Can a parental responsibilities and rights agreement be used as a means to circumvent the rights of an existing parent when conferring parental responsibilities and rights on an interested third party?*

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OPSOMMING

Kan 'n ooreenkoms oor ouerlike verantwoordelikheid en regte gebruik word as 'n meganisme om 'n bestaande ouer se regte te omseil wanneer ouerlike verantwoordelikhede en regte aan 'n belanghebbende derde party oorgedra word?

Die oogmerk van artikel 22 van die Kinderwet 38 van 2005 was om die verkryging van ouerlike verantwoordelikhede en regte te vergemaklik waar die moeder of ander houer van ouerlike verantwoordelikhede en regte instem om dit met die artikel 21-vader of belanghebbende derde party te deel. Die doel van hierdie artikel is om vas te stel in watter mate 'n ooreenkoms ingevolge artikel 22 oor ouerlike verantwoordelikheid en regte gebruik kan word as 'n meganisme om die regte van 'n bestaande ouer te omseil wanneer sodanige verantwoordelikheid en regte aan 'n belanghebbende derde party oorgedra word. Die antwoord op hierdie vraag hang grotendeels daarvan af of artikel 22 eng of wyd geïnterpreteer word. Die gebruik van die voegwoord "of" tussen die verskillende kategorieë van persone wat baat kan vind by die ooreenkoms maak beide interpretasies moontlik. Die Kinderwet verskaf ook geen klarigheid oor die bedoelde interpretasie nie en by publikasie van die artikel is daar ook geen relevante regspraak hieroor nie. Die artikel begin met 'n ondersoek na die wetgewer se beoogde doel met die insluiting van artikel 22 in die Kinderwet en gaan dan voort om die impak van 'n eng en wye interpretasie van die bepaling op die belange van die kind en ouer te ondersoek. Daar word vlugtig na die Engelse Kinderwet verwys om vas te stel hoe dié jurisdiksie kinders en ouers se regte beskerm onder soortgelyke omstandighede. Met verwysing na die daargestelde beskermingsmeganismes in die Engelse Kinderwet, identifiseer die artikel die leemtes in artikel 22 wat ontstaan uit die wye interpretasie en maak voorstelle om die moontlike nadele wat uit so 'n interpretasie kan volg, aan te spreek.

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1 INTRODUCTION

The acquisition of parental responsibilities and rights has to a large extent been codified in the Children's Act.[1] Although not expressly identified in such terms in the Act, parental responsibilities and rights can be acquired in one of two ways – either automatically or by assignment.[2] Until the enactment of the Children's Act, a parent or person who had not acquired responsibilities and rights automatically, *ex lege*, at the birth of the child, could only acquire such rights by order of court.[3]

Section 22 of the Act now makes provision for an additional, more informal way of acquiring parental responsibilities and rights. The creation of an opportunity for the acquisition of parental responsibilities and rights by means of an agreement is a legislative innovation which did not exist in terms of the common law.[4] This form of acquisition of parental responsibilities and rights is deemed *sui generis*.[5] For ease of reference the relevant part of the section is quoted here in full:

> "(1) Subject to subsection (2), the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with –
>
> (*a*) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order; or
>
> (*b*) any other person having an interest in the care, well-being and development of the child.
>
> (2) The mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement upon a person contemplated in subsection (1) those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such an agreement.

1 38 of 2005. Any reference to the "Children's Act" or "Act" shall be to the Children's Act 38 of 2005, unless expressly indicated otherwise.

2 See *CM v NG* 2012 4 SA 452 (WCC) para [24] for confirmation of this interpretation of the provisions in the Act. To make the distinction clearer, the headings of these sections will be amended by the proposed Children Amendment Bill 2018 to read 'Automatic acquisition of parental responsibilities and rights' and 'Acquisition and loss of parental responsibilities and rights' respectively: see Heaton "Notes on the proposed amendment of section 21 of the Children's Act 38 of 2005" 2019 *PER/PELJ* 1 5.

3 This power is derived from the High Court's inherent jurisdiction as upper guardian of all minors.

4 This acquisition of parental responsibilities and rights can be distinguished from the common-law doctrine *in loco parentis* where a person could act on behalf of a parent by way of an informal agreement or understanding where such person can temporarily exercise parental responsibilities and rights on behalf of the parent. The latter is now regulated by s 30(3) of the Act in terms of which a co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.

5 Alluded to by Lowe & Douglas *Bromley's family law* 10 ed (2007) 412. See also Louw *The acquisition of parental responsibilities and rights* (LLD thesis, University of Pretoria 2009) (hereafter "Louw *Thesis*") 308n418.

(3) A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.

(4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if –

(*a*) registered by the family advocate; or

(*b*) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.

(5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interest of the child."

The section makes provision for two categories of persons with whom the mother or a person holding parental responsibilities in respect of a child (hereinafter referred to as "a person who has PR&R") may conclude a parental responsibilities and rights agreement (hereinafter referred to as a "PR&R agreement"). The first category consists of a biological father who has not acquired parental responsibilities and rights in any other way, and the second category includes "any other person having an interest in the care, well-being and development of the child" (hereinafter referred to as "an interested third party").[6]

A PR&R agreement must be in the prescribed format and contain the prescribed particulars.[7] The PR&R agreement must be registered with the Office of the Family Advocate or made an order of court to become effective.[8] Before being registered or made an order of court, the family advocate or the court concerned must be satisfied that the PR&R agreement is in the best interests of the child and must accordingly apply the exhaustive and comprehensive "checklist" of criteria contained in section 7 read with section 9 of the Children's Act.[9]

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6 As discussed by Heaton "Parental responsibilities and rights" in Skelton & Davel (eds) *Commentary on the Children's Act* (2015) RS 7 3-16.

7 According to reg 7(1)(*a*)–(*d*) of the General Regulations Regarding Children, 2010 published in GN R261 *GG* 33076 of 1 April 2010, the agreement must be in writing by utilising Form 4 and must contain particulars of those aspects pertaining to the care of, contact with, financial responsibility for the child; and contain incidental matters related to the upbringing of the child or children that are being conferred by the mother or other person having PR&R upon the biological father or any other interested third party.

8 S 22(4). According to s 22(7) only the High Court may confirm, amend or terminate a PR&R agreement that relates to the guardianship of a child because the High Court has exclusive jurisdiction regarding matters relating to the guardianship of a child (in terms of s 45(3)). Many authors have criticised the exclusive retention of the High Court's jurisdiction in relation to guardianship: Louw *Thesis* 326 and Gallinetti "The Children's Court" in Skelton & Davel (eds) *Commentary on the Children's Act* (2015) RS 7 4-4. The Children's Amendment Bill 2018 seeks to address this issue by proposing the deletion of s 22(7).

9 The family advocate is required to provide evidence of this process in Form 5 (reg 7(6)). Form 5 makes provision for the family advocate to confirm that the contents of the agreement have been furnished to the child or children, bearing in mind their age, maturity and stage of development. The family advocate must also on the form confirm (in terms of reg 8(3)(*a*) and (*b*)) that the child or children has/have been given an opportunity to express his/her/their views and that those views were given due consideration. Where the child or children is/are not in agreement with the contents of the agreement, this should be recorded in the agreement and the matter referred for mediation by a family advocate, social worker, social service professional or other suitably qualified person (reg 8(4)). S 9 echoes the wording of s 28(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") and endorses the paramountcy of the child's best interest standard: see

continued on next page

The main aim of this article is to investigate to what extent the law allows one parent to circumvent the rights and interests of the other parent when conferring parental responsibilities and rights on an interested third party[10] by means of a PR&R agreement. The focus will therefore only be on section 22(1)(*b*) of the Act. The outcome of this investigation, in the first place, depends on whether section 22 is interpreted to apply in a narrow or wide sense. As will be explained below, a narrow interpretation would make the different categories mentioned in the section mutually exclusive. The application of section 22 in this restrictive manner could generally speaking not be questioned as being undesirable or prejudicial to the interests of the child becoming the subject of a PR&R agreement. The problem, however, is that the section is also susceptible to a wide interpretation. The reason for this is that the inclusion of the word "or", linking the various categories of persons in the section, can just as well be used to justify a liberal or broad interpretation of the section. The Children's Act does not provide clarity on the intended application of section 22 and there is, as far as we are aware, no relevant reported case law specifically dealing with this matter.[11]

The article will commence with an investigation into the objectives for including section 22 in the Children's Act, then continue by considering the impact of the narrow and wide application of the section. A brief description of the law under the English Children Act of 1989 will be provided to illustrate how the rights of an existing parent could be protected when an interested third party stands to acquire parental responsibility and rights by means of an agreement. Based on the protective measures found in English law, the article will conclude by recommending that similar measures be introduced in South Africa to prevent the circumvention of the rights of an existing parent when conferring parental responsibilities and rights on an interested third party by means of a PR&R agreement. A preference for a qualified narrow application of the section is furthermore submitted pending legislative amendment to the section.

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in this regard, Schäfer *Child law in South Africa: Domestic and international perspectives* (2011) 157; Boezaart in Skelton & Davel (eds) *Commentary on the Children's Act* (2015) RS 7 2-8; Heaton "Parental responsibilities and rights" in Boezaart (ed) *Child law in South Africa* 2 ed (2017) 88.

10 This category is obviously very broad. Some authors have attempted to provide a list of persons that could fall within the scope of this category, such as grandparents, care-givers, aunts, uncles, siblings, stepparents, teachers, social workers and doctors: See Bosman-Sadie, Corrie (with Swanepoel) *A practical approach to the Children's Act* (2013) 48 and Heaton in Boezaart (2017) 87. In *CM v NG* 2012 4 SA 452 (WCC) para 38 the court stated that interested third parties may vary from unmarried parents to grandparents to employers of parents and care-givers.

11 Only two cases were found in which a PR&R agreement is mentioned: *Minister of Public Service and Administration v Ngwenya* 2012 JOL 29398 (SCA), which dealt with the issue of maintenance and whether or not the Department of International Co-operation and International Relations was obliged to interpret their own internal regulations as also extending to maintenance for dependants in terms of a PR&R agreement, and *PDP v MPDP* 2013 JOL 30128 (ECP), which was a divorce matter where one of the parties was not the biological parent of the children and a PR&R agreement was entered into to afford the divorced stepparent contact rights to the child concerned.

2 THE LEGISLATOR'S OBJECTIVES FOR INTRODUCING PARENTAL RESPONSIBILITIES AND RIGHTS AGREEMENTS

It is not apparent from studying the available sources[12] what exactly prompted or motivated the legislator to include section 22, more specifically section 22(1)(*b*), in the Children's Act. From the various sources that were consulted, it would seem as though any or all of the following factors could have influenced the legislator's decision to incorporate section 22 in the Children's Act: (a) To create an acceptable middle-ground between those representing society who argued that all unmarried fathers must automatically acquire parental responsi-bilities and rights and those who opposed this notion in its entirety.[13] Section 21[14] does not afford all unmarried fathers the opportunity to acquire automatically parental responsibilities and rights.[15] Section 22 accordingly provides these remaining "unqualified"[16] fathers with an opportunity still to acquire parental responsi-bilities and rights without the encumbrance of approaching the court, provided the mother agrees thereto.[17] (b) In order to ensure legal certainty in the case of same-sex partners in a permanent life partnership,[18] by affording the non-biological parent the opportunity to acquire parental rights and responsibilities

12 The following publications of the South African Law Reform Commission were consulted: First Issue Paper 13 on the *Review of the Child Care Act* Project 110 (18 April 1998) (SALRC *Issue Paper* (1998)), Discussion Paper 103 on the *Review of the Child Care Act* Project 110 (23 December 2001) (SALRC *Discussion Paper* (2001)) and Report and Draft Children's Bill on the *Review of the Child Care Act* Project 110 (December 2002) (SALRC *Report* (2002)). The South African Law Reform Commission was formerly called the South African Law Commission. The name change became effective on 17 January 2003 in terms of s 5 of the Judicial Amendment Act 55 of 2002. Throughout this article reference will be made to the "SALRC", even though some of the publications (such as those relating to the *Review of the Child Care* Act) were published before the name change. The minutes of the meetings of the Committee on Social Development (Minutes of CSD) available at www.pmg.org.za were also consulted.

13 SALRC *Report* (2002) para 7.4.1 ff (see in particular the recommendation made under para 7.4.2).

14 In terms of s 21, committed unmarried fathers now automatically acquire parental respon-sibilities and rights if they comply with the listed statutory requirements. The significant legal reform stemming from the inclusion of s 21 in the Act has been welcomed by many scholars and commended as one of the major legal reforms of South Africa's law of parent and child: Boniface *Revolutionary change to parent-child relationship in South Africa with specific reference to guardianship, care and contact* (LLD thesis, University of Pretoria 2007) (hereinafter "Boniface *Thesis*") 503; Louw "The constitutionality of a biological father's recognition as a parent" 2010 *PER/PELJ* 156 and Heaton in Skelton & Davel (2015) 3-11.

15 Unlike married fathers who automatically acquire parental responsibilities and rights if they are or were married to the mother of the child.

16 'Unqualified', for purposes of this article, means the father who failed to meet the requirements as set out in s 21 of the Act.

17 Most authors seem to suggest that this is the main rationale behind s 22: See Schäfer (2011) 246n168 and Skelton "Parental responsibilities and rights" in Boezaart (ed) *Child law in South Africa* (2009) 80 fn 82.

18 This was before the Civil Union Act 17 of 2006 came into force allowing such partners the choice to formalise their union. In terms of s 13 of this Act a spouse includes a civil union partner. With regards to a child conceived by artificial fertilisation, s 40 of the Children's Act provides that the "spouse" (but not the permanent life partner) of the woman who was artificially fertilised will automatically acquire parental responsibilities and rights upon the birth of the child: Heaton in Skelton & Davel (2015) 3-48.

in respect of a child by entering into an agreement with the other partner without the encumbrance of approaching the court.[19] (c) To give recognition to the large number of step-parents and "reconstituted" families, by establishing a less formal and more easily accessible mechanism whereby step-parents could acquire parental responsibilities and rights without the necessity to apply to court for an order assigning parental responsibilities and rights, or in the more extreme case, apply for the adoption of the child.[20] (d) To address the problem relating to the acquisition of parental responsibilities and rights by non-parents and the central issues revolving around the position of *de facto* care-givers.[21]

During the developmental phase of the Children's Act, divergent submissions were received on these issues.[22] Based on these submissions, it was expressly recommended that non-biological parents should not be able to acquire parental responsibilities and rights simply by entering into an agreement with the biological parent or parents.[23] Therefore, the provision that was initially proposed, limited the conclusion of a PR&R agreement to an "unqualified" unmarried father.[24] The SALRC[25] was of the view that the legal position of non-biological

19 SALRC *Discussion Paper* (2001) para 8.5.2.4.

20 *Idem* para 8.5.3.1. The SALRC (at 8.5.3.2) also took cognisance of the fact that England, at that time, was in the process of extending the scope of their parental responsibility agreement to stepparents. In SA, stepparents do not automatically acquire parental responsibilities and rights in respect of their stepchildren, although a stepparent may in certain cases be obliged to maintain their stepchild as was the case in *MB v NB* 2010 3 SA 220 (GSJ) para [20].

21 According to s 1(1) of the Children's Act, "care-giver" means "any person other than a parent or guardian, who factually cares for a child" and could include stepparents, grandmothers, extended families, social parents and the like. Recently enacted legislation has given some recognition to the reality of the diverse family forms found in this country and has facilitated the legal recognition of *de facto* carers, thus obviating the need for a PR&R agreement in this regard: See discussion by Louw "Children and grandparents: An overrated attachment?" 2013 *Stellenbosch LR* 618 624. Probably the best example of this trend can be found in the provisions of the Social Assistance Act 13 of 2004 allowing a child support grant to be paid to the child's "primary care-giver" which is defined broadly. For other examples, see the broad definition of "parent" in the SA Schools Act 84 of 1996 and s 32(2) of the Children's Act concerning care of a child by a person who does not hold PR&R.

22 Interesting is the specific reference to the submissions made by the National Coalition for Gay and Lesbian Equality and the following view expressed by the Coalition: "A biological parent who refuses to enter into a *parental responsibility agreement* (emphasis added) with a *de facto* caregiver who fulfils an important role in the life of a particular child, may be acting in violation of the child's best interests." It therefore seems as though this opinion would have supported the view that the opportunity to acquire parental responsibilities and rights by agreement should be extended to third parties: See SALRC *Discussion Paper* (2001) para 8.5.3.3.

23 See the Parliamentary Monitoring Group minutes of the Portfolio Committee on Social Development meeting dated 14 Nov 2003 available at www.pmg.org.za ("PMG minutes of 14 Nov 2003"). From the chronological discussion in the SALRC's *Report* (2002) it appears as if the main argument against the extension of PR&R agreements to *de facto* care-givers was the possibility of allowing non-South African citizens caring for children to circumvent the adoption procedure by obtaining guardianship in respect of a child by means of a PR&R agreement with the biological parent of the child (even if the agreement would have had to be sanctioned by the High Court): SALRC *Report* (2002) para 7.4.2.

24 The proposed s 22(1) contained the exact wording of the current s 22(1)(*a*).

25 See note 12 above concerning the name change of the SALRC.

de facto care-givers should be "spelt out" elsewhere in the new children's statute, as has been done in other jurisdictions.[26]

Section 22 remained unaltered in the various subsequent amendments to the Children's Bill.[27] During a meeting held by the Social Development Portfolio Committee in 2005, it was pointed out by the SALRC that no objections had been received to the notion that section 22, as contained in the draft Children's Bill, should be extended to persons other than "unqualified" unmarried fathers.[28] It seems as though the eventual extension of section 22 was based on a lack of opposition to include interested third parties, rather than a consideration of the benefits of such inclusion.[29] Paragraph (*b*), inserted at this point in section 22(1), was retained during all further amendments and alterations to the Children's Bill[30] and became enforceable with the enactment of the Children's Act.

3 DIFFERENT INTERPRETATIONS OF SECTION 22

3.1 Narrow interpretation

A narrow interpretation of the section would entail that the mother, unilaterally, could enter into a PR&R agreement only with the biological father; and only if there is no biological father, with an interested third party. Only if there is no mother, the other person who has PR&R would acquire the same narrow option available to the mother. It is accordingly a question of either the mother *or* the person who has PR&R with either the biological father *or* the interested third party. Such a narrow and restrictive interpretation would almost seem to exclude the possibility of a PR&R agreement when there is already more than one co-holder of PR&R in respect of a child.

The use of the word "or" between the various categories could be interpreted as support for a narrow interpretation.[31] The section makes provision for the "mother" separately from any other person who has PR&R. Should the legislator have intended the scope of section 22 to apply widely, it is uncertain why the legislator would have deemed it necessary to list the mother disjunctively from any other person who has PR&R. If a disjunctive reading was not the intention, the legislator could simply have phrased section 22(1) to read:

> "Any co-holder of parental responsibilities and rights may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement...".

26 SALRC *Discussion Paper* (2001) para 8.5.3.4 where reference was made to provisions in the English legislation which resulted in the inclusion of s 32 in the Children's Act.

27 B70–2003 re-introduced. See the respective PMG minutes of 4 August 2004 and 15 February 2005. See also the summarised discussion by Boniface *Thesis* 429 ff.

28 See the PMG minutes of 18 February 2005. This recommendation most probably emanated from the decision to include the current s 25 which closed the above discussed loophole and provides that an application for guardianship in terms of s 24 by a non-citizen must be regarded as an inter-country adoption, now regulated in chapter 16 of the Act.

29 See the PMG minutes of 18 February 2005 as mentioned in note 28 above.

30 Amended Bill of May 2005.

31 Skelton in Boezaart (2009) 80) seemed to support this viewpoint but it is not made clear whether the author of the chapter in the latest edition of this source shares this view: See Heaton in Boezaart (2017) 87 in this regard. Interestingly, Schäfer (2011) (at 246) seems to interpret s 22 to apply widely.

In terms of a narrow interpretation of the section, the inclusion of the words "... *or* other person who has parental responsibilities and rights" in section 22(1) could perhaps have been intended to make provision for a scenario where the child does not have a mother or where the mother may not be competent to confer responsibilities and rights on another person.[32] Under these circumstances, the other person who has PR&R could, for example, be the biological father of the child who acquired parental responsibilities and rights automatically at birth[33] or another person who was vested with parental responsibilities and rights in terms of the mother's will,[34] or by order of court.[35]

As will become clearer after the discussion of the impact of a wide interpretation of the section, the application of section 22 in this restrictive manner could generally speaking not be questioned as being undesirable or prejudicial to the interests of the child becoming the subject of a PR&R agreement.

3.2 Wide interpretation

As already mentioned in the introduction, the inclusion of the word "or" between the different categories of persons referred to in section 22 can just as well be used to justify a liberal or wide interpretation of the section. A wide interpretation would also seem to be supported by the aim of the legislator[36] to allow for multiple co-holders of parental responsibilities and rights in respect of the same child under the Children's Act.[37]

The impact of a wide interpretation of section 22 would allow a mother and any other person who has PR&R to conclude a PR&R agreement with the biological father of the child and any interested third person. This could potentially create a situation where PR&R agreements could be entered into with a variety of persons without participation of all interested parties. The mother, for example, could enter into a PR&R agreement with someone other than the father of the child (such as her new partner) and any co-holder could enter into a PR&R agreement with any other interested person whom he or she deems suitable, without consulting the mother or the father. The ramifications of such possibilities are enormous. The following is a list of the shortcomings of the current section 22 and the reasons why a wide interpretation of section 22 could be

32 As contemplated by s 19(2) of the Act where the mother is a minor and does not have guardianship in respect of her child.

33 In terms of s 20 or 21.

34 In terms of s 27. Eg the mother died and appointed her parents as the child's guardian in her will, who will acquire full parental responsibilities and rights by testamentary appointment. Several years later the father surfaces and now wishes to form a relationship with the child. The grandparents, in their capacity as the "other person(s) who has PR&R", may agree to confer contact on the father by means of a PR&R agreement.

35 In terms of s 23 and/or 24.

36 The SALRC indicated that, by allowing more than one person concurrently to exercise parental rights and responsibilities or components thereof in respect of a child, their objective is to cast the net widely in an attempt to extend the range of possible care-givers beyond the traditional nuclear family: SALRC *Report* (2002) para 7.9.2.

37 As contained in s 30(1). S 30(4) read with s 30(3) provides that no co-holder shall "forfeit" their parental responsibilities and rights just because someone else acquired it by agreement, which explicitly creates the possibility for multiple persons to hold parental responsibilities and rights in respect of the same child: Louw 2013 *Stellenbosch LR* 618 633.

detrimental to the interests of both the children in respect of whom a PR&R agreement is being considered as well as the existing parents of such children.

3.2.1 *No provision for inclusion of personal particulars of existing co-holders*

The prescribed forms make no provision for the inclusion of an existing co-holder's personal particulars.[38] Under a wide interpretation, it is uncertain how a "non-contracting co-holder"[39] will be contacted to obtain information which will surely be relevant when applying the section 7 "checklist" of criteria important to the application of the best interests standard.[40] A number of factors mentioned in section 7 would require a consideration of the child's relationship with an existing parent and the capacity of that parent to provide for the needs of the child.[41]

This "defect" in the prescribed forms may create opportunities for possible abuse. In the first instance, the family advocate or court will have to rely on information as provided by the "conferring co-holder"[42] of parental responsibilities and rights. This information will most certainly be geared towards achieving successful endorsement of the PR&R agreement when an interested third party stands to acquire parental responsibility and rights, especially if the conferring co-holder knows beforehand that the non-contracting co-holder (like a section 21(1)(*a*) father) will not approve.[43] Secondly, an existing co-holder may not become aware of the PR&R agreement until after its registration.[44]

38 See Form 4. The only exception is contained in part E which pertains to the matter of guardianship. The heading of part E reads as follows: "Details of application for registration of parental responsibilities and rights agreement to be made an order of court", which requires the biological father's signature.

39 In other words, the co-holder who is not a party to the PR&R agreement like the s 21 father.

40 The courts have supported a holistic approach when dealing with care and contact related disputes. See, in this regard, *CM v NG* 2012 4 SA 452 (WCC) para 66; *DM v LB* Unreported Case No 272/2017 ZAFSHC 122 para [8]; and *BK v FS* 2018 JOL 40578 (ECP) para 32. Referring with approval to a 1959 case, the court in *MM v AV* 2015 JOL 34964A (WCC) para 91 observed as follows: "It seems to me that the court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. For while certain aspects taken separately might appear to be of no real importance, in combination they might build up a strong case in favour of one or other conclusion."

41 S 7(1)(*a*), (*b*) and (*c*). S 7(1)(*d*) would also require the court or family advocate to consider the likely effect of any change in the child's living circumstances, including the likely effect on the child of any separation from a parent or other significant person in the child's life. Thus, while a s 7 investigation should theoretically involve a consideration and evaluation of the interests of an already existing co-holder, such consideration is not expressly made a precondition for the approval of a PR&R agreement.

42 The mother *or* other person who has PR&R.

43 The mother may indicate that the s 21 father is uninvolved and cannot be traced or conceal the fact that there is a s 21 father. Consequently, the sanctioning authority will apply the s 7 factors in the context of the mother, child, and interested third party only, without due consideration of any implications pertaining to the parent-child relationship in relation to the s 21 father and the child.

44 Reg 7(5) provides that only *after* the agreement is entered into, copies must be filed to "enable each co-holder of parental responsibilities and rights to retain a copy of the registered agreement".

The courts[45] have emphasised the child's right to parental care and increasingly focuses on the need for a child to enjoy parental care from both parents, irrespective of their marital status.[46] It is evident that this "defect" in the formalities create the possibility for children to be deprived of an able and willing parent's care in favour of an interested third party.

3.2.2 *Lack of measures to ensure child-centred decision-making*

To prevent individual persons who hold parental responsibilities and rights in respect of a child from making unilateral "major decisions" involving that child, section 31(2)(*a*) provides that prior to making a "major decision", such a person must give due consideration to any views and wishes of any other co-holder.[47] Section 31(1)(*b*) further contains a list of what is deemed "major decisions" which, amongst others, include any decision which is likely to change significantly, or to have an adverse effect on, the child's living conditions and personal relations with a parent.[48] While entering into a PR&R agreement would clearly qualify as a major decision and should thus place an obligation on a parent to consult with an existing co-holder of PR&R, the section itself does not expressly contain any similar injunction.

It is, therefore, possible that the child's mother could use section 22 to enter into an "exclusive substitute"[49] PR&R agreement with an interested third party without consulting and involving the child's father. The mother may perhaps feel that the biological father is not as committed as he could be and that it will be in "her" child's best interests if she shares the parental responsibility component of care with her trusted friend,[50] for example.[51] The court in *MM v AV*[52] stated that

45 Most notably in *MM v AV* 2015 JOL 34964A (WCC) para 31. The court further stated that: "[T]he provisions of s 21 of the Children's Act are nothing new: they simply serve to 'codify' the legal position which previously pertained. What is important to note is that this is entirely consistent with the 'best interests of the child' principle enshrined in the Constitution of the Republic of South Africa. Section 28 of the Constitution stipulates that in all matters concerning a child it is the child's best interests which are paramount and that every child has the right to parental care".

46 As was illustrated by the court in *KLVC v SDI* 2015 1 All SA 532 (SCA) para 19. In *P v P* 2007 5 SA 94 (SCA) para 26 the Supreme Court of Appeal stated that courts have emphasised that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era, which approach is consistent with the equality principle enshrined in s 9 of the Constitution. See also *Ex Parte Critchfield* 1999 3 SA 132 (W) and *Van der Linde v Van der Linde* 1996 3 SA 509 (O) for the rejection of the so-called maternal preference rule.

47 Heaton in Boezaart (2017) 96. Bonthuys is critical of the inclusion of ss 30 and 31 and submits that although these clauses attempt to forestall and minimise parental conflict, they are formulated very widely and vaguely, and may in fact create the opportunity for parental conflict: Bonthuys "Parental rights and responsibilities in the Children's Bill 70D of 2003'' 2006 *Stellenbosch LR* 482 490.

48 According to *J v J* 2008 6 SA 30 (C) para 35, the first case in which the court had to interpret s 31(2)(*a*), it was held that once a parent has given consideration to the views and wishes of the other parent, such parent may act independently.

49 For example, by substituting the mother with the maternal grandmother or trusted family friend as primary care-giver of the child and excluding the able and willing s 21 father from the opportunity to take care of the child.

50 As was the case in a care and contact dispute related matter. The PR&R agreement in question was registered as Van Zyl, with Reference Number 03/2016 at the Office of the Family Advocate Johannesburg (hereinafter the "*Van Zyl* matter"). The mother conferred

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unless the father expressly fails to act in the child's best interests, the mother cannot simply elect not to "co-parent" with the father. The court placed emphasis on our established legal principles concerning the paramountcy of the child's best interest standard and stated that where arrangements are inconvenient to a parent, yet serve a child's best interests, that inconvenience will be outweighed by the interests of the child.[53]

It is evident that a wide application under the current content of section 22 makes an "exclusive substitute" arrangement possible that may not be in the child's best interest, especially when child-centred decisions are not made due to ongoing irreconcilable differences between the parents.

3.2.3 *Absence of measures to avoid parental conflict*

There is little doubt that an "exclusive substitute" arrangement, which was not reached by mutual consent with the other parent from the outset, may create or even aggravate existing parental conflict. Many concerns have been raised regarding the negative impact that child-related disputes have on children's well-being[54] and the reality in South Africa is that child-related disputes are widespread.[55] The court has always endeavoured to protect the child from the harmful effects of ongoing family conflict, even if it requires the dismissal of an interested third party's claim for care and contact.[56]

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care on a family friend, circumventing the rights of the s 21(1)(*a*) father who was able and willing to care for the child. In terms of the PR&R agreement that was registered, the child will live with the family friend indefinitely and the father can only exercise his right to contact with the child.

51 It seems to be quite a common occurrence if the numerous cases emanating from s 21(1)(*b*) are anything to go by. In many of these cases the mother deemed the commitment by the father inadequate: See Louw 2010 *PER/PELJ* 194 and "Revisiting the limping parental condition of unmarried fathers" 2016 *De Jure* 199 201 ff for a comprehensive discussion of the case law in this regard. Bosman-Sadie & Corrie (2013) 42 also mention the fact that in the past many grave injustices were committed "when parents exerted parental authority without the slightest thought to the best interests of the child". According to these authors unmarried fathers, grandparents and other well-meaning people important to the child "were frequently held ransom in the past, as a result of the thoughtless acts or deliberate blackmailing of an unfit mother or father".

52 2015 JOL 34964A (WCC) para 95. A similar approach was adopted in *Bosch v Van Vuuren* Unreported Case No 06504/12 (SGHC) where the court concluded that it is in the child's best interest to be cared for and have contact with both her parents, regardless of the fact that the mother subjectively felt that the father lacked the "necessary parenting skills".

53 *MM v AV* 2015 JOL 34964A (WCC) paras 95–99.

54 Corneli "What is the 'voice of the child' and why should we adhere to it?" July 2019 *De Rebus* 29. The courts also emphasise this fact by quoting *verbatim* from the remarks by expert witnesses, such as psychologists and social workers on the negative effect parental conflict has on children. See *Townsend-Turner v Morrow* 2004 2 SA 32 (C) para 46; *Bosch v Van Vuuren* Unreported Case No 06504/12 (SGHC) para 25 and *DM v LB* Unreported Case No 272/2017 ZAFSHC para 33. See also the executive summary of the SALRC *Family Dispute Resolution: Care of and Contact with Children* Issue Paper 31 Project 100D (2015) in relation to divorce and separation of parents and the concerns raised with regard to the alarming rise in parental conflict.

55 In *Bosch v Van Vuuren* Unreported Case No 06504/12 (SGHC) para 17 the court pointed out that it deals with matters pertaining to care and contact disputes on a daily basis. See Louw 2013 *Stellenbosch LR* 618 ff for a discussion of cases about conflict between grand-parents and the parents of their grandchild.

56 In *Townsend-Turner v Morrow* 2004 2 SA 32 (C) para 48 the court stated that granting the grandmother contact would therefore place the child "in the middle of a situation which

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By giving committed unmarried fathers the right to become co-holders of parental responsibilities and rights automatically, section 21 has perhaps inadvertently increased the risk of parental conflict in relation to section 22.[57] It is possible that the legislator may have failed to consider the improved position of unmarried fathers under section 21 when the scope of section 22 was extended to interested third parties.[58]

In a comparative study, Schwenzer indicated that in other jurisdictions with a comparable section 22, the consent of both the biological parents are usually required.[59] Section 22 contains no consent provision that could have acted as an additional safeguarding measure to protect the child's best interests, especially in the presence of acrimony between the mother and a section 21 father.[60] Furthermore, the legislator has left it to the endorsing authority to interpret section 22.[61] Although most family advocates would seem to interpret section 22 in a way that implies consent of all the co-holders before a PR&R agreement is endorsed, there is no guarantee of uniformity in this practice.[62]

Even though section 22 would seem to make a substitute agreement possible, there are indications that courts are generally reluctant to assign parental responsibilities and rights to an interested third party – even more so when a

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will confuse him and lead him to feel guilt and divided loyalties that could not possibly be in his best interests". See also *LH v LBA* 2013 JOL 29947(ECG) para 17. In *FS v JJ* 2011 3 SA 126 (SCA) para 52 the court granted the s 21 father care of his child and dismissed the grandparent's application. See Pieterse "*In loco parentis*: Third party parenting rights in South Africa" 2000 *Stellenbosch LR* 324 ff for a discussion of third party parenting rights in South Africa and Boniface *Thesis* 311.

57 The enactment of s 21 has given rise to an increase in the number of applications by s 21 fathers for care and contact as evidenced from the discussions in Louw 2016 *De Jure* 199 ff and Adams *The challenges that unmarried fathers face in respect of the right to contact and care of their children: Can amendments to the current law make enforcement of these rights more practical?* (LLM dissertation, University of Cape Town 2016) 17 ff.

58 During the research phase of the Children's Act, the SALRC *Discussion Paper* (2001) para 8.2.1 specifically referred to statistics indicating that most single-parent households are headed by women and mothers commonly bear full responsibility for caring and rearing children, with little or no material assistance from the father or members of his family. Perhaps the SALRC endeavoured to assist such mothers through the notion of a PR&R agreement to legally share the "responsibility" to care for a child with an interested third party since, according to statistics, it seems as if most unmarried fathers are uninvolved in the upbringing of their children.

59 Schwenzer "Tensions between legal, biological and social conceptions of parentage" December 2007 *EJCL* 1 13. In developing s 22, some commentators asked for parental consent to be made a requirement for the registration of a PR&R agreement: SALRC *Discussion Paper* (2001) para 8.5.3.3. It is not apparent why the SALRC did not implement this recommendation.

60 The omission of such a requirement could thus arguably be challenged on constitutional grounds. See also discussion in para 4 below concerning the consent requirement applied in England.

61 Which is seemingly done in a sporadic manner in practice.

62 There are some indications obtained from informal consultations with practitioners in the field that if, at any stage in the application procedure, it appears that a co-holder does not agree with the intended PR&R agreement, the said application is abandoned and other remedies, such as the assignment of contact and care by court order in terms of s 23, is utilised. Yet, as the *Van* Zyl matter discussed in note 50 above illustrated, not all practitioners interpret s 22 in that way, and the current uncertainty remains open for abuse by parties in care and contact related disputes.

parent objects – unless, of course, it is deemed in the child's best interests.[63] This trend, however, is cold comfort when no information regarding all the existing co-holders are provided and it is generally the overburdened offices of family advocates, and not a court, registering the PR&R agreement.

3.2.4 *Lack of measures to promote conciliation*

In addition to the lack of collaborative measures mentioned above, section 22 also does not contain any measures to promote conciliation which is a central object of the Children's Act.[64] The conclusion of a PR&R agreement can clearly affect the interests of a number of role players – parents or persons who already have parental responsibilities and rights, the child him- or herself and a biological father or other person who does not have parental responsibilities and rights. Despite the possible impact that a PR&R agreement may have on the exercise of the parental responsibilities and rights of existing co-holders, the Act has not created any mechanism for resolution or mediation in cases where parties may not agree on the conclusion of a PR&R agreement. A mechanism for resolution is created only when the child is not in agreement with the PR&R agreement.[65]

If compared to the provisions of section 33 relating to a parenting plan[66] (a mechanism to facilitate the *exercise* of parental responsibilities and rights between existing holders of PR&R), section 22 appears to be wholly inadequate in so far as it fails to provide any mechanism to avoid or resolve confrontation between the various role players.[67] Section 33 creates conciliation mechanisms in cases where existing co-holders are having trouble in the exercise of their parental responsibilities and rights.

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63 See case law and sources referred to in note 56 above.

64 Some authors suggest that mediation is implied in s 22: Boniface "Resolving disputes with regards to child participation in divorce mediation" 2013 *Speculum Juris* 130 140. Mediation may result in there being less conflict between the parties and the primary purpose of mediation is to solve concrete problems: Boniface "Family mediation in South Africa: Developments and recommendations" 2015 *THRHR* 397 398. See also fn 11 above regarding reg 8(4) which mandates mediation when the child or children are not in agreement with the contents of the agreement. See also discussion of child participation and mediation by Breytenbach *Parental responsibilities and rights agreements: An impact study of section 22 of the Children's Act 38 of 2005* (LLM dissertation, University of Pretoria 2019) 44.

65 See note 11 above.

66 The court has described a parenting plan as a formal agreement concluded between the holders of PR&R in which they mutually agree to the terms upon which such parental responsibilities and rights are to be exercised: *PDP v MPDP* 2013 JOL 30128 (ECP) para 24. See also other possible definitions offered by authors such as Bosman-Sadie & Corrie (2013) 67; Heaton in Skelton & Davel (2015) 3-37 and Mtshengu "Parental responsibilities and rights agreements and parenting plans" March 2011 *De Rebus* 12. A major difference between a parenting plan and a PR&R agreement is that the latter is a mechanism whereby a person can *acquire* full or specific components of parental responsibilities and rights by agreement for the first time (s 33(1)): Mtshengu 2011 *De Rebus* 12. Skelton refers to a PR&R agreement as an option available to those who wish to formalise care arrangements: Ozah & Skelton "Legal perspectives: Children, families and the state" in Hall *et al* (eds) *South African Child Gauge* Cape Town: Children's Institute, University of Cape Town (2018) 53.

67 In Part C of Form 4 (as prescribed in terms of reg 7), provision is made for supporting documentation relating to "other matters incidental to the exercise of parental responsibilities and rights". The form and s 22, however, do not indicate the weight, if any, that should be afforded to the information contained in the supporting documentation.

The legislative encouragement of the use of parenting plans marks a fundamental policy shift regarding the way in which the interests of children might best be protected.[68] In this regard, the legislator's main objective was to shift the focus from an adversarial inquiry to one of agreement between parties in acrimonious matters pertaining to children.[69] This objective was further underlined by the mandatory mediation provision inserted in section 33(2) to promote conciliation between co-holders in the exercise of their parental responsibilities and rights before seeking judicial intervention, to circumvent the widely acknowledged detrimental and severe negative impact ongoing conflict between co-holders of parental responsibilities and rights has on a child.[70]

PR&R agreements are not intended to transfer parental responsibilities and rights from one person to another, but merely intends to create a *sharing* of parental responsibilities and rights (or incidence of such responsibilities and rights).[71] The acquisition of parental responsibilities and rights by means of a PR&R agreement by another person does not result in the termination of an existing co-holder's parental responsibilities and rights.[72]

It seems irrational that co-holders should mediate if they cannot agree on a parenting plan but when a co-holder decides to *confer* parental responsibilities and rights on an interested party by means of a PR&R agreement, no such mechanism is created.[73] The failure to create similar mechanisms in section 22 is even more glaring given the fact that the effect of a PR&R agreement is to add to the existing pool of co-holders that hold and exercise parental responsibilities and rights in respect of the child. In the absence of mandatory mediation, or at least a process that is conducive to conciliation and problem-solving,[74] the

68 Paleker "Mediation in South Africa's new Children's Act: A pyrrhic victory" paper presented at the Asia-Pacific Mediation Forum Conference (2008) 2. Bosman-Sadie & Corrie (2013) 67 submit that s 33 can be seen as an attempt by the legislator to ensure that both parents stay equally involved with their children and continue to fulfil their parental responsibilities.

69 SALRC *Report* (2002) para 7.8.2.

70 See also De Jong "Suggestions for a divorce process truly in the best interests of children" 2018 *THRHR* 48 61 concerning the advantage of mandatory mediation to reach a mutually satisfactory agreement that recognises the needs and interests of all the family members.

71 Louw *Thesis* 308.

72 See discussion in Heaton in Skelton & Davel (2015) 3-17.

73 The Office of the Family Advocate has an implied discretion to refer the parties for mediation and to refuse the registration of the PR&R agreement until the issues are resolved between the various parties.

74 S 6(4)(*a*) of the Children's Act. According to s 7(1)(*n*) greater weight should be given to the consideration of which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child. The court in *Cunningham (born Ferreira) v Pretorius* 2010 JOL 25638 (GNP) para 8 held that the Children's Act "obligates courts adjudicating disputes concerning children to engage in a value based method of appropriate dispute resolution and to order the proceedings before them in a manner minimising adversarial litigation and delays". The Supreme Court of Appeal in *FS v JJ* 2011 3 SA 126 (SCA) emphasised the value of mediation and cautioned that litigation should not be a first resort. Lewis JA observed (para 54) that legal practitioners should take heed of s 6(4) of the Children's Act which provides that in matters concerning children an approach conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided. See discussion in Boniface 2015 *THRHR* 399 ff concerning case law where mediation was ordered by the court before and after the enactment of the Children's Act.

only route for an unhappy co-holder is to apply to court for judicial intervention, which is the less preferred option.[75] In addition, it seems illogical to set a higher threshold for the *exercise* of already existing parental responsibilities and rights than the *acquisition* of such rights.[76] Similar to parenting plans, a mandatory mediation provision could have acted as an additional safeguarding measure to protect the child's best interests under a wide application of section 22.

4 PARENTAL RESPONSIBILITY AGREEMENTS UNDER ENGLISH LAW

Section 22 and the possibility of conferring parental responsibilities and rights on a person by agreement was an emulation of a similar process created in the English Children Act 1989.[77] However, similar agreements can also be found in other jurisdictions.[78]

Under English law, the opportunity to acquire parental responsibility[79] by means of a parental responsibility agreement (hereinafter a "PR agreement") was extended to step-parents.[80] When PR agreements were extended to step-parents,

75 It is widely accepted that it is in the best interests of children for their separated parents to resolve parenting conflicts amicably and speedily as soon as they arise and to approach the court for judicial intervention only as a last resort: De Jong "Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa" 2015 *PER/PELJ* 150 156. Judicial preference for mediation and/or the use of alternative forms of dispute resolution is also becoming more evident in child-centred disputes as was highlighted by Davis J in the case of *TC v SC* 2018 4 SA 530 (WCC) para 36 who affirmed that parenting coordination, for example, evolved in response to the widespread recognition that parental conflict is not in the child's best interests and it is imperative "to avoid even those conflicts regarding minor issues, and implement mechanisms of resolving those conflicts amenably".

76 The SALRC also envisaged the possibility of child-related disputes concerning s 21 and similarly incorporated mandatory mediation in terms of s 21(3)(*a*).

77 As asserted in the SALRC *Discussion Paper* (2001) para 8.5.2.2. See also Lowe & Douglas (2007) 411. Any reference to the English Children Act has this Act in mind unless otherwise indicated.

78 For example, Scotland (ss 3(1), 4 and 11 of the Children (Scotland) Act 1995) and Kenya (s 24(3) read with s 25(1) of the Kenyan Children Act of 2001, as discussed in Wabwile "Rights brought home? Human rights in Kenya's Children Act 2001" 2005 *Int'l Surv Fam L* 393 409. However, Kenya's parliament is currently reviewing the Children Act of 2001. In terms of the proposed amendments the notion of a parental responsibility agreement is abolished as all parents, irrespective of their marital status, will automatically acquire parental responsibility in terms of the proposed s 27(1).

79 English law employs the term "responsibility" to refer to what is known in terms of SA law as "parental responsibilities and rights": Halsbury's laws of England 5 ed *Children and young persons* Vol 9 (2017) para 150. Further reference in this article to "parental responsibility" will be made in relation to the position under English law while the phrase "parental responsibilities and rights" will be used to refer to the position under SA law.

80 S 4A(1)(*a*) of the English Children Act. Two other categories of persons may enter into a PR agreement with the mother. The first category includes unmarried fathers that have largely become redundant due to the fact that unmarried fathers now automatically acquire parental responsibility when being registered as the child's father: See s 4(1)(*a*) read with s 4(1A) of English Children Act, as amended by s 38 of the Adoption and Children Act 2002 during 2005). The other category is the "second female" parent who complies with the agreed female parenthood conditions in terms of the Human Fertilisation and Embryology Act of 2008 (s 4A(1)(*b*) of the English Children Act read with s 43 of the Human Fertilisation

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an additional restrictive requirement was explicitly incorporated: The PR agreement with the step-parent must be entered into by *both* parents, if both parents have parental responsibility (referred to as the "consent" requirement).[81]

Similar to section 22 of the Children's Act, the English Children Act also provides that a PR agreement must comply with certain prescribed formalities[82] and be recorded in the prescribed manner.[83] Unlike the position in South Africa, which provides for the PR&R agreement to be subjected to the paramountcy principle before it may be endorsed by the family advocate or court,[84] it has been noted that the English courts' function is a purely administrative one[85] and merely acts as a rubberstamp for the parents' agreement with no power to question the desirability of the agreement on the basis of the welfare[86] of the child.[87] It is possible that the legislator intended the best interest inquiry in section 22 to undercut any possible risks that the extension of PR&R agreements to any interested third parties could pose.[88]

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and Embryology Act of 2008). The latter's position is similar to a same-sex spouse in terms of s 40(1) of the SA Children's Act (see fn 19 above).

81 S 4A(1)(*a*) of the English Children Act. The High Court in *Re X (Minors) (Care Proceedings: Parental Responsibility)* 2000 2 (FLR) 156 para 161 confirmed that where there are two parents with parental responsibility, the PR agreement must be concluded with both and that there are no exceptions to this rule. Should the other parent refuse, an application to court can be made for a parental responsibility order: Halsbury (2017) para 157n5.

82 S 4(2)(*a*) and (*b*) of the English Children Act. The PR Agreement Regulations make provision for three different prescribed forms for each of the following categories, namely: (a) mother and an unmarried father (Form C (PRA1)); (b) a parent (and other parent, if applicable) and the stepparent (Form C (PRA2); and (c) a mother and the second female parent (Form C (PRA3): Discussed by Jarret "Children: Parental responsibility – what is it and how is it gained and lost (England and Wales)" 9 August 2017 *House of Commons Library* 1 6. The respective forms are available at https://www.gov.uk/government/-collections/children-act-forms. Reg 7 of the SA Children's Act only provides for one prescribed form – form 4.

83 In terms of s 4(2) of the English Children Act read with reg 3(1) of the PR Agreement Regulations 1991/1478 (amended by SI 2005/2808), the PR agreement takes effect once recorded at the Principal Registry of the Family Division: See Halsbury (2017) para 155 fn 13.

84 Louw *Thesis* 309 argues that the application of the best interests inquiry under South African law could have been deemed necessary because the PR&R agreement is available to "any" other interested third party - not only the three categories under English law.

85 This was confirmed by the High Court in *Re X (Minors) (Care Proceedings: Parental Responsibility)* 2000 2 (FLR) 156 para 161.

86 Schäfer *Unmarried fathers and their children: A comparative study of English, Australian and South African Law* (LLD thesis, Wadham College, Oxford University 2005) 5n17 explains the difference between the terminology used in England and SA as follows: "Although it has long been the convention in English law to speak of a child's 'welfare', the modern trend in South Africa is to refer to the child's 'best interests'. It is also the term used in Article 3 of the CRC."

87 A PR agreement terminates automatically when the child attains the age of 18 years (as provided for by s 91(8) of the English Children Act) or earlier by order of court. When a court order is necessary to terminate a PR agreement, the welfare principle will apply: Cretney & Masson *Principles of family law* 6 ed (1997) 642. However, the English courts have emphasised that, once obtained, parental responsibility ought not to be terminated except on solid ground and not if there was a strong presumption in favour of its continuance. In *Re P (Terminating Parental Responsibility)* 1995 1 (FLR) 1048 the court terminated the PR agreement only after it became clear that the father caused the injuries of the baby who was subsequently removed by the local authorities.

88 See Louw *Thesis* 310.

Despite the opportunity that it created for step-parents, the use of PR agreements in the United Kingdom has been limited and the number of PR agreements entered into has remained very low.[89] An empirical study revealed that the main reason for the poor registration rate of PR agreements was that most step-parents were trying to maintain consensual relations with each member of the family. The study revealed that step-parents were particularly hesitant to usurp the parental role of the "non-resident" parent, as they recognised the impact that disagreement and/or conflict would have on their step-child, even if only indirectly.[90]

Noteworthy for purposes of this article is that there were also calls to extend the availability of PR agreements to any "kinship carer"[91] (grandparents, brothers, sisters, uncles, or aunts), to allow such kinship carer to acquire parental responsibility for a child in their *de facto* care without having to apply to court for the necessary parental responsibility order.[92] The proposed Kinship Carers (Parental Responsibility Agreements) Bill, however, was never enacted.[93] The Government and English Law Commission agreed that an application to court by the child's kinship carer was necessary because it acted as an important safeguarding measure for children and their families. The need for a court application in such cases was deemed necessary to prevent "hopeless" or "vexatious" applications that were not in the best interests of the child and afforded the child and the family protection from "stress and harm of unwarranted interference and the harassment of actual or threatened proceedings".[94]

89 Data released by the Ministry of Justice indicated that very few stepparents acquire parental responsibility by agreement. In 2006, only 678 PR agreements were registered in comparison with 6460 parental responsibility orders granted. In 2009, the ratio was 804 to 5712: Russell "An empirical exploration of parental responsibility for stepparents" 2014 *FLQ* 301 notes 43 and 45.

90 See Russel 2014 *FLQ* 314 and 316.

91 In South Africa, a kinship care order was also considered and initially included in s 167 of the Children's Bill 70B of 2003: SALRC *Discussion Paper* (2001) paras 17.2.2 and 17.2.5, as discussed by Boniface *Thesis* 446 notes 350, 432 and 528. However, it was not incorporated in the Children's Act for reasons outlined by Skelton "Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa" 2012 *Int'l Surv Fam L* 333 339. Perhaps this was another reason why s 22 under the Children's Act was extended to interested third parties under s 22(1)(*b*).

92 See submissions made in favour of such extension: Bill 198 2010-2012 (as introduced on 20 October 2011) available at https://publications.parliament.uk/pa/bills/cbill/2010-2012/0198/cbill_2010-20120198_en_1.htm. Contrary to the position in SA, the English Children Act divides applicants into two categories – those who are entitled to apply for parental responsibility orders as of right (directly), and those who require leave of the court: Bainham *Children The modern law* 3 ed (2005) 220.

93 See the Parliamentary Services statement at https://services.parliament.uk/bills/2010-12/kinshipcarersparentalresponsibilityagreements.html.

94 *Family Justice Review Committee of England Final Report Family Justice Review* (November 2011) para 110. As a Parliamentary Under-Secretary of State at the Ministry of Justice stated: "Experience suggests that grandparents (or other interested relatives) would not usually experience difficulty in obtaining permission where their application is motivated by a genuine concern for the child": See Murphy "Children: Grandparents and others who require leave of the court to apply for access" 28 April 2016 *House of Commons Library* 9.

Similar to the position in South Africa, English law generally places two limitations on parents' autonomy to act independent of each other concerning major decisions relating to a child.[95] The first is where a statute requires the consent of more than one person.[96] The second is where the independent exercise of parental responsibility would be incompatible with a court order.[97] Apart from these two exceptions, the unilateral exercise by one parent of the power to make decisions about a child's upbringing can be prevented by obtaining a section 8(1) court under the English Children Act.[98]

Should one parent, therefore, refuse to consent to the PR agreement, the only right of recourse under the English Children Act is to apply to court for an order assigning parental responsibility. England has developed an extensive and cohesive family dispute resolution framework to support families to reach mutual agreement when disputes arise. Mediation in *all* family dispute-related matters[99] is compulsory before the court may be approached for judicial intervention.[100] The framework for family dispute resolution in South Africa is not as extensive or cohesive.[101] For example, it was only when the Children's Act came into operation that mediation was made mandatory, and then only in certain prescribed cases, before the court may be approached for judicial intervention.[102]

5 CONCLUSION

Should a wide application of section 22 have been envisaged, it is evident from the above reasons that section 22 suffers from a serious number of *lacunae*.

95 See s 2(7) of the English Children Act. Although there is no express right of consultation as in SA under s 31 of the Children's Act, England has developed and implemented various approaches to encourage parents to reach mutual agreement on their child's upbringing. The focus of the English resolution framework shifted towards being proactive in their efforts and is now principally aimed towards encouraging parents to stay together through parental education at the birth of the child, or even earlier: See *Family Justice Review Committee of England Final Report Family Justice Review* (November 2011) paras 4.5 ff. According to Lowe & Douglas (2007) 433 an extensive consultative model like the one created in terms of ss 30 and 31 under the Children's Act, is both "unworkable and undesirable".

96 Such as an intended PR agreement with a stepparent. See Halsbury (2017) para 150n5 for other examples.

97 As provided for in s 2(8) of the English Children Act.

98 Such as a "specific issue order" or a "prohibited steps order": See Lowe "The allocation of parental rights and responsibilities – the position in England and Wales" 2005 *FLQ* 267 268.

99 English Law Commission *Children and Families* Bill No 131 of 2012 Research Paper 13/11 (2013) paras 3.1 and 3.4. Noteworthy is the statistics bulletin of the Court Statistics Quarterly, published by the Ministry of Justice, that revealed that the number of private law cases that started in family courts in England during April to June 2014 dropped with 19% compared to the equivalent quarter of 2013: See www.gov.uk.

100 However, it must be kept in mind that the child's welfare is the paramount concern and if at risk of harm or abuse (family violence) the court can and must be approached as a first resort.

101 SALRC *Family Dispute Resolution Issue Paper* (2015) paras 1.2.1 and 1.2.3. See also discussion relating to parenting support offered by the SA government in *Mkhwanazi, Makusha, Blackie, Manderson, Hall & Huijbregts* "Negotiating the care of children and support for caregivers" in Hall *et al* (eds) *South African Child Gauge* Cape Town: Children's Institute, University of Cape Town (2018) 75.

102 See ss 21(3) and 33(2).

The most significant of these is the fact that a wide application of section 22 makes an exclusive substitute arrangement possible. Such an arrangement may create or escalate parental conflict if the arrangement was not mutually inclusive from the outset, especially in the presence of another co-holder with parental responsibilities and rights, such as a section 21(1)(*a*) father. It is, therefore, submitted that an unfettered wide application of section 22 casts the net too wide and may unintentionally have increased the possibility for child-related conflict, a possibility that is difficult to reconcile with the promotion of a child's best interests and is arguably not in keeping with the general objectives[103] of the Children's Act and belies the child-centred approach envisaged by the Act.

Legislation should be drafted to protect children from the adverse negative effect of parental conflict where possible – not create new opportunities for producing possible conflict.[104] The Constitutional Court in *S v M*[105] held that even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and should diligently seek, wherever possible, to avoid conduct of its agencies that may have the effect of placing children in peril. It follows that section 28 requires the law to implement measures to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk.

While there has been a steady rise in discourse about parental autonomy *vis-à-vis* social parenting in the family law context,[106] it is submitted that the legislator could not have intended that the principles protecting the autonomy of the parent-child relationship, embodied in our common law and developed by our judiciary, now be disregarded by a person when utilising the opportunity to confer parental responsibilities and rights on an interested third party by agreement.[107] The principles underlying the acquisition of parental responsibilities and

103 Listed in s 2 of the Act as including the protection and enhancement of children's rights. These general objectives underpin all the provisions of the Act and guide the implementation of proceedings, actions and decisions concerning children. In this regard, it is important to refer to s 2(*b*)(iv), which echoes the wording of s 28(2) of the Constitution, to the effect that the best interests of the child must be of paramount importance in all matters concerning the child (s 2(*b*)(iv) must be read with s 9 of the Act). S 2(*a*) of the Act states as one of its objectives the aim to reduce state intervention in family relationships by strengthening and supporting the capacity of parents to give their children the best possible start in life. S 2(*e*) of the Act seems to encourage the settlement of disputes out of court and to move away from an adversarial approach where the interests of children are involved.

104 As stated by the Constitutional Court in *S v M* 2007 2 SACR 539 (CC) para 20.

105 2007 2 SACR 539 (CC) para 20.

106 Clark "From rights to responsibilities – an overview of recent developments relating to the parent/child relationship in South African common law" 2002 *Comp & Int LJ* 216 217.

107 Judicial precedent is indicative of the court's ongoing reluctance to award interested third parties parental responsibilities and rights when a biological parent objects and/or is able and suitable to care for the child. See *LH v LBA* 2013 JOL 29947 (ECG) para 14 and *S v J* 2011 2 All SA 299 (SCA) para 26 for such examples. In *FS v JJ* 2011 3 SA 126 (SCA) para 26 the High Court held that while it had the power as the upper guardian of a child to confer "access" (now contact), "custody" (now care) or guardianship on an interested third party, this power could only be exercised subject to the child's best interests – a determination which included a consideration of the rights of the biological parents. A similar reasoning was followed in *DM v LB* Unreported Case No 272/2017 (ZAFSHC). See further the discussions by Pieterse 2000 *Stellenbosch LR* 333; Clark 2002 *Comp & Int LJ* 220 and Louw 2013 *Stellenbosch LR* 626 in relation to the assignment of parental responsibilities and rights to third parties.

rights by agreement must surely also conform to the values and norms as embodied, in the first instance, in the Constitution[108] and, secondly, in international instruments.[109]

Furthermore, when the incorporation of a parenting plan was considered, the SALRC expressed its belief that parents generally have the best interests of their children in mind, and accordingly should be afforded every opportunity to reach agreement when such a plan is agreed upon. Provision is also made for circumstances where parents cannot reach agreement, restricting their autonomy and independent decision-making authority to ensure a child-centred approach where the child's best interests are upheld. Surely, under an envisaged wide application, the same principles should apply in relation to section 22?

The intended scope of application of section 22 remains uncertain. Unfortunately, the use of the word "or" in section 22(1) has opened up the possibility for the provision to be interpreted differently. When faced with a similar interpretational challenge of the word "or" in terms of section 23 of the Children's Act, the court in *CM v NG*[110] had to decide whether both care *and* contact could be awarded to an interested person in terms of section 23(1).[111] The respondents relied on the word "or" between section 23(1)(*a*) and (*b*) to argue for a disjunctive reading of the section which would not allow the applicant to apply for both care *and* contact.[112] The court utilised the judicial interpretational rules which require that words should be given their ordinary meaning unless the context shows or furnishes "very strong grounds" for presuming that the legislator really intended that the word used is not the correct one.[113] The said rules, in the court's view, further require that such "grounds" will include that if "and" or "or" are given their ordinary meaning, the interpretation of a particular section will be "unreasonable, inconsistent or unjust" or that the result will be "absurd" or "*unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights*".[114] The court concluded that to interpret section 23(1)(*a*) and (*b*)

108 Concerning the child's constitutional right to parental care as envisaged in s 28(1)(*b*). It is recognised today that neither parent is inherently more suitable by reason of his or her gender to care for a child. Consequently, should the mother be unable to care for the child, a capable and willing s 21 father is in principle deemed equally capable to care for the child unless there are compelling circumstances that indicate otherwise as emphasised in *P v P* 2007 5 SA 94 (SCA) para 26. This approach also accords with the apparent emphasis placed on care by a parent before care by the family in the determination of the child's best interests in terms of s 7. Reference throughout the entire section is made to "parent" before "family" and "extended family". See specifically s 7(1)(*f*)(i).

109 International instruments also enshrine a right to parental care for all children which proceeds from the fundamental premise of equality between the biological parents of a child: See Art 16(1)(*d*) of the United Nations Convention on the Rights of the Child (the CRC) and Art 19 of the African Charter on the Rights and Welfare of the Child (the ACRWC). The CRC was adopted by the UN General Assembly in 1989 and entered into force on 2 September 1990. South Africa ratified the CRC on 16 June 1995 and the ACRWC in 2000.

110 2012 4 SA 452 (WCC).

111 S 23(1) 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, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary – (a) contact with the child; or (b) care of the child."

112 Para 30.

113 Para 31.

114 *Ibid.*

disjunctively would render it inconsistent with the objects of the Children's Act as well as section 28 of the Constitution.[115] The same judicial interpretation rules could be applied to argue for the opposite interpretation as far as section 22 is concerned. It is our view that section 22 should be read disjunctively rather than conjunctively because any other interpretation would render the section inconsistent with the objects of the Children's Act as well as section 28 of the Constitution.

In comparing the underlying legal principles supporting the acquisition of parental responsibility by an interested third party through an agreement, it becomes evident that the legal principles in South Africa and England are radically different. The English legislator intentionally restricted the scope of PR agreements to only three specific categories of persons.[116] The English legislator's reluctance to extend the scope of PR agreements beyond these categories to any other interested third party is mainly motivated by the desire to protect children from the negative effect of possible family-related conflict – despite acknowledging that there are many children who are being brought up in diverse family arrangements and who may benefit from such an extended scope.[117] Another significant diverging tendency from South Africa when both parents have parental responsibility is the explicit requirement that the PR agreement must be concluded with the consent of both parents. This requirement is particularly significant given the fact that the step-parent would for all practical purposes often be the *de facto* care-giver of the child.[118] The consent requirement also acts as an important safeguarding measure to protect the child from possible conflict between the parent and step-parent (with whom he or she is living) and the non-residential parent that may arise if a parent is given a free hand to enter into a PR agreement with any interested party. The best interest inquiry, in our view, does not adequately safeguard children against the very real possibility of parental conflict arising from an exclusive substitute PR&R agreement.

It is submitted that while a narrow interpretation and application of section 22 is preferable, it may not be practicable. For this reason, it is submitted that the section should be interpreted to require an inclusive process, where all the co-holders of parental responsibilities and rights, the child, and the interested third party are involved from the outset in developing the PR&R agreement.[119] With this prerequisite, it can be deemed an exception to the general rule that section 22 should apply in a strict narrow sense. To ensure a uniform practice in this regard,

115 Paras 31–43.

116 The unmarried father (now largely redundant), stepparents, and a second female parent.

117 The underlying premise that both parents have equal parental responsibility towards their child under the English Children Act would further support this approach. This premise is further underscored by the statutory presumption that parental involvement of both parents is important for the child's well-being and development and is therefore deserving of encouragement and protection from interference by outsiders: See *English Law Commission Children and Families* Bill No 131 of 2012 Research Paper 13/11 (2013) para 3.9.

118 *Ibid.*

119 Under Part C of the current form 4, the inclusion of such an arrangement can be accommodated in relation to the provision for supporting documents. Here the s 21 father's consent can be attached under "particulars relating to other matters incidental to the exercise of parental responsibilities and rights" as a supporting document. A document closely resembling a parenting plan could be included to outline how all three parties will exercise their parental responsibilities and rights.

regulation 7 and the prescribed form 4 should consequently be amended to make the consent of all existing co-holders of parental responsibilities and rights obligatory, failing which the matter should be referred to mandatory mediation.

There is little doubt that an inclusive arrangement would be more in keeping with the objectives of the Children's Act, the Constitution, and the child's convention rights[120] and will result in an approach which is conducive to conciliation and problem-solving that will surely serve the child's best interests more than applying to court for a review or termination of an exclusive decision which was not in the child's best interests from the outset. Once the PR&R agreement is registered, section 33 will become relevant and could act as an additional safeguarding measure. If co-holders then experience difficulty in giving effect to the PR&R agreement, they will be subject to the mandatory mediation requirement.[121] Should the parties be unable to mediate, the dispute can be referred to court for judicial intervention or an application can be made for termination or suspension of the PR&R agreement.[122]

120 See note 111 above.

121 See Louw 2013 *Stellenbosch LR* (at 634) for a similar view concerning the use of parenting plans in the context of the rights of grandparents.

122 See *Goliath v Hutchinson* 2011 JOL 27178 (ECG) where the court had to intervene in an informal mutually inclusive arrangement.