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THE CONSTITUTIONALITY OF A BIOLOGICAL FATHER'S RECOGNITION AS A PARENT

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1 Introduction

Despite the increased recognition of the beneficial role that fathers can play in the lives of their children by allowing not only married fathers, but also some unmarried fathers automatic parental responsibilities and rights, the new *Children's Act*¹ has retained the *status quo* to the extent that it still does not confer automatic, inherent parental rights on biological fathers on the same basis as mothers.² This contribution aims to ascertain whether the continued differential treatment, regarding the initial allocation of parental responsibilities and rights, can be justified in view of international trends emphasising the importance of the role of both parents in the upbringing of their children.³ These international trends have for the most part been inspired by the United Nations Convention on the Rights of the Child (hereinafter referred to as the UNCRC) that has been ratified by all United Nations' member states, except the United States of America and Somalia.⁴ Article 9(3) of the UNCRC obliges state parties to respect the child's right to contact with *both* parents while Article 18(1) of the UNCRC compels state parties to apply their best efforts to ensure recognition of the principle that *both* parents have common responsibilities for the upbringing of the child.

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1 38 of 2005. While most of the provisions dealing with the acquisition of parental responsibilities and rights have been in operation since 1 July 2007, the *Children's Act* only became fully operational on 1 April 2010. Any further reference to "the *Children's Act*" has this Act in mind.

2 See S 20 and 21 of the *Children's Act*. The latter section, which is fundamental to the present discussion, is quoted in full in n 31.

3 Sinclair "Legal personality" 27.

4 States such as the Cook Islands, Niue and Switzerland have ratified the UNCRC despite not being United Nations' members. See in general Mahery "The United Nations Convention" 309 ff.

Not all countries have responded to the obligations and norms entrenched in the UNCRC with the same degree of enthusiasm and commitment.⁵ While Australia is probably now most in accordance with the approach underscored by the UNCRC,⁶ other countries have, with varying degrees of success, justified a departure from such an approach.⁷

South Africa ratified the UNCRC in 1995. Although the UNCRC is not generally regarded as a direct source of individual rights and obligations because its provisions are generally not formally incorporated into municipal law,⁸ it has been held⁹ to enjoy a heightened status in the South African legal framework for two important reasons:

- (a) Convention rights pertaining to children have been constitutionalised in Section 28 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution), thereby giving the UNCRC legal significance in South Africa.
- (b) Specific provisions (such as Sections 39(1)(b) and 233) in the Constitution require courts to consider international law in their deliberations.¹⁰

5 For a comparative overview in this regard, see Louw *Acquisition of Parental Responsibilities* 134–148.

6 The *Australian Family Law Act* 1975 (Cth) has since 1988 allowed for the initial allocation of parental responsibilities and rights to both mother and father on an equal basis, based on the ground of their parentage alone. The provisions created rights for parents regardless of their marital status. Wide-ranging changes to the regulation of the parent/child relationship were again brought about by the enactment of the *Family Law Reform Act* 1995 (Cth), which came into operation on 11 June 1996. The new provisions create a formal policy of joint parenting underpinned by the expressed principle that children have the right to know and be cared for by both their parents, irrespective of whether they are married, separated, have never married or never lived together, and the principle that children have a right of contact, on a regular basis, with both their parents. See Bailey-Harris 1996 *Adel LR* 84–85 and Mills *Family Law* 110–111.

7 In Scotland, for example, the government rejected a recommendation by the Scottish Law Commission in their *Report on Family Law* to give automatic "parental responsibility" (the English equivalent of parental responsibilities and rights) to unmarried fathers. For a detailed discussion of the position of biological fathers in Scotland, see Lowe and Douglas *Bromley's Family Law* 426–428.

8 The *Children's Act* however expressly incorporated certain aspects of the UNCRC, such as the preamble, to name but one example.

9 Sloth-Nielsen 2002 *International Journal of Children's Rights* 139.

10 While other provisions of the Constitution, such as S 39(1)(a) and 39(2), do not specifically refer to international law, Sloth-Nielsen 2002 *International Journal of Children's Rights* 139 regards them as significant in so far as they were inspired by international norms.

In addition, the *Children's Act* now states as one of its objectives the realisation of the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.¹¹

It should be noted at the outset that while *children* have a right to parental care in terms of Section 28(1)(b) of the Constitution, the Constitution does not expressly protect the rights of parents *qua* parents in any direct manner.¹² The paucity of constitutional protection afforded to the family, and more particularly, to the parents of the children within the family in the present context, stands in stark contrast to all major international human rights instruments that provide for the protection of the family and family relations in some way or another.¹³ The effect of this *lacuna* in our law has been the subject of much debate.¹⁴ Although the Constitution contains no express right to family life,¹⁵ the Constitutional Court in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*¹⁶ held that such right is indirectly protected *via* the right to dignity.¹⁷ Van der Linde¹⁸ concludes that an express protection of the right to respect for family life, such as found in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights

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

12 Bekink and Brand "Constitutional protection of children" 186.

13 See Visser and Potgieter 1994 *THRHR* 495.

14 See Van der Linde *Grondwetlike Erkenning* 15–21.

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

16 2000 3 SA 936 (CC) para 36.

17 See also Currie and De Waal *Bill of Rights Handbook* 605; Bekink and Brand "Constitutional protection of children" 186. Despite the absence of a provision directly protecting the right to family life, "the principles of dignity, equality and concern for the vulnerability of marginalised groups in society" have, according to Sloth-Nielsen and Van Heerden 2003 *IJLPF* 121 "heralded a wide-ranging revision of the legal meaning of family, of how the law should protect family members, and is reshaping the understanding of relationships between family members (including children)" (see abstract of article).

18 *Grondwetlike Erkenning* 490.

(ECHR),¹⁹ would have avoided the convoluted manner of (indirect) protection currently necessitated by the absence of such a right and would have brought South Africa more in line with international trends in this regard.²⁰

Despite the fact that the parents of a child bear the primary burden to care for their child,²¹ the Constitution does not expressly entrench or protect the right of a parent to care and assume responsibility of his or her biological child.²² Since the Constitution, and more specifically, the Bill of Rights, "does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill",²³ parents would seem to retain their inherent common law right to assume responsibility of their children without arbitrary interference from the state.²⁴ The court in *Jooste v Botha*²⁵ was prepared to interpret Section 28(1)(b) in a manner consistent with the common law as being "aimed at the preservation of a healthy parent–child relationship in the family environment against unwarranted executive, administrative and legislative acts."

The Constitution also does not explicitly protect the *equal* sharing of the rights and responsibilities of parents *vis-à-vis* their children,²⁶ as found in many international

19 On the ECHR in general, see Kilkelly *The Child and European Convention* 1.

20 For similar views, see Visser 1996 *De Jure* 351, who questions the value of a right to family care where the family as a unit is not deemed worthy of protection and Robinson 1998 *Obiter* 329 334–335.

21 According to Moosa J in *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) para 10: "The primary responsibility for the protection and promotion of the interests of the child vests in the parents".

22 Cockrell "The Law of Persons and the Bill of Rights" with loose-leaf updates para 3E21. Cockrell contends in the same paragraph that such a right is also not recognised by implication in terms of S 28(2) of the Constitution and calls for a strict interpretation of the latter section "so as not to amount to a back-door recognition of the parental power".

23 S 39(3) Constitution.

24 Van Heerden "Judicial interference " 497 refers to this right as a "primordial" right that was reaffirmed in *Petersen v Kruger* 1975 4 SA 171 (C) para 173H.

25 2000 2 BCLR 187 (T) para 195F–G – hereafter *Jooste*.

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

instruments.²⁷ The absence of similar guarantees in the South African Constitution raises the question of whether biological parents have a constitutional right to assume parental responsibilities and rights on an equal basis.

The concomitant duty of the child's constitutional right to parental care is imposed on parents, who in terms of the *Children's Act* automatically acquire parental responsibilities and rights,²⁸ that is biological mothers in all cases (in terms of Section 19), married fathers (Section 20) and unmarried fathers who fall within the ambit of Section 21 of the Act.²⁹ As far as maternal care is concerned, the right of the child to parental care thus corresponds fully with the duty imposed on the biological mother. As far as paternal care is concerned, the right of the child has been circumscribed by the provisions (Sections 20 and 21)³⁰ of the *Children's Act*. The duty of care imposed upon fathers would thus appear to fall short of the Constitution's unconditional guarantee to children to provide them with parental care – hence the present enquiry into the constitutionality of the *Children's Act* in this regard.

27 These instruments not only enshrine a right to parental care for all children, but also proceed from the fundamental premise of equality between the biological parents of the child as evidenced by A 9(3) and 18(1) of the UNCRC already mentioned. A 16(1)(d) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women states unequivocally that men and women have the "same rights and responsibilities as parents". The African Charter on the Rights and Welfare of the Child outlaws discrimination on grounds such as fortune, birth or other status of the child, the parent or the legal guardian, thereby ensuring protection of parental rights and responsibilities whatever their marital status.

28 The concept of "parental responsibilities and rights" in lieu of "parental power" was introduced in the Children's Act (S 1(1)) to describe the rights, duties and responsibilities which a parent exercises in relation to his or her child. "Responsibilities" as used in the new concept has thus absorbed the idea of parental duties.

29 In terms of S 28(1)(b), the *child* also has a right to family care and alternative care but the focus of the present article is limited to *parental* care. The possibility of persons other than the biological parents of a child acquiring parental responsibilities and rights (and therefore also a duty of care) in terms of S 23 and 24 of the *Children's Act* is for the same reason not addressed here.

30 In terms of S 21(1) of the *Children's Act*, a biological father: "... who does not have parental responsibilities and rights in respect of the child in terms of section 20 [by being married to the mother], acquires full parental responsibilities and rights in respect of the child – (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or (b) regardless of whether he has lived or is living with the mother (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

2 Constitutional enquiry

2.1 Grounds for attack

The differentiation between mothers and fathers as far as the acquisition of parental responsibilities and rights in terms of the *Children's Act* is concerned can conceivably be attacked on the following constitutional grounds:

- (a) It constitutes an infringement of the parents' right to equality in the following specific ways:
- (i) It unfairly discriminates against *mothers* on the grounds of sex, gender and marital status in terms of Section 9(3) of the Constitution.
 - (ii) It unfairly discriminates against biological *fathers* in the following respects:
 - In relation to biological mothers, on the grounds of sex and gender in terms of Section 9(3) of the Constitution,³¹ and
 - in relation to mothers and *married* fathers or fathers who have committed themselves to the *mother* in a permanent life-partnership³² on the ground of marital³³ or equivalent status;
 - in relation to mothers and *unmarried* fathers who have shown the necessary commitment to their *children* as required by Section 21(1)(b) of the *Children's Act*.
- (b) It constitutes an infringement on the following constitutional rights of children:
- (i) The right of a child not to be discriminated against on the grounds of social origin and birth (out of wedlock)³⁴ in terms of Section 9(3) and the child's right to dignity in terms of Section 10;
 - (ii) The constitutional rights of a child in terms of Section 28:
 - A child's right to parental care in terms of Section 28(1)(b); and

31 In terms of S 9(3) of the Constitution: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... gender, sex, pregnancy, marital status, ethnic or social origin ... and birth".

32 As required by S 21(1)(a) of the *Children's Act*.

33 As required by S 20 of the *Children's Act*.

34 Cockrell "The Law of Persons and the Bill of Rights" para 3E24; Currie and De Waal *Bill of Rights Handbook* 256–257 and Albertyn and Goldblatt "Equality" 74.

- the right of the child to the paramountcy of its best interests as required by Section 28(2).

While appreciating the fact that "constitutional rights are mutually interrelated and interdependent and form a single constitutional value system",³⁵ the constitutional enquiry undertaken for present purposes will first look at the parents' position *qua* parents (as outlined in (a) above) and then proceed to consider the position of the children *vis-à-vis* their parents (as outlined in (b) above).

2.2 ***Unfair discrimination against parents?***

2.2.1 *General*

As far as the right to equality in general is concerned, it is important to keep in mind that Section 9 of the Constitution is not aimed merely at achieving formal equality.³⁶ The section as a whole must be read as grounded on a substantive conception of equality that takes actual social and economic disparities between groups and individuals into account.³⁷ For this purpose, Section 9(2) of the Constitution allows for "remedial or restitutionary equality",³⁸ that recognises measures "designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination".³⁹

According to Albertyn and Goldblatt,⁴⁰ the test for unfair discrimination outlined in *Harksen*⁴¹ can be pared down to the following three queries:

- (a) Does the differentiation amount to discrimination?
- (b) If so, was it unfair?⁴²

35 As reiterated by Langa DCJ in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 55.

36 Currie and De Waal *Bill of Rights Handbook* 232: "Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike".

37 Currie and De Waal *Bill of Rights Handbook* 233–234.

38 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 61.

39 See also *Harksen v Lane* 1998 1 SA 300 (CC) para 324C–D (hereafter *Harksen*).

40 "Equality" 43.

41 Para 53.

- (c) If so, can it be justified in terms of the limitations clause, that is Section 36 of the Constitution? To succeed with this inquiry, the criteria in terms of Section 36 must be satisfied by showing that the right has been limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
- (i) the nature of the right;
 - (ii) the importance of the purpose of the limitation;
 - (iii) the nature and extent of the limitation;
 - (iv) the relation between the limitation and its purpose; and
 - (v) less restrictive means to achieve the purpose.⁴³

Goldstone J in *Harksen*⁴⁴ describes this "final leg of the enquiry" as "a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality". According to Currie and De Waal,⁴⁵ this does not really take the matter any further. These authors express doubt as to whether Section 36 has any meaningful application to Section 9 because "[t]he factors taken into account when determining whether the discrimination is unfair (the impact of the discriminatory measure) are very similar to the factors that are used to assess the proportionality of a limitation in terms of s 36".⁴⁶ Despite the overlapping of the criteria, Currie and De Waal⁴⁷ state

42 Discrimination based on a listed ground is presumed to be unfair: S 9(5) of the Constitution. As to discrimination on an unspecified ground, the unfairness will have to be proved: Albertyn and Goldblatt "Equality" 43.

43 S 36(1) Constitution.

44 Para 53.

45 *Bill of Rights Handbook* 237.

46 Currie and De Waal *Bill of Rights Handbook* 238. These authors find it, for instance: "... difficult to see how discrimination that has already been characterised as 'unfair', because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, can ever be acceptable in an open and democratic society based on dignity, freedom and equality. Similarly, it is difficult to see how one could justify as 'reasonable' a law which differentiates for reasons not rationally related to a legitimate government purpose and which is therefore arbitrary. In a similar vein, Albertyn and Goldblatt "Equality" 81 state that the relationship between unfairness and justification "has been described as a 'paradox' since it seems impossible that something that violates the right to equality would be reasonable and justifiable in a society based on equality". Cf Kriegler J in his dissenting judgment in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 77 (hereafter *Hugo*), suggesting that the factors of the respective enquiries should be distinguished from one another, holding that the enquiry in terms of S 36 is concerned with justification, possibly notwithstanding unfairness, while the S 9 enquiry is concerned with fairness and nothing else.

that the Constitutional Court has nevertheless, on each occasion when it has found a violation of the equality clause, also considered (however briefly) the effect of the limitation clause.

2.2.2 *Discrimination against mothers on grounds of sex, gender and marital status*

In terms of Section 19 of the *Children's Act*, "[t]he biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child". A biological father, on the other hand, must either be (or have been) married to the mother of the child in terms of Section 20 of the *Children's Act* or show the required commitment in terms of Section 21 – that is, either by living with the mother in a permanent life-partnership at birth or by identifying himself as the father, as well as contributing to the maintenance and upbringing of the child.⁴⁸ Various reasons can be found for the law's preferential treatment of mothers as legal parents:

- (a) It promotes legal certainty. Since, unlike paternity, maternity⁴⁹ could always be established with certainty, it made sense to allocate parental responsibilities and rights to the biological mother. In this way, the legal parentage of the child could, at least as far as the mother was concerned, be determined whatever the marital status of the child's parents. Paternity, as well as legal paternity, could then be determined with reference to a certain objectively determinable fact – maternity.
- (b) It gives effect to the importance of the mother's contribution to the child who, in the opinion of the Constitutional Court in *Fraser v Children's Court, Pretoria North*:⁵⁰

... has a biological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of a father.

47 *Bill of Rights Handbook* 238.

48 See n 30 in which the section is quoted in full.

49 The woman who gave birth to the child.

50 1997 2 SA 261 (CC) para 274B – hereafter *Fraser*.

(c) Lastly, the automatic allocation of parental responsibilities and rights to the unmarried mother affords the mother, as primary caregiver, a certain degree of autonomy as far as decisions regarding her child are concerned. This protects her (and, as a consequence, presumably also the children born out of wedlock) from the unwarranted and sporadic interference by "irresponsible" fathers of such children.⁵¹

It seems, therefore, that mothers are entrusted with full responsibilities and rights because they can give birth and, as mothers, are automatically presumed suitable to act in the best interests of the child.⁵² Fathers, on the other hand, are first subjected to a screening process. If they "pass" the screening test (by showing the necessary commitment to either the mother or the child)⁵³ then, and only then, will the law accept and expect them to assume legal responsibilities and rights in respect of their child. Fathers who fail the "screening" test by not showing a sufficient degree of commitment are "spared" the burden of responsibilities automatically imposed on mothers. Since sex and gender are listed grounds of discrimination,⁵⁴ the discrimination is presumed to be unfair unless it can be justified in terms of the limitation clause.⁵⁵

Despite the fact that the automatic allocation of parental responsibilities and rights to all mothers serves a rational purpose, the unfair impact of such an allocation may still result in unfair discrimination. According to Goldstone J in the *Hugo* case:⁵⁶

51 Kaganas "Joint custody and equality in South Africa" 181 contends that the mother is vulnerable to "disruptive interventions".

52 Heaton "Family Law and the Bill of Rights" para 3C42.3.

53 In terms of S 20 and 21 of the *Children's Act*.

54 S 9(3) Constitution.

55 S 36(1) Constitution.

56 Para 38. The case concerned the constitutionality of a special remission of sentence granted by the President to certain categories of prisoners including "all mothers in prison on 10 May 1994, with minor children under the age of 12 years". The remission was embodied in a Presidential Act and was granted under S 82(1)(k) of the *Constitution of the Republic of South Africa Act 200 of 1993* (the interim Constitution). The respondent, a father of a minor child under the age of 12 years, sought an order declaring the Presidential Act unconstitutional in that it unfairly discriminated against him on the grounds of sex or gender and indirectly against his son because his incarcerated parent was not a female. The Durban and Coast Local Division upheld the contention and ordered the first appellant to correct the Presidential Act in accordance with the provisions of the Constitution within six months from the date of its order. The Constitutional Court on appeal, however, found that the remission did not constitute unfair discrimination in violation of S 8(2) of the interim Constitution.

For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship.⁵⁷ The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. ... It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.

Goldstone J in the *Hugo* case⁵⁸ was not, as a rule, prepared to accept that it would be *fair* to discriminate between women and men on the basis that mothers bear an unequal share of the burden of child rearing in our society. However, the majority of the court ultimately found that the presidential pardon did not unfairly discriminate against fathers, since it could be seen as advancing the interests of a particularly vulnerable group (mothers) in society, disadvantaged by unfair discrimination in the past.⁵⁹

In a dissenting judgment, Kriegler J⁶⁰ endorsed the general observations in the majority judgment regarding gender discrimination but submitted that the President transgressed the provisions of Section 8(2) of the interim Constitution (the equivalent of Section 9(2) of the final Constitution) and that the presumption of unfairness on that distinction had not been rebutted. After considering the importance of equality in the constitutional scheme as a whole⁶¹ and the "persuasive"⁶² factors that could possibly rebut the presumption of unfairness on the ground of gender, Kriegler J concluded that:

... the President's *ipse dixit* establishes that the decision (to implement the pardon) was founded on what has come to be known as gender stereotyping. And the Constitution enjoins all organs of state – here the President – to be careful not to perpetuate the distinctions of the past based

57 The court in *Fraser* para 44 also stressed the "deep disadvantage experienced by the single mother in society".

58 Para 37.

59 *Hugo* para 52, confirming *Brink v Kitshoff* 1996 4 SA 197 (CC) para 44.

60 *Hugo* para 66.

61 *Hugo* para 74.

62 *Hugo* para 85. Kriegler J, however, took care at the same time to emphasise that "am not suggesting that gender or sex discrimination of any kind must always and inevitably be found to be irrevocably unfair".

on gender type-casting. In effect the Act put the stamp of approval of the head of State on a perception of parental roles that has been proscribed. Mothers are no longer the 'natural' or 'primary' minders of young children in the eyes of the law, whatever tradition, prejudice, male chauvinism or privilege may maintain. Constitutionally the starting point is that parents are parents.⁶³

Yet, it has been held that the discrimination against women in this context can be justified in terms of the view that formal equality, as far as parental roles are concerned, will not create substantive equality for women who may suffer even more if fathers are automatically given parental responsibilities and rights.⁶⁴ The focus of this argument is on the mother's diminished autonomy as a result of having to share parental responsibilities and rights with the father of the child. The fear is that while mothers will still do all the parenting, fathers will acquire the right to interfere with the parenting. In reply to these arguments it is important to emphasise, first of all, that the law will not only confer parental rights on the father, but also parental responsibilities and that while the acquisition of such responsibilities and rights will be automatic, the continued exercise thereof will be conditional upon the best interests of the child as the overriding concern. It is conceded that conferring rights on *all* fathers will not necessarily in all cases translate into an increased sharing of the duties and responsibilities pertaining to the care of the child. However, it must be noted that, to the extent that such duties and responsibilities are accepted and assumed by the father, doing so can only lessen the burden of mothers. In this way, formal equality as far as the acquisition of parental responsibilities and rights are concerned could in fact contribute to substantive equality for mothers.

The discrimination against mothers on the ground of marital status is founded upon the fact that a married mother shares parental responsibilities and rights with the father of the child, while an unmarried mother has to bear the burden on her own.⁶⁵ The inequality between married and unmarried mothers arises as a direct consequence of the unequal allocation of parental responsibilities and rights to mothers and fathers. The discrimination between married and unmarried mothers would automatically disappear if mothers and fathers were treated on an equal basis

63 *Hugo* para 85.

64 See in this regard Sloth-Nielsen and Van Heerden 2003 *IJLPF* 127.

65 Heaton "Family Law and the Bill of Rights" para 3C42.3.

as far as the allocation of parental responsibilities and rights is concerned. The fact that mothers generally bear the burden of caring for their children may justify the differential treatment of fathers as legal parents. The question whether it is constitutionally justifiable to equalise the position of mothers and fathers as far as the allocation of parental responsibilities and rights is concerned will be canvassed in the following paragraph.

2.2.3 *Discrimination against fathers*

2.2.3.1 Discrimination based on sex, gender and marital or equivalent status⁶⁶

Section 28(1)(b) of the Constitution only creates rights for children, not their parents. However, in so far as the biological father is given the right to acquire parental responsibilities and rights in terms of Sections 20 and 21 of the *Children's Act*, he may claim an entitlement to the same rights as the biological mother, based on the equality provisions contained in Section 9 of the Constitution. The biological father's right to claim the same rights as the mother will nevertheless fail if the unequal treatment of fathers can be justified.

The law, as amended by the *Children's Act*, discriminates in the first instance between biological fathers and biological mothers in so far as all mothers, regardless of their marital status or commitment to their child, automatically acquire parental responsibilities and rights based exclusively on their biological relationship to their child. If fathers are denied automatic parental responsibilities and rights because only females are capable of bearing children, the discrimination seems to have less to do with the law's discrimination on ground of sex than nature's discrimination against men. The discrimination against fathers has rather been found to lie in the prejudicial treatment of fathers arising out of their parenting roles, and is thus based on gender.⁶⁷ Assigning automatic parental responsibilities and rights to *all* mothers and not all fathers at birth is deemed discriminatory because it perpetuates harmful stereotypes and "reinforces the message that the law (and society at large) still

66 See Deech 1992 *Journal of Child Law* 3–5, for an excellent human rights assessment of the unmarried father's position in the UK.

67 Currie and De Waal *Bill of Rights Handbook* 251.

sends, namely that child care is a mother's duty and that fathers should not concern themselves with child care because it simply is not their job and/or because they are incapable of, or unsuited to it".⁶⁸

The discrimination based on sex and gender has often been said to overlap with discrimination based on marital status.⁶⁹ The court in *B v S*⁷⁰ held that in so far as the assignment of access (now contact) depends only on the best interests of the child and not the respective position of the parents, fathers of extra-marital children are in the same position as married fathers and are consequently not discriminated against. As pointed out by Pantazis,⁷¹ this proposition is unacceptable, since access is presumed not to be in the best interests of the child in the case of extra-marital children, while in the case of a legitimate child, the assumption is that it is in the best interests of the child. In *Fraser*,⁷² the court recognised that the existence of marriage might have little to do with whether a father involved himself with his children.⁷³ While most constitutional commentators⁷⁴ agree that the unequal allocation of parental responsibilities and rights to mothers and fathers may amount to unfair discrimination on the grounds of sex, gender and marital status, the *Children's Act* no longer denies fathers equal parenting rights based merely on these grounds.⁷⁵ A biological father who lived with the mother in a permanent life-partnership at the time of the child's birth will now also acquire parental responsibilities and rights automatically in the same way that a father who is or was married to the mother will acquire.⁷⁶ The intention was clearly to equate the commitment of permanent life-partners with that

68 Heaton "Family Law and the Bill of Rights" para 3C42.3. Bonthuys 1999 *THRHR* 547 549 contends that "[l]aw constructs the ways in which women are different from men and thus, how mothering differs from fathering. It is in this sense that all women are defined as mothers or potential mothers and controlled through stereotypes of maternal femininity". See also minority judgment of Mokgoro J in *Hugo* para 93.

69 Albertyn and Goldblatt "Equality" 35–59. In both the judgments of *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) and *J v Director-General, Department of Home Affairs* 2003 5 SA 621 (CC), the unfair discrimination on the ground of sexual orientation overlapped with discrimination on the ground of marital status.

70 1995 3 SA 571 (A) – hereafter *B v S*.

71 1996 *SALJ* 8 19.

72 Para 44.

73 Albertyn and Goldblatt "Equality" 35–59.

74 Sinclair "Family rights" 538–539; Cockrell "The Law of Persons and the Bill of Rights" para 3E25; Heaton *South African Law of Persons* 69; Currie and De Waal *Bill of Rights Handbook* 607–608; Albertyn and Goldblatt "Equality" 59; Clark and Goldblatt "Gender and family law" 228.

75 The common law's "sharp" distinction between legitimate and extra-marital children (as noted by Cockrell "The Law of Persons and the Bill of Rights" para 3E25) has thus been tempered.

76 *Children's Act* 38 of 2005 S 21(1)(a).

of spouses for purposes of the allocation of parental responsibilities and rights – hence the alternative ground "equivalent status" added to discrimination based on marital status. A biological father can now, furthermore, also automatically become the legal parent of the child if he can show that he is sufficiently committed to his *child* by not only having identified himself as the father of the child, but also by having contributed to the child's upbringing and maintenance.⁷⁷ The question of whether the law is fair in so far as it requires fathers to "qualify" to acquire parental responsibilities and rights whereas it does not do so in the case of mothers is, it is submitted, now even more complex and nuanced than before.⁷⁸ While the constitutional attack on the commitment requirement could obviously also be based on unfair discrimination on the grounds of sex, gender and marital status, since mothers do not have to show a similar commitment to be recognised as the legal parent of the child, a "lack of commitment" could arguably constitute an independent ground on which to attack the constitutionality of the father's legal recognition as a parent. If such a ground is recognised, it would have to be treated as an unspecified ground and would not benefit from the presumption of unfairness.⁷⁹ To amount to discrimination, the differentiation based on a lack of commitment will thus have to be established as unfair and will be considered separately below.

As sex (to the extent that it is applicable), gender and marital or equivalent status are all listed grounds, the discrimination would be deemed unfair unless the violation of the fathers' right to equality can be justified in terms of Section 36 of the Constitution. The question of whether such justification exists has given rise to a range of responses from the judiciary and academics in the field, as shown below.

77 *Children's Act* 38 of 2005 S 21(1)(b).

78 Bainham 1989 *IJLPF* 228 distinguishes in this regard between so-called "first-class" fathers who are married and acquire parental responsibility as a result thereof, "second-class" fathers who are unmarried but can graduate to legal parenthood if they can convince the mother and/or the court that they deserve this, and "third-class" fathers who are unmarried and have either not tried or have failed to convince the mother and/or the court of their worth.

79 S 9(3) Constitution.

Qualified justification for limiting father's right to equality

Mahomed DP in *Fraser*⁸⁰ seemed to think that such gender discrimination could be justified, albeit only in the initial period after the child is born. The extent of the bias or preference was (further) limited by the court in *Madiehe (born Ratlhogo) v Madiehe*,⁸¹ holding that a court would only *in case of doubt* favour the mother rather than the father. The court was adamant that "[c]ustody of a young child is a responsibility as well as a privilege and it has to be earned. It is not a gender privilege or right."⁸² The dilution of the so-called "maternal preference rule"⁸³ is also evident from cases such as *Van der Linde v Van der Linde*,⁸⁴ in which it was held that "bemoedering" or mothering is indicative of a function rather than a *persona* and that a father is as capable of mothering a child as a mother.⁸⁵ Mindful of these judicial developments and the obligations imposed by the Constitution, Willis AJ in *Critchfield*⁸⁶ was of the view that:

... given the fact of pregnancy or, more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination (it would not be unconstitutional) for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination (and, correspondingly, be unconstitutional) if a court were to place undue (and unfair) weight upon this factor when balancing it against other relevant factors. Put simply, it seems to me that the only significant consequence of the Constitution when it comes to custody disputes is that the Court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children. This, as I have indicated above, has for a long time been the position in our common law.⁸⁷

80 Para 274B–C.

81 1997 2 All SA 153 (B) 157 f (hereafter *Madiehe*).

82 *Madiehe* 157 f.

83 According to Willis AJ in *Ex parte Critchfield* 1999 3 SA 132 (W) 142B (hereafter *Critchfield*), the maternal preference "rule" has never been a rule of law but rather "a statement of judicial preference or, if you will, a statement of the prevailing practice and, perhaps, prevailing policy". See also Van Heerden "Judicial interference" 534 for a discussion of the "rule" and examples of the application thereof in the cases mentioned in n 145. Pantazis 1996 SALJ 9 claims it was the development of the maternal preference rule (also referred to as the "tender-years" rule) that advanced the recognition of the best interests standard.

84 1996 3 SA 509 (O) – hereafter *Van der Linde*.

85 *Van der Linde* 515B–H.

86 Para 143B–D.

87 See also *Van Pletzen v Van Pletzen* 1998 4 SA 95 (O) 101C–D; *B v M* 2006 3 All SA 109 (W) para 74: "As far as parenting is concerned we have long since abandoned the 'maternal preference rule'"; and *K v M* 2007 4 All SA 883 (E) para 883.

Whereas the "dynamics of pregnancy" is thus only one factor to be considered in a *custody* (now "care") dispute at divorce, it is *the* determining factor in initially assigning sole *parental responsibilities and rights* to an unmarried mother of a child. Despite the fact that, save for the *Fraser* case, the above-mentioned cases were all concerned with the *continued exercise* of parental responsibilities and rights *post* divorce and not with the initial *acquisition* thereof⁸⁸ as such, the judgments do demonstrate an increased willingness by the courts to re-evaluate the gender stereotyping of parental roles.⁸⁹

(a) *Limitation of father's right to equality fully justified*

Authors such as Cockrell⁹⁰ however suggest that gender discrimination in the automatic allocation of parental responsibilities and rights is justified by deep notions

88 Howie JA draws attention to this fact in *B v S* para 578B, stating that the real issue in that case was "whether access was appropriate and not whether access was the father's inherent legal right". Sonnekus and Van Westing 1992 *THRHR* 244 entertain the notion of a loose analogy between granting automatic parental rights to unmarried fathers and awarding joint custody to parents after divorce. Reference is made to the diminishing enthusiasm for such orders in both Europe and America, where the experiment with joint custody orders after divorce has a longer history. The disparity between practice and theory in this regard and the negative outcomes of such orders are, according to Sonnekus and Van Westing 1992 *THRHR* 245, evident from authors such as Wilkinson *Child Custody and Divorce* (an American author) who hold the opinion that "[w]here there is conflict joint custody is unworkable, and where there is cooperation joint custody is unnecessary". Kaganas "Joint custody and equality in South Africa" 184 expresses similar concerns about joint custody.

89 See in this regard Rosen 1978 *SALJ* 247, who concluded after an (albeit very limited) empirical study that there were no significant differences in the adjustment level of children placed in the custody of their mother or father post divorce, and Kahn 1978 *SALJ* 249–250, who commented on this article by referring to the position in Australia where the "mother principle" had come under attack by the judiciary and authors who concluded that "there is absolutely no evidence to support the mother principle. It is belied by the evidence of infanticide, neglect and abuse, and the relative success of adopted children over their peers". See Goldberg 1993 *SALJ* 274, who contends that the considerations in the case of unwed parents are incomparable to those at divorce: "With divorce, what would be in the best interests of the child would be for the parents not to divorce. Yet it is a reality that we have to make the best of. Often that 'best' will be for the child to continue seeing his or her father after the separation. With the unwed father no such consideration applies in the majority of cases, except where the parties were cohabitants for any length of time".

90 "The Law of Persons and the Bill of Rights" para 3E25. While admitting that it is essential that the law recognise the relationship between an extra-marital child and its natural father, Mosikatsana 1996 *CILSA* 165, on the other hand, contends that both formal and substantive equality between unwed parents may potentially subordinate women. Mosikatsana is of the opinion that equal treatment of unwed parents (formal equality) would only give a natural father the option of being involved without ensuring that he bears equal responsibility for child rearing. Mosikatsana (164) in this regard draws attention to the distinction between caring "for" and caring "about" children, pointing out that although either men or women can do both, it is typically women who do the caring "for". This author maintains (164) that "[m]ost fathers will not assume equal responsibility for child rearing with the mother, no matter how many rights they are granted", concluding (165) that "[g]ender neutral rules applied to situations of social and economic inequality, would

of substantive equality and should not be held in violation of the father's constitutional rights to equality. To overcome the gender discrimination challenge, Currie and De Waal⁹¹ favour a system that confers parental rights on the *de facto* parent or primary caretaker:⁹²

The question whether sex-specific parental rights unfairly discriminate on the basis of gender is complex. On the one hand, affording fathers of children the same rights as mothers by abolishing the maternal preference and awarding fathers of children born out of wedlock automatic parental rights may advance gender equality by encouraging fathers to take an active role in the care of their children. Moreover, awarding mothers of children a greater share of parental rights merely on the basis of their gender perpetuates harmful stereotypes which require women to shoulder the burden of childcare. On the other hand, it is well known that mothers actually continue to take the primary responsibility for childcare in our society. Awarding fathers equal rights may not contribute to actual caring by fathers, but instead award fathers legal rights to interfere in mother's childcare arrangements.⁹³ In this way, gender-neutral rules may exacerbate the actual disadvantage experienced by women in the family. Perhaps a gender neutral solution which awards parental rights on the basis of actual childcare work, like the primary caretaker standard, could avoid this problem.⁹⁴

According to Clark,⁹⁵ a primary caretaker role is established:

... through leading evidence of various factors in relation to the child, such as, for example, the preparing and planning of meals; bathing, grooming and dressing; medical care; arranging for social interaction after school; arranging alternative care – babysitting or daycare, disciplining and education. A perceived advantage of the primary-care-taker rule is that it may reduce the likelihood of unnecessary litigation and diminish the uncertainty of a case-by-case discretionary method. From a feminist perspective the primary-care-taker rule does not give the secondary care-

perpetuate existing gender inequalities". Rules of substantive equality would also reinforce gender stereotypes by designating women and not men as the primary care givers. According to Mosikatsana (165), "the best approach would be to apply legal rules that neither apply false gender neutrality nor reinforce gender inequalities". See also Kaganas "Joint custody and equality in South Africa" 170.

91 *Bill of Rights Handbook* para 27.2(b)(ii).

92 S 1(1) of the *Children's Act* employs the term "care-giver" but reserves the term for "any person *other* [own emphasis] than a parent or guardian". As such, the term "care-giver" would be inappropriate in the present context in which the possibility of a parent acting as the primary carer is specifically contemplated.

93 This has also been a major factor preventing the creation of an automatic legal status for fathers in England. See Bainham 1989 *IJLPF* 226.

94 Also see Kaganas "Joint custody and equality in South Africa" 183.

95 Clark 2000 *Stell LR* 9–10.

taker (usually the man) an opportunity to gain an unfair bargaining advantage by trading off custody against maintenance payments, and it is sex-neutral: fathers who have been the primary care-takers are not disadvantaged ... The main disadvantage ... is that the child may lose contact with the non-custodial parent which may not be in the best interest of the child.⁹⁶

Kaganas⁹⁷ also favours the standard of the primary caretaker, concluding⁹⁸ as follows:

Legal provisions which presume a norm of shared parenting before it has become a social reality may reinforce unequal power relations between men and women rather than encourage its demise.⁹⁹

(b) No justification for limiting a father's right to equality

Sinclair¹⁰⁰ proposes transforming the law to reflect a "fundamental premise of equality between parents". Sinclair,¹⁰¹ it is submitted correctly, questions women's demands for constitutional equality while at the same time still insisting that it would be unfair to vest unmarried fathers with inherent parental responsibilities and rights. According to her,¹⁰² a preference for shared parental responsibilities and rights should only be interfered with "[w]here the interests of the child demand judicial intervention". In this way, it is argued "[s]tereotyped assumptions that child care is woman's work and that fathers do not want to or cannot take care of their children would be diminished" as a result of which "[t]he law would be sending the signals

96 Other authors such as Wolhuter 1997 *Stell LR* 65 would rather have the law adopt a so-called *via media* "premised upon the reformulation of a natural father's right of access to encompass both shared parenting and a social relationship with the child". See Sinclair "Family rights" 537, who indirectly rejects this *via media* approach (which she describes as the "typical panacea") on the basis that what is required is not an approach that reformulates the existing approach or that tries to reconcile disparate views on both extremes of the spectrum, but a "comprehensive recrafting of the rights and responsibilities of parents and their children, taking into account the justification for state intervention to protect widely shared societal values, and also the diversity of cultural and religious convictions in our country" (539).

97 "Joint custody and equality in South Africa" 184.

98 In support of Boyd "Gender specificity to gender neutrality?" 146. See Kaganas "Joint custody and equality in South Africa" 170 n 9 and 184 n 119.

99 Kaganas "Joint custody and equality in South Africa" 182, referring to an American author, Littleton 1987 *California LR* 1297, agrees that the "function of equality is to make gender differences, perceived or actual, costless relative to each other so that people are enabled to follow their chosen lifestyles without being punished for following a female lifestyle or rewarded for following a male one".

100 "Family rights" 540.

101 "Family rights" 540 n 138.

102 Sinclair "Family rights" 540.

that conform to the letter and spirit of the Bill of Rights".¹⁰³ Although equal parental rights and responsibilities would not eliminate competition and conflict between the parents, Sinclair¹⁰⁴ is convinced that where there is no "war", which in her opinion is the norm rather than the exception, "individual men and women would be treated alike".

In conclusion, it could be said that in view of the wide range of responses and viewpoints held in this regard, it is a moot point whether the unequal treatment of *committed* biological fathers¹⁰⁵ as compared to mothers can be justified in terms of Section 36(1) of the Constitution.

2.2.3.2 Discrimination based on "lack of commitment"

The question is however whether the differentiation between *committed* fathers and *uncommitted* fathers, that is those fathers who have not shown the necessary commitment in terms of the *Children's Act*, can be considered unfair discrimination.

While it is admitted that there is a similarity and overlap between the unfairness enquiry (in the case of discrimination based on a specified ground) and the enquiry into whether the differentiation on an unspecified ground amounts to discrimination because both consider the impairment of dignity, the two enquiries apparently have different objectives. While the unfairness enquiry has to determine whether a particular act of discrimination was unfair, the enquiry relating to an unspecified ground has to determine whether the differentiation amounts to discrimination.¹⁰⁶

103 Sinclair "Family rights" 540. See also the proposal by Pantazis 1996 SALJ 8 (testing the arguments in *B v S* 1993 2 SA 211 (W) against the still then applicable interim Constitution) to the effect that if the common law rights of a father cannot be changed by a court (because the interim Constitution may not have horizontal application) to grant a natural father an inherent right of access, the common law should be developed in accordance with the spirit, purport and objects of the Bill of Rights to proceed from an assumption of desirability of a relationship between father and child rather than the inverse (21), since the presumption of an unmarried father's unsuitability strongly influences the decision of what is in a child's interests (19).

104 "Family rights" 540.

105 Fathers who have shown their commitment in terms of S 20 and 21 of the *Children's Act*.

106 Albertyn and Goldblatt "Equality" 49.

A lack of commitment may qualify as an unspecified ground because it is based on "attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner".¹⁰⁷ The test for unfairness focuses primarily on the impact of the differentiation on the complainant and others in his or her situation.¹⁰⁸ According to the Constitutional Court in *Harksen*,¹⁰⁹ the following factors must be considered to determine whether the differentiation has had an unfair impact:¹¹⁰

(a) *The position of the complainants in society and whether they have been victims of past patterns of discrimination*

Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than a burden placed on those who are relatively well off.¹¹¹ While fathers, who have been denied an opportunity to develop a "family life"¹¹² with either the mother herself or the child may argue that they have always been at a disadvantage,¹¹³ uncommitted fathers, save perhaps in so far as they have been obliged to support their children out of wedlock, have in a sense been advantaged by the law's disregard of them. Because uncommitted fathers have never been allowed to acquire parental responsibilities and rights automatically, they have never had a legal duty to care for their children.¹¹⁴ In a case in which, however, the father was either unaware of his paternity or was prevented by the mother from forming an

107 *Harksen* para 46, as discussed by Albertyn and Goldblatt "Equality" 49.

108 *Harksen* para 54. See Albertyn and Goldblatt "Equality" 75.

109 Para 51.

110 In stating these guidelines, the court in *Harksen* para 41 made use of existing equality jurisprudence as represented especially by the Constitutional Court's judgments in *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) and *Hugo*.

111 The court in *Harksen* para 324C–D specifically referred to the judgment in *Hugo* as an example in this regard.

112 Requiring a father to demonstrate a commitment to his child in order to be recognised as a parent may be a way of incorporating the requirement of a family life in terms of A 8 of the ECHR into our law: See Van der Linde *Grondwetlike Erkenning* 477.

113 See Louw *Acquisition of Parental Responsibilities* para 4.2.3.1(b), discussing the position of unmarried fathers before the enactment of the *Children's Act*.

114 As evidenced by the judgment in *Jooste*. The court gave another reason for not enforcing such a duty (209H): "*Lex non cogit ad impossibilia*". The law will not enforce the impossible. It cannot create love and affection where there is none. Not between legitimate children and their parents and even less between illegitimate children and their fathers". According to Sloth-Nielsen and Van Heerden 2003 *IJLPF* 127, the case possibly "supports the further development of the notion of care as a corollary to parental status, at least as far as natural fathers are concerned". For criticism of the judgment, see Bekink and Brand "Constitutional protection of children" 184; Van der Linde and Labuschagne 2001 *THRHR* 308 and sources quoted in Currie and De Waal *Bill of Rights Handbook* 608 n 45.

attachment with his child,¹¹⁵ one may very well argue that such differentiation is discriminatory because it fundamentally impairs the dignity of such fathers not *automatically* to be recognised as a legal parent from the birth of the child on the same basis as mothers.¹¹⁶

Kruger¹¹⁷ would appear to imply, at least as far as being able to acquire rights of "access" (now "contact") in respect of their children are concerned,¹¹⁸ that fathers have been disadvantaged. She argues that fathers rarely succeed in their application for "access", which often involves protracted and expensive litigation.¹¹⁹ The drawn out litigation, furthermore, has the potential to alienate and isolate the father from the child, resulting in the court ultimately denying the application on the basis that the access is no longer in the best interests of the child.¹²⁰ The same arguments could conceivably apply with even more force in the case of a father approaching the court for co-guardianship and co-care.¹²¹ Furthermore, Van Onselen¹²² claims that mothers are abusing the current legal position in the following ways. Firstly, the "liberated female" may elect to bear a child with no intention of permitting the father to play a role as part of the family at all. In this case, the father "is left without any rights so he cannot perform his function even if he wants to and the mother is possessed of awesome legal predominance".¹²³ Secondly, "some women use the weak legal position of the father to extort money from the father in exchange for so-called

115 Since it is difficult to interpret the meaning of the words "attempted in good faith" as employed in S 21(1)(b), it is not entirely clear whether a father who is prevented by the mother from contributing to the maintenance and upbringing of the child would be able to satisfy the requirements in terms of the said Section.

116 Van Onselen 1991 *De Rebus* 501.

117 1996 *THRHR* 514.

118 While many authors are in favour of recognising an inherent *right of access* (now contact) for unmarried fathers, it is not always evident whether such recognition would be supported if extended to include the other incidents of parental responsibilities and rights, that is care and guardianship. Kruger *et al* 1993 *THRHR* 703 and Pantazis 1996 *SALJ* 17 in express terms limit their support for a right of access only, while Goldberg 1996 *THRHR* 282, on the other hand, reflects on the position of the unmarried father in general. The significance of this observation is that since the co-exercise of care and guardianship may seem far more threatening to the mother's preferred legal position than the co-exercise of contact, it is less likely to be considered justifiable at a constitutional level.

119 Kruger 1996 *THRHR* 519.

120 Kruger 1996 *THRHR* 519, with reference to the judgment in *B v S* para 587D, wherein the judge made the following observation: "If the evidence on remittal shows that time and circumstance have driven an unshakeable wedge between [father and child], so be it".

121 Kruger 1996 *THRHR* 522 admits to this.

122 1991 *De Rebus* 500.

123 Van Onselen 1991 *De Rebus* 500.

'favours' of access to the child".¹²⁴ Lastly, "[t]he dominance of the mother's legal position interferes with the development of a balanced mother/father relationship vis-à-vis the child".¹²⁵

The court in the *Hugo* case,¹²⁶ however, by implication found that fathers are not a vulnerable group adversely affected by discrimination.¹²⁷

(b) The nature of the discriminating law or action and the purpose sought to be achieved by it

An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal. According to Preiss J in *Fraser*,¹²⁸ the social origins of the rule (that natural fathers do not acquire inherent parental responsibilities and rights in respect of their children born out of wedlock) may have been based upon a desire to preserve or encourage the formation of the family unit for the benefit of children, or designed to punish profligate men or to discourage the irresponsible procreation of children. Hughes¹²⁹ summarises the reasons for societies wanting to channel sexuality into legitimate marriages as threefold:

- (i) the economic motive – to maintain property within the family group;
- (ii) the political motive – to accumulate power and influence by a carefully conducted policy of marriage alliances; and
- (iii) the moralistic motive – to enforce the primarily religious exhortations to sexual renunciation.¹³⁰

As stated by Van Onselen,¹³¹ "these objectives would appear to have failed largely or at least to have been ineffective".¹³² Pantazis¹³³ moreover submits that none of

124 Van Onselen 1991 *De Rebus* 500.

125 Van Onselen 1991 *De Rebus* 500. Supporting this view, Kruger 1996 *THRHR* 519 contends: "Daar word vandag algemeen deur gedragwetenskaplikes aanvaar dat 'n kind 'n vader en 'n moeder nodig het vir die ontwikkeling van 'n eie persoonlikheid en identiteit". See also Eckhard 1992 *TSAR* 125 and Labuschagne 1993 *THRHR* 421 in this regard.

126 Para 52.

127 See *Harksen* para 64, in which Goldstone J reviewed the reasoning in the *Hugo* case.

128 1997 2 SA 218 (T) para 234H.

129 "Law, religion and bastardy" 4–6.

130 Pantazis 1996 *SALJ* 10.

131 1991 *De Rebus* 500.

these reasons is an acceptable basis for treating children born of unmarried parents differently in law because it is "unacceptable to punish the child for the sin of the father". While the denial of granting fathers equal parental rights merely on the basis that they have not married the mothers of their children can easily be dismissed as not achieving "a worthy and societal goal", the question is considerably more complex in the present dispensation where all that is required from fathers is that they demonstrate some form of commitment to either the mother or the child. Is it unfair to exclude fathers who have not shown such commitment – especially given the fact that uncommitted fathers can still acquire parental responsibilities and rights by agreement or by order of court?

Albertyn and Goldblatt¹³⁴ suggest that the constitutionality of the mother's preferred legal position with regard to her children may ultimately depend on the specific strategy chosen – "whether the lack of involvement of fathers in their children's lives should be punished by the law or whether the law should be used to encourage greater involvement" – which will of course not necessarily mean that these fathers will in fact be more involved.

It could be argued that the societal goal achieved by the *Children's Act* is, in the first place, to protect mothers who are in general still the primary caretakers of children. The problem with this argument is that it is parent centred and, by implication, gender specific. What is best for the mother will not always be best for the child. A second argument that will probably have more force, because of the obligation in terms of Section 28(2) of the Constitution, is to contend that excluding an uncommitted father from automatically acquiring parental responsibilities and rights in respect of his child is generally in the best interests of the child.

However, the vagueness of the criteria for the automatic acquisition of parental responsibilities and rights by fathers makes it very difficult to determine with absolute certainty whether a particular father will fall within the ambit of the section. In terms of Section 21(1)(a), for example, the biological father must be living in a "permanent

132 As also noted by Kruger 1996 *THRHR* 519.

133 1996 *SALJ* 10.

134 "Equality" 59.

life-partnership" with the mother – a concept that is not defined for purposes of the *Children's Act* and which has no fixed content.¹³⁵ A further problem is the arbitrariness of the criteria. Requiring the father to have cohabited with the mother "at birth" would only be one such example.¹³⁶ It is submitted that the uncertainty created by the provisions contained in Section 21 outweighs the ostensible protection of children against uncommitted fathers.

The advantage of vesting parental responsibilities and rights in both parents at birth is that should the mother die or for some reason disappear the father could *automatically* act as caretaker and guardian. The present dispensation would necessitate a High Court application with its attendant costs.

The concern that "a capricious man would use such undeserved status to badger the woman whom he has left – perhaps happily so – to bring up his children unaided"¹³⁷ is at least partially dispelled by the fact that co-holders of parental responsibilities and rights can act "without the consent of the other co-holder or holders when exercising those parental responsibilities and rights".¹³⁸ It must, however, be conceded that this general principle is tempered by Section 18 in terms of which co-guardians will both have to consent to the child's marriage, adoption, relocation, passport application and alienation or encumbrance of the child's immovable property. Major decisions involving the child will, therefore, have to be made with due consideration of any views and wishes expressed by any co-holder of parental responsibilities and rights.¹³⁹

The purpose sought to be achieved by limiting a father's right to automatic parental responsibilities and rights seems to have more to do with protecting the mother's vested interests than putting the interests of children first. It goes without saying that

135 For details regarding the problematic nature of this concept, see Louw *Acquisition of Parental Responsibilities* 116–117.

136 S 21(1)(a) *Children's Act*. For a detailed discussion of other problematic provisions in S 21, see Louw *Acquisition of Parental Responsibilities* 117–122.

137 Barton 1998 *Solicitors Journal* 401.

138 S 30 *Children's Act*.

139 S 31(2)(a) *Children's Act* 38. A major decision is defined as "any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child" – S 31(2)(b).

formal equality between parents in this respect would allow patently obvious unsuitable fathers to be vested with parental responsibilities and rights – but the same is happening at the moment in the case of mothers.

In the process of evaluating the criteria to be applied when assigning parental responsibilities and rights to the biological parents of a child by operation of law, it is considered essential to remain focused on the purpose and function of such assignment, that is to ensure that every child is assigned a legal parent at birth and to bear in mind that such assignment may be judicially varied, terminated or reassigned over time, depending on the best interests of the child.¹⁴⁰ It is submitted that the law should allow both parents to assume parental responsibilities and rights by operation of law, since that would provide the child with the most extensive potential protective net. To allow the mother to manipulate the child's relationship with its father seems overtly unfair.¹⁴¹ It is only in those instances in which a parent fails to make use of a given opportunity to develop a relationship with his or her child that the responsibility entrusted to the particular parent should be limited or denied. In this way, a negative outcome is not anticipated or prejudged – each parent would have to take responsibility for his or her own lack of commitment to the child.¹⁴² It may also, in practice at least, be marginally easier to show a failure to commit to the child from birth than to prove a commitment to the mother or the child as required by

140 The thoughts expressed here were at least partly inspired by the following observation of the Scottish Law Commission as quoted by Lowe 1997 *IJLPF* 192 at 199: "The question is whether the starting point should be that the father has, or has not, the normal parental responsibilities and rights. Given that about 25 percent of all children born in Scotland in recent years have been born out of wedlock, and that the number of couples cohabitating outside marriage is now substantial, it seems to us that the balance has now swung in favour of the view that parents are parents, whether married to each other or not. If in any particular case it is in the best interest of a child that a parent should be deprived of some or all of his or her parental responsibilities and rights that can be achieved by means of a court order". In this context, it is submitted, the concept of "revocable" responsibility seems to be apposite: Lowe 1997 *IJLPF* 192 at 207, referring to Conway 1996 *NLJ* 782.

141 Eckhard 1992 *TSAR* 129 is of the opinion that this approach amounts to an unacceptable limitation of the discretion of the court that would be bound by what the mother sees as the future for the child. According to Meulders-Klein 1990 *IJLF* 131 at 150, an approach which focuses on the position of the father *vis-à-vis* that of the mother in terms of their respective powers should be avoided because it is "divisive and therefore destructive".

142 This approach would also obviate the need of one parent to prove the other parent's unsuitability or incompetency in order to acquire parental responsibilities and rights. Such an attack can only increase the animosity between the already incompatible parents and make it more difficult to exercise shared parental responsibilities and rights in future: Eckhard 1992 *TSAR* 131.

Section 21 of the *Children's Act*.¹⁴³ In short, it may be easier to determine what is *not* in the child's best interests with reference to the history of the relationship between that child and its mother and father than to predict and predetermine whether such a relationship will in future be in the best interests of the child.¹⁴⁴ The only real and obvious drawback of this approach is that it may in practice mean that the mother, who generally seems to remain the primary caretaker, will have to cope with the (mostly) unwelcome involvement of the father in the life of the child,¹⁴⁵ at least as far as the responsibilities and rights of guardianship and taking major decisions concerning the child is concerned. Proponents of the "substantive equality" argument would be justified in regarding this as further discrimination against the mother based on sex and especially gender. However, if the focus is shifted to that of the child in question, as required by Section 28(2) of the Constitution,¹⁴⁶ then such an approach would seem to be the only constitutionally viable one.¹⁴⁷ After all, expecting a father who wants to develop a relationship with his child to approach the court to acquire legal recognition may seem as unreasonable as expecting a mother to prevent such legal recognition.¹⁴⁸

143 In this regard, the stated preference (in *McCall v McCall* 1994 (3) SA 201 (C)) for maintaining the *status quo* in so far as the care of the child is concerned, should also be mentioned. As Bainham 1989 *IJLPF* 233 so aptly observes: "The father will almost certainly be in a weaker position in arguing that the *status quo* should be disturbed than he would be if he was instead resisting a change in the *status quo*".

144 Eckhard 1992 *TSAR* 128.

145 Pantazis 1996 *SALJ* 14.

146 Bainham 1989 *IJLPF* 234 points out that the current protection of unmarried mothers from adverse behaviour of fathers assumes that the interests of the mother and child are synonymous which is not unlike the equally dogmatic nineteenth century attitude which equated children's interests with their fathers' and concludes that "the principle which informs modern child law is not that the interests of mothers and fathers are paramount, but that the interests of children are".

147 Apart from A 18 of the UNCRC, the judgments of the European Court of Human Rights in *Marckx v Belgium* 1979 2 EHRR 330 and *Johnston v Ireland* 1986 9 EHRR 203 have made it clear that the fundamental rule is that "every child has the fundamental rights to have a normal family life, that is to say, a father and a mother with whom he has a personal relationship": Meulders-Klein 1990 *IJLF* 131 at 151.

148 With reference only to the natural father's right of access, Wolhuter 1997 *Stell LR* 65 at 78 is, however, of the opinion that the mother should only bear the evidential burden to prove the father's unfitness once he "has discharged the *onus* of proving that he has a social relationship with his child and is committed to shared parenting". Despite holding that there may be serious other risks in granting fathers automatic rights (of access (at 268)), Goldberg 1993 *SALJ* 261 admits that the difficulty of getting access to court "could be equally problematic for fathers" (at 267).

(c) *The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity*¹⁴⁹

The legislative scheme differentiating between mothers and fathers as far as the acquisition of parental responsibilities and rights is concerned can be said to perpetuate the image of natural fathers as "fly by night" progenitors who are disinterested in their children and shirk their financial obligations.¹⁵⁰ Uncommitted biological fathers are thus by implication in law regarded as lesser parents with inherently deficient parenting skills,¹⁵¹ while all biological mothers are initially irrefutably presumed to be capable of assuming the role of legal parenthood. The effect of the discrimination is that the mere existence of a biological link creates a relationship of parent and child in the one case but not in the other.¹⁵² As such, the limitation of the father's right to be treated equally as a parent may well be an affront to his dignity. This will especially be so in cases in which the father was not aware of his paternity or the mother has refused him the opportunity to develop a relationship with herself or with the child.

Despite the fact that the limitation does not negate the possibility of fathers acquiring parental responsibilities and rights, Sections 20 and 21 still preclude the automatic acquisition of parental responsibilities and rights on the same basis as mothers in terms of Section 19. While fathers should not be allowed to *exercise* parental responsibilities and rights if it is detrimental to the interests of his children, they should at least be dignified with the same opportunity of *acquiring* such responsibilities and rights at the birth of the child.

149 Currie and De Waal *Bill of Rights Handbook* 245.

150 Goldberg 1993 *SALJ* 261 at 274 calls them "uncaring rascal(s)".

151 Mosikatsana 1996 *CILSA* 152. See also the minority judgment of Mokgoro J in *Hugo* 92 who contended that not releasing fathers of children from prison on the same basis as mothers "does not recognise the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers". With reference to the American case of *Stanley v Illinois* 405 US 645 (1972), Pantazis 1996 *SALJ* 17 observes: "Given the importance of the parent's interest, it is unconstitutional to presume parental unfitness; it has to be established on an individual basis". One may then surely ask but what about the presumption of fitness in the case of a mother? Is that constitutional?

152 *J v Director-General* 2003 5 SA 605 (D) para 27 (hereafter *J v Director-General*).

2.3 *Constitutional rights of children*

The inequality in the *ex lege* assignment of parental responsibilities and rights may have a more deleterious effect on the constitutional (and international) rights of children than on the rights of their parents. Denying a child the right to have both its parents recognised by law on an equal basis could, as indicated above, be seen as unfair discrimination, a limitation of the child's constitutional rights to parental care (embodied in Section 28(1)(b)) and could arguably also inhibit an approach dedicated to pursuing the best interests of the child (in terms of Section 28(2) of the Constitution).

2.3.1 *Unfair discrimination against children?*

The possible discrimination against children on the grounds of their social origin and birth is based on the differentiation between children born to parents who are either committed to each other and/or their child in a specific way and children born to parents who are not so committed. In particular, the discrimination is against those children whose father is or was not married to their mother, did not live with their mother at birth or has not shown a commitment to the children themselves, as prescribed by Section 21. The *Children's Act* has thus to a large extent minimised the possible discrimination against children, since the differentiation between children is no longer made with reference only to their parents' marital status.

The Constitutional Court in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; and South African Human Rights Commission v President of the Republic of South Africa*¹⁵³ found Section 23 of the *Black Administration Act*¹⁵⁴ and the customary law rule of primogeniture in its application to intestate succession unconstitutional in so far as it unfairly discriminated against extra-marital daughters to qualify as heirs in the intestate estate of their deceased father in terms of the Constitution's equality provisions (Section 9), the right to human dignity (Section 10) and the rights of

153 2005 1 SA 580 (CC) – hereafter *Bhe*.

154 38 of 1927.

children under Section 28 of the Constitution.¹⁵⁵ The court held that children could not be subjected to discrimination on grounds of sex and birth in terms of Section 9 of the Constitution. The customary law rule of primogeniture prevented all female children from inheriting intestate and significantly curtailed the rights of extra-marital male children in this regard.¹⁵⁶ In its consideration of the constitutional rights of children implicated in the case,¹⁵⁷ the court gave special attention to the question "whether the differential entitlements of children born within marriage and those born extra-maritally constitutes unfair discrimination".¹⁵⁸ In so far as the answer to this question could be based on the interpretation of Section 28 and other rights in the Constitution, the court held that the provisions of international law must be considered, since: "South Africa is a party to a number of multilateral agreements designed to strengthen the protection of children."¹⁵⁹ In the general context of according natural fathers equal rights to those of mothers, the court made the following important comments:¹⁶⁰

The European Court on Human Rights has held that treating extra-marital children differently to those born within marriage constitutes a suspect ground of differentiation in terms of art 14 of the [African] Charter¹⁶¹ [on the Rights and Welfare of the Child]. The United States Supreme Court, too, has held that discriminating on the grounds of 'illegitimacy' is 'illogical' and 'unjust'.

Describing the position of extra-marital children in South Africa, the court concluded that:¹⁶²

... extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus when 9(3) prohibits unfair discrimination on the ground of 'birth', it

155 *Bhe* para 100.

156 *Bhe* para 88.

157 *Bhe* paras 47–59.

158 *Bhe* para 54.

159 *Bhe* para 55.

160 *Bhe* para 56, referring to *Weber v Aetna Casualty and Surety Co* 406 US 164 (1972) para 175; *Levy v Louisiana* 391 US 68 (1968); *Glon v American Guarantee and Liability Insurance Co* 391 US 73 (1968) para 76 and *Trimble v Gordon* 430 US 762 (1977).

161 The court referred to the judgments of *Marckx v Belgium* 1979 2 EHRR 330 paras 38–39 and *Inze v Austria* 1987 10 EHRR 394 para 41, in this regard.

162 *Bhe* para 59.

should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed unfair unless it is established that it is not.¹⁶³

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*,¹⁶⁴ the court held:¹⁶⁵

I am of the opinion that this common-law rule, which differentiates between children born in wedlock and extra-marital children, not only denies extra-marital children an equal right to be maintained by their paternal grandparents, but conveys the notion that they do not have the same inherent worth and dignity as children who are born in wedlock.

The court added that the common-law rule was also contrary to the best interests of the child and that it followed that: "it violates the constitutional rights of extra-marital children, and in particular, the rights enshrined in Sections 9, 10 and 28(2) of the Constitution".¹⁶⁶

Although both of these cases focused on the rights of children and not the rights of parents or natural fathers, these comments undeniably support an egalitarian approach that disregards sex and marital status in the determination of the parent-child relationship. Whether the judgment could be interpreted as supporting an approach in terms of which the parents of the child are placed on an equal footing as far as the automatic acquisition of parental responsibilities and rights is concerned, is debatable. The creation of such a blanket rule was not considered appropriate in the *Fraser* case,¹⁶⁷ where a "nuanced" approach was advocated. The court in that case seemed to intimate that the right to parental care should be qualified by an inference that the right should only apply to committed parental care as now embodied in Sections 20 and 21 of the *Children's Act*.

163 Also see Pantazis 1996 SALJ 12.

164 2004 2 SA 56 (C) – hereafter *Petersen v Maintenance Officer*.

165 *Petersen v Maintenance Officer* 19.

166 *Petersen v Maintenance Officer* 21.

167 Para 29.

2.3.2 *Infringement of a child's rights in terms of Section 28 of the Constitution*

If it is argued that the differentiation between mothers and fathers as far as the acquisition of parental responsibilities and rights is concerned constitutes an infringement of a child's right to parental care,¹⁶⁸ the question would be whether such infringement can be justified in terms of Section 36 of the Constitution. A further question is whether the infringement of the child's right to parental care can be considered as giving paramountcy to the best interests of a child.¹⁶⁹ The limitation analysis in terms of Section 36 of the Constitution involves a proportionality enquiry. The balancing exercise in this case requires that the purpose, effect and importance of the denial of automatic parental responsibilities and rights to uncommitted fathers, on the one hand, be weighed up against the nature and effect of the impairment caused to the children's rights, on the other. The limitation analysis will be considered with reference to the factors mentioned in Section 36(1) of the Constitution¹⁷⁰ and the best interests of the child.

2.3.2.1 The nature of the right to parental care¹⁷¹ and the best interests of the child

The nature of the right to parental care is apparent from the words "parental" and "care". It is submitted that "care" in this context should be given a wide interpretation as including both the intangible aspects of the parent-child relationship, such as "love, attention and affection",¹⁷² and the more tangible or economic aspects of the relationship of providing for the child's physical needs. While it would admittedly be difficult, if not impossible, to enforce the intangible component of the relationship between parent and child because of its highly personal nature,¹⁷³ this does not

168 S 28(1)(b) Constitution.

169 As required by S 28(2) of the Constitution. The court in *J v Director-General* para 8 interpreted "paramount" as it is used in S 28(2) to mean that "the interests of the children are not merely important – they override all other considerations in cases concerning children". The statement was later qualified by the Constitutional Court in *S v M* 2007 2 SACR 539 (CC) para 26 to the effect that "the fact that the best interests of the child are paramount does not mean that they are absolute".

170 See the discussion in 2.2 above.

171 See S 36(1)(a) of the Constitution.

172 *Jooste* para 201D–E.

173 See *Jooste* para 209H.

mean, as correctly pointed out by Heaton,¹⁷⁴ that the right should not be recognised. In fact, the right and the responsibility to care, as defined in the *Children's Act*, appear mainly to be comprised of intangibles.¹⁷⁵

A further question that is important for the present investigation is whether the right to "care" also includes a right to legal "care" or assistance, that is a right to parental guardianship. In so far as the right and responsibility of guardianship would be necessary to provide sufficient "care" of a child, it could be argued to fall within the ambit of the right to parental care.

The adjective "parental" means "of or characteristic of a parent or parents".¹⁷⁶ The word "parent" means to bring forth, to bear or to beget and includes a natural or biological father and mother.¹⁷⁷ "Parental" care consequently refers to the care ordinarily associated with or similar in nature to care provided by a biological parent or the biological parents in respect of their offspring. A child would by necessary implication also have a right to care by a person other than a parent.¹⁷⁸ While Section 28(1)(b) would thus not generally speaking necessarily include a right to parental care by *both* parents of a child, it could be seen as implicit in the Section if interpreted against the backdrop of the UNCRC, from which it derives.¹⁷⁹ The use of the gender neutral term "*parent(al)*" cannot be interpreted as giving preference to either the mother or the father. Similarly, the inference that the section only recognises the right or duty to care in respect of a parent who has custody¹⁸⁰ cannot be justified considering the absence of any qualification to the child's right to parental care in Section 28(1)(b) itself.¹⁸¹ Since a child only becomes a legal subject at birth,

174 "Family Law and the Bill of Rights" para 3C36.

175 See definition of "care" in the *Children's Act*. S 1(1) sv "care", which includes reference to both tangible aspects (in (a)) and intangible aspects (in (b) to (j)).

176 *Webster's Dictionary* sv "parental".

177 *Webster's Dictionary* sv "parent"; Pearsall *Concise Oxford Dictionary* sv "parent"; Claassen *Dictionary of Legal Words and Phrases* sv "parent"; Garner *Handbook of Family Law Terms* sv "parent".

178 The court in *SW v F* 1997 1 SA 796 (O) para 802G–H confirmed that the right to parental care not only referred to care by natural parents.

179 A 18 of the UNCRC promotes the principle that both parents have common responsibilities in raising their children.

180 See *Jooste* para 208F.

181 Unless the judgment in *Jooste* is read as implying that only fathers who have automatically acquired parental responsibilities and rights (and, therefore, "custody" or care) have a duty to care for the child. If the judgment is interpreted in this way, it would explain why the duty to care

the child will have a right to parental care as from the moment of its birth. While it is acknowledged that families in South Africa take many different forms, children have a right not to be discriminated against on the ground of their birth or social origin.¹⁸² Every child should thus have a right to parental care by both its parents as from birth, regardless of the relationship (or lack of a relationship) between the parents themselves or, for that matter, between the child and its parent.

The right to parental care is however not absolute. It is, in the first place, dependent on the best interests of the child as provided for in Section 28(2) of the Constitution. As such, the right to parental care can in a given case be limited or even denied if doing so is deemed to be in the best interests of the particular child concerned. The right to parental care can, furthermore, like any other constitutional right, be limited by a law of general application to the extent that it is reasonable and justifiable as prescribed by Section 36 of the Constitution. The *Children's Act* is such a law and, while it does not limit a child's right to *maternal* care, it limits a child's right to *paternal* care. As far as the child's right to *paternal* care is concerned, the right is only recognised in the case of a father who has shown the necessary commitment to either the mother or the child as provided for in Sections 20 and 21. While limiting the child's right to *paternal* care may in a given case be considered in the best interests of that particular child, the question is whether the blanket limitation (limiting all children's right to *paternal* care in this specific way) can, generally speaking, be justified in terms of Section 36.

2.3.2.2 The importance of the purpose of the limitation of the child's right to parental care¹⁸³ and the best interests of the child

While the acquisition of parental responsibilities and rights is always subject to the best interests of the child concerned, it would be impracticable to delay the initial allocation of parental responsibilities and rights pending the outcome of a determination of the best interests of each child born in South Africa. In deciding who

for a child cannot be enforced against a father who has not acquired any parental responsibilities and rights. Also see comments in n 115 above.

182 S 9(3) of the Constitution.

183 S 36(1)(b) Constitution.

should automatically be vested with parental responsibilities and rights at birth, the law must thus, for practical reasons, make certain basic assumptions as to what would generally be in the best interests of children. The difficulty in making such assumptions is that there will always be cases in which the assumption will prove to be wrong: while it may be in the best interests of one child to have two legal parents from birth, it may not always be so for another. The challenge is thus to formulate a flexible rule that allows for exceptional cases. In a case in which the rule allows for the acquisition of responsibilities and rights by the parent by operation of law, that is automatically, it is very difficult to devise a mechanism in terms of which the exceptional cases can be identified and accommodated. For this reason, it is submitted that the rules providing for the *ex lege* assignment of parental responsibilities and rights at the time of the child's birth should be clear and simple, and provide for a method of determining legal parenthood with the utmost degree of certainty – most of which is lacking in the new scheme devised by the *Children's Act*.¹⁸⁴

The purpose of preventing uncommitted fathers from automatically acquiring parental responsibilities and rights is mainly to protect the stability of the relationship between children and their mothers as the primary caretakers of children. Protecting this relationship is important in circumstances in which the arbitrary and inconsistent involvement of the father would be prejudicial to the child's welfare. However, it cannot be denied that while the best interests of the child are often identical to the interests of the mother, this is not always the case.¹⁸⁵ The negative effect that the sharing of parental responsibilities and rights with the father might have on the mother must be offset against the advantages for the child in developing and maintaining a relationship with its father.

184 S 21 *Children's Act*.

185 Pantazis 1996 *SALJ* 14, referring only to the right of "access", is of the opinion that: "Given the importance of contact between child and father, it is not reasonable to generalise this potential clash into a rule of law that denies automatic access". Bonthuys 1997 *SAJHR* 631 is however of the opinion that the ideologies of the new, participating father, and the need for the presence of a father in the 'family' "are conveniently accommodated within the elastic concept of the best interests of the child" and is critical of "[b]iological assumptions" that "serve as authority for views about qualities deemed inherent in fatherhood and motherhood, and about the needs of all children and families for fathers" (at 632). See the discussion in 1.4.3 above in this regard. Currie and De Waal *Bill of Rights Handbook* 620 and Bonthuys 1997 *SAJHR* 622 contend that the best interests standard is simply a vehicle for parental interests.

2.3.2.3 The nature and extent of the limitation of the child's right to parental care¹⁸⁶ and the best interests of the child

A child's right to parental care, should the child be born to married parents, is limited in so far as it excludes the right of that child to have both the mother and the father of the child automatically recognised as the child's legal parents. In a case in which a father has not shown any demonstrable commitment to his child or the mother of his child, as provided for in Sections 20 and 21 of the *Children's Act*, he will not by law be recognised as the father of the child. The law's disregard of such fathers will thus simply reflect the reality of the situation. As far as the mother of the child is concerned, she will become the legal parent of the child even if she displays no interest at all in the child or its welfare – provided of course the mother does not decide to terminate her pregnancy.

While a father can elect not to be legally recognised as the child's parent by simply dropping out of the picture, his position is rather precarious if he actually wants to be legally recognised as the child's father. His recognition will to a large extent depend on the mother's co-operation. If she is willing, the father can marry the mother or live with her *at the time of the child's birth* – not before or after. If this is not possible, the father can take the steps outlined in Section 21 to acquire parental responsibilities and rights. The mother can also confer parental responsibilities and rights on him by agreement. If the mother does not wish the father to be recognised, she can refuse to marry him or live with him. She can refuse to allow him to develop a relationship with the child or to confer rights on him by agreement. The problem is thus not excluding uncommitted fathers from caring but allowing fathers who want to care and be legally recognised as the child's father the opportunity to do so without necessarily making it dependent on the mother's (or ultimately a court's) view of what is in the best interests of the child.

Although dealing with a same-sex partner, the following observations made by the court in *J v Director-General* can apply with equal force in the present context as far

186 S 36(1)(c) Constitution.

as the disadvantages in not automatically being recognised as the parent of a child are concerned:

- (a) If the relationship between the parents is terminated, the partner, or father in the present context, will have no automatic right of access to the child and the child will not automatically have a right of access to him.¹⁸⁷
- (b) A testamentary appointment as guardian after the death of the mother will not ensure that the biological father will become the guardian, since the testamentary nomination can be revoked at any time, in which event the child might be left without any guardian at all.¹⁸⁸
- (c) In cases of emergency, such as a medical emergency, it might well be vital in the interests of the children that the father be entitled to give the requisite consent if, for whatever reason, the mother becomes unavailable to give such consent.¹⁸⁹
- (d) The court also stressed the importance of having "two parents and guardians rather than one".¹⁹⁰

The court in *J v Director-General* finally concluded that, as a natural parent, the partner's right to human dignity in terms of Section 10 of the Constitution and the children's right to parental care in terms of Section 28(1)(b) demand that her claim be recognised by law.¹⁹¹ The same argument is applicable in the case of a biological father.

2.3.2.4 The relation between the limitation of the child's right to parental care and its purpose¹⁹² and the best interests of the child

It appears that the legislature has opted for a compromise between the complete insulation of the mother–child relationship against outside interference, on the one hand, and the automatic recognition of all fathers as legal parents on the same (biological) basis as mothers, on the other. The legislation has thus attempted to

187 *J v Director-General* para 20.

188 *J v Director-General* para 20.

189 *J v Director-General* para 20.

190 *J v Director-General* para 20.

191 *J v Director-General* para 22.

192 See S 36(1)(d) of the Constitution.

adopt a more nuanced approach¹⁹³ to the automatic acquisition of parental responsibilities and rights by acknowledging the varying degrees of commitment that can be displayed by fathers. In so doing, the *Children's Act* aims to *protect the stability* of the environment created by the mother as primary caregiver while at the same time *accommodating* the advantage that a relationship with a *committed father* may have for the child. It is submitted that the new provisions will fail on both accounts (indicated in italics) for the following reasons:

- (a) While it is laudable that the *Children's Act* no longer limits the recognition of fathers to those who have married the mothers of their children, it should be clear by now that a demonstrable commitment shown towards the *mother*, whether by means of marriage or other informal life-partnership, is no indication that the father will assume responsibility for the *children* born from such a union. The degree of commitment by the father cannot be predicated on the commitment to the mother and should thus be irrelevant for purposes of bringing into life a legal relationship between child and father.¹⁹⁴ The uncertainty caused by the undefined notion of a "permanent life-partnership" as an alternative to marriage merely complicates the issue and creates new problems. Whether parents are married or not, separated or not or whatever their specific family situation may be, the existence of the biological link between a parent and child raises an expectation of entitlement – for both parent and child. In those instances in which such expectations are frustrated by one parent, the other parent will feel wronged irrespective of whether the initial expectations have legal sanction or not.¹⁹⁵ The best interests standard is currently the only guiding principle to settle the ensuing dispute. If the starting point is the same as in the case of children born of married parents, that is that both parents automatically acquire parental responsibilities and rights at birth and that shared parental responsibilities and rights is *a fortiori* deemed to be in the best interests of

193 As advocated in *Fraser* para 29.

194 According to Bainham 1989 *IJLPF* 236, the attempt to distinguish between responsible and irresponsible unmarried fathers is arbitrary since "there is no way of proving a correlation between stable cohabitation and responsible behaviour". Palmer 1996 *SALJ* 579 seems to sympathise with this line of thinking.

195 Pantazis 1996 *SALJ* 13.

children, the law can, as is being done in Australia, focus on measures to mediate the disputes, if and when they arise.¹⁹⁶

- (b) While a commitment to the *child* is considered significant for purposes of creating a legal relationship between father and child, the criteria contained in Section 21(1)(b) are so fraught with difficulties that they will fail to provide a proper screening mechanism for such commitment and will only lead to increased animosity and litigation. It is submitted that the increased litigation resulting from the problems inherent in the interpretation and application of Section 21 will do little to further the best interests of the child. While the initial assignment of parental responsibilities and rights to both biological parents will not be without its problems, the disputes which will inevitably arise will at least require the courts to focus on the manner in which to best to further the interests of the *child* in the particular case, rather than oblige the courts first to settle a dispute between the parents arguing about whether they in fact have the (parental) right to involve themselves in the child's interests in the first place.
- (c) Especially disconcerting is the fact that the provisions apply to children who were born before the *Children's Act* came into operation. This implies that a father may now assume equal and shared parental responsibilities and rights with the mother based on circumstances that existed at the time of the birth of the child – which could be many years ago. In such a case, the recognition of the father may definitely have a destabilising effect on the mother–child relationship.

2.3.2.5 Less restrictive means to achieve the purpose¹⁹⁷

The exclusion of uncommitted fathers from acquiring parental responsibilities and rights automatically does not completely extinguish the possibility of acquiring parental responsibilities and rights – the father may still be assigned such parental

196 In so far as an order for joint custody at divorce is comparable to equality in the acquisition of parental responsibilities and rights, Kagana's "Joint custody and equality in South Africa" 179 holds the view that "given the shift in emphasis in welfare discourse towards the importance of fatherhood and shared parenting, joint custody can be perceived as serving the interests of both welfare and justice".

197 S 36(1)(e) Constitution.

responsibilities and rights by means of a parental responsibilities and rights agreement or by order of court. The court in *J v Director-General*¹⁹⁸ however held that the constitutionality of legislation does not depend on whether the litigant has a satisfactory alternative remedy.

3 Conclusion

When the respective rights are finally weighed up against each other, it would seem as though the limitation of the parents' right to equality is currently justified by the child's overriding right to parental care, which in terms of the best interests standard is currently limited to committed parental care, as defined by Sections 20 and 21 of the *Children's Act*.¹⁹⁹ It has, however, been argued that the differential treatment of mothers and fathers, as far as the acquisition of parental responsibilities and rights is concerned, may not be constitutionally justifiable. Conferring full parental responsibilities and rights on both parents based on their biological link to the child would not only be in line with worldwide trends,²⁰⁰ but would also meet the constitutional demands of substantive sex and gender equality. It would furthermore place the focus on the best interests of the child, which emphasises the importance of *both* parents for the child.²⁰¹

198 Para 28.

199 See Wolhuter 1997 *Stell LR* 71 and Kaganas "Joint custody and equality in South Africa" 179, who explains it in the following terms – "since s 30(3) (of the interim Constitution) stipulates that the child's best interests are paramount, in all matters concerning such child, the equality rights of the parents would doubtless have to yield to the welfare principle".

200 According to Schwenger 2007 *EJCL*, trends with regard to parentage are becoming less and less orientated towards status: "The trend is to give priority to the autonomous private regulation within the private sphere, on the one hand, and, where an amicable settlement is not possible, to take the actual relationships and not the existing status as a reference point, on the other".

201 Once both parents automatically acquire parental responsibilities and rights at the birth of the child, it should in one way or another be possible to enforce the duty to care for the child against *both* parents in accordance with the guarantee provided in S 28(1)(b) of the Constitution.

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List of abbreviations

Adel LR

Adelaide Law Review

CILSA

Comparative and International Law Journal of Southern
Africa

EJCL

Electronic Journal of Comparative Law

IJLPF	International Journal of Law, Policy and the Family
ILJF	International Journal of Law and the Family
NLJ	New Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Journal for Contemporary Roman-Dutch Law
TSAR	Tydskrif vir die Suid Afrikaanse Reg