

**A CRITICAL ANALYSIS OF SECTION 21 OF THE CHILDREN'S ACT
38 OF 2005 WITH SPECIFIC REFERENCE TO THE PARENTAL
RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS**

by

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TABLE OF CONTENTS

| | |
|--|-----|
| ABSTRACT | i |
| ACKNOWLEDGEMENTS | iii |
| KEYWORDS | iv |
| 1. The Children’s Act and Some Constitutional Considerations | |
| 1.1 Introduction..... | 1 |
| 1.2 The Children’s Act..... | 4 |
| 1.3 The Unmarried Father, His Right to his Child and the Interaction of their Rights with the Constitution..... | 11 |
| 1.3.1 Vertical or Horizontal Application?..... | 12 |
| 1.3.2 Limitation of Constitutional Rights..... | 16 |
| 1.3.3 Commitment <i>versus</i> Automatic Acquisition of Rights..... | 21 |
| 1.4 Background of Study..... | 24 |
| 1.5 Aim of Study..... | 25 |
| 1.6 Hypothesis..... | 26 |
| 1.7 Methodology..... | 27 |
| 2. The History behind Section 21 | |
| 2.1 Introduction..... | 29 |
| 2.2 Previous Position of Unmarried Fathers | |
| 2.2.1 A Short Lesson in History..... | 32 |
| 2.2.1 <i>Van Erk v Holmer</i> | 34 |
| 2.2.3 Criticism against the <i>Van Erk v Holmer</i> Judgment..... | 36 |
| 2.2.4 Further Developments towards the Current Position..... | 39 |
| 2.3 Current Position of Unmarried Fathers..... | 42 |
| 2.4 Mediation | |
| 2.4.1 A General Overview..... | 48 |
| 2.4.2 Section 21(3)-Mediation..... | 50 |
| 2.4.3 Confusing Terminology..... | 53 |
| 2.4.4 A Peculiar Predicament..... | 56 |
| 2.5 Back to the Beginning?..... | 57 |
| 3. Section 21: A Comparative Analysis | |
| 3.1 Introduction..... | 59 |
| 3.2 Uganda..... | 63 |
| 3.3 Kenya..... | 67 |
| 3.4 Ghana..... | 72 |
| 3.5 Namibia..... | 77 |
| 3.6 Other Non-African Countries..... | 79 |
| 3.6.1 England and Wales..... | 80 |
| 3.6.2 Scotland..... | 83 |
| 3.6.3 Australia..... | 87 |
| 3.7 Conclusion..... | 89 |
| 4. The Interaction between Section 21 and other Relevant Sections of the Children’s Act | |
| 4.1 Section 18..... | 95 |

| | | |
|-----------|---|-----|
| 4.1.1 | Differences | 97 |
| 4.1.2 | <i>FS v JJ</i> | 100 |
| 4.1.3 | Section 18 Possibly Misunderstood?..... | 104 |
| 4.1.4 | Conclusion..... | 105 |
| 4.2 | Section 24..... | 107 |
| 4.2.1 | Interpretation Difficulties related to Section 24(3)..... | 107 |
| 4.2.2 | Terminology: To Be a Guardian or to Act as Guardian..... | 110 |
| 4.2.3 | Conclusion..... | 113 |
| 4.3 | Section 29(2)..... | 114 |
| 4.4 | Section 231..... | 118 |
| 4.4.1 | A Case Study: <i>Williams v Duvenhage</i> | 119 |
| 4.4.2 | To Adopt, or Not?..... | 122 |
| 4.4.3 | Consequences: The Reason for Adoption?..... | 125 |
| 4.4.4 | A Question of Definition..... | 125 |
| 4.4.5 | Conclusion..... | 127 |
| 5. | Applying Section 21 in Practice | |
| 5.1 | The Children’s Court..... | 129 |
| 5.1.1 | Section 21 | |
| 5.1.1.1 | Mediation | 130 |
| 5.1.1.2 | Permanent Life-Partnership..... | 131 |
| 5.1.1.3 | Contribution for a Reasonable Period..... | 135 |
| 5.1.1.4 | Contribution in Good Faith..... | 136 |
| 5.1.1.5 | Cumulative or Alternative Application..... | 138 |
| 5.1.2 | Contact and Care..... | 139 |
| 5.1.3 | Section 22..... | 146 |
| 5.1.4 | Procedure..... | 151 |
| 5.2 | The High Court | |
| 5.2.1 | Care and Contact and Parental Responsibilities and Rights..... | 154 |
| 5.2.2 | Guardianship..... | 156 |
| 5.2.3 | The Dangers of Approaching a High Court on an Unopposed Basis without a Report or Investigation..... | 160 |
| 5.2.4 | Conclusion..... | 165 |
| 6. | Recommendations and Conclusion | 167 |
| 6.1 | Introduction..... | 167 |
| 6.2 | The Transformation..... | 168 |
| 6.3 | Recommendations | |
| 6.3.1 | Section 21..... | 169 |
| 6.3.2 | Sections in Interaction with Section 21..... | 175 |
| 6.3.3 | Conclusion..... | 177 |
| 7. | Abbreviations | 181 |
| 8. | Bibliography | 182 |
| | Acts and Regulations..... | 182 |
| | Books..... | 183 |
| | Cases..... | 184 |
| | Foreign Cases..... | 187 |
| | Foreign Legislation..... | 187 |

| | |
|--|-----|
| International Documents..... | 188 |
| Journal Articles..... | 188 |
| Loose-Leaf Publications..... | 193 |
| Other..... | 194 |
| South African Law Reform Commission..... | 194 |
| Theses and Dissertations..... | 194 |
| Websites..... | 195 |

ABSTRACT

The aim of this dissertation is to establish if the unmarried father has been placed in a better position regarding his rights to his child with the advent of the Children's Act 38 of 2005. Prior to the commencement of the Children's Act a number of different sets of legislation encompassed the unmarried father's position. The unmarried father could not automatically acquire any rights to his child and had to prove that it would be in the child's best interests to be allowed contact.

The study was done on the basis of an analysis of the interaction of the unmarried father's rights with the child's rights, as well as the interaction of their rights with the Constitution. An analysis was also made of the manner in which the Bill of Rights in the Constitution should be applied with respect to the relationship between parents, their children and the state. From the study it was found that the unmarried father's rights interlink closely with those of his child and the state. It was established that the Bill of Rights must be applied both horizontally and vertically and that the primary duty rests on the parents and only passes to the state if the parents are unable to perform their primary duties to the child. It was further established from the study that a limitation on the parent's right to equality is only justified in terms of section 36 of the Constitution by the child's overriding right to have meaningful relationships with both parents.

A comparison was made with the relevant legislation of some African and non-African countries to establish if South Africa could learn something from their child law legislation. An analysis was also done of those sections of the Children's Act that interact with section 21. From this analysis it was clear that many sections and phrases in the Children's Act are unclear, undefined and open to interpretation. In this regard certain amendments to the Children's Act are suggested in the study.

It is submitted in this study that even though the Children's Act codified legislation pertaining to children and the unmarried father may acquire parental responsibilities and rights, the improved position is superficial and subject to obstacles. The unmarried father needs to fulfil certain requirements in order to acquire his parental responsibilities and rights, as provided for in section 21(1). One of the main

problems of this section is that it does not provide for any form of proof to be provided to the unmarried father to confirm or indicate that he has acquired responsibilities and rights. Even though the mother has these rights simply because of her biological link to the child, she is hardly ever placed in the position where her parental responsibilities and rights are questioned by third parties. This is not the position with the unmarried father. He is firstly placed in a disadvantaged position because he has no way to show that he is the holder of rights and secondly he is being discriminated against, simply because he is placed in this position.

It was concluded in this study that despite the improved position of unmarried fathers, their position has only *prima facie* improved and they really should be placed in the same position as mothers. It is submitted that if the same rights mothers have are also afforded to unmarried fathers, it would be to the benefit of their children and their right to parental care and family life.

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KEYWORDS

Adoption
Best interest
Care
Children's Court
Commitment
Contact
Exercising of parental rights
Family advocate
Guardianship
Limitation of rights
Mediation
Parental responsibilities and rights
Parenting plan
Section 18
Section 21
Section 22
Section 231
Section 24
Section 29
Unmarried father

A CRITICAL ANALYSIS OF SECTION 21 OF THE CHILDREN'S ACT 38 OF 2005 WITH SPECIFIC REFERENCE TO THE PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS

CHAPTER 1

THE CHILDREN'S ACT AND SOME CONSTITUTIONAL CONSIDERATIONS

1.1 Introduction

Since the Children's Act¹ became fully operational on 1 April 2010² it has provided for some interesting case law³ and developments⁴ related to the Act in different forums and can no longer be referred to as the "new" Children's Act.

¹ Act 38 of 2005.

² Initially only certain sections came into operation on 1 July 2007 under GN 13 of 2007 in GG 30030 of 2007-06-29 and the remainder of the Act on 1 April 2010 under GN R250 in GG 33067 of 2010-03-31.

³ For instance, in *HG v CG* 2010 3 SA 352 (ECP) the court mainly had to consider the best interests of children and analysed and applied ss 7, 10 and 31 of the Children's Act; *Chirindza v Gauteng Department of Health and Social Welfare* 2012 2 SA 208 (CC) 75, regarding children who have been removed to be brought to children's court for a review of temporary safe care in terms of ss 151 and 152; *C v Department of Health and Social Development, Gauteng* 2012 2 SA 208 (CC) 1, which concerns the confirmation of a declaration of constitutional invalidity of ss 151 and 152 of the Children's Act; *SS v Presiding Office, Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) where the court had to consider whether a foster care order was to be made if the child was without any visible means of support as envisaged in s 150(1)(a) and therefore a child in need of care. The phrase "visible means of support" was interpreted by the court.

⁴ Skelton "Severing the Umbilical Cord: A Subtle Jurisprudential Shift regarding Children and their Primary Caregivers" 2008 *CCR* 358 noted that *S v M (Centre for Child Law as Amicus Curiae)* developed child law significantly through its detailed description of the scope and application of s 28 of the Constitution dealing with the paramountcy of the best interests of the child. Skelton and Proudlock "Interpretation, Objects, Application and Implementation of Act" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 1-11 (n 1) noted that new laws such as the South African Schools Act 84 of 1996, the Housing Act 107 of 1997, the National Health Act 61 of 2003 and the Social Assistance Act 13 of 2004, which had an impact on children's rights, had been completed to provide a legislative framework for the realisation of the rights to education, housing, health care services and social services. The authors further said that the existence of a legislative framework assists in the realisation of the respective rights, as the roles and responsibilities of the relevant governmental and legislative powers are defined clearly and resources are allocated to implement the new laws. See also Robinson "Children's Rights in the South African Constitution" 2003 *PER* 11 for a discussion of children's rights to which he said they are entitled, not only as contained in s 28 of the Constitution, but also to all other rights in the Bill of Rights pertaining to them. He further said that in this regard the rights to equality, education, personal autonomy constructed from the rights to privacy, freedom of religion, expression and of association read together, are the most important.

In the years prior to the promulgation of this Act, the need to reform all acts and legislation related to children and to harmonise and consolidate these into one act became very clear. The challenge recognised in this regard was that a wide range of intersecting law, policies and principles would require review.⁵ This challenge is important for this study in order to indicate the imbalance between the position of the unmarried and the married father,⁶ regardless of the provisions in the Children's Act. The review mentioned above resulted in a challenge of *inter alia* the maternal preference rule (also referred to as the tender years rule or doctrine). It had to yield before a more fundamental question as to which parent is best suited to care for the child.⁷ It also became clear that at most "mothering", on which the maternal preference rule is based, can be seen as a function that is not necessarily inherent to a woman.⁸ It became clear that parenting is a gender-neutral function.⁹

Unmarried fathers' rights to their children were also some of the rights that needed serious consideration for reform.¹⁰ This resulted in provision being made in the Children's Act for more responsibilities and rights of unmarried fathers than what they used to have in terms of common law. Discrimination

⁵ South African Law Commission (SALRC) Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 10 (hereafter referred to as Discussion Paper 103). The SALRC was formerly called the SALC. The name change became effective on 17 January 2003 in terms of s 5 of the Judicial Amendment Act 55 of 2002. See in this regard also Skelton and Proudlock *Commentary* 1-12.

⁶ The unmarried father did not have an inherent right to his child, prior to the commencement of the Children's Act. See in this regard the discussion in chapter 2.2 and 2.3 hereunder. Louw "The Constitutionality of a Biological Father's Recognition as a Parent" 2010 *PER* 156 is of the opinion that despite the increased recognition of the role the unmarried father can play in the life of his child by allowing him automatic parental responsibilities and rights in some instances, the position is still the same to the extent that the Act does not confer inherent parental responsibilities and rights on biological fathers on the same basis as on mothers. See also Louw *Acquiring Parental Responsibilities and Rights* (LLD Thesis 2009 UP) (hereinafter referred to as *Thesis*) who is of the same opinion. She discussed these imbalances throughout her thesis and concluded (476) that the Children's Act was not progressive enough in this regard.

⁷ Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) (hereafter referred to as *Gender Law*) 225. See also Schäfer *The Legal Position of Unmarried Father in the Adoption Process after Fraser v Children's Court, Pretoria North 1997 2 SA 261 (CC): Towards a Constitutionally-Sound Adoption Statute* (LLM Dissertation 2009 RU) 32.

⁸ *Van Der Linde v Van Der Linde* 1996 3 SA 509 (O) 514-515; Schäfer *The Law of Access to Children* (2007) (hereafter referred to as *Law of Access*) 29.

⁹ Barrie "The Best Interest of the Child: Lessons from the First Decade of the New Millennium" 2011 *THRHR* 134.

¹⁰ Prior to the commencement of the Children's Act, unmarried fathers did not have an inherent right of access to their children. See also chapter 2 hereunder.

based on a child's birth status has consequently been diminished.¹¹ The move towards equal parenting resulted in more equality in fundamental parental rights.¹²

The results of the reform eventually led to the Children's Act¹³ and Child Justice Act.¹⁴ All of the archaic acts and legislation related to children in South Africa have been repealed.¹⁵ The Children's Act adopted a more holistic approach, as matters pertaining to children more often involved a variety of practitioners and professionals.¹⁶ However, despite the comprehensive scope of the Children's Act, the family advocate will continue to operate under the terms of the Mediation in Certain Divorce Matters Act.¹⁷ The Divorce Act¹⁸ and the Recognition of Customary Marriages Act¹⁹ will still deal with and regulate the granting and subsequent amendment, variation and rescission of access (contact) orders made upon divorce.²⁰

¹¹ Buthelezi "A Missed Opportunity to Settle the Law on DNA Testing in Paternity Disputes – YD (*now M*) v LB 2010 SA 338 (SCA)" 2011 *Obiter* 484.

¹² Bonthuys and Albertyn *Gender Law* 225. However, it is submitted (in agreement with Louw 2010 *PER* 195) that this has not been successfully achieved, as the unmarried father only acquires parental responsibilities and rights once he has met the criteria prescribed in s 21 and does therefore not acquire the rights on the same basis as the biological mother. In this regard also see chapters 1.3.3 and 2.3 hereunder. See also chapter 1.3.2 for a discussion of the limitation of the father's constitutional rights regarding his child.

¹³ 38 of 2005.

¹⁴ 75 of 2008.

¹⁵ Under GN 13 of 2007 in GG 30030 of 2007-06-29 the repealed Acts are: the whole Children's Act 33 of 1960, s 1 of the General Law Further Amendment Act 93 of 1962, the whole of the Age of Majority Act 57 of 1972, the whole Child Care Act 74 of 1983, the whole of the Children's Status Act 82 of 1987, s 4 of the Prevention of Family Violence Act 133 of 1993, the whole of the Guardianship Act 192 of 1993, the whole of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 and the whole of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

¹⁶ Boezaart "Preface" in Boezaart (ed) *Child Law in South Africa* (2009) xxiii.

¹⁷ 24 of 1987. This Act has not been repealed in schedule 4 of the Children's Act. This Act amplifies and makes provision for mediation as well as for investigations and recommendations by the family advocate regarding the best interests of the child.

¹⁸ 70 of 1979. S 6 deals with the safeguarding of the interests of dependent or minor children. This Act has also not been repealed in schedule 4 of the Children's Act. The Divorce Act also still refers to the old terminology of custody and access. See chapter 5 hereunder for a further discussion of the terminology and the use thereof in the Divorce Act.

¹⁹ 120 of 1998. This Act was also not one of the Acts that had been repealed in schedule 4 of the Children's Act. S 8(3) of this Act, which deals with the dissolution of marriages, provides that s 6 of the Divorce Act 70 of 1979, which deals with the safeguarding of the child's best interest, shall be applicable on dissolution of the marriage. It provides that the Mediation in Certain Divorce Matters Act 24 of 1987 is also applicable.

²⁰ S 8 regulates rescission, suspension and variation of orders and provides that a maintenance order, or an order in regard to the custody or guardianship of, or access to a child, made in terms of the Divorce Act, may at any time be rescinded or varied or, in the case of a maintenance order,

The impact of the Constitution²¹ is also noted, as it reshaped the understanding of what constitutes a family,²² what protection families should be afforded and the relationship between family members, including children. The constitutionally entrenched rights to equality, human dignity, privacy and children's rights have underpinned an ongoing revision of key areas of family law, regardless of the absence of provisions²³ that directly protect the rights of families.²⁴

1.2 The Children's Act

The Act recognises in the preamble the state's international and constitutional duty to the child to respect, promote and fulfil the child's rights. The state's responsibility in this regard is therefore very important in relation to these duties.²⁵ The protection of these rights²⁶ leads to a corresponding improvement in the lives of other sections in the community, as it is neither desirable, nor possible to protect children's rights in isolation from their families and communities. The rights are interrelated and interdependent on one another.²⁷ By implication, the Act is thus committed to improve the rights of those adults entrusted with the care of children²⁸ as well.

or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefore. See also Schäfer *Law of Access* 50.

²¹ Constitution of the Republic of South Africa, 1996. Hereinafter referred to as "the Constitution" in all text and footnotes. The impact is *inter alia* made by s 28 dealing with children's rights and also s 36, which deals with the limitation of rights. S 28, for instance, has been mirrored in the preamble of the Children's Act. Also refer to chapter 1.3.2 hereunder for a discussion of the limitation and interaction of these constitutional rights with the Children's Act 38 of 2005.

²² Robinson 2003 *PER* 19 and further, discussed the family rights of the child and he said that the protection of the family as institution should have been the focal point of s 28(1)(b) of the Constitution, which provides that every child has the right to family or parental care, or to appropriate alternative care when removed from the family environment.

²³ The right to family life was deliberately omitted in the Bill of Rights because of each family's unique functioning, constitution and dissolution in a multi-cultural, multi-faith society; see also *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) par 99.

²⁴ Sloth-Nielsen and Van Heerden "The Constitutional Family: Developments in South African Family Law Jurisprudence under the 1996 Constitution" 2003 *IJLPF* 122.

²⁵ Skelton and Proudlock *Commentary* 1-21.

²⁶ The right in respect of the child to respect, promote and fulfil the child's rights.

²⁷ Examples of interdependent rights can be found in cases such as *Government of South Africa v Grootboom* 2001 1 SA 46 (CC) par 77 where the court said that there is an obligation on the State to provide shelter to children who are removed from their families, although the Constitution does not create any primary state obligation to provide shelter to parents on demand; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) where the court had to consider if the child's best interests would be served if the primary caregiver was jailed. Sachs J in par 26 quoted from

The long title of the Act *inter alia* gives effect to certain rights of children as contained in the Constitution. Where children's rights are entrenched in the Constitution, those rights are enforceable and do not need to be contained in legislation. Further legislation will have to be interpreted in a way that is consistent with the Constitution.²⁹ When principles or rights that are already contained in the Constitution are embodied in legislation as well, it has the advantage of giving that Act the "appropriate spirit". This will then provide a framework for interpretation by the judiciary and practitioners.³⁰ Often this framework has proven to be insufficient. Some interpretation difficulties have already posed challenges. Specific problems stemmed, for example, from the interpretation of section 21,³¹ because no definition is provided in the Act of a permanent life-partnership.³² Several questions are also raised regarding what is meant by "contributions in good faith"³³ and what "payments in good faith" are. To provide that the child's best interests should be taken into consideration in an attempt to provide a possible solution would not suffice, as it may be applied subjectively and it would be difficult to measure. It would also not specifically assist with interpretation of the above specific examples. The application of the best interest standard will also in some instances limit the father's constitutional rights.³⁴

the case of *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) par 36 in emphasising that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.

²⁸ Skelton and Proudlock 1-21; Louw *Thesis* 13.

²⁹ In terms of s 8 of the Constitution, the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a natural or a 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. When applying a provision of the Bill of Rights to a natural or juristic person in terms of s 8(2), a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right, in order to give effect to a right in the Bill and it may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1). See *Central Authority v Reynders* 2011 2 SA 428 (GNP) par 13, 26 where Fabricius J said that the constitutional imperative of the child's best interest should be considered and given effect to. Also see SALRC Issue Paper 13, Project 110, *The Review of the Child Care Act*, First Issue Paper, April 1998 (further referred to as First Issue Paper 13) par 3.8.

³⁰ SALRC First Issue Paper 13 par 3.9.

³¹ Act 38 of 2005.

³² S 21(1)(a). See chapter 5.1.1.2 for a discussion hereof.

³³ S 21(1)(b)(ii) and (iii). Also see chapter 5.

³⁴ See also the further discussion in this chapter.

In search of a solution the courts will often be approached for clarity. In the case of *Carmichele v Minister of Safety and Security*,³⁵ it was said that judges should be mindful in exercising their power to develop common law and that the major engine for law reform is the legislature and not the judiciary. It was also noted in the concurring judgment of Sachs J³⁶ in *Du Plessis v De Klerk*³⁷ that the role of the courts is not to usurp the functions of the legislature, but to scrutinise the legislation promulgated and enacted by the legislature. The courts should therefore not establish new, positive rights and remedies on their own. Skweyiya J in *C v Department of Health and Social Development, Gauteng*³⁸ pointed out that how a court exercises its duties to remedy the constitutional invalidity of a statute, calls for a degree of restraint.³⁹ The extent of restraint will however be largely determined by the facts and circumstances of each case.⁴⁰ It is then submitted that clarity on certain aspects open for interpretation will therefore have to come from the legislator. Furthermore, as it is not common law being reformed, development of acts by the judiciary will have to assist in order to clarify uncertainty and to interpret those sections that cause confusion.

Chapter one of the Children's Act deals with the interpretation, objects, application and implementation of the Act. Section 1 specifically deals with the interpretation of the Act and contains an array of definitions. It also deals with the terminology "custody" and "access", to which different terms have

³⁵ 2001 10 BCLR 995 (CC) par 36.

³⁶ He concurred with the majority ruling of Kentridge AJ.

³⁷ 1996 3 SA 850 (CC) par 181.

³⁸ 2012 2 SA 208 (CC) 1 par 44. The judge also noted in par 43 that one should be wary of the separation of powers in South Africa's constitutional democracy when considering constitutional invalidity.

³⁹ 2012 2 SA (CC) 31 par 50-51.

⁴⁰ Sachs J said in *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) par 15 that statutes must be interpreted and the common law developed. It should however be done in such a way that that it favours protecting and advancing the interests of children.

been assigned, namely “care” and “contact”.⁴¹ Both these terms are also defined in section 1.⁴²

In the object clause⁴³ details are provided of the exact rights for which the Act aims to provide. These rights are *inter alia* to promote and strengthen families, to give effect to certain constitutional rights of children⁴⁴ and to generally promote the protection, development and well-being of children. Bosman-Sadie and Corrie⁴⁵ note that it is striking that the promotion of the preservation and strengthening of families was mentioned as the first object in the list⁴⁶ provided in the Act. They reason that it appears that there has been a paradigm shift in the Act in that state intervention is reduced in family relationships. The Act recognises that the family is the best place for a child to grow up and develop to his or her full potential.⁴⁷ This can be compared to children’s rights as set out in section 28(1)(b) of the Constitution.⁴⁸

Section 2(b)(ii) of the Act, which gives effect to children’s rights to social services, stands in relation to section 28(1)(c) of the Constitution, which

⁴¹ S 1(2). Judgments regarding the use of this terminology have already been handed down. In *J v J* 2008 6 SA 30 (C) par 25 where the court referred to and applied s 1(2) of the Children’s Act dealing with the new meanings assigned to the terms “custody” and “care”. In *WW v EW* 2011 6 SA 53 (KZP) Rall AJ (par 25-26) followed the interpretation of the court in the *J v J* case and said that “custody” and “access” had (albeit clumsily) been equated to “care” and “contact” respectively. See also Skelton and Proudlock *Commentary* 1-29.

⁴² Heaton “Parental Responsibilities and Rights” in Davel and Skelton (eds) *Commentary on the Children’s Act* (2007) 3-5 notes that the term “care” in terms of the definitions in s 1, appears to be wider than the term “custody”, as it also provides for the duty of support and elements of what was traditionally called “access” are now known as “contact”. She further noted that “contact” corresponds with the common law aspect of “access”, as it refers to maintaining a personal relationship with the child, as well as communicating with the child on a regular basis. Also see chapter 4 below for a further discussion hereof.

⁴³ S 2 Act 38 of 2005.

⁴⁴ S 2(b) of the Children’s Act lists for instance family care, social services, protection from maltreatment, neglect, etc. and that the child’s best interests are of paramount importance in every matter concerning that child. Other objects the Act aims to achieve are listed further in s 2.

⁴⁵ Bosman-Sadie and Corrie *A Practical Approach to the Children’s Act* (2010) (hereafter referred to as *A Practical Approach*) 15. The reason why it appears striking is that there is a paradigm shift in the Act in that state intervention is reduced in family relationships. The resemblance with the wording of the Constitution and the first object in s 2 indicates emphasis on the promotion of the protection of children and maintaining structures and resources to do so.

⁴⁶ Refer to the object clause in s 2 of the Children’s Act 38 of 2005 for a list of the objects the Act aims to promote and give effect to.

⁴⁷ Ss 2(a) and 2(b)(i). See also Bosman-Sadie and Corrie *A Practical Approach* 15.

⁴⁸ This section states that every child has the right to family care, or to appropriate alternative care when removed from the family environment. Bosman-Sadie and Corrie *A Practical Approach* 15; Skelton and Proudlock *Commentary* 1-31.

provides that every child has the right to basic nutrition, shelter, basic health care services and social services. The Constitution further states that a child is to be protected from maltreatment, neglect, abuse or degradation.⁴⁹ This correlates with section 2(b)(iii) of the Children's Act, which uses the same wording as that contained in the Constitution. The Children's Act in section 2(b)(iv) also uses the same wording as the Constitution,⁵⁰ where reference is made to the fact that the best interests of a child are of paramount importance in every matter concerning the child.

Although not expressly mentioned, there are also other constitutional rights that partially fall under the scope of the Children's Act owing to the inclusion of substantive sections related to these rights in the Act.⁵¹ These rights include the right to shelter,⁵² protection from child labour,⁵³ and the child's rights to a legal practitioner at state expense in civil proceedings if substantial injustice would otherwise result.⁵⁴ The child's rights to equality and not to be discriminated against are also promoted in several sections of the Act.⁵⁵

It further appears from the reading of sections 4⁵⁶ and 5⁵⁷ of the Children's Act that these sections emphasise the state's duty to guide and achieve the implementation of the Act. These duties are in addition to the duties and responsibilities as set out in the preamble to the Act. It is submitted that by the introduction of sections 4 and 5, the state's duties are reinforced and it gives weight to the principle that children's best interests are of paramount

⁴⁹ S 28(1)(d).

⁵⁰ S 28(2).

⁵¹ S 28(1)(c) providing for the right to shelter corresponds with chapter 13 in the Children's Act providing for alternative care for children in child and youth care centres. Ss 28(1)(e) and (f) protecting children from child labour correspond with s 150(2)(a) of the Children's Act requiring an investigation and support to a child who is a victim of child labour. S 28(1)(h) dealing with the child's right to a legal practitioner at state expense if substantial injustice would otherwise result corresponds with s 55 of the Children's Act. See also Skelton and Proudlock *Commentary* 1-31.

⁵² S 28(1)(c) of the Constitution.

⁵³ S 28(1) and 28(1)(f) of the Constitution.

⁵⁴ S 28(1)(h) of the Constitution.

⁵⁵ Skelton and Proudlock *Commentary* 1-31.

⁵⁶ S 4 deals with the implementation and realisation of the objects of the Act.

⁵⁷ S 5 provides that in order to achieve the implementation as provided for in s 4 above, there should be co-operation in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children.

importance.⁵⁸ The fact that there are sections⁵⁹ in the Children's Act specifically providing for implementation, emphasises the best interest principle as well.⁶⁰ In the Act the factors were listed to be taken into consideration when the child's best interest standard was relevant.⁶¹

Chapter two of the Children's Act deals with general principles. Section 6 makes specific provision for principles on how decisions should be made regarding children and guides the implementation of applicable legislation and proceedings, actions and decisions in relation thereto. Specific provision⁶² is made for the child's rights as enshrined in the Constitution.⁶³ These rights should be respected, protected, promoted and fulfilled, subject to lawful limitation⁶⁴ and the child's best interests.⁶⁵ Provision is made that the child's family must be given the opportunity to express their views in any matter concerning the child.⁶⁶ Their views are however subject to the child's best interests. The importance of the value of a family and family members is confirmed.⁶⁷ In any matter concerning the child an approach conducive to conciliation should be followed and a confrontational approach should be avoided.⁶⁸

⁵⁸ S 28(2) of the Constitution.

⁵⁹ Ss 4 and 5.

⁶⁰ S 2(b)(iv) also states that effect is to be given to the best interest principle as provided for in the Constitution.

⁶¹ S 7(1)(a)-(n). See also Heaton "An Individualised, Contextualised and Child-centred Determination of the Child's Best Interests, and the Implications of such an Approach in the South African Context" 2009 *JJS* 6-9 for a discussion of the factors listed. The author also pointed out that each individual case or situation had to be considered independently in the light of the effect that the individual child's circumstances are having, or will possibly be having on the child.

⁶² S 6(2)(a).

⁶³ Chapter 2 setting out the Bill of Rights.

⁶⁴ In *Central Authority v Reynders (LS intervening)* 2011 2 SA 428 (GNP) par 26.2 Fabricius J specifically referred to these rights in a discussion of the rights of the child. The limitation is dealt with in s 36 of the Constitution. Also see the discussion in 1.3.

⁶⁵ The child's best interest standard is provided for in s 7 of the Children's Act.

⁶⁶ S 6(3).

⁶⁷ Boezaart "General Principles" in Davel and Skelton (eds) (2007) *Commentary on the Children's Act* 2-4.

⁶⁸ S 6(4). In the case of *FS v JJ* 2011 3 SA 126 (SCA) par 54 the court said that s 6(4) should be applied, that an approach conducive to conciliation and problem-solving should be followed and that a confrontational approach should be avoided. See also *MB v NB* 2010 3 SA 220 (GSJ) par 49, 53 where the court said that mediation should be used instead of litigation. See also Boezaart *Commentary* 2-4. Also refer to chapter 2.4 for a discussion of mediation related to the Children's Act.

It is also in this chapter that specific provision is made for the application of the paramountcy of the child's best interest.⁶⁹ Provision is made that the rights the child has in terms of the Children's Act, supplement the rights that the child has in terms of the Bill of Rights,⁷⁰ which rights must be respected, protected and promoted.⁷¹

Over and above the other sections in this chapter dealing with children's rights, provision was also made for responsibilities of children to family, community and the state, depending on the child's age and ability.⁷² Boezaart⁷³ is of the opinion that the responsibilities placed on the child would maintain a balance with the rights provided for. In this chapter the age of majority, which used to be twenty-one years,⁷⁴ was lowered to eighteen years.⁷⁵

⁶⁹ S 9. This principle is also entrenched in s 28(2) of the Constitution. In *S v M* 2008 3 SA 232 (CC) par 24, the court said that the inherent flexibility of the child's best interest standard is not a weakness. The court said that to apply a pre-determined formula for the sake of certainty, would be contrary to the best interests of the child. In *FS v JJ* 2011 3 SA 126 (SCA) par 49 the court said that the ultimate consideration was the child's best interests and how these were to be served. Also refer to par 32 and 43 where the court referred to the fact that the child's best interests need to be served. Also see chapter 3 for references to the paramountcy principle.

⁷⁰ S 8(1). The Bill of Rights as contained in chapter 2 of the Constitution.

⁷¹ S 8(2). The application was also confirmed in *Shange v MEC for Education, KwaZulu-Natal* 2012 2 SA 519 (KZD) par 23. In this case the court had to consider whether or not to grant condonation for the delivery of the prescribed notice to the MEC within the prescribed 6 months. The court also had to consider whether or not the claim under the main action had prescribed, or not, as the child (plaintiff) had reached majority in terms of the Children's Act, whereas he would still have been a minor under 21 years in terms of the repealed Age of Majority Act 57 of 1972. The court was of the view (par 28) that the legislature must have been aware when lowering the age of majority that it did not affect the child's right to a claim for damages under the Age of Majority Act. The court was of the view that once the date by which the claim had to be instituted had been established, it remained immutable and any change in the child's status would not affect that date. It was further said (par 32) that the Children's Act must be read in a manner that does not interfere with any accrued rights of the child.

⁷² S 16.

⁷³ Boezaart *Law of Persons* (2010) 54.

⁷⁴ Age of Majority Act 57 of 1972. This Act was repealed by schedule 4 of the Children's Act from 1 July 2007. The age of majority was one of the points discussed under the heading "The committee's vision" of the SALRC First Issue Paper 13 par 2.7. The UNCRC defines a child as every person below the age of eighteen years (18) years, unless the national law of a particular country allows a person to attain majority status at a younger age. On the significance of the wording hereof see Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Law" in Boezaart (ed) *Child Law in South Africa* 311 where the author discusses the interaction and meaning of the wording in the UNCRC in relation to the age of majority. See also chapter 3.1 for further reference to the age of majority.

⁷⁵ S 17.

1.3 The Interaction of the Unmarried Father's Rights with the Constitution

The Children's Act⁷⁶ no longer refers to terminology such as "legitimate" or "illegitimate" or "extra-marital", thus detaching the labelling of children in a specific way from their parents' marital status. The child's status is therefore not defined by the father's marital status⁷⁷ or the child's birth status.⁷⁸

However in terms of the Children's Act a distinction is made between the acquisition of parental responsibilities and rights of married⁷⁹ and unmarried fathers.⁸⁰ From a reading of section 21 it is clear that the unmarried biological father does not have the same rights as the married biological father.⁸¹ The unmarried father's acquisition of parental responsibilities and rights is dependent on whether or not he fulfilled the criteria as contemplated in section 21(1). Only in the event that unmarried fathers "pass the screening test"⁸² will the law allow them to have parental responsibilities and rights.⁸³

To deny a child the right to have both parents recognised by law on an equal basis could be seen as unfair against the child and a limitation of the child's rights to parental care.⁸⁴ This then means that the child's right to contact with a parent is increasingly regarded as the right of the child. If children do not have an inherent right to the contact, care or guardianship of their natural fathers, it might result in disregard of the child's rights and in particular parental care, human dignity and equality. This will then again have an

⁷⁶ 38 of 2005.

⁷⁷ Heaton *Commentary* 3-3. For a discussion on the position of the father prior to the commencement of the Children's Act, see chapter 2.

⁷⁸ Bonthuys and Albertyn (eds) *Gender Law* 227 note that the focus has shifted from the marital status of the parents to the relationship between parents and children. Pantazis "Access Between the Father and his Illegitimate Child" 1996 *SALJ* 15, writes that as long as parents are called illegitimate, their children will also be illegitimate and children will be discriminated against because of the stigma of being categorised.

⁷⁹ S 20 provides that the married father has full parental responsibilities and rights if he is married or was married to the mother at the time of birth, conception or any time between birth and conception.

⁸⁰ S 21 provides that the unmarried father will automatically acquire full parental responsibilities and rights, once he has complied with the criteria as contemplated in s 21(1).

⁸¹ Skelton and Carnelley (eds) *Family Law in South Africa* (2010) 246.

⁸² As referred to by Louw 2010 *PER* 165.

⁸³ Louw 2010 *PER* 165.

⁸⁴ Louw 2010 *PER* 184; Mailula "Taking Children's Rights Seriously: Access to, and Custody and Guardianship of a Child Born out of Wedlock" 2005 *Codicillus* 26.

influence on the child's best interests.⁸⁵ Contact between the unmarried father and his child should therefore not just be a unilateral right, but rather a continuous relationship between him and his child.⁸⁶

1.3.1 *Vertical or Horizontal Application?*

In order to consider an unmarried father's rights, chapter two of the Constitution (which contains the Bill of Rights) is to be applied to his position. The Constitution stipulates that everyone has inherent dignity that has to be respected,⁸⁷ and that all people are equal before the law.⁸⁸ Equality implies *inter alia* that the state may not unfairly discriminate either directly or indirectly against anybody.⁸⁹ In terms of section 8, the Bill of Rights is applicable to all law and determines that the legislator, executive, judiciary and all organs of state are bound by the Bill of Rights.

The question is then whether this provision only has an effect on the relationship between the state and the individual⁹⁰ or also among individuals.⁹¹ In the case of *Jooste v Botha*⁹² Van Dijkhorst J indicated that section 28(1)⁹³ is primarily vertically applicable⁹⁴ and that it is only the state

⁸⁵ Mailula 2005 *Codicillus* 17.

⁸⁶ In *V v V* 1998 4 SA 169 (K) 189E the court said that the more extensive the relationship between the parents, the greater the benefit to the children is likely to be.

⁸⁷ S 10.

⁸⁸ S 9(1).

⁸⁹ S 9(3) mentions the specific grounds on which discrimination should not be allowed, namely race, gender/sex, pregnancy, mental state, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth.

⁹⁰ The vertical application of the Constitution.

⁹¹ The horizontal application of the Constitution.

⁹² 2000 2 SA 199 (T) 207H. In this case compensation was claimed by an 11-year-old boy from his father for *iniuria* as the father did not want to render the child love, attention and interest. The boy's claim was primarily based on ss 28(1)(b) and 28(2) of the Constitution. The father did not show any interest in the child. It was claimed in the alternative that there was a duty on the unmarried father to afford the child love, attention and interest in terms of the Constitution in a way a child should normally enjoy, alternatively that the unmarried father had a duty to protect his child's welfare, which would result in him providing his child with love, affection and attention. The father in this case excepted to the claim and argued that there was no cause of action. The exception was upheld as the court found that there was neither a common law nor statutory right allowing a child to be loved, cherished and attended to by a parent and that a bond of love is not a legal bond. The boy's claim was therefore unsuccessful. See the criticism of authors against this case in n 166, with which I associate.

⁹³ Of the Constitution.

⁹⁴ Application between individuals. Van Dijkhorst J (207H) distinguished between the position of a non-custodian parent of a child born in wedlock and the natural father of a child born out of

that can conceivably give full effect to its provisions.⁹⁵ He went further to state that section 28(1)(b) sets out vertical socio-economic rights against the state.⁹⁶ This clearly indicates a vertical application of section 28(1)(b). In *Government of the Republic of South Africa and Others v Grootboom and Others*⁹⁷ it appears that section 28(1)(b) also has vertical application. However, the court noted that there was no obligation upon the state to provide shelter to children and through them, recognise their parents' rights⁹⁸ in terms of section 28(1)(c).⁹⁹ Section 28(1)(c) did therefore not create separate and independent rights for parents and their children.¹⁰⁰ Yacoob J in the *Grootboom* case went further to argue that section 28(1)(c) is primarily imposed on parents or family and only in the alternative on the state. No primary obligation is therefore created for the state if children are being cared for by parents.¹⁰¹ However, the state needs to provide the necessary infrastructure to enable the parents or family to afford the children the protection as contemplated in section 28(1).¹⁰² The judgment in *Grootboom* clearly suggests that the rights in terms of section 28(1)(b)¹⁰³ are primarily horizontally applied, but that the obligation to fulfil the rights as contemplated in section 28(1)(c) is regarded as resting primarily upon parents.¹⁰⁴ The

wedlock, who does not have custody. He reasoned that what s 28(1)(b) envisages is that the state is obliged to establish, safeguard and foster a child who is in the care of somebody who has custody of him/her. He argued that the state may not interfere with the non-custodian, legitimate parent and the natural father of the illegitimate child (the terminology of the case was used here).

⁹⁵ 207H. Louw *Thesis 27* also mentions the different applications of s 28(1)(b). However she incorrectly refers to par 3.2 of SALRC Discussion Paper 103, whereas it should have been par 3.4. The specific reference in the *Jooste* case where the vertical application of s 28 was mentioned is also not to 195G-F, but indeed 207H.

⁹⁶ 209C.

⁹⁷ 2001 1 SA 46 (CC). The Constitutional Court had to consider the right to housing in terms of s 26 of the Constitution in relation to children's right to shelter, in terms of s 28(1)(c) of the Constitution. The court *a quo* held that there is an obligation on the state to provide shelter to children if their parents are unable to do so, which indicated that s 28(1)(c) has horizontal application. The Constitutional Court however overturned this decision.

⁹⁸ The right to basic nutrition, shelter, health care services and social services.

⁹⁹ Par 79.

¹⁰⁰ Par 74.

¹⁰¹ Par 77.

¹⁰² Par 78.

¹⁰³ Of the Constitution. The rights are the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

¹⁰⁴ SALRC Discussion Paper 103 par 3.4, 11. See also Sloth-Nielsen "Too Little? Too Late? The Implications of the *Grootboom* Case for State Responses to Child-headed Households" 2009 *LDD* 113 for a discussion of the implications of the rights in the *Grootboom* case in relation to the Constitution and Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 2001 *SAJHR* 210 where the author analysed the socio-economic rights of children and the possible

application of the rights in terms of the Constitution is thus between the parent and the child and not vertically, between the state and the child.¹⁰⁵

Mokgoro J in *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)*¹⁰⁶ held that while the obligation to ensure that all children are properly cared for is an obligation that the Constitution firstly imposes on the parents, there is also an obligation on the state to create an environment that enables the parents to do so.¹⁰⁷ The parents need to be provided with the necessary legal and administrative infrastructure to ensure that children are accorded the protection as contemplated by section 28.¹⁰⁸

From the above, it is clear that the Bill of Rights is intended to be applied both horizontally and vertically and there is room for both the direct and indirect application of the Bill of Rights on the horizontal level.¹⁰⁹ The primary duties rest on the parents and pass to the state only when the parents are unable to perform such duties.¹¹⁰ In this regard children's rights would therefore mostly be horizontally applied between the parent and the child before being

implications the *Grootboom* case might have for the drafting of child protection legislation. Also refer to Heaton *South African Family Law* (2010) 273 for a discussion hereof.

¹⁰⁵ SALRC Discussion Paper 103 par 3.4 (11) also opined that the *Grootboom* judgment held a contrary view on whether s 28(1)(b) is primarily of horizontal or vertical application. Louw *Thesis* 27 mentions that the SALRC Discussion Paper 103 noted that the *Jooste* case contradicts the *Grootboom* case regarding the application of s 28. The child's right to parental care should not be confined to natural parents or only custodial (now to be read as care-giving) parents, to the exclusion "non-custodial" (non-care giving) parents or other parental care. See also Heaton *South African Family Law* 274 where the court's view in the *Jooste* judgment that a child is not entitled to parental care, was criticised as incorrect as there is nothing in s 28(1)(b) of the Constitution that suggests the limitation the court applied. The court in *Heystek v Heystek* 2002 SA 754 (T) 757C-D, held an opposite point of view than in the *Jooste* case, in that parental care is not confined to natural parents. It also includes entitlement to care from a non-care-giving parent.

¹⁰⁶ 2003 2 SA 363 (CC).

¹⁰⁷ Par 24.

¹⁰⁸ Par 24 with reference to *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 78. Also refer to Louw *Thesis* 26-27 for a discussion on the vertical and horizontal application of the Constitution.

¹⁰⁹ Boezaart *Law of Persons* 9. See also *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC) for a comprehensive discussion by Kentridge AJ of the direct and indirect application of the Bill of Rights, as well as the horizontal and vertical application thereof in the Constitution.

¹¹⁰ Bekink " 'Child Divorce': A Break from Parental Responsibilities and Rights due to the Traditional Socio-cultural Practices and Beliefs of Parents" 2012 *PER* 183. She mentions that the duties imposed operate with an uneasy triangular relationship between the child, the parents and the state; also refer to SALRC Discussion Paper 103 at 16 where it was mentioned as one of the goals that a legislative and policy environment is to be provided by the state to support the family.

vertically applied between the child and the state.¹¹¹ Cockrell¹¹² submits that the Constitution does not allow for a full-scale horizontal application and that it shies away from this application in at least two respects. The first is that the Constitution endorses a strategy of compromised direct horizontality, as only certain constitutional rights will apply directly against private persons.¹¹³ The second is that the Constitution straddles the application of both direct and indirect horizontal application against a private person in terms of section 8(2) and it is common law that needs to be developed or applied to give effect to any inconsistency in respect of the Constitution.¹¹⁴

A different point of view was however formed by Robinson, Horsten, Human and Coetzee.¹¹⁵ They are of the opinion that as the Constitution is applicable to all law, it will result in the Constitution having horizontal application.¹¹⁶ It is submitted that this view is too simplistic. The Constitution cannot simply be horizontally applied between parents and children. If the discussion in the *Grootboom* case¹¹⁷ and the views of the other authors herein are taken into consideration, it appears that there has to be a contributory (vertical application) duty on the state to provide the resources in terms of the Constitution as well.¹¹⁸

¹¹¹ Bekink 2012 *PER* 183 found support for this in the *Grootboom* case as well as another article she wrote: "Parental Religious Freedom and the Rights and Best Interest of Children" 2003 *THRHR* 246; Bosman-Sadie and Corrie *A Practical Approach* 23 are of the opinion that the provisions of the Constitution can be applied both horizontally and vertically.

¹¹² "Private Law and the Bill of Rights: A Threshold Issue of 'Horizontality'" in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (1998) 3A-16.

¹¹³ Cockrell referred to s 8(2) of the Constitution. Also refer to this author's discussion in explanation hereof to *Bill of Rights Compendium* 3A-8.

¹¹⁴ Refer in this regard to *Bill of Rights Compendium* 3A-18 n 4 for Cockrell's support for this argument.

¹¹⁵ *Introduction to the South African Law of Persons* (2008) 13.

¹¹⁶ These authors based their argument on a judgment of *S v Ntuli* 1996 1 SA1207 (KH), where the court stated that "differentiation does not *per se* amount to unequal treatment in the constitutional sense". See Robinson, Horsten, Human and Coetzee *Introduction to the South African Law of Persons* 13. Van der Vyver "Begripspresisering" in Van der Vyver and Joubert *Persone en Familiereg* (1991) 57 however said that in so far as the law of persons is applicable to differentiation between different groups of persons that need to be classified on the grounds of their race, gender or other factor, it may be said that the basic juridical principle is that all persons are to be treated evenly before the law. This principle is again intimately associated to the idea of justice. Justice then rather requires that the differentiation should be between different groups of people, instead of blindly equating them before the law.

¹¹⁷ 2001 1 SA 46 (CC).

¹¹⁸ In circumstances as already discussed above.

1.3.2 *Limitation of Constitutional Rights*

In order to consider the unmarried father's rights in terms of the Constitution, one needs to have regard to the interaction between sections 28¹¹⁹ and 36¹²⁰ of the Constitution. Section 36 of the Constitution states that:

- (1) The rights in the Bill of Rights may be limited 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 relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The above limitation has general application and must be applied to all parents equally. No distinction is therefore to be made between mothers and fathers and especially between married and unmarried fathers, provided that it is reasonable and justifiable,¹²¹ with certain factors being taken into account.¹²² Any conduct inconsistent with the Constitution¹²³ is invalid and denying an unmarried father a reasonable right to his child is as such also invalid. It is submitted that it may be reasonable for an unmarried father to claim that his rights to his child in terms of section 36 of the Constitution have been limited, if he is for instance not allowed contact rights. It will then be up to the mother of the child to show that the limitation of his rights is reasonable

¹¹⁹ These sections deal with the rights of and best interest of the child being of paramount importance.

¹²⁰ According to Boezaart *Law of Persons* 10, this section provides guidance in the process where one has to decide whether the discrimination was fair or not. It is also known as the "limitation clause".

¹²¹ Carpenter "Constitutionally Protected Rights for Parents" 2008 *TSAR* 409.

¹²² The factors are 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 a less restrictive means to achieve the purpose. Carpenter 2008 *TSAR* 409 discussed the limitations in terms of the Constitution in relation to the factors set out herein.

¹²³ S 2.

and justifiable and in the child's best interest.¹²⁴ Boezaart¹²⁵ is of the opinion that sections 9(3) and 9(5)¹²⁶ should be read together, as the latter creates a presumption that discrimination on the grounds as stated in section 9(3)¹²⁷ is unfair, unless the contrary is established. In order to establish whether discrimination in terms of the Constitution was fair, three questions need to be asked; the first is whether the differentiation amounts to discrimination; if so, whether the discrimination was unfair; and if so, whether it can be justified in terms of the section 36 limitation clause.¹²⁸

Section 36(1) thus provides that the rights contained in the Bill of Rights may only be limited to the extent that it is reasonable and justifiable in terms of the limitations as laid down in this section.¹²⁹ The courts are however required to interpret all legislation in the context of the provisions of the Constitution and with due regard to the constitutional context within which such legislation is set.¹³⁰

Buthelezi¹³¹ is of the opinion that the paramountcy of the best interest of the child principle should be viewed in the light of the limitation clause in section 36 of the Constitution. The fact that the child's best interests are paramount does not mean that this principle is absolute.¹³² These rights cannot serve as a trump to override the unmarried father's rights automatically, or mean that

¹²⁴ *YD (now M) v LB* 2011 All SA 501 (SCA) par 15 Lewis J also confirmed that constitutional rights may only be infringed if it is in the child's best interest.

¹²⁵ *Law of Persons* 10.

¹²⁶ This section states that discrimination on one or more of the grounds listed in s 9(3) is unfair, unless it is established that the discrimination is fair.

¹²⁷ The grounds of discrimination are referred to in n 89.

¹²⁸ As provided for in the Constitution. Albertyn and Goldblatt "Equality" in Woolman, Bishop and Brickhill (eds) *Constitutional Law of South Africa* 35-80 to 35-85, discussed if the discrimination can be justified based on Goldstone J who first summarised this test in *Harksen v Lane* 1997 4 SA 1 (CC) par 53. See also Bonthuys and Albertyn (eds) *Gender Law* 98-99 in this regard. Refer also to Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 273 where they offered an alternative approach to testing whether there had been unfair discrimination. The authors in the latter publication proposed some changes to the court's equality test in the *Harksen* case.

¹²⁹ Boezaart *Law of Persons* 10.

¹³⁰ *M v V (born N)* 2010 ZAWCHC 228 par 22.

¹³¹ 2011 *Obiter* 483.

¹³² *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) par 26. Khampepe J made the point in *S v The State (Centre for Child Law as Amicus Curiae)* 2011 (ZACC) par 21 - 22 that whether proper regard for the children's best interest has been considered, is a serious matter that strikes at the core of the administration of justice. He noted that it is a constitutional issue that goes beyond the interests of the parties (referring to the mother of the child in the matter).

his other constitutional rights are unimportant and may simply be ignored.¹³³ The paramountcy principle is to be applied in a meaningful way without unduly obliterating other valuable and constitutionally protected interests.¹³⁴ The fact that the child's interests are more important than anything else does not imply that everything else is unimportant.¹³⁵ In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*¹³⁶ Langa DCJ confirmed that section 28(2) of the Constitution is subject to reasonable and justifiable limitations in compliance with section 36¹³⁷ and that constitutional rights are mutually interrelated and interdependent.¹³⁸

Carpenter¹³⁹ submitted that it may be argued that the unmarried father's rights¹⁴⁰ are regarded as personality rights and should not be contingent on his "performance" as a parent. These rights may however be limited when the best interest of the child demands it. The limitation must however be in accordance with the constitutional criteria applicable to the limitation of any of his constitutional rights as contemplated in the limitation clause.¹⁴¹

¹³³ Bekink 2012 *PER* 191.

¹³⁴ *S v M (Centre for Child Law, Amicus Curiae)* par 25. Heaton *South African Family Law* 262 also said that rendering the child's best interests paramount does not mean that all other constitutional rights may simply be ignored or that limitations of the child's best interests are impermissible. Skelton 2008 *CCR* 343 noted that the court in *S v M* did not get entangled in a debate about the issues relating to the rights of the primary caregiver, but carefully focussed on the best interests of the child. This caused a discourse that centred on children's rights to family and parental care and to their rights to have their best interests given appropriate weight. Erasmus " 'There is Something you are Missing; What about the Children': Separating the Rights of Children from those of their Caregivers" 2010 *SAPL* (135) also submits that the rights of children in the *S v M* case were fully argued. His opinion was that this did not result in an entanglement of the children's rights with those of their mother.

¹³⁵ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) par 29.

¹³⁶ 2004 1 SA 406 (CC) par 54.

¹³⁷ Goldstone J in *Sonderup v Tondelli* 20001 1 SA 1171 (CC) par 27, wrote that any inconsistency with a provision of the Constitution would have to be justifiable under the provisions of s 36 of the Constitution, in order to be constitutionally valid. Also see Heaton *South African Family Law* 277.

¹³⁸ *De Reuck* par 45.

¹³⁹ "Constitutionally Protected Rights for Parents?" 2008 *TSAR* 402. The author considered the arguments of Sonnekus "*Meyer v Van Niekerk*" en "*Coetzee v Meintjies*" 1977 *TSAR* 81 and Scott "*Meyer v Van Niekerk*" en "*Coetzee v Meintjies*" 1977 *TSAR* 169. Sonnekus (whose approach Carpenter supports) and Scott both argued that parental interests could be categorised as personality rights. They however differed on what the object of the rights is. Sonnekus said the object of the right is the parent and Scott was of the view that the object is the child.

¹⁴⁰ The rights are the inherent right to maintain contact with his child, to interact with his child, to participate in the intellectual, moral and spiritual development of the child and in general to maintain an emotional bond with the child.

¹⁴¹ Carpenter 2008 *TSAR* 402. See also *Van Erk v Holmer* 1992 2 SA 636 (W) 649I-650A, where Van Zyl J (although criticised for his view; see chapter 2 below) mentioned that an unmarried father has

Even though the child's rights are extensively described and provided for in the Children's Act and in section 28 of the Constitution¹⁴² as of paramount importance,¹⁴³ it does not appear that the unmarried father's rights are expressly protected in the Constitution. It does seem as if the unmarried father enjoys indirect protection under section 10 of the Constitution, which stipulates that everyone has an inherent right to dignity, which is to be respected and protected.¹⁴⁴

The limitation of the parents' right to equality is currently justified by the child's overriding right to parental care, which in terms of the best interest standard is limited to committed parental care.¹⁴⁵ Louw¹⁴⁶ argues that the differential treatment of mothers and fathers regarding the acquisition of parental responsibilities and rights may not be constitutionality justifiable. In terms of the Children's Act it appears as if mothers are automatically presumed suitable to act in the child's best interest and as such they are automatically vested with full parental responsibilities and rights.¹⁴⁷ The unmarried father however needs to first "pass a screening test"¹⁴⁸ before acquiring responsibilities and rights to his child.¹⁴⁹ From a gender perspective, the

an inherent right to his child, which cannot be denied, unless if it is in the best interests of the child; it is not a contingent right, which is accorded the father only if it is in the best interests of the child.

¹⁴² See Heaton *South African Family Law* 278 where the uncertainty is discussed as to whether s 28(2) constitutes a separate, enforceable constitutional right, or whether it is a right only if it is applied in conjunction with s 28(1). It is also mentioned that there is uncertainty about whether it is a principle, an injunction or a legal rule. However, Goldstone J said in *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17, that s 28(2) must be interpreted to extend beyond the provisions of s 28(1) of the Constitution. The paramountcy principle therefore creates an independent right. See also Skelton "Constitutional Protection of Children's Rights" in Boezaart (ed) *Child Law in South Africa* (2010) 280.

¹⁴³ Regarding the paramountcy principle, see also *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *Sonderup v Tondelli* 2001 1 SA 1171 (CC).

¹⁴⁴ Louw 2010 *PER* 158 discussed the *lacuna* in South African law related to this. She came to the conclusion based on the judgment in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC). It is further noted that ss 20 and 21 of the Children's Act provide for parental responsibilities and rights of married and unmarried fathers, although they only provide for the circumstances under which the father has obtained responsibilities and rights and not the rights as such.

¹⁴⁵ As defined in ss 20 and 21 of the Children's Act; Louw 2010 *PER* 195.

¹⁴⁶ Louw 2010 *PER* 195 states that conferring full parental responsibilities and rights on both parents based on their biological link to the child, would meet the constitutional demands of substantive sex and gender equality, it would place the focus on the child's best interest and emphasise the importance of both parents for the child.

¹⁴⁷ S 19 Act 38 of 2005.

¹⁴⁸ In terms of s 21.

¹⁴⁹ Louw 2010 *PER* 165.

starting point should rather be the sharing of parental responsibilities and rights with the focus on the child's rights and the father's responsibilities.¹⁵⁰ Since gender is some of the discrimination grounds¹⁵¹ listed in the Constitution, the discrimination is presumed to be unfair, unless it can be justified in terms of the limitation clause.¹⁵²

In a nutshell, it can be said that rights are not absolute. They may be infringed for a compellingly good reason. A compellingly good reason is that such infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations.¹⁵³ Wolhuter¹⁵⁴ submits that an unmarried father should be allowed inherent rights that are dependent upon the existence of a social relationship with his child. This commitment should also encompass a commitment to share child-rearing¹⁵⁵ and he should bear the *onus* to prove that he has fulfilled the prerequisite of commitment in order to exercise his rights in relation to the child.

It is submitted that it appears as if the argument regarding the limitation of the father's constitutional rights and the child's best interests is a circular one. However, when one considers the fact that the child's best interests also include the right to have contact with his/her father, then the circle would be completed and stop with the child's best interests. Surely it should not be a question of whose rights weigh heavier in terms of the Constitution. It is further submitted that the question should rather be whose interests would be served best and it cannot be that of the father if his rights are weighed up against the best interests *and* rights of his child.¹⁵⁶ There is no room for decisions that impinge on a child's rights and the constitutionally protected

¹⁵⁰ Heaton "Family Law and the Bill of Rights" in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* 3C-67.

¹⁵¹ S 9(3) of the Constitution.

¹⁵² S 36 of the Constitution; Louw 2010 *PER* 165.

¹⁵³ Currie and De Waal (eds) *The Bill of Rights Handbook* (2005) 185.

¹⁵⁴ "Balancing the Scales – Access by a Natural Father to his Extra-marital Child" 1997 *Stell LR* 76.

¹⁵⁵ In *Fraser v Children's Court Pretoria North* 1997 2 SA 261 (CC) par 26 the court also recognised that the existence of a marriage has little to do with whether or not a father involves himself with his children. Marriage would therefore not guarantee commitment.

¹⁵⁶ In *P v P* 2002 6 SA 105 (N) 108 the judge noted that guardianship and custody should not be viewed as rights vesting in a parent, but rather duties imposed upon the parent.

best-interests principle plainly elevates the interests of the child above those of parents.¹⁵⁷

In conclusion it seems as though the limitation of parents' rights to equality is justified by the child's overriding right to parental care.¹⁵⁸ To confer full parental responsibilities and rights on both parents based on their biological link would in any event place the focus on the child's best interests, which would in return emphasise the importance of both parents for the child.¹⁵⁹

1.3.3 *Commitment versus Automatic Acquisition of Rights*

It is submitted that an unmarried father should also have parental responsibilities and rights from the outset and the acquisition thereof should not be dependent on certain requirements.¹⁶⁰ It should be vested in him by law.¹⁶¹ It appears as if the problem that would arise with this argument is whether the unmarried father with acquired rights is committed¹⁶² to exercise

¹⁵⁷ Schäfer *Law of Access* 28. Even though parents have wide decision-making power regarding the child, it should be exercised in the child's best interests. Also note Schäfer *Law of Access* 143-150 for a detailed discussion of this decision-making autonomy.

¹⁵⁸ As contemplated in both ss 20 and 21; Louw *PER* 195.

¹⁵⁹ Louw 2010 *PER* 195 writes further that once both parents have acquired parental responsibilities and rights at the birth of the child, it should be possible, in one or another way, to enforce the duty to care for the child against both parents as contemplated in s 28(1)(b) of the Constitution.

¹⁶⁰ As set out in s 21 of Act 38 of 2005.

¹⁶¹ This point of view will be open to criticism both ways. For instance Van Zyl J in *Van Erk v Holmer* 1992 2 SA 636 W 649 (although criticised for not following previous judgments by for instance Howie J in *B v S* 1995 3 SA 571 (A); refer also to a discussion of the criticism in chapter 2.2.3), stated that he disagreed with the viewpoint of Clark and Van Heerden, where restriction on access was suggested in an article they made available to him for consideration in his judgment (Burman and Preston-Whyte (eds) *The Legal Position of Children Born out of Wedlock: Questionable Issue - Illegitimacy in South Africa* (1992) Oxford University Press, Cape Town). He noted (644) that the authors recommended that only the father who acknowledges paternity and voluntarily undertakes the duties of a father should have custodial rights. He said that in the authors' opinion, there were very serious risks in granting the unmarried father automatic rights, as the mother might find it difficult to get access to court. He further noted (645) that they had however not clarified their view in this regard. Van Zyl J was of the opinion (649) that it should not be any more difficult for the mother to approach the court than it is for the father. Louw 2010 *PER* 181 also submitted that this should be the position. Clark "Should the Unmarried Father have an Inherent Right of Access to His Child? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1992 *SAJHR* 568 said that the sufficiently keen unmarried father, who acknowledges his duty of support to the child, should have a right to access, subject to the child's best interests. The *onus* in this regard will be on the father. For a further discussion hereof refer to chapter 5.1.

¹⁶² Louw 2010 *PER* 176 noted that requiring a father to demonstrate his commitment to his child in order to be recognised as parent, may be a way of incorporating the requirement to develop the opportunity of a family life into South African law. Goldberg "The Right of Access of a Father of an Illegitimate Child: Further Reflections" 1996 *THRHR* 294 also mentioned that the unmarried father

those parental responsibilities and rights, or not. Commitment to these responsibilities and rights would obviously go further than the definition of parental responsibilities and rights as contained in the Children's Act. It should also be a real physical commitment to be actively involved in the child's life; for instance in his or her upbringing,¹⁶³ to love the child, to care actively for the child, and general involvement in the child's life.¹⁶⁴ In the *Jooste v Botha* case¹⁶⁵ the court held that the unmarried father could not be forced to show love and affection and to pay attention to his child where there is no interest and therefore show his commitment to his child in a physical way. He however had to contribute economically, by paying maintenance. There was therefore no physical bond between the father and the child and therefore no physical or emotional commitment.¹⁶⁶ However, in view of the focus that is now placed on parental responsibilities, it might have raised interesting possibilities for the enforcement of children's rights, against the reluctant parent in the *Jooste* case.¹⁶⁷ It is submitted that the court might have come to a different conclusion if the Children's Act¹⁶⁸ had been in operation then, as it would not have been necessary to consider only the juxtaposition of the father's constitutional rights against the child's best

should have an emotional relationship with the child and he should be steadfast in fulfilling his financial duties to the child.

¹⁶³ Skelton *Child Law in South Africa* 77 noted that upbringing involves more than just financial support; it also implies involvement in the child's life. In *Van Erk v Holmer* 1992 2 SA 636 W 649G Van Zyl J also referred to the unmarried father's *commitment* and *devotion* to the child's best interests.

¹⁶⁴ Balcombe LJ in the case of *Re H and Another (Minors) (Adoption: Putative Father's Rights) (No 3)* 1991 All ER 185 (CA) 189a-d said that the court needed to take into account *inter alia* the degree of commitment which the father had shown and the degree of attachment between father and child when considering to make an order.

¹⁶⁵ 2000 2 SA 199 (T) 209H.

¹⁶⁶ The Constitutional Court in *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) par 26, recognised the fact that marriage had little to do with whether or not a father involved himself with his children and that single mothers are in a disadvantaged position (par 44) in society. Several authors disagreed with this interpretation of Van Dijkhorst J, such as Van Zyl and Bekker "*Jooste v Botha* Case no 1554/1999 (T) (unreported)" 2000 *De Jure* 149 and Mailula 2005 *Codicillus* 25. Van der Linde and Labuschagne "Die Omgangsreg van die Ongehude Vader en sy Buite-egtelike Kind en die Vraagstuk van Deliktuele Aanspreeklikheid binne Konteks van 'n Interaksiereg" 2001 *THRHR* 314 criticised the *Jooste* judgment and said that a right does not necessarily have a duty as counterbalance. Delictual liability that ensues as a result of the infringement of a subjective right that has a duty as a counterbalance, cannot limit that right in a meaningful way.

¹⁶⁷ Bonthuys and Albertyn *Gender Law* 226.

¹⁶⁸ 38 of 2005.

interests. The court might have focused more on the responsibilities the father has towards the child.¹⁶⁹

It might then be asked what the child's best interest constitutes. It is argued that the unmarried father's rights only become relevant, once he shows his commitment and once he wants to exercise those rights.¹⁷⁰ The child's best interest is therefore not relevant at this stage. It then raises the question why an unmarried father who wants to play an active, physical role in his child's life should not be allowed parental responsibilities and rights¹⁷¹ because of his commitment and not because of the fact that he lived with the mother or acknowledged that he is the father of the child.¹⁷² This criterion laid down in section 21 relates to only the unmarried father's relationship with the child's mother and is not based on any relationship between the unmarried father and his child. The uncommitted unmarried father can therefore acquire parental responsibilities and rights, without showing any commitment to the child,¹⁷³ whereas a committed father may not qualify at all for parental responsibilities and rights.¹⁷⁴

¹⁶⁹ Paizes *The Position of Unmarried Fathers in South Africa: An Investigation with Reference to a Case Study* (LLM Dissertation 2006 UNISA) (hereafter referred to as *Dissertation*) 39 is of the opinion that although the Constitution protects the child's right to parental care and guarantees that the child's best interests are taken into consideration, the law was misinterpreted in the *Jooste* case.

¹⁷⁰ Skelton *Child Law in South Africa* 78 also argues that children's best interests are only considered at the exercising of responsibilities and rights. Skelton and Carnelley(eds) *Family Law in South Africa* 249 and Bosman-Sadie and Corrie *A Practical Approach* 37 concur with this point of view. Bonthuys "Parental Rights and Responsibilities in the Children's Bill 70D of 2003" 2006 *Stell LR* 487 however recommended that the child's best interests should be considered prior to the acquisition of parental responsibilities and rights. This recommendation was however not adopted.

¹⁷¹ Kruger, Blackbeard and De Jong "Die Vader van die Buite-egtelike Kind se Toegangsreg. S v S 1993 (2) SA 200 (W)" 1993 *THRHR* 703 criticise this point of view. They are of the opinion that it will place the unmarried father in a worse position. They ask how he will be able to prove a parent-child relationship if the mother of the child is already not allowing him to see the child. It is submitted however that the commitment referred to above is not necessarily based on an already existing relationship between the unmarried father and the child. Commitment can be shown in several other forms, as discussed above.

¹⁷² The remainder of the criteria are set out in s 21(1) of Act 38 of 2005.

¹⁷³ In *B v S* 1995 3 SA 571 (A) par 585D it was noted that the father should prove his worth and commitment to succeed in showing that access would be in the child's best interests.

¹⁷⁴ He may however qualify for parental responsibilities and rights by order of court, or in terms of a parental responsibilities and rights agreement.

1.4 Background of Study

The best interest of the child is not a new concept in South Africa,¹⁷⁵ although its application was previously limited to family law and welfare proceedings.¹⁷⁶ There has however been a very important paradigm shift.¹⁷⁷ The shift is that the best interest standard should be considered in every matter concerning the child.¹⁷⁸ Boezaart¹⁷⁹ pointed out that child law has gone through evolutionary changes since the turn of the century. She also mentions that the law related to children is dynamic in nature and that the relationship between the child and his or her family members is no longer restricted to the private domain. The Children's Act has therefore revolutionised the parent-child relationship.¹⁸⁰ It has largely minimised possible discrimination against children, since the differentiation between children is no longer made with reference to only their parent's marital status.¹⁸¹ The law related to the unmarried father and his child, who did not have an inherent right to his child in terms of common law, has also evolved to make provision that he may acquire parental rights automatically.¹⁸² The Children's Act has also reconfigured the building blocks¹⁸³ by which South African law regulates parental relationships with children, in addition to the introduction of a statutory doctrine of parental authority.¹⁸⁴

It is the child's rights that are violated if a child of an unmarried father is denied contact.¹⁸⁵ However, the right of a child to have contact with his or her parents is complemented by the rights of the parents to have contact with the child. Contact is not a unilateral right of a child to be exercised separately

¹⁷⁵ *Fletcher v Fletcher* 1948 1 SA 130 (A) already established the best interest principle in the early years of South African law. See also *Van Deijl v Van Deijl* 1966 4 SA 260 (R) and Skelton *Child Law in South Africa* 280.

¹⁷⁶ Skelton *Child Law in South Africa* 280.

¹⁷⁷ Boezaart *Law of Persons* 52.

¹⁷⁸ S 28(2) of the Constitution.

¹⁷⁹ Preface to *Child Law in South Africa* (2009) xxiii.

¹⁸⁰ Boezaart *Law of Persons* (2010) v.

¹⁸¹ Louw 2010 *PER* 184.

¹⁸² S 21 of Act 38 of 2005, provided that certain requirements have to be met. See also chapter 2 hereunder.

¹⁸³ Schäfer *Law of Access* 54 refers to these building blocks as access, custody and guardianship.

¹⁸⁴ Schäfer *Law of Access* 54.

¹⁸⁵ Mailula 2005 *Codicillus* 16.

from his or her parents, but rather part of a continuing relationship between the child and the parents. Contact rights are therefore not rights exclusive to the child, but also involve the parent.¹⁸⁶ It was furthermore one of the goals of the SALRC to respect the responsibilities of parents, families and communities regarding rearing the young and to create a legislative and policy environment in which the family is supported by the state.¹⁸⁷ According to Van Der Linde and Van Schalkwyk¹⁸⁸ three children's rights are relevant, namely the right of the child to parental care by both parents, the right to have a personal relationship with both parents and the right to have contact with both parents.¹⁸⁹

1.5 Aim of Study

The question arose whether the law should be used to punish the lack of involvement of fathers in their children's lives, or whether the law should rather be used to encourage greater involvement.¹⁹⁰ It appears as if the societal goal achieved by the Children's Act is to protect mothers, who are normally the primary caretakers of children. However, what is in the mother's best interest is not always in the child's best interest and because of the obligation in terms of section 28(2) of the Constitution, the view is generally that it is in the best interest of the child to exclude the uncommitted father.¹⁹¹ It is however submitted that in doing so the committed father's rights are often also excluded. Fathers should not be allowed to exercise parental responsibilities and rights if it might be detrimental to the child's interests, but

¹⁸⁶ *V v V* 1998 4 SA 169 (K) 189B-E. Navsa J in the case of *Clinton-Parker v Administrator, Transvaal Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 64 also ruled that children had a right to be cared for by their natural parents (in this specific case their mothers). Also see *P v P* 2002 6 SA 105 (N) 19, which supports the view that contributing to the promotion of children's rights can be seen as equality between sexes regarding joint custody (the "old" terminology was used here as the judgment was made prior to the commencement of the Children's Act).

¹⁸⁷ SALRC Discussion Paper 103.

¹⁸⁸ "Die Reg van die Kind op Kontak met Beide Ouers: Opmerkings na Aanleiding van die Onlangse Ontwikkelinge in die Nederlandse Reg" 2011 *PER* 89.

¹⁸⁹ Mailula 2005 *Codicillus* 28 mentions that both parents need to provide emotional, psychological and socio-economic support to their children.

¹⁹⁰ Albertyn and Goldblatt *Constitutional Law of South Africa* 35-59.

¹⁹¹ Louw 2010 *PER* 179.

they should at least be dignified with the same opportunity to acquire such parental responsibilities and rights.¹⁹²

A problem often occurs if a mother refuses to allow a committed unmarried father to develop a relationship with his child, regardless of whether he has acquired rights in terms of section 21 or not. Often the unmarried father who wishes to exercise his parental responsibilities and rights cannot reach an agreement with the mother as to how to exercise those rights. The unmarried father is then initially dependent on the mother of the child to allow him to exercise his rights, regardless of the extent of his commitment. Ultimately the unmarried father needs to approach the court for relief.¹⁹³

1.6 Hypothesis

This study will critically analyse the rights of the unmarried father and consider amendments to the Children's Act to promote more equality between unmarried parents by the use of better wording or providing definitions and in so doing improve the position of the unmarried father. It is clear that the rights of the unmarried father and those of his child are intertwined to the extent that his rights cannot be fully considered without considering the rights of his child as well and *vice versa*.¹⁹⁴ It is submitted that if the best interest of the child standard is applied correctly, it should be a sufficient safety net for the unmarried father's automatic inherent right of access.¹⁹⁵

Louw¹⁹⁶ correctly says that the principles underlying the assignment of parental responsibilities and rights must also conform to the values and norms as embodied firstly in the Constitution and secondly in international law, which must be considered when interpreting the Bill of Rights.

¹⁹² Louw 2010 *PER* 183.

¹⁹³ Refer to chapter 5 for a discussion of the court's involvement.

¹⁹⁴ Mailua 2005 *Codicillus* 24 pointed out that the parent's legal duties do not exist in a vacuum, but co-exist with children's rights to parental care.

¹⁹⁵ Kruger, Blackbeard and De Jong 1993 *THRHR* 704.

¹⁹⁶ *Thesis* 30.

1.7 Methodology

The methodology followed in this study was to assess the provisions of the Children's Act critically, specifically those pertaining to the exercising of parental responsibilities and rights of the unmarried father. The unmarried father's position was studied in relation to his position prior to the commencement of the Children's Act (retrospectively) and in comparison to his position and requirements of the Constitution and the rights of the unmarried father's child. A comparative study¹⁹⁷ was also undertaken to study the acquisition of parental responsibilities and rights, specifically the automatic acquisition thereof, and other rights incidental thereto, to establish the extent, if any, of differential treatment of mothers and unmarried fathers.

It was decided to analyse whether the unmarried father who acquired automatic parental responsibilities and rights had been placed in a better position after the commencement of the Children's Act, than before it. In order to do this analysis, section 21 conferring automatic parental responsibilities and rights on unmarried fathers in certain circumstances was analysed in relation to the Constitution and the rights of the child. Specific attention was paid to the interaction of the Constitution with the unmarried father's rights and those of his child.

A retrospective study was further done of the position of the unmarried father prior to the commencement of the Children's Act. This was done in order to be able to provide the necessary background to the study on whether the position of the unmarried father after the commencement of the Children's Act has indeed improved. During this research focus was placed on mediation as provided for in the Children's Act. With the focus on mediation it became apparent that *inter alia* a lack of definitions of certain terminology and uncertainty regarding interpretation led to confusion and *lacunae*. Recommendations and suggestions will be made in the final chapter of this study in this regard.¹⁹⁸

¹⁹⁷ Refer to chapter 3.

¹⁹⁸ Refer to chapter 6.

A comparative analysis of legislation in certain African countries¹⁹⁹ was undertaken. Uganda, Kenya, Ghana and Namibia was studied to establish if any of their child law legislation could assist with some of the confusion and *lacunae* found in the South African Children's Act.²⁰⁰ The unmarried father's position prior to the commencement of the Children's Act was thus compared to his current position. In order to establish whether South Africa could learn from child law legislation of other countries, a comparison was done specifically related to the acquisition of parental responsibilities and rights and the best interests of the child.

Other sections of the Children's Act which may, albeit in different ways, also confer parental responsibilities and rights, were also analysed to establish how each of them interacts with section 21 or if it has any bearing or effect on section 21 and how it is applied or interpreted. Unfortunately the analysis of the relation between section 21 and these sections²⁰¹ only indicated possible further interpretation problems, on which recommendations and suggestions have been made in the final chapter.²⁰²

The practical application of section 21 was further considered in order to gain better understanding of its implications²⁰³ and specifically possible interpretation problems it might cause in practice.²⁰⁴ In the final chapter some suggestions were made to compensate for problems that may be expected in practice because of *lacunae* or misinterpretation, as discussed in this study.

¹⁹⁹ Refer to chapter 3. Some other non-African countries were also compared.

²⁰⁰ Recommendations in this regard may also be found in chapter 6.

²⁰¹ Ss 18, 24, 29(2) and 231 were studied in relation to s 21. Refer to chapter 4.

²⁰² Refer to chapter 6.

²⁰³ See for instance the wide scope of the orders a Children's Court may make in s 46. Also refer to Gallinetti *Commentary* 4-11 to 4-14.

²⁰⁴ Refer to chapter 5.1 for reference to terminology which may cause interpretation problems.

CHAPTER 2

THE HISTORY BEHIND SECTION 21

2.1 Introduction

It was clear that the unmarried father's rights to his child needed to be reformed. This would obviously also involve the child's rights separately and in interaction with the child's father's rights. However, the notion that a child might be in need of a father figure is a vexed issue and when debated, completely opposing views would be arrived at¹ in any given situation.

When the SALRC was initially briefed, it was to examine defects in the Child Care Act 74 of 1983. It however became clear that a range of intersecting and overlapping laws, principles and policies would require a review. The Child Care Act could not be isolated from other legislation affecting children and it could also not be separated from the laws regulating the relationships between parents and children and between families and the state.²

In the last paragraph of the preamble of the Children's Act 38 of 2005 it is stated that it is necessary to effect changes to existing laws affecting children, in order to afford them protection and assistance and ensure that they may grow up in a happy, loving and understanding family environment.³

One of the important results of the change effected by the commencement of the Children's Act 38 of 2005 was the improvement of the rights of unmarried fathers. In terms of section 21 of the Children's Act, the unmarried father may now *automatically* acquire *full*⁴ responsibilities and rights, in the event that he fulfils certain requirements as set out in the Act.⁵ These rights were not automatically afforded to the unmarried father prior to the commencement of

¹ Goldberg "The Right of Access of a Father of an Extramarital Child: Visited Again" 1993 *SALJ* 261.

² Refer to the objects of the Children's Act contained in Chapter 2 thereof. Also see SALRC Discussion Paper 103 par 2.1 at 15.

³ Skelton and Proudlock *Commentary* 1-22.

⁴ Own emphasis added.

⁵ In terms of s 21(1). The requirements will be discussed in more detail in 2.3 hereunder.

the Children's Act.⁶ This section specifically introduced parental responsibilities and rights for unmarried fathers and was one of the sections of the Children's Act that came into operation on 1 July 2007.⁷

Section 21 contained and caused major changes to the South African law of parent and child as the legal profession knew and applied it. This section is based on the argument that a child's unmarried father, who has met the requirements as stipulated in that section, should acquire the same parental responsibilities and rights as that child's mother.⁸ The denial of automatic responsibilities and rights to all fathers of children born out of wedlock most probably infringed on their constitutional right of especially equality,⁹ which would result in infringement of children's rights.¹⁰

Many arguments were raised both against¹¹ and in favour of¹² the granting of automatic responsibilities and rights to the unmarried father.¹³ The concept that joint custody promotes gender equality was, for instance, criticised.¹⁴ It was also argued that not all unmarried fathers are committed and caring.¹⁵ In contrast, other authors opined that the child's rights to equality and parental care are infringed if the unmarried father is denied automatic access to his

⁶ 38 of 2005.

⁷ GG 30030 of 2007-06-29.

⁸ The SALRC Discussion Paper 103 at 15 recognised the challenge to develop an approach consistent with constitutional and international law obligations of equity, non-discrimination and concern for the best interest of the child.

⁹ S 9 of the Constitution.

¹⁰ In terms of s 28 of the Constitution; Heaton *Commentary* 3-12.

¹¹ Clark "Should the Unmarried Father Have an Inherent Right of Access to his Child?" 1992 *SAJHR* 565; Sonnekus and Van Westing "Faktore vir die Erkenning van 'n Buite-egtelike Kind" 1992 *TSAR* 232.

¹² Boberg "The Sins of the Fathers - and the Law's Retribution" 1988 *BML* 35; Ohanessian and Steyn "To See or not to See? - That is the Question" 1991 *THRHR* 254; Eckard "Toegangsregte tot Buite-egtelike Kinders - Behoort die Wetgewer in te Gryp?" 1992 *TSAR* 122; Kruger, Blackbeard and De Jong "Die Vader van die Buite-egtelike Kind se Toegangsreg - S v S" 1993 *THRHR* 696.

¹³ See Heaton *Commentary* 3-10, n 5 where reference was made to several authors, arguing for and against the automatic granting of parental responsibilities and rights and whether the unmarried father should be placed on equal footing in relation to the mother, regarding his child. See also Kruger, Blackbeard and De Jong 1993 *THRHR* 702.

¹⁴ Bonthuys "Parental Rights and Responsibilities in the Children's Bill 70D of 2003" 2006 *Stell LR* 492. Reference is only made to the term "custody" as Bonthuys specifically used it in the above article, regardless of the amended terminology proposed in the Children's Bill. It is also noted that she refers to parental *rights and responsibilities* instead of *responsibilities and rights*, the way it was used in the Children's Bill on which she based her article. It was however noted that the SALRC Discussion Paper 103 referred to *rights and responsibilities*.

¹⁵ Goldberg "The Right of Access of a Father of an Extramarital Child: Visited Again" 1993 *SALJ* 274.

child.¹⁶ By denying the unmarried father contact with his child, an imbalance would be created, which would relegate the burden and resultant responsibility of child-rearing to the mother of the child.¹⁷ The unmarried father who is committed to shared parenting and who has proved to have a social relationship with the child should be allowed to exercise his rights in relation to his child.¹⁸ Mosikatsana¹⁹ submitted that it is essential for the law to recognise the relationship between an extra-marital child and the natural father. However, equal treatment of unwed parents would give a natural father the option of being involved without ensuring that he bears equal responsibility for child rearing.²⁰ The best approach would be to apply legal rules that neither apply false gender neutrality, nor reinforce gender inequality.²¹ As section 21 does not confer full parental responsibilities and rights on all unmarried fathers,²² its provisions would probably satisfy those who advocate the automatic acquisition of automatic responsibilities and rights on the one hand, while leaving dissatisfied those who argue that unmarried fathers should not have responsibilities and rights equal to those of the mother of the child, because the mother still bears a disproportionate child-care burden.²³

¹⁶ Pantazis “Access between the Father and his Illegitimate Child” 1996 *SALJ* 14.

¹⁷ Wolhuter “Balancing the Scales – Access by a Natural Father to his Extra-marital Child” 1997 *Stell LR* 68.

¹⁸ Wolhuter 1997 *Stell LR* 78. The author also submitted that the *onus* should then be on the mother to prove that the father is unfit. See also Clark 1992 *SAJHR* 565 who shares a similar point of view. She further said (567) that to bestow rights on an uncommitted father, who has not maintained a relationship with the child, is to place the interests of the unmarried father above those of the child. This would then result in the child’s interests not being paramount.

¹⁹ “Is Papa a Rolling Stone? The Unwed Father and his Child in South African Law – A comment on *Fraser v Naude*” 1996 *CILSA* 165. Bonthuys and Albertyn *Gender Law* 231 said that it can be argued that fathers who are not significantly involved in their children’s lives during marriage, will not necessarily be more, or equally involved after divorce if they were afforded equal parental rights to their children.

²⁰ Mosikatsana 1996 *CILSA* 164 maintained that most fathers will not assume equal responsibility for child rearing, no matter how many rights they are granted. Sloth-Nielsen, Wakefield and Murungi “Does the Differential Criterion for Vesting Parental Rights and Responsibilities Violate International Law? A Legislative and Social Study of Three African Countries” 2011 *JAL* 229 are of the opinion that if no differentiation is made between the unmarried father and the mother, it may exacerbate the unequal position of single mothers.

²¹ Mosikatsana 1996 *CILSA* 165.

²² Full rights will only be conferred if the unmarried father fulfilled the requirements stipulated in s 21(1).

²³ Heaton *Commentary* 3-12.

Even though unmarried biological fathers are not placed in the same position as biological mothers or married fathers,²⁴ it is submitted that section 21 did place them in a better position than before, where they had only had a right to contact if proven that it is in the child's best interest. In order to comprehend and appreciate the current position of the unmarried father, one has to briefly examine his position prior to the commencement of the Children's Act 38 of 2005, specifically with reference to section 21,²⁵ which vests him with automatic parental responsibilities and rights.

2.2 Previous Position of Unmarried Fathers

2.2.1 A Short Lesson in History²⁶

Unmarried fathers were not awarded or allowed to have automatic rights to their children. South African courts²⁷ consistently upheld the exclusionary rules of the Roman-Dutch law against unmarried fathers.²⁸ In *Duncombe v Willies*²⁹ the father applied for a variation of a custody order in order to provide him with sole custody, as his religious beliefs were different from those of the mother. The court held that the mother, as the custodian parent, had the right to determine the children's religious education. The father's interference in the way she practised and educated the children's religion, was an invasion of her rights as custodial parent.

In the Zimbabwean case of *Douglas v Mayers*³⁰ the court held that the father of an illegitimate child had no inherent right of access or custody to his child. It was further held that he may only claim access if he can satisfy the court

²⁴ Skelton *Child Law in South Africa* 74.

²⁵ Refer to n 7 in this chapter.

²⁶ Reference will be made to "illegitimate" and "legitimate" children and "married" and "unmarried" fathers or children born "in or out of wedlock" and "access" and "custody" only if those were the terms used by the author(s) or court decision(s) under discussion. Cognisance is to be taken of the change in terminology as stated in s 1(2) of the Children's Act and in further reference herein. Also refer to Paizes *Dissertation* 21 - 27 for a discussion of the position of the unmarried father under common law.

²⁷ *Docrat v Bhayat* 1932 (TPD) 125; *Duncombe v Willies* 1982 3 SA (D) 311; *Douglas v Mayers* 1987 1 SA 910 (ZS); *F v L* 1987 4 SA 525 (W); *B v P* 1991 4 SA 113 (T).

²⁸ Schäfer *Dissertation* 2,8.

²⁹ 1982 3 SA 311 (D) 312.

³⁰ 1987 1 SA 910 (ZS) 915.

that it will be in the best interest of the child to interfere with the mother's full custodial rights.³¹

An unmarried father applied to be allowed reasonable access to his illegitimate child in *B v P*.³² Kirk-Cohen J came to the conclusion³³ that the father (the applicant in the case) had to prove on a preponderance of probability that the relief sought was in the best interest of the child (he used the words "of paramount consideration") and that such relief would not unduly interfere with the mother's rights of custody.³⁴ The unmarried father was placed on even footing with other interested parties. If he could satisfy the court on a balance of probabilities that access would be in the child's best interest and that access would not unduly interfere with the mother's custodial rights, he could approach the court as if he were any other interested party.³⁵

In *Bethell v Bland*³⁶ the court elevated the unmarried father to a third party or outsider in a special position, as he was favoured over other outsiders owing to his genetic or biological link to his child.³⁷ Wunsch J said that the court would only order a departure from an existing legal relationship if there were sufficient reasons to do so.³⁸ The court said that a variation would be ordered upon a balance of probabilities, if such a variation was in the child's best interests.³⁹

³¹ As this is a Zimbabwean case, it has only persuasive authority in South African courts. It was also noted by Van Zyl J in *Van Erk v Holmer* 1992 2 SA 636 (W) 647G.

³² 1991 4 SA 113 (T).

³³ 117.

³⁴ See also *F v L* 1987 4 SA 525 (W) and *S v S* 1993 2 SA 200 (W), where the mother's position as sole custodian parent was confirmed. It also confirmed the position that the unmarried father had no inherent right to access, but that he could apply to court (like any other party) for such right.

³⁵ Goldberg 1993 SALJ 265.

³⁶ 1996 2 SA 194 (W). This case dealt with an application for custody by a maternal grandfather of an illegitimate child. The paternal grandparents launched a counter-application for custody. The unmarried, biological father intervened. The court had to consider if there were sufficient reasons to depart from the existing custody arrangements. The court held that it was in the child's best interest that custody be awarded to his father.

³⁷ 209G; Louw *Thesis* 90.

³⁸ 208E.

³⁹ 208E. The court in this regard also referred to the well-known criteria to determine what is in the child's best interests, as laid down by King J in *McCall v McCall* 1994 3 SA 201 (C) 204I-205F.

2.2.2 *Van Erk v Holmer*⁴⁰

The first case that deviated dramatically from the historical view held in South Africa that an unmarried father of an illegitimate child⁴¹ had no inherent right of access to that child, was *Van Erk v Holmer*. In this rogue case⁴² an unmarried father applied to have access to his child. As the matter was initially opposed, it was referred to the family advocate for an investigation and recommendation.⁴³ The family advocate recommended that the father be afforded access in certain defined aspects. The family advocate's recommendation was accepted by the court and the parties then settled the matter accordingly. However, despite the fact that the matter was uncontested, the parties requested the court to furnish reasons for accepting the family advocate's recommendation.

Judge Van Zyl comprehensively compared common law and case law in order to reach a conclusion in the *Van Erk* case.⁴⁴ He noted that in Roman law,⁴⁵ illegitimate children did not fall under the *patria potestas* of a father and were regarded as not having a father at all. He further assumed that since nothing was said about access, that no such right had ever been considered. According to him, this also appeared to be the position in Roman-Dutch law.⁴⁶

⁴⁰ 1992 2 SA 636 (W0).

⁴¹ Under common law children were referred to as "legitimate" or "illegitimate", where "legitimate" children were born from married parents. Since the adoption of the Natural Fathers of Children Born out Wedlock Act 86 of 1997, there has been a move away from these terms. Mosikatsana 1996 *CILSA* 166 also noted that there is no place in an industrial capitalist society for a distinction between children born in wedlock and extra-marital children. He said (167) that all children should be entitled to equality. The Children's Act refers to "married" (s 20) or "unmarried" (s 21) fathers or sometimes to "biological" (ss 19, 20 21) fathers. See also Skelton and Carnelley (eds) *Family Law in SA* 245; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* (LLD Thesis 2007 UP) (hereafter referred to as *Thesis*) 6.

⁴² As referred to by Pantazis 1996 *SALJ* 10.

⁴³ In terms of Annexure B of Regulation 3 of the Mediation in Certain Divorce Matters Regulations, 1990, Request to Family Advocate to Institute an Enquiry in terms of s 4 of the Mediation in Certain Divorce Matters Act 1987 (Act 24 of 1987).

⁴⁴ The court said (637F) that Roman and Roman-Dutch law did not render any assistance in establishing whether the unmarried father had any right of access.

⁴⁵ Van Zyl J (637H) noted that he found support in this regard in the legal sources that constitute South African common law.

⁴⁶ Van Zyl J however observed further in his judgment (647B) that the fact that common law does not say anything about the father's right of access, does not justify the inference that such right does not, or cannot exist.

According to Van Zyl J a pivotal case where recognition of an inherent right of access to an illegitimate child by the father of such child had been refused, was the *Douglas v Mayers* case. The court in this case held that access is part of and an encroachment upon, or diminution of custodial rights, with which the court will only interfere if it is in the child's best interest. It appears that the approach was to emphasise the child's rights to see the father, rather than the father's right to access.⁴⁷ He concluded that there should therefore be no distinction between legitimate and illegitimate children and therefore also not between the fathers of those children.⁴⁸ Van Zyl J also compared the position of unmarried fathers in Australia and the United States, where it appears that there is no distinction between legitimate and illegitimate children.

Regarding the position in South Africa, he noted that although the common law is silent on a father's right of access to his illegitimate child, it does not justify the conclusion that such right does not exist. He further argued that a father's maintenance duty is based on paternity, regardless of whether or not the child has been born in or out of wedlock. On the other hand, this same paternity does not allow him an inherent right of contact with his child. According to Van Zyl J this common law principle that an illegitimate child is regarded as having no father made no sense.⁴⁹

The judge perceived it as a great injustice that an unmarried father was compelled to pay maintenance for a child whom he may never be able to see or visit, despite him being prepared to commit and devote himself entirely to the best interests of the child.⁵⁰ He did note however that the right to access should not be claimed as *quid pro quo* for the payment of maintenance.⁵¹

⁴⁷ The judge found support for his view from several authors as referred to in 642B-644D of his judgment.

⁴⁸ 636E-F. It however appears that a distinction is still made between married and unmarried fathers. In this regard; refer to chapter 1.3 above.

⁴⁹ 647D-E.

⁵⁰ 649G.

⁵¹ 647F. In this regard he noted that he relied on and agreed with the judgment in *F v L*, as previously cited.

The judge noted that he associated himself more with the criticism in *B v P*⁵² regarding the burden of proof required by the court. He welcomed the emphasis on the rights of the child rather than those of the parent. He reiterated the fact that it was unfortunate that the father of an illegitimate child did not have an inherent right of access to his child.⁵³

The interests of the child, which constitute a predominant consideration in evaluating access matters, demand that no distinction should be drawn between a legitimate and illegitimate child.⁵⁴ He stated that there is therefore no justification for distinguishing between the fathers of such children either.⁵⁵

Van Zyl J then concluded that the time had arrived for the recognition by the courts of an inherent right of access by a natural father to his illegitimate child. The court did however recognise that married and unmarried fathers should not be equated in “one fell swoop” and that legislated parental authority was required to make provision for more extended rights.⁵⁶ This right should only be removed if the access is shown to be contrary to the child’s best interests.⁵⁷ This judgment then basically afforded the unmarried father an inherent right to access to his child.

2.2.3 Criticism against the *Van Erk v Holmer Judgment*

Unfortunately this judgment, which was described as an activist judgment,⁵⁸ was heavily criticised for not following the *stare decisis* rule.⁵⁹ The *stare*

⁵² This *onus* was also required by the court in *Douglas v Mayers* 1987 1 SA 910 (ZS) and *F v B* 1988 3 SA 948 (D), which followed the *dictum* related to access in the *Douglas* case.

⁵³ Van Zyl J (648A) noted that the court in *F v L* 1987 4 SA 525 (W) accepted this position uncritically.

⁵⁴ Judge Van Zyl found support for this in the contribution of Ohannesian and Steyn 1991 *THRHR* 254-63.

⁵⁵ 649F.

⁵⁶ 649E.

⁵⁷ 649G-650A.

⁵⁸ Skelton *Child Law in South Africa* 71.

⁵⁹ The rule entails a general duty on judges to follow judgments or rulings in previous cases. Van Zyl J, for instance, did not follow a full bench decision in *B v P* 1991 4 SA 113 (T). Kirk-Cohen J (117E-F) in *B v S* 1995 3 SA 571 (A) was of the opinion that the relief sought should on a balance of probability be in the child's best interest and that the relief (access in this case) would not unduly interfere with the mother's right of custody. In *Afrox Healthcare Bpk v Christaan George Strydom* 2002 6 SA 21 (SCA) par 26 and *Ex Parte The Minister of Safety and Security In Re: The State v*

decisis rule was not followed by the courts in several other cases⁶⁰ as well. The courts opined that Van Zyl J ignored the binding precedent that unmarried fathers had no inherent right of access to their children and was placed in the position that they first had to prove that access would be in their children's best interests before it would be allowed. The courts considered them bound to the applicable legal principles and decided that the inherent right to access had been "invented" in the *Van Erk* case.⁶¹

Further criticism was levelled at this judgment because of the fact that Van Zyl J provided reasons for his judgment. In the *B v S*⁶² case Howie J was of the opinion that as the family advocate's report stood uncontested and the matter was no longer opposed, there was no longer a *lis* between the parties. He was of the opinion that after the judge had made the order incorporating the settlement agreement,⁶³ his work was done, especially as there was nothing in the family advocate's report to imply that there was a question in law related to the inherent right of unmarried fathers.⁶⁴ He was of the opinion that it was not the court's duty to include reasons for acceptance of the family advocate's report.⁶⁵ No judgment or ruling was required in law, or given.⁶⁶ Howie J stated that the arguments were rather based on an interpretation of

Walters 2002 7 SA BCLR 663 (CC) par 60-61 the courts held that they are obliged to follow legal interpretations of the SCA, whether these relate to constitutional or other issues and that they are bound to accept the authority and the binding force of applicable decisions of higher tribunals. A more recent case in which this principle was applied is *Camps Bay Ratepayers Association v Harrison* 2011 (4) 42 (CC) where Brand AJ (28-30) noted that: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*". He then pointed out that the courts can only depart from a previous decision of their own when they are satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of the South African Constitution. He said that to deviate from this rule would be to invite legal chaos.

⁶⁰ *B v P* 1991 4 SA 113 (T); *S v S* 1993 2 SA 200 (W); *B v S* 1993 2 SA 211 (W); *B v S* 1995 3 SA 571 (A).

⁶¹ Skelton *Child Law in South Africa* 71. Of course the *Van Erk* judgment found favour with some authors, such as Labuschagne "Persoonlikheidsgoedere van 'n Ander as Regsobjek: Opmerkinge oor die Ongehude Vader se Persoonlikheids- en Waardevormende Reg ten aansien van sy Buite-egtelike Kind" 1993 *THRHR* 414; Kruger "Die Toegangsbevoegdheid van die Ongetroude Vader - Is die Finale Woord Gespreek?" *B v S* 1995 3 SA 571 (A)" 1996 *THRHR* 514; Pantazis 1996 *SALJ* 11; also refer to Pantazis for a discussion of the judgment in *B v S*.

⁶² 1995 3 SA 571 (A). It was confirmed (583F) that an unmarried father does not have an inherent right of access and that he may only have access if it is in the child's best interest.

⁶³ 578G-H.

⁶⁴ 578B.

⁶⁵ 578E.

⁶⁶ 578G.

common law, the judge's equity considerations and an examination of case law. He concluded that had it been necessary to hear debate and give a considered decision for acceptance of the family advocate's recommendation, the decision regarding the inherent right should have been *obiter*.⁶⁷ If there were sound sociological and policy reasons for affording unmarried fathers an inherent right to access, in addition to already having been granted access if it is in the child's best interests, then that is a matter that can only be dealt with legislatively.⁶⁸

Clark⁶⁹ noted that by the time the judgment was heard, the parents had already been married for four months and the question of access was actually an academic one. The facts of this case indicated that it was clearly in the child's best interests that the father be allowed access. He had shown an active interest in the child's life. Clark noted further that if an unmarried father is keen to establish his paternity and consequently his duty of support, the court should affirm his right of access, if it is in the child's best interest. The *onus* should however rest on the father. Clark's criticism is that the reality is that mothers are sometimes confronted with fathers who are bad parents and in this regard the access places the child's interests in danger of being subordinated to the rights of the father. She suggested that despite the unmarried father's worthy qualities the courts should be slow to afford fathers an automatic inherent right of access. She argued that this would shift the *onus* of proof onto the mother to show that the best interests of the child demanded that no right of access be allowed.⁷⁰ Only where the father is willing and able to act as the father and has given evidence to this effect, should he be allowed a right to reasonable access. Clark concluded however

⁶⁷ Howie J (583E) did however take cognisance of the SALRC's (then SALC) report of July 1994 in which it was recommended that the unmarried father had a right to apply to court. This right was however not the recognition or grant of an inherent right. Goldberg 1993 *SALJ* 265 also noted that one wonders why Van Zyl J thought that he was not bound by previous decisions and whether the judgment was *obiter*.

⁶⁸ 479I. Goldberg 1993 *SALJ* 270 agreed that legislative intervention was needed to aid the unmarried father, but disagreed that the unmarried father should be vested with an automatic inherent right of access.

⁶⁹ Clark 1992 *SAJHR* 568-569.

⁷⁰ Pantazis 1996 *SALJ* 18 argued that if the unmarried father had an inherent right to access, then the *onus* would be on the mother to show that it was not in the child's best interests that the father should exercise the right. If the unmarried father however did not have an inherent right of access, the *onus* would be on him to prove that it is in the child's best interests that he be granted access.

that the High Courts as upper guardians of minors should be slow to depart from their discretionary powers.⁷¹

Although it is clear that there are different points of view regarding whether or not the unmarried father should have an inherent right of access to his child, what is clear is the fact that the unmarried father's position needs to be taken into reconsideration.⁷² Children need both a mother and a father and many fathers are concerned about the welfare of their children. It should be unnecessary for them to have to approach a court for access to their children. If the way in which a father exercises his right of access is not in the child's best interest, the mother may approach the court to rein in the father's access rights.⁷³ Given the importance of contact between a child and its father, it is not reasonable to generalise the potential clash between the interests of the mother with those of the child into a rule of law, denying the father automatic access.⁷⁴

2.2.4 Further Developments towards the Current Position

A further ripple effect in South African law was then caused by the case of *Fraser v Children's Court Pretoria North*.^{75 76} It had an extensive impact on specifically parental responsibilities and the rights of unmarried fathers regarding their minor children.⁷⁷

The history of this case started off in the Children's Court, Pretoria North where application was made to adopt the child born from a relationship between Naude (the mother) and Fraser (the father). The child was handed to the adoptive parents shortly after birth. Fraser also wanted to adopt the

⁷¹ Clark 1992 *SAJHR* 569.

⁷² Kruger, Blackbeard and De Jong 1993 *THRHR* 701-703. The authors concluded that the time was ripe for an automatic inherent right of access of the unmarried father to be acknowledged. Goldberg 1993 *SALJ* 268 agreed with the point of view that the lot of unwed fathers should change. However one needs to be cautious, not losing sight of the fundamental aim of protecting the child.

⁷³ Kruger 1996 *THRHR* 519-520.

⁷⁴ Pantazis 1996 *SALJ* 14.

⁷⁵ 1999 1 SA 1 (CC).

⁷⁶ Skelton *Child Law in South Africa* 72 referred to it as a "trail blazer".

⁷⁷ Also refer to chapter 4.4 for a discussion of an unreported case with similar facts.

child and hence opposed the adoption. After the Children's Court decided not to give Fraser right of audience to address the court on his rights, Fraser applied for an interdict restraining Naude from handing the child over to anybody but himself after birth. The interdict did not succeed, as the court argued that common law should be followed. The court relied on the case of *B v S*,⁷⁸ which stated that the common law position was that the father of an "illegitimate" child did not have an inherent right to his child.⁷⁹

After the Children's Court had granted the adoption order, Fraser approached the High Court again.⁸⁰ He requested that the adoption be set aside⁸¹ and challenged the constitutionality of section 18(4)(d) of the Child Care Act.⁸² The adoption was set aside and the constitutionality of section 18(4)(d) was referred to the Constitutional Court for consideration. The Constitutional Court had to give consideration to the question whether section 18(4)(d) of the Child Care Act was inconsistent with the interim Constitution of the Republic of South Africa.⁸³ This section required the Children's Court to obtain the consent of both parents before it could issue an order for the adoption of a legitimate child, but dispensed with the need to obtain a father's consent for the adoption of his "illegitimate child".⁸⁴ It was argued in the review court⁸⁵ that section 18(4)(d) violated the unmarried father's (Fraser's) rights to equality⁸⁶ and procedurally fair administrative action⁸⁷ and his child's right to parental care. To dispense with the consent of the unmarried father appeared

⁷⁸ 1995 3 SA 571 (A).

⁷⁹ Also see Mosikatsana 1996 *CILSA* 152 for comments and an analysis of this case. This author agreed (166) that s 18(4)(d) of the Child Care Act (now repealed) was not in line with a constitutional democracy and that all children, whether born in or out of wedlock, should enjoy equality.

⁸⁰ *Fraser v Naude* 1997 2 SA 82 (W).

⁸¹ The validity of the adoption was also attacked. Fraser contended that he had not had an adequate hearing, as an interested party, in the Children's Court.

⁸² 74 of 1983. This Act was repealed in terms of Schedule 4 of the Children's Act 38 of 2005; GG 30030 2007-06-29, which commenced on 1 July 2007. Also refer to n 15 in chapter 1 above.

⁸³ Act 200 of 1993, herein referred to as the interim Constitution.

⁸⁴ The terminology of the Child Care Act is used here, as reference is made here to that Act.

⁸⁵ *Fraser v Children's Court, Pretoria North* 1997 2 SA 218 (T).

⁸⁶ S 24(b) of the interim Constitution.

⁸⁷ S 30(1)(b) of the interim Constitution.

to be in conflict with the equality clause⁸⁸ in the interim Constitution, which provided for equality in law and equal protection under the law.⁸⁹

Mahomed DP then held that section 18(4)(d) of the Child Care Act 74 of 1983⁹⁰ was inconsistent with the interim Constitution and therefore invalid to the extent that it dispensed with the father's consent for the adoption of his illegitimate child. Parliament was then required to correct this defect within a period of two years⁹¹ and the order of invalidity of this section was suspended for a period of two years.⁹²

The Natural Fathers of Children Born out of Wedlock Act⁹³ was the result of an attempt to rectify section 18(4)(d) of the Child Care Act 74 of 1983, as indicated above. This Act⁹⁴ provided *inter alia* that unwed fathers may approach the court for rights of access, custody, or guardianship over their children born out of wedlock.⁹⁵ This Act then provided these fathers with the rights mentioned, provided that certain conditions were complied with.⁹⁶ A

⁸⁸ S 8 provides that every person shall have the right to equality before the law and to equal protection of the law. It further makes provision that no person shall be unfairly discriminated against, directly or indirectly based on his/her race, gender or sex.

⁸⁹ This was also the argument raised by Fraser. He invoked s 10 of the 1993 Constitution and argued that by denying him the right to adopt his child, he was discriminated against and that this offended his dignity.

⁹⁰ This section provides that consent to the adoption has to 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 the child, whether or not such 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, provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known.

⁹¹ Par 52.

⁹² In the meantime Naude successfully appealed the High Court's decision to set aside the adoption and the High Court's order was overturned. See *Naude v Fraser* 1998 4 SA 539 (SCA). Fraser's special application to appeal this decision was not successful (*Fraser v Naude* 1999 1 SA 1 (CC)), as the court was of the opinion that it would not be in the child's best interests. At that stage he had been living with his adoptive parents for nearly three years. See also Skelton *Child Law in South Africa* 72, 73. Also see Jordaan and Davel "Die Fraser Trilogie *Fraser v Naude* 1997 2 SA 82 (W); *Fraser v Children's Court Pretoria-North* 1997 2 SA 218 (T); *Fraser v Children's Court Pretoria-North* 1997 2 SA 216" 1997 *De Jure* 394 for a discussion and commentary of the Fraser cases. The authors said (406) that it was important that an amended s 18(4)(d) of the Child Care Act 74 of 1983 should not create another way for fighting parents to use the child in the fight between them, but that the interests of the child should rather be paramount.

⁹³ 86 of 1997. This Act was also repealed in Schedule 4, as stated above.

⁹⁴ In terms of s 2(1), the court may grant the application on the conditions as determined by the court and in terms of s 2(2) provided that access is in the child's best interest and if an enquiry has been instituted at the family advocate, after consideration of their report and recommendations.

⁹⁵ This Act has also been repealed by Schedule 4 as noted above.

⁹⁶ S 2(2) of Act 86 of 1997.

further result of this Act was also that the court was obliged to consider certain circumstances, prior to allowing the adoption of the child of the unmarried father⁹⁷ and reasonable written notice of the adoption had to be given to him.⁹⁸

The unmarried father's position then was that he was allowed to approach the court to be allowed access to his child, provided that it would be in the best interests of the child. Although this right to his child was not automatic, it did place the father in a better position than the one he was in before the *Van Erk* case. The procedure⁹⁹ to be followed was clearly defined for unmarried fathers to apply to court for access to their children. In fact, this Act went beyond the *Van Erk* decision¹⁰⁰ in that the unmarried father could also apply for both guardianship and custody in the same way.¹⁰¹

2.3 Current Position of Unmarried Fathers

It became apparent that the position of the unmarried father needed to be improved to expand his rights to his child, keeping in mind the interactive role his child's rights as well as other legislation such as the Constitution, would play.

Section 21 of the Children's Act¹⁰² provided the unmarried father with the leap towards improved rights. Section 21 provides as follows:

- (1) The biological father of a child 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

⁹⁷ As contained in s 2(5), for instance the relationship between the child and the father, the father's degree of commitment and the child's attitude related to the adoption.

⁹⁸ This was required in terms of s 6(1). This section was however repealed by the Adoption Matters Amendment Act 56 of 1998, which would amend the contentious s 18(4)(d) of the Child Care Act 74 of 1983 to provide that both parents consent to the adoption of a child born out of wedlock. Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (1999) 400.

⁹⁹ In terms of s 2(1) of the Natural Fathers of Children Born out of Wedlock Act.

¹⁰⁰ As cited before.

¹⁰¹ Davel and Jordaan *Law of Persons Student's Textbook* (1998) 111.

¹⁰² 38 of 2005.

- permanent life-partnership; or
- b) if he, regardless of whether he has lived or is living with the mother-
- (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 leap is from having *no* inherent right, to *automatically acquired*¹⁰³ parental responsibilities and rights of the unmarried father in respect of his child. Unmarried biological fathers are however not placed in the same position as biological mothers.¹⁰⁴ They are also not placed on equal footing with married fathers.¹⁰⁵

Regardless of these rights afforded to the unmarried father, unfortunately section 21 does not provide for a court order, document or other mechanism recording those rights. It also does not appear to provide a distinct step which provides for a process to determine how an unmarried father, who has now acquired those rights, should exercise them.¹⁰⁶ It does not appear that the SALRC considered how these rights should be exercised when the review of the Child Care Act was discussed.¹⁰⁷ Section 21 will moreover not assist third parties who question whether or not the unmarried father has in fact complied with the requirements in section 21. In this regard the compulsory mediation

¹⁰³ Author's emphasis.

¹⁰⁴ As biological mothers acquire full parental responsibilities and rights, whether they are married or not, merely because they gave birth to the child in terms of s 19(1).

¹⁰⁵ This is because married fathers obtain full parental responsibilities and rights, because they are married to the mother as provided for in s 20(a). Skelton and Carnelley (eds) *Family Law in South Africa* 74.

¹⁰⁶ Boniface *Thesis* 626 also points out that this is one of the questions that still need to be addressed.

¹⁰⁷ It appears as if only the acquisition of the rights were discussed in both the Discussion Paper 103 and the First Issue Paper 13, as referred to before. It is also noted that in submissions made by the Children's Institute (UCT) on the Discussion Paper 103 at 25, certain recommendations were made regarding the vesting and acquisition of parental responsibilities and rights, but nothing was mentioned as to *how* these rights were to be exercised once acquired.

prescribed in section 21(3) cannot be invoked by the third party. Section 21(3) will only be applicable between the parties *inter se*.¹⁰⁸ As section 21 only refers to fathers' rights, consideration of the child's best interests in exercising these responsibilities and rights should be kept in mind. Although the criterion for the best interest of the child appears to be built into section 21 it does however not refer to the specific criterion to be taken into consideration when considering the child's best interest.¹⁰⁹ The unmarried father who has acquired his rights in terms of section 21 may not simply proceed to exercise these rights as he wishes.¹¹⁰ It appears that the standard that the best interest of the child is paramount is not applied before the rights in terms of section 21 are conferred upon the unmarried father. Bonthuys¹¹¹ raised her objection against the automatic conferring of parental responsibilities and rights, as she was of the opinion that the unmarried father's rights were not subjected to the application of the best interests of the child.

The best interest standard appears only to become relevant once a decision needs to be made on *how* these rights will be exercised.¹¹² The child's best interests were built into the criteria for the automatic acquisition of parental responsibilities and rights.¹¹³

Section 21¹¹⁴ exclusively deals with the acquisition of the unmarried father's parental responsibilities and rights and not with how these rights are to be exercised, once acquired. It is submitted that the definitions of care and

¹⁰⁸ Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 243 (further referred to as *Domestic Perspectives*).

¹⁰⁹ *LB v YD* 2009 5 SA 463 (T); Louw *Thesis* 97, 98. Bonthuys 2006 *Stell LR* 487 rightly so, raised her concern about the fact that the unmarried father would automatically acquire parental responsibilities and rights, without any consideration as to whether or not it would be in the child's best interests. See Chapter 4 hereunder for a further discussion hereof.

¹¹⁰ Skelton *Child Law in South Africa* 78.

¹¹¹ The objection in this regard was raised by Bonthuys 2006 *Stell LR* 487. She argues that the best interests of the child should be applied prior to the acquisition of parental responsibilities and rights.

¹¹² Murphy J in *LB v YD* 2009 5 SA 463 (T) par 39 held that it is not required that the best interests of the child standard must be applied before the rights in terms of this section will be awarded to an unmarried father. Also refer to n 133 for further reference to this case and the fact that the court a *quo's* judgment was overturned on appeal.

¹¹³ Louw *Thesis* 98.

¹¹⁴ It also appears as if the remainder of the Children's Act does not specifically make provision for how the acquired parental responsibilities and rights are to be exercised.

contact¹¹⁵ and the description of the duties of a guardian,¹¹⁶ as well as section 30¹¹⁷ and 31(2)¹¹⁸ contain the closest descriptions of how these rights are to be exercised.¹¹⁹ These sections however do not provide a solution if the mother of the child is not prepared to allow the unmarried father to exercise some, or all of the rights¹²⁰ jointly with her, or limits the exercising of his rights. It appears as if a solution might be to provide for an agreement right from the outset¹²¹ to be entered into, where the exercising of the unmarried father's rights is contained in a written agreement explaining how parental responsibilities and rights are to be exercised.¹²²

¹¹⁵ The definitions are contained in s 1 of the Act and include *inter alia* the duty to provide the child with a suitable place to live, to safeguard and promote the well-being of the child, to protect the child from abuse and neglect, to communicate regularly with the child and to visit the child.

¹¹⁶ S 18(3) provides that a child's property and property interest need to be administered and safeguarded, the child needs to be assisted in contractual, legal or other administrative matters and consent is required for the child's marriage, adoption, etc.

¹¹⁷ This section describes how the co-holders of parental responsibilities and rights should exercise these rights.

¹¹⁸ This section provides that any co-holder of parental responsibilities and rights should give due consideration to the wishes and views of the other co-holder, before making decisions as contemplated in s 31(b).

¹¹⁹ Louw *Thesis* 121. Heaton *Commentary* 3-27 writes that ss 33-35 also deal with the exercising of parental responsibilities and rights of co-holders of parental responsibilities and rights. It is however submitted that s 33 and 34 do not directly deal with *how* the rights are to be exercised. They only deal with the contents and formalities of parenting plans. Only once the parenting plan is finalised, the parenting plan itself will provide for *how* the parental responsibilities and rights are to be exercised. S 35 only prescribes how parental responsibilities and rights are to be exercised to the extent that the person having care and residency has to provide the co-holder of rights with the right to contact, with a residential address and allow that co-holder to exercise his or her contact rights and the consequences if contact is withheld or frustrated.

¹²⁰ In terms of s 30 more than one person may hold parental responsibilities and rights in respect of the same child.

¹²¹ It is suggested that once it is clear that the unmarried father qualifies under s 21 of the Children's Act and he wishes to be actively involved in his child's life, he should attempt to reach an agreement with the mother as to how he may exercise his rights regarding his child. In terms of s 22 a parental responsibilities and rights agreement may be entered into. If this fails, mediation should be attempted and the court should only be approached as a last resort.

¹²² The format of the form for a parental responsibilities and rights agreement is prescribed in chapter 3, Regulation 7, Form 4 of the Children's Act 38 of 2005 General Regulations Regarding Children, 2010 (hereinafter referred to as Social Development Regulations). S 71(2) of the Uganda Children Act 1997, Chapter 59 of the Laws of Uganda provides that any instrument signed by the mother of a child and by any person acknowledging that the unmarried father is the father of the child and an instrument signed by the father of a child and by any person acknowledging that she is the mother of the child, shall if the instrument is executed as a deed; or if it is signed jointly or severally by each of those persons in the presence of a witness, be *prima facie* evidence that the person named as the father is the father of the child or that the person named as the mother is the mother of the child. Also see chapter 3.2 herein.

Louw¹²³ refers to the acquired rights as “deemed automatic”.¹²⁴ It is not clear why Louw *deems* the acquired rights as automatic if it is clear from the reading of section 21, that these rights *are* automatic.¹²⁵ She explains that she deems the acquired rights to be automatic because the acquisition thereof was not subject to the child’s best interests. She did however submit that she deemed these rights to be automatic for the purposes of her thesis, as the acquisition of responsibilities and rights is not subject to the prior application of the best-interests standard by the state. She then proceeds to submit that these rights cannot be made subject to the best interests of the child, as the rights are just that – automatic. Louw is not clear on her viewpoint. It further does not appear as if Louw considered the option of approaching a court to confirm the father’s responsibilities and rights, or the exercising of these regarding his child.¹²⁶ The only reference she makes to approaching a court for relief is where the mother refuses to allow the unmarried father to develop a relationship with his child, or to confer rights on the unmarried father by agreement. The problem is that the committed father who wants the opportunity to care for and be recognised as the father, is still dependent on the mother, or ultimately the court’s view of what is in the child’s best interests.¹²⁷

It is submitted that it should not be necessary for the unmarried father to approach a court to confirm his acquired responsibilities and rights, as these have already been afforded to him by operation of law.¹²⁸ Bosman-Sadie and Corrie¹²⁹ confirm this opinion and state specifically that there is no need to obtain a court order for the unmarried father to claim his rights, as he automatically obtains these as provided in section 21. Skelton¹³⁰ is of the

¹²³ Louw *Thesis* 97.

¹²⁴ Louw *Thesis* 97.

¹²⁵ Louw *Thesis* 97. Also see chapter 4 hereunder for a further discussion of these objections and the counter-arguments.

¹²⁶ She has also not made any reference to this option in her article “The Constitutionality of a Biological Father’s Recognition as a Parent” 2010 *PER* 156.

¹²⁷ Louw 2010 *PER* 191.

¹²⁸ However Lewis J in *FS v JJ* 2011 3 SA 126 (SCA) did issue a declaratory order that an unmarried father was the holder of full parental responsibilities and rights in terms of s 18 of the Children’s Act 38 of 2005.

¹²⁹ *A Practical Approach* 37.

¹³⁰ Skelton *Child Law in South Africa* 74.

opinion that the unmarried father, who has acquired full parental responsibilities and rights, does not have to take any legal action to acquire those rights. However, if the unmarried father does not comply with the requirements of section 21, he may of course enter into an agreement with the mother¹³¹ or proceed to court with an application for his rights.¹³²

The court *a quo* in the *LB v YD*¹³³ case stated specifically that an unmarried father was entitled to be the co-holder of parental responsibilities and rights if he had proved that he was the biological father and complied with the additional requirements of section 21. Murphy J went further to state that no case needs to be made out that it will be in the best interests of the child to bestow the relevant rights¹³⁴ on the unmarried father. According to him, the child's best interest will only become relevant once the extent of the unmarried father's responsibilities and rights as co-holder becomes relevant.¹³⁵

The fact that no mechanism or vehicle is provided to prescribe how an unmarried father with automatic rights to his child should exercise these, poses a challenge in the implementation of section 21. It is also interesting to

¹³¹ In terms of s 22 he may enter into a parental responsibilities and rights agreement with the mother.

¹³² In terms of s 23 contact and care may be assigned to the unmarried father and in terms of s 24, guardianship. Heaton *Commentary* 3-11.

¹³³ 2009 5 SA 463 (T) par 43. In this case the unmarried father disputed paternity. He then applied to court for an order to compel the mother of the child to submit herself and the child to DNA testing. The mother opposed the application on the grounds that the tests were an invasion of her rights to privacy and dignity. The court *a quo* held that it would be in the child's best interests that paternity be scientifically determined and resolved and the mother was therefore ordered to submit herself and the child to the DNA testing. This judgment was however overturned on appeal (2010 6 SA 338 (SCA)). Lewis J (par 12) argued that paternity was not actually in dispute, as it was determinable on a balance of probabilities (par 13) and that the High Court should not have ordered that the mother and her daughter undergo DNA testing. Lewis J therefore held that the rights to privacy and bodily integrity may be infringed if it is in the child's best interest. These rights may however be limited where it is reasonable, applying s 36(1) of the Constitution. However the court held that it is not the court's function to ascertain scientific proof of the truth. Buthelezi "A Missed Opportunity to Settle the Law on DNA Testing in Paternity Disputes –YD (now M) v LB 20106 SA 338 SCA: case" 2011 *Obiter* 480 noted that the SCA missed a golden opportunity to place s 37 into perspective, within the era of the Children's Act. S 37 of the Children's Act deals with the taking of blood samples where paternity is in dispute. Unfortunately this section does not compel the taking of samples or submission to scientific tests, but only a warning that such refusal may have an effect on the credibility of that party.

¹³⁴ Par 43.

¹³⁵ Louw *Thesis* 97-98 also supports this point of view. See also Skelton *Child Law in South Africa* 78. Also refer to Chapter 4 hereunder for a discussion of the criticism against this approach, which appears to be father-centred.

note that section 29¹³⁶ does not refer to an application that may be brought in terms of section 21 of the Act¹³⁷ to confirm the unmarried father's rights, or otherwise to prescribe the exercising thereof. Section 29 refers to several other specific applications¹³⁸ that may be brought. It however does not mention section 21 as one of the sections under which an application to court is prescribed.

The unmarried father, who has not automatically acquired parental responsibilities and rights, does however have other options available to him in order to have those rights confirmed, namely:

- a. by agreement with the mother;¹³⁹
- b. by bringing a court application;
- c. by referring the matter for mediation.¹⁴⁰

All of the above options will be subject to the best interest of the child standard in the application thereof.

2.4 Mediation

2.4.1 A General Overview

Mediation can be defined as a confidential, informal, private, flexible process facilitated¹⁴¹ by an impartial third person with a view to reaching a future-

¹³⁶ S 29 deals specifically with court proceedings.

¹³⁷ 38 of 2005.

¹³⁸ In terms of s 22(4) a parental responsibilities and rights agreement may be made an order of court; care and contact may be assigned by court in terms of s 23; application may be made to court for an order granting guardianship in terms of s 24; a person who claims paternity, who is not married to the mother may apply for an order confirming his paternity in terms of s 26(1)(b); application to court may be made for the termination, suspension or restriction of parental responsibilities and rights in terms of s 28.

¹³⁹ In terms of s 22. This entails that a parental responsibilities and rights agreement may be entered into between the mother or other person who has parental responsibilities and rights, with the biological father. Skelton *Child Law in South Africa* 80 pointed out that parental responsibilities and rights are not *transferred* but rather *conferred*. This simply means that a holder of parental responsibilities and rights will retain those responsibilities and rights jointly with the person upon whom it was conferred. Also refer to chapter 5 hereunder for a further discussion of s 22.

¹⁴⁰ In terms of s 21(3) of Act 38 of 2005.

oriented outcome.¹⁴² Mediation will hold most advantages for the interests of children¹⁴³ who normally get caught in their parents' protracted litigation, which litigation often involves them and their future.¹⁴⁴ With the best interests of children catered for in the mediation process,¹⁴⁵ the effect and advantages of the interests of those around them would also be noticeable.¹⁴⁶ With mediation, issues are put into perspective and emotions are soothed so that the parties can negotiate and resolve those issues in a meaningful way. Unfortunately the legal process can in practice do little to avoid the effects that divorce may have on the children of a marriage. Mediation will improve the situation and it will not further exacerbate and exploit an already traumatic and sad situation, as is the case in the normal course of litigation.¹⁴⁷ Mediation will also be in line with the provisions of section 6(4) of the Children's Act, which provides that an approach conducive to conciliation and problem-solving should be followed and a confrontational approach avoided.¹⁴⁸

¹⁴¹ De Jong "Opportunities for Mediation in the New Children's Act 38 of 2005" 2008 *THRHR* 634 refers to it as "facilitated negotiation". See also De Jong "A Pragmatic Look at Mediation as an Alternative to Divorce Litigation" 2010 *TSAR* 515 where she discusses all the characteristics of mediation.

¹⁴² Refer to De Jong "Child Focused Mediation" in Boezaart (ed) *Child Law in South Africa* (2009) 114-117 where the features of mediation are discussed. The different stages of mediation are also mentioned (114), namely the orientation stage, the information-analysis stage, the negotiation stage, the agreement stage and the contracting stage.

¹⁴³ De Jong *Child Law in South Africa* 117.

¹⁴⁴ Jordaan "The Potential of Court-based Mediation" March 2012 *De Rebus* 20 notes that research suggests that mediated settlements tend to have a higher rate of compliance than court judgments.

¹⁴⁵ De Jong *Child Law in South Africa* 118.

¹⁴⁶ Pieterse *The Pursuit of Paternal Custody* (Masters of Social Science 2002 RU) 37, basing her opinion on an article of Severson and Bankston "Social Work and the Pursuit of Justice through Mediation" (1995) *Social Work* 40(5) 684, notes that if couples can resolve their disputes in a minimally antagonistic, non-adversarial atmosphere, the volatile interpersonal nature of their disputes will be diffused and the children involved will benefit (Pieterse however incorrectly refers to "Bankson" instead of "Bankston"). De Jong "Judicial Stamp of Approval for Divorce and Family Mediation in South Africa" 2005 *THRHR* 96-99 says that mediation offers overwhelming advantages to the parties in dispute, the affected children and the judicial system in general.

¹⁴⁷ De Jong "An Acceptable, Applicable and Accessible Family-law System for South Africa – Some Suggestions Concerning a Family Court and Family Mediation" 2005 *TSAR* 38. Regarding the trauma caused to children while their parents litigate matters about them. Also refer to *R v H* 2005 6 SA 535 (C) par 26 and 31. The boy in this case suffered from anxiety and distress and could not deal with conflict situations. He was at the centre of a dispute related to contact and custody (as it then was) to him. Also see *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 613 where the court said that as the child was being used as a football between the parents. The court ordered that the matter be mediated prior to any party returning to court.

¹⁴⁸ Refer to chapter 1.2 and n 68 above.

If mediation is successful and an agreement is reached either on whether the unmarried father qualifies for full parental responsibilities and rights,¹⁴⁹ or on an appropriate parenting plan, the agreement may be subjected to judicial review.¹⁵⁰ It is to be noted that a parenting plan can only be entered into between the co-holders of parental responsibilities and rights.¹⁵¹ In this regard the unmarried father must already be vested with those rights.¹⁵²

In the event though that mediation is unsuccessful, a court may be approached for the relevant relief. In this regard some form of proof would be required to indicate that mediation was attempted and that it was either unsuccessful or that the parties involved failed to attend the meeting. The proof would be in the form of the statement of outcome of mediation as provided for in Form 6 of Regulation 8,¹⁵³ to be completed by a social worker, psychologist or other suitably qualified person as provided for in the form. If however either or both parties failed to attend the mediation, Form 7¹⁵⁴ will be completed by the social worker, psychologist or other suitably qualified person to that effect.¹⁵⁵

2.4.2 Section 21(3) – Mediation

When there is a dispute between the child's unmarried biological parents, as to whether the father meets the conditions as laid down in section 21(1), the

¹⁴⁹ In this regard no certificate or document is issued, or prescribed to confirm that the unmarried father actually complied with the requirements as prescribed in s 21.

¹⁵⁰ De Jong *Child Law in South Africa* 120. S 21 (3)(b) provides that any party to the mediation may refer the outcome to a court for review. However, "court" is not defined. Louw *Thesis* 119 is of the opinion that it should be referred to a High Court, as it entails guardianship as one of the elements of parental responsibilities and rights. S 34(3) also provides that a parenting plan may be registered with the family advocate or made an order of court, accompanied *inter alia* by a statement confirming that it was prepared after consultation with a family advocate, social worker or psychologist or that it was prepared after mediation by a social worker or other appropriate person.

¹⁵¹ As prescribed by s 33(1) of the Children's Act. The parenting plan will assist the co-holders to exercise their responsibilities and rights in respect of the child.

¹⁵² In terms of s 21 of the Children's Act.

¹⁵³ Of the Social Development Regulations.

¹⁵⁴ Regulation 8 of the Social Development Regulations provides for this form.

¹⁵⁵ De Jong 2008 *THRHR* 633 and 635 mentions that provision should be made for a prescribed form or certificate to note an attempt at mediation. No provision has been made for a statement or certificate for discretionary mediation in terms of ss 49, 67, 70 and 71. Forms 6 and 7 of the Social Development Regulations only deal with s 21(3).

matter *must* be referred for mediation.¹⁵⁶ This is one of the only two sections in the Children's Act that prescribes compulsory mediation.¹⁵⁷ The court may not be approached as a first resort to resolve the dispute.¹⁵⁸ Mediation may in other circumstances be ordered in the discretion of the relevant children's court.¹⁵⁹ As the family advocate may also be requested to do an investigation¹⁶⁰ by either party (mother or father) involved in the proceedings, the court or the family advocate himself or herself, it can be argued that the services offered by the offices of the family advocate include elements of both voluntary and mandatory mediation.¹⁶¹

The High Court's powers as upper guardian of all children should not be diminished, as it can still be approached for an order, without having to engage in mediation, if it is in the child's best interests.¹⁶² Although it is an objective of mediation to keep the parties and the children out of court, the High Court as upper guardian of all minor children is still acknowledged in the

¹⁵⁶ Also refer to chapter 5.1.1 hereunder.

¹⁵⁷ It provides that where the co-holders of responsibilities and rights experience difficulties in exercising these, they must first seek to agree on a parenting plan. In preparation for this parenting plan, the parties *must* seek the assistance of a family advocate, social worker or psychologist, or mediation through a social worker or other suitably qualified person. Louw *Thesis* 119 is of the opinion that this section is vague and may give rise to many problems. She mentions, for instance, that it is not clear who gets to choose the mediator and whether more than one mediator can be appointed for the particular purpose. Personal experience has shown that one party will often accuse the mediator of bias if the mediator was suggested or appointed by the other party. In this regard it is then often difficult to obtain the services of a mediator, as the question remains open as to who is then allowed to appoint or suggest a mediator, as there is no guidance in the Children's Act. Refer to chapter 6 for a recommendation in this regard

¹⁵⁸ Heaton *Commentary* 3-12. Hawkey "Mandatory Mediation Rules to Shape up the Justice System" December 2011 *De Rebus* 20 reported that the Rules Board also published a set of draft rules, which would provide for mandatory mediation once a matter before court is opposed. She mentioned further that in a meeting of the Cape Law Society it was mentioned that through mediation a result may be achieved which a court is not competent to reach. This is also in line with s 6(4)(a) in the Children's Act, which provides that an approach conducive to conciliation and problem-solving should be followed, rather than a confrontational approach. It is submitted that it appears as if the thrust towards mediation in more litigious matters will become stronger. See also De Jong 2008 *THRHR* 630.

¹⁵⁹ S 49 of the Act deals with a referral to a lay-forum hearing; s 69 with referral for a pre-hearing conference; s 70 with referrals for a family conference and s 71 with referrals to any appropriate lay forum. Mediation is also implied in s 22(1) where parental responsibilities and rights are conferred in terms of agreement; s 30(3) refers to agreement to exercise certain parental responsibilities and rights on behalf of the holder thereof; s 234(1) to post-adoption agreements and s 292 to surrogate motherhood agreements.

¹⁶⁰ In terms of ss 4(1) and 4(2) of Act 24 of 1987.

¹⁶¹ De Jong *Child Law in South Africa* 118-119.

¹⁶² Heaton *Commentary* 3-15.

process: all decisions made in mediation can still be reviewed and approved by the appropriate court.¹⁶³

Parties must participate in mediation and disclose relevant documentation and information honestly and in good faith. In the event that there is no honest disclosure or an abuse of the mediation process, the *bona fide* party should have some form of recourse.¹⁶⁴ Section 48(1)(d) provides that a Children's Court may make appropriate orders as to costs in matters before it. Normally *mala fide* or resisting parties are penalised with costs orders and the Children's Court may order this party to pay wasted costs of mediation and any legal costs, if applicable. This might deter resisting parties and hopefully encourage participation in mediation.¹⁶⁵

In the case of *MB v NB*¹⁶⁶ the court specifically underlined the importance of mediation, prior to approaching the court. Brassey AJ voiced his displeasure with the case and the process because of the legal costs and the time taken to resolve the issues.¹⁶⁷ During a pre-trial conference¹⁶⁸ in this matter one of the questions that had to be considered was whether the dispute should be referred for possible mediation. This question was answered in the negative. This resulted in the judge to whom the matter was allocated to, trying to perform the role of mediator himself.¹⁶⁹ During the plaintiff's testimony, the judge asked if the option of resolving the matter through mediation had been

¹⁶³ Heaton *Commentary* 3-15; De Jong *Child Law in South Africa* 120; De Jong 2008 *THRHR* 631.

¹⁶⁴ De Jong 2008 *THRHR* 636.

¹⁶⁵ De Jong 2008 *THRHR* 637 further discusses the possibility of contempt of court if a party does not adhere to mandatory mediation in terms of s 21 and 33, or court-ordered mediation in terms of ss 49, 69, 70 or 71, which might result in a fine or imprisonment. However a formal court application needs to be lodged, with a supporting affidavit setting out the grounds of the contempt in detail to support the application for a finding of contempt of court. Only once this application has been granted by the court will the resisting party be held accountable.

¹⁶⁶ 2010 (3) All SA 220 (GSJ). This was a defended divorce matter, where two children were involved. However the eldest of the two children was not born from the marriage between the parties, but was raised and accepted by the father as his own son. Some patrimonial issues were still in dispute, maintenance for the plaintiff (the wife), dispute of the value of the accrual of the defendant's estate and costs of the matter. At the pre-trial conference most elements regarding the estate were settled.

¹⁶⁷ Par 48.

¹⁶⁸ A round table conference is normally held after the close of pleading in terms of Rule 37 of the Uniform Rules of Court, in an attempt to narrow down and possibly resolve disputes before going to trial.

¹⁶⁹ Par 49.

mooted with her and she replied that it had not.¹⁷⁰ Brassey AJ proceeded to point out that mediation can produce remarkable results in the most unpropitious of circumstances and that the success of the process lies in its very nature. He noted further¹⁷¹ that if mediation is appropriate in commercial cases, it would be even much more apposite in family disputes.¹⁷² Brassey AJ was confident that the parties would have been served well if their dispute had been submitted to mediation¹⁷³ and that mediation was the better alternative and should have been tried.¹⁷⁴ Lewis J in *FS v JJ*¹⁷⁵ also endorsed the views expressed by Brassey AJ that mediation in family matters is a useful way of avoiding protracted and expensive legal battles. Lewis J further said that an approach conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided.¹⁷⁶

After an agreement has been reached through mediation it may be made an order of court or it may be registered with the family advocate, to take effect.¹⁷⁷

2.4.3 *Confusing Terminology*

It is required that mandatory mediation¹⁷⁸ be undertaken by a family advocate, social worker, social services professional or other suitably qualified person. It is noted that section 33(5)(b) however only requires that mediation be done through a social worker or other suitably qualified person. It is submitted that

¹⁷⁰ Par 50.

¹⁷¹ The judge based his argument on the judgment of *Egan v Motor Services (Bath)* 2007 EWCA Civ 1002). He specifically noted that this case “cries out for mediation” and that mediation is a perfectly proper adjunct to litigation.

¹⁷² Par 51-52.

¹⁷³ Par 55.

¹⁷⁴ Brassey J felt so strong about the fact that the matter should have been referred to mediation by the respective attorneys, that he ordered that each party had to bear his/her own costs and that their attorneys’ fees were only recoverable as between party and party and should be taxed, or agreed upon with independent advice.

¹⁷⁵ 2011 3 SA 126 (SCA) par 54. Also see *Van Den Berg v Le Roux* 2003 All SA 519 (NC) 606.

¹⁷⁶ Par 54. This is in line with the provisions of s 6(4) of the Children’s Act.

¹⁷⁷ As provided for in s 22(4). Note that s 34 of the Children’s Act does not make it compulsory for a parenting plan to be registered or made an order of court. Subject to the plan being put in writing and signed it *may* then be registered or made an order of court to take effect. For a further discussion hereof, refer to chapter 5 hereunder.

¹⁷⁸ In terms of s 21(3). S 33(5)(a) also added a psychologist to the list of persons who may assist in preparing a parenting plan.

section 33(5)(b) should be amended to include mediation by the family advocate and social services professional as well.

Firstly the question arises as to who can be regarded as a suitably qualified person. No guidance is provided in the definitions of the Children's Act,¹⁷⁹ or any description in either section 21 or 33. Would a suitably qualified person be someone who has undergone some form of training, or would an attorney with sufficient experience be regarded as suitably qualified?¹⁸⁰ A psychologist or social worker might be skilled in mediation techniques, but might not be versed in law and its implications, whereas attorneys on the other hand might be versed in law, but may lack compassion or mediation skills.¹⁸¹ A person needs to be skilled in the art of mediation in order to cope with animosity, which usually accompanies disputes,¹⁸² otherwise it might result in serious complications. It is submitted that even attorneys with experience in family or divorce litigation might still have a litigator's approach¹⁸³ instead of a mediator's approach and might not be qualified to act as mediators, simply because of their experience in that field. They should also be trained in the skills of mediating.¹⁸⁴ It is therefore submitted that the legislator should define what is meant by a suitably qualified person, by adding that this person should at least have some form of formal training.¹⁸⁵ The greatest concern is also that there is no formal body or code of conduct to which mediators need to conform.¹⁸⁶

¹⁷⁹ S 1; Heaton *Commentary* 3-14.

¹⁸⁰ Heaton *Commentary* 3-14.

¹⁸¹ Paizes *Dissertation* 49.

¹⁸² De Jong *Thesis* 119.

¹⁸³ De Jong "A Pragmatic Look at Mediation as an Alternative to Divorce Litigation" 2010 *TSAR* 516 discusses the approach of attorneys when dealing especially with divorce matters. She says that the problem lies with attorneys who are schooled in the adversarial system and that their approach is one of "winner-takes-all".

¹⁸⁴ Paizes *Dissertation* 49 refers to an unreported case of *Visser v Visser* (no case number was provided) where a parenting plan was drawn up after mediation. The court requested that the mediator be called to testify about her qualifications after the family advocate queried whether the arrangements regarding the minor child would be in her best interests. The mediator could not be called, as she had no formal qualifications.

¹⁸⁵ De Jong 2008 *THRHR* 638-639 is of the opinion that mediators should receive formal mediation training and where they do not comply with such training requirements they should not be allowed to facilitate, especially in family violence cases. Mediation training will also ensure that essential mediation skills are promoted and that mediators will stay abreast of developments.

¹⁸⁶ Paizes *Dissertation* 50.

Currently mediation services are provided by the offices of the family advocate, involving disputes in terms of section 21(1)¹⁸⁷ parental responsibilities and rights agreements¹⁸⁸ and parenting plans.¹⁸⁹ As the family advocate is assisted by a family counsellor¹⁹⁰ in investigations, the family advocate's office offers an interdisciplinary approach to disputes and mediation.¹⁹¹

Secondly, the use of the word *through* in section 33(5)(b) raises a further question. Should mediation be done through a social worker or other suitably qualified person (meaning they appoint someone), or should the social worker or other suitably qualified person actually do the mediation?¹⁹² It is submitted that the legislator should replace the word *through* with the word *by*.

Thirdly, when one refers to section 34, dealing with the formalities of a parenting plan, further confusion is created in section 34(3)(b)(ii)(bb). This section requires that a parenting plan be accompanied by a statement by a social worker or *other appropriate person* to the effect that the plan was prepared after mediation. This phrase is even vaguer than *other suitably qualified person* and it is not clear why the legislator used a different phrase in this section.¹⁹³ It appears as if the same meaning needs to be equated to these phrases.¹⁹⁴ It is submitted that the legislator should amend section 34(3)(b)(ii)(bb) to replace the word *appropriate* with *suitably* to bring it in line

¹⁸⁷ The mediation would be regarding whether the unmarried father meets the criteria in s 21(1) that would allow him to acquire automatic parental responsibilities and rights.

¹⁸⁸ These agreements are often the result of mediation after an s 21-dispute or where the unmarried father needs assistance to enforce his contact rights.

¹⁸⁹ The family advocate also makes inquiries regarding what would be in the child's best interests regarding residency and contact in divorce proceedings and provides the court with a recommendation in this regard. S 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 makes specific provision for these enquiries by the family advocate, after the institution of divorce proceedings or other post-divorce matters related to the child.

¹⁹⁰ Family counsellors are appointed in terms of s 3(1) of Act 24 of 1987.

¹⁹¹ De Jong *Child Law in South Africa* 119.

¹⁹² Heaton *Commentary* 3-38 is of the opinion that the use of the word "through" is unfortunate.

¹⁹³ It is noted that the terminology used in the Social Development Regulations in Form 8 (Application for Registration of a Parenting Plan or for Parenting Plan to be made an Order of Court: s 34(2)), Form 9 (Statement of Family Advocate, Social Worker or Psychologist that Parenting Plan was Prepared after Assistance: s 33(2) and (5)), Form 10 (Statement of Social Worker or Other Suitably Qualified Person that Parenting Plan was Prepared after Mediation) and s 36(3), refer to *other suitably qualified person*.

¹⁹⁴ Heaton *Commentary* 3-40.

with the rest of the wording used in the Children's Act where reference is made to mediation specifically.

2.4.4 A Peculiar Predicament

By their very nature mediation proceedings and negotiations are privileged and therefore to be treated as confidential. This leads to conflict with section 69(4)(b), which stipulates that the mediator has to report any fact emerging from a pre-hearing conference which ought to be brought to the notice of the court.¹⁹⁵ This might result in the parties not fully disclosing some information relevant and necessary for mediation. In this regard the mediator might find himself/herself in a very peculiar predicament, as certain information given in confidence needs to be reported. An example is if information about child abuse¹⁹⁶ is disclosed during the mediation process in a discussion on why one party is to have only supervised contact with the child. Should the right to confidentiality of information obtained in the mediation process be one of the rights that may be limited in terms of section 36 of the Constitution?¹⁹⁷ The Constitution¹⁹⁸ prescribes that the child's best interests are of paramount importance in *all* matters related to the child. This is therefore a clear indication that the child's best interests should prevail over confidentiality.¹⁹⁹ It is submitted that in this instance, the child's best interest should be of paramount importance and the right to confidentiality should bend the knee to the child's best interests. The abuse should, although discussed in confidence, be reported to the court.

¹⁹⁵ S 63 allows a children's court to prescribe the manner in which a record is kept of an agreement reached between parties to mediation after a family group conference, lay forum or pre-hearing conference. Any fact emerging from such conference ought to be brought to the notice of the court and will be admissible as evidence.

¹⁹⁶ It is submitted that a skilled mediator should deal with situations like this, or that mediation should then cease. Cognisance should be taken of s 69(2), which provides that a pre-hearing conference is prohibited in matters involving the alleged abuse or sexual abuse of a child. S 71 however provides that this exclusion is only applicable in relation to mediation in lay forum hearings; De Jong *Child Law in South Africa* 122.

¹⁹⁷ Certain rights may be limited if it is reasonable and justifiable to do so. This limitation has general application and must be applied to all persons.

¹⁹⁸ S 28(2).

¹⁹⁹ In this regard see chapter 1.3 regarding a discussion of the interaction of the father's constitutional rights and the child's best interests in terms of the Constitution.

2.5 Back to the Beginning?

It is clear that the problem the unmarried father faces does not actually stem from his acquisition or possession of parental responsibilities and rights. His problem is rather the way in which he is allowed to exercise those rights.

As no criteria or specifications are prescribed as to how the unmarried father should exercise his automatically acquired responsibilities and especially rights towards his child, it is submitted that the legislator should consider adding provisions to the Children's Act stipulating this. The Uganda Children Act²⁰⁰ appears to be providing a vehicle to the unmarried father to exercise his parental responsibilities and rights.²⁰¹ It is suggested that once it has been established that the unmarried father does have parental responsibilities and rights, a formal declaration to that effect should be issued by the family advocate.²⁰²

It was pointed out by Louw²⁰³ that while it may be in the best interest of one child to have two legal parents from birth, it might not always be so for another. The challenge in this regard would be to formulate a flexible rule that also allows for exceptional cases.²⁰⁴ It is submitted that in any event, each father will exercise his rights in a different milieu and way.²⁰⁵ It appears therefore that there is still differentiation between married and unmarried fathers. It appears that the problem is not whether or not the father actually has rights, but rather whether he is allowed to exercise them and how. The uncommitted father, whether married or not, would not normally enforce his

²⁰⁰ Act 1997, Chapter 59 of the Laws of Uganda.

²⁰¹ Refer to n 122 earlier in this chapter.

²⁰² In this regard it is further suggested that application for such declaration should be made on a prescribed form, to be submitted to the family advocate. Once it has been confirmed that the unmarried father meets the criteria set out in s 21(1), he will be issued with a declaration, or certificate. In the event that it cannot be established whether the unmarried father does fulfil the criteria in s 21, or it is being disputed, the matter can then be mediated in terms of s 21 (3).

²⁰³ 2010 *PER* 190.

²⁰⁴ Louw 2010 *PER* 190 also notes that when making assumptions there will always be cases in which these will prove to be wrong.

²⁰⁵ Heaton 2009 *JJS* 6 -9 says that an individualised approach in the child's best interest should be followed. She points out that each individual case or situation has to be considered independently in the light of the effect that the individual child's circumstances have, or will possibly have on the child.

right to his child. However, fathers who want to play an active role in their children's lives are normally the ones who encounter problems, such as denial or limitation of contact.

Has section 21 then really placed unmarried fathers in a better position by automatically vesting them with parental responsibilities and rights? It has indeed advanced the unmarried father's position from having no inherent right to his child to at least having a right.²⁰⁶ This raises the question whether unmarried fathers are once again back at the steps of the court, in order to enforce their rights regarding their children. Surely this position does not advance the right of the child to build a relationship with both parents, which would in turn result in the position not being in the child's best interests.²⁰⁷

²⁰⁶ Once the requirements of s 21(1) as discussed earlier in this chapter, have been satisfied.

²⁰⁷ See the arguments in 2.2.3 above.

CHAPTER 3

SECTION 21: A COMPARATIVE ANALYSIS

3.1 INTRODUCTION

The position prior to the Children's Act was that there was a shift in emphasis from parental rights to parental responsibility.^{1 2} The rights and duties a parent had in relation to a child born within a marriage were referred to as parental authority over that child. According to common law the unmarried mother had parental authority in respect of the child.³ The unmarried father could obtain rights of guardianship, custody or access if he could convince the High Court that it was in the child's best interests.⁴ In terms of customary law, the father's right to custody and guardianship of his child was absolute and could not be taken from him. In this context it would then be more appropriate to say that the child belonged to the family group of the father.⁵ The

¹ Sinclair (assisted by Heaton) *The Law of Marriage* (1996) 111. See also Sinclair "From Parent's Rights to Children's Rights" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 62.

² In *V v V* 1998 4 SA 169 (C) par 176D the court said that there had been a shift in thinking from a concept of parental power to one of parental responsibility and children's rights. Also see Boezaart *Law of Persons* 111 and SALRC Discussion Paper 103 at 192.

³ Bonthuys and Albertyn *Gender Law* 227.

⁴ Bonthuys and Albertyn *Gender Law* 227. Common law provided that the unmarried father had no parental authority, but that he could approach the court for an order awarding it (or only certain elements thereof) to him. The Natural Fathers of Children Born out of Wedlock Act 86 of 1997 did not provide the unmarried father with an automatic right, but provided that he could apply to the High Court for rights. (This Act was repealed with Schedule 4 of the Children's Act as discussed in chapter 2 above.) With the introduction of s 21, unmarried fathers were given automatic parental responsibilities and rights, provided that certain requirements were met. Also see Heaton *Commentary* 3-11. Refer also to chapter 2 for a more detailed discussion on the position of the father prior to the commencement of the Children's Act 38 of 2005.

⁵ Jansen "Customary Family Law" in Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism in South Africa* (2010) 66. The author however points out (with reference to *inter alia* the case of *Hlope v Mahlalela* 1998 1 SA 449 (T)) that the court as upper guardian has modified customary law by emphasising that the best interests of the child are decisive. The position will then be that consideration will be given to the child's best interests as provided for in the Constitution. This was confirmed in the case of *Hlope v Mahlalela* 1998 1 SA 449 (T). The court also noted that it was unclear whether common law had been incorporated into customary law, or whether customary law had been excluded in favour of common law (458F-G). Ngidi *Child Law in South Africa* 242 says that customary law is an active and integral part of the South African community and its application is bound to produce challenges to court. However, she further says (229) that the principle that the best interests of the child are paramount in any matter concerning the child is a constitutional injunction that invalidates customary and common law where it is not consistent with the Constitution. The limitation clause (s 36) of the Constitution providing for a limitation of rights where there are other competing rights will be applied in this regard. See also chapter 1.3 for a discussion of the limitation of rights.

unmarried father also had no parental rights in relation to his child and children of unmarried parents belonged to the child's mother's family.⁶ The Children's Act⁷ however moved away from parental authority (or power)⁸ to focus on parental responsibilities and rights.⁹ One of the reasons for using the word "responsibilities" rather than the word "rights" was also to emphasise the responsibilities to the child, rather than the rights in respect of that child.¹⁰ The purpose of the introduction of parental responsibilities and rights was to replace the common law concept of parental "power"¹¹ and to act in accordance with South Africa's constitutional¹² and international demands.¹³ A balance had to be struck between parents' responsibilities to their children

⁶ Bennett *Customary Law in South Africa* (2012) 307 however points out that there is a difference depending on whether or not *lobolo* was paid. If it was duly paid, the child belongs to the father's family and if not, to the mother's family. Also see Sinclair *Law of Marriage* 114 and Heaton *Commentary* 3-11.

⁷ 38 of 2005.

⁸ Parental authority is defined by Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (1999) 313 as the complex of rights, powers, duties and responsibilities vested in or imposed upon parents by virtue of their parenthood. Parental power thus includes both guardianship in its narrowest sense and custody, which pertains to the personal day-to-day life of the child. Visser and Potgieter *Introduction to Family Law* (1994) 199 define it as the sum of the rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, which rights, responsibilities and obligations must be exercised in the child's best interests, with due regard to his/her rights. In terms of the common law parental authority included guardianship, custody and access. See also Skelton *Child Law in South Africa* 63 and Heaton *Commentary* 3-3. See also the discussion in chapter 2.2 above.

⁹ S 18. Parental responsibilities and rights are dealt with in chapter 3 of the Children's Act 38 of 2005. See also Boezaart *Law of Persons* 111. Bonthuys 2006 *Stell LR* 484 however criticised the formulation and contents of parental responsibilities, due to its legal enforceability. She for instance pointed out that the duty of care contains very vague responsibilities and that other parental responsibilities are "simply too onerous" such as the securement and fulfilment of children's constitutional rights.

¹⁰ Skelton *Child Law in South Africa* 63. It is submitted that these parental responsibilities rather create a duty for the parents. Parental authority was replaced with the term "parental responsibilities and rights" in the Children's Act. In this regard see Heaton *South African Family Law* 283, Boezaart *Law of Persons* 111 and Skelton and Carnelley (eds) *Family Law in South Africa* 238. Also refer to the SALRC Discussion Paper 103 par 8.3.4 and 8.4.

¹¹ Skelton and Proudlock *Commentary* 1-29 say that the term "parental power" is outdated. See also Louw *Thesis* 44. Louw correctly states (38) that the UNCRC was probably the most important initiative to create a global children's right initiative and the shift towards parental responsibilities. She points out that parental responsibility (-ies), mostly used in conjunction with "rights", is the preferred term to refer to the relationship between parent and child. See also SALRC Discussion Paper 103 at 193 where it is mentioned that the concept of parental "power" became outdated and the use thereof unsatisfactory. As one of the State Parties to the UNCRC, South Africa had to recognise the international move away from parental power as discussed further in this chapter. Refer to chapter 1 n 74.

¹² S 28(2) of the 1996 Constitution provides that the best interest of the child is paramount in all matters concerning the child.

¹³ In terms of the UNCRC. This was passed by the General Assembly in 1989, came into force on 2 September 1990 and was ratified by South Africa in June 1995. See also Robinson "The Child's Rights to Parental and Family Care: Some Brief Remarks" 1998 *Obiter* 333 who also says that the authority of the *pater* lost much of its harshness in the South African law.

and their rights and duties required to enable them to fulfil those responsibilities.¹⁴ The child rather has the right to care from the parent, whereas the parent has the right and responsibility to provide that care to the child.¹⁵

With the introduction of section 21 of the Children's Act, the position of the father changed when recognition was given to the rights of children. The parents' marital status no longer affected the acquisition of parental responsibilities and rights of the unmarried father.¹⁶ By acknowledging that the child is an individual who must be allowed to maintain a relationship with both parents,¹⁷ rights were also given to the unmarried father, which in turn *prima facie* improved his position after the commencement of the Children's Act.¹⁸

¹⁴ This was also the reason why "responsibilities" as well as "rights" were included in the definitions (s 1 of the Children's Act) and why provision was made that every child has age-appropriate responsibilities to the state, his/her family and community (as provided in s 16 of the Children's Act 38 of 2005). See also Boezaart *Commentary* 2-13, 2-35; Lowe "The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective" 1997 *IJLPF* 193, 196, 197 who is of the opinion that the Scottish legislation is vastly superior to the English and Australian, as it shows that it is possible to provide general guidance as to the meaning of parental responsibility. See further Louw *Thesis* 44; SALRC Discussion Paper 103 at 193, 195.

¹⁵ Skelton and Proudlock *Commentary* 1-29.

¹⁶ Ngidi *Child Law in South Africa* 242. In the *Hlope v Mahlalela* case, the court also said that the child's best interests should prevail and not whether or not the father has paid *lobolo* (the bride price or dowry; see however Bennet *Customary Law* 220 for a detailed discussion of the meaning of *lobolo*). See also Heaton *Commentary* 3-3, Boezaart *Law of Persons* 111 and Kerr "Customary Family Law" in Clark (ed) *Family Law Service* G74-39 who said that the most important factor in deciding which system of law is the one generally pertaining to the minor, is the form of the child's parent's marriage. In common law then the child's parent's marital status decides the position of the child's guardianship and customary custody. Also refer to chapter 2.2. for a discussion hereof.

¹⁷ Ngidi *Child Law in South Africa* 242. See UNCRC art 9.3, which provides that it is the child's right to maintain personal relations and direct contact with both parents, except if it is contrary to the child's best interest, and art 18(1), which provides that it is the responsibility of both parents to see to their child's upbringing and development. This means that the parents' marital status is irrelevant and implies that the unmarried father should be allowed to assume his parental responsibility to the child. Louw *Thesis* 134 is however of the opinion that arts 9.3 and 18(1) were not entirely successful in reaching its obligation under these articles to provide for equal treatment of unmarried fathers. The author said that South Africa has no mechanism to enforce the Convention rights directly and the wide terms in these articles have opened up the possibility of interpreting these provisions in such a way that an approach to differentiate between mothers and fathers would be justified. See also Lowe 1997 *IJLPF* 202, 203; Sloth-Nielsen, Wakefield and Murungi "Does the Differential Criterion for Vesting Parental rights and Responsibilities Violate International Law? A Legislative and Social Study of Three African Countries" 2011 *JAL* 205; Louw 2010 *PER* 156. Refer also to the discussion in 2.2.3 above.

¹⁸ Although the unmarried father's position improved, he might not necessarily be in a better position than before the commencement of the Act. See Louw 2010 *PER* 156, 191, 193 who questions if the unmarried father was really placed in a better position. She submits that committed fathers should be allowed to care for their children, without necessarily making it dependent on the mother's view of what would be in the child's best interests. She says that the position has not

The SALRC¹⁹ referred to noteworthy features with reference to the content of other African countries' statutes, which have engaged in comparable law reform.²⁰ These African countries are Uganda, Kenya, Ghana and Namibia.²¹ These countries have all also ratified the UNCRC and they have constitutions containing children's rights provisions.²² Common themes in all these countries' legislation are that the best interests of the child are of paramount importance; the shift from parental rights to parental responsibility; the entrenchment of children's rights; the minimum intervention principle and that delay will be prejudicial to the child; and the criterion of significant harm as a reason for removal of children into state care.²³ All of these countries also determined that the age of majority and therefore the end of childhood, is at eighteen years.²⁴

changed to the extent that automatic inherent parental rights are not conferred on biological fathers on the same basis as on mothers. She further argues that this position of the unmarried father regarding the acquisition of parental responsibilities and rights may not be constitutionally justifiable. Also refer to chapter 2 herein.

¹⁹ First Issue Paper 13 par 10.1-10.2.

²⁰ SALRC First Issue Paper 13 par 10.1. For the purposes of this study only those sections that could be compared with s 21 of the Children's Act 38 of 2005 were used for this comparison. The rest of the countries' children's acts mentioned were not otherwise interpreted, unless directly relevant to this study.

²¹ The SALRC First Issue Paper 13 par 10.1 said that these specific countries had been selected because of accessibility of material, the possible relevance for the South African context and because all the examples of law reform were from the period after ratification of the UNCRC. South Africa, Uganda, Ghana and Kenya were also former British colonies. Skelton "The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa, based on International and Regional Instruments" 2009 *AHRLJ* 486, says that law reform in the field of children's rights appears to be well under way although progress remains uneven. She mentions that many African countries have drafted new child laws in recent years, such as Uganda, Kenya, Ghana and South Africa, and that Namibia has a new bill pending. These countries are discussed further in this chapter.

²² Sloth-Nielsen and Van Heerden "New Child Care and Protection Legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 268 contend that recent law reform endeavours in Uganda, Namibia, Kenya and Ghana could be of great use in contemporary South Africa, as all these countries have used the principles of the UNCRC as a backdrop to the improvement of child law; they have all had to repeal or substantially revise colonial legislation inherited from former regimes; pragmatism and realistic considerations of socio-economic constraints and objectives have influenced both the process and content of the proposals of reform; statutory law would not operate in isolation (customary practices and religion need to be taken into account as well) and the importance of the family in African society is a common factor. See also SALRC First Issue Paper 13 par 10.2.1.

²³ For the purposes of this paper all these common themes will not be discussed, as a detailed comparison can be a dissertation on its own. Only the common themes related to the subject matter of this dissertation were compared and discussed.

²⁴ In terms of s 2 of the Age of Majority Act 57 of 1972 (which was repealed in Schedule 4 of Act 38 of 2005 in terms of GG 30030 of 29 June 2007), the age of majority in South Africa was twenty-one years. The age of majority is now eighteen years, as provided in the definition of "child", which means a person under the age of eighteen years, as described in s 1 of the Children's Act 38 of 2005. This is also in terms of art 1 of the UNCRC, except that the UNCRC also provides that where a specific country has a lower age of majority, persons who attained majority at that

The provisions related to parental responsibilities and rights and the acquisition thereof in the acts of the African countries referred to by the SALRC will be briefly discussed and compared to the South African Children's Act.

3.2 UGANDA

The Ugandan Children Act²⁵ confers parental responsibility²⁶ on both parents of a child, regardless of whether the child was born in or out of wedlock.²⁷ The section dealing with parental responsibilities reads as follows:

6. Parental responsibility.

1. Every parent shall have parental responsibility for his or her child.

The South African Children's Act provides more depth to the concept "parental responsibility". It does not merely stipulate that the parent has responsibilities and duties, but also specifically gives content to the term, unlike Uganda's Children Act. This section also does not mention the marital status of the child's parents and parental responsibilities are therefore not dependent on whether the parents were married. According to the South African Children's Act, mothers, married and unmarried fathers still acquire parental responsibilities and rights in different ways.²⁸ In terms of the Uganda Children Act parental responsibility is also not dependent on whether the parents have lived together,²⁹ or whether the unmarried father took any steps similar to

younger age will not be able to benefit from the protection of the UNCRC. They will no longer be regarded as "children" for the purposes of the UNCRC. Scotland, for instance, made provision for different ages in relation to the exercising of parental responsibilities and rights. In this regard also refer to 3.6.2 below. See also Mahery *Child Law in South Africa* 311. Refer also to chapter 1.2 n 74 above.

²⁵ Act 1997, Chapter 59 of the laws of Uganda.

²⁶ S 1 of the Ugandan Children Act defines parental responsibility as all the rights, duties, power, responsibilities and authority which by law a parent of a child has in relation to the child. S 1 of the South African Children's Act refers to s 18 for a definition of parental responsibilities and rights, which are to care for the child, maintain contact with the child, act as guardian of the child and to contribute to the child's maintenance.

²⁷ S 7(1).

²⁸ This is provided for in ss 19, 20 and 21.

²⁹ In the South African Children's Act (s 21(1)(a)), one of the requirements to acquire parental responsibilities and rights is that the unmarried father must have lived with the mother at the time of the child's birth in a permanent life-partnership.

those provided for in the South African Children's Act.³⁰ It simply confers responsibilities on both parents.³¹ The Uganda Children Act also does not refer to or mention any parental rights. It however provides for certain duties of the parent, guardian or any person who has custody³² of the child to be fulfilled. These duties then give rise to certain rights of the child.³³ In contrast, the South African Act also confers parental rights simultaneously with parental responsibilities on a parent. Section 67 of the Uganda Children Act however makes provision for a declaration of parentage towards a man alleged to be the father, or woman alleged to be the mother of the child.³⁴ This declaration however does not confer rights of custody upon the declared father or mother of the child.³⁵ This declaration only establishes a blood relationship³⁶ with the child and the child will accordingly be in the same legal position towards the father or the mother, as a child actually born of married parents.³⁷ According to the SALRC,³⁸ a key reform of the Ugandan Children Act has been to grant shared parental responsibility, whereas the previous position was that the

³⁰ S 21(1) Act 38 of 2005. S 25 of the Kenyan Children Act also provides that the unmarried father will acquire parental responsibilities subject to certain actions of the father. See the discussion in 3.3 below.

³¹ The term "parental responsibility" has not been defined in the Ugandan Act.

³² It is noted that the term "custody" has not been specifically defined in the Ugandan Act. The term "custodian" has however been defined in s 1(6) to mean a person in whose care the child is physically placed. In South Africa the common law meaning will in such a case be given to the word "custody". Skelton *Child Law in South Africa* 66 says that when a parent has custody it means that the child lives with that parent and that parent takes the day-to-day decisions relating to the child and the child's life. S 1(2) of the South African Children's Act specifically makes provision for it that this term must also be construed to mean "care and contact". Also refer to a more detailed discussion regarding the new terminology in chapter 5.1.2.

³³ S 5(1) provides that a parent, guardian or any other person who has custody of a child shall have a duty to maintain the child. This duty gives the child the right to education and guidance; immunisation; clothing; shelter and medical attention. S 5(2) provides further that any person having custody shall protect the child from discrimination, violence, abuse and neglect.

³⁴ A declaration of parentage is not the same as adoption. It is made when the mother, father or guardian of the child, or the child personally (with assistance) applies for an order to "establish" a blood relationship in terms of s 72. This order has the **effect** of the child having a blood relationship with the parent so declared. It is submitted that the word "establishing" should not have been used in s 72, as there either is a blood relationship or there is none. A better word would have been "simulates". S 72 should then read: A declaration of parentage by a court shall **simulate** a blood relationship of father and child or of mother and child and, accordingly, the child shall be in the same legal position towards the father or the mother as a child actually born in lawful wedlock. Adoptions are regulated by Part VII of this Act.

³⁵ S 72(2).

³⁶ S 72(1).

³⁷ S 72(1) does not refer to "married parents", but to a child born in "lawful wedlock". It is unclear why wedlock is referred to as "lawful". It is submitted that the wording of this terminology is clumsy and that once wedlock has been entered into, it is lawful. The use of the wording "married parents" is more desirable.

³⁸ First Issue Paper 13 par 10.2.4.

father's paternal power allowed him the right to remove the child from the mother at the age of seven.³⁹

An instrument signed by the mother of a child and by any person acknowledging that the unmarried father is the father of the child and an instrument signed by the father of a child and by any person acknowledging that she is the mother of the child, will, if the instrument is executed as a deed; or if it is signed jointly or severally by each of those persons in the presence of a witness, be *prima facie* evidence that the person named as the father (or mother) is the father (or mother) of the child.⁴⁰ A declaration of parentage has the effect of simulating a blood relationship of father and child, or of mother and child. The child is therefore in the same legal position towards the father or mother, as a child actually born from that parent.⁴¹ In the case of unmarried fathers this "instrument" appears to be the instrument recording and confirming that the unmarried father has parental responsibilities and rights. In the South African Children's Act, no provision is made for any instrument to record the fact that the unmarried father has acquired parental responsibilities and rights.⁴² This causes a huge *lacuna* in this section, as it

³⁹ This was done in terms of Ugandan customary practice. In most parts of Uganda in cases of separation, the custody of the child would go to the father. Uganda therefore has a patriarchal society, which influences decisions about parental responsibilities and rights. See the Initial Report of States Parties due in 1996: Uganda. 17/06/96, of the Committee on the Rights of the Child Consideration of Reports submitted by State Parties under art 44 of the Convention, obtained from www.law.yale.edu/rcw/jurisdictions/afe/uganda/UGANDA_CRC.htm accessed on 20 January 2013.

⁴⁰ S 71(2). S 71 further notes other incidences which would be regarded as *prima facie* proof of parentage, such as where the name of the father or the mother of a child is entered in the register of births in relation to a child, a certified copy of that entry shall be *prima facie* evidence that the person named as the father is the father of the child, or that the person named as the mother is the mother of the child. An order of a court for maintenance made against a person under any written law shall be *prima facie* evidence of parentage in subsequent proceedings, whether or not between the same parties. A declaration of parentage by the court shall be conclusive proof of parentage. An order made by a competent court outside Uganda in any affiliation, or similar proceedings, declaring or having the effect of declaring a person to be the father or the mother of a child shall be *prima facie* evidence that the person mentioned in that order is the father or mother of the child. Implied or express references in a written or oral will of any person to a child as his or her son or daughter (as the case may be) will serve as *prima facie* evidence that that person is the father or mother of that child. A written or oral statement by a deceased person confided to a person in a position of authority, indicating that the deceased is, or was the father or the mother of a particular child is *prima facie* evidence that the deceased person was the father or the mother of the child.

⁴¹ S 72(1). It does however not confer rights of custody on that parent. However, s 6 provides that every parent shall have parental responsibilities for the child. Refer to n 34 earlier.

⁴² The rights would automatically be acquired once the requirements in s 21(1) have been met. Also refer to chapter 2.3 for a discussion hereof.

causes uncertainty. It is submitted that South Africa should consider introducing an instrument to record and confirm that the unmarried father has acquired parental responsibilities and rights. This will provide more clarity on the position of the unmarried father.⁴³

It is further noted that the Ugandan Act refers to the child's "welfare"⁴⁴ rather than to the child's best interests.⁴⁵ If one reads the sections in the Ugandan Act referring to "welfare", it is submitted that the term "welfare" has a similar meaning as "best interests" as used in the South African Children's Act.⁴⁶ The child's welfare is of paramount consideration in respect to the upbringing of the child or administration of the child's property or application of income arising from it.⁴⁷ In terms of the South African Children's Act the child's best interests enjoy paramount importance and not merely consideration. The Ugandan Act also uses the term "custody",⁴⁸ whereas the South African Children's Act moved away from the use of this term. "Custody" in any law and the common law must now also be construed to mean "care"⁴⁹ as well.

⁴³ Refer to chapter 2.5 further for a suggestion on how this should be included in the South African Children's Act.

⁴⁴ For example ss 10(1), 68(3)(1), 73(3) and s 1 of the First Schedule to the Children Act.

⁴⁵ The term "welfare" has not been defined in the Ugandan Act. The principle has however been described in s 1 to the First Schedule.

⁴⁶ S 7 of the South African Children's Act describes the factors that need to be taken into consideration when applying the best interest of the child standard. In comparison with the Ghana Children's Act 560 of 1998, the child's best interests were set out in s 2 under the heading "Welfare principle". The term "welfare" is defined as the health, happiness and fortunes of a person or the statutory procedure or social effort designed to promote the basic physical and material wellbeing of people in need (obtained from <http://oxforddictionaries.com/definition/english/welfare?q=welfare> accessed on 27 January 2013). Statutory provision for factors to be considered when the child's best interests are applied, can also be found in s (1)(3) of the Children Act 1989 in England, s 3 of the First Schedule to the Uganda Children Act 1997 (chapter 59) and s 68F of the Australia Family Law Reform Act 1995.

⁴⁷ S 1, 1st Schedule related to the guiding principles in the implementation of the Act.

⁴⁸ S 73.

⁴⁹ S 1(2) of the Children's Act 38 of 2005. See also *WW v EW* 2011 6 SA 53 (KZP) par 25 where the court considered whether an additional meaning should be given to "custody" and "care" or whether the legislator meant to abolish it. The court concluded that an additional and wider meaning should be assigned to these terms (par 26 and 28).

3.3 KENYA

Kenya's Children Act⁵⁰ provides as its aim for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁵¹ The Kenya Children Act automatically vests parental responsibilities and rights in all mothers and married fathers. This is similar to the South African model.⁵² Unmarried fathers however only acquire these rights by cohabitating with the mother subsequent to the child's birth for a period of not less than twelve months, or where the father has acknowledged paternity.⁵³ Section 25 deals with the acquisition of these rights and requires that:

- (1) Where a child's father and mother were not married at the time of his birth –
 - a) the court may, on application of the father, order that he shall have parental responsibility for the child; or
 - b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.
- (2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited 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, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.

⁵⁰ The Children Act No 8 of 2001 (hereinafter referred to as the "Kenya Children Act").

⁵¹ This is provided for in the preamble to the Kenya Children Act.

⁵² Ss 19 and 20.

⁵³ See Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 215 who also say that South Africa borrowed from the Kenyan Children Act in its search for a suitable model for South Africa. Also refer to a discussion of the time period laid down for the Ugandan and South African father, later in this chapter.

The Kenyan model initially appears to provide for a mechanism for the acquisition of an unmarried father's parental rights by specifically allowing him to apply to court to do so. However, when the rest of the section is read it appears to be only one of the ways in which the unmarried father may acquire parental responsibilities and rights. The unmarried father's rights in the Kenyan model are automatically acquired, dependent on what he wishes to do and his subsequent conduct. If he then wishes to take no steps, he will not have parental rights and responsibilities.⁵⁴ A positive duty is placed on the father to perform one of the acts listed in section 25 in order to acquire parental rights and responsibilities.⁵⁵

The father may also acquire parental rights by agreement with the mother.⁵⁶ This is similar to section 22 of the South African Children's Act, which stipulates that the biological father without parental responsibilities and rights may enter into an agreement with the mother providing for the acquisition of such rights. The South African model however provides that a parental responsibilities and rights agreement will only be registered or made an order of court⁵⁷ if the family advocate or court is satisfied that such agreement is in the best interests of the child concerned.⁵⁸ No provision for the consideration of the child's best interests prior to giving effect to the parental responsibility agreement is made in the Kenyan model.⁵⁹ It is submitted that in this regard the South African model providing for the acquisition of parental responsibilities and rights via an agreement with the mother, is dealt with more comprehensively than the Kenyan model, as the child's best interests

⁵⁴ This will be the position of the unmarried father who has not lived with the mother after the birth of the child for 12 months, as contemplated in s 25(3) of the Kenyan Children Act. See also Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 208. These authors question if this position discriminates against the child born out of wedlock, as this position is in contrast with the Kenyan Constitution of 2010, which provides in s 53(1)(e) that every child has a right to parental care.

⁵⁵ This section does not allow for other interested parties, the mother of the child, or the child himself/herself to enforce parental responsibilities against the father. Also refer to the conclusion of this chapter for the reason why reference is made to "rights" first and not "responsibilities". This is also similar to the South African model in terms of ss 22(3) and 22(4).

⁵⁶ S 26 of the Kenya Children Act provides for a parental responsibility agreement, which shall only be effective if it is in the prescribed format.

⁵⁷ As contemplated in s 22(4).

⁵⁸ S 22(5).

⁵⁹ It is however noted that both the Kenya Children Act (s 83) and South African Children's Act (s 23) have made provision for certain factors to be considered by the court when determining who to give care to. The South African Act however refers to "care" and the Kenyan Act to "custody".

should be taken into consideration prior to registration of the agreement or it being made an order of court.

Although both the South African and Kenyan models provide that there should be a period of cohabitation with the mother, the main difference with section 21 of the South African Children's Act⁶⁰ is noted in the time period laid down for cohabitation with the mother in the Kenyan model.⁶¹ In the South African Act's section 21 there is no time period built into the section. The Kenyan model further provides for cohabitation with the mother subsequent to the child's birth, whereas the South African model provides for cohabitation at the time of the child's birth. It is submitted that cohabitation with the mother prior to the birth of the child shows commitment to the mother, in contrast with the Kenyan model where the cohabitation with the mother is after the birth of the child. The cohabitation with the mother after the birth of the child might be indicative of not only commitment to the mother, but also to the child.⁶² Commitment to the child is more important than just commitment to the mother, as commitment to the mother does not necessarily include or indicate commitment to the child.⁶³ The South African Children's Act refers to the unmarried father having lived with the mother in a "permanent life-partnership" whereas the Kenyan Children Act refers to "cohabitation" with the mother. The South African terminology used is open to interpretation and it is submitted that less confusion would have been created if the South African model also used "cohabitation" instead of "permanent life-partnership", or if a definition was provided for life-partnership.⁶⁴

⁶⁰ 38 of 2005.

⁶¹ Kenya Children Act s 25(3).

⁶² Skelton *Child Law in South Africa* 75 says that the intention underpinning the requirements in s 21, remains linked to what the father can demonstrate regarding his commitment to the child, or to the mother.

⁶³ Louw *Thesis* 182 submits that a commitment to the mother does not indicate that the father will assume responsibility for the child born from their union. She further says that the degree of the father's commitment cannot be predicated on the commitment to the mother and that it should thus be irrelevant as a requirement for a relationship between the child and father. It is submitted that this point of view is correct. The unmarried father acquires parental rights related to his child and not the mother and therefore his commitment to the mother should be irrelevant in his acquisition of parental responsibilities and rights.

⁶⁴ Refer to chapter 5.1.1.2 for a more detailed discussion about the confusion created by the use of this terminology. It was suggested in this chapter that a definition be provided for "permanent life-partnership", as none was provided in the Act to clarify the meaning. It appears that the requirement to just "cohabit" with the mother is not as stringent as the "life-partnership"

The Kenyan Act further provides that the father will acquire parental responsibilities if he has “maintained” the child. In terms of the South African Children’s Act⁶⁵ the unmarried father can acquire parental responsibilities and rights if he *inter alia* contributes, or has attempted in good faith to contribute to the child’s “upbringing” for a reasonable period and to “expenses in connection with the child’s maintenance”.⁶⁶ As maintenance also implies upbringing,⁶⁷ it is submitted that the South African model expanded the meaning of maintenance by using the term “upbringing”. Maintenance refers to economic or financial contributions and upbringing involves more than financial support. It also implies involvement in the child’s life.⁶⁸ Maintenance is a wide concept, which may include provision for food, housing, clothing, medical care and education.⁶⁹ The South African Children’s Act has therefore advanced the concept of the father’s contribution to include not only financial or economic assistance or support for the child,⁷⁰ but also intangible aspects such as psychological and emotional needs.⁷¹

requirement in South Africa. Cohabitation is simply that – it is submitted that the fact that parties cohabit does not necessarily mean that they have a life-partnership. It is further submitted that “life-partnership” is more permanent in nature. However, the fact that the definition is more stringent in South Africa does not have merits, as the relationship and commitment are still to the mother and not the child. The existence of a life-partnership of cohabiters was for instance questioned in the case of *FS v JJ* 2011 3 SA 126 (SCA). In *Volks v Robinson* 2005 5 BCLR 446 (CC) criteria were laid down for a life-partnership, as discussed in chapter 5.1.1.2.

⁶⁵ S 21(1)(b)(ii). This is the alternative to having lived with the mother in a *permanent* life-partnership as provided for in s 21(1)(a).

⁶⁶ The unmarried father also has to consent to be identified as the child’s father, or has to apply successfully to be identified as such, or he must have paid damages in terms of customary law.

⁶⁷ Louw *Thesis* 131 says that upbringing pertains to intangible aspects such as training, education, rearing and nurturing of a child. See also the discussion in 5.1.1.3 and further.

⁶⁸ Skelton *Child Law in South Africa* 77.

⁶⁹ Van Zyl “Maintenance” in Clark (ed) *Family Law Service* (2011) C8-5. Schäfer “Young Persons” in Clark (ed) *Family Law Service* (2011) E30-22(1) says that the distinction between “upbringing” and “maintenance” is not clear. It is however submitted that a distinction should not be made and that “upbringing” expands the meaning of “maintenance” to include economic as well as physical and emotional support for the child. This submission is also supported by Schäfer *Family Law Service* E30-22(1) where he says that “upbringing” refers to a broader notion of what a committed parent might reasonably be expected to do. See further chapter 5.1.1 herein.

⁷⁰ Refer however to chapter 5.1 where concerns are discussed regarding the terms “in good faith” and “reasonable period” used in s 21 of the Act.

⁷¹ In *Jooste v Botha* 2000 2 SA 199 (T) 201D-E Van Dijkhorst J said that there are two aspects of the parent-child relationship, namely the economic aspect (providing for physical needs) and the intangible aspect (providing for psychological, emotional and developmental needs). Regardless of the fact that the court acknowledged the latter aspect and that the best interests of the child demand an environment of love and affection, it was still held (210G) that no legal duty rests on the father of the child to afford his child his love, attention and affection. This contradiction was correctly criticised by Van der Linde and Labuschagne 2001 *THRHR* 314. See also chapter 1.1.3 for a discussion of this case.

Further, in contrast with the South African model, the Kenyan Children Act confers only parental responsibilities.⁷² Parental responsibility is further explained in the Act as all the duties, rights, powers, responsibilities and authority which the parent has in relation to the child and the child's property.⁷³ The duties are listed further under section 23(2).⁷⁴ The Kenya Constitution⁷⁵ as well as their Children Act⁷⁶ provides that every child has a right to parental care. No distinction is therefore made between married and unmarried parents.⁷⁷ Section 25 of the Kenya Children Act will however have to be amended to make provision for parental care of both parents and not to make it subject to the unmarried father's actions, in order to bring it in line with the provisions of their Constitution, which provides that the child has a right to care by both parents.⁷⁸

The Kenya Children Act provides for the best interests of the child to be a primary consideration. It is submitted that the wording hereof does not provide sufficient importance to the paramountcy of the child's best interests, as it only appears to be a primary consideration, which makes it appear as if the child's best interests are one of a number of considerations. The South African model in this regard is more effective in lending importance to the best interests of the child.⁷⁹

⁷² The South African Children's Act refers to "responsibilities and rights" and not just to "responsibilities" as in the Kenyan model.

⁷³ S 23(1).

⁷⁴ These duties include the duty to maintain the child and in particular to provide the child with an adequate diet, shelter, clothing, medical care (which includes immunisation) and education and guidance; to protect the child from neglect, discrimination and abuse. Provision is further made for the right to give parental guidance in certain instances; to determine the child's name, appoint a guardian, to administer the child's property for the benefit of the child and in the child's best interests, arrange or restrict emigration and to arrange for burial or cremation upon the child's death. This is similar to the Ghanaian Children's Act 560 of 1998, which also provides for a parent's responsibilities alongside certain duties in order to exercise those responsibilities.

⁷⁵ S 53(1)(e) of the 2010 Constitution.

⁷⁶ S 6(1) provides that a child shall have a right to live with and to be cared for by his parents.

⁷⁷ S 2 of the Kenya Children Act, which deals with the interpretation of words, describes a "parent" to mean the mother or father of a child and to include any person who is liable by law to maintain a child, or is entitled to the child's custody. It is noted that the term "custody" is also still used here.

⁷⁸ S 2(4) of their Constitution provides that any law which is not consistent with the Constitution is void, to the extent of such inconsistency. In order to avoid this situation the Kenyan legislator will have to see to the necessary amendments of the Act in this regard. Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 213. See also Tobin "Increasingly Seen and Heard; The Constitutional Recognition of Children's Rights" 2005 *SAJHR* 101; Boniface *Thesis* 538.

⁷⁹ Refer to par 3.6.1-3.6.2 as well.

Furthermore the Kenya Children Act refers to the term “custody” and defines it to mean “so much of the parental rights and duties as relate to the possession of the child”.⁸⁰ The term “possession” is however an outdated and inappropriate term.⁸¹

The requirements listed in section 25 should further be applied in the alternative, as they do not have a cumulative effect, owing to the word “or” that appears between subsections 25(4) and 24(5).⁸² The unmarried father can therefore take any of the steps listed in section 25 to acquire parental responsibilities. Section 25 does not provide that the unmarried father automatically acquires these parental responsibilities,⁸³ whereas section 21 of the South African model provides that the unmarried father’s responsibilities and rights are acquired automatically, once the prescribed criteria have been met.

3.4 GHANA

The Ghanaian Children’s Act⁸⁴ confers parental rights and responsibilities on all parents, regardless of their marital status.⁸⁵ The section in the Ghanaian Children’s Act that is similar to section 21 of the South African Children’s Act,⁸⁶ which deals with the acquisition of parental responsibilities and rights, is section 6. It reads as follows:

⁸⁰ S 81(1).

⁸¹ Boniface *Thesis* 548. Author hereof agrees with this submission made by Boniface and submits further that possession relates rather to ownership of an object, which causes the child to be objectified and not to enjoy recognition as a person in his/her own right. The main goal of the UNCRC is to confirm that children are bearers of rights. The court in *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17 also acknowledged that children are bearers of rights. See also Bekink 2012 *PER* 428.

⁸² This is similar to the argument offered as to whether the requirements in s 21 of South Africa’s Act 38 of 2005 have a cumulative effect, or not. See chapter 5 hereunder for further reference as to whether or not the requirements in the South African s 21 have a cumulative effect, or not.

⁸³ S 25(2) provides that the unmarried father “shall have acquired...” whereas the South African Act provides that the unmarried father “acquires...” full parental responsibilities and rights.

⁸⁴ Act 560 of 1998 (hereinafter referred to as the “Ghanaian Children Act”).

⁸⁵ Ss 6(1) – (3). This section appears under the heading “Parental duty and responsibility”.

⁸⁶ 38 of 2005.

Parental duty and responsibility

- (1) 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.
- (2) Every child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents.
- (3) Every parent has rights and responsibilities whether imposed by law or otherwise towards his child which include the duty to –
 - a) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression;
 - b) provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development;
 - c) ensure that in the temporary absence of a parent, the child shall be cared for by a competent person and that a child under eighteen months of age shall only be cared for by a person of fifteen years and above except where the parent has surrendered his rights and responsibilities in accordance with law.

In terms of section 6(3) both parents are given rights and responsibilities and no distinction is made between unmarried and married fathers. Hence, divorce will also not affect the father's (or either parent's) rights and responsibilities. Provision is made for both rights and responsibilities, which then again imposes a duty on the parent. The South African model does not impose separate duties on the parents simultaneously with conferring responsibilities and rights on them. In South Africa it then appears that the duties a parent has in relation to the child are included in the responsibilities and rights a parent has towards the child. In the South African Children's Act the definition of "care" (care is one of the elements of parental responsibilities and rights) makes similar provision for the duties imposed on parents as in the Ghanaian model.

Whether a child was born in or out of wedlock has no effect on the parents' duties. In contrast, the South African Children's Act provides separately for

the acquisition of parental responsibilities and rights of married mothers,⁸⁷ married fathers⁸⁸ and unmarried fathers,⁸⁹ as they acquire these rights in different ways. It is submitted that no distinction should be made between married mothers and fathers and unmarried fathers, as any parent should be committed to the child and responsible for the child, in the child's best interests and in line with the Constitution.⁹⁰ The Ghanaian Act explains that rights and responsibilities to the child also include a duty on the parents to protect the child, to provide assistance and to care for the child.⁹¹ The way in which section 6(3) has been worded makes a clear distinction between parents' rights and responsibilities and their duties. It provides parents with rights and responsibilities and in order to exercise those rights and responsibilities, they need to fulfil the duties as contemplated in section 6(3).

The Ghanaian Children's Act also states that parental rights and responsibilities are not dependent on whether or not the parents lived together.⁹² In contrast, one of the requirements of section 21(1) is that the unmarried father must have lived with the mother at the time of the child's birth.⁹³ The unmarried father's acquisition of parental responsibilities and rights in South Africa is therefore dependent on whether or not he has lived with the mother. It is submitted that the Ghanaian model is better, as parental responsibilities are not dependent on whether or not the unmarried father lived

⁸⁷ S 19.

⁸⁸ S 20.

⁸⁹ S 21. Refer to chapter 2 for a discussion of the way in which the unmarried father may acquire parental responsibilities and rights and whether it has placed him in a better position than before the commencement of the Children's Act, or in an equal position with the mother.

⁹⁰ See Heaton *Commentary* 3-12; Louw 2010 *PER* 156. Also refer to the discussion in chapter 2.1 for a discussion of the rights of the unmarried father in relation to his child.

⁹¹ As contemplated in s 6(3)(a) - (c).

⁹² S 5 provides that no person shall deny a child the right to live with his/her parents and family, unless ordered otherwise by court. S 6(2) further provides that a child shall not be deprived of his/her welfare whether or not the parents lived together, or not. It is noted that this Act only refers to "him" or "his" in several instances, instead of a more gender-neutral use or also referring to the female gender. It is submitted however that the female gender is also included where reference is made to the male form only and that the use thereof excluding the female gender was simply for the purposes of consistency. S 3 of the Ghanaian Children's Act provides that no person shall discriminate against a child on the grounds of *inter alia* gender. It is submitted therefore that the intention of the legislator was not to exclude females.

⁹³ The other requirements are provided for in s 21 and discussed in chapters 1 and 2 herein.

with the child's mother. The unmarried father's relationship with the mother should not have any effect on his relationship and commitment to the child.⁹⁴ Section 2(1)⁹⁵ further states that the best interest of the child shall be paramount in any matter concerning the child. This section is similar to the corresponding one in the South African Children's Act, which also provides that the best interests of the child are of paramount importance in every matter concerning the child.⁹⁶ What is further interesting is that the Ghanaian Act does not allow a child below the age of fifteen to care for another child less than eighteen months of age in the absence of the parents of the younger child, unless those parents have surrendered their parental rights.⁹⁷

⁹⁴ Refer also to the position in Kenya as discussed above. See also Skelton *Child Law in South Africa* 75 and Louw *Thesis* 182.

⁹⁵ Ghana Children's Act.

⁹⁶ Ss 2 and 9 provide that in all matters concerning the care, protection and well-being of a child, the child's best interests are of paramount importance. S 7 then lists factors to be considered when the best interest standard is applied.

⁹⁷ Ghanaian Children Act s 6(3)(c). It is submitted that the rationale behind this might possibly be that a child cannot look after a child. However, this may attract criticism if one considers the factual existence of child-headed households in Africa. S 137(1) of the South African Children's Act makes provision for the recognition of a child-headed household if the parent, guardian or care-giver is terminally ill, has died, or abandoned the children; when no adult family member is available to provide care for the children; when a child over the age of sixteen years has assumed the role of care-giver and if it is in the best interest of the children of that household. See also Sloth-Nielsen "Too little? Too late? The Implications of the Grootboom Case for State Responses to Child-headed Households" 2003 *LDD* 113 who says that: "Any assessment of levels of destitution, desperation and societal disintegration must surely rank the increasing phenomenon of children living in households without adult caregivers, a consequence of the HIV/AIDS epidemic, as one of the most pressing concerns facing South African society. It has been estimated that by 2005 there will be more than a million children aged under 16 who have lost their parents due to HIV/AIDS and that by 2010 there will be more than two million who have been orphaned and who are fending for themselves and their siblings." See also Kassan and Mahery "Special Protective Measures in the Children's Act" in Boezaart (ed) *Child Law in South Africa* 196; Couzens and Zaal "Legal Recognition for Child-Headed Households: An Evaluation of the Emerging South African Framework" 2009 *IJCR* 299 where they mention that South Africa has begun to provide legal recognition for child-headed households. Couzens and Zaal suggest that despite many negative arguments against the legal status of child-headed households, the approach is a fundamentally sound one, which negates many of the negative arguments. Sloth-Nielsen "Of Newborns and Nubile: Some Critical Challenges to Children's Rights in Africa in the Era of HIV/Aids" 2005 *IJCR* 77, 78 however points out that an inherent conceptual dilemma is created by the recognition of child-headed households. She is of the opinion that it can significantly undermine the main message that the protection of a child rights approach should extend to all children under eighteen and that to award premature adult status and responsibility to the child heading the household, would inevitably deprive that child of his/her own childhood. It is submitted that child-headed households might be a necessary nuisance. Without it, the children will be uprooted from their environment and the community in which they grew up, but with it come more responsibilities for the child heading such a household. However the author hereof agrees with the view of Sloth-Nielsen in "Protection of Children" in Davel and Skelton (ed) *Commentary* 7-47 where she argues that the support encapsulated in the provision requiring that a child-headed household must function under the general supervision of a designated adult (s 137(2)) is an indication that it is intended to facilitate protection, rather than constituting an abdication of state responsibility

This Act also uses the term “custody”.⁹⁸ It however only appears relevant where that parent, family member or person is raising the child⁹⁹ or is caring¹⁰⁰ for the child. It does not specifically refer to the person with whom the child is physically residing. However, when section 45 is read, it is clear that custody refers to the person with whom the child is to reside.¹⁰¹

The sections in the Ghanaian Children’s Act dealing with the child’s best interests¹⁰² appear under the heading of “welfare principle”. This is however an outdated way of referring to the best interests of a child.¹⁰³ The South African model only refers to best interests¹⁰⁴ and not welfare. This section provides that the child’s best interests shall be paramount, which is similar to the wording used in the South African Children’s Act.¹⁰⁵

Of importance in the comparison made is the fact that in Ghana there is no difference between parental responsibilities and rights related to children whether they are born in or out of wedlock. In South Africa unmarried and married fathers acquire parental responsibilities and rights in different ways and even on a different basis as the mother. It is submitted that South Africa may learn from Ghana where no distinction is made between unmarried and married fathers in the acquisition of parental responsibilities and rights.¹⁰⁶

regarding child care. Through the legal recognition of child-headed households institutional care is limited, siblings can be kept together and family life promoted.

⁹⁸ Sub-part II of the Act deals with custody and access matters and ss 43 and 45 deal specifically with custody.

⁹⁹ S 43 provides that any person who is raising a child may apply to a family tribunal for custody of a child.

¹⁰⁰ S 44 provides that a parent, family member or person who has been caring for the child may apply to a family tribunal for access to that child.

¹⁰¹ S 45 deals with aspects to be considered when custody (or access) orders are made.

¹⁰² S 2.

¹⁰³ Boniface *Thesis* 510. Even though this is an outdated concept and view, this term is also used in Ghana, Kenya, England and Wales and Australia. “Welfare” then simply refers to “best interests”.

¹⁰⁴ Best interests are dealt with in s 9 providing for the paramountcy of the child’s best interests and s 7 referring to the factors to be considered in dealing with the child’s best interests. Refer to chapter 1.2 and 1.3.

¹⁰⁵ S 9.

¹⁰⁶ This is also the position in Uganda.

3.5 NAMIBIA¹⁰⁷

In Namibia the Children's Status Act 6 of 2006¹⁰⁸ currently governs matters related to children in Namibia. The preamble to the Children's Status Act provides for children to be treated equally regardless of whether they are born inside or outside marriage.¹⁰⁹ It also states as the objectives of the Act to promote and protect the best interests of the child and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents.¹¹⁰ The Act must as such be interpreted in a manner consistent with these objectives. Once again, as in the case of the other countries compared above, the child's parents' marital status has no influence on the child's status.¹¹¹

The Children's Status Act provides for a presumption that a father is the parent of the child if the father fulfils certain criteria.¹¹² This is however only a

¹⁰⁷ At the time of publication of the SALRC's First Issue Paper 13, Namibia only had two draft acts to refer to: The draft Children's Status Act of 2010 and the draft Child Care and Protection Act. Namibia passed a Child Care and Protection Act in May 2011 as well, but it has not come into force yet. See also Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 203, 221.

¹⁰⁸ Namibia initially inherited its Children's Act 33 of 1960 from South Africa. This Act was then replaced by the current Children Status Act 6 of 2006. However shortly after Namibia's independence in 1990 it became clear that the 1960 Children's Act needed to be amended to make provision for more appropriate and current matters related to Namibian children. This resulted in the Children Status Bill and Child Care and Protection Bill. The idea was that the Children's Status Act would cover two main topics which were not addressed by the Children's Act 1960, namely the status of a child born to unmarried parents and the status of a child whose parents or guardian had died; the Child Care and Protection Act would cover the remaining issues relating to child protection and replace the 1960 Children's Act. However a change in ministers delayed the drafting process. The Children's Status Bill was tabled in Parliament in 2003, passed in 2006 and it has been operational since 3 November 2008 in terms of *Government Gazette of the Republic of Namibia* Notice 266 of 2008. The Child Care and Protection Bill is currently under revision. See *Public Participation in Law Report* Revision of Namibia's Draft Child Care and Protection Bill, Final Report (2010) 3, 4, 185, obtained from http://www.crin.org/docs/Namibia_Law%20ReformCCPAFinal%20Report%20%20minimum%20resolution.pdf accessed on 21 February 2013.

¹⁰⁹ The preamble further provides for matters relating to custody, access, guardianship, inheritance in relation to children born outside marriage, to provide for matters which are in the best interest of all children and matters connected thereto. The preamble to the Children's Status Bill makes provision for the same wording in the preamble as the current Children's Status Act.

¹¹⁰ S 2.

¹¹¹ S 17 provides that a distinction may not be made between a person born inside or outside marriage regarding the duty to maintain a child. The unmarried father is not relieved of the duty of maintenance if the mother is the custodian parent.

¹¹² S 9(1). The criteria are that the man was married to the mother at the approximate time of conception, or at the time of birth, or any time between those two points in time, he cohabited with the mother of the child at the approximate time of conception, he is registered as the father, both

rebuttable presumption and in contrast with the South African model, where the father acquires rights¹¹³ if he has fulfilled certain criteria.

Part 4 of the Namibian Act further deals with children born outside marriage. Section 11(1) states that both parents have equal rights to custody¹¹⁴ of a child born outside of marriage. One parent however needs to be the primary custodian and the parents may agree on who should fulfil this role, either orally or in writing.¹¹⁵ If no agreement exists, then the court may be approached for a custody order.¹¹⁶ Section 12 also allows for an equal right to guardianship,¹¹⁷ although only one parent may be the guardian.¹¹⁸ Thus, regardless of the equal right that both parents have to obtain custody¹¹⁹ and guardianship, the position is that only one parent can be the primary custodian,¹²⁰ which will include guardianship.¹²¹ The non-custodian parent will have the right to access.¹²² This position effectively prejudices the child's position in that the child is being deprived of the benefit of joint parenting.¹²³

he and the mother have acknowledged his paternity and he admits, or it is otherwise proved, that he had sexual intercourse with the mother at any time when conception could have taken place.

¹¹³ The acquisition of these rights is provided for in s 21 of Act 38 of 2005.

¹¹⁴ The Children Status Act still makes reference to the terminology "custody", "access" and "control". It was reported in the *Public Participation in Law Report* Revision of Namibia's Draft Child Care and Protection Bill, Final Report (2010) 170 that it would be difficult to make a complete switchover from the notions of "custody", "guardianship" and "access" to the concept of parental responsibility in the Child Care and Protection Bill under consideration, as these traditional concepts are operative in a number of other legal contexts in Namibia, such as divorce law and the Children's Status Act 2006. However, it was submitted that in light of the importance of the parental responsibility principle this concept should be introduced in Namibia. Namibia also still refers to "control", which is in contrast with the whole being of the UNCRC. It was concluded that for this and other reasons, the Children's Status Act of 1960 should be repealed and replaced with parallel provisions in the Child Care and Protection Act. Refer to 3.2 above and n 48 regarding Uganda who also still refers to the term "custody".

¹¹⁵ S 11(2). S 13(1) provides that the person who has custody is also the guardian of the child.

¹¹⁶ S 12(1) provides that application may be made for custody by the mother of father, or someone who is acting as caretaker of the child, or a person otherwise authorised by the Minister to do so.

¹¹⁷ The Namibian Act does not define the term "custody" or "guardianship". The common law meaning should then be given to these terms. "Custody" means the day-to-day decisions related to the life of the child and "guardianship" means to administer the child's estate and related matters. See also Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 222.

¹¹⁸ Refer to n 115 above.

¹¹⁹ S 11(1).

¹²⁰ S 11(2).

¹²¹ S 13(1).

¹²² S 14.

¹²³ Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 226. The unmarried father is however not relieved of the duty of maintenance as provided for in s 17. Namiseb "The Children Status Act, 2006 (No 6 of 2006)" 2009 *Namibia Law Journal* 123 says that although law reform on several issues such as custody, guardianship, presumption of paternity, etc had already begun prior to the

It is noted that Namibia is the only African country referred to by the SALRC whose current Children Status Act and the subsequent draft Children's Status Act (2010), do not use the terminology "parental rights and responsibilities" as used by Ghana, Kenya and Uganda. Even the draft Namibian Child Care and Protection Bill (June 2010) does not use the terminology "parental rights and responsibilities".

3.6 OTHER NON-AFRICAN COUNTRIES

In its search for a South African model for a reformed Children's Act, the SALRC also considered the relevant legislation in other countries. The legislation of the United Kingdom,¹²⁴ Scotland, Australia and New Zealand's related to children was consulted and studied for guidance.¹²⁵ The SALRC considered and discussed the status, the objects and the scope of and principles underpinning the legislation of these non-African countries. It was further questioned¹²⁶ whether a South African children's code with regulations should cover procedural aspects, or whether courts should continue to rely on aspects of other legislation, such as the Magistrate's Court Act.¹²⁷ In the countries discussed hereunder there was no dispute that parental

commencement of the Children Status Act, the Act provided for a long overdue reform of the parts on family law dealing with children born outside marriage.

¹²⁴ Within the United Kingdom of Great Britain and Northern Ireland, England and Wales is the component nation in which largely English law prevails. See the United Kingdom Library of Congress website at <http://www.loc.gov/law/help/child-rights/uk.php> accessed on 22 February 2013.

¹²⁵ SALC First Issue Paper 13 par 10.3. South Africa, Uganda, Ghana and Kenya are also former British colonies and as such legislation and child law reform in the UK would also influence these countries. This is the reason why these countries were used for comparative research herein. New Zealand was not included in this comparison, as it is submitted that not much could be learnt from its legislation, as the New Zealand model provides for *inter alia* different legislation dealing with children, for instance the New Zealand Adoption Act 1955 and the Care of Children Act 1955 (Public Act 2004 No 90). The latter Act deals with guardianship, day-to-day care and contact, wardship and child abduction (Hague Convention cases) and the Children, Young Persons and their Families Act 1989 deals with care and protection of children and young persons and youth justice.

¹²⁶ Question 99 under par 10.3.3.

¹²⁷ Question 99 is confusing, as it is unclear to which Magistrates' Court Act reference is made. If the sentence directly before the question regarding the adapting of Magistrate's Court procedures for Children's Court procedures is read, it may be the South African Magistrate's Court Act 32 of 1944. However, the answer following immediately after question 99 appears to be referring to the United Kingdom's Children Act 1989, which has a Family Court system derived from the Magistrate's Court Act 1980 and especially in the context of what was discussed directly after question 99, it is submitted that the discussion directly after question 99 does not provide much clarity on the question asked and does not provide much clarity on the confusion created as to which specific act question 99 refers to.

responsibility should automatically be vested in all mothers, regardless of whether they were married to the father. The contentious point was whether the unmarried father should also be automatically vested with those responsibilities.¹²⁸ The acquisition of these responsibilities will be referred to hereunder, as well as the “welfare” or best interest principle of the child.

3.6.1 *England and Wales*

The legal relationship between parent and child has undergone considerable change in England and Wales. The emphasis is placed firstly on the father’s rights and then attention was briefly paid to improving the mother’s position and lastly the primary focus was on the child’s position.¹²⁹ In England and Wales¹³⁰ the child’s welfare must enjoy paramount consideration¹³¹ in any question with respect to the child’s upbringing, or administration of property.¹³² In South Africa the child’s best interests are of paramount importance¹³³ and do not merely enjoy paramount consideration.¹³⁴ The child’s interests are not just *considered* as paramount, but *are* paramount as contemplated in section 9 of the South African Children’s Act and section 28(2) of the Constitution.¹³⁵

¹²⁸ Lowe 1997 *JLPP* 197.

¹²⁹ Lowe “The Legal Position of Parents and Children in English Law” 1994 *Sing JLS* 329.

¹³⁰ The most substantive legislation that deals with children’s rights is the Children Act 1989, which came into force in October 1991. Lowe 1994 *Sing JLS* 339 says that it was the most important reform of child law ever undertaken in England.

¹³¹ Although the term “welfare” was used, this is similar to the South African Children’s Act s 7, where the factors are listed when the child’s best interests have to be considered. S 1(3) of the Children Act 1989 provides for circumstances a court shall have regard to when considering any question with respect to the child. Lowe “The Allocation of Parental Rights and Responsibilities -The Position in England and Wales” 2005 *FLQ* 280 quoting from *J v C* AC 668 710-711 says that the paramouncy principle is the first consideration because of its first importance. It is however submitted that this just indicates that the child’s best interests should first be considered and not that those interests are actually paramount.

¹³² S 1(1) Children Act 1989. In comparison s 18 of the South African Children’s Act provides for a more detailed description of what parental responsibilities and rights entail.

¹³³ S 28 of the Constitution and s 9 of Act 38 of 2005.

¹³⁴ The position is similar in Scotland and Australia, whose legislation uses the same wording (“paramount consideration”).

¹³⁵ Although the child’s views are considered as well, this only contributes to the resultant decision where the best interests of the child enjoy paramount consideration. Even though specific provision is not made for the child’s wishes in s 7, it can be argued that provision is made for these in s 10 of the Children’s Act, which specifically provides for child participation. The latter section provides that the child’s views (depending on age, maturity and stage of development) shall be given due consideration in *all* matters related to the child and it is submitted that the provision for the child’s views in s 10 is sufficient and provision need not be made for these wishes in s 7 as well. See also Boezaart *Commentary* 2-9. S 16 of the Children (Scotland) Act 1995 however makes provision for both the child’s wishes and welfare. In *Minister of Welfare and Population*

It is noted that no explicit reference is made to parental rights, but rather to the parental responsibilities a parent has to the child.¹³⁶ In contrast, the South African Children's Act provides for both parental responsibilities and rights. Furthermore, in terms of English law, in the event that the father was not married to the mother at the time of the birth of the child, the mother has parental responsibility for the child, unless the father has acquired it in the prescribed manner.¹³⁷ The unmarried father may acquire parental responsibilities¹³⁸ if he becomes registered as the child's father,¹³⁹ by

Development v Fitzpatrick 2000 3 SA 422 (CC) par 18, Goldstone J said that every child has the right to have his or her best interest considered to be of paramount importance in every matter concerning him or her. He stated that the reach of s 28(2) cannot be limited by the rights enunciated in ss 28(1) and 28(2), but that it should extend beyond those provisions and rights independent of those specified in s28(1). See also *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (C) par 25-26, where the court discussed the paramountcy principle. Sachs J par 42, concluded by stating that "...the paramountcy principle read with the right to family care requires that the interests of children who stand to be affected received due consideration. It does not necessitate overriding all other consideration. Rather it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned". See also Mahlobogwane 2010 *Obiter* 245. Also refer to chapter 1.3 for a discussion on a limitation of constitutional rights.

¹³⁶ S 2. S 1 carries the heading "Welfare of the child". S 3 describes "parental responsibility" as all the rights, duties, powers, responsibilities and authority a parent has in relation to a child, as well as the rights, powers and duties a guardian has in relation to a child's estate. Lowe 1994 *Sing JLS* 346 said that the overall change in attitude was well reflected in that concepts such as "parental rights and duties" have been abandoned in favour of the concept of "parental responsibilities". See also Lowe 2005 *FLQ* 267, 268.

¹³⁶ This is dealt with in Chapter 3 of the South African Children's Act.

¹³⁷ S 2(1). S 75(2) of the Civil Partnership Act 2004 also provides for acquisition of parental responsibilities. It specifically pertains to persons in a civil relationship where one of the partners is not necessarily biologically related to the child. S 22 of the South African Children's Act makes provision for a situation similar to this, where a person who has an interest in the care, well-being and development of the child may enter into an agreement with the mother of the child in order to acquire such responsibilities and rights. S 23 provides that any person having an interest in the care, well-being or development of the child may apply to court for an order requesting care or contact with the child and guardianship may also be requested in terms of s 24.

¹³⁸ S 3(1) of the Children Act 1989 defines parental responsibility as "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". The term "responsibilities" was used instead of "responsibilities and rights", as the inclusion of a comprehensive list of the incidences of parental responsibilities is impractical in view of the fact that the list would change from time to time to make provision for changing circumstances and needs of the child. The English Law Commission Report 172 *Review of Child Law; Guardianship and Custody* obtained from <http://www.officialdocuments.gov.uk/document/hc8788/hc05/0594/0594.pdf> accessed on 21 April 2013 par 2.6 said that it would be "superficially attractive" to provide a list, but impractical to do so. See Lowe 1997 *IJLPF* 195 who says that to provide a general statutory definition of what parental responsibility comprises would provide meaningful and helpful general guidance, instead of just relying on case law to interpret it. The author says that Scottish legislation neatly handles the problem of dealing with children of different ages and maturity by stating that the responsibility to give guidance and direction in an age-appropriate manner and by making separate provision for responsibilities and rights, deals with the problem of the parent-child relationship, not simply between parent and child (responsibilities), but also between parents themselves and parents and third parties (rights). Bainham "Reforming Scottish Children Law - Sense from North of the Border" 1993 *JCL* 3 says that the effect of making separate provision for responsibilities and rights,

agreement with the mother,¹⁴⁰ or by order of court on application. This position can be criticised, as the unmarried father does not acquire automatic parental responsibilities, whereas the mother automatically has such responsibilities. The similarity with the South African Act is that provision is made separately for married and unmarried fathers and mothers.¹⁴¹ Another similarity is that both the South Africa and English unmarried father will acquire parental responsibilities¹⁴² once certain criteria have been met,¹⁴³ or once certain steps were taken in order to acquire it. However, the South African father is not required to approach a court to confirm his rights, as the general view^{143a} is that he has *automatically acquired* his parental responsibilities and rights. In this regard the South African unmarried father is in a better position than the English unmarried father.

preserves rights and responsibilities as independent incidents of parenthood and spells out the specific content of each more precisely. Also see Louw *Thesis* 39. Author hereof is in agreement with Bainham and submits that by making separate provision for responsibilities and rights, parental rights are acknowledged separately, once parental responsibilities have been established, thus ensuring that it is acknowledged that parents not merely have rights in relation to their children, but also responsibilities and duties.

¹³⁹ S 4(1)(a) provides that the father will acquire rights if he has been registered in terms of the Births and Deaths Registration Act 1953, or Registrations of Births, Deaths and Marriages (Scotland) Act 1964 or Births and Deaths Registration (Northern Ireland) Order 1976. This section was added in an amendment to the Children Act 1989, which came into force in December 2003 in terms of Order 2003, SI 2003/3079. See also Lowe 2005 *FLQ* 270 for a discussion of the different ways in which the unmarried father may acquire parental responsibilities. This is similar also to s 71(2) of the Uganda Children Act, which provides that a certified copy of the entry in the register of births shall be *prima facie* evidence that the person named as the father, is the father of the child, or that the person named as the mother, is the mother of the child. Although this entry has only the effect of establishing a blood relationship, the child will then have a parent with parental responsibilities in respect of that child, as contemplated in s 6 of the Uganda Children Act.

¹⁴⁰ S 4(1)(b). This is similar to the parental responsibilities and rights agreement in terms of which an unmarried father may acquire such responsibilities and rights in terms of s 22 of the South African Children's Act. It is submitted that where the parents do not see eye to eye, the father's contact rights might be at stake and the father will in any event be at the mercy of the mother, or the court for relief. Refer to chapters 2.3 and 2.5 related to this disposition of the unmarried father.

¹⁴¹ Ss 19, 20 and 21 respectively.

¹⁴² And rights.

¹⁴³ As provided for in s 21.

^{143a} In this regard refer to *LB v YD* 2009 5 SA 463 (T) par 43 and the discussion hereof in chapter 2.3.

3.6.2 Scotland

The SALRC¹⁴⁴ noted that the Children (Scotland) Act 1995¹⁴⁵ resembled the South African Child Care Act.¹⁴⁶ The predominant principles of the Scotland Act is the paramount consideration of the welfare of the child,¹⁴⁷ the child's views¹⁴⁸ and the stipulation that no order regarding a child is to be made, unless the authority making the order is convinced that such an order will be better for the child than no order at all.¹⁴⁹ Provision is made in the same section for both the child's welfare and views.¹⁵⁰ In South Africa's Children's Act, provision is made separately for the best interests¹⁵¹ of the child and the child's views.¹⁵²

The Scotland Children Act sets out the responsibilities¹⁵³ a parent has towards his or her child, as well as the rights to enable the parent to fulfil those responsibilities in relation to that child.¹⁵⁴ The South African Act does not

¹⁴⁴ First Issue Paper 13 par 10.3.3.

¹⁴⁵ This Act will further herein be referred to as the Scotland Act. The Family Law (Scotland) Act 2006, made provision for certain amendments to the Children (Scotland) Act.

¹⁴⁶ 74 of 1983. This Act had been repealed by schedule 4 of the Children's Act 38 of 2005.

¹⁴⁷ S16(1) of the Scotland Act. Once again reference is made to the child's welfare instead of the child's best interests. Although this term itself has been labelled as outdated, it depends on the contents thereof, as the contents may provide a more modern meaning.

¹⁴⁸ S 6 deals with provisions relating to both parental responsibilities and rights and s 16 provides for the welfare of the child and consideration of the child's views. With the incorporation of the child's view in s 16 where reference is made to the child's welfare, it is submitted that the importance of the child's views are enhanced. Maybe South Africa can learn from the inclusion of the child's views in the section dealing with best interests, as it will underpin the child's best interests as being of paramount importance.

¹⁴⁹ S 16(3) of the Scotland Act.

¹⁵⁰ S 16.

¹⁵¹ S 7.

¹⁵² S 10. S 6 of the Scotland Children Act makes additional provision for the views of the child. It is however noted that s 6 of the Scotland Act refers to any decisions involving the child, whereas s 16 relates to the views of the child at children's hearings. See also s 31(1), where due consideration must be given to views of the child in major decisions involving that child and s 61 that deals with participation of children in children's court proceedings.

¹⁵³ S 1(1) provides that a parent has the responsibility in relation to his child to safeguard and promote the child's health, development and welfare; to provide direction and guidance, in a manner appropriate to the stage of development of the child; if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis and to act as the child's legal representative. These provisions are to be complied with as far as is practicable and in the interests of the child. This is similar to the position in England. See also Bainham 1993 *JCL* 3 where rights and responsibilities as separate incidents of parenthood were discussed.

¹⁵⁴ S 2(1) provides that in order for a parent to fulfil his parental responsibilities in relation to his child, the parent has the right to have the child living with him, or to otherwise regulate the child's residence; to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing; if the child is not living with the parent (the Act does not use a gender-

make separate provision for responsibilities and rights, but rather uses them as a consolidated term.¹⁵⁵ Provision is not specifically made in the South African Children's Act that the parent holds parental rights in order to enable him/her to fulfil his/her parental responsibilities.¹⁵⁶ More emphasis is placed on parental responsibility, rather than parental rights, in order to stress the importance of responsibilities to children first and then recognising parental rights in relation to those children.¹⁵⁷ The SALRC¹⁵⁸ noted 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". Care should be taken to avoid new legislation becoming "parent-unfriendly". The inclusion therefore of a provision that could be deemed a corollary of rights afforded to children and the inclusion of both the words "responsibility" and "rights" have the effect that every child has age-appropriate responsibilities and abilities in respect of his/her family, community and the state.¹⁵⁹

The Scottish Act provides further that a child's mother shall have parental responsibilities and rights¹⁶⁰ and that the father will only have such responsibilities and rights if he was married to the child's mother at the time of conception or subsequent thereafter, or if the father is registered as the child's

neutral term here, but only refers to the male gender of "him"), to maintain personal relations and direct contact with the child on a regular basis and to act as the child's legal representative.

¹⁵⁵ As provided for in s 18(2), it consists of the responsibility and the right to care for the child, to maintain contact, be the guardian and to contribute to the child's maintenance. However, see Bainham "Changing Families and Changing Concepts: Reforming the Language of Family Law" 1998 *CFLQ* 5, who says that it is important that these provisions expressly acknowledge parental rights in addition to parental responsibilities, as it is not logical that where two parties are in a legal relationship, there are no reciprocal rights.

¹⁵⁶ Boniface *Thesis* 611 says that parents have rights over their children in order for them (the children) to be benefited. The exercise of these rights must then be performed in the child's best interests as contemplated in s 7 of the Children's Act 38 of 2005.

¹⁵⁷ Skelton *Child Law in South Africa* 63. Under art 9(3) UNCRC an obligation is placed on state parties to respect the child's right to contact with both parents. Art 18(1) places a further obligation on state parties to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Lowe 1997 *IJLPP* 202 submits that there is a strong case for arguing that the UK is obliged to treat all fathers equally. The same applies to South Africa, especially unmarried fathers who will only acquire parental responsibilities and rights, once they have met the prescribed criteria. They are therefore not on equal footing with the mother, as she has all those rights simply because she gave birth to the child.

¹⁵⁸ Discussion Paper 103 par 8.3.1.

¹⁵⁹ S 16 Children's Act 38 of 2005; Boezaart *Commentary* 2-35. See also Louw *Thesis* 45.

¹⁶⁰ S 3(1)(a).

father.¹⁶¹ ¹⁶² The unmarried father may also acquire such responsibilities and rights by agreement with the mother.¹⁶³ It is submitted that this provision is discriminating against the unmarried father, as his parental responsibilities and rights in relation to the child may be solely dependent on whether he is able to reach an agreement with the mother of the child.¹⁶⁴ This agreement is similar to section 22 of the South African Children's Act, which provides for parental responsibilities and rights agreements. It also provides that this agreement will only take effect once it has been either registered with the family advocate or made an order of court. The agreement is however not dependent on whether or not it is in the child's best interest and hence not subject to any scrutiny before registration thereof. In South Africa the position is that the family advocate or court concerned must be satisfied that the agreement is in the child's best interests before a parental responsibility and rights agreement may be registered, or made an order of court. The only other avenue for the unmarried father will be to approach a court in order to

¹⁶¹ S 3 (1)(b). This registration of the father shall be in terms of the registration of Births, Deaths and Marriages (Scotland) Act 1965, the Births and Deaths Registration Act 1953 and Births and Deaths Registration (Northern Ireland) Order 1976. It is submitted that the definition of "parent" in the Scottish Act does not specifically exclude an unmarried father as it *inter alia* describes a parent as someone, of whatever age, who is the child's genetic father or mother. It is submitted that once parentage has been established, an unmarried father will be a parent who has certain responsibilities or rights in relation to his child as contemplated in ss 1 and 2 of the Scottish Children Act. It is submitted that these sections are inconsistent with the provisions of the remainder of the Act, providing only the mother with parental responsibilities and rights. Ss 1 and 2 should rather have used the word "mother" and added "and any person who has acquired parental responsibilities and rights". From a reading of the remainder of the Act it is apparent that it was written in such a way that parentage *per se* does not mean that the unmarried father would have parental responsibilities and rights in relation to his child.

¹⁶² The fact that the father may acquire parental responsibilities and rights was brought about by an amendment to the Children (Scotland) Act in terms of s 23 of the Family Law (Scotland) Act 2006. The latter Act is however not retrospective as provided for in s 23(4) of the Family Law (Scotland) Act and will only have effect on future rights of the father from the date the Act came into operation (4 May 2006). Bainham 1993 *JCL* 6 (rightly, it is submitted) says that both parents having responsibilities and rights regardless of their marital status is to the benefit of the children and not the parents.

¹⁶³ S 4(1). It is however a prerequisite that the mother must still be the holder of all those parental responsibilities and parental rights. This agreement shall only take effect if it has been concluded in the prescribed form and duly registered while the mother still has the parental responsibilities and rights she had at the time the agreement was made, as contemplated in s 4(2). See also s 3(5) of the Scottish Act, which provides that a person who has parental responsibilities and rights shall not abdicate those responsibilities or rights to anyone else. It may however be arranged that some, or all of these be fulfilled or exercised on behalf of that person, which person must already have parental responsibilities or rights. This is similar to s 22 of the South African Children's Act.

¹⁶⁴ This is in the event that he has not been registered as the father of the child. This position is very similar to the position in South African prior to the Children's Act 38 of 2005. See chapter 2.2 above where the position of the unmarried father prior to the commencement of the Children's Act was discussed.

claim his rights¹⁶⁵ and to regulate any arrangements regarding the child's residency, or to maintain personal relations and direct contact between the child and himself.¹⁶⁶ The unmarried father in South Africa is in a better position, as the acquisition of parental responsibilities and rights is not dependent solely on an agreement with the mother. The agreement with the mother will just outline how he would exercise his rights in relation to the child and underline his responsibilities. The South African model is also more developed in relation to the agreement itself, as it is to be scrutinised by a court or family advocate to have effect.

The child will not be referred to in terms of his/her parents' marital status. No person shall be illegitimate and the fact that a person's parents are not or have not been married shall be irrelevant in determining that person's legal status or establishing the legal relationship between the persona and any other person.¹⁶⁷

A "child" in Scotland has been described to mean a person under the age of either sixteen or eighteen years,¹⁶⁸ depending on the responsibilities the parent has to exercise in relation to the child. The meaning of "child" is further qualified to mean a person under the age of sixteen for purposes of safeguarding and promoting the child's health, development and welfare, of providing direction to the child, maintaining personal relations and direct contact with the child if the child is not living with a specific parent and acting

¹⁶⁵ S 11 of the Scottish Act provides for court orders relating to parental responsibilities, rights, guardianship and administering a child's estate. The court shall however not make an order without considering the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all. S 11(7) provides that the court will take into account the child's age and maturity and will so far as practicable give the child an opportunity to indicate whether he/she wishes to express his/her views and if so, to give the child the opportunity to do so and to have regard to such views as the child may have expressed.

¹⁶⁶ These are some of the orders the court may make as contemplated in s 11(2). It is however only relevant to children under the age of 16 years.

¹⁶⁷ S 21(2) Family law (Scotland) Act 2006, which amended the Law Reform (Parent and Child) (Scotland) Act 1986.

¹⁶⁸ S 15(1) defines a "child" as a person under the age of 18 years, except if a "child" has been otherwise defined in the Scotland Children Act. Also refer to par 3.1 above. This is in line with the definition of "child" of the other countries compared, as well as the UNCRC.

as the child's legal representative.¹⁶⁹ A "child" is also a person under the age of eighteen years where a parent has the responsibility to provide the child with age-appropriate guidance. Regarding parental rights a parent has in order to exercise the parental responsibilities in relation to a child, a "child" means a person under the age of sixteen years.¹⁷⁰

3.6.3 *Australia*

Child protection, adoption and child welfare are not covered by the Australian Family Law Act 53 of 1975,¹⁷¹ as these matters are covered by legislation related to and made by the different territorial governments.¹⁷² It was however suggested that a Family Court be empowered to deal with all care and protection issues and that State and Territory Children's Courts be empowered to deal reciprocally with the relevant family matters.¹⁷³ In this way one forum could deal with all relevant issues related to family law matters.¹⁷⁴ Fundamental principles in the Family Law Act are *inter alia* that the child's best interests should enjoy paramount consideration;¹⁷⁵ the child has the right

¹⁶⁹ S 1(2). The age of majority is the same in all the African and non-African countries compared. However, Scotland is the only country that has also qualified the parent's responsibilities and rights according to the age of the child. Mahery *Child Law in South Africa* 312 says that the South African approach to have a higher age of majority ensures maximum protection for children.

¹⁷⁰ S 2(1).

¹⁷¹ This Act deals with several matters such as *inter alia* management and jurisdiction of courts, divorces, spousal maintenance and maintenance agreements and family violence.

¹⁷² Australia has federal, state and territories laws. The states and territories have independent legislative power in all matters not specifically assigned to the federal government (information obtained from the Australian Government Department of Foreign Affairs website at http://www.dfat.gov.au/facts/legal_system.html accessed on 1 March 2013). This may unfortunately cause problems. Some examples would be lack of co-ordination between the jurisdictions, which might result in duplication of proceedings. The state-based system of care and protection may lead to litigation in courts in more than one state or territory, or leave the child at risk of continuing abuse. Parents are able to move interstate to avoid proceedings or to escape orders. See Australian Law Reform Commission (further referred to as ALRC) Report 84 (1997) *Seen and Heard: Priority for Children in the Legal Process* par 15.7-15.19 for a discussion on the problems associated with jurisdictional arrangements, obtained from <http://www.alrc.gov.au/publications/seen-and-heard-priority-children-legal-process-alrc-report-84> accessed on 26 February 2013. However, where there is an inconsistency between federal and state or territory law, the federal laws prevail and apply to the whole of Australia.

¹⁷³ ALRC Report 84 par 15.27.

¹⁷⁴ ALRC Report 84 par 15.31.

¹⁷⁵ S 60CC(1) and (2) provide that when a court determines the child's best interests, the court should give primary consideration to the benefit of the child having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm, or from being subjected or exposed to abuse, neglect or family violence. The ALRC Report 84 par 16.13 also noted that greater scope should be given to the consideration of children's best interests. This is however in contrast with the South African Children's Act and Constitution, which stipulate that the

to know and be cared for by both parents regardless of their marital status¹⁷⁶ and the child has a right to regular contact with both parents and other people significant to his/her care and welfare.¹⁷⁷ Each parent of a child who has not yet attained the age of eighteen years has full parental responsibility.¹⁷⁸ No distinction is therefore made between married and unmarried parents.¹⁷⁹ However, provision is made only for parental responsibilities¹⁸⁰ and no reference is made to parental rights. Louw¹⁸¹ presumes that since provision is made for full¹⁸² responsibilities for all parents,¹⁸³ there was no need for the legislator to create the possibility of conferring parental responsibility on the unmarried father as well. She says that the word “powers”¹⁸⁴ might be wide enough to encompass the “rights” of parents as well.¹⁸⁵ It is further presumed

child’s best interests are paramount. In England and Wales, as well as in Scotland, the position is similar to that in Australia, where the child’s welfare should just enjoy paramount consideration and not be paramount, as is the position in South Africa. Refer to par 3.6.1 above.

¹⁷⁶ S 60CB(2)(a).

¹⁷⁷ S 60CB(2)(c).

¹⁷⁸ S 61C(1) of the Family Law Act 1975. S 61B describes parental responsibility as all the duties, powers, responsibilities and authority which by law, parents have in relation to children.

¹⁷⁹ Rhoades, Graycar and Harrison “The Family Law Reform Act 1995: The First Three Years” conducted research regarding the impact of the Family Law Reform Act 1995. Their Legal Studies Research Paper no 08/69 was published in 2008 in the *Australian Family Lawyer* (obtained from <http://ssrn.com/abstract=1170057> (accessed on 26 February 2013)). The authors say that there is no evidence to suggest that shared care-giving has become a reality for children of separated parents. The authors quote former Family Court judge Peter Nygh who said when the reforms were enacted “For good or for ill, the notion of continuing parental responsibility will empower those who now languish as access ‘parents’”. They further said that whether the system will work if they actually start to exercise that authority, remains to be seen. The researchers suggest that the Family Law Act should make it clear that there is no presumption of shared residence and the notion of shared parental responsibilities should therefore be clarified. Louw *Thesis* 146 however points out that the focus is more on post-separation parenting, which seems to have obscured the impact of the equal allocation of parental responsibilities on disputes between parents. Louw in this regard refers to the interim report published by Rhoades, Graycar and Harrison in 2001, also in the *Australian Family Lawyer* at 2. See also Bonthuys 2006 *Stell LR* 488 who supports a similar viewpoint. She says that even though the awarding of equal parental responsibilities and rights to unmarried fathers will be just and fair, to award it to most unmarried fathers will increase the burden borne by mothers. See also Sloth-Nielsen, Wakefield and Murungi 2010 *JAL* 228, who share a similar view.

¹⁸⁰ S 61B of the Family Law Act 1975 defines it as all the duties, powers, responsibilities and authority parents have, by law, in relation to children. In contrast the South African Children’s Act provides for both parental responsibilities and rights.

¹⁸¹ *Thesis* 304.

¹⁸² S 61B refers to “all” duties, powers, responsibilities and authority in relation to the child.

¹⁸³ S 61C refers to “each” parent who has parental responsibility.

¹⁸⁴ “Powers” is part of the definition of what parental responsibilities entail as contemplated in s 61B.

¹⁸⁵ *Thesis* 42.

to be in the child's best interests for both parents to share equal parental responsibilities.¹⁸⁶

Regarding the child's best interests, the Family Law Act provides that the child's best interests shall enjoy paramount consideration.¹⁸⁷ In contrast, the South African Children's Act provides that in all matters concerning the care, protection and well-being of a child, the child's best interest shall be of paramount importance.¹⁸⁸

3.7 CONCLUSION

The legislative changes that were brought about by the above countries were made to emphasise the notion that children have rights, against parents who have responsibilities.¹⁸⁹ In South Africa this brought about a change in terminology and provision for unmarried fathers to acquire parental responsibilities and rights, once certain criteria have been met.¹⁹⁰

It is quite clear that an extensive study was done of several other acts and legislation in order to guide the SALRC to the result, being the South African Children's Act.¹⁹¹ Although the position of unmarried fathers has improved after the commencement of the Children's Act,¹⁹² it has been criticised for still not placing unmarried fathers on the same footing as mothers and it has been argued that this differential treatment of mothers and fathers, as far as the acquisition of parental responsibilities and rights is concerned, is not justifiable.¹⁹³ To confer full parental responsibilities and rights on both parents, based on their biological link, would be in line with worldwide trends

¹⁸⁶ S 61DA(1). S 61DA(3) and 61DA(4) provide that this presumption will apply, unless the court considers it inappropriate in certain circumstances, or it is rebutted by evidence that it will not be in the child's best interests.

¹⁸⁷ In Scotland, England and Wales the position is similar where provision is made that the child's best interests shall enjoy paramount consideration. Refer to the discussions thereof in this chapter above.

¹⁸⁸ S 9 Act 38 of 2005 and s 28(2) of the Constitution. See also the discussion in par 3.6.1-3.6.2.

¹⁸⁹ SALRC Discussion Paper 103 at 203.

¹⁹⁰ As provided for in s 21.

¹⁹¹ 38 of 2005.

¹⁹² 38 of 2005.

¹⁹³ Louw *Thesis* 184, 185.

and will meet the constitutional demand of gender equality. In this way, the focus will be placed on the best interest of the child, which in return will emphasise the importance of *both* parents for the child.¹⁹⁴ Sloth-Nielsen, Wakefield and Murungi¹⁹⁵ are of the opinion that the child's well-being and survival very often depend on the mother being able to enforce maintenance. The authors are of the opinion that the mother's position may be weakened if parents are placed in a completely equal position regarding the award of parental responsibilities and rights.¹⁹⁶

From the African countries studied it became clear that the child's parents' marital status was of no importance when parental rights and responsibilities were conferred.¹⁹⁷ In Uganda every parent has parental responsibilities, regardless of the whether the child was born in or out of wedlock. However, the South African Children's Act makes provision for responsibilities and rights of married mothers,¹⁹⁸ married fathers¹⁹⁹ and unmarried fathers²⁰⁰ separately in the Act. In the South African model it is clear that not every parent has parental responsibilities, in contrast with the Ugandan model. The unmarried biological father, according to the Ugandan model, does not have to meet certain criteria in order to qualify for parental responsibilities. However, once a parent has parental responsibilities, these responsibilities come with certain duties the parent needs to fulfil in relation to the child as well.²⁰¹ The South African model confers both parental responsibilities and rights simultaneously.²⁰²

¹⁹⁴ Louw *Thesis* 184, 185.

¹⁹⁵ 2010 *JAL* 228.

¹⁹⁶ The authors argued that mothers bear the overwhelming burden of child rearing and their position would be weakened by equality; fathers would have undue leverage and status by operation of law. The unmarried father may, for example, use the payment of maintenance as a *quid pro quo* to have contact with his child. See also Sloth-Nielsen and Van Heerden 2003 *IJLPF* 127 regarding a discussion of the economic and social conditions in South Africa, specifically related to mothers.

¹⁹⁷ Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 217. Also refer to chapter 1.3 above.

¹⁹⁸ S 19 provides that the biological mother has full parental responsibilities and rights, regardless of her marital status.

¹⁹⁹ S 20 provides that a married father has full parental responsibilities and rights if he is married to the mother, or was married to the mother at the time of the child's conception, birth or any time between conception and birth.

²⁰⁰ S 21 provides that a biological father will only acquire full parental responsibilities and rights if he has met certain criteria.

²⁰¹ Refer to the discussion in par 3.2 above.

²⁰² It is submitted that the duties a parent has towards a child in the Ugandan model are similar to the best interests of the child as contemplated in s 7 of the South African Children's Act.

It appears as if the South African section 21 mostly resembles section 25 of the Kenyan model.²⁰³ There is however a difference in that the required cohabitation with the mother in Kenya is after the child's birth and for a specified period.²⁰⁴ In South Africa cohabitation is not for a specified period and it is also prior to the child's birth. The undefined term "permanent life-partnership" is used in the South African Children's Act in contrast to the word "cohabitation" in the Kenyan model. It is submitted that South Africa should either add a definition of permanent life-partnership²⁰⁵ or rather use the term cohabitation, in order to curb possible confusion and interpretation problems. In Kenya no distinction is made between married and unmarried parents in the acquisition of parental responsibilities, unlike the South African Children's Act,²⁰⁶ which still makes separate provision for married and unmarried fathers and mothers. In both these countries the acquisition of parental responsibilities is however reliant on certain acts of the father. It is submitted that South Africa may learn from the Kenyan model in having the father cohabit with the mother after the birth of the child, and not only prior to it, as is currently the position. It is submitted that it will indicate a stronger commitment to both mother and child and not just to the mother.

Of importance in the comparison made between the South African and Ghanaian Children Act is the fact that in Ghana there is no difference between parental responsibilities and rights related to children, whether they are born in or out of wedlock. In South Africa unmarried and married fathers acquire parental responsibilities and rights in different ways and even on a different basis as the mother. To live with the mother is not a requirement to acquire parental responsibilities in the Ghanaian Act, whereas it is one of the requirements the unmarried father has to meet in the South African Children's Act.²⁰⁷ The Ghanaian Children Act also uses outdated terminology in contrast with more updated terminology used in the South African model.²⁰⁸ Except that no distinction is made between children of unmarried or married parents,

²⁰³ Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 215.

²⁰⁴ A period of not less than 12 months as prescribed in s 25(2).

²⁰⁵ Refer to chapter 5.1.1.2 for a discussion and a suggested definition.

²⁰⁶ Ss 19, 20 and 21.

²⁰⁷ As contemplated in s 21 and discussed in 3.4 above.

²⁰⁸ Refer to par 3.4 above.

it is submitted that the South African Children's Act contains more extensive and updated legislation than the Ghanaian Act.

Regarding the comparison with Namibia, they still have a way to go in adapting and adopting more current concepts related to their legislation regarding children.²⁰⁹ Not much can currently be learned from the Namibian model, except that the child's parents' marital status has no influence on that child's status.²¹⁰

In England and Wales the unmarried father will acquire parental responsibilities, once certain requirements have been fulfilled.²¹¹ These responsibilities are however not acquired automatically, as is the position in South Africa.²¹² No parental rights are conferred, but only parental responsibilities.²¹³ In South Africa a person may be vested with both parental responsibilities and rights. Even though the SALRC²¹⁴ described the English Children Act as "well developed legislation", it can be criticised for discriminating against fathers not married to the mothers of their children, on the basis of their marital status.²¹⁵ The child's status is therefore dependent on the father's marriage with the mother. The definition of "parent" in the Children Act 1989 also makes provision for only a married person, to the exclusion of unmarried fathers,²¹⁶ which discriminates against the unmarried father.

The position of the unmarried father in Scotland is similar to that in England and Wales where the mother has full parental responsibilities by virtue of her biological link to the child. The South African position is also similar. The

²⁰⁹ Sloth-Nielsen, Wakefield and Murungi 2011 *JAL* 22 said that Namibia will for example have to consider definitions of custody and guardianship or to replace these terms similar to the South African model, or to expand the common law meaning of these terms. Its Act also needs to make more comprehensive provision for the allocation of, or incidence of custody and guardianship of a child born of married parents.

²¹⁰ See par 3.5 above.

²¹¹ See par 3.6.1 above.

²¹² Provided that the criteria in s 21 have been met.

²¹³ This is the position in Scotland as well.

²¹⁴ First Issue Paper 13 at 132.

²¹⁵ See par 3.6.1 above. This is also in contrast with the African countries referred to in this study.

²¹⁶ Schedule 1 par 16(2).

unmarried Scottish and English father may however acquire these rights by agreement with the mother, or by registration with the mother as the child's father.²¹⁷ The unmarried father in South Africa may also enter into an agreement with the mother in order to acquire parental responsibilities and rights.²¹⁸ Even though the child's parents' marital status is irrelevant, it has no impact on whether or not the unmarried father has parental responsibilities or not, in contrast to African countries discussed above.²¹⁹

In Australia every parent has parental responsibilities in relation to the child, indicating that the marital status of the child's parents is not relevant for a parent to have parental responsibilities. No distinction is made between married and unmarried parents and any change in the nature of the relationship of the child's parents does affect their parental responsibilities.²²⁰ The Australian Act however only makes provision for parental responsibilities and does not mention any rights of the parent, in contrast with the South African Act. A distinct difference from the South African Children's Act is that the Australian Family Law Act provides that the child's best interests shall enjoy paramount consideration and not that it shall be of paramount importance.²²¹ To consider the child's best interests as paramount is not the same as it actually *being* of the utmost importance.²²²

In the comparison above, it was noted that the father's parental responsibilities and rights in South Africa are dependent on his relationship with, or commitment to the child's mother and not on his relationship with, or commitment to the child. This is not the case in the African countries referred to above. The father's responsibilities are not dependent on any relationship with, or commitment to the mother. Parental responsibilities are simply acquired owing to the father's biological link with the child.²²³ The position in Australia is the same, but not in England and Scotland, where the unmarried

²¹⁷ See par 3.6.2 above.

²¹⁸ See par 3.6.1 and 3.5.2 above.

²¹⁹ As in par 3.1-3.4 above.

²²⁰ S 61C(2).

²²¹ Refer to par 3.6.3 above.

²²² Refer to par 3.6.3 above.

²²³ As discussed in par 3.2-3.4 above.

father may acquire parental responsibilities by *inter alia* entering into an agreement with the mother, or by obtaining a court order to that effect.²²⁴

England and Wales, Scotland and Australia provide that the child's welfare shall enjoy paramount consideration. This is also the position in Uganda and Kenya.²²⁵ It is clear that the South African Children's Act has advanced this concept in that in children's best interests shall be of paramount importance in *all* matters pertaining to them.²²⁶ Their best interests will therefore not just be *considered* as paramount, but actually enjoy paramouncy.²²⁷ The highest value must therefore be given to children's best interests.

Whereas the South African Children's Act refers to parental "responsibilities and rights", the above African countries²²⁸ refer to this terminology in the opposite order of "rights and responsibilities". Skelton²²⁹ said that it is indeed easier to say "parental rights and responsibilities" rather than "responsibilities and rights". However the less common construction was favoured in the Children's Act in order to emphasise the importance of responsibilities to children, rather than the rights in relation to them.²³⁰ By mentioning the word "rights" before the word "responsibilities" it is given more prominence and importance. Even though parental rights are important when protecting children within the family sphere, by using the word "responsibility" first, the importance thereof in relation to children is stressed to a greater extent.²³¹

²²⁴ Refer to par 3.6.2 and 3.6.3 above.

²²⁵ Although in Kenya it is provided that the best interests of the child shall be a primary consideration and not "paramount consideration".

²²⁶ Sachs J in *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) par 25 said that the word "paramount" is emphatic as it is notably stronger than the phrase "primary consideration".

²²⁷ Refer to par 3.6.1-3.6.3 above.

²²⁸ Except for Namibia.

²²⁹ *Child Law in South Africa* 63.

²³⁰ Skelton *Child Law in South Africa* 63.

²³¹ Skelton *Child Law in South Africa* 63.

CHAPTER 4

THE INTERACTION BETWEEN SECTION 21 AND OTHER RELEVANT SECTIONS OF THE CHILDREN'S ACT

4.1 SECTION 18

Section 18 deals with parental responsibilities and rights in respect of a child and is part of Chapter 3 of the Children's Act, which deals with the acquisition and loss of parental responsibilities and rights.

The relevant parts of section 18 to be dealt with hereunder, read as follows:

- (1) A person may have either full or specific parental responsibilities or rights in respect of a child.
- (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right
 - a) to care for the child;
 - b) to maintain contact with the child;
 - c) to act as guardian of the child; and
 - d) to contribute to the maintenance of the child.¹

One of the difficulties with section 21 is that it does not make provision for how an unmarried father, who has acquired parental rights, should proceed to exercise or implement those rights. The Act does not provide the section 21-father with a mechanism to implement his acquired rights and he will often still be at the mercy of the child's mother, who will decide if and when he sees the child.² In the event that the section 21-father's right to contact is withheld by the mother, it will once again leave the father at the doors of the court, to enforce his rights.³

¹ S 18(1) and (2).

² An example of such a case is found in *B v S* 1995 3 SA 571 (A). The unmarried father in this case was not allowed contact with his child, despite initially having had contact. He also contributed financially in several ways. The father's attempts to contribute to maintenance were refused and further contact was denied. He had to approach the court to enforce his rights.

³ Louw 2010 *PER* 181 notes that it is unfair to the unmarried father to allow the mother to manipulate the child's relationship with him. It is submitted that the mother should not be allowed to decide whether or not the father may exercise any, or all of his rights. Only if the father is unsuitable should she approach the court to limit the father's rights. However, the limitation should not be linked to the mother's interests, but to the interest and rights of the child. Also refer to chapter 2.4 for a discussion on mediation in this regard and specifically a discussion about

Although the Act does make provision for an unmarried father to enter into a parental responsibilities and rights agreement with the mother,⁴ problems occur with parents who do not sit around the same fire and where the father is forced to approach a court for relief.⁵ The position of the unmarried father and the divorced father in this regard does not really differ; the court is to be approached for relief if the mother is not prepared to allow the father contact and contact will then be allowed if it is in the child's best interest.⁶ In the event that a father approaches the court for relief, the question arises as to what relief he should ask for:⁷ a declaratory order in terms of section 21⁸ or an order in terms of section 18.⁹ If a declaratory order in terms of section 21 is granted, the unmarried father will be declared to have fulfilled the requirements of either section 21(1)(a) or (b), resulting in him having acquired full parental responsibilities and rights.¹⁰ Both parents will then exercise these responsibilities and rights independently, as contemplated in section 30(2).¹¹ In the event that a declaratory order in terms of section 18 is sought and granted, the resultant effect will also be that the unmarried father is vested with full

compulsory mediation in terms of s 21(3). For court-related proceedings in this regard, refer to chapter 5 hereunder.

⁴ S 22 provides for an agreement between the mother of a child, or other person holding parental responsibilities and rights, to enter into an agreement with the biological father or any other person, providing the biological father or other person with parental responsibilities and rights.

⁵ This is apparent from the reading of s 19 (parental responsibilities and rights of mothers), s 20 (parental responsibilities and rights of married fathers) and s 21 (parental responsibilities and rights of unmarried fathers). Paizes *Dissertation* 59 is of the opinion that the impact of the Children's Act in this regard is disappointing, as the law has effectively not changed for the unmarried father. Louw 2010 *PER* 156 is also of the opinion that inherent and automatic parental rights are not conferred on biological fathers on the same basis as on mothers. The author hereof is in agreement with the opinions of the aforementioned authors. Simply from a reading of the Act, the position of the unmarried father is clear in that he acquires parental responsibilities and rights in a different way.

⁶ *B v S* 1995 3 SA 571 (A) 582A, E-F. See also Van der Linde and Van Schalkwyk 2011 *PER* 85.

⁷ Refer to chapter 5 hereunder for a discussion of the court's involvement and proceedings.

⁸ A declaratory order in this regard will declare that the unmarried father has fulfilled the requirements in terms of s 21 and hence acquired full parental responsibilities and rights. In this regard, the compulsory mediation prior to approaching a court as prescribed in s 21(3), must be kept in mind if there is a dispute regarding whether or not the unmarried father has met the requirements as contemplated in s 21(1). Also see chapter 2.4 above.

⁹ This section provides that a person may have either full or specific parental responsibilities and rights.

¹⁰ As s 18(2) provides that guardianship is one of the elements of parental responsibilities and rights, a declaratory order in terms of s 18 can only be brought in a High Court. See chapter 5.2 hereunder.

¹¹ S 30(2) provides that when more than one person holds the same parental responsibilities and rights, they may exercise those responsibilities and rights without each other's consent, unless the Act, any other law, or a court order provides otherwise.

parental responsibilities and rights.¹² In this regard a parenting plan will have value, as it would then set out the way in which the parents would exercise their parental responsibilities and rights in relation to the child. It would also prevent possible future disputes.

To be able to answer the above question, one needs to understand the differences between the two sections, as well as the interaction between them.

4.1.1 Differences

It is submitted that the difference between section 21 and section 18 lies in the requirements which the unmarried father needs to fulfil as prescribed in section 21, in order to qualify for parental responsibilities and rights. In section 18¹³ there are no criteria to be met and section 18 simply qualifies what parental responsibilities and rights entail, once acquired.

Bonthuys criticises section 21 because she is of the opinion that it has a father-centred approach.¹⁴ She says that it appears that the child's best interests are not taken into consideration when the criteria the unmarried father has to meet, are applied. As the child's best interests should always be of paramount importance,¹⁵ it might appear that section 21 is unconstitutional, as the child's best interests are not considered prior to the granting of responsibilities and rights to the unmarried father.¹⁶

¹² In this regard consideration is only given to the scenario where application is made for full parental responsibilities and rights and not where only specific parental responsibilities and rights as contemplated in s 18(2) are requested.

¹³ According to Heaton *Commentary* 3-4, s 18 partly codified the legal rules pertaining to parental responsibilities and rights. This would explain why no criteria were laid down. In countries such as Uganda and Ghana the unmarried father does not have to meet certain criteria to qualify for parental responsibilities. He simply acquires it, because he is the father of the child. Refer to chapter 3 for a more detailed discussion hereof.

¹⁴ 2006 *Stell LR* 487.

¹⁵ In terms of s 28(2) of the Constitution.

¹⁶ Murphy J in *LB v YD* 2009 5 SA 463 (T) par 43 said that unmarried fathers are entitled to be co-holders of parental responsibilities and rights and they do not need to make out a case that it will be in the best interests of the child. Skelton *Child Law in South Africa* 75 is of the opinion that the intention underpinning s 21's requirements remains linked to the father's demonstration of commitment to his child and the child's mother. In this regard the approach may also appear to be mother-centred. If the unmarried father has been living with the child's mother at the time of birth, then he would have acquired full parental responsibilities and rights; it then appears as if it is his commitment to the mother that is the prevalent issue.

Louw¹⁷ however submits that Bonthuys's criticism does not appreciate the fact that the awarding of parental responsibilities and rights is automatic and that it cannot expressly be made subject to the best interests of the child standard. This would mean that the "automatically" acquired rights are not acquired automatically, but are made subject to the assessment relating to what would be in the best interests of the child. The best interests of the child are already built into the criteria for the automatic acquisition of parental responsibilities and rights.¹⁸

Skelton¹⁹ is also of the opinion that children's interests are not to be considered prior to the acquisition of rights, but central to the determination of the exercise of such responsibilities and rights. Bosman-Sadie and Corrie²⁰ say it only becomes relevant when a decision needs to be made on how these rights will be exercised.

The differentiation therefore lies between the acquisition of and the exercising of the parental responsibilities and rights.²¹ A distinction should thus be made between the *acquisition* of these rights and the *exercising* thereof and the child's best interests will only become relevant with the exercising of the rights.²²

In the case of *LB v YD*²³ Murphy J said that once the unmarried father's paternity has been established, his rights are automatic. It is no longer in a court's discretion to grant it to him, subject to and after consideration of the child's best interest. Murphy J also specified that unmarried fathers are entitled to be co-holders of parental responsibilities and rights and a case need not be made out for whether or not it will be in the child's best interest for him to have

¹⁷ Louw *Thesis* 97, 98.

¹⁸ *LB v YD* 2009 5 SA463 (T) par 43; Louw *Thesis* 98.

¹⁹ *Child Law in South Africa* 78. Skelton does however point out further that it cannot be correct that the unmarried father may simply proceed to exercise his acquired responsibilities and rights, as the best interests of the child need to be considered prior to the exercising thereof. She rightly points out that this is a *lacuna* in the Act, as no provision is made for what the unmarried father should do to exercise his acquired rights.

²⁰ *A Practical Approach* 37.

²¹ Louw *Thesis* 97, 98.

²² Skelton and Carnelley (eds) *Family Law in South Africa* 249.

²³ 2009 5 SA 463 (T) par 39.

those rights.²⁴ This suggests that the unmarried father does not have to approach the court for a section 21 declaratory order.

A further difference between section 18 and 21 lies in the fact that in terms of section 18(1) a person may have either full parental responsibilities and rights, or only specific elements of parental responsibilities and rights.²⁵ Section 21 in contrast provides for only full parental responsibilities and rights.

Section 18(1), provides that a person may have parental responsibilities and rights and subsection (3) refers to “a parent or *other person* who acts as guardian ...” In contrast, section 21 confers these rights *only* on unmarried fathers. This has the effect that one person may have the right to care for a child and another person the right to maintain contact, in terms of sections 18(1) and (2).²⁶ Any number of people can therefore be co-holders of parental responsibilities and rights in respect of the same child.²⁷ However, it is important to note that the holder of parental responsibilities and rights does not transfer those rights, but rather confers them, while still retaining his or her own responsibilities or rights.²⁸ The mother of the child will thus still have her normal parental responsibilities and rights, regardless of the fact that the father has also acquired these rights.²⁹

The implication is that any person may hold parental responsibilities and rights in terms of section 18(1). The question however is whether *a person* in section 18(1) simply refers to any person who may have parental responsibilities or rights, or whether it is specifically limited to *a person who acts as guardian*³⁰ as contemplated in section 18(3). It is submitted that it appears not to limit the application of this section specifically and that the legislator’s intention is to confer parental responsibilities and rights on *any* person. The wording of section 18(4) indirectly supports this opinion, as it provides that where more

²⁴ Par 43.

²⁵ Heaton *Commentary* 3-4.

²⁶ See also the discussion in chapter 5.1.2 hereunder.

²⁷ S 30(1).

²⁸ S 30(4); Skelton *Child Law in South Africa* 82.

²⁹ Also refer to chapter 5 below.

³⁰ Author’s emphasis.

than one person have guardianship of a child, they might exercise their parental responsibilities and rights independently and without consent of the other.³¹ This might imply that any other person who does not have parental responsibilities and rights (of which guardianship is one element) may acquire these under section 18(1). If so acquired, section 18(3) simply describes the juristic acts that such a person must fulfil on behalf of the child. Section 18(3) also only provides for guardianship conferred on any person who does not necessarily have *full* parental responsibilities and rights, or on those who have acquired full parental responsibilities and rights, of which guardianship is one of the elements.

The confusion created is due to the wording used in both subsection 18(1) and subsection 18(3). The legislator in section 18 should from the outset³² be specific whether it intends to provide for “only a guardian” to have parental responsibilities and rights, or whether it just wants to confer it on “any person”. It is suggested that section 18(3) should be amended to read as follows:

Subject to subsections (4) and (5) the guardian of a child 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...³³

It is further suggested that section 18(2)(c) should rather read as follows:

- c) to be the guardian of the child;

4.1.2 *FS v JJ*³⁴

The *FS v JJ* case was an appeal against three applications granted in the Northern Cape High Court. All three orders of the court *a quo* were overturned

³¹ Consent is required for actions as prescribed in s 18(3), namely for the child’s marriage, adoption, removal from the Republic, application for a passport and the alienation and encumbrance of the child’s immovable property.

³² In subsection (1).

³³ The remainder of s 18(3)(c)(i)-(iv) to remain unchanged. Also refer to chapter 6.

³⁴ *FS v JJ* 2011 3 SA 126 (SCA) 126.

on appeal and were replaced with another order, as will be discussed hereunder.

In this case the mother of the child (C) passed away when the child was two months old. The child's parents were never married, but lived together at the time of her birth and, although C's maternal grandparents (the JJ's) denied this, intended to marry soon after the birth of the baby. Prior to the commencement of certain sections of the Children's Act,³⁵ the JJ's instituted proceedings in April 2006 in the Children's Court. However, prior to the finalisation of the proceedings in the Children's Court, FS brought an application in the Northern Cape High Court for a declaratory order in terms of section 21, as well as access (now referred to as contact).³⁶ The High Court proceedings were postponed. The Children's Court ordered in February 2008 that C be placed in her father's (A's) care and reside with him, following a reunification process to take place between February 2008 and August 2008.

In August 2008, the JJ's brought another application, requesting that the reunification process be suspended, that they be granted parental responsibilities and rights in respect of C and that A's rights be limited to reasonable contact. A *rule nisi* was granted and the matter was referred back to the Children's Court.

A brought a counter-application in September 2008, again for a declaratory order in terms of section 21 and that he be allowed contact with C, pending the finalisation of the JJ's latest application. The *rule nisi* was extended several times, in order to make provision for the appointment of psychologists and to

³⁵ Ss 18 and 21 were some of the sections that came into operation on 1 July 2007 in terms of GG 30030 of 2007-06-29.

³⁶ S 1(2) Act 38 of 2005 replaced the terminology. Also see *WW v EW* 2011 (6) SA 53 (KZP) 59 par 21; Skelton and Proudlock *Commentary* 1-29, Boezaart *Law of Persons* 114 and Schäfer *Domestic Perspectives* 213-214 for discussions regarding the replaced terminology. Bonthuys 2006 *Stell LR* 493 criticises the formulation of many of the parental rights and obligations in the Children's Bill as unclear and idealistic. She points out (484) that the formulation and contents of certain parental duties are likely to frustrate legal enforcement, such as the duty of care, which contains very vague responsibilities. She is specifically of the opinion that it is problematic for very poor parents to provide for their children. The aspect of both care and contact does not indicate whether it is a right or a responsibility of the parent, but argues that it might be both from a reading of s 18 (clause 18 of the Bill).

facilitate contact between A and C. Several reports also had to be filed in anticipation of the return date.

The family advocate stated in his report that A had automatically acquired full parental responsibilities and rights by virtue of section 21 of the Children's Act. It was also recommended that C reside with A, subject to a process of integration and right of contact to the JJ's. C was at this stage three years old. The *rule nisi* was then extended twice by agreement and the recommendations of the family advocate were also made an order of court.

Despite the above, the JJ's once again approached the Northern Cape High Court in August 2009. This time it was for an order that the question of parental responsibilities and rights be referred for oral evidence. However, this request was abandoned.³⁷ An order was made in the court *a quo* that custody³⁸ and guardianship be awarded to the JJ's and that full parental responsibilities and rights in terms of section 18 of the Children's Act also be awarded to the JJ's, as well as primary residency. A was given right of reasonable access, to be determined in accordance with recommendations from the parties. This was the first order appealed against.

The Supreme Court of Appeal ruled that the court *a quo* did not take the current legislation into account when making the order regarding care and guardianship,³⁹ as reunification had already taken place between C and A and it could not have been in C's best interest to uproot her and move her to the JJ's. The court *a quo* also continued to ignore the legislation when care and guardianship of C was awarded to the JJ's. The court *a quo* also appeared to be oblivious of the fact that A had acquired parental responsibilities and rights

³⁷ It is submitted that the matter could in any event not have been referred for oral evidence, as s 21(3) specifically requires mediation in the event of a dispute. Mediation in terms of this section is mandatory and the court would not have been allowed to consider oral evidence, without the matter having been mediated first.

³⁸ The term "custody" was used by Kgomo JP, despite the fact that it has been replaced by s 1(2) of the Children's Act with "parental responsibilities and rights". This section was also in operation at the time of the granting of this order.

³⁹ At this time s 9 of the Children's Act was in operation. It provides that a child's best interests are of paramount importance in all matters concerning the child's care, protection and well-being.

of C by virtue of section 21 and that its order was effectively depriving him of these responsibilities and rights.

There was a further application by A in the Western Cape High Court for a stay of the first order as mentioned above, pending the filing of an application for leave to appeal. The JJ's also brought a further application to enforce the order that C be returned to them, despite the above application.⁴⁰

The Supreme Court of Appeal replaced the order of the court *a quo* with *inter alia* the following orders:

2. (a) ...
- (b) It is declared that the first respondent⁴¹ is the holder of full parental responsibilities and rights in terms of s 18 of the Children's Act 38 of 2005.
- (c) C shall reside permanently with the first respondent.
- (d) The applicants⁴² may have contact with C on a regular basis...

Despite the fact that A applied for a declaratory order to confirm his rights under section 21, the Supreme Court of Appeal did not go into a discussion thereof, save to repeat the wording of the Children's Act.⁴³ The Supreme Court of Appeal instead afforded the unmarried father responsibilities and rights in terms of section 18. This can only imply that the responsibilities and rights in section 21 had been automatically acquired and did not have to be confirmed by a court as well.

The Supreme Court of Appeal also pointed out that at the time the JJ's applied for parental responsibilities and rights, A had already acquired those rights by virtue of section 21 and that at the time the JJ's applied for those rights, the

⁴⁰ Since it is not relevant for the purposes of this discussion, the other two orders appealed against will not be discussed.

⁴¹ A is the biological father of C.

⁴² The applicants were the JJ's.

⁴³ Par 31.

sections dealing with the acquisition of those rights⁴⁴ were not in operation yet⁴⁵ and hence they could not be granted any parental responsibilities and rights.⁴⁶

4.1.3 Section 18: Possibly misunderstood?

As section 18(1) refers to a person, one wonders whether the JJ's could not have been granted an order under section 18. However, what might be confusing is the wording of section 18(3), which refers to a parent or *other person acting as guardian*. This can be interpreted as limiting the person who may acquire parental responsibilities and rights under this section, to only persons who act as guardians of a child.

⁴⁴ S 23 deals with the assignment of contact and care to interested persons and s 24 with guardianship.

⁴⁵ It only commenced from 1 April 2010 and the JJ's applied in August 2008 for responsibilities and rights.

⁴⁶ In the *FS v JJ* case a *curator ad litem* was appointed for the child. In terms of South African law a *curator ad litem* is normally appointed (refer to Davel in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 250) in the following circumstance: where the minor is without parents; when the parent or guardian cannot be found or is not available; the interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such conflict or the parent or guardian is unreasonably refusing to assist the minor. See also Boezaart "Child Law, the Child and South African Private Law" in Boezaart (ed) *Child Law in South Africa* 34. In *FS v JJ* the child was not without a parent; as A, the unmarried father, was C's parent since he had acquired full parental responsibilities and rights in terms of s 21. A was therefore available to assist the child. The only ground under which a *curator ad litem* could have been appointed is where the child's interests were in conflict with those of his parent or guardian or where there was a possibility of such conflict. This was also one of the questions considered in the case of *Molete v MEC for Health, Free State* 2012 (ZAFSHC) 126. A payment was to be made to the child by the RAF and the attorneys who dealt with the RAF claim were under police investigation related to RAF cases they handled. It further appeared that the child's parents might not ably manage their child's estate. The court felt obliged to interfere judicially for the sake of the best interests of the child (par 55). The court in the *Molete* case however decided to appoint a *curator bonis*, as the trial had already been finalised and a *curator ad litem* would serve no useful purpose. In the *Molete* case the child was not without a parent or guardian and the court could only appoint a *curator* if the child's interests were in conflict with those of his parents. In the *FS v JJ* case the child also had a parent and the only reason a *curator ad litem* could be appointed, was to protect the child from the conflict between his father and his maternal grandparents. It was therefore not the child's interests that were directly in conflict with those of his father (parent), but rather the conflict between the people who wanted rights to him. It appears as if the court may have given a broader interpretation of the grounds under which a *curator ad litem* could be appointed and that the conflict of interests would not necessarily be that of the child in relation to his or her parent, but also in the broader sense related to a conflict of other persons in relation to the child. Also refer to Boezaart *Commentary* 2-26 (and further) where she discusses the fact that the courts have been interpreting the common law more broadly regarding the use of *curators ad litem*. It appears that *curators ad litem* will also be appointed to do independent investigations in the child's best interests and ensure that all facts are placed before court.

On the other hand it can also mean that it simply gives an explanation of what the duties of a person who acts as guardian of a child entail.⁴⁷ It is submitted that it could not have been the legislator's intention to limit the ambit of section 18 to only persons who act as guardians. Once again the legislator's choice of wording might cause confusion. From a reading of the Children's Act,⁴⁸ it is submitted that the legislator intended to confer parental rights on other persons as well and not just on the holders thereof. This is established from a reading of the Act and specifically section 23, which allows that any person having an interest in the care and wellbeing of the child may approach the court.

Having regard to the above arguments, it is submitted that an order in terms of section 18 could have been granted in favour of the JJ's, as this section also came into operation simultaneously with section 21⁴⁹ under which A acquired his responsibilities and rights. Section 30 in any event provides that these rights can be shared and persons may be co-holders of parental responsibilities and rights.

4.1.4 Conclusion

In order to answer the question as to whether a declaratory order in terms of section 18 or 21 needs to be applied for, it is submitted that one also needs to ask whether it is actually necessary to have parental responsibilities and rights so confirmed in terms of section 21.

Since the rights in terms of section 21 have been automatically acquired, an unmarried father should not have to approach a court to confirm these rights.⁵⁰ He acquires these rights *ex lege*, without having to take any legal action to acquire them.⁵¹ This means that an unmarried father⁵² has an inherent right to his child.⁵³

⁴⁷ According to author's interpretation, which will be discussed further in this chapter under 4.2, to act as guardian and to be the actual guardian are two separate concepts.

⁴⁸ Specifically refer to ss 22 and 23 in this regard.

⁴⁹ Under GG 30030 of 2007-06-29.

⁵⁰ Bosman-Sadie and Corrie *A Practical Approach* 37; Skelton and Carnelley (eds) *Family Law in South Africa* 246.

⁵¹ Skelton *Child Law in South Africa* 74.

In the event that an application for a declaratory order under section 21 is opposed by a respondent mother who claims that the father does not comply with the requirements laid down in section 21, the matter may not proceed without it having been referred for mediation in terms of section 21(3).⁵⁴ However, the reason why one would apply for a declaratory order in terms of section 21 is that any dispute regarding the fulfilment of the requirements would obviously first be intercepted by a court order.

The Supreme Court of Appeal in the *FS v JJ* case simply granted a declaratory order in terms of section 18 to A and the judge did not also confirm A's rights acquired in terms of section 21.

However, sections 18, 22 and 23 are to be applied neither mutually inclusively nor exclusively. In many ways these sections overlap, which might make it difficult to decide which section to use in order to enforce or acquire parental responsibilities and rights.⁵⁵ Each situation will however dictate and prescribe which section of the Act would be suitable to use in each case.

It is then concluded that the unmarried father who has been vested with parental responsibilities and rights in terms of section 21, should rather have his rights confirmed in terms of a court order under section 18, instead of approaching the court under section 21 for a declaratory order.

⁵² Referring to those fathers qualifying under s 21.

⁵³ This was not the position prior to the commencement of the Children's Act. See also the discussion in chapter 2.2 above.

⁵⁴ S 21(3) compels mediation in the event of a dispute as to whether or not the unmarried father fulfilled the conditions in s 21(1)(a) or (b).

⁵⁵ An unmarried father without parental responsibilities and rights may also enter into an agreement with the mother in terms of s 22, in order to obtain these rights. See also chapter 5.1.3 and 5.1.4 hereunder for a discussion of this.

4.2 Section 24

Section 24 deals with the assignment of guardianship by order of court. It makes provision that *any person* having an interest in the care, well-being and development of a child may apply to court to be granted guardianship.

Section 24 reads as follows:

- (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.

4.2.1 *Interpretation Difficulties Related to Section 24(3)*

One of the main problems with section 24(3) lies in its interpretation and application. This section provides that the person applying for guardianship must submit reasons why the existing guardian is unsuitable to have guardianship.

This section also does not prescribe any guidelines on when an existing guardian would be regarded as unsuitable to have guardianship.⁵⁶ Since no guidelines are provided in this regard, the court would have to consider what is

⁵⁶ Heaton *Commentary* 3-22.

in the child's best interest in order to make a decision.⁵⁷ Does this section now imply that a child can have only one guardian? It is clear that this section is open to different interpretations.⁵⁸ It can either mean that the child will have an additional guardian, or that the current guardian's guardianship is terminated.

An unmarried father who has not acquired responsibilities and rights in terms of section 21 may apply for guardianship in terms of section 24. He will however have to show reasons why he is not adopting the child⁵⁹ and if the child's mother is still in the picture, he must also show why she is not suitable to have guardianship in respect of the child.

Section 23(4) also makes specific provision that the granting of care and contact to a person does not affect the parental responsibilities and rights another person may have in respect of the child. This is however contrary to section 24(3), according to which the existing guardian will lose guardianship⁶⁰ if guardianship in terms of section 24 is granted. It then appears that in terms of section 23 persons may be co-holders of parental rights, whereas it is not the case with section 24.

The effect of section 24 is also limited by the provision in section 29(2) that a person applying for guardianship must provide reasons why that person is not adopting the child. Its applicability is limited by the fact that section 24 should

⁵⁷ S 7 lists several factors that must be taken into consideration when considering the child's best interests. This list replaces the checklist that was defined in the case of *McCall v M Call* 1994 3 SA 201 (C). The repealed Natural Fathers of Children Born out of Wedlock Act 86 of 1997 also identified certain factors to be taken into consideration when considering the child's best interests in s 2(5) thereof. S(1)(3) of the Children Act 1989 in England, s 3 of the First Schedule to the Uganda Children Act 1997 (chapter 59) and S68F of the Australia Family Law Reform Act 1995 also provide for statutory lists to be considered when the best interests of children are considered. In this regard refer to chapter 3. See also Boezaart *Commentary* 2-8 and further. Albertus and Sloth-Nielsen "Relocation Decisions: Do Culture, Language and Religion Matter in the Rainbow Nation?" 2010 *JFLP* 94 however say that the approach should not be to take each section of s 7 and *seriatem* tick it off. The authors say that a composite approach is required and that all the factors should just be weighed up. Heaton 2009 *JJS* 9 points out that each individual child's position should be assessed in the light of each individual case. Bekink 2012 *PER* 204, rightly so, also concludes that the task of deciding what is in the best interests of the child is a very arduous and complex one that requires the wisdom of Solomon (of the Bible).

⁵⁸ Heaton *Commentary* 3-22.

⁵⁹ S 29(1).

⁶⁰ Whereas guardianship in this regard is one of the elements of parental responsibilities and rights in terms of s 18(3)(c).

be read with the proviso laid down in section 29(2). It therefore limits the applicant applying for guardianship, in that the applicant appears to be allowed to apply for guardianship only, with an explanation as to why the applicant is not adopting the child. Skelton⁶¹ is of the opinion that section 24(3) will only make sense if the application is made for sole guardianship.⁶² She suggests that in cases like these, the applicant needs to show why the existing guardian is not suitable to have guardianship. However, the application is to be brought together with an application to terminate guardianship. Heaton⁶³ on the other hand, provides a different interpretation of section 24(3). She says that the applicant will only have to show that the existing guardian is unsuitable to such a degree that the court should assign an additional guardian. In this case the inclusion of section 29(2) in the Act is unclear.

A successful application of an unmarried father in terms of section 24 should not affect the guardianship status of the mother. This would only mean that the child has two guardians.⁶⁴ Heaton⁶⁵ concurs in that she suggests that the successful application for guardianship will only give the child another guardian with equal and concurrent rights to the current guardian. It is submitted that it could not have been the intention of the legislator that parental responsibilities and rights should not be shared. From a reading of the Act⁶⁶ it appears as if the legislator supports the notion of shared parental responsibilities and rights and that those rights should not be limited.⁶⁷ Section 30 specifically makes provision for co-holders of parental responsibilities and rights and guardianship

⁶¹ Skelton *Child Law in South Africa* 84. See also Skelton and Carnelley (eds) *Family Law in South Africa* 255.

⁶² Skelton and Carnelley (eds) *Family Law in South Africa* 255 say that s 24(3) goes against the concept of shared parental responsibilities and rights. If the legislature intended that this section would apply to applications for sole guardianship, the requirement for the reason for non-suitability of the other guardian would make sense. The authors note that the word “sole” does however not appear in s 24(3). In *CM v NG* 2012 4 SA 452 (WCC) par 58 the court also said that was clear that s 24(3) would only be applicable where a party was applying for exclusive rights as to guardianship.

⁶³ *Commentary* 3-22.

⁶⁴ Skelton *Child Law in South Africa* 84.

⁶⁵ Heaton *Commentary* 3-22.

⁶⁶ The preamble of the Act related to children’s rights enshrined in s 25 of the Constitution; s 2 dealing with the objects of the Act, specifically those related to family care and s 30 that provides for co-holders of parental responsibilities and rights.

⁶⁷ Skelton *Child Law in South Africa* 84 is of the opinion that the only plausible explanation regarding s 24(3) is that it contains a drafting error. Refer also to chapter 6.

is one of the elements of parental responsibilities and rights. There is thus no reason why the unmarried father cannot be the co-holder of parental responsibilities and rights, with the child's mother. It is therefore suggested that section 24(3) should be amended to read: In the event of a person applying for *sole* guardianship of a child who already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have *sole* guardianship in respect of the child.

4.2.2 Terminology: *To Be a Guardian or to Act as Guardian*

Guardianship in the definitions⁶⁸ in the Children's Act is defined as "guardianship as contemplated in section 18". Section 18 provides for and describes what parental responsibilities and rights entail. These parental responsibilities and rights a person may have are listed⁶⁹ in the Act. One of the elements of parental responsibilities and rights is to "act as guardian". It is submitted that this can be interpreted to be a person only acting as a guardian and that this person might not necessarily be the actual legal guardian.⁷⁰ In addition to section 18(2)(c), section 18(3) also refers to a person who "acts as guardian".⁷¹

The word "guardianship"⁷² is however used further in section 18. It appears from the remainder of section 18 that guardianship refers to a person who actually *holds* the position as guardian, resulting in section 18(2)(c) appearing to be inconsistent with the wording of the remainder of this section. It also appears to be inconsistent with the wording of section 24, which specifically refers to the word "guardianship"⁷³ as well. The Guardianship Act⁷⁴ also referred to the words "guardian" or "guardianship" and did not refer to "to act"

⁶⁸ S 1.

⁶⁹ S 18(2)(a)-(d).

⁷⁰ A guardian appointed by court, or as holder of parental responsibilities and rights.

⁷¹ The specific phrase "to act as guardian" does not appear in the acts of the other countries studied in chapter 3. S 7 of the Children (Scotland) Act 1995 for instance refers specifically to "to be" a guardian.

⁷² Ss 18(4) and (5).

⁷³ S 24(1) and (3).

⁷⁴ Act 192 of 1993. This Act was however repealed by Schedule 4 of the Children's Act in terms of GG 30030 of 2007-06-29.

as guardian. A person only acting as guardian would not have been able, or allowed, to execute any of the juristic acts as contemplated in section 2⁷⁵ of the Guardianship Act or as contemplated in section 18(3) of the Children's Act.

Because a person may have either full or specific parental responsibilities and rights,⁷⁶ it is submitted that it appears as if this section implies that a person is allowed to act as guardian, while that person is not necessarily the legal guardian of the child.⁷⁷

In terms of section 21, an unmarried father would acquire parental responsibilities and rights when certain criteria have been fulfilled. In order to establish what parental responsibilities and rights are, the definitions in the Children's Act refer to those responsibilities and rights referred to in section 18.

The *Oxford Advanced Learners Dictionary*⁷⁸ defines the word "act" as to "do something for a particular purpose or in order to deal with a situation" or "to perform a particular role or function". On application of this definition, it means that the person acting as guardian is performing the role or function of a guardian. This then has the effect that the person acting as guardian might not necessarily be the legal guardian as contemplated in the Act.

On a strict linguistic interpretation of section 18(2)(c), the position may exist where an unmarried father might then not be the guardian of a child, but may only be acting as guardian. An example of a person only acting as guardian will be in the case where both parents are deceased and have not left a will appointing a guardian or guardians. Their child goes to live with the

⁷⁵ S 2 provided that the consent of both parents would be necessary for the contracting of a marriage by the minor child; for the adoption of the child; for the removal of the child from the Republic by either one of the parents or by a person other than a parent of the child; for the application of a passport by one of the parents in which the minor child is to be specified as a child of the prospective passport holder and for the alienation or encumbrance of immovable property, or any right to immovable property belonging to the minor child.

⁷⁶ As contemplated in s 18(1).

⁷⁷ An example where parents "acted as guardians", without formally adopting the child, or legally applying for guardianship, can be found in the case of *Flynn v Farr* 2009 1 SA 584 (C). Flynn was raised and treated as if he was the Farr's son, without a formal adoption order or order granting them guardianship. However, this presented a problem when Flynn could not inherit intestate from the Farris.

⁷⁸ www.oxfordadvancedlearnersdictionary.com/dictionary/act_2 accessed on 22 July 2011.

grandparents, who assume the role of guardians and they also act as such. The grandparents in this example never apply to court to be formally appointed as guardians; they simply act as guardians of the child. Do they legally have guardianship? It is submitted that they do not have guardianship. They cannot consent to marriage of the child, for example. They can as a matter of fact not consent to any of the juridical acts as set out in the Children's Act. It appears as if the legislator used the term "to act as guardian" and "guardianship" interchangeably.⁷⁹

As section 18(3) refers to "to act as guardian" and Heaton⁸⁰ refers to "guardianship" where they refer to the acts a guardian can fulfil in terms of section 18(3), they also appear to be using the terms interchangeably.

Regardless of the fact that section 18(2)(c) does not specifically use the term "guardianship", but only the act of being a guardian, Skelton⁸¹ also just uses the term "guardianship" where she mentions that it is an element of parental responsibilities and rights.

Domingo⁸² also refers to the term "guardianship" instead of referring to the wording of the Children's Act, namely to "act as guardian".⁸³ Where the author mentions an unmarried father who has acquired section 21 responsibilities and rights, he says that the unmarried father also has the right to "guardianship".⁸⁴

⁷⁹ Bainham *Children: The Modern Law* (2005) 88 says that changes in society have resulted in many children being parented by "social" or "psychological" parents, who are not biologically related to the child. He submits however that these parents should not be given the status of parents, but rather parental responsibility. However, it is submitted that a person who has parental responsibilities and rights would also have guardianship as one of the elements of full parental responsibilities and rights. It is submitted that Bainham might have referred to s 23 of the Children's Act 38 of 2005, which provides that only specific parental responsibilities and rights as contemplated in s 18(1) can be conferred and that contact and care may be granted to any interested person in terms of s 23 of the Act. However, the circumstances of each case need to be considered, such as whether the parents of the child are in a position to fulfil their full parental responsibilities and rights, or not.

⁸⁰ Heaton *South African Family Law* 283 says that "In terms of section 18(3) ... "guardianship" refers to administering ..."

⁸¹ *Child Law in South Africa* 83.

⁸² Domingo " 'For the Sake of the Children': South African Family Relocation Disputes" 2011 *PER* 151.

⁸³ S 18(3).

⁸⁴ It is noted however that a court may ratify the actions of a person who acted as guardian on behalf of a child while under the impression that he/she was the guardian. See in this regard *Yu Kwam v*

4.2.3 Conclusion

Since a person who only acts as guardian is not able to perform any of the juristic acts as contemplated in section 18(3), it is submitted that it could not have been the intention of the legislator that section 18(2)(c) and (3) would not refer to the person who is actually the guardian and has legal guardianship.

In the case of *WW v EW*,⁸⁵ Rall AJ mentions that the term guardianship has a wider and a narrow meaning and that it can be used or referred to in both senses. In the wider sense it can be equated to parental power or authority, while in the narrow sense it means that portion of parental power which relates to the control and administration of a child's estate, the capacity to assist or represent a child in legal proceedings or in the performance of other juristic acts. Rall AJ is further of the opinion that the use of the word guardianship in the narrow sense is the more correct use.

Rall AJ⁸⁶ is of the express opinion, that the position prior to the coming into force of sections 18(3), (4) and (5) remains unchanged. This then effectively means that the narrow meaning must be given to the term guardianship and it also lends indirect support to the opinion that the legislator never intended that there should be a difference in the use of the wording "to act as guardian" and "guardianship".

It can be argued that the interchangeable use of the word "guardianship" and "to act as guardian" implies that it means the same, but it is clear that it may cause confusion. In this regard, it is submitted that the legislator should rather

President Insurance Co Ltd 1963 1 SA 66 (T) 70 where parents were not legally married and action was instituted on behalf of the child by the father. The father was at the time of institution of the action not the guardian of the child, but the court retroactively ratified his actions.

⁸⁵ *WW v EW* 2011 6 SA 53 (KZP) par 6. This case is also known as *Wheeler v Wheeler* 2010 JDR 0176 (KZP). However, It is noted that the flynotes under the above two citations are different in that the first refers to *inter alia* guardianship, custody and access and the latter only to custody, access, contact and care.

⁸⁶ Par 20.

substitute the word “act” with the word “be”,⁸⁷ in order to curb possible confusion or interpretation problems.⁸⁸

4.3 Section 29(2)

This section requires that a person who applies to court for guardianship has to supply reasons why that person is not adopting the child and it reads as follows:

An application in terms of section 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child.

Skelton⁸⁹ mentions that the requirement to provide reasons in section 24(3) is inconsistent with section 23(4), which stipulates that to grant care and contact to an applicant, does not affect any other person’s responsibilities and rights in relation to the child. As guardianship is one of the elements of parental responsibilities and rights, such an application would not affect the mother’s guardianship status. The child will simply have two guardians. If it was meant that the child will have only one guardian, or application is made for sole guardianship, then only section 24(3) will make sense.⁹⁰

Heaton⁹¹ suggests that as adoption terminates a person’s guardianship, it lends indirect support to the argument that assignment of guardianship in terms of section 24 terminates the existing guardian’s guardianship. She is further of the opinion that section 29(2) suggests that the consequences of adoption and an order for guardianship are similar, if not the same. The consequences referred to would for instance be that an adopted child may inherit intestate from the adoptive parents, whereas this is not the case with a child who has

⁸⁷ In s 18(2)(c) and (3). The word “as” in the sentences should then obviously be removed.

⁸⁸ Refer to chapter 6 for a suggested definition in this regard.

⁸⁹ *Child Law in South Africa* 83.

⁹⁰ Skelton *Child Law in South Africa* 84.

⁹¹ Heaton *Commentary* 3-22.

only guardians. The guardian must specifically make provision for the child in a will and this child cannot simply inherit intestate.⁹²

Louw⁹³ however says that Heaton's interpretation is problematic insofar as it equates the effects of section 24⁹⁴ to an adoption order.⁹⁵ Louw⁹⁶ is of the opinion that the purpose of the provision in section 29(2) is to ensure that the applicant only wants to acquire guardianship and nothing more. Louw⁹⁷ argues further that section 29(2) does not attempt to equate the application for guardianship and the application for adoption of a child. She says that the provision instead requires the applicant to distinguish between the two applications insofar as an applicant has to justify why he is only applying for the assignment of guardianship. An application for the assignment of guardianship can take two forms: an application for co-guardianship and an application for substitution of the existing guardian.⁹⁸

According to Skelton⁹⁹ the consequences of adoption and guardianship are not the same. She is of the opinion that there is a substantial difference in the effects of guardianship and adoption. Adoption ends the previously existing legal relationship between the parent and child. The consequences of adoption will also be different. The child can inherit intestate from the adoptive parent, but not from the guardian.¹⁰⁰

Perhaps the consequences Heaton has in mind are the juristic acts that a guardian and an adoptive parent can fulfil, as contemplated in section 18(2).

⁹² A child may only inherit intestate from his or her natural or adoptive parents as contemplated in s 1(4)(e) of the Intestate Succession Act 81 of 1987. Also refer to n 77 above and Louw *Thesis* 397 where she compares the differences between an order for adoption and sole guardianship.

⁹³ *Thesis* 291.

⁹⁴ An order assigning guardianship to a person.

⁹⁵ This order confers full parental responsibilities and rights on adoptive parents.

⁹⁶ *Thesis* 291.

⁹⁷ *Thesis* 291.

⁹⁸ *Thesis* 292-293.

⁹⁹ *Child Law in South Africa* 84.

¹⁰⁰ S 1(4)(e) of the Intestate Succession Act 81 of 1987 provides that adopted children are deemed to be descendants of their adoptive parents. They can therefore inherit intestate from adoptive parents and *vice versa*. Skelton and Carnelley (eds) *Family Law in South Africa* 286 discuss the effects of adoption and say that once the adoption has been concluded, the child becomes for all intents and purposes the child of the adoptive parents. The child then has the same status as a child naturally born to the adoptive parents, which includes the right to inherit.

However, the author concurs with Skelton's opinion, having regard to the different definitions of "adoption" and "guardianship" and the different consequences of each.

Although adoption is not specifically defined in the Children's Act, it may be defined by considering the effects of adoption.¹⁰¹ An adoption order terminates all parental responsibilities and rights and confers these upon the adoptive parent or parents and those rights of the previous parent will be terminated *in toto*. A child is adopted if the child has been placed in the permanent care of a person (or persons) in terms of a court order that has the effects as contemplated in section 242.¹⁰² Louw¹⁰³ defines adoption as a legal fact or process aimed at bringing about specific legal consequences. Heaton¹⁰⁴ describes adoption as a formal process by means of which existing rights and responsibilities are terminated and vested in the adoptive parent. Adoption then means that a child is legally considered as the child of the adopting parents, who also get full parental responsibilities and rights regarding the child.¹⁰⁵ There is therefore no longer a legal relationship between the child and the initial holders of parental responsibilities and rights.

According to Schäfer, guardianship can in its wide sense be defined as parental authority.¹⁰⁶ However, Schäfer is of the opinion that the more correct denotation of guardianship is in its narrow sense, namely to control and administer a child's estate and to assist or represent the child in the performance of juristic acts.¹⁰⁷ His definition in the narrow sense is in line with

¹⁰¹ S 242 Act 38 of 2005. Schäfer *Domestic Perspectives* 305 is of the opinion that the word "permanent care" in s 228 is used erroneously, as it might result in an adoption order being crafted in such a manner as to be conceptually different from what is understood to be an adoption. He is of the opinion that it would defeat the purpose of having a regime for adoption that is distinct from guardianship and care orders. It is submitted that s 228 cannot be read separately from s 242 in this regard, in order to avoid a glorified guardianship and care order as contemplated by Schäfer.

¹⁰² S 228 Act 38 of 2005. According to Skelton and Carnelley (eds) *Family Law in South Africa* 285 this section contains the definition of adoption.

¹⁰³ *Child Law in South Africa* 133.

¹⁰⁴ *South African Family Law* 291.

¹⁰⁵ S 242(3); Boezaart *Law of Persons* 95, 119; Schäfer *Domestic Perspectives* 304.

¹⁰⁶ *Domestic Perspectives* 224.

¹⁰⁷ The narrow definition is endorsed in s 18(3) of Act 38 of 2005. Heaton *South African Family Law* 170 points out that the Children's Act limited the meaning of guardianship to the narrow meaning.

the narrow definition of guardianship in *WW v EW*.¹⁰⁸ In this case guardianship was described as that portion of parental power which relates to the control and administration of a child's estate, the capacity to assist or represent a child in legal proceedings or in the performance of other juristic acts.¹⁰⁹

Skelton¹¹⁰ is of the opinion that the legislature built in the requirement to provide reasons why adoption is not applied for, in order to prevent applications for guardianship to circumvent adoption.¹¹¹ Louw¹¹² however says that the fear of misusing the procedure for obtaining guardianship to circumvent the rigorous adoption process is unfounded.¹¹³ It is submitted that Skelton's opinion above will make sense if the adoption is done by a person who is not the unmarried biological father. The unmarried biological father should not apply to adopt his own child, unless he does not have guardianship.¹¹⁴

Heaton¹¹⁵ says that it can also be interpreted that the person applying for guardianship acquires equal and concurrent guardianship with the existing guardian. Reasons only need to be provided to the extent that the existing guardian is unsuitable to be the only guardian and why the court should assign an additional guardian. In the event that this interpretation is correct, it is unclear why section 29(2) was included in the Children's Act.

¹⁰⁸ 2011 6 SA 53 (KZP) 2010 JDR 0176 (KZP) par 6.

¹⁰⁹ Boezaart *Law of Persons* 111 notes that the content of the term guardianship is very similar to the common law meaning of this term. Parental authority in the Children's Act was replaced with the term parental responsibilities and rights and the common law term included guardianship, custody and access. Parental responsibilities and rights include guardianship, care, contact and maintenance.

¹¹⁰ *Child Law in South Africa* 85.

¹¹¹ The case of *AD v DW* 2006 6 SA 51 (W) was such a case. Skelton also made submissions on behalf of the Centre for Child Law as *amicus curiae* in this case. Baby R was abandoned and therefore adoptable. The intended adoptive parents were UK citizens. However, instead of following the normal adoption route via the Children's Court, the adoptive parents approached the High Court for an order of sole custody and guardianship. The court *a quo* held that to grant such an order would result in sanctioning an alternative route to inter-country adoption under the guise of sole custody and guardianship and dismissed the application. If such an order would be granted, it was argued that it would effectively bypass the Children's Court adoption system, which might not be in the child's best interests. The appeal against the order was not successful.

¹¹² *Thesis* 291; Louw says further that it is only a problem when application is made for sole guardianship and sole care.

¹¹³ The SALRC First Issue Paper 13 par 7.4.2 deemed this provision necessary to prevent misuse of the procedure to obtain guardianship to circumvent the adoption procedure.

¹¹⁴ S 231(7)(a) provides that a biological father of a child who does not have guardianship, has the right to be considered as adoptive parent. See also the discussion of s 231 further in this chapter under 4.4.

¹¹⁵ *Commentary* 3-22.

However, if a choice between an application for adoption and guardianship is to be made, one needs to consider the circumstances of each case, bearing the child's best interests in mind. It is submitted that a child needs a stable and secure environment and adoption will place the child in a better position compared to that of a child who only has an appointed guardian, who also provides the child with residency and care.¹¹⁶ It is submitted that an unmarried biological father, who is not vested with parental responsibilities and rights, should not approach the court to be appointed as guardian only. If he cannot be vested with full parental responsibilities and rights¹¹⁷ it is submitted that he should rather apply for full parental responsibilities and rights in terms of section 18, or choose to adopt his child.¹¹⁸

In view of the above, it is submitted that section 29(2) does not make sense, as it lacks reasoning and does not provide specifications for creating the limitation on guardianship applications. It is submitted that in view of Louw's opinion above, the legislature should consider adding the word "only" after guardianship, to fall in line with Louw's argument that reasons should be provided if application is made for guardianship only. Section 29(2) will make more sense if it is specified with the word "only".¹¹⁹

4.4 Section 231

Section 231(1) makes provision for the different classes of persons who are eligible to adopt a child and provides as follows:

- (1) A child may be adopted-
 - a) jointly by-
 - (i) a husband and wife;
 - (ii) partners in a permanent domestic life-partnership; or

¹¹⁶ Bosman-Sadie and Corrie *A Practical Approach* 49.

¹¹⁷ In terms of s 21, or by agreement with the mother in terms of s 22 or otherwise in terms of s 23.

¹¹⁸ It is submitted that the unmarried father without acquired parental rights, appears to have a choice between adoption and an application in terms of s 18. Also refer to a discussion hereof in 4.4.2 below.

¹¹⁹ Refer to chapter 6 for the suggested wording for this section.

- (iii) persons sharing a common household and forming a permanent family unit;
- b) a widower, widow, divorced or unmarried person;
- c) 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 father¹²⁰ of a child born out of wedlock; or
- e) the foster parent of the child.

Section 231(1)(d) allows for a biological father of a child born out of wedlock to adopt his child. Section 231(7)(a) further provides that fathers who do not have guardianship in respect of their children, have the right to apply to adopt their children.¹²¹

4.4.1 A Case Study: *Williams v Duvenhage*¹²²

In this case an unmarried father wanted to raise his daughter and not allow the mother to give her up for adoption. The Children's Court advised him that the only way he would be allowed to raise his child and have any rights to her, was to adopt her. Eventually relief was sought under section 18 of the Children's Act.

The relevant facts as set out in the founding affidavit of this case are as follows:

Duvenhage fell pregnant with Williams' baby. The relationship was steady at that stage, according to Williams. However Duvenhage did not return home one afternoon from work. On enquiry from Williams she advised him that she just needed some time away from him. This was about six months into Duvenhage's pregnancy.

¹²⁰ In the Child Care Act 74 of 1983 the biological father was referred to as a "natural father". This Act was repealed in Schedule 4 of Act 38 of 2005 in terms of GG 30030 of 2007-06-29.

¹²¹ These sections will be discussed later herein after the case study.

¹²² Unreported case no 09/26662 South Gauteng High Court 29 September 2009. The author hereof was the attorney of record for the applicant in the High Court application only and not during the Children's Court proceedings.

Shortly after the above and after Williams had accompanied Duvenhage for her monthly medical check-up, Duvenhage requested him to meet her at a specified address where they could have couples counselling. However, on arrival at the specified address, Williams realised that it was an adoption agency. Williams was advised that Duvenhage did not want the baby and that he (Williams) had to consent to the adoption. Williams was not prepared to consent and advised the agency that he would take care of and raise the baby.

About a month before the baby was due, Duvenhage advised Williams that she was prepared for him to have the baby on condition that he paid for a “full narcotic birth” (*sic*)¹²³ at a private hospital. She advised him that she wanted a “narcotic birth” (*sic*), as she did not want to see the baby and that she wanted the baby removed before she woke up. He however advised Duvenhage that he could not afford the procedure at the private hospital. Duvenhage then advised him that she would not let him have the baby.

Despite the above, Duvenhage telephoned Williams and advised him of the date of delivery and the hospital where the baby was to be born and said that he would be contacted as to when he could come and collect his child. Williams was fully prepared for the baby. He had a room set up with clothes, toys, bottles, milk and the like, in order to care for the baby. However, the baby was not born on the day Duvenhage told him she would be born. It was later established that the baby was born two days later. Williams never heard anything from Duvenhage again.

Williams received a message texted to his cell phone from the adoption agency, advising him of the birth of the baby, that the baby was in a place of safety and that he should attend the Children’s Court concerning her adoption on a specified date. Williams went to the adoption agency on the same day in order to establish his baby’s whereabouts. He was however denied access to their premises.

¹²³ A caesarean section under general anaesthetic instead of a normal delivery. These were the terminology Duvenhage used when she explained her conditions of the birth to Williams.

Williams then went to the Children's Court to enquire about the baby's whereabouts. On opening of the court's record book, his daughter's name was noticed and written in pencil next to her name "inter country adoption". He could not obtain more information, except the appearance date. It was also established from the date on the Form 4¹²⁴ that the baby had been removed from the hospital two days after she was born.

Williams then requested the assistance of the South African Police Services. He was accompanied by one of their inspectors to the adoption agency, but they were once again denied access.

At the first court appearance Williams advised the magistrate¹²⁵ that he did not consent to his daughter's adoption. He was advised to obtain legal representation. It was also suggested that he should apply to adopt his daughter if he wanted any rights to her.

He was, regardless of his position, allowed to visit his daughter. Williams had visitation sessions for about a month, when he was advised by the adoption agency that his daughter's adoption had been confirmed after a round table they had with the Commissioner of Child Welfare. Williams was also advised that the same couple who had adopted Duvenhage's older child six years previously, would be adopting his daughter.

In view of the above Williams' visitation sessions with his daughter were terminated. Williams then obtained legal representation and with the help of his attorney a social worker was requested to compile a report on Williams' personal circumstances in order to oppose the adoption proceedings. The proceedings were postponed several times pending Williams' social worker's report.

¹²⁴ Interim authority for the detention of a child in a place of safety in terms of Regulation 9(2)(a) of the Child Care Act 74 of 1983. This Act was repealed as indicated in n 120 above.

¹²⁵ Then referred to as the Commissioner of Child Welfare in terms of the repealed Child Care Act 74 of 1983.

Eventually, about eight months after proceedings in the Children's Court were opened, a request was launched for a variation of the place of safety in terms of section 14 of the Child Care Act.¹²⁶ The application was successful and Williams' daughter was placed in his custody for two years. He was advised by the magistrate on finalisation of the order in court though, that he would have to apply to have his daughter adopted, or approach the High Court in order to apply for full parental rights to his daughter.

The Children's Act¹²⁷ then came into operation and Williams applied to the High Court for parental responsibilities and rights in terms of section 18 and that primary residency of the child should be with him. The application was successful.¹²⁸

4.4.2 To Adopt or Not?

Prior to the commencement of the Children's Act, children could be adopted by their unmarried fathers.¹²⁹ After the commencement of the Children's Act the unmarried father who wanted the right to raise his child and care for her or him, was also given the right to adopt his child.¹³⁰ The position of the unmarried father then appears to be the same before and after commencement of the Children's Act. It is specifically determined that the unmarried father of the child may apply to adopt his child.¹³¹ The Children's Act goes further to qualify

¹²⁶ Act 74 of 1983 now repealed in terms of schedule 4 of Act 38 of 2005.

¹²⁷ 38 of 2005.

¹²⁸ As far as the author is aware, Duvenhage has never seen the child, nor tried to make contact with the child since she was born in 2008, to date. The application to the court was also unopposed, despite the fact that it was personally served on her.

¹²⁹ In terms of s 17 of the Child Care Act 74 of 1983, now repealed in terms of schedule 4 of Act 38 of 2005. The unmarried father had no inherent right to his child and would only have guardianship, if acquired by an order of court, prior to the commencement of the Children's Act.

¹³⁰ S 231(7) provides that the unmarried father without guardianship may apply to adopt his child. For the purposes of the argument that follows, the termination or suspension of the mother's parental rights will not be discussed and it will be accepted that the position is that she takes no interest in her child. The principle that an unmarried father may give or withhold consent to adoption if he has acknowledged paternity and has taken some responsibility for the child as provided for in the Child Care Act 74 of 1983 was also retained in the Children's Act. However the criteria in terms of which the unmarried father takes responsibility have been expanded in the Children's Act, which provides for more clarity. See also Mosikatsana and Loffell "Adoption" in Davel and Skelton (eds) *Commentary on the Children's Act* 15-17. Louw "Adoption of Children" in Boezaart (ed) *Child Law in South Africa* 147.

¹³¹ S 231(1)(d).

that for the biological father to have a right to qualify to apply to adopt his child, he must not have guardianship in respect of his child.¹³² The unmarried father who does not wish to adopt his child and wants to acquire parental responsibilities and rights otherwise, is however subject to the limitations placed on him by sections 24(3)¹³³ or 29(2).¹³⁴ It appears that these sections might force the unmarried father rather to adopt his child.¹³⁵ Section 230(3) however defines an adoptable child as a child who does not have a guardian or caregiver who is willing to adopt that child,¹³⁶ or in the event that the whereabouts of the child's parents or guardian cannot be established.¹³⁷

In the case of an unmarried father who has acquired parental responsibilities and rights in terms of section 21, or by agreement in terms of section 22,¹³⁸ or otherwise by court order in terms of sections 18 or 23,¹³⁹ it is submitted that the unmarried father should not adopt his child. The unmarried father should rather apply for parental responsibilities and rights in terms of section 18.¹⁴⁰

The unmarried father has already obtained guardianship, which is one of the elements of parental responsibilities and rights (simultaneous with the other rights as contemplated in section 18). Bearing in mind that the purpose of adoption is to transfer parental responsibilities and rights,¹⁴¹ the effect of

¹³² S 231(7).

¹³³ In terms of this section, reasons must be supplied as to why the existing guardian is not suitable to have guardianship, when another person applies for guardianship.

¹³⁴ This section provides that reasons must be supplied why the applicant is not applying to adopt the child.

¹³⁵ If the child is adoptable as contemplated in s 230, the unmarried father may adopt his child. S 231(7) does however not compel the father to adopt his child, but just provides him with a right to do so.

¹³⁶ S 230(3)(a).

¹³⁷ S 230(3)(b).

¹³⁸ Parental responsibilities and rights may also be acquired in terms of s 22, where the mother of the child may confer these rights on the father who does not have any, in terms of an agreement with him.

¹³⁹ An application in terms of s 24 will not suffice, as it will only provide the unmarried father with guardianship and not full parental responsibilities and rights. This will not have a similar effect as having full parental rights as contemplated in ss 18, 21, 22 or 23. It will also not have the same results as an adoption order, which provides that full parental responsibilities and rights are transferred to the adoptive parents.

¹⁴⁰ Sloth-Nielsen and Van Heerden "Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa" 1996 *SAJHR* 255 are of the opinion that fathers should be given the opportunity to apply themselves to adopt the child.

¹⁴¹ Also refer to the effects of adoption and the discussion of what adoption entails in 4.3 above.

adoption will be the same as acquiring parental responsibilities and rights in terms of sections 18, 21, 22 or 23. In the event that the biological father also applies for adoption, he would effectively apply to have the same rights he would then already have in terms of one of the sections mentioned herein above.

It is unclear why unmarried fathers,¹⁴² who can apply for responsibilities and rights under sections 18 or 23, should apply to adopt their children. It should also not be necessary for an unmarried father who has acquired parental rights in terms of section 21 or by agreement with the mother in terms of section 22, to adopt his child.¹⁴³ Schäfer¹⁴⁴ points out that unless the unmarried father in this regard has not also complied with any one of the requirements in section 236(4),¹⁴⁵ he might be under the impression that as he has acquired parental rights in terms of section 21, he will have the right to consent to his child's adoption.¹⁴⁶ This can be very misleading. Schäfer¹⁴⁷ is of the opinion that it seems odd to define parental responsibilities and rights as the aggregate of all the rights and responsibilities denoted by guardianship, care and contact, but to then exclude the right to consent to adoption from its scope.

It is therefore submitted that unmarried fathers who have acquired parental responsibilities and rights should not adopt their children, as they already have the rights that will be conferred upon them by an adoption order.¹⁴⁸

¹⁴² This will only be the case if he has not acquired parental responsibilities and rights in terms of s 21.

¹⁴³ Skelton and Carnelley (eds) *Child Law in South Africa* 297; Bosman-Sadie and Corrie *A Practical Approach* 251.

¹⁴⁴ *Domestic Perspectives* 295.

¹⁴⁵ The unmarried father can acknowledge that he is the biological father of the child by giving a written acknowledgement as such to either the mother or clerk of the Children's Court, before the child is six months old; he can voluntarily pay maintenance for the child; he can pay damages in terms of customary law or cause his particulars to be entered in the registration of birth of the child.

¹⁴⁶ Skelton and Carnelley (eds) *Family Law in South Africa* 294 said that in relation to consent to adoption, unmarried fathers are not in the same position as married fathers or biological mothers.

¹⁴⁷ *Domestic Perspectives* 295.

¹⁴⁸ Skelton and Carnelley (eds) *Family Law in South Africa* 297 also support this point of view. They further say that the unmarried father without acquired parental responsibilities and rights will be protected by s 233, which ensures that an eligible father is notified, gives consent, or alternatively is considered as adoptive parent himself.

4.4.3 **Consequences: The Reason for Adoption?**

The consequences of adoption for the child of an unmarried father cannot be held to be the reason why that child should rather be adopted by the biological father. As all parental responsibilities and rights any person might have had in respect of the child will be terminated with an adoption order, full parental responsibilities and rights will be conferred on the adoptive parent. The result of this is *inter alia* that the adopted child may inherit intestate from the adopted parent's estate as if that child had been born from that parent. The consequences will be the same for an unmarried father and his biological child, regardless of whether he has adopted that child or not. The child of the unmarried father will thus inherit intestate from that father's estate.¹⁴⁹

4.4.4 **A Question of Definition?**

As an unmarried father is not excluded from the definition of a parent,¹⁵⁰ he will be regarded as also being a parent of the child. In terms of section 1 "a parent" is defined as follows:

"parent", in relation to a child, includes 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;¹⁵¹

¹⁴⁹ See also the discussion in 4.3 above regarding the effects of adoption related hereto.

¹⁵⁰ S 1.

¹⁵¹ In the case of *M v V (born N)* 2010 (ZAWCHC) 288 the court interpreted the definition of a parent where the unmarried father acquired parental responsibilities and rights in terms of s 21, but the father was disqualified as a parent in terms of the definition because of allegedly raping the mother of the child. The child has however treated and regarded the applicant (the unmarried father) as his father in every conceivable way and *vice versa*. Cloete J (par 23) considered the provisions in the Constitution which provide that every child has the right to parental care and that a child's best interests are of paramount importance. He also took note of everyone's right to dignity and the fact that some rights may be limited to the extent that doing so is reasonable and justifiable, as provided for in s 36(1) of the Constitution. Cloete J said (par 24) that it is required to attempt to give effect to the competing rights of the child and the mother (respondent) on the other hand, whose rights in terms of s 36(1) might be limited if the father is allowed to be recognised as co-holder of parental responsibilities and rights. The court found (par 30.3) that it would not be in the child's best interests to exclude the father from the provisions of s 21 and that the mother was not allowed to rely on the exclusionary provision (par 41.1) in regard to the definition of "parent".

- b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- c) parent whose parental responsibilities and rights in respect of a child have been terminated;”

The unmarried father will in terms of the above definition, be regarded as the child’s parent as well. Once he has either claimed his parental responsibilities and rights by court order, or acquired it otherwise, he will also have guardianship as contemplated in section 18. In terms of the definitions, a guardian means “a parent who has guardianship” of a child and in this regard the unmarried father with parental responsibilities and rights has guardianship. This means that the unmarried father is a parent who has guardianship of the child and guardianship in relation to a child means guardianship as contemplated in section 18.¹⁵²

The above further supports the view that the unmarried biological father should not have to adopt his child as well, once he has guardianship of his child.

Louw¹⁵³ argues that section 231 gives the biological father of the child born out of wedlock the right to first refusal. According to her, section 231(7) was intended rather to accommodate those unmarried fathers who have not acquired responsibilities and rights in terms of section 21. Louw further suggests that the unmarried biological father who has not acquired section 21 rights may either apply for guardianship in terms of section 24 or adopt his child.¹⁵⁴

However, cognisance must be taken of the limitation laid down in section 29(2) - which specifically requires that reasons must be given why the child is not being adopted - when application is made for guardianship. According to

¹⁵² Definition of “guardian” and “guardianship” in s 1 of Act 38 of 2005.

¹⁵³ *Child Law in South Africa* 138.

¹⁵⁴ *Child Law in South Africa* 139.

Louw¹⁵⁵ the above would evidently cause the High Court also to consider the possibility of adoption at the time of awarding guardianship to the father.

Mosikatsana and Lofell¹⁵⁶ are of the opinion that the inclusion of a biological father in this section was influenced by the decision in the *Fraser v Naude* case.¹⁵⁷ These authors submitted that the inclusion was due to the fact that the denial of the right of an unmarried father to adopt his child because of his marital status might discriminate against him.

4.4.5 Conclusion

It is submitted that the biological child of an unmarried father cannot be regarded as an adoptable child as contemplated in section 230(3).¹⁵⁸ In the event that the unmarried biological father has acquired parental rights in terms of an agreement with the mother,¹⁵⁹ in terms of section 21, or by application to court in terms of sections 18 or 24, the child already has a guardian as contemplated in these sections. The unmarried father as holder of parental responsibilities and rights would therefore have guardianship as one of the elements of parental responsibilities and rights and the child would not be without a guardian.¹⁶⁰

The child would only be adoptable in the event that the father has *not* approached the court to vest his rights in terms of sections 18 or 24 or has not acquired parental responsibilities and rights in terms of section 21, or by agreement with the child's mother in terms of section 22. However, section

¹⁵⁵ *Child Law in South Africa* 139.

¹⁵⁶ *Commentary* 15-7 n 5.

¹⁵⁷ 1999 1 SA 1 (CC). Also refer to chapter 2.2.4 for reference to the different *Fraser* cases and specifically to n 92 thereof for reference to the Constitutional Court case referred to here.

¹⁵⁸ In terms of s 230(2) an adoption social worker needs to make an assessment to determine whether a child is adoptable. The adoptable child's best interest must be considered in order to be adopted in terms of s 230(1).

¹⁵⁹ S 22 provides that the holder of parental responsibilities and rights may enter into an agreement in terms whereof a non-holder of parental rights may acquire such rights.

¹⁶⁰ Despite the fact that s 33(2) discourages approaching the court as a first resort when co-holders are experiencing difficulties in exercising their parental responsibilities and rights, the court in *M v V (born N)* 2010 (ZAWCHC) 228 compelled the mother (as respondent) to enter into a parenting plan with the unmarried father. This was after the court found that the father had not been excluded from the definition of "parent" and that he had acquired parental responsibilities and rights in terms of s 21. See also Heaton *Commentary* 3-37.

231(7)(a), provides for a more specific qualification and specifies that the biological father of a child “who does not have guardianship” has the right to be considered as adoptive parent.

Was it the intention of the legislator that section 231(7)(a) should amplify and be read with section 231(1)(d)? It is submitted that these sections should be read together. It is also submitted that section 231(1)(d) should have specified that this section refers to only unmarried biological fathers who do not have guardianship or who have not yet at the time of the adoption application acquired parental responsibilities and rights.

As guardianship is one of the elements of parental responsibilities and rights, the unmarried biological father would have acquired guardianship in terms of section 18, 21, 22, or 24 and he would not be a “biological father of a child who does not have guardianship”.¹⁶¹ He would therefore not be a person who may adopt a child in terms of section 231.

¹⁶¹ S 231(7)(a).

CHAPTER 5

APPLYING SECTION 21 IN PRACTICE

5.1 THE CHILDREN'S COURT

An extensive list of different matters that the Children's Court may adjudicate upon is included in the Children's Act.¹ The orders that the Children's Court may make in relation to the matters on which it may adjudicate² are also contained and specified in the Children's Act. The Children's Court, as creature of statute,³ only has those powers afforded to it in terms of the Children's Act. In contrast the High Court has inherent jurisdiction in relation to children and remains the upper guardian of all children.⁴ The Children's Act has specifically reserved jurisdiction for the High Court in certain matters,

¹ In terms of s 45 it is matters related to the child involving the child's protection and well-being; care and contact; paternity; support; provision of early childhood development services or prevention or early intervention services; maltreatment, abuse, neglect, degradation or exploitation (except criminal prosecutions in this regard); temporary safe care; alternative care; adoption and inter-country adoption; child and youth care centres, partial care facilities, drop-in centres or other facilities purporting to be a care facility for children or any other matter relating to the care, protection or well-being of a child.

² S 46 provides that the Children's Court may make an alternative care order; an order placing the child in a child-headed household; an adoption order; a partial care order; a shared care order; a supervision order; an order providing for early intervention services, a family preservation programme or both; a child protection order (which might *inter alia* limit access or contact of a person to a child); a contribution order; an order to investigate a matter (as provided for in s 50) or any other order which the court may make in terms of any other provision of the Act.

³ This means that it has been created by statute. See also Gallinetti "The Children's Court" in Davel and Skelton (eds) *Commentary on the Children's Act* 4-4.

⁴ S 45(4) states that nothing in the Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children. In *Johnson v Johnson* 1963 1 SA 162 (T) the High Court confirmed (164A) that it acts as upper guardian even when dealing with an unopposed divorce action involving a settlement agreement between the parties. Quoting from *Christian v Christian* 1945 TPD 435 the court said the fact that there was a settlement agreement does not relieve the court from its duty to investigate and protect the interests of children. This confirms the common law principle. In the case of *AD v DW* 2008 3 SA 183 (CC) par 18 one of the issues raised to decide was the jurisdiction of the High Court to hear an application for sole custody and guardianship, where the ultimate purpose was adoption. Sachs J (par 31) said that the High Court had not been dispossessed of its jurisdiction in its capacity as upper guardian of all minors. However, the best interests of the child would be served (par 33-34) by referring the matter at hand to the Children's Court to ensure that there would be safeguards and procedures to protect the child, as the presiding officer would be well-positioned to apply the applicable law pertaining to the rights of the child. The forum in this regard most conducive to protecting the best interests of the child would be the Children's Court. The SALRC Project 110 *Review of the Child Care Act* Report, December 2002 par 6.3.3 confirmed the common law principle that the High Court is the upper guardian of all minors and that it can overrule any decision taken by parents if it is in the best interest of the child, as is the position in South Africa.

such as guardianship,⁵ where the Children's Court may not adjudicate on these matters.⁶

The Children's Court therefore has specified and limited decision-making powers derived from the Children's Act, whereas the High Court retains jurisdiction in all matters relating to children. However, Gallinetti⁷ notes that there has been a great improvement under the Children's Act on the jurisdiction of Children's Courts, providing more South African children with access to judicial intervention.

Some of the matters that do not have to be adjudicated by the High Court will be referred to hereunder.

5.1.1 Section 21

5.1.1.1 Mediation⁸

In the event that the biological mother disputes whether or not the biological father fulfilled the requirements as set out in section 21(1)(a) or (b), the dispute must be referred for mediation prior to requesting a court for relief.⁹ It is however not clear exactly what it is that has to be mediated.¹⁰ No provision was made either for which party should appoint or choose the mediator.

Even though mediation is compulsory before the court may intervene, the High Court may still intervene as upper guardian of children without having to engage in mediation first. The High Court could then establish whether or not

⁵ Other limitations of the Children's Court's powers are further described in s 45(3), such as termination of guardianship (in this regard refer to chapter 4.2, 4.3 and 5.2 for a discussion hereof); artificial fertilisation; the removal and applications for the return of the child to and from the Republic; age of majority or contractual or legal capacity of the child; safeguarding of a child's interest in property and surrogate motherhood.

⁶ Jurisdiction related to guardianship will be further discussed in 5.2 hereunder.

⁷ *Commentary* 4-9.

⁸ Refer to chapter 2 above for a more detailed discussion of mediation.

⁹ S 21(3) provides for compulsory mediation of the dispute, before a matter is allowed to proceed further in court. This is indicated by the word "must" in the section. See also Heaton *Commentary* 3-14.

¹⁰ Louw *Thesis* 120.

the father has met the requirements as set out in section 21(1)(b) and make an order that he has acquired full parental responsibilities and rights.¹¹

The Children's Act further prescribes that the mediation is to be done by the family advocate, social worker, social service professional or other suitably qualified person. Although the Act provides definitions¹² for all the persons listed who may act as mediators, no definition or explanation is provided of who or what exactly another suitably qualified person is or will be in the circumstances¹³ as prescribed in the Act.¹⁴ Once again this may lead to different interpretations and ultimately to different applications of the Act, which might not have been the intention of the legislator. Louw¹⁵ however submits that the uncertainty created by the provisions contained in section 21 outweighs the ostensible protection of children against uncommitted fathers.

Although mediation should be the route to resolve disputes, it is submitted that the path to be followed in order to get to the mediated solution should be more clearly defined by the legislator. It is suggested that provision should be made for specifically what it is that needs to be mediated: the criteria as to whether or not a permanent life-partnership existed should be set out; definitions of a permanent life-partnership¹⁶ and a suitably qualified person to conduct mediations should be provided.

5.1.1.2 Permanent Life-partnership

As section 21(1)(a) and (b) cause interpretation difficulties, the door is left wide open for the development of possible disputes between the mother and unmarried biological father. Section 21(1)(a) refers to an unmarried father

¹¹ Heaton *Commentary* 3-15.

¹² S 1.

¹³ The circumstances referred to are related to whether or not the father meets the conditions to acquire full parental responsibilities and rights.

¹⁴ Heaton *Commentary* 3-15. Heaton also points out that once the biological father has acquired parental responsibilities and rights in terms of s 21, the child's mother has no choice but to accept co-parenting. This may however be curtailed or terminated if it is in the child's best interests.

¹⁵ 2010 *PER* 180.

¹⁶ Refer also to 5.1.1.2 for a discussion hereof, as well as a suggestion for a definition.

who was living with the mother in a permanent life-partnership.¹⁷ The definitions to the Children's Act¹⁸ unfortunately do not provide for a definition of a permanent life-partnership,¹⁹ which may result in interpretation problems concerning this term. The application of this term can be very subjective, as the mother may not have regarded the relationship as a permanent life-partnership, but the unmarried father may be of a different opinion.²⁰ Skelton²¹ points out that this can be a very difficult question to answer when analysing what is regarded as a permanent life-partnership and also when it can be regarded as permanent. It was also noted by Schäfer²² that in every case where constitutional protection of a life-partnership was extended to a court, it was a question of fact. It is therefore submitted that every case should be considered separately, taking into account its own unique facts and circumstances.

Schäfer²³ mentions further that the adjective "permanent" to life-partnership may be superfluous. He reasons that both the words "permanent" and "life" imply a settled relationship, which indicates an intention for the relationship to last indefinitely.

The case of *Volks v Robinson*²⁴ provided some assistance and guidance with regard to the elements or criteria to be present in order for the relationship of

¹⁷ It is noted that s 293 of Act 38 of 2005 (which deals with consent to enter into a surrogate agreement) refers to the term "permanent relationship" and not "permanent life-partnership" as in s 21. Also see Schäfer *Domestic Perspectives* 240.

¹⁸ The definitions are contained in s 1.

¹⁹ A further question that arises is whether a permanent life-partnership has the same characteristics as those of a universal partnership. At least the contractual requirements of a universal partnership can be applied as discussed and applied in the case of *Butters v Mncora* 2012 2 All SA 485 (SCA) par 11; firstly that both parties bring something into the partnership or bind themselves to bring something in; the second element is that the partnership business should be carried on for the joint benefit of both parties; the third element is that the object should be to make a profit; a fourth element, namely that the partnership contract should be legitimate, has been discounted by the South African courts for being common to all contracts.

²⁰ *FS v JJ* 2011 3 SA 126 (SCA) is an example where the existence of a permanent life-relationship was challenged. An unmarried couple cohabited before the birth of their child and evidence suggested that they intended to get married. The mother's parents denied however that they had a relationship that could be described as a "partnership". See chapter 4.1.2 for a more detailed discussion of this case.

²¹ *Child Law in South Africa* 75.

²² "Same-sex Life Partnerships" in Clark (ed) *Family Law Service* R6-6.

²³ *Family Law Service* E18-13. See also Schäfer *Family Law Service* R4-4.

²⁴ 2005 5 BCLR 446 (CC).

cohabitating couples to be regarded as a life-partnership.²⁵ In this case the criteria to be considered to establish the nature of a relationship were listed.²⁶ However, other elements may also be taken into consideration and may be essential for the establishment of a cohabitation relationship, for instance a sexual relationship, a factual cohabitative relationship, a measure of durability and stability and a sense of responsibility towards each other.²⁷

According to *Bosman-Sadie and Corrie*²⁸ the Civil Union Act²⁹ lays down certain formalities for a relationship to qualify as a civil union. They are of the opinion that if there is a civil union according to the Civil Union Act, it can be concluded that the relationship is a permanent life-partnership. It appears as if *Bosman-Sadie and Corrie* are equating a civil union to a permanent life-partnership. It is submitted that once the requirements of the Civil Union Act are met, the relationship is not simply a life-partnership, but a marriage or “civil partnership”³⁰ in the full sense of the word, with all its legal

²⁵ See also *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) and *Gory v Kolver* 2007 4 SA 97 (CC), which cases dealt with the existence of a duty of support as an element of life-partnership. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC), which specifically dealt with the element of *consortium omnis vitae*.

²⁶ In par 18 the criteria were listed as: commitment to a shared household; financial and other dependence between the parties; the duration of the relationship and the roles played by the parties in relation to each other. Skweyiya J, who wrote the majority judgment, held that the High Court’s order was not to be confirmed. The Cape Provincial Division found that the exclusion of a permanent life partner from the estate of the deceased partner for maintenance in terms of s 2(1) the Maintenance of Surviving Spouses Act 27 of 1991, was unconstitutional. He discussed the various differences between married and unmarried people, as well as the obligations and duties arising from a marriage agreement. The gist of his judgment was that the estate of a deceased person should not be burdened with a duty it did not have during that person’s lifetime. It is noted that in the majority judgment the criteria as listed herein, were not fully discussed. In the case of *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) 130 Cachalia J said in par 32 that millions of South Africans live together without entering into formal marriages. He further added (par 34) that life-partnerships have received increasing legislative and judicial recognition. The judge however did not discuss or lay down any general criteria for a permanent life-partnership; he just discussed whether or not one existed in this case. The judge did however quote and discuss the reciprocal duty of support criteria from the *Volks* case and extended the dependant’s action (against the RAF) in that case to unmarried persons in heterosexual relationships if a contractual reciprocal duty of support had been established (par 40). See also the discussion of this case by Manyathi “‘Dependants’ Action’ extended to Heterosexual Life Partners” December 2012 *De Rebus* 42 - 43.

²⁷ Schweltnus “Cohabitation” in Clark (ed) *Family Law Service* N2-2.

²⁸ *A Practical Approach to the Children’s Act* 37. It is noted on this page that they incorrectly refer to the Civil Unions Act instead of Civil Union Act.

²⁹ 17 of 2006.

³⁰ S 1 of the Civil Union Act defines a civil union as the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others. “Civil partnership” however, is not defined separately in this Act, but it is clear

consequences and obligations.³¹ A civil union is defined in terms of the Civil Union Act and means a relationship that has been solemnised in terms of that Act. The commencement and duration of the relationship can thus objectively and easily be determined.³² This is the total opposite of a permanent life-partnership, of which the commencement and duration can be subjective.³³ As a result of lack of adherence to the required formalities, a life-partnership cannot be defined in terms of the Civil Union Act. In the *Volks* case³⁴ Skweyiya J noted specifically that a wide range of legal privileges and obligations are triggered by the marriage contract, which rights are largely fixed by law. This is however not the case with parties who cohabit without being married. Schäfer³⁵ also mentions that unlike marriage, a life-partnership is not capable of objective proof and therefore open to challenges and misunderstanding. He is further of the opinion that it is doubtful whether it follows that the fact that a civil union is solemnised, will necessarily mean that it qualifies as a permanent life-partnership.³⁶ It is therefore submitted that Bosman-Sadie's conclusion that if there is a civil union, there is also a permanent life-partnership is too simplistic and not correct.

Heaton³⁷ came to the conclusion that to establish whether or not a life-partnership has come into existence "can be a tricky affair", owing to the fact that the courts have not approached this question consistently.³⁸ With the writing of the Children's Act the legislator had an opportunity to clarify the term "permanent life-partnership", which could have prevented some of the confusion regarding what exactly is meant by it. It is submitted that the

that it is formalised and permanent and that the legal status and consequences thereof are exactly the same as those of a marriage.

³¹ Heaton *South African Family Law* Chapter 5, discuss these consequences. Also see Sinclair (assisted by Heaton) *The Law of Marriage* Chapter 11 for a general discussion of the invariable consequences of marriage. These consequences would also apply to a civil union.

³² Schäfer *Family Law Service* R6-6 says that marriages and civil partnerships have a clearly defined and readily ascertainable beginning and ending.

³³ Skelton & Carnelley (eds) *Family Law in South Africa* 247.

³⁴ 2005 5 BCLR 446 (CC) par 55.

³⁵ *Domestic Perspectives* 240.

³⁶ Schäfer *Family Law Service* E18-13 to E18-14 and R3-3 to R8-7 discusses some elements to be taken into consideration when considering whether or not a life-partnership exists.

³⁷ Heaton *South African Family Law* 252.

³⁸ Schäfer *Family Law Service* E18-13 also points out that no court has attempted to provide a comprehensive definition of a same-sex life partnership and a definition in this regard from the legislator would have provided clarity about this term.

legislator should also have provided a definition of civil partnership and partner.³⁹ The elements in amplification of a “partnership” should also be regulated in the Act itself.

The author hereof is in agreement with Schäfer above that the use of the word “permanent” is superfluous before the word “life-partnership” and suggests that it be removed.⁴⁰ It is therefore suggested that a definition of life-partnership may read as follows: A life-partnership is a relationship of a permanent nature between two people to the exclusion of others, where there is an agreement to cohabit with a reciprocal duty of support.⁴¹

5.1.1.3 Contribution for a Reasonable Period

A further requirement laid down in section 21(1)(b)(ii), is that the father has contributed or attempted in good faith to contribute to the child’s upbringing, for a reasonable period. The problem with this section is that “reasonable period” is a very relative concept and what is reasonable to the unmarried father might not be reasonable to the mother or even to the person next door. Attempts at contributions should also not be made on an *ad hoc* basis. The attempts should at least be made consistently, even if it is not to the full financial extent required or needed by the child;⁴² they should be made in good faith. This section also provides that the unmarried father just has to show that he has “attempted” to contribute to maintenance. This could mean that the unmarried father acquires rights without actually having contributed anything to his child’s upbringing and his acquisition in this regard is just based on his attempt at contribution. This “attempt” may also be only a once-off attempt, which might result in the unmarried father acquiring parental responsibilities and rights. However, the Act does not appear to imply that the

³⁹ See also Schäfer *Family Law Service* R10-9 where he points out that several other Acts also refer to the word “partner” without qualifying it with a definition (ie s 20 of the National Credit Act 34 of 2005).

⁴⁰ The word “life-partnership” should then also be used in s 293 instead of the term “permanent relationship”. Refer to chapter 6 for a suggested definition.

⁴¹ This is a suggestion for a definition to be added to s 1 of the Children’s Act. The word “cohabitation” was borrowed from s 25 of the Kenya Children Act 8 of 2001. Also refer to the comparison in chapter 3.3 above.

⁴² Louw *Thesis* 131.

father's contribution is only limited to maintenance contributions for the child. Maintenance also implies upbringing.⁴³ It can therefore also be involvement otherwise in the child's life and thus be more than only financial involvement in the child's life.⁴⁴

When an unmarried father's child has just been born and the mother rejects the father's contribution, or his attempts to contribute, he will not be able to demonstrate compliance with section 21(1)(b) immediately. A reasonable time will have to pass before he can demonstrate his commitment through the payment of maintenance and being involved in his child's upbringing.⁴⁵

5.1.1.4 Contribution in Good Faith

The "attempted in good faith" part of section 21 may rescue unmarried fathers who are unable to pay maintenance because of financial constraints. They may show commitment otherwise by playing an active role in the upbringing of the child and in so doing may show compliance under this section and acquire parental responsibilities and rights.

As this section does not describe exactly what is meant by "good faith", the mother may question the unmarried father's reasons for paying maintenance and therefore question his good faith.⁴⁶ This implies that the mother may accuse the father of only paying maintenance in order to qualify under section 21 for parental responsibilities and rights, which might mean that he is not acting in good faith when paying maintenance. However, the father may argue that he is just paying it in order to contribute to his child's expenses as

⁴³ Louw *Thesis* 131 says that upbringing pertains to intangible aspects such as training, education, rearing and nurturing of a child.

⁴⁴ Van Dijkhorst J in *Jooste v Botha* 2000 2 SA 199 (T) 201 D-E said that there are two aspects of the parent-child relationship; the economic aspect (providing for physical needs) and the intangible aspect (providing for psychological, emotional and developmental needs). Refer also to chapter 1.3.3 n 166. See also Skelton *Child Law in South Africa* 77 and Skelton and Carnelley (eds) *Family Law in South Africa* 247.

⁴⁵ Louw *Thesis* 131.

⁴⁶ Louw *Thesis* 129.

can be expected of a reasonable father, which would indicate that he is paying in good faith.⁴⁷

Skelton and Carnelley⁴⁸ submit that if the father can show that he has tried in good faith to be involved in the child's upbringing, or to maintain the child, it will be sufficient.⁴⁹ Louw⁵⁰ however raises several questions related to what is meant by "attempted in good faith" and the actual contribution in good faith, which is a clear indication of the ambiguity that can be caused by the interpretation of section 21 related to the terminology. The "attempted in good faith" could however benefit unmarried fathers who do not have the means to make a financial contribution, but who might nevertheless demonstrate commitment to the responsibilities of parenthood.⁵¹ It is submitted that any attempt to contribute would be an attempt in "good faith". In any event, the father only has to show that he attempted to contribute, without making an actual contribution.⁵² These attempts to contribute will assist to provide the unmarried father with an avenue to fulfil the criteria to acquire parental responsibilities and rights, in the event that the mother for instance does not want to accept his contribution.⁵³ It is therefore submitted that "in good faith"

⁴⁷ Louw *Thesis* 129 correctly points out that while it may be difficult enough to determine whether the father is in fact making a contribution to the child's upbringing, it would be even more difficult to assess whether he has made the attempt "in good faith", without actually making such a contribution.

⁴⁸ *Family Law in South Africa* 247. The authors also point out that a striking feature of s 21(1) is that it was written in such a way that it presumes that the unmarried father is trying to claim his rights in respect of a child who has been alive for a number of years.

⁴⁹ See also Skelton *Child Law in South Africa* 77. Skelton however further says that it will not be sufficient if the unmarried father has only recently started or attempted to contribute. The unmarried father will not be in a position to show compliance immediately and it is inevitable that a reasonable period of time needs to lapse first. However, it is submitted that what constitutes a reasonable period is also relative and would differ from case to case.

⁵⁰ Louw *Thesis* 129.

⁵¹ Schäfer *Family Law Service* E30-22(1).

⁵² Skelton *Child Law in South Africa* 77 says that the words "attempted in good faith" might also assist the unmarried father who is unable to pay regularly, or to the fullest extent because of poverty or unemployment.

⁵³ For example, the author hereof was involved in a matter where the unmarried father bought nappies, Purity food, milk formulae and clothes on a monthly basis for his baby and delivered these to the house where the mother lived with the baby. He was continually denied access to the property and contact with his baby. The mother of the child would not accept delivery of anything he brought. He even attempted to leave the products with the neighbours, but would find them delivered back at his house again. The court was eventually approached for an order declaring that the father had parental responsibilities and rights and specifically to allow him contact. Also refer to Skelton and Carnelley (eds) *Family Law in South Africa* 247 who say that "in good faith" appears to contradict a situation where the mother of the child may not want the father of the child to be involved and may reject his attempts to contribute to the child's upbringing or maintenance.

should be omitted in section 21(1)(b)(iii), as it does not take the attempt to contribute any further than a mere attempt.⁵⁴

It is therefore clear that several disputes may arise from section 21 as a result of the terminology used and section 21 may therefore be interpreted differently by the mother and unmarried father.⁵⁵ It however appears as if the legislature took into account the fact that disputes are likely and made provision for *inter alia* the above disputes by adding the compulsory mediation clause provided for in section 21(3). A court may not be asked for relief prior to the matter being referred for mediation.⁵⁶

5.1.1.5 Cumulative or Alternative Application

A further question that arises is whether or not section 21(1)(b)(i)-(iii) needs to be complied with in the alternative, or cumulatively. It appears as if the answer presents itself in the wording of the section. The use of the word “and” between subsections (ii) and (iii) suggests that the requirements are cumulative⁵⁷ and that the unmarried father needs to satisfy all three requirements in order to acquire automatic parental responsibilities and rights.⁵⁸

Louw⁵⁹ is of the opinion that a more restrictive interpretation of this section should be favoured, as it appears to have been the aim of the South African Law Reform Commission to afford unmarried fathers more rights, except in exceptional cases.⁶⁰

⁵⁴ S 21(1)(b)(iii) would then read as follows: ... contributes or has attempted to contribute to expenses in connection with the maintenance of the child for a reasonable period.” Refer to chapter 6.

⁵⁵ Skelton *Child Law in South Africa* 77.

⁵⁶ S 21(3)(b). However, the mediation appears to refer only to disputes arising as to whether or not the father has met the requirements as prescribed in s 21. Also refer to the discussion of mediation in Chapter 2.

⁵⁷ Skelton and Carnelley (eds) *Family Law in South Africa* 247.

⁵⁸ Louw *Thesis* 123.

⁵⁹ Louw *Thesis* 124.

⁶⁰ SALRC 103 par 8.5.2.4, where the word “or” was used between the different requirements suggested. This suggests compliance with any one of the requirements and therefore an alternative application.

Bosman-Sadie and Corrie⁶¹ are also of the opinion that all the factors listed in section 21(1)(b)(i) – (iii) need to be present before the unmarried father may acquire parental responsibilities and rights in terms of this section.

5.1.2 Contact and Care

The Children's Act does not use the word "custody", but does not replace the terms "custody" and "access"⁶² with "care" and "contact" or abolish the common law terms⁶³ either. At face value it appears as if the word "custody" has been replaced with the word "care".⁶⁴ However the word "care" has a broader definition than "custody".⁶⁵ Schäfer⁶⁶ points out that pleadings in South African courts are increasingly referring to a child's primary or shared residence and the term "care" is being ignored.⁶⁷ He is of the opinion that this is an indication that there is a realisation that it is impractical to use "care" as a substitute for "custody". According to Skelton and Carnelley,⁶⁸ care can be equated to the term "custody" and contact is similar to "access". Skelton and Proudlock⁶⁹ say that the term "care" has replaced the term "custody" in family

⁶¹ *A Practical Approach* 37.

⁶² Which was the terminology used in the repealed Child Care Act 74 of 1983.

⁶³ *WW v EW* 2011 6 SA 53 (KZP). In par 15 of this case the court said that the similarity between care and contact, and custody and access respectively, raises the question of whether the statutory formulations were meant to replace the common law ones entirely. See also Zaal "Articulating Common Law and Statutory Parental Responsibilities" 2012 *TSAR* 190; Heaton *Commentary* 3-5.

⁶⁴ Skelton *Child Law in South Africa* 65.

⁶⁵ S 1 of Act 38 of 2005 defines care in relation to a child to include where appropriate and within available means to provide the child with a suitable place to live; living conditions that are conducive to the child's health, well-being and development and financial support; to safeguard and promote the well-being of the child; to protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards; respecting, protecting, promoting and securing the fulfillment 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; guiding, directing and securing 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; guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development; guiding the behaviour of the child in a humane manner; maintaining a sound relationship with the child; accommodating any special needs that the child may have; and generally, ensuring that the best interests of the child are the paramount concern in all matters affecting the child.

⁶⁶ *Domestic Perspectives* 221.

⁶⁷ Zaal 2012 *TSAR* 190 is however of the opinion that many lawyers resorted to wordy combinations of terminology drawn from both the Children's Act and common law.

⁶⁸ *Family Law in South Africa* 242.

⁶⁹ *Commentary* 1-29. These authors also say that the shift recognises the autonomy of the child as a human being within the spectrum of human rights, which the parent is responsible to uphold and

law and “contact” has replaced the term “access”. However, section 1(2) of the Children’s Act⁷⁰ clearly indicates that an additional meaning has been given to these terms⁷¹ and section 1(3) indicates that it has a corresponding meaning, unless the context indicates otherwise. Zaal⁷² says that it is unfortunate that a clear indication of the intended effect on previous law was not provided in the Act. He is of the opinion that s 1(2) of the Children’s Act could be interpreted as possibly preserving, rather than abolishing custody and access and argues that their ambit might even be extended because they are to incorporate care and contact respectively.

If the parents of the child are unmarried, care normally vests with the biological mother of the child alone.⁷³ The unmarried father may approach a court if the mother does not want to allow him to care for and have contact with the child. However, unmarried fathers no longer have to approach the High Court exclusively to request contact with and care of their children. They may now also approach the Children’s Court for contact and care orders.⁷⁴ Both of these terms are defined in the Children’s Act. Contact involves a

protect. The child therefore has the right to care from the parent and the parent the right and responsibility to provide such care to the child.

⁷⁰ S 1(2) provides that in 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. However in the case of *J v J* 2008 6 SA 30 (C) par 25 it was held that “custody” has been replaced by the term “care” and that the definition of “care” includes topics traditionally covered by the term “custody” although it includes matters that would seem to be the responsibility of all who have parental responsibilities and rights.

⁷¹ It is noted that s 6(3) of the Divorce Act 70 of 1979 and s 5 of the Matrimonial Affairs Act 37 of 1953 still refer to “custody”. However, the SALRC Discussion Paper 130 *Family Law and Marriage*, Project Paper 25: Statutory Law Revision October 2011 identified *inter alia* these sections to be repealed and/or amended in the Justice Laws Repeal and Amendment Bill, 2011 in order to bring it in line with the Children’s Act. It was *inter alia* suggested (p 32) that the Matrimonial Affairs Act be repealed in its entirety.

⁷² 2012 TSAR 190.

⁷³ S 19(1) of the Children’s Act vests the biological mother with full parental responsibilities and rights.

⁷⁴ S 45(1) states that the Children’s Court may adjudicate upon any matter involving contact with a child. This section needs to be read with s 28(1)(a), which section deals with suspension or termination of contact rights by *inter alia* a Children’s Court. Also refer to s 23, which deals with the assignment of contact and care to an interested person on application to court. See also Schäfer *Family Law Service* E57-48. Robinson, Horsten, Human and Coetzee *Introduction to the South African Law of Persons* 101 say that applications for contact and care may be made in the High Court. They have not considered or discussed the fact that these applications may now be brought in a Children’s Court, in terms of the Children’s Act 38 of 2005 as well. In *Jordaan v Jordaan* unreported case no 19702/2009 (NGHC) 25 January 2012, Bertelsman J (par 34) however said that as upper guardian of all minors within its jurisdiction, the High Court always had the power to award temporary care and supervision of a child to a person.

personal relationship with the child and communication in different forms, in the event that the child is living with someone else. Care is extensively defined, but *inter alia* provides for accommodation, clothing and food for the child and guiding, directing and protecting the child.⁷⁵

Proceedings in the Children's Court will normally commence with the completion of Form 2⁷⁶ by the clerk of the Children's Court when a child who is affected by, or involved in the matter to be adjudicated, or anyone acting on behalf of, or in the interest of the child, or anyone acting in the public interest⁷⁷ brings the matter to the attention of that clerk. If there is no dispute as to whether the father has parental responsibilities and rights, the Children's Court has to consider certain factors before an application of contact and care is granted.⁷⁸ The court may impose such conditions as it may deem fit related to contact with and care of the child.⁷⁹ It is clear that the child's best interests will once again weigh heavily when the court needs to consider the question of whether or not to allow the unmarried father care and contact in respect of his child.⁸⁰ The child's best interests are listed first under the factors the court needs to consider before granting the contact and care order. Cognisance is to be taken of sections 6,⁸¹ 7⁸² and 9,⁸³ which deal specifically with the best

⁷⁵ Skelton and Proudlock *Commentary* 1-23 to 1-24.

⁷⁶ Children's Act 38 of 2005 Regulations relating to Children's Court and International Child Abduction GN 250 of 2010-03-31 by the Department of Justice and Constitutional Development (hereinafter referred to as the Justice Regulations) - Regulation 6 and Form 2: Bringing matter to Children's Court, in terms of Section 53. In terms of Regulation 5(b) the clerk of the Children's Court must then also fill out the register that must correspond with Form 1 regarding all such matters.

⁷⁷ S 53 of the Children's Act lists who may approach the court. It provides that any person listed in this section who falls within the jurisdiction of a Children's Court may bring a matter to a clerk of that court for referral.

⁷⁸ S 23(2) provides that the court must take into consideration the best interests of the child; the relationship between the applicant (or other relevant person) and child; the degree of commitment to the child; the extent to which the applicant has contributed to birth and maintenance expenses of the child and any other factor the court should take into account.

⁷⁹ S 23(1).

⁸⁰ *Jordaan v Jordaan* unreported case no 19702/2009 (NGHC) 25 January 2012. This case was noted as reportable, but has not yet been formally reported. Bertelsmann J (par 34) said that formalism should not be allowed to stand in the way of the realisation of the child's best interests. This is an indication of the weight the child's best interests carry when the courts consider the relief requested.

⁸¹ S 6 deals with the general principles of the Act. It further describes the principles according to which decisions should be made in regard to children in domestic legislation. It prescribes a problem-solving and conciliatory approach in dealing with children's matters. It guides the implementation, proceedings, actions and decisions in relation to children. It also deals in s 6(3)

interest standard. In the case of *Jordaan*,⁸⁴ Bertelsmann J mentioned that although section 23 empowers any interested party to approach a court for an order granting contact with, or care of a child, it does not prevent the court from giving prevalence to section 28(2) of the Constitution⁸⁵ by placing a child in an interested party's care if circumstances require such course of action. This can be done without prior application having been made in terms of section 23. Bertelsmann J reasoned that the High Court is the upper guardian of a child and is empowered and has the duty to consider all facts and circumstances relevant to decide the best interest of the child.⁸⁶

In order for the court to establish to what extent the factors⁸⁷ listed in section 23(2) were complied with, an investigation⁸⁸ may be required. The court orders an investigation in order to assist it in deciding the matter and the court is to be furnished with a report and recommendation after such investigation.⁸⁹ This can be done by requesting a designated social worker⁹⁰ or any other person authorised by the court to conduct such an investigation in order to compile a report with a recommendation. It is submitted that the Children's Court should, simultaneously with the contact and care order, also consider

with the best interest of the child, where the child's family must be given an opportunity to express their views if in the child's best interests.

⁸² S 7 makes provision for factors to be taken into consideration when the child's best interest is to be taken into consideration.

⁸³ S 9 provides that in all matters concerning the care, well-being and protection of the child, the child's best interest is of paramount importance.

⁸⁴ Unreported case no 19702/2009 (NGHC) 25 January 2012 par 34.

⁸⁵ This section provides that a child's best interests are of paramount importance in all matters related to the child.

⁸⁶ Bertelsmann J found support for this viewpoint from *J v J* 2008 6 SA 30 (C) par 20. The minority judgment of Heher JA and Hancke AJA in the case of *AD v DW (Centre for Child Law as Amicus Curiae)* 2008 3 SA 183 (CC) par 9 also confirmed this point of view.

⁸⁷ The factors are the child's best interests, the relationship between the applicant and the child and any other person relevant to the child, the degree of commitment the applicant has shown to the child, to which extent the applicant has contributed to expenses in connection with the birth and maintenance of the child and any other factor that should in the court's opinion be taken into account.

⁸⁸ In terms of s 50 the Children's Court may request an investigation and recommendation to assist the court, before it decides a matter. The request will be made in the form of Form 9 of the Justice Regulations.

⁸⁹ S 50(1).

⁹⁰ A designated social worker is described in the definitions in s 1(1) of the Children's Act as a social worker in the service of the Department or provincial department of social development, a designated child protection organisation or a municipality. This definition will therefore exclude social workers in private practice.

having the parties enter into a parenting plan⁹¹ as contemplated in section 33.⁹² The parenting plan will then incorporate contact and care of the father and may resolve any other possible contentious issues related to the child as well.⁹³

Once a contact and care order has been granted in favour of the unmarried father, the mother is not allowed to refuse the father contact to the child. In the event that a mother denies the unmarried father contact with the child, she may be held liable of a criminal offence.⁹⁴

In the case of *WW v EW*⁹⁵ the court addressed the uncertainty related to whether the concepts of custody and access and to a lesser extent guardianship, survived the provisions of the Children's Act. The uncertainty manifests itself in the relief sought in relation to minor children in divorce actions.⁹⁶ The court in the *WW* case⁹⁷ suggested that where it was intended

⁹¹ A parenting plan is concluded between the co-holders of parental responsibilities and rights.

⁹² Among others this plan or agreement will determine with whom the child will live, how maintenance will be paid and how communication will take place. From experience in the Johannesburg Children's Court, it may be stated that this is how matters regarding contact and care are mostly dealt with.

⁹³ Such as maintenance and exactly how often and when contact is to be exercised.

⁹⁴ In terms of s 35 a person who is found guilty of this offence may on conviction be liable to a fine or imprisonment for a period not exceeding one year. It is however to be questioned if it will be in the child's best interest that imprisonment takes place of the person who has primary care and residency of that child. This is exactly what the court considered in the case of *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC). Sachs J said (par 35) that, "it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm." The court then provided guidelines to follow (par 36) to promote uniformity of principle, consistency of treatment and individualisation of the outcome.

⁹⁵ 2011 6 SA 53 (KZP) 2010. The *WW v EW* judgment is noted as important in addressing the confusion regarding the use of the terminology "care" and "contact". See Zaal 2012 TSAR 188. Prior to this judgment, confusion was created by certain other judgments: in *J v J* 2008 6 SA 30 (C) Erasmus J said that "custody" is replaced by "care" (par 25) and Murphy J in *LB v YD* 2009 5 SA 436 (T) said that care and contact "correspond broadly with custody and access" (par 37).

⁹⁶ Also refer to a discussion of this case by Schulze "Law Reports" January/February 2012 *De Rebus* 40.

⁹⁷ Par 35E-G. This case dealt with contact and care related to a minor child and Rall AJ specifically dealt with the question of whether the concepts of custody, access and to a lesser extent guardianship, have survived the Children's Act 38 of 2005. The uncertainty manifested itself in the relief sought in relation to minor children in divorce actions and specifically the wording used in divorce prayers.

that one parent has common law custody, while the other parent has access, the order should read as follows:

1. ... both parties shall have full parental responsibilities and rights as contemplated by section 18(1) and section 18(2) read with section 1(1)...;
2. The children shall reside with the Plaintiff;
3. The Plaintiff shall have the responsibility and right to **care**⁹⁸ for the children as contemplated by sections 18(2)(a) read with section 1(1) of the Act.
4. ...

It is submitted that the above suggestion that an order for care be separated and granted separately from the order providing for full parental responsibilities and rights is not correct.⁹⁹ In the event that a parent has full parental responsibilities and rights, that parent already has the right to care for the child as contemplated in section 18(2).¹⁰⁰ The right to care is just one element of what makes up full parental responsibilities and rights. It is unclear why Rall AJ again gave the right to care in terms of section 18(2)(a) to the plaintiff, if the plaintiff already had the right to care as part of parental responsibilities and rights.¹⁰¹ It is further submitted that it is unnecessary and superfluous to isolate one of the elements of parental responsibilities and rights and order that it be granted again to the parent holding residency.¹⁰² It

⁹⁸ Writer's own emphasis.

⁹⁹ Skelton *Child Law in South Africa* 66 says that some of the tasks of care do not fall solely on the parent with whom the child lives. She says that it is the responsibility of **both** parents to ensure that the child has a suitable place to live in conditions conducive to the child's health, well-being and development.

¹⁰⁰ Full parental responsibilities and rights in terms of s 18(2) consist of the right to care for the child, maintain contact with the child, to act as guardian and to contribute to the child's maintenance.

¹⁰¹ Admittedly, if care in this regard is to mean that the parent with whom the child shall reside is to have a greater say regarding normal day-to-day care of and decision-making related to the child, it will make more sense. However, it is submitted that the definition of care is wide enough to provide for more than just the day-to-day care of the child.

¹⁰² According to Skelton *Child Law in South Africa* 66 there is lack of clarity in the Children's Act about what terminology is to be used in relation to residency of the child. The term "custody" previously conveyed this automatically. However if "care" is to be shared there is no prescribed term to explain where the child is to live after dissolution of the marriage. The practice has however developed to make provision that an order be granted for a child's residency. This has now been confirmed in the *WW v EW* case. From experience the author also found that the Johannesburg family advocate's recommendations in similar cases read similar to Rall AJ's suggestion in the *WW v VW* case. Joint legal care is the default position in terms of the Children's Act.

is submitted that only the right to maintain contact¹⁰³ could be isolated and provided for separately and hence granted to the parent with whom the child does not mainly reside.¹⁰⁴

In terms of section 20 and 21 of the Children's Act, the father of the child will have full parental responsibilities and rights in respect of the child.¹⁰⁵ Section 18 on the other hand, provides that a person may have either specific, or full parental responsibilities and rights. Section 18 therefore makes provision for any number of people being co-holders of parental responsibilities and rights in respect of the same child.¹⁰⁶ However, the holder of parental responsibilities and rights does not transfer those rights, but confers them, while still retaining his or her own responsibilities or rights.¹⁰⁷ The mother of the child will thus still have her full and normal parental responsibilities and rights, regardless of the fact that the father has also acquired these rights.¹⁰⁸

Section 30(3) makes provision that the holder of parental responsibilities and rights may by agreement with a co-holder allow the co-holder specific responsibilities and rights on his or her behalf. The co-holder does however not surrender or transfer those responsibilities and rights to the other co-holder. This might result in one co-holder only exercising the right to care as contemplated in section 18(2)(a). It is submitted that when a child is residing with one co-holder, that does not mean that the other co-holder is divested of the duty to care and *vice versa*. The co-holder with whom the child is not residing still has a duty to safeguard and promote the wellbeing of the child, to protect the child from *inter alia* maltreatment, abuse and neglect and to maintain a sound relationship with the child, as well as what is provided for further under the definition of care,¹⁰⁹ regardless of whether or not the child is

¹⁰³ S 18(2)(b).

¹⁰⁴ It is submitted that this is done as a matter of setting out contact arrangements and not necessarily to give the right to contact to just one parent. The parent that does not have physical care of the child at any given stage still has the right to contact.

¹⁰⁵ In terms of s 21 the unmarried father will have parental responsibilities and rights, once he has met the criteria as contemplated in that section.

¹⁰⁶ S 30(1).

¹⁰⁷ S 30(4); Skelton *Child Law in South Africa* 82.

¹⁰⁸ Also refer to chapter 4 above for a detailed discussion in this regard.

¹⁰⁹ As provided for in s 1 of Act 38 of 2005.

in the physical care of that co-holder. Even so, when the parent with whom the child is not ordinarily residing is exercising contact rights, the other parent still has the right to contact with the child.

Section 18(1) should only have application where a person is not already a holder of parental responsibilities and rights and it would then only make sense if the right to care is isolated and bestowed separately.¹¹⁰

It is submitted that an order where the parties share parental responsibilities and rights should for example rather read as follows:

1. The parties shall be co-holders of full parental responsibilities and rights as contemplated in section 18(2);
2. The child shall reside with the plaintiff, subject to the defendant's right to contact;
3. The defendant shall exercise the right to contact as follows: ...¹¹¹

5.1.3 Section 22

This section provides for parental responsibilities and rights agreements¹¹² between the parents of the child.¹¹³ This agreement makes provision for the biological father who does not have parental responsibilities and rights in terms of either section 20¹¹⁴ or 21.¹¹⁵

¹¹⁰ Also note the case of *CM v NG* 2012 4 SA 452 (WCC), where Gange AJ discussed whether or not application may be made for contact **or** care, or both. The court said (par 32) that both of these terms were components of parental responsibilities and rights. The court also said (par 39-40) that both s 28(2) and the heading of s 23 refer to "contact **and** care". By inserting the word "or" it was intended to indicate that both care and contact would not be automatically awarded to an interested party (the judge in this regard referred to the *WW v VW* case, which also delineated this concept). The court came to the conclusion in par 42 that regardless of the use of the word "or" between "care" and "contact", it was not the intention of the legislature that it be read disjunctively and doing so would render it inconsistent with the objects of the Children's Act and s 28 of the Constitution.

¹¹¹ This is suggested as example in a case where the child is to reside with the plaintiff.

¹¹² This should not be confused with a parenting plan in terms of s 33, which is relevant to parents who are already co-holders of parental responsibilities and rights.

¹¹³ It is to be noted that in terms of s 22(2) the mother cannot confer more parental responsibilities and rights than those she already holds.

¹¹⁴ This section deals with married fathers with full parental responsibilities and rights.

¹¹⁵ This section deals with unmarried fathers who acquired parental responsibilities and rights.

The unmarried father's rights regarding *inter alia* contact will be contained in this agreement. In order for the agreement to have binding legal effect,¹¹⁶ it needs to be concluded in the prescribed format.¹¹⁷ This agreement will only take effect if it is registered with the family advocate, or made an order of court.¹¹⁸ The family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the child's best interests.¹¹⁹ It is however submitted that the child's best interests cannot be established by simply reading either the application for registration to the family advocate or the application to have it made an order of the High Court, together with the agreement that is submitted. This may have the effect that a very subjective decision is taken by the court, based on only the reading of the agreement and the application before court. It is very important also to take cognisance of section 31(1) in applications to be considered by the court, prior to making a decision. Section 31(1) specifically states that the child's views also need to be considered in any decision involving that child, depending on the child's age, maturity and stage of development. In this regard, the Children's Act provides for mechanisms to enable the child to express his or her views. Section 22, for instance, provides that where application is made to the family advocate to register the parental responsibilities and rights agreement, the family advocate must confirm and indicate on Form 5¹²⁰ that the child's views were, where relevant,¹²¹ taken into consideration. As this form already contains the confirmation that the child, or children, were given the opportunity to express their view and that due consideration was given

¹¹⁶ As contemplated in s 22(3). In terms of regulation 7(5) of the Social Development Regulations, copies of the agreement must be filed with the family advocate, Children's Court or High Court. Schäfer *Domestic Perspectives* 246 is of the opinion that this regulation was clumsily drafted, as he is of the opinion that what was meant, was just that **sufficient** copies need to be filed to allow every intended co-holder of parental responsibilities and rights to have a copy. The author hereof disagrees that the meaning was obscured by the drafting of this regulation and submits that it is clear from the wording of this regulation that sufficient copies need to be available for all relevant parties.

¹¹⁷ As prescribed in regulation 7 of the Social Development Regulations. Form 4 thereof prescribes the format of the parental responsibilities and rights agreement.

¹¹⁸ S 22(4). The exception to this is s 22(7), which provides that only a High Court may be approached for orders to confirm, amend or terminate a parental responsibilities and rights agreement that relates to guardianship.

¹¹⁹ S 22(5).

¹²⁰ In terms of regulation 7(6) of the Social Development Regulations.

¹²¹ This is dependent on the child's age, maturity and stage of development, as contemplated in s 10 of the Children's Act.

thereto, it may have the effect of mere rubberstamping by the family advocate, as the prescribed form itself already contains statements that the contents of the agreement were furnished to the child and that the child was given the opportunity to express a view and that due consideration was given thereto.¹²²

In this regard, it is suggested that an investigation in terms of section 50 should also be undertaken in order *inter alia* to make sure that the child's views were sufficiently considered and due consideration¹²³ was given thereto. In this way the child's views would be properly taken into consideration and the child's best interests served. Mahlobogwane¹²⁴ points out that children contribute to the decisions about them and that their wishes and feelings may be relevant to the order related to them.¹²⁵ It is therefore submitted that the child's views (or wishes) are contributory and considered relevant to all the circumstances of the specific case and that the views expressed might not necessarily be in the child's best interests.¹²⁶

¹²² The relevant part of Form 5 reads: "I confirm that information about the contents of this parental responsibilities and rights agreement have been furnished to the child or children, bearing in mind the child/children's age, maturity and stage of development ... I confirm that the child or children have been given an opportunity to express their views and that these views have been given due consideration ..."

¹²³ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 264 suggest that mechanisms be set up in order to ensure that the child's views are heard. An example would be inspections of places of safety prior to placement decisions. They however note that it does not appear as if these mechanisms were provided for in the Children's Act, as suggested. See also Zaal and Skelton "Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts" 1998 *SAJHR* 539 where they discuss how Children's Court matters should be dealt with by attorneys representing the child and how to present the child's voice. Pillay and Zaal "Child-interactive Video Recordings: A Proposal for Hearing the Voices of Children in Divorce Matters" 2005 *SALJ* 685 suggest that video recordings be used as a non-intrusive manner for presiding officers to gain a direct impression of the child's views, without the child having to appear before them. This would provide the child with a meaningful sense of participation.

¹²⁴ "Determining the Best Interest of the Child in Custody Battles: Should a Child's Voice be Considered?" 2010 *Obiter* 234.

¹²⁵ The child's age, maturity and level of development are determining factors as contemplated in s 10 of the Children's Act.

¹²⁶ This view is in line with art 12 of the UNCRC. This stipulates that if the child is capable of forming his or her own views, due weight should be given to the views of the child in accordance with the age and maturity of the child. The child shall have the right to express those views freely in all matters affecting the child. For this purpose, the child shall in particular be granted the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. However, refer to the judgment of *Soller v G* 2003 SA 430 (W) where the child's preference needed to be treated not just as significant, but as overridingly important in relation to other factors. Satchwell J said (435 C-D) that the child's views and wishes were vital to the proceedings. See also Pillay and Zaal 2005 *SALJ* 686 who say that the *Soller* judgment broke new ground and furthered development of a children's rights approach in South African law, with its appreciation that the wishes of a sufficiently mature child in some cases must be allowed to

Bonthuys¹²⁷ however criticises the term “due consideration”¹²⁸ where the child is to be consulted and cognisance is to be taken of the child’s views and wishes. She is of the opinion that despite the attempt to minimise parental conflict, it is formulated too widely and vaguely; instead of minimising conflict, the opportunity for more conflict might be created. Children as individuals ought to be able to contribute to decisions related to their future and are to be treated as active participants in the process related to them.¹²⁹ It will then be the decision of the presiding officer to decide what weight to give the child’s preferences.¹³⁰ In the case of *The Central Authority for the Republic of South Africa v B*¹³¹ Meyer J carefully considered a thirteen-year-old child’s views, having due regard for his age and maturity. In order for Meyer J to have made his finding, he *inter alia* observed the child during the proceedings, he listened to the child’s representative and he interviewed the child. These actions can all be regarded as giving “due consideration” to the child’s voice. Meyer J eventually found that the child’s voice would prevail¹³² and dismissed the application for the child to return to Australia.

It is submitted that parental responsibilities and rights agreements are only enforceable *inter partes* and problems may arise with agreements that have been registered with the family advocate and not been made orders of court. Although it is a punishable offence not to allow the other party contact, or not

override other best interest considerations. Melton “Background for a General Comment on the Right to Participate: Art 12 and Related Provisions of the Convention on the Rights of the Child” 32 also says that if a child is able to express an opinion, the right to do so should not be limited. He says that the real question is not the child’s ability to make a good decision, but instead whether there is substantial risk of harm as a direct result of the experience of giving an opinion, whatever that opinion may be. He also points out that “conversation” in order to determine the child’s opinion should not become “interrogation”. The child’s opinion itself might cause the child distress and the child’s right to the opinion should rather then be abrogated.

¹²⁷ 2006 *Stell LR* 490.

¹²⁸ The terminology used in s 10 of the Children’s Act.

¹²⁹ Melton 20 says that participation can help children to feel some sense of control and mastery even in the most troubled circumstances. He further says (29) that children should be able to have a say, to be heard respectfully and to have their views considered even if they are not competent to make the decision on their own.

¹³⁰ Mahlobogwane 2010 *Obiter* 234, 236.

¹³¹ 2012 2 SA 296 (GSJ); 2012 3 All SA 95 (GSJ) par 11, 15, 20. In this case the mother sought the return of her son to Australia. However the son, who was at the time residing with his father in Johannesburg, did not want to return to Australia.

¹³² The child objected in terms of art 13 of the Hague Convention on the Civil Aspects of International Child Abduction to return to Australia with the respondent (his mother) and chose rather to remain with his father in South Africa.

to pay maintenance, it is not clear what the innocent party's actions should be to enforce his rights in terms of the registered agreement. It is submitted that the innocent party's only action would be to approach the courts for enforcement of any (or all) of the terms of the agreement. Section 35 of the Act reads as follows:

(1) Any person having care or custody of a child, who contrary to an order of any court or to a parental responsibilities and rights agreement ... refuses another person who has access¹³³ to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence...

Even though the contravention of the agreement was criminalised, the enforcement of the agreement registered with the family advocate is unclear. It is submitted that it may be argued that as the agreement is not a court order, it needs to be made an order of court first¹³⁴ in order to enforce compliance with it. It is therefore suggested that it is a question of remedies: What remedy is available to a party who wants to enforce a term (or all of the terms) of such an agreement? In the event of a parental responsibilities and rights agreement that has been made a court order, a non-complying party can at least be held in contempt of that court order and the court can be requested to enforce compliance with the court order.¹³⁵ It is therefore submitted that these agreements should rather be made orders of court as

¹³³ According to Heaton *Commentary* 3-43, the word "custody" was used as a synonym for "care" and "access" for "contact". See also s 1(2) of Act 38 of 2005 and the discussion in 5.1.2 above.

¹³⁴ An application can then be made for contempt of court, or for specific performance of the agreement, whereas the family advocate does not have these powers.

¹³⁵ Once found guilty of contempt of court, the guilty party may be charged criminally. However, to remove a parent with whom a child is residing might not be in the best interests of the child. It raises the question if s 35 in this regard serves any purpose if the best interest of the child in all matters needs to be taken into consideration. However, Skelton and Carnelley (eds) *Family Law in South Africa* 269 point out that a parent who is frustrating or preventing contact between the other parent and the child might be doing so for a good reason. The authors say that the powers of s 35 should be carefully used after consideration of all possible consequences, particularly the effect it will have on the child.

contemplated in section 22(4)(b),¹³⁶ than to register them with the family advocate.

The Children's Court will only be allowed to make this agreement an order of court if the acquisition of guardianship in the parental responsibilities and rights agreement is not an issue,¹³⁷ as the High Court has exclusive jurisdiction in matters related to guardianship of the child.¹³⁸

5.1.4 Procedure

The unmarried father may approach the Children's Court with a request to be allowed contact with his child.¹³⁹ It is at this stage that the mother would question compliance with section 21 and whether or not the father has then acquired parental responsibilities and rights.

In the case of a mother questioning an unmarried father's compliance with section 21 after the father has already approached the court, it is obvious that the matter cannot proceed unless it has been mediated in terms of section 21(3). The presiding officer will refer the parties for mediation. The presiding officer should refer the matter for an investigation to a family advocate, social worker, social service professional or other suitably qualified person¹⁴⁰ who conducts mediation, in order to establish whether or not the unmarried father fulfils the requirements of section 21 and has accordingly acquired parental responsibilities and rights. De Jong¹⁴¹ mentions that in the event that mediation is unsuccessful, some proof would be required that the parties

¹³⁶ Regarding parenting plans in terms of s 33 the court in the unreported case of *Jordaan v Jordaan* case no 19702/2009 (NGHC) 25 January 2012 said that from a reading of the Children's Act it is clear that the parenting plan should be made an order of court. However, the judge said that the court can only make it an order if the parties fail to reach an agreement assisted by the family advocate and if the best interests of the child require it.

¹³⁷ Skelton and Carnelley (eds) *Family Law in South Africa* 252.

¹³⁸ S 29. See also chapter 5.2 below.

¹³⁹ The clerk of the Children's Court would then proceed to open a file at the Children's Court by completing Form 1. This is done in order that a proper register of each case can be kept as prescribed in regulation 5 of the Justice Regulations.

¹⁴⁰ See par 5.1.1 above. Through personal experience in the Children's Court it appears as if matters are normally referred to the family advocate for mediation.

¹⁴¹ *Child Law in South Africa* 121. Refer also to chapter 2 above for a more detailed discussion of mediation.

indeed attended mediation or consulted a family advocate, social worker, other social service professional, or other suitably qualified person. Provision has been made for proof of mediation, in terms of the regulations.¹⁴² A form¹⁴³ is prescribed specifically to be used to note the outcome of mediation in terms of section 21(3), although section 21(3) itself does not specifically refer to the requirement of any proof of mediation. The wording used in regulation 8(1)¹⁴⁴ also indicates that there is no obligation that a certificate must be provided, as it reads, “A family advocate, social worker other social service professional, or other suitably qualified person, ...with regard to the fulfilment by that father of the conditions ... **may**¹⁴⁵ certify the outcome of that mediation in a form identical to Form 6.” The use and submission of Form 6 is therefore not compulsory. It is submitted that in order to fill this *lacuna* the word “may” in regulation 8(1) ought to be replaced by the word “must”.

Once the family advocate has completed the mediation process, a certificate in the form of the prescribed Form 6 will be provided, indicating the outcome of the mediation. In the event that the parties cannot reach an agreement, it will be noted on the aforementioned certificate and the matter will proceed to trial in the Children’s Court, where the court will then decide after the hearing of evidence, as to whether or not the father fulfils the requirements of section 21.

The proceedings which then follow are regulated in terms of section 60¹⁴⁶ and appear to be basically similar to those of a trial in which evidence is heard and questioning and cross-examination are allowed. Gallinetti¹⁴⁷ suggests that it will be ideal if presiding officers deal with Children’s Court matters in a child-friendly way.¹⁴⁸ On the other hand, it will also be ideal to enforce procedural

¹⁴² Regulation 8(1) of the Social Development Regulations.

¹⁴³ Regulation 8 of the Social Development Regulations prescribes Form 6.

¹⁴⁴ Social Development Regulations.

¹⁴⁵ The emphasis in bold of “may” is the author’s own.

¹⁴⁶ Act 38 of 2005.

¹⁴⁷ “The Children’s Court” in Davel and Skelton (eds) *Commentary* 4-26.

¹⁴⁸ S 42(8) *inter alia* provides that the Children’s Court be held in a room furnished and designed to put children at ease and that is conducive to the informality of the proceedings. Attorneys representing children in Children’s Courts do not normally wear the formal attorney’s robe either, in

formalities insofar as these are “appropriately protective” of everybody involved. Children’s Court proceedings are more inquisitorial in nature than accusatorial.¹⁴⁹ This type of litigation is therefore not of the ordinary civil kind, as it is not adversarial¹⁵⁰ and rather involves a judicial investigation where the court may call for evidence when necessary.¹⁵¹ This allows the presiding officer to ask investigative questions in order to enquire on any issues that might not be clear during the Children’s Court proceedings. Howie J in *B v S*¹⁵² also indicated that where parents’ access entitlement is being judicially determined the first time, there is no *onus*¹⁵³ on either party. No party to the proceedings bears any *onus* in the conventional sense.¹⁵⁴

Even when information has been gathered from different expert reports and evidence, such as a social worker’s or family advocate’s, these reports and evidence are simply intended to guide the court.¹⁵⁵ The purpose of these reports is not to arrogate the function of the court.¹⁵⁶ Only after taking into consideration all the relevant information before it, will the court make a finding.

order not to intimidate the child and to keep the environment as child-friendly as possible. Also see Schäfer *Family Law Service* E127-107.

¹⁴⁹ Zaal and Skelton 1998 *SAJHR* 558 also make the point that an adversarial approach in cross-examining a parent is sometimes most inappropriate, as it might destroy any last vestiges of respect the child may have for the parent. This is true in the case where the child is present or there is a possibility that the child might be returned to the care of that parent.

¹⁵⁰ Gallinetti *Commentary* 4-26.

¹⁵¹ This is in accordance with s 6(4) of the Children’s Act which provides that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided. See also Schäfer *Family Law Service* E32-25 and the discussion in chapters 1.2 and 2.4.2 above.

¹⁵² 1995 3 SA 571 (A) 584G.

¹⁵³ This refers to the evidentiary burden borne by either party.

¹⁵⁴ *B v S* 1995 3 SA 571 (A) 584H – 585A.

¹⁵⁵ Zaal and Skelton 1998 *SAJHR* 558 say that the legal representative acts both as voice and protector of the child and as officer of the court. In this regard a constructive critical approach needs to be taken in the investigative social worker’s report and recommendation.

¹⁵⁶ According to Chetty J in *Potgieter v Potgieter* 2007 3 All SA 9 (SCA) par 16.

5.2 THE HIGH COURT

5.2.1 Care and Contact and Parental Responsibilities and Rights

An application of this kind will be brought to the High Court by way of a long notice of motion,¹⁵⁷ setting out the relief being applied for. This motion is supported by an affidavit¹⁵⁸ setting out the facts sufficiently to support the relief asked for.¹⁵⁹ The motion with affidavit will be served on the mother (as the respondent), who will be afforded the opportunity to oppose the application and to thereafter file an answering affidavit explaining the reasons for her opposition. The matter will then be heard and argued on only the papers before court.¹⁶⁰ However, the courts should be slow in applying the rule in *Plascon-Evans*. Its application is particularly inappropriate if it leaves unresolved disputes related to the child's welfare.¹⁶¹

There is no prescribed format or form¹⁶² for the contents of the affidavit, as in the Children's Court.¹⁶³ There is also no provision that prescribes that the

¹⁵⁷ Form 2a as prescribed by rule 6(1) of the Uniform Rules of Court. Although care and contact are some of the elements of parental responsibilities and rights, it might often occur that an unmarried father who has already acquired parental responsibilities and right, wishes to approach the court to enforce his rights to contact and care. An application may also be brought to court in terms of section 18 to declare the unmarried father the holder of parental responsibilities and rights, or otherwise he may approach the court for those rights as contemplated in section 23. In *CM v NG* 2012 4 SA 452 (WCC) the court also said that (par 39) that s 23(1)(a) and (b) should be read conjunctively. This simply means that contact **and** care should be assigned in respect of a child. Application may also be made for contact, care *and* guardianship. However for a discussion related to guardianship applications, refer to 5.2.2 for a discussion hereof.

¹⁵⁸ In the prescribed Form 2a, it is stated that "...the accompanying affidavit of (the Applicant) (or petition where required by law) will be used in support ...".

¹⁵⁹ Rule 6(1) of the Uniform Rules states that "... every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief".

¹⁶⁰ This simply means that no extrinsic evidence is heard as is the procedure with action proceedings. See also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A), where it is stated in par 8 that "... where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted". This is also referred to as the Plascon-Evans rule.

¹⁶¹ Schäfer *Family Law Service* E32-25.

¹⁶² At least the prescribed forms in the Children's Court provide for a guideline as to what content is required to commence proceedings. However, it is noted that although a form is prescribed, the form only prescribes details related to biographical details and not specifically to the remainder of the details of the case which is to support the relief requested from the court.

¹⁶³ Form 2 of the Justice Regulations requests that other relevant information, which may assist the court to make a decision regarding the manner in which the matter could be dealt best with be provided, such as financial position, availability of transport, socio-economic status, if an interpreter will be needed and if special requirements are needed (such as wheelchair access). This information is to be provided under Part A, dealing with the particulars of the child/children.

court should be provided with any report by the family advocate or a social worker regarding the circumstances of the unmarried father (being the applicant), or whether he appears to be *prima facie* fit to be the holder of parental responsibilities and rights as set out in either section 18 or 21 of the Children's Act.

The matter would normally only be referred to a family advocate once it is opposed.¹⁶⁴ The family advocate will conduct an investigation into the unmarried father's circumstances and what will be in the child's best interests. After a thorough investigation of the facts, a recommendation will be made.¹⁶⁵ However, because of heavy case loads the family advocate often prefers recommendations that result in closure, as opposed to those that result in monitoring.¹⁶⁶ Whether the decisions recommended by the family advocate are actually effective in ensuring the child's wellbeing is an empirical question yet to be investigated.¹⁶⁷ However, the purpose of the family advocate's recommendations is not to direct the court, but rather to place facts before the court for consideration in assisting it in making an order.¹⁶⁸

Part B of this form deals with particulars of the child who is affected by or involved in the matter, or with the person acting in the interest or on behalf of the child who cannot act in his/her own name, as contemplated in s 53(2) of the Children's Act.

¹⁶⁴ This also appears from *CM v NG* 2012 4 SA 452 (WCC). In a same-sex relationship the applicant approached the court for an order in terms of ss 23 and 24 of the Children's Act. Once it was opposed, the family advocate was authorised to investigate the best interest of the child. The author's experience has also been that if it appears from the papers before court that the granting of an application appears to be in the child's best interests, it will be granted without referring the matter to the family advocate.

¹⁶⁵ This will be more fully discussed in 5.2.3 below.

¹⁶⁶ Africa, Dawes, Schwartz and Brandt "Criteria Used by Family Counsellors in Child Custody Cases: A Psychological Viewpoint" in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 141. The authors discussed the time constraints that weigh heavily on both the family counsellors' and family advocate's abilities to conduct *inter alia* in-depth assessments and monitoring of cases. Family counsellors in terms of s 3(1) of the Mediation in Certain Divorce Matters Act 24 of 1987 are appointed to assist the family advocates with inquiries.

¹⁶⁷ Africa, Dawes, Schwartz and Brandt in *The Fate of The Child* 143.

¹⁶⁸ *Whitehead v Whitehead* 1993 3 SA 72 (SE) 75F-G where the court said that the family advocate should play a neutral role and not take sides, or create the impression that a decision has already been taken and prescribe to the court what to do. The court in this case did not follow the recommendations of the family advocate and was of the opinion that the family advocate and counsellor sided strongly with the mother in the case. Van Zyl "Whitehead v Whitehead: Fair Comment on the Family Advocate" in June 1994 *De Rebus* 469-470 questioned whether this comment in the *Whitehead* case was fair. Van Zyl studied the psychologist's report, the family advocate's and counsellor's report. Because of certain allegations made by the father against the mother, the family advocate deemed it necessary to obtain a report from a psychologist and an outside social worker was also appointed. When this social worker was criticised, a new social worker was appointed. Van Zyl in this regard could not fault the actions of the family advocate and

Some of the facts considered will be how often the father had contact with the child, the continuity of the relationship between the father and the child and the quality of the parental relationship.¹⁶⁹

5.2.2 Guardianship

In terms of section 45(3)(a) of the Children's Act a High Court has exclusive jurisdiction over matters concerning guardianship of a child, which includes the assignment, exercise, extension, restriction, suspension or termination thereof.¹⁷⁰ In addition, section 24 also stipulates that the High Court may be approached for orders requesting guardianship. This section is applicable in cases where someone does not already have guardianship, or where the unmarried father has not acquired parental responsibilities and rights, which include the specific right to guardianship,¹⁷¹ once the set of requirements of section 21 has been met. If no agreement can be reached with the mother in terms of section 22, the unmarried father can approach the High Court for a guardianship order.¹⁷²

Section 29(1), which deals with court proceedings, stipulates that:

An application in terms of section 22(4)(b), 23, 24, 26(1)(b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a Children's Court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.

counsellor and was of the opinion that they went to great lengths to ensure the best interests of the child were investigated; Van Zyl further said that they strove to produce balanced and in-depth reports. Van Zyl also noted that the family advocate's functions go beyond that of assisting the court, by placing facts and considerations before it. An enquiry is launched in order to furnish the court with a report and recommendations. Van Zyl concluded that it was difficult to find anything in the available documents to justify the court's criticism against the family advocate. She said that if something other than the reports led the court to the criticism, it was regrettable that the judge did not spell it out. See also *Potgieter v Potgieter* 2007 3 All SA 9 (SCA) related to a discussion of the function and role of expert witnesses' evidence and reports in court. Van Heerden J quoted from the judgment of Chetty J in the court *a quo* (par 16) said that although the courts in many cases need and benefit from an expert's opinion, it should not usurp the function of the court. In this regard see also *Jackson v Jackson* 2002 2 SA 303 (SCA).

¹⁶⁹ Africa, Dawes, Schwartz and Brandt *The Fate of the Child* 123.

¹⁷⁰ S 45(3)(a) and (b).

¹⁷¹ S 18(2)(b).

¹⁷² Domingo "For the sake of the Children: South African Family Law Relocation Disputes" 2011 *PER* 151.

Several sections in the Children's Act provide that the Divorce Court has jurisdiction.¹⁷³ Divorce Court means the Divorce Court established in terms of section 10 of the Administration Amendment Act 9 of 1979.¹⁷⁴ These Divorce Courts were not part of the High Court and strictly speaking also not part of the Magistrate's Court structure, as they had their own set of rules¹⁷⁵ and registrars. However, the Administration Amendment Act was repealed¹⁷⁶ when the Regional Courts came into operation.¹⁷⁷ The Divorce Court as defined in the definitions¹⁷⁸ to the Children's Act is therefore no longer in existence,¹⁷⁹ but is still referred to in the Children's Act.

Section 29(1) provides that a High Court, Divorce Court¹⁸⁰ dealing with a divorce matter, or a Children's Court in whose jurisdiction the child is ordinarily resident has jurisdiction. In the case that a parental responsibilities and rights agreement needs to be made an order of court,¹⁸¹ contact and care are to be assigned by a court,¹⁸² guardianship is applied for at court,¹⁸³ orders are to be made confirming paternity,¹⁸⁴ or parental responsibilities and rights are to be terminated, suspended or restricted,¹⁸⁵ a High Court must therefore be approached. Section 29(1) however appears to be in conflict with section

¹⁷³ For instance ss 29(2) and 45(3). S 45(3) also provides that pending the establishment of family courts the High Court and Divorce Court will have jurisdiction. The family courts have however not been created yet and the Magistrate's Court Amendment Act 120 of 1993 came into operation without any provision for such courts. The Divorce Courts are also no longer in existence as discussed above. See also Schäfer *Domestic Perspectives* 345-346 for a discussion of this.

¹⁷⁴ S 1(1).

¹⁷⁵ Divorce Court Rules published under GN R1454 in GG 19458 of 1998-11-09, with effect from 15 November 1998.

¹⁷⁶ In terms of s 11 of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which Act came into operation on 9 August 2010. New rules regulating the Conduct of Proceedings in the Magistrate's Courts of South Africa published under GN R740 in GG 33487 of 2010-08-23 came into operation under Notice 888 published in GG 33620 on 2010-10-08, with effect from 15 October 2010. It was under the latter notice that the Divorce Court rules were repealed.

¹⁷⁷ An exception was however made for ongoing matters still pending in the Divorce Court before 9 August 2010. These matters must still be finalised in the Regional Courts, by applying the Divorce Court rules, regardless of the repeal thereof on 15 October 2010. See GG 33620.

¹⁷⁸ S 1(1) defines it to mean the Divorce Court established in terms of s 10 of the Administration Amendment Act 9 of 1979.

¹⁷⁹ Also refer to Heaton *Commentary* 3-18 n 5.

¹⁸⁰ This court is however no longer in existence, as discussed above.

¹⁸¹ S 22(4)(b).

¹⁸² S 23.

¹⁸³ S 24.

¹⁸⁴ S 26(b)(1).

¹⁸⁵ S 28.

24, as it also provides jurisdiction to a Divorce Court¹⁸⁶ in a divorce matter or a Children's Court. Heaton¹⁸⁷ initially suggested that section 29(1) should be interpreted merely to specify which High Court has jurisdiction over the child. She reasoned that to restrict the assignment of guardianship to only a High Court, would then correspond with the other restrictions in sections 22(6) and 22(7), the latter confirming that parental responsibilities and rights agreements relating to guardianship are to be made orders of court, terminated, or amended.

Swain J in *Ex parte Sibisi*¹⁸⁸ provided more clarity on the conflict. He found that relief may be obtained in terms of sections 22(4), 23(1) and 28 from the High Court, Divorce Court¹⁸⁹ or Children's Court, despite the fact that none of these sections deals with guardianship. Section 26(1)(b)¹⁹⁰ provides that application may be made to "a court". However "a court" is not specified, nor defined in the Children's Act. Section 24 provides that an application for guardianship is to be made to the High Court. According to Swain J, when the aforementioned distinction is borne in mind, it is clear that section 29 does not confer jurisdiction upon the Children's Court to hear an application for an order granting guardianship.¹⁹¹ He goes further to add that the above sections¹⁹² are subject to the words "as the case may be", which implies that the appropriate court for the relief envisaged in the sections mentioned is the court named in each section. Section 45(3)(a) also expressly provides exclusive jurisdiction to the High Court or Divorce Court in matters related to guardianship of a child.¹⁹³ Section 45(4) further provides that nothing in the

¹⁸⁶ Which no longer exists, as discussed earlier.

¹⁸⁷ *Commentary* 3-19 (Original service, 2007). However after the case of *Ex parte Sibisi* (discussed later) Heaton *Commentary* 3-22 (Revision service 4, 2012) concluded that the apparent contradiction was solved by the *Sibisi* judgment, explaining that s 29(1) merely refers to proceedings being brought in the various courts "as the case may be".

¹⁸⁸ 2011 1 SA 192 (KZN). This matter stemmed from a referral to the High Court from a Children's Court where application was made for an order in terms of s 18 for sole full parental responsibilities and rights. The presiding officer submitted that the Children's Court did not have jurisdiction, as the application involved guardianship as one of the elements of parental responsibilities and rights. Also see Heaton *Commentary* 3-22 and 3-29.

¹⁸⁹ Which no longer exists, as discussed earlier.

¹⁹⁰ This section deals with the biological father who seeks an order confirming paternity.

¹⁹¹ *Ex parte Sibisi* par 9 – 11.

¹⁹² Ss 22(4)(b), 23(1) and 28.

¹⁹³ S 45(3)(b)-(h) deals with other matters over which only the High Court, Divorce Court (which no longer exists), or still to be established family court may preside.

Children's Act shall be construed as limiting the High Court's inherent jurisdiction as upper guardian of all children. Swain J suggested that the legislature clarify the jurisdiction in the Children's Court, Divorce Court and High Court related to the determination of guardianship.¹⁹⁴

Section 22(7) also provides that only a High Court may confirm, amend or terminate a parental responsibilities and rights agreement, which relates to the guardianship of a child.

One must keep in mind that a High Court has jurisdiction in matters related to guardianship, but also that it should be a High Court within whose area of jurisdiction the child is ordinarily resident. In the case of *FS v JJ*¹⁹⁵ the question was considered which High Court had jurisdiction to vary or set aside an order of another High Court. Although the Western Cape High Court, which at that stage heard the matter, did not have jurisdiction to vary or set aside an order of another High Court, it had jurisdiction over the child. Hence it was confirmed by the Supreme Court of Appeal in the *FS v JJ* case that the court *a quo* correctly found that as upper guardian of minors residing in its area of jurisdiction, the Western Cape High Court had the necessary power to make any order necessary for the protection of the child. Louw J looked for support for this view to section 28(2) of the Constitution,¹⁹⁶ which provides that the child's best interest is of paramount importance in every matter concerning the child. The judgment of Lewis JJA in the Supreme Court of Appeal refers to these arguments and then concludes: "It [is] so ordered. In my view the Western Cape High Court did have jurisdiction to make the order in respect of C, who was resident within its jurisdiction at the time."

Section 1(4) of the Children's Act provides an indication of how to resolve the above problem, by providing that any proceedings arising out of the application of the Administration Amendment Act¹⁹⁷ and the Divorce Act,¹⁹⁸

¹⁹⁴ *Ex parte Sibisi* par 14.

¹⁹⁵ 2011 3 SA 126 (SCA) 134 par 36. A discussion of the case is also done by Schulze "The Law Reports" July 2011 *De Rebus* 42.

¹⁹⁶ 1996 Constitution.

¹⁹⁷ 9 of 1979.

where they relate to children, may not be dealt with by a Children's Court. A limitation is therefore placed on the jurisdiction of the Children's Court related to contact and care orders, where there are divorce proceedings pending in a Divorce Court under the Divorce Act.¹⁹⁹

5.2.3 The Dangers of Approaching a High Court on an Unopposed Basis without a Report or Investigation

Since there is no prescribed form²⁰⁰ for proceedings in the High Court related to applications for contact to, or care of a child,²⁰¹ confirmation of the vesting of parental responsibilities and rights, or otherwise any rights regarding children, the normal High Court application proceedings will be followed.²⁰² Unfortunately, because of the above, it is submitted that the applicant has *carte blanche* to make all the averments necessary in order to provide the court with sufficient grounds to support the relief or remedies applied for.²⁰³

Some sections in the Children's Act do however provide some guidelines for court proceedings, but do not provide specifications or guidelines for the contents of the affidavit or the format thereof: Section 24(3) provides that an applicant must submit reasons as to why a child's existing guardian is not suitable to have guardianship in the event of an application for guardianship.²⁰⁴ Section 29(2) further provides that if an application for guardianship is made in terms of section 24, reasons should be given why the

¹⁹⁸ As well as issues arising from the Maintenance Act 99 of 1998, Domestic Violence Act 116 of 1998 and the Recognition of Customary Marriages Act 120 of 1998.

¹⁹⁹ Skelton and Proudlock *Commentary* 1-30. The authors note that it is not clear whether after some time has passed and new issues related to contact and care have arisen, the Children's Court may then be approached. They submit that a common sense reading of the Act would allow for such an approach.

²⁰⁰ Also refer to the discussion in 5.2 above.

²⁰¹ In terms of s 22. Although proceedings for contact and care may be brought in the Children's Court in terms of s 45(1)(b), it does not preclude any party to bring proceedings in a High Court. From personal experience as a practising attorney, writer has on many occasions dealt with such matters in the High Court.

²⁰² In terms of Rule 6 of the Uniform Rules of Court.

²⁰³ The rule in *Plascon-Evans* may be applied. See also chapter 5.2.1 above.

²⁰⁴ However, also refer to chapter 4 for a more detailed discussion of s 24(3) and the criticism against its wording.

applicant is not applying for adoption of the child.²⁰⁵ These would then be *inter alia* relevant averments an applicant has to make in the affidavit to support the application for guardianship.

Section 29(3) further states that an application will only be granted if it is in the child's best interests.²⁰⁶ Section 29(4) further prescribes that the court must be guided by the principles set out in chapter 2²⁰⁷ to the extent that those principles are applicable to the matter before it.²⁰⁸ The word "must" places an obligation on the court to take cognisance of the applicable principles mentioned. However at the hearing of the application, the court "may" order that a report be submitted to court²⁰⁹ or that the matter be investigated²¹⁰ or that a person appear before court to give or produce evidence²¹¹ related to the matter. There is therefore no obligation on the court to refer the matter, or to request an investigation as contemplated in section 29(5) and it is left to the court's discretion.

However Rule 6(5)(g) of the Uniform Rules of Court²¹² provides that:

Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it seems to meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end

²⁰⁵ Regarding the controversy and anomaly regarding these specific requirements in these sections, refer to chapter 4 for a discussion thereof.

²⁰⁶ The court may however grant such application unconditionally, or upon certain conditions as it may determine. Heaton *Commentary* 3-30 is of the opinion that making provision for the child's best interest in s 29(3) is superfluous, as s 6(2)(a) provides that **all** proceedings, actions and decisions must respect, promote and fulfil the child's best interest. Also in terms of s 9 the child's best interests are of paramount importance in **all** matters concerning his/her care, protection and well-being.

²⁰⁷ Act 38 of 2005. Chapter 2 deals *inter alia* with a child-centred conciliatory approach in procedural matters, the child's best interests, the child's participation in matters concerning the child, the child's right to bring matters to court, etc.

²⁰⁸ Heaton *Commentary* 3-30 is of the opinion that this section is also superfluous, as it merely restates part of the rule that is set out in s 6(1), which provides for the general principles guided by the Children's Act.

²⁰⁹ S 29(5)(a).

²¹⁰ S 29(5)(b).

²¹¹ S 29(5)(c).

²¹² Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, GN R315 (GG 19834) of 1999-03-12 effective from 5 May 1999.

may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

This rule therefore allows for applications to be dealt with by allowing oral evidence to be led in order to clarify some issues. However, this does not necessarily mean that the application would be referred for a report or investigation otherwise.

In the event that there is no opposition to the application, the applicant is allowed to set the application down,²¹³ without any further documents to be submitted, whether it is reports, or otherwise. It then appears that the High Court may decide on the application related to the child, without any report from the family advocate, social worker or other suitably qualified person, or without any investigation or additional evidence, as long as it appears from the application before court that the child's best interests will be served.

It is submitted that in the event that an order is granted on an unopposed basis, without any investigation, report or additional evidence, it may result in an order that is not in the child's best interests. In cases like these, the voice of the child could also not have been given due consideration. The court can simply not be aware of the child's wishes, without "hearing" the child via an investigation, report or evidence. Unfortunately how the child's voice is to be heard is not prescribed.²¹⁴ It is therefore unclear how the child's views are to be obtained: should the child be questioned in court, should a social worker or

²¹³ Rule 6(5)(f) of the Uniform Rules of Court. It however became the practice in the South Gauteng High Court, that all unopposed matters be endorsed by the family advocate, prior to hearing by the court. The reason for this endorsement is for the family advocate to establish if the relief applied for appears to be in the best interest of the child. It is however submitted that the family advocate is in the same position as the court, as they both just have the facts before them based only on the affidavits and possibly supporting annexures. A proper investigation will only be conducted if it clearly appears that the child's best interests will not be served. It is further submitted that this will not always appear from a mere reading of the papers.

²¹⁴ Mahlobogwane 2010 *Obiter* 237.

psychologist interview the child and submit a report, or should the child be represented by an attorney?²¹⁵

Section 29(6)(a) provides however that a legal practitioner may be appointed to represent the child at court proceedings. Section 28(1)(h) of the Constitution further gives every child the right to a legal practitioner.²¹⁶ The voice of the child would then be heard through the legal representative.²¹⁷

Article 12 of the UNCRC²¹⁸ also specifically provides for the participation of the child as follows:

1. States Parties **shall** assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

²¹⁵ S 14 provides that every child has the right to bring and to be assisted to bring a matter to a court. Boezaart and De Bruin "Section 14 of the Children's Act 38 of 2005 and the Child's Capacity to Litigate" 2011 *De Jure* 430 say that s 14 of the Children's Act should be interpreted extensively to allow the broadest possible platform for the voice and views of children to be heard and considered, when compared to art 12 of the UNCRC and art 4(2) of the ACRWC (African Charter on the Rights and Welfare of the Child (OAU Doc CAB/LEG/24.9/49 (1991), entered into force November 29, 1999 (referred to as ACRWC). See further *Central Authority for the Republic of South Africa v B* 2012 2 SA 296 GSJ, par 2. Regarding representation in parental child abduction applications, Woodrow and Du Toit "Child Abduction" in Davel & Skelton (eds) *Commentary on the Children's Act* 17-27 submit that in cases where very young children are involved, the role of the legal representative would be more akin to that of a *curator ad litem*, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child. See also Zaal and Skelton 1998 *SAJHR* 539 who say that children should receive access to effective legal representation. They also say (557) that the representative serves both as voice and protector of the child, as well as officer of the court. See also the discussion in 5.1.3 above.

²¹⁶ Both these sections mention that a legal practitioner should be assigned at state expense if it appears that substantive injustice would otherwise result. Heaton *Commentary* 3-30 says that ss 29(6) of the Children's Act and 28(1)(h) of the Constitution echo each other.

²¹⁷ Legal representation for the child is not a requirement in **all** court proceedings. It is required if substantial injustice would otherwise result, as contemplated in s 28(1)(h) of the Constitution and s 29(6)(b) of the Children's Act. In *Soller v G* 2003 5 SA 430 (W) Satchwell J pointed out that the family advocate cannot fulfil the role (par 23) and that s 28(1)(h) of the Constitution provides for legal representation. She also said (par 26) that the appointment of a social worker, psychologist or counsellor would not suffice. See also Zaal and Skelton 1998 *SAJHR* 541, 555; Schäfer *Domestic Perspectives* 149; Boezaart *Commentary* 2-30, 2-31. It is noted however that no specific provisions were made to describe what exactly would be regarded as "substantial injustice". In this regard refer to Schäfer *Domestic Perspectives* 148, 336. Skelton and Carnelley (eds) *Family Law in South Africa* 270 say that it is disappointing that children can only bring applications with the leave of the court as provided for in ss 22(6)(a)(ii), 28(3)(c) and 35(5)(c). This could be indicative of the fact that s 14 of the Children's Act did not remove the common law restrictive on children's capacity to litigate.

²¹⁸ Refer to chapter 1 n 74.

2. For this purpose, the child **shall** in particular be provided the opportunity to be heard in **any** judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²¹⁹

The word “shall” in the above quotation indicates that there is an obligation that the child’s views are to be given consideration, depending on the child’s age and maturity. The African Charter on the Rights and Welfare of the Child²²⁰ similarly places an obligation for the child’s views to be heard, as follows in article 4(2):

All judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity **shall**²²¹ be provided for the views of the child to be heard either directly or through an impartial representative, as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate law.

From the above it is clear that the child’s views must be taken into consideration in all matters before court, subject to the child’s age and maturity.²²² The child however does not necessarily require a legal representative to convey his or her views, but simply requires the opportunity to present his or her views.²²³

²¹⁹ The emphasis in bold in the quote is the author’s own.

²²⁰ Refer to n 215 above.

²²¹ Emphasis in bold is the author’s own.

²²² *HG v CG* 2010 3 SA 352 (ECP) par 6; *Central Authority for the Republic of South Africa v B* 2012 2 SA 296 (GSJ) par 20. See also Barratt “ ‘The Best Interest of the Child’- Where is the Child’s Voice” in Burman (ed) *The Fate of the Child* 145 and further; Sloth-Nielsen and Van Heerden 1996 *SAJHR* 264; Pillay and Zaal 2005 *SALJ* 684; Mahlobogwane 2010 *Obiter* 234; Domingo 2011 *PER* 161.

²²³ *Soller v G* 2003 5 SA 430 (W) par 27. Du Toit “Legal Representation of Children” in Boezaart (ed) *Child Law In South Africa* 95 says that participation does not mean that a separate legal representative should be appointed for a child in every matter in order to ensure the child’s right to participation. It is however mandatory that a child participates and be given an opportunity to express his or her views in relation to decisions involving the child. See also Davel in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* 18; Boezaart and De Bruin 2011 *De Jure* 435.

It is therefore further submitted that the court cannot make an objective finding in unopposed matters relating to children where the child's views²²⁴ were not taken into consideration. The only facts before court would be the allegations made by the applicant in the founding affidavit. The result thereof might be that the child's best interests are not being served by the granting of the relief prayed for in the application, as the child's views were not aired or taken cognisance of.²²⁵

In view of the above it is submitted that the word "may" in section 29(5) be replaced with "must" in order to give execution to the fact that due consideration must be given to voice of the child, as contemplated in article 12 of the UNCRC and article 4(2) of the ACRWC by the person compiling a report, doing the investigation or giving evidence.²²⁶

5.2.4 Conclusion

The Children's Act is wide enough that anyone who acts in the interest of the child, or the child who is affected, may approach a competent court.²²⁷ This therefore does not limit an applicant to a specific forum, unless it is in matters related to guardianship of the child, in which case the High Court has exclusive jurisdiction.

In regard to Children's Court proceedings, there are several sections in the Children's Act providing guidance on what the Children's Court is to take into consideration when considering matters before it, how proceedings are to be conducted and orders²²⁸ the court may make. It also makes provision for forms in the regulations²²⁹ to be used in the Children's Courts. In the High

²²⁴ Subject to the child's age, maturity and level of development.

²²⁵ Sachs J in *AD v DW* 2008 3 SA 183 (CC) par 3 said that the High Court in this case (2006 6 SA 51 (W)) expressed concern about the need to ensure that the child's best interests would be protected in the absence of any opposition to the application.

²²⁶ It is accepted that persons referred to in s 29(5)(a)-(c) would report to court after consultation with the child and investigation into the circumstances of the child in relation to the relief applied for in the application before court.

²²⁷ S 15.

²²⁸ S 46.

²²⁹ Both the Justice and Social Development regulations have prescribed forms.

Court however there are hardly any guidelines as to what specific facts are to be placed before court when application is made to court in matters related to children.²³⁰

It is suggested that the best interests of a child can only be served if an application to the High Court is supported by a report by the family advocate,²³¹ social worker, or other professional person²³² where the applicant's circumstances related to the application are to be investigated and the child's views obtained. It is further submitted that the court should not hear such an application without some confirmation that the child's view has been obtained as well. It is submitted that the danger lies not only in the child's best interest not truly having been served, but also that the father might have sketched himself and his circumstances in a very favourable light, in order to support his application to court. These circumstances might not all be fact and can only be confirmed by a third party.²³³ The facts of each case will also be different and each case is to be considered on the basis of its own unique facts; no two cases are the same.²³⁴

²³⁰ Except for ss 24(3) and 29(2) of the Children's Act.

²³¹ However, Bonthuys 2006 *Stell LR* 491 submits that the office of the family advocate is already dealing with the burden of a heavy workload. See also Africa, Dawes and Brandt in *Fate of the Child* 141.

²³² Preferably a psychologist or attorney who has experience in family law matters. See Zaal and Skelton 1998 *SAJHR* 543 and further.

²³³ For instance, when the social worker, or other relevant person investigating the matter questions the child on his or her views, the allegations of the father in support of his application, may be verified as far as possible. It is submitted that an endorsement by the office of the family advocate would not suffice as no enquiry has been made. The endorsement is simply that – an endorsement.

²³⁴ *Jackson v Jackson* 2002 2 SA 303 (SCA) 139 par 2 of Cloete J's judgment. See also Domingo 2011 *PER* 154; Clark "Post Divorce Relocation by a Custodian Parent: Are Legislative Guidelines for the Judicial Discretion Desirable?" 2003 *SALJ* 89 noted that the absence of any reference to the wishes or feelings of the children in the *Jackson* case was surprising. She also said that the quality of the parent-child relationship should influence the courts more than the abstract conception of parental rights. She suggested further that by the framing of legal guidelines greater legal certainty could be achieved. The court's discretionary powers as upper guardian should however still be preserved.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The aim of this dissertation was to analyse the impact of section 21 of the Children's Act on the position of the unmarried father after the commencement of the Act and to assess whether the law is used to encourage involvement of unmarried fathers or to "punish" uninvolved fathers.¹

The impact and interaction of the Constitution and the child's rights were assessed to establish whether section 21 enhanced the unmarried father's position. Through this assessment it was established that the structure of section 21 is such that the interpretation thereof often creates more questions than answers and it appears that the result is rather that the position of the unmarried father has only improved superficially. Because of this apparent anomaly, section 21 was further analysed on the basis of comparison to other sections of the Children's Act.² However, this analysis revealed that other sections of the Children's Act might also cause confusion or lead to interpretation problems.

Ironically it was the position (or disposition) of the unmarried father that initially prompted law reform.³ The initial brief of the SALRC was then only to examine the defects in the Child Care Act.⁴ It however became clear that the Child Care Act could not be isolated from other legislation affecting children and it could not be dealt with or investigated separately from the laws regulating the relationships between parents and children and between

¹ Refer to chapter 1.4.2.

² A comparative study was also undertaken in order to establish if anything could be learned from other countries. Refer to chapter 3.

³ Refer to chapter 2.2.

⁴ 74 of 1983.

families and the state.⁵ This enhances the hypothesis of this study that these rights are intertwined and that none can be fully considered in isolation.⁶

6.2 The Transformation

In the past the emphasis has been on parental authority, but it has now moved to a child-centred approach.⁷ The belief that the parents of children may also have rights *qua* parents has taken longer than the rights of children to gain recognition. In many instances the recognition of the right of the child has instead limited parental authority.⁸ Regarding the unmarried father, the SALRC kept the global shift away from parental “power” towards parental “responsibilities” in mind.⁹ Children are also no longer labelled in terms of their parent’s marital status.¹⁰

Another important reform has been that children’s rights are now comprehensively provided for in a regulatory system specifically for the rights of children. Unmarried fathers are also now automatically given parental responsibilities and rights in certain circumstances.¹¹ After the commencement of the Children’s Act the position of children of unmarried parents has therefore greatly improved.¹² However, Schäfer is of the opinion

⁵ SALRC First Issue Paper 13 par 2.1. Also refer to chapter 1.3 for a discussion of the interaction of the rights of the unmarried father, his right to his child and the Constitution.

⁶ Refer to chapter 1.4.3.

⁷ Heaton *South African Family Law* 271; Bekink 2012 *PER* 178. Also refer to chapters 1, 2 and 3.1 above.

⁸ Carpenter 2008 *TSAR* 400 noted that it “acted as a brake” on parental authority. For further elucidation of parental authority also refer to chapter 3.1. Skelton and Carnelley (eds) *Family Law in South Africa* 5 said that another major development has been to extend the concept of marriage to a monogamous heterosexual arrangement, to include same-sex and polygamous unions as well. This has not formed part of this study, but is mentioned here to indicate some of the changes brought about by the Children’s Act.

⁹ SALRC First Issue Paper 13 par 2.2.

¹⁰ Refer to chapter 1.3 herein.

¹¹ Skelton and Carnelley (eds) *Family Law in South Africa* 7. Only some of the points concerning reform in the Children’s Act were referred to here, as not all of them were analysed or discussed in this study. Refer to Skelton and Carnelley (eds) *Family Law in South Africa* 5 – 7 for several other developments related to the rights of children and other associated aspects introduced in the Children’s Act, such as *inter alia* the law related to people who cohabit, same-sex marriages, etc. Schäfer *Law of Access* 26, 49 also points out the different changes the Children’s Act brought about. See also Boniface *Thesis* chapters 3 and 4 for a discussion of changes brought about by the Children’s Act.

¹² Robinson, Horsten, Humand and Coetzee *Introduction to the South African Law of Persons* 105. The author of this document is in agreement herewith relating to the position of the child.

that section 21 lacks objective certainty.¹³ Some of the problems related to interpretation and possible confusion caused by the wording in section 21 and even some other sections are referred to hereunder and recommendations have been made regarding possible amendments.

6.3 Recommendations

6.3.1 Section 21

Huge steps forward have indeed been made since the common law, which granted unmarried fathers no inherent rights to their children.¹⁴ A radical departure regarding the unmarried father's rights was that for the first time, he would acquire automatic parental responsibilities and rights. However, the automatic acquisition is dependent on meeting certain requirements.¹⁵ The unmarried father's rights are therefore acquired *ex lege* and he does not have to take any legal action to acquire them.¹⁶ This simply means that an unmarried father¹⁷ now has an inherent right to his child¹⁸ and that he should not have to approach a court to confirm these automatically acquired rights.¹⁹

It is however submitted that even though it appears *prima facie* that the unmarried father is placed in a better position after the commencement of the Children's Act and specifically section 21 thereof, affording him automatic parental responsibilities and rights,²⁰ these "improved" rights for unmarried fathers are superficial. For instance, even though unmarried fathers can be more actively involved in the lives of their children, the Children's Act does unfortunately not provide them with a mechanism or instrument to indicate

¹³ Schäfer *Domestic Perspectives* 243. Also see chapter 5.1. The author of this dissertation is in agreement with this point of view.

¹⁴ Refer to chapter 3 above.

¹⁵ The requirements are prescribed in s 21(1); Skelton and Carnelley (eds) *Family Law in South Africa* 7.

¹⁶ Skelton *Child Law in South Africa* 74. Also refer to chapter 4.1.

¹⁷ Referring to those fathers qualifying under s 21.

¹⁸ This was not the position prior to the commencement of the Children's Act. See also the discussion in chapter 2.2 above.

¹⁹ Bosman-Sadie and Corrie *A Practical Approach* 37; Skelton and Carnelley (eds) *Family Law in South Africa* 246.

²⁰ Once the prescribed criteria in s 21(1) have been met.

that they have acquired these rights and may proceed and are now allowed to exercise them. The mother of the child may still influence *how* the unmarried father is allowed to exercise his acquired responsibilities and rights.²¹ There are also no criteria or specifications provided or prescribed in section 21²² indicating how unmarried fathers should exercise responsibilities and rights towards their children, once these have been acquired.²³ So, even if the unmarried father does not have to approach a court to acquire his rights to his child, he might still end up approaching the court either to declare him to be the holder of these rights,²⁴ or to order how he is to exercise his parental responsibilities and rights. In the event that the mother does not allow the unmarried father contact with his child or contact is irregular or under unreasonable circumstances, the unmarried father will have no choice but to approach a court for relief to make an order on *how* he is to exercise his automatically acquired parental responsibilities and rights.²⁵ It is clear that there is a *lacuna* in section 21. It is submitted that once it is established that the unmarried father complies with the provisions of section 21(1)(a) or (b), he

²¹ In this regard refer to the discussion in chapter 5.1. Even though ss 30 and 31 effectively provide that co-holders of parental responsibilities and rights need to co-operate with each other in exercising their parental responsibilities and rights, the unmarried father who has s 21 rights will often be excluded by the unmarried mother in taking major decisions as contemplated in s 31. In the absence of an agreement with the mother, there is no formal document available to the father allowing him the opportunity to have a say in decisions involving his child's life, as obligated in s 31. A problem would for instance arise if an unmarried father, whose name does not appear on his child's birth certificate (for possible identification purposes), who lives in another town and is unknown to his child's school teacher, for instance, wants to collect his child from school with the mother's consent. He has acquired rights in terms of s 21, but the school would not know about it, unless the mother advises them, or unless the father can produce some form of documentary proof. As these parental responsibilities and rights are acquired *ex lege* there will not be a court order confirming that the father is the holder of these rights.

²² The only guideline is s 18, which defines what parental responsibilities and rights entail. However, this is still problematic, as the child often resides with one parent and specific arrangements need to be made for contact. If no arrangements can be made in terms of s 22 (if the father does not qualify under s 21) or in terms of s 33 (if the father does qualify under s 21), the court still needs to be approached.

²³ Bonthuys 2006 *Stell LR* 487 criticises s 21, as she is of the opinion that the best interests of the child were not taken into account when granting responsibilities and rights to the unmarried father. It is however correctly pointed out by Skelton and Carnelley (eds) *Family Law in South Africa* 249 that the child's best interest should only become relevant when these rights are **exercised**. However, as no criteria or requirements are laid down on **how** the rights should be exercised by the unmarried father once acquired, it is submitted that the possible ambiguity that can be caused cannot be in the child's best interest. Also refer to chapter 2.3 n 111-113.

²⁴ As no form or proof exists to indicate that he is the holder of these rights. In the case of *FS v JJ* 2011 3 SA 126 (SCA) the court did grant such a declaratory order. Also refer to chapter 4.1.2.

²⁵ This is of course if a parenting plan (if she does not dispute that he qualifies for parental responsibilities and rights under s 21(1)) cannot be amicably concluded or mediation fails or cannot be done.

be issued with a formal declaration or form declaring or confirming that he is the holder of parental responsibilities and rights.^{26 27} It is therefore suggested that a section should be inserted between sections 21(1) and 21(2) as follows:

The biological father who has acquired parental responsibilities and rights in respect of the child shall be provided with a declaration by the family advocate²⁸ that he has acquired such rights and that he may exercise those rights as contemplated in section 18 of the Children's Act.

Section 21(1) has further been criticised for the fact that an unmarried father may acquire parental responsibilities and rights, without showing any commitment to the child.²⁹ The section is currently worded to make provision for only commitment to the mother of the child.³⁰ What is in the mother's best interest is however not always in the child's best interest. Because of the obligation in terms of section 28(2) of the Constitution,³¹ the view is generally that it is in the best interest of the child to exclude the uncommitted father.³² The uncommitted father may however acquire parental responsibilities and rights, in contrast to the father who is actually committed to the child and who

²⁶ Such a declaration is provided for in Uganda. In terms of s 71(2) of the Uganda Children Act 1997, Chapter 59 of the laws of Uganda, provision is made that an instrument signed by the mother of a child and by any person acknowledging that the unmarried father is the father of the child and an instrument signed by the father of a child and by any person acknowledging that she is the mother of the child, shall if the instrument is executed as a deed; or if it is signed jointly or severally by each of those persons in the presence of a witness, be *prima facie* evidence that the person named as the father (or mother) is the father (or mother) of the child. See chapter 3.2 for further reference to this.

²⁷ Of course this would immediately open up a whole new topic because the next question would be to whom such a declaration would be issued. This will however be a discussion on its own. However, it is submitted that this may be the first step towards providing greater clarity on the unmarried father's position and certainty relating to his position in this context. It is then suggested that application for such a declaration should be made to the family advocate, possibly on a prescribed form. Once it has been confirmed that the unmarried father meets the criteria set out in s 21(1), he would then be issued with a declaration, or certificate. In the event that it cannot be established whether the unmarried father does fulfill the criteria in s 21, or it is being disputed, the matter can then be mediated in terms of s 21(3). However, it is submitted that this may be a step towards providing better clarity for the unmarried father's position and certainty relating to his position in this context.

²⁸ It is suggested that some form of register should be kept by the family advocate where each declaration is noted. This should be an administrative act and if there is a dispute it should be referred for mediation in terms of s 21(3).

²⁹ Refer to chapters 1.3.3.

³⁰ This is in contrast with the Kenya Children Act, as discussed in chapter 3.3.

³¹ This provides that the best interest of the child shall enjoy paramount consideration.

³² Louw 2010 *PER* 179.

does not automatically qualify in terms of section 21.³³ The committed father's rights may thus often be excluded, as he does not qualify in terms of section 21. Fathers in general should not be allowed to exercise parental responsibilities and rights in any event, if it might be detrimental to the child's interests. However, fathers should at least be afforded the same opportunity as mothers to acquire such parental responsibilities and rights.³⁴

The provision in section 21(1)(b)(ii) that the father must have contributed or attempted "in good faith" to contribute to the child's upbringing has also raised many questions.³⁵ It is not exactly clear what an indication of "good faith" is and it is submitted that this can be very subjectively interpreted. Mothers may, for instance, argue that there was no "good faith" with the contribution, as it was done as a *quid pro quo* for contact or possibly to qualify under section 21. On the other hand though, the father may argue that all he wanted to do was to contribute to his child's upbringing.³⁶ It is submitted that even a contribution to the child's upbringing³⁷ and maintenance³⁸ is not sufficient indication of actual commitment to the child, as words such as "good faith" and "attempted" might mitigate the actual actions of making the contribution. This will however be in favour of the delinquent father who might make random attempts, but then it might again be argued that these attempts were not made in good faith. It is therefore suggested that "in good faith" be omitted from this section, as it does not contribute anything to it.³⁹

Section 21(3) provides for compulsory mediation. It is however not clear who should mediate the dispute, who should appoint the mediator and exactly what it is that needs to be mediated.⁴⁰ Even though the Children's Act

³³ He may however qualify by entering into an agreement with the mother in terms of s 22, or by applying to court for rights in terms of s 23.

³⁴ Louw 2010 *PER* 183. Also refer to chapter 1.3 and 3.1 n 18. It is noted that in the comparative study parents acquire parental responsibilities regardless of their marital status in countries such as Uganda and Ghana. It is submitted that South Africa may learn from these countries in this regard. Please refer to chapter 3.

³⁵ Refer to chapters 5.1.1.3 and 5.1.1.4 for a detailed discussion of this.

³⁶ Refer to chapter 5.1.1.3 n 43.

³⁷ S 21(1)(b)(ii).

³⁸ S 21(1)(b)(iii).

³⁹ Refer to chapter 5.1.1.4 n 54 for a suggested definition in this regard.

⁴⁰ Refer to chapters 2.4.1 and 5.1.1.1 for a discussion about mediation.

requires that mediation⁴¹ be done by a family advocate, social worker, social services professional or other suitably qualified person, it does unfortunately not provide a definition of “suitably qualified person”. It is therefore suggested that a definition describing this “person” be added to the Children’s Act. The following possible definition is suggested:

A suitably qualified person is an attorney, psychologist, social worker, family advocate or family councillor with formal training in mediation and with current accreditation with SAAM,⁴² who shall be practising as mediator under the rules of such association.⁴³

Regarding what it is that needs to be mediated, there is even more confusion. It is not clear whether the aim of mediation is to ascertain whether the criteria in section 21(1) have been met. However, it is submitted that it is indeed the fulfilment of the requirements in section 21(1) that need to be mediated.⁴⁴ Unfortunately, further confusion may be created, as no definition has been provided for “permanent life-partnership”.⁴⁵ This raises the question whether the existence of such a partnership should be mediated as well in addition to or alternatively to determine whether the unmarried father fulfilled the criteria of section 21(1). The problem would be resolved by simply providing a definition for life-partnership.⁴⁶ It is also submitted⁴⁷ that the word “permanent” before the word “life-partnership” be removed⁴⁸ as it is superfluous. Section 21(1)(a) should then be amended to read:

(1) The biological father of a child 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 -

⁴¹ In terms of s 21(3). S 33(5)(a) also added a psychologist to the list of persons who may assist in preparing a parenting plan. Refer to the discussion in chapter 2.4.

⁴² Or any other association of mediators.

⁴³ Guidance for membership and training was obtained from the South African Association of Mediators’ (SAAM) website at <http://www.saam.org.za/infopages.php?pageid=5> accessed on 5 May 2013.

⁴⁴ Refer to s 21(2) and the discussion in chapter 2.4.

⁴⁵ S 21(1)(a) refers to “life-partnership” without explaining what the requirements for this are and the definitions in s 1 do not provide any definition of “life-partnership” either.

⁴⁶ Refer also to 5.1.1.2 for a discussion of this and a suggestion for a definition.

⁴⁷ This is in agreement with Schäfer *Family Law Service* E18-13. See also Schäfer *Family Law Service* R4-4. Also refer to chapter 5.1.1.2 of this document.

⁴⁸ The word “life-partnership” should then also be used in s 293 instead of the term “permanent relationship”.

- (a) if at the time of the child's birth he is living with the mother in a⁴⁹ life-partnership.

Another problem pointed out in this study⁵⁰ is that section 21(3) does not give an indication of who should appoint a mediator. It is suggested that if the parties cannot agree on who should appoint the mediator within a certain period after it has become clear that there is a dispute, either of them may approach the family advocate or an institution such as SAAM⁵¹ to request the appointment of a mediator. It is further suggested that a formal form should be available to a party to a dispute to apply to have a mediator appointed.⁵² Section 21(3) should then be amplified to make provision for this by the insertion of a subsection (c) as follows:

Any party to a dispute may request the family advocate or SAAM within 30 days after a dispute has been declared⁵³ to appoint a mediator in a form similar to form X as prescribed in the regulations.

As section 21(3) is one of the sections providing for compulsory mediation in the Children's Act,⁵⁴ one would have thought that it would be important for it to be compulsory to provide proof of such mediation. However, section 21(3) does not specifically refer to or prescribe proof of mediation and therefore fails to stipulate that such proof is obligatory. However, provision has been made in the regulations⁵⁵ for the outcome of the mediation to be noted in a specific form. The wording used in the regulations also does not indicate that there is an obligation that a certificate or proof of mediation must be provided.⁵⁶ As this is clearly a *lacuna*, it is therefore suggested that in order to make the

⁴⁹ The word "permanent" from the original text was removed here.

⁵⁰ Refer to chapter 2.4.2.

⁵¹ Refer to n 43 and the earlier reference to SAAM.

⁵² This form should then be added as one of the forms in the Social Development Regulations. The noting of the outcome should then be compulsory, as suggested in this chapter.

⁵³ It is suggested that s 21 should also make provision for the declaration of a dispute in writing. This declaration should contain the date the dispute is declared and what is in dispute as well. It is further suggested that the declaration of this dispute should be regulated by a prescribed form. It is submitted that this will provide greater clarity on the many questions raised with regard to the mediation required by s 21(3).

⁵⁴ The only other section where mediation is compulsory is s 33(2) read with s 33(5) regarding the compilation of a parenting plan.

⁵⁵ Regulation 8(1) of the Social Development Regulations prescribes form 6.

⁵⁶ The wording on the form reads: "A family advocate, social worker other social service professional, or other suitably qualified person, ... with regard to the fulfillment by that father of the conditions ... may certify the outcome of that mediation in a form identical to Form 6."

provision of a certificate compulsory, the word “may” in the regulations should be replaced with the word “must”, in order to give the necessary weight to the mediation the legislator intended it to have.⁵⁷

Further analysis indicated that the use of the word “through” in section 33(5)(b) might also create confusion.⁵⁸ It is not clear whether mediation is to be done through a social worker or other suitably qualified person⁵⁹ or if the social worker or other suitably qualified person should actually do the mediation.⁶⁰ It is submitted that section 33(5) should then rather read as follows:

- (5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek –
 - (a) ...
 - (b) mediation by a social worker or other suitably qualified person.

6.3.2 Sections Interacting with Section 21⁶¹

The analysis of the interaction of sections 18, 24(3) and 29(2) with section 21, revealed that these sections also present challenges.⁶² By simply rephrasing some sections and adding definitions, a great deal of the current interpretation problems would be less problematic.

Specific reference was made in this study to the use of the phrase “to act as guardian” in sections 18(2)(c) and 18(3). It was submitted that “to act” as guardian is different from actually being the guardian and therefore actually having guardianship as intended by the legislator.⁶³ From the discussion it appears that several authors use both “guardianship” and “to act as guardian”

⁵⁷ It is clear that the legislator intended this mediation process to carry weight, as s 21(3) provides specifically that the court may not be approached without the matter having been mediated first.

⁵⁸ This section provides that mediation is to be done “through” a social worker or other suitably qualified person.

⁵⁹ It is submitted that this may indicate that a social worker or other suitably qualified person may appoint another person to do the actual mediation.

⁶⁰ Heaton *Commentary* 3-38 is of the opinion that the use of the word “through” is unfortunate, with which opinion the author of this document associates. Refer also to chapter 2.4.3.

⁶¹ Refer to chapter 4.

⁶² Skelton and Carnelley (eds) *Family Law in South Africa* 249 say that it is apparent that many disputes will be arising from s 21.

⁶³ In this regard refer to chapter 4.2.2 for a discussion.

interchangeably and that it may create confusion, especially for lay people without sound knowledge of the law and the Children's Act.⁶⁴ In this regard it is therefore suggested that the word "act" be replaced by the word "be",⁶⁵ and that section 18(2) should then read as follows:

The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right - (c) to **be**⁶⁶ the guardian of the child; ...

and section 18(3) as follows:

Subject to subsections (4) and (5), a parent or other person who **is/are**⁶⁷ the guardian(s) of a child must - ...

Section 24(3), which provides that a person who applies for guardianship of a child who already has a guardian, must submit reasons why the existing guardian is not suitable to have guardianship, poses interpretation difficulties as well, as this section implies either that the child can have only one guardian or that the child will have an additional guardian.⁶⁸ No provision is made in this section for any guidelines on when an existing guardian would be regarded as unsuitable to have guardianship.⁶⁹ If it is argued that the child should have only one guardian, sufficient reasons need to be provided to terminate the current guardian's guardianship and this does not necessarily imply that the existing guardian is an incompetent guardian. However, the court's opinion in *CM v NG*⁷⁰ was that section 24(3) would only be applicable if application was made for *sole* guardianship. Because of the interpretation problems with this section, it had to be interpreted and elaborated on by the court and in view thereof it is suggested that section 24(3) should be amended to read: In the event of a person applying for *sole* guardianship,⁷¹ of a child who already has a guardian, the applicant must submit reasons as to why the

⁶⁴ Refer to chapter 4.2.2.

⁶⁵ In s 18(2)(c) and (3). The word "as" in the sentences should then obviously be removed.

⁶⁶ Instead of using the words "to act".

⁶⁷ Also instead of using the words "to act".

⁶⁸ Refer to the discussion hereof in chapter 4.2.1.

⁶⁹ Heaton *Commentary* 3-22. Also refer to chapter 4.2.1.

⁷⁰ 2012 4 SA 452 (WCC) par 58. See also chapter 4.2.1 n 62. The author hereof concurs with this judgement.

⁷¹ This section reads exactly the same as it currently stands in the Children's Act, except that the word "sole" has been inserted, as indicated in italics here.

child's existing guardian is not suitable to have *sole* guardianship in respect of the child.

In a similar vein, section 29(2) does not make sense,⁷² as it does not supply adequate reasons why guardianship applications are limited.⁷³ Section 29(2) provides that a person applying for guardianship should give reasons why that person is not applying to adopt the child.⁷⁴ Various authors⁷⁵ argued the consequences of and differences between adoption and guardianship. The author of this thesis supports the view of Louw⁷⁶ that this section will make more sense if it is specified by using the word "only". It is therefore suggested that section 29(2) should be amended to read as follows:

An application in terms of section 24 for *only*⁷⁷ guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child.

It is also noted that despite the fact that Divorce Courts are no longer in existence, several sections⁷⁸ in the Children's Act still refer to the Divorce Court.⁷⁹ It is suggested that these references in the Children's Act should be removed.

6.3.3 Conclusion

In view of the analysis in this study, the above suggestions, several cases that interpreted and enhanced the Children's Act and the period that the Act has been in operation, it is submitted that the time is ripe for further development of the Act specifically related to the rights of the unmarried father. Unfortunately it still appears as if mothers and unmarried fathers are treated differently. Mothers have parental responsibilities and rights, simply due to a

⁷² This section provides that a person who applies for guardianship must provide reasons why the person is not adopting the child.

⁷³ Also refer to chapter 4.3.

⁷⁴ In this regard refer to a more detailed discussion hereof in chapter 4.3 and for a discussion of the differences between adoption and guardianship.

⁷⁵ Such as Heaton, Skelton and Louw, as discussed in chapter 4.3.

⁷⁶ Refer to chapter 4.3 and n 96, n 97 and n 112.

⁷⁷ This section remains the same as the original s 29(2), except for the insertion of the word "only".

⁷⁸ For example ss 1(1), 29(2) and 45(3). Also refer to chapter 5.2.2 for further reference to this.

⁷⁹ Refer to chapter 5.2.2 n 176.

biological link to the child,⁸⁰ whereas fathers need to prove commitment and fulfil requirements.⁸¹ Even though the unmarried father's position has improved, it is clear that the mother is in a superior position in relation to the child compared to the unmarried father.

Schäfer⁸² says that the Children's Act reflects established legal principles, especially those related to parental responsibilities and rights conflicts. Louw⁸³ is however of the opinion that although the unmarried biological father's rights increased and his role as father enjoys more recognition, it is unfortunate that the Children's Act has actually retained the *status quo* to the extent that it still does not confer automatic and inherent parental rights on the father on the same basis as on the mother. The author of this dissertation is in agreement with Louw in this regard and it is submitted that it appears as if a distinction is still being made between married and unmarried fathers, despite the improved rights of unmarried fathers. The unmarried father still needs to "prove" himself and has to fulfil some requirements first.⁸⁴ These requirements however are an indication of commitment to the mother rather than the child, which will counter the best interests of the child. It appears that because criteria have been laid down that the father has to meet prior to acquiring any parental responsibilities and rights, it is an indication that mothers are being "protected" from the unmarried father. However, it is submitted that in doing so, the rights being infringed are effectively the child's right to family care and the right to have contact with the father, rather than those of the mother. It is further submitted that unmarried fathers, especially those who want to be involved with their children, may not be "punished" even before they have acquired any parental responsibilities and rights. The law should rather encourage them to be involved by allowing them the same opportunities as mothers to acquire parental responsibilities and rights.⁸⁵

⁸⁰ S 19.

⁸¹ S 21. Also refer to chapters 1.3, 2.3 and 5.1.1.

⁸² Schäfer *Law of Access* 57. He also refers to some inconsistency in judgements on child-related matters regarding s 28 of the interim Constitution. Also refer to s 1(2) of the Children's Act and for a discussion of the terminology refer to chapter 1.2 of this dissertation.

⁸³ Louw *Thesis* 156.

⁸⁴ In terms of s 21(1).

⁸⁵ Refer to chapter 1.4.2 n 192. Louw *Thesis* 475 came to the same conclusion in her thesis and submitted that the Children's Act had not been progressive enough regarding the equal treatment

One of the goals of the SALRC⁸⁶ was to respect the responsibilities of parents, families and communities and to create a legislative and policy environment in which the family is supported by the state. It is submitted that an unmarried father is not excluded from the definition of “parent”. He should unconditionally qualify for parental responsibilities and rights as a parent and as such he forms part of a “family”. If the unmarried father needs to qualify for rights or apply to court for them, he appears to be excluded as parent and therefore from the “family” and the SALRC, it is submitted, has consequently failed in its goal. A child has the right to parental care by both parents⁸⁷ and contact is a right of both parent and child.⁸⁸ If unmarried fathers are left to fight constantly for their rights to their children, the children are deprived of their right to parental care by *both* parents. The result of not allowing unmarried fathers unconditional parental responsibilities and rights⁸⁹ is that the child’s best interests are not upheld.⁹⁰

The child’s best interests are overridingly important and to confer full parental responsibilities and rights on both parents based on their biological link would then place the focus on the child’s best interests, which would in return emphasise the importance of both parents for the child.⁹¹

This again reverts to the hypothesis of this study, namely that the rights of the unmarried father cannot exist in a vacuum from those of the child, the mother and even the state. These are all interlinking rights, which would be applied differently, taking into account the best interests of the child in each situation.

of unmarried fathers on the same level as mothers in the acquisition of parental responsibilities and rights.

⁸⁶ Discussion Paper 103 at 16. Also refer to chapter 1.4.

⁸⁷ Van Der Linde and Van Schalkwyk 2011 *PER* 89.

⁸⁸ See chapter 1.4.2 2 n 186.

⁸⁹ However, these rights may be limited, like any other constitutional right, in terms of the limitation clause in s 36 of the Constitution. Also refer to chapter 1.3.2.

⁹⁰ Louw *Thesis* 476 correctly pointed out that even though the Children’s Act aimed at protecting the stability of the environment created by the mother as primary caregiver while at the same time accommodating the advantage a relationship with a committed father may have for a child, the provisions in the Children’s Act failed on both accounts. She further said that it would cause unnecessary disputes and litigation. This supports the conclusion reached by the author in this study, which also formed part of the aim of this study: the unmarried father is dependent on the mercy of the mother to allow him to exercise his parental rights, which often results in litigation, either to vest his rights or to enforce them, or both.

⁹¹ Louw 2010 *PER* 195. Also refer to the impact of the Constitution on the rights of the unmarried father and the best interests of the child in chapter 1.3 of this dissertation.

It is however submitted that as the unmarried father's right to his child is one of these interlinking rights, his right to his child should not be held ransom for the sake of different legal, gender and constitutional arguments against it.⁹²

From the different judgements, publications and opinions that emanated from the Children's Act, it is clear that the development of family law in this regard is not yet complete and various issues remain legally problematic.⁹³ However, bearing in mind the position prior to the commencement of the Children's Act, the change that has come about in the position of unmarried fathers may still be described as revolutionary and there is no reason why the revolution should not be taken to its logical conclusion.⁹⁴ It is submitted that the logical conclusion would be to provide the unmarried father with parental responsibilities and rights, simply because of his biological link with the child⁹⁵ and because it forms part of the link between the interactive rights of the child, the father, the mother and the state, instead of requiring the unmarried father to pass some "screening test".⁹⁶

It was rightfully said that "when fathers abandon their children, it makes news. Not much is said about fathers who stick around to fight for their children. A shift in thinking is needed in society. Fathers who want to be fathers should be allowed to do so without being punished for not staying in a loveless relationship."⁹⁷

⁹² Of course there would be litigation if the father does not exercise his rights in the child's best interests. It is however submitted that he would then at least have had a chance to exercise his rights and it could be established *how* he exercised them.

⁹³ Skelton and Carnelley (eds) *Family Law in South Africa* 15. See also Schäfer *Law of Access* 45 who argues that to respect the paramountcy of the child's best interests is no justification to preserve the residual inequalities in the extent to which the law protects the legitimate interests of the child's parents. He proceeds to submit correctly that the inequality between unmarried fathers and other parents is probably not consistent with constitutional proscription of unfair discrimination.

⁹⁴ Carpenter 2008 *TSAR* 410. Boniface *Thesis* 634 notes that although the changes regarding the parent-child relationship can be regarded as drastic, the process has not been completed with reference to guardianship and care and contact.

⁹⁵ This is in any event the default position in most of the African countries studied in the comparative study in chapter 3.

⁹⁶ This is how Louw 2010 *PER* 165 refers to the requirement in s 21(1). She also correctly points out (194) that s 21(1)(b) is so fraught with difficulties that it fails to provide a proper screening mechanism for commitment to the child, which leads to increased animosity and litigation.

⁹⁷ Mbuyiselo Botha, spokesman of Sonke Gender Justice, was quoted in an article in the Times Live obtained from <http://www.timeslive.co.za/thetimes/2013/02/11/single-fathers-fight-back> accessed on 11 February 2013.

ABBREVIATIONS

| | |
|----------|---|
| AHRLJ | African Human Rights Law Journal |
| AIDS | Acquired Immune Deficiency Syndrome |
| ALRC | Australian Law Reform Commission |
| BML | Businessman's Law |
| CCR | Constitutional Court Review |
| CFLQ | Child and Family Law Quarterly |
| CILJSA | Comparative and International Law Journal of South Africa |
| FLQ | Family Law Quarterly |
| GG | Government Gazette |
| HIV | Human Immune Deficiency Virus |
| IJCR | International Journal of Children's Rights |
| IJLPF | International Journal of Law, Policy and the Family |
| JAL | Journal of African Law |
| JCL | Journal of Child Law |
| JFLP | Journal of Family Law and Practice |
| JJS | Journal for Juridical Science |
| LDD | Law, Democracy and Development |
| PER | Potchefstroom Electronic Review |
| SAJHR | South African Journal on Human Rights |
| SALJ | South African Law Journal |
| SALRC | South African Law Reform Commission |
| SAPL | South African Public Law |
| Sing JLS | Singapore Journal of Legal Studies |
| STELL LR | Stellenbosch Law Review |
| THRHR | Tijdskrif vir Hedendaagse Suid Afrikaanse Reg |
| TSAR | Tydskrif vir die Suid Afrikaanse Reg |
| UNCRC | United Nations Convention on the Rights of the Child |
| ZACC | South African Constitutional Court |
| ZASCA | South African Supreme Court of Appeal |

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