

## NOTES / AANTEKENINGE

### THE ACQUISITION OF SHARED PARENTAL RESPONSIBILITY BY SAME-SEX CIVIL UNION PARTNERS\*

#### 1 Introduction

The acquisition of parental responsibility in South Africa is currently still determined by the legitimate status of a child (Van Heerden "How the Parental Power is Acquired and Lost" in Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (1999) 317 and authority quoted in fn 17). The birth of a legitimate child will vest equal and independent parental responsibility in both parents of the child (s 1(2) of the Guardianship Act 192 of 1993). Legitimate status and the resultant acquisition of parental responsibility can also be achieved through the legitimation of the child *per matrimonium subsequens*, adoption and artificial fertilisation with the consent of both spouses (Davel and Jordaan *Law of Persons* (2005) 108-109). In the case of a same-sex civil union it is obvious that the acquisition of shared parental responsibility by both civil union partners through the birth of a legitimate child or the legitimation of a child born out of wedlock, is out of the question. This comment will investigate the possibility of same-sex civil union partners acquiring shared parental responsibility in respect of a child or children born through adoption and artificial fertilisation. Since the children cannot be described as being legitimate or "born from the marriage" between the same-sex civil union partners, they will be referred to as children "planned" by the partners themselves. In this way the civil union partners are seen as the intentional parents of the children, that is, the persons who intend to become the legal parents of the child(ren) at birth. The acquisition of parental responsibility by one civil union partner in respect of children born from a previous (heterosexual) marriage or relationship of the other same-sex civil union partner will also briefly be canvassed.

#### 2 The Civil Union Act 17 of 2006

Since the Civil Union Act, which came into operation on 30 November 2006, is couched in gender-neutral terms, same-sex couples can now in terms of

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\* The commentary in this note was completed and finalised for publication before the inception of the Children's Act 38 of 2005 on 1 July 2007.

the Act conclude a legally recognised civil union which can be registered as either a marriage or a civil partnership, depending on the choice of the partners to such a union (s 11(1)).

The consequences of a civil union concluded in terms of the Civil Union Act are in terms of section 13(1) of the Act identical to the legal consequences of a marriage contemplated in the Marriage Act (25 of 1961). The aim of the Civil Union Act is clearly to confer upon civil union partners the same legal status as spouses in a valid marriage in all respects. Section 13 of the Civil Union Act is of crucial importance for the present exposition and provides that –

“with the exception of the Marriage Act and the [Recognition of] Customary Marriages Act, any reference to –

- (a) marriage in any other law, including the common law, includes with such changes as may be required by the context, a civil union; and
- (b) husband, wife or spouse in any other law, includes a civil union partner”.

### **3 Children planned by the civil union partners themselves**

#### *3 1 Child conceived by natural means*

If the partners to an all-female civil union wish to become the parents of a naturally conceived child one of the partners would have to be impregnated and give birth to the child. The child will have to be conceived by an adulterous act committed with, for example, a male friend, family member or stranger willing to assist with the conception. The partner who gives birth to the child will be regarded as the mother of the child and will automatically assume full parental responsibility of the child at birth (*mater semper certa est*). The female partner of the mother will be considered a stranger to the child and be in the same position as any step-parent (the common law *pater est*-presumption can obviously not apply because there is no “husband”, and even if “husband” is interpreted as spouse or civil union partner in terms of s 13 quoted above, there is, more importantly, no spouse that can be presumed to be the “father” of the child). Such a partner would have to apply for the adoption of the child (jointly with the mother) to acquire parental responsibility (s 17(c) of the Child Care Act 74 of 1983 as “a married person whose spouse is the parent of the child”).

The partners in a male civil union will have to find a surrogate mother to give birth to a child which is genetically related to at least one of the partners. If the child is to be conceived naturally it would also involve at least one act of adultery between the male civil union partner and the surrogate mother. In such a case the surrogate mother would, in terms of the current legal position, automatically acquire full parental responsibility at the time of the child's birth. As the natural father of the child born out of wedlock, the “commissioning” civil union father would not have any inherent parental rights but would be able to acquire guardianship and custody of, or access to the child, in terms of the Natural Fathers of Children Born Out of Wedlock

Act (86 of 1997) if the High Court deems it to be in the best interests of the child. If, however, the civil union partner of the father also wishes to acquire parental responsibility in respect of the child, the partner and the father would jointly have to apply for the adoption of the child to acquire full and shared permanent parental responsibility (s 17(a) of the Child Care Act providing for an adoption application by “a husband and his wife jointly” read with s 13 of the Civil Union Act 17 of 2006). The High Court, as upper guardian of all minors, would of course always have inherent jurisdiction to confer parental responsibility on a civil union partner or both civil union partners provided it is deemed in the best interests of the child concerned.

Since it is obvious that same-sex civil union partners cannot jointly assume parental responsibility in respect of a naturally conceived child in the same way that heterosexual spouses can, the question is whether and to what extent they can acquire such parental responsibility by means of artificial fertilisation.

### 3.2 *Child conceived by artificial fertilisation*

The effects of artificial fertilisation are currently regulated by section 5 of the Children’s Status Act (82 of 1987) in terms of which –

“[w]hensoever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination”.

In terms of subsection 2 of the same section –

“[n]o right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where –

- (a) that person is the woman who gave birth to that child; or
- (b) that person is the husband of such a woman at the time of such artificial insemination”.

It is at the outset clear that where the civil union partners are both male the above-mentioned provisions can find no application. The male partners can, of course, in this case as well, commission a surrogate mother (either a friend or a stranger) to give birth to a child artificially conceived with sperm donated by either of the two partners. But unless the partners succeed in adopting the child (that is to say, *inter alia*, if the surrogate mother and her spouse, if she is married, consent to the adoption) neither of them will have or be able to acquire any parental responsibility in respect of the child (the “biological father” because he is merely considered the sperm donor and the other partner because he has no relation to the child at all).

The question whether partners in an all-female permanent life-partnership can acquire parental responsibility was already confirmed in the 2003

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Constitutional Court judgment in *J v Director General, Department of Home Affairs* (2003 5 SA 621 (CC)) in terms of which section 5 of the Children's Status Act was declared unconstitutional. The court ([28]) ordered that the words "permanent same-sex life partner" be read in after the word "husband" wherever it appears in the section.

If the term "husband" is given a gender-neutral interpretation in terms of section 13 of the Civil Union Act as being wide enough to include a civil union partner of any sex, it seems as though both partners in an all-female civil union may be able to acquire parental responsibility in respect of a child conceived by artificial fertilisation. The woman who gives birth to the child, conceived with her own gametes or ova donated by her partner or a third (known or unknown) party and sperm from a (known or unknown) donor, will in terms of the common law and subsection 2(a) be deemed the biological and legal mother of the child. The mother's partner will automatically acquire joint parental responsibility with the mother, provided the partner consented to the artificial fertilisation of her birth-giving partner. The child will consequently be considered the child of the female civil union partners and will thus in law have two mothers and no father – the sperm donor is excluded from the equation in terms of section 5(2) of the Children's Status Act quoted above.

As far as the effect of the Civil Union Act on the judgment in *J v Director General, Department of Home Affairs (supra)* is concerned, it is submitted that since the judgment was made on the premise that permanent same-sex life partners could not conclude a legally recognised marriage, they should henceforth be barred from acquiring parental responsibility in terms of section 5 of the Children's Status Act unless they have concluded a valid civil union in terms of the relevant Act. Any other interpretation would be manifestly unjust to unmarried heterosexual life partners who are excluded from the ambit of the section.

#### **4 Child conceived and born from previous marriage or relationship**

If a partner in a same-sex civil union had been previously married to a person of the opposite sex in terms of the Marriage Act or the Recognition of Customary Marriages Act and the divorce court made no order as to the guardianship of the children born from such a marriage (as is generally the case) then the civil union partner may either have been awarded custody of these children or granted reasonable access to them. If the civil union partner never married the mother of his child, he would not automatically have any responsibility in respect of such child but could have been vested with aspects of parental responsibility by the High Court in terms of the Natural Fathers of Children Born Out of Wedlock Act. Apart from these two possibilities a partner in a same-sex civil union may also have acquired parental responsibility by an order of the High Court in terms of its inherent jurisdiction, or by the children's court ordering that the child be placed in foster care with the partner or by the granting of an adoption order in favour

of the partner. In all these cases the legal parent's same-sex civil union partner will be a stranger in law to the child in respect of whom the legal parent has acquired parental responsibility. The only way in which the civil union partner can acquire shared parental responsibility is by means of an adoption order in respect of these children.

## 5 The (new) Children's Act 38 of 2005

The position outlined above will in certain respects change dramatically once the Children's Act comes into operation (according to all indications not before 2008).

### 5.1 *Female civil union*

In terms of this Act the biological mother of a child will still have full parental responsibility in respect of "the child"(s 19(1)). Since the rights of a child conceived by artificial fertilisation are regulated specifically elsewhere in the Act (s 40), it may be assumed that "the child" refers to the naturally conceived child of the mother. The legal position of the same-sex civil union partner of the mother *vis-a-vis* the child born to her partner will, however, be much improved in terms of the new Act.

The Children's Act now makes it possible for a mother or "other person who has parental responsibility in respect of a child" to enter into an agreement providing for the acquisition of parental responsibility with "any other person having an interest in the care, well-being and development of the child" (s 22). The mother or other person may confer upon the other person only "those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such an agreement" (s 22(2)). The parental responsibilities and rights agreement will only take effect if it is registered with the family advocate or made an order of the High Court, divorce court or children's court that must consider the agreement in the best interests of the child (s 22(4)). The parental rights agreement will in practice thus have the effect of conferring joint or co-responsibility on the same-sex civil union partner with whom the agreement is concluded. A mother of a child may thus arguably confer full parental responsibility of her child upon her female partner by mere agreement if sanctioned by the family advocate or court in terms of this provision. A civil union partner of the mother can, in addition, be assigned parental responsibility by an order of court as a person "having an interest in the care, well-being or development" of the child. The High Court, a divorce court in divorce matters or the children's court may, in terms of section 23, assign the contact (previously access) and care (previously custody) to the partner provided, *inter alia*, it is deemed in the best interests of the child. Only the High Court can assign guardianship in respect of a child on the same basis (s 24(1) and (2)). In an application for guardianship of a child who already has a guardian the applicant must, however, "submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child" (s 24(3)). These provisions will thus, in the absence of a parental

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rights and responsibilities agreement, make it possible for a partner in a same-sex civil union to acquire and share parental responsibility (or aspects thereof) with the mother by order of court.

## 5.2 *Male civil union*

As far as the biological father of a child is concerned, the Children's Act extends the ways in which he can acquire parental responsibility automatically beyond the scope of a marriage, to cases where such father –

- “(a) is living with the mother in a permanent life-partnership at the time of the birth of the child (s 21(1)(a));
- (b) regardless of whether he has lived or is living with the mother –
  - (i) consents to be identified or successfully applies 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 (s 21(1)(b)).”

Subsection (a) is clearly limited to heterosexual life-partnerships and would thus not affect same-sex civil union partners (these provisions refer to the biological “father” who is or was living with the biological “mother”). The biological father of the child may, however, in terms of subsection (b), acquire parental responsibility of his child automatically even if he is not married to or living with the mother of the child, provided he shows a commitment to the child as outlined in subsection (b) (the provision is ambiguous since it is not clear whether the requirements are stated in the alternative as proposed by the South African Law Commission (Discussion Paper 103 on the *Review of the Child Care Act* Project 110 December 2001), or should be read as being cumulative because of the use of the word “and” before the last requirement). If one of the civil union partners acquires parental responsibility as the biological father of the child in this way, the possibilities of his same-sex partner acquiring parental responsibility in respect of the child are similar to those of the same-sex civil union partner of the mother of a child. A biological father who has automatically acquired parental responsibility in terms of section 21(1)(b) may thus also confer the same responsibilities and rights upon his male civil union partner by means of a parental responsibilities and rights agreement (s 22). The same-sex civil union partner of the father may similarly apply to court for the assignment of parental responsibility to him by order of court in terms of sections 23 and 24, discussed above.

If neither of the civil union partners has parental responsibility in respect of the child, an adoption order would be the most likely option, despite the fact that they may presumably (it seems separately, not jointly) approach the court to share guardianship and/or contact and/or care in respect of the same child in terms of sections 23 and 24.

### 5.3 *Child conceived by artificial fertilisation*

The possibilities of same-sex civil union partners acquiring parental responsibility in respect of a child conceived by means of artificial fertilisation in terms of the new Children's Act are identical to those which currently exist (a provision similar to s 5 of the Children's Status Act has, apart from certain changes in terminology, such as "fertilisation" instead of "insemination" and "spouse" instead of "wife" or "husband", which have been incorporated in s 40 of the Children's Act). It is interesting to note that the legislator has retained the use of the word "husband" in the equivalent of subsection 5(2)(b) of the Children's Status Act. In view of the substitution of the term in the rest of the section one can only assume that this was an oversight. The fact that the provision only refers to the possibility of a "spouse" acquiring responsibility in respect of an artificially conceived child is, in my view, further support for the contention that unmarried same-sex life-partners are, despite the judgment in *J v Director General, Department of Home Affairs* (*supra*), excluded from the ambit of section 40 of the Children's Act.

The fact that the Act will henceforth formally regulate surrogacy will, however, have a huge impact in cases where same-sex civil union partners (male or female) commission a surrogate mother to give birth to a child genetically related to at least one of the partners. Once the Act comes into operation the commissioning civil union partners will no longer have to adopt the commissioned child to acquire parental responsibility. As long as the surrogate motherhood agreement is in all respects valid in terms of the Act (s 295) and confirmed by the High Court (s 292), the partners will, generally speaking, be regarded as the parents of the child from the moment of the child's birth (s 297).

## 6 Conclusion

Despite the fact that same-sex civil union partners cannot procreate in the traditional sense of the word and can thus not both automatically acquire joint parental responsibility as the biological parents of the child, it is evident that the new provisions of the Children's Act have given such partners considerable scope in achieving parental status. Most of these options include the assignment of parental responsibility to one or both (same-sex) civil union partners by order of court or subject to the prior scrutiny by a family advocate. To what extent the realisation of these possibilities will be deemed in the best interests of the child or children concerned, however, remains to be seen.

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