law position of parental rights of unmarried fathers has barely changed. They still do not have automatic rights and the legislature should look into this.

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