

Unmarried Fathers – Do They (Still) Get a Raw Deal? The Constitutionality of the Legal Position of the Unmarried Father in South African Law

Brigitte Clark

BA LLB LLM PhD

Associate Professor, School of Law, University of KwaZulu-Natal

Honorary Visiting Researcher, Oxford Brookes University, Oxford

<https://orcid.org/0000-0003-0432-8196>

Ruth T Nyamadzawo

LLB LLM PhD

Previously Postdoctoral Fellow, University of KwaZulu-Natal

SUMMARY

With the widespread prevalence of non-marital childbearing and given the number of unmarried fathers in many South African families, the legal position of unmarried fathers in South Africa raises serious concerns about equality and the best interests of the child. Despite recent changes in legislation in South Africa, it appears that unmarried fathers' involvement and parenting remain minimal, with South Africa having high rates of paternal absence in the lives of its children. This absence and lack of paternal involvement in children's lives is generally not in the psychological best interest of children. Teenage pregnancy, migration, poverty, cultural and customary law and disputative relationships between parents have led to the absence of fathers in many families, resulting in no meaningful involvement from a social or economic perspective. In this article, the legal position of unmarried fathers in South Africa is examined. The current legislative position needs to give effect to the child's international and constitutional right to parental care while balancing the interests of parents and children and acknowledging the broader trends and context of family life and caring responsibilities in these countries. It is argued that a legislative assignment of automatic responsibilities and rights will not be enough to change the current culture on the position of many unmarried fathers, but may encourage a gradual shift in the attitude of younger unmarried fathers to involvement in and responsibilities for their children's welfare. More must be done to promote and support the concept and the implications of paternal parental responsibility in both countries. Ultimately, a sensitive and holistic approach is required – one that focuses parents and families on the

significance of the child's best interests and the importance of caring involvement from both parents.

KEYWORDS: Unmarried fathers, non-marital childbearing, best interests of the child, right to parental care, automatic parental responsibilities and rights

1 INTRODUCTION: ABSENT AND UNINVOLVED FATHERS

The legal position of unmarried fathers in sub-Saharan Africa, and especially South Africa, has long been a contentious issue, raising concerns about equality and the best interests of the child.¹ Non-marital childbearing and the phenomenon of unmarried fathers in many South African families are very prevalent.² The South African General Household Survey found that, nationally, most children live with their biological mothers, and fathers are generally more absent from the household than mothers.³ Therefore, despite the changes in legislation, it appears that unmarried fathers' involvement and parenting remain minimal, with South Africa having one of the highest rates of father absence in Africa.⁴ These absent parents may fail to contribute to the child's day-to-day life, have limited contact with the child and, in some instances, pay little maintenance.⁵ The notion of the new-type involved father seems largely rhetorical in most parts of South Africa. Instances have even been cited where fathers intentionally want less contact with their children, and mothers approach the court to urge the father to have a relationship with his child.⁶ This absence and lack of involvement of fathers in children's lives

¹ Louw "The Constitutionality of a Biological Father's Recognition as a Parent" 2010 13 *Potchefstroom Electronic Law Journal* 156 161. The international position of unmarried fathers in South Africa was thoroughly covered in 2011 (Sloth-Nielsen, Wakefield and Murungi "Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries" 2011 55 *Journal of African Law* 203–229).

² Statistics South Africa *General Household Survey 2021: Measuring the Progress of Development in the Country* (23 June 2022) 11. The General Household Survey found that, nationally, one-third of children lived with both parents while 43,4 per cent lived with mothers only and most young children in South Africa live with their biological mothers. Fathers are generally more absent from the household than mothers. In 2015, it was established that South African children living with their fathers constituted about 3,3 per cent of the population in comparison to about 39,5 per cent who live with their mothers, and 34,7 per cent lived with both parents (Meintjes, Hall and Sambu "Demography of South Africa's Children" in De Lannoy, Swartz, Lake and Smith (eds) *South African Child Gauge* (2015). In KwaZulu-Natal, a slightly higher proportion (4,3 per cent) of children lived with their fathers only, while 43,8 per cent lived with their mothers only.

³ Stats SA *General Household Survey 2021* 10–11.

⁴ Posel and Devey "The Demographics of Fatherhood in South Africa: An Analysis of Survey Data, 1993–2002" in Richter and Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 38.

⁵ O'Connor "No Man's Land: Unmarried Fatherhood and Caring" 2009 1 *Critical Social Thinking: Policy and Practice* 184 193.

⁶ Carels "An Evaluation of Mediation in High-Conflict Situations: A Reflection on Mediating Parenting Plans" 2024 49 *Journal for Juridical Science* 24–52, citing *P v P* [2020] 2 All SA 587 (WCC) par 58; *TSF v SCD* [2022] ZAGPJHC 758 par 44, although in both those high-

is generally not in the psychological best interests of children.⁷ Unmarried and non-cohabiting fathers have been found to have less involvement in parenting children from birth to three years old than older children, which suggests that a child's age may influence paternal involvement, based perhaps on the assumption that women should mostly care for children from birth.⁸

In this article, the legal position of unmarried fathers in South Africa is examined. It is argued that in South Africa there is a parlous lack of objective criteria to determine the legal position of unmarried fathers in relation to their acquisition of parental rights and responsibilities. The current legislative position is unsatisfactory in that it fails to give effect to the child's constitutional right to parental care⁹ and does not give full effect to international obligations in the United Nations Convention on the Rights of the Child¹⁰ (CRC). Legal reform needs to balance the interests of parents and children within the context of family life and caring responsibilities. A legislative assignment of automatic responsibilities and rights may not be sufficient to change the current culture on the position of many unmarried fathers, but it may encourage a gradual shift in the attitude of younger unmarried fathers to their involvement in and responsibilities for their children's welfare. It is concluded that more must be done to promote and support the concept and implications of paternal parental responsibility. Ultimately, a sensitive and holistic approach is required – one that focuses parents and families on the significance of the child's best interests.

2 APPROACHES TO FATHERHOOD IN SOUTH AFRICA

The term "fatherhood" requires clarification. In southern Africa, the definition of fatherhood is not always straightforward and often raises complex social and cultural issues. In examining the nature of fatherhood and attempting to define fatherhood, a distinction can be made between "economic" and "social" fathers. "Economic" fathers are those who contribute financially to the child's maintenance or support the child financially. "Social" fathers are those who cohabit with and/or look after children who may not be their biological children – such as adopting fathers, stepfathers, or members of the extended family who have taken on the role and responsibilities of caring for children. A father's absence at home does not, however, necessarily predict their level of participation in the lives of their children.¹¹

conflict cases, there did not appear to be much evidence that the mothers wished the fathers to have more contact.

⁷ Wilson "Father Involvement and Child Well-Being" 2010 47 *Journal of Paediatrics and Child Health* 405 407.

⁸ Heilman, Levitov, Van der Gaag, Hassink and Barker *State of the World's Fathers: Time for Action* (2017).

⁹ S 28(1)(b) of the Constitution of South Africa, 1996.

¹⁰ United Nations General Assembly *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990 art 9(3).

¹¹ Salami and Okeke "Absent Fathers' Socio-Economic Status and Perceptions of Fatherhood as Related to Developmental Challenges Faced by Children in South Africa" 2018 8 *South African Journal of Childhood Education* 1 2.

Those who oppose an extension of inherent or automatic responsibilities and rights for unmarried fathers point out that, since mothers are still the primary caregivers of children in much of South Africa, the mothers' primary responsibility for childcare justifies the exclusion of unmarried fathers from an extension of automatic parental rights and responsibilities (PRR).¹² Conversely, it could be contended that the primary-caregiver test reinforces the false ideology that childcare is a mother's duty and that fathers should not concern themselves with childcare.¹³ The consequence of such a test is a denial of the father's role in the upbringing of the child.¹⁴ Mothers, if they be the primary caregivers of their children, are often perceived to have the ability to control how much contact is allowed between their children and their ex-partners.¹⁵ Fathers' rights groups have argued for the right of a child to be in contact with both parents after separation, contending that a strong gender bias exists in the family-law system, leading to serious injustice and discrimination.¹⁶ Many fathers' rights groups wish to revise family law¹⁷ and the legal system to ensure that contact is maintained between fathers and children after the divorce or separation of parents.¹⁸ This has led to a demand, *inter alia*, for a more favourable approach to unmarried fathers.¹⁹

¹² Sloth-Nielsen and Van Heerden "The Constitutional Family: Developments in South African Family Law Jurisprudence Under the 1996 Constitution" 2003 17 *International Journal of Law Policy and the Family* 121 146.

¹³ Louw (2010 *Potchefstroom Electronic Law Journal* 21) argues convincingly that 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 equally in the allocation of parental responsibilities and rights.

¹⁴ In *President of the Republic of South Africa v Hugo* (1997 6 BCLR 708), the Constitutional Court had to decide the constitutionality of a presidential pardon in which a number of prisoners were released in terms of the decree, including mothers of minor children under the age of 12. Hugo, a single father of a son below the age of 12, challenged the pardon on the grounds that it unfairly discriminated against him on the basis of sex and gender. A key issue that the Constitutional Court canvassed was whether a short-term benefit afforded to a historically disadvantaged group – the remission of imprisoned mothers with children under 12 years of age – outweighed the perpetuation of a gender stereotype – that mothers bear more responsibility for childrearing than fathers in South African society. Although the majority of the Constitutional Court was of the view that such a generalisation was one of the chief causes of women's inequality in South African society, it nevertheless found the challenged decree to be justified on the basis that it was aimed at benefiting vulnerable groups, which historically had borne the brunt of unfair discrimination. In a dissenting opinion, Kriegler J's view was that alleviating the historical burden of a small group of women benefiting from the pardon could not outweigh concerns regarding the long-term effects of judicially endorsing an unjustifiable gender stereotype against all women in the country. Kriegler J held that, by releasing mothers of minor children based on such a generalisation, the decree was perpetuating an unfortunate stereotype that was at the core of women's inequality in society (par 74).

¹⁵ Morrell "Fathers, Fatherhood and Masculinity in South Africa" in Richter and Morrell (eds) *Baba: Men and Fatherhood in South Africa* 69.

¹⁶ Portfolio Committee on Justice and Constitutional Development on Fathers 4 Justice *Report of the Portfolio Committee on Justice and Constitutional Development on Fathers 4 Justice* (19 February 2009) <https://pmg.org.za/tables/committee-report/1233/> par 1.1.

¹⁷ Specifically, s 21 of the Children's Act 38 of 2005.

¹⁸ Gallinetti "Legal Aspects of Fatherhood in South Africa" in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 212.

¹⁹ Gallinetti in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 202.

Little is known about fatherhood in South Africa from the perspectives of unmarried men, who frequently have restricted contact with their biological children.²⁰ Ten years ago, Makusha and Richter urged that there should be further research involving fathers in South Africa, with specific reference to the non-financial involvement of poorer non-resident fathers in their children's lives.²¹ Although there have been several studies involving unmarried fathers and their parental involvement,²² further research would help to inform policy and understanding of the challenges faced by fathers regarding their parental involvement.²³ It was argued that the notion of the new-type caring and nurturing father in South Africa seemed largely rhetorical.²⁴ Meyer and Cancian concluded that at the end of a romantic relationship, unmarried fathers tend to stop contributing to their children's lives on the understanding that a new partner would take on the fatherhood role.²⁵ From the legal perspective, in 2006 Gallinetti argued that the courts often tended to favour the mother and discount the father's ability to be the custodial parent, thereby restricting the fatherhood role to that of a financial provider.²⁶

Many biological fathers, largely unmarried fathers and for various reasons, do not assume the role of either economic or social fathers in South African society.²⁷ Abandonment, poverty,²⁸ disappearance, denial, apathy, age and a poor relationship with the children's mothers all lead to the absence of

²⁰ Lesch and Kelapile "In My Dream She Finds Me ... And She Wants Me Just the Way I Am": Fatherhood Experiences of Unmarried Men in South Africa" 2016 19(5) *Men and Masculinities* 503 504 <https://doi-org.oxfordbrookes.idm.oclc.org/10.1177/1097184X15601476> (accessed 2023-10-10).

²¹ Makusha and Richter "The Role of Black Fathers in the Lives of Children in South Africa" 2014 38 *Child Abuse and Neglect* 982 986; Makusha and Richter "Gatekeeping and Its Impact on Father Involvement Among Black South Africans in Rural Kwazulu-Natal" 2016 18 *Culture, Health and Sexuality* 308 319–320.

²² Bonthuys "A Duty of Support for All South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment" 2018 21 *PER/PELJ* <https://www.saflii.org/za/journals/PER/2018/60.html> (accessed 2026-01-10) 60; see Lesch and Kelapile 2015 *Men and Masculinity* 519 on fatherhood experiences of unmarried fathers in Pretoria; Ratele, Shefer and Clowes "Talking South African Fathers: A Critical Examination of Men's Constructions and Experiences of Fatherhood and Fatherlessness" 2012 42(2) *South African Journal of Psychology* 553–563. Makhanya studied young unmarried fathers' perceptions of fatherhood in KwaZulu-Natal (Makhanya *Young Unmarried Fathers in the Hibiscus Coast Local Municipality: Experiences and Perceptions of Fatherhood* (master's dissertation, University of KwaZulu-Natal) 2016). See also Makusha and Richter 2014 *Child Abuse and Neglect* 982–992; Makusha and Richter 2016 *Culture, Health and Sexuality* 320.

²³ Nordien-Lagardien, Pretorius and Terblanche "The Need for Culturally Responsive Mediation Practices to Enhance the Process and Outcomes of Mediation for Unmarried Fathers" 2021 33 *Southern African Journal of Social Work and Social Development* 1–19; Makusha and Richter 2014 *Child Abuse and Neglect* 990; Makusha and Richter 2016 *Culture, Health and Sexuality* 319.

²⁴ O'Connor 2009 *Critical Social Thinking: Policy and Practice* 190.

²⁵ Meyer and Cancian "I Am Not Supporting His Kids': Non-Resident Fathers' Contribution Given Mothers' New Fertility" 2012 74 *Journal of Marriage and Family* 132 136.

²⁶ Gallinetti in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 212.

²⁷ Bonthuys "Parental Responsibilities and Rights in the Children's Bill 70D of 2003" 2006 17 *Stellenbosch Law Review* 482 487.

²⁸ Bonthuys 2006 *Stellenbosch Law Review* 493.

involved fatherhood.²⁹ Furthermore, traditional customary law prescribes far more maternal and extended maternal family involvement in children's lives.³⁰ Increasingly, fathers, especially unmarried and poor fathers, have been unable to meet the financial expectations of fatherhood – that is, paying child maintenance or the payment of a bride price or damages for impregnating a girl in customary law.³¹ Simultaneously, traditional maternal and paternal roles in many South African communities prescribe greater involvement by mothers in children's lives.³²

3 FACTORS AFFECTING PATERNAL INVOLVEMENT

3.1 Fathers' age and developmental stage

In 2016, Lesch and Kelapile's phenomenological study sought to understand the experience of fatherhood for a sample of single Black South African fathers.³³ These researchers found that, for their qualitative sample of unmarried fathers, fatherhood was experienced first as an unplanned event when the fathers were very young.³⁴ Although many of the participants blamed the mothers (or mothers' families) for their limited or lack of involvement in their children's lives, most of them expressed feelings of regret and guilt.³⁵ The fathers' age and maturity frequently influenced paternal involvement in their children's lives, especially where there had not been a stable relationship with the mother or after disintegration of that relationship.³⁶ Younger fathers were found to be less involved in their children's lives compared to older, resident unmarried fathers.³⁷

3.2 Poverty and unemployment

Morrell and Richter³⁸ have argued that poverty tends to destabilise paternal involvement as fathers are expected to provide, protect and be actively involved in their children's lives, even if they are unable to support their children financially. In South Africa, the lack of involvement and absence of

²⁹ Morrell "Fathers, Fatherhood and Masculinity in South Africa" 53–69; Herbert and Princess "Experiences of Female University Students Who Grew Up in Father Absent Homes" 2017 *International Journal of Education & Psychology in the Community* 17 19.

³⁰ Richter, Chikovore and Makusha "The Status of Fatherhood and Fathering in South Africa" 2010 86 *Childhood Education* 360 364.

³¹ Morrell in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 59.

³² Richter, Chikovore and Makusha 2010 *Childhood Education* 365.

³³ Lesch and Kelapile 2016 *Men and Masculinities* 504.

³⁴ Lesch and Kelapile 2016 *Men and Masculinities* 510.

³⁵ Lesch and Kelapile 2016 *Men and Masculinities* 503.

³⁶ Lesch and Kelapile 2016 *Men and Masculinities* 517.

³⁷ Lesch and Kelapile 2016 *Men and Masculinities* 510; Zirima *Subjective Wellbeing Among Women With Father Absence Experience in Masvingo: Depression, Anxiety and Relationship Strategies* (doctoral dissertation, Julius Nyerere School of Social Sciences, Great Zimbabwe University) 2019.

³⁸ Richter and Morrell "Introduction" in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 12.

fathers appears to occur in particular among poorer families.³⁹ In 2023, Dawson examined the different ways in which poor young men practise fatherhood, noting that the quality of men's relationships with the mothers of their children played an important role in distinguishing fatherhood practices.⁴⁰ The most frequently cited cause of restricted contact in this study was conflict with the child's mother, as diminished contact was reported by most of the participants following the end of an intimate relationship with the mother of the child.⁴¹ In another study, fathers reported that they were denied contact with their children by vindictive ex-partner mothers and their families, who were depicted as valuing the fathers' financial contribution above any other form of involvement by the father.⁴²

3 3 Migratory labour practices

The demise of traditional fatherhood roles was exacerbated by migratory labour practices during the apartheid era, which forced Black men to migrate from rural to urban areas for better job prospects.⁴³ Continued migratory labour practices⁴⁴ render it increasingly challenging for poorer men to be involved fathers. Furthermore, many Black fathers have to spend time away from their children to find employment.⁴⁵

3 4 Culture and customary law

According to South African customary law, fatherhood is not necessarily a role assumed by the biological father in relation to his children.⁴⁶ Some South African cultures⁴⁷ and customs hold that, unless the unmarried father of a child has paid damages to the mother's family, the child belongs to the mother's family.⁴⁸ Damages may be payable for pregnancy⁴⁹ and/or seduction of a

³⁹ Spjeldnaes, Moland, Harris and Sam "‘Being Man Enough’: Fatherhood Experiences and Expectations Among Teenage Boys in South Africa" 2011 9 *Fathering* 3 13.

⁴⁰ Dawson "Father-Child (Dis)Connections: Expectations and Practices of Young Un(Der)Employed Fathers in Johannesburg" 2023 26 *Men and Masculinities* 270 287 <https://journals-sagepub-com.oxfordbrookes.idm.oclc.org/doi/epub/10.1177/1097184X231153170>.

⁴¹ Jordan "Dads Aren't Demons. Mums Aren't Madonnas. Constructions of Fatherhood and Masculinities in the (Real) Fathers 4 Justice Campaign" 2009 31 *Journal of Social Welfare & Family Law* 419 433.

⁴² Jordan 2009 *Journal of Social Welfare & Family Law* 433.

⁴³ Morrell in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 68.

⁴⁴ Morrell in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 69.

⁴⁵ Malinga *Precarious Employment and Fathering Practices Among African Men* (DPhil thesis, UNISA) 2015 23.

⁴⁶ Morrell in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 66.

⁴⁷ It should be noted that customs differ in South Africa in this regard among the different cultures (Samukimba and Moore "Understanding Customary Practices and Fatherhood: Intlawulo, Masculinities and Relational Power" 2020 *University of Cape Town Centre for Social Science Research Working Paper* 453 1 2–8).

⁴⁸ Makusha and Richter 2014 *Child Abuse and Neglect* 992; Makusha and Richter 2016 *Culture, Health and Sexuality* 320.

⁴⁹ *Ndawokwelo v Meleni Tongo* 1941 NAC (C&O) 41.

virgin,⁵⁰ and maintenance (also known as *isondlo*).⁵¹ If the unmarried father wishes to acquire all parental rights and responsibilities over the child, he is required to deliver the full amount of *lobolo* (bride price) to the woman's family.⁵² Bekker notes that South African common law, with its roots in notions of the Western nuclear family system, differs from most African cultures, in which African children are part of the extended family as a group, whereas in the global North, the biological parents tend to be key role players in the lives of their children.⁵³ In traditional African society, fatherhood is sustained substantially with the support of the extended family and the community, and guidance is provided on fatherhood through traditional institutions.⁵⁴ Cultural ideals define the "appropriate" gender roles and delineate the role of the father, which is often to provide for economic needs, and that of the mother, which is to nurture and take care of the children.⁵⁵ It appears that many South African fathers living under customary law find themselves estranged from their children because of their inability to pay *ilobolo*,⁵⁶ *isondlo*,⁵⁷ and *inhlawulo*.⁵⁸ These customary-law obligations cannot be met if the father is unemployed and poverty-stricken. With increasing unemployment⁵⁹ and poverty, unmarried fathers who are unemployed and living in poverty lack the ability to pay child maintenance or the payment of a bride price or damages for impregnating a girl in customary law.⁶⁰ Cultural responsibilities regarding marriage and children frequently restrict contact.⁶¹ In customary law, parental responsibilities and rights do not follow automatically once damages have been paid, as the child "belongs" to the maternal family.⁶² The maternal family

⁵⁰ *Sigonga Nojantsholo v Nkosana and Mbiwa Godo* 1941 NAC (C&O) 26.

⁵¹ Where the biological father pays damages long after the child was born, he will be required to pay *isondlo* (maintenance) to the person who was responsible for the upbringing of his child.

⁵² Skelton and Hansungule "Parental Responsibilities and Rights" in Van Heerden, Skelton and Du Toit (eds) *Family Law in South Africa* 2ed (2021) 300.

⁵³ Bekker "Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa" 2008 29 *Obiter* 395.

⁵⁴ Lesch and Kelapile 2016 *Men and Masculinities* 519.

⁵⁵ Paquette "Theorizing the Father-Child Relationship: Mechanisms and Developmental Outcomes" 2004 47 *Human Development* 203.

⁵⁶ IsiZulu for bridewealth, as defined by the Commission for Gender Equality (*When Relationships Disentangle: Assessing Factors Prohibiting Unmarried, Divorced, or Separated Biological Fathers From Exercising Their Parental Rights, Including Contact With Their Children* 2021 <https://www.cge.org.za/wp-content/uploads/2021/08/When-Relationships-Disentangle-Report.pdf> 17).

⁵⁷ IsiZulu for paying for the upkeep of the child, as defined by the Commission for Gender Equality (*When Relationships Disentangle* 17 fn 34).

⁵⁸ IsiZulu for paying damages, as defined by the Commission for Gender Equality (*When Relationships Disentangle* 17 fn 33). See Swartz and Bhana *Teenage Tata: Voices of Young Fathers in South Africa* (2009); Ncayiyane and Nel "Young Black Fathers' Perceptions of Fatherhood: A Family Systems Account" 2024 45 *Journal of Family Issues* 1431 1434.

⁵⁹ Anonymous "Unemployment Rate Jumps to 33.5%, 8.4 Million South Africans Now Jobless" (2024-09-13) <https://www.news24.com/fin24/economy/unemployment-rate-jumps-to-335-84-million-south-africans-now-jobless-20240813> (accessed 2025-09-12).

⁶⁰ Morrell in Richter and Morrell *Baba: Men and Fatherhood in South Africa* 69.

⁶¹ Lesch and Kelapile 2016 *Men and Masculinities* 511–512.

⁶² Bekker 2008 *Obiter* 401.

is perceived to play a significant role in the co-parenting relationship between the parents after their separation.⁶³

4 LEGAL POSITION OF THE UNMARRIED FATHER IN SOUTH AFRICA

4 1 International law

The South African Constitution⁶⁴ obliges the courts to consider international law when interpreting the Bill of Rights⁶⁵ and provides that when a court interprets any legislation, it should select a reasonable interpretation consistent with international law.⁶⁶ South Africa, as a member state of the United Nations, has ratified various international legal instruments relating to the rights of children, including the Convention on the Rights of the Child (CRC)⁶⁷ and the African Charter on the Rights and Welfare of the Child (ACRWC).⁶⁸ By ratifying these Conventions, the South African state is obliged to ensure that domestic laws concerning children are aligned with them. The CRC provides that each child has the right to be cared for by their parents, should this be possible.⁶⁹ The CRC further sets out the responsibility that the State has in relation to the care and well-being of children.⁷⁰ States Parties must provide parents with the assistance and tools they require to fulfil properly their parental responsibilities and rights.⁷¹ The CRC requires States Parties to ensure the rights of each child within their jurisdiction without discrimination of any kind,⁷² which includes combating discrimination against children on the basis of the marital status of their parents.⁷³ The CRC further requires States Parties to ensure that parents are given a common responsibility for the development and upbringing of children,⁷⁴ which responsibility is interpreted as the child's right.⁷⁵ A failure by States Parties to enable unmarried fathers to acquire and exercise parental responsibility may

⁶³ Bekker 2008 *Obiter* 402.

⁶⁴ Constitution of the Republic of South Africa, 1996.

⁶⁵ S 39(2) of the Constitution. See also *S v Makwanyane* 1995 (2) SACR 1 (CC) par 35.

⁶⁶ S 233 of the Constitution.

⁶⁷ UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990. The CRC was signed and ratified by South Africa on 29 January 1993 and 16 June 1995, respectively.

⁶⁸ Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49. Adopted: 11/07/1990; EIF: 29/11/1999. The ACRWC was signed and ratified by South Africa on 10 October 1997 and 7 January 2000, respectively.

⁶⁹ Art 7 of the CRC.

⁷⁰ Art 18 and 20 of the CRC.

⁷¹ Art 18(2) of the CRC provides: "States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children."

⁷² Art 2(1) of the CRC. Art 2 prohibits discrimination of any kind, regardless of a child's parents' status, such as race, age, gender, or religion.

⁷³ UN Committee on the Rights of the Child (CRC) *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood* CRC/C/GC/7/Rev.1 (20 September 2006) par 12.

⁷⁴ Art 3, 5, 18(1) and 27 of the CRC.

⁷⁵ Sloth-Nielsen *et al* 2011 *Journal of African Law* 205, citing UNICEF *Implementation Handbook for the Convention on the Rights of the Child* 3ed (2007) 235.

therefore constitute a breach of the CRC.⁷⁶ There are similar relevant provisions in the ACRWC for the protection of the rights and best interests of children, and it specifically recognises the child's right to parental care.⁷⁷ The ACRWC also bestows the primary obligation for the development and upbringing of a child on the parents.⁷⁸ The ACRWC prohibits discrimination of children *inter alia* on the basis of their parents' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.⁷⁹ Every child has the right to be cared for by their parents and, as far as possible, to reside with them,⁸⁰ and primary responsibility for the upbringing and development of the child vests in the parents or other persons responsible for the child.⁸¹

4 2 Constitutional law

The Constitution has dramatically altered the way in which children's rights are regulated, as it recognises the special vulnerability of children and their need for additional protection.⁸² Constitutional provision is made for certain rights to apply specifically to children, in addition to the other rights in the Bill of Rights to which they as persons are already entitled.⁸³ Section 28(1)(b) of the Constitution provides that every child has the right to family care, parental care and, in certain circumstances, appropriate alternative care.⁸⁴ The focus of the parent-child relationship is now on the rights to which children are entitled and the responsibilities that parents must fulfil,⁸⁵ and no longer on the common-law parental authority of the parents. Section 28(1)(b) and (c) of the Constitution should be read together, as both set out the person(s) entrusted with the responsibility for caring for a child, and what is involved in that care.⁸⁶ The right to parental care consists of both the financial and tangible needs of the child, and the intangible emotional and psychological support and guidance that a child requires.⁸⁷

⁷⁶ Sloth-Nielsen *et al* 2011 *Journal of African Law* 205.

⁷⁷ Art 19(1) of the ACRWC states that every child shall be entitled to the enjoyment of parental care and protection.

⁷⁸ Art 20(1) of the ACRWC. Both the CRC and ACRWC view the primary responsibility of caring for a child as the responsibility of the child's parents. Art 20(1) of the CRC states: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

⁷⁹ Art 3 of the ACRWC.

⁸⁰ Art 19 of the ACRWC.

⁸¹ Art 20(1) of the ACRWC.

⁸² Robinson "Children's Rights in the South African Constitution" 2003 1 *PELJ* 1 <https://doi.org/10.17159/1727-3781/2003/v6i1a2858> 11.

⁸³ S 28 of the Constitution; *V v V* 1998 (4) SA 169 SA (C) 176; Skelton "Children" in Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 599; Bekink 2012 *PELJ* 178.

⁸⁴ See *Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC) par 77), where it was stated that children are entitled to appropriate alternative care in the event that there is an absence of family or parental care.

⁸⁵ Robinson 2003 *PELJ* 21 26.

⁸⁶ *Government of the Republic of South Africa v Grootboom supra* par 76; Robinson 2003 *PELJ* 21 26.

⁸⁷ *M v Minister of Police* 2013 (5) SA 622 (GNP); Louw 2010 *PELJ* 187.

4 3 Domestic legislation

4 3 1 *The current legal position of the unmarried father*

The Children's Act⁸⁸ states that one of its main objectives is to give effect to the constitutional rights of children, specifically the right to parental care.⁸⁹ However, no definition of the right to parental care is provided in either the Constitution or the Children's Act, although "care" has been defined in the Children's Act.⁹⁰ Section 21(1)(a) states that if the unmarried father is (or was) living with the mother of the child in a permanent life partnership at the time of the child's birth, he then acquires full PRR automatically. Even if the father moves out after the child's birth and fails to demonstrate any commitment to the child, he has already acquired full PRR.

If an unmarried father was not living with the mother in a permanent life partnership at the time of a child's birth, he may acquire PRR automatically in terms of section 21(1)(b) of the Children's Act if (regardless of whether he has ever lived with the child's mother) he consents or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period. It would appear that the word "and" between subparagraphs (ii) and (iii) of section 21(1)(b) separates subparagraphs (i), (ii) and (iii), and it appears that the father must fulfil *all* three requirements that relate to a demonstration of his commitment to the child. However, the courts have found the statute unclear as to whether the requirements in section 21(1)(b) operate conjunctively⁹¹ or independently.⁹²

⁸⁸ 38 of 2005.

⁸⁹ Preamble to the Children's Act.

⁹⁰ S 1 of the Children's Act.

⁹¹ *RRS v DAL* (WCHC) (unreported) case number 22994/2010 of 10 December 2010 9. In this case, the court clearly interpreted s 21 conjunctively. However, the circumstances of that case were exceptional in that they were based on an application in terms of the Hague Convention on Child Abduction. The mother argued that the unmarried father did not have "rights of custody" on the date she and the child left the country. *In casu*, the requirement that the applicant had consented to be identified as the child's father was not in issue. However, the court held that the father would have to satisfy both of the remaining additional requirements of s 21(1)(b). The father contended that he had made a contribution to the child's upbringing in accordance with the provisions of s 21(1)(b)(ii). The court established a definition of "upbringing" as defined in the *Concise Oxford Dictionary* as the treatment and instruction received from one's parents through childhood and held that the applicant's conduct did not fall into this category. The father's case was that over a period of about six months, he visited the child on a few occasions. The court held that these few visits over a relatively short period of time in the child's life while the child was still living with the mother could hardly qualify as a contribution to the child's upbringing, and the father's case with regard to a good-faith contribution towards expenses in connection with the maintenance of the child was found to be even less convincing. He had not paid any expenses in connection with the maintenance of the child either for a reasonable period or at all. The suggestion that he attempted to pay maintenance was established to be incapable of "fair-minded support" as he was aware of the respondent's bank account details and could easily have transferred some money into it – and failed to do so. The father accordingly did not acquire parental responsibilities and rights (PRR), and, accordingly, the court held that the mother's removal of the child from South Africa was not wrongful for the purposes of art 3 and 5 of the Hague Convention.

⁹² Skelton and Hansungule in Van Heerden, Skelton and Du Toit *Family Law in South Africa* 298.

Despite the use of the connecting word “and” between subparagraphs (ii) and (iii) of section 21(1)(b), the courts have adopted different approaches to whether the three requirements in section 21(1)(b) apply conjunctively and must therefore all be satisfied, or whether they apply independently; that is, whether they are self-standing and distinct requirements.⁹³ Therefore, although the legislation appears to suggest that all the factors in section 21(1)(b) must be cumulatively met, the courts appear to be adopting a less rigid and more fluid approach to the interpretation of this legislation. It would seem that any one of these three options is sufficient.

Section 21(1)(b)(ii) requires the unmarried father to contribute to the child’s upbringing, which implies an involvement in the child’s life.⁹⁴ Alternatively, he should contribute to the expenses involved in the maintenance of the child, which does not necessarily mean that the father must formally pay maintenance in terms of the Maintenance Act,⁹⁵ but rather that he must have contributed financially in some way.⁹⁶ The “in good faith” and the “reasonable period” provisions also apply to the payment of maintenance; “attempted in good faith” may cover a situation where an unmarried father has been unable to pay maintenance regularly, or to the full extent, owing to poverty or unemployment.⁹⁷

In *GM v KI*,⁹⁸ the High Court assumed, without reaching a definitive conclusion, that the requirements in section 21(1)(b) are read disjunctively when it held that a father had acquired PRR by virtue of agreeing to have his name put on the birth certificate of the child concerned, as set out in section 21(1)(b)(i). In *KLVC v SDI*,⁹⁹ the Supreme Court of Appeal (SCA) held that determining whether an unmarried father had met the requirements in section 21(1)(b) of the Children’s Act was a factual investigation, considering all the relevant circumstances of the case. The SCA found it unnecessary to rule on whether the requirements in section 21(1)(b) should be read conjunctively and affirmed the finding of the court *a quo* that section 21(1)(b) requires a court to consider the facts, exercise a value judgment, and come to a conclusion, taking into consideration a wide range of circumstances and that the language in section 21(1)(b) was deliberately broad, so allowing for a range of considerations on which judges may differ in the exercise of a value judgment.¹⁰⁰

⁹³ *KLVC v SDI* [2015] 1 All SA 532 (SCA) par 22.

⁹⁴ *RRS v DAL supra*.

⁹⁵ 99 of 1998.

⁹⁶ *KLVC v SDI supra* par 3–14.

⁹⁷ Skelton and Hansungule in Van Heerden, Skelton and Du Toit *Family Law in South Africa* 300.

⁹⁸ 2015 (3) SA 62 (GJ).

⁹⁹ *Supra*.

¹⁰⁰ *KLVC v SDI supra* par 14. The SCA held that determining whether or not an unmarried father has met these requirements in s 21(1)(b) was an entirely factual inquiry and judicial discretion had no role in such an inquiry. The SCA found it unnecessary to rule on whether the requirements set out in s 21(1)(b) should be determined conjunctively or whether these are simply categories of facts that a court must consider in determining whether an unmarried father had acquired parental responsibilities and rights over his child.

If the unmarried father does not qualify in terms of section 21, he can enter into a PRR agreement with the mother of the child.¹⁰¹ If the mother does not agree, the unmarried father must bring an application to the Children's Court¹⁰² or the High Court to have contact, care and/or guardianship assigned to him.¹⁰³ If the mother denies that he is the biological father of the child, an unmarried father would need to apply to court to make an order confirming his paternity and prove that he is the father by undergoing a DNA test. In this regard, he may be challenged by the fact that the mother of the child, or even the child if they are of sufficient age and maturity, may refuse to undergo tests.¹⁰⁴

4 3 2 Recent draft reform proposals

In 2018, the Draft Children's Amendment Bill attempted to address several of the uncertainties flowing from the current wording of section 21. However, the wording of many of the amendments was not sufficiently considered and left intact many of the uncertainties in section 21, including the issue of whether the requirements in section 21(1)(b) operate conjunctively or independently. Heaton has discussed both the problems and lack of clarity in section 21 of the Children's Act, and the somewhat inept and unsatisfactory attempt of the draft Children's Amendment Bill of 2018 to address the unsatisfactory aspects of section 21.¹⁰⁵

In 2020, another Children's Amendment Bill was drafted to attempt (*inter alia*) to clarify and expand the rights and parental responsibilities of unmarried fathers so as to provide that all unmarried fathers living with the mother at the time of the child's conception or birth automatically acquire parental responsibilities.¹⁰⁶ The words "in good faith" and "for a reasonable period" in section 21(1)(b)(i) and (ii) are removed. The Bill inserts a new subsection (1A) after section 21(1), which provides that a family advocate may issue a certificate confirming that the biological father has automatically acquired full parental responsibilities and rights in terms of section 21(1)(a) or (b)

"on application from (a) the mother and biological father jointly; (b) the biological father, after reaching an agreement during the mediation ...; or (c) the biological father, if (i) ... he referred the matter for mediation and the mother ...

¹⁰¹ S 22 of the Children's Act.

¹⁰² Children's Amendment Act 17 of 2022. S 45(3A) of the Children's Act provides that the High Court and Children's Court have concurrent jurisdiction over the guardianship of a child, and the High Court, Children's Court and Regional Court have concurrent jurisdiction over the assignment, exercise, extension, restriction, suspension or termination of guardianship.

¹⁰³ Ss 23 and 24 of the Children's Act.

¹⁰⁴ See *YM v LB* 2010 (6) SA 544 (SCA).

¹⁰⁵ Heaton "Notes on the Proposed Amendment of s 21 of the Children's Act 38 of 2005" 2019 22 *PER/PELJ* 1 3.21 <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5974> (accessed 2024-10-2). Heaton pointed out that the draft Bill not only was unable to address adequately several of the ambiguities inherent in the wording of s 21 but also exacerbated this lack of clarity. Heaton noted how the Memorandum of the Bill refers to incorrect case law to justify its aims, which appear somewhat nonsensical and out of date in terms of the legislative position at the time of this case. In particular and, finally, the draft Bill did not clarify the central issue of whether the requirements in s 21(1)(b) should operate conjunctively or independently and left the legal position shrouded in continued uncertainty.

¹⁰⁶ Cl 10 of the Children's Amendment Bill B18-2020.

unreasonably refused to attend the mediation, and (ii) the biological father has shown to the satisfaction of the family advocate that he has automatically acquired full parental responsibilities and rights ...".¹⁰⁷

These draft reform proposals do not remove the inequality between married or cohabiting and unmarried mothers, which arises as a direct consequence of the unequal allocation of PRR to mothers and fathers. The discrimination between married and unmarried mothers would automatically disappear if mothers and fathers were treated equally in the allocation of PRR.¹⁰⁸ The continued reluctance to confer automatic PRR on unmarried fathers on the basis that it could disrupt the established relationship between mother and child and place the onus on the mother to bring a court application to protect her rights is no longer tenable, especially considering that the increased jurisdiction of the Children's Court means that access to court is cheaper and more accessible for an unmarried single mother who seeks to terminate or suspend the rights of an unworthy father. The distinction should not be drawn between unmarried and married fathers, but the focus should be on the exercise of parental responsibilities of all parents. A father's willingness to commit to the mother by marriage or cohabitation is not necessarily a guarantee that he will be a responsible or involved father. The only issue should be the best interests of the child. All biological parents, or, as in English or Australian law,¹⁰⁹ all parents who appear on the birth registration form should automatically have parental rights and responsibilities.

5 IMPROVING THE RELATIONSHIP BETWEEN AN UNMARRIED FATHER AND HIS CHILD

The authors contend that more could be done to promote and support the concept and implications of joint, and especially paternal, parental responsibility. In this section, the authors examine how case law and the use of alternative dispute resolution may help improve the legal position of unmarried fathers. Possible government initiatives that could target adolescent fathers and also educate adolescent boys about the responsibilities of fatherhood while they are at school are suggested. Ultimately, a sensitive and holistic approach is required that focuses parents on the significance of the child's best interests. It is argued that there should be in this process a greater focus on the wishes and feelings of the child in all court decisions.¹¹⁰ Children who are the innocent victims of a broken home are frequently the worst affected by the separation of their parents.¹¹¹ Family court counsellors and family advocates, and all those dealing with children, need to be sensitive to whether the child's wishes and feelings are genuinely

¹⁰⁷ S 21(1A) as contained in clause 10 of the Children's Amendment Bill B18-2020.

¹⁰⁸ Louw 2010 *PELJ* 161; Louw "Revisiting the Limping Parental Condition of Unmarried Fathers" 2016 *De Jure* 193 211.

¹⁰⁹ S 4(1)(a) of the Children Act, 1989, which applies to the law in England and Wales; s 69R of the Australian Family Law 1975, read with s 61 B of that Act.

¹¹⁰ In terms of s 10 of the Children's Act and art 12 of the CRC.

¹¹¹ Van der Bijl "Considering Parental Alienation Under the Aegis of the Criminal Law" 2016 29 *South African Journal of Criminal Justice* 147 149.

their own or whether there has been some degree of parental indoctrination against another parent, where there is an acrimonious separation between the parents and a battle for the child's affections.

5 1 Case law

South African courts have improved the legal position of unmarried fathers in relation to birth registration and paternal leave. In *Van Wyk*,¹¹² the court confirmed the unconstitutionality of certain sections of the Basic Conditions of Employment Act (BCEA)¹¹³ and the Unemployment Insurance Fund Act¹¹⁴ relating to maternity, parental and commissioning parental leave entitlements. The sections infringed on the right to equality and dignity as provided for in the Constitution. The court held that it would be an unfair and discriminatory application to have parental-leave provisions that discriminated according to the type of parenthood. The court concluded that the provisions of the BCEA regulating parental leave offended the Constitution¹¹⁵ and unfairly discriminated between mothers and fathers. While the granting of parental leave to fathers is welcomed, the authors acknowledge that compulsory leave for recovery from pregnancy and childbirth is a necessary component for any mother.¹¹⁶ It is argued that although there should be sharing of childcare responsibilities, pregnancy, childbirth, breastfeeding, and recovery after childbirth are biological burdens for mothers alone (married or unmarried). It is also believed that full realisation of parental-leave rights involves more than the right to leave and right to maternity allowance for mothers or fathers (married or unmarried). To be fully realised, there must be prioritisation of the well-being of the child from both parents.¹¹⁷ The proposed legislation must recognise this.

In *Centre for Child Law v Director General: Department of Home Affairs*,¹¹⁸ the Constitutional Court found sections 9(2) and 10 of the Births and Deaths Registration Act (BDRA)¹¹⁹ to be invalid. Section 10 provided for the notice of birth of a child born of unmarried fathers to be given under the surname of either the mother or the person acknowledging himself as the father. The default position was that the birth was registered under the mother's surname. Where a joint request with the mother was made, and fatherhood had been acknowledged, the birth could be registered under the father's surname; and where the mother's consent was obtained, and fatherhood had been accordingly acknowledged, the child could adopt the mother's surname, and

¹¹² *Van Wyk v Minister of Employment and Labour* [2024] 1 BLLR 93 (GJ); (2024) 45 ILJ 194 (GJ); 2024 (1) SA 545 (GJ).

¹¹³ 75 of 1997.

¹¹⁴ 63 of 2001.

¹¹⁵ Rights to equality and dignity (ss 9 and 10 of the Constitution).

¹¹⁶ Buch "Maternity Benefit Act, 2017: A Game Changer for Women's Economic Empowerment" 2019 9 *GNLU Journal of Law, Development and Policy* 138 139.

¹¹⁷ Rose "Role Reversal: Can Dad Stay Home While Mom Goes to Work? An Analysis of Maternity and Parental Leave in the United Kingdom and European Union Through Principles and Treaties of International Human Rights Law" 2022 12 *Notre Dame Journal of International and Comparative Law* 75 96.

¹¹⁸ [2021] ZACC 31.

¹¹⁹ 51 of 1992.

the father's particulars would appear in the birth register. Unmarried fathers were unable to register the birth of their children under their surname unless through a joint request with the mother or with her consent.¹²⁰ As a result of this judgment, unmarried fathers are no longer treated differently from married fathers when registering the births of their children. The majority of the Constitutional Court found that section 10 of the BDRA unfairly discriminated against unmarried fathers on the grounds of marital status, sex and gender and infringed on the unmarried father's rights to equality, non-discrimination and dignity, unfairly discriminated against children born of unmarried parents on the grounds of social origin and birth, and infringed the child's right to equality, non-discrimination, dignity and to have their best interests safeguarded.¹²¹

The minority judgment held that section 10 of the BDRA did not unfairly discriminate against the unmarried father on the grounds of marital status, sex and gender, and that the provision was aimed at safeguarding the best interests of a child. Both the majority and minority accepted that section 10 and section 9(2) differentiated between married fathers and unmarried fathers. Since the discrimination in this case was based on a listed ground, unfair discrimination was presumed unless otherwise established.¹²²

The majority held that there was no reasonable justification, but the minority held that safeguarding the child's best interests was a reasonable justification that rendered the differentiation fair. The minority reasoned that the justification for the discrimination was to safeguard the best interests of a child.¹²³ In reaching this conclusion, the minority were concerned about possible human trafficking, the involvement of an unworthy man in the life of the child, and that the removal of section 10 would result in there being no safeguards against dangers to the child. However, regulation 12(b)(ii) of the regulations under the BDRA requires the unmarried father to submit an affidavit in which he acknowledges paternity of the child. Although regulation 12(b)(ii) does not specifically require paternity test results, it would appear that, in practice, the Department of Home Affairs requires the attachment of such results to the notice of birth application for children born of unmarried parents.¹²⁴

¹²⁰ Ss 10 and 9(2) of the Birth Registration Act 51 of 1992.

¹²¹ *Centre for Child Law v Director General: Department of Home Affairs supra* par 25–81. The majority concluded that s 10 enforced the distinction between "legitimate" and "illegitimate" children in our law, which was abhorrent to the constitutional values of human dignity, *ubuntu* and substantive equality.

¹²² *Centre for Child Law v Director General: Department of Home Affairs supra* par 47.

¹²³ *Centre for Child Law v Director General: Department of Home Affairs supra* 113.

¹²⁴ Parliamentary Committee on Social Development "Children's Amendment Bill: Department of Home Affairs and Department of Justice input on Issues Raised During Public Hearings, With Deputy Minister of Home Affairs" *Parliamentary Monitory Group* (2 March 2022) <https://pmg.org.za/committee-meeting/34466/>; Mkhize and Dhever "Registration of a Child's Birth: Unmarried Fathers No Longer Treated Differently From Married Fathers" *African Legal Information Institute* https://africanlii.org/articles/2022-02-07/a-hrefusersfasken1069a/registration-of-a-childs-birth-unmarried-fathers-no-longer-treated-differently-from-married-fathers#_ftn3 (accessed 2024-07-28).

Easier access to justice (in the form of the services of the Family Advocate) has recently been granted to unmarried fathers. In *Centre for Child Law v T S*,¹²⁵ the order of the High Court declaring section 4 of the Mediation in Certain Divorce Matters Act¹²⁶ inconsistent with the Constitution and therefore invalid was confirmed to the extent that it precluded unmarried parents and their children from accessing the services of the Family Advocate in the same way as divorced or divorcing married parents. The court unanimously found that section 4 limits section 9(1) and (3) of the Bill of Rights and that the limitation was not justifiable in terms of section 36 of the Constitution and was also an unjustifiable limitation of the rights of unmarried parents and children in terms of sections 10 and 28 of the Bill of Rights.¹²⁷

5 2 Mediation

Family mediation, a process in which a mediator facilitates negotiations between separating or disputing parties with the object of helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members, may help unmarried fathers to reach an agreement in a less disputative and expensive manner than via the courts.¹²⁸ In this regard, the Children's Act states that the co-holders of parental responsibilities and rights in respect of a child, who are experiencing challenges in exercising their responsibilities and rights, must first seek to agree on a parenting plan.¹²⁹ Furthermore, mandatory mediation is required when disputes arise between a child's unmarried biological parents as to whether the father meets the requirements for acquiring full parental responsibilities and rights.¹³⁰ In such cases, the dispute must be sent for mediation to a social worker, a family advocate, a social service professional or a suitably qualified person.¹³¹ Unmarried fathers could therefore use this option to improve contact with their child.

Nordien-Lagardien *et al* conducted a study on the value and impact of mediation on the parental rights and responsibilities of unmarried fathers.¹³² The study focused on unmarried parents (fathers and mothers) who participated in the mediation process, where an unmarried father sought to acquire parental responsibilities and rights in the Mandela Bay district. The study used in-depth semi-structured qualitative interviews for data collection on the perceptions and experiences of mediation, as reflected by unmarried parents and mediators. The results highlighted that, for unmarried fathers, mediation had therapeutic and educational benefits.¹³³ These benefits

¹²⁵ [2023] ZACC 22; 2023 (9) BCLR 1027 (CC); 2023 (6) SA 1 (CC).

¹²⁶ 24 of 1987.

¹²⁷ *Centre for Child Law v T S supra* par 58.

¹²⁸ Charlton and Dewdney *The Mediator's Handbook: Skills and Strategies for Practitioners* 3ed (2014) 123.

¹²⁹ S 33(2) and (5) of the Children's Act.

¹³⁰ S 21(3)(a) of the Children's Act.

¹³¹ Matthias "Parental Responsibilities and Rights of Unmarried Fathers: Court Decisions and Implications for Social Workers" 2017 53 *Social Work/Maatskaplike Werk* 102 106.

¹³² Nordien-Lagardien, Pretorius and Terblanche "Family Mediation: The Perceptions and Experiences of Unmarried Parents and Mediators" 2021 57 *Social Work* 157 159.

¹³³ Nordien-Lagardien *et al* 2021 *Social Work* 159 160.

affected the co-parenting relationship for both parents after mediation.¹³⁴ In addition, fathers specifically became aware of their parental responsibilities and rights, of which they had no or little knowledge prior to mediation, while mothers became aware of the parental responsibilities and rights of unmarried fathers.¹³⁵ This then positively changed the way in which these parents viewed the co-parenting relationship after mediation.¹³⁶

Studies have also shown that, although social workers are required to offer mediation services under the Children's Act, some unmarried fathers are not aware of this.¹³⁷ This highlights the need for awareness of the existence of such services to be better communicated to unmarried fathers with regard to exercising their parental rights and obligations.¹³⁸

5 3 Government initiatives

The Departments of Social Development and Basic Education could find ways to strengthen an understanding of parental responsibility, such as by providing parents with a leaflet when they register the birth of their child, so introducing them to the meaning, importance and practical implications of parental responsibility and the effect of their beneficial involvement on the early development of the young child.¹³⁹ The government could also focus on raising awareness about contemporary social and environmental issues at an early age during secondary education.¹⁴⁰ Many young single fathers are unaware of their legal rights and responsibilities as parents.¹⁴¹ Educational and awareness campaigns are clearly needed to educate young parents and the community, perhaps via the Life Orientation Learning Area, which aims to equip learners (grades 7–12)¹⁴² with the skills, knowledge, values and

¹³⁴ Nordien-Lagardien *et al* 2021 *Social Work* 158.

¹³⁵ Nordien-Lagardien *et al* 2021 *Social Work* 159.

¹³⁶ *Ibid.*

¹³⁷ Makhanya "Young Unmarried Fathers Current Relationship With Their Children: The South African Social Work Perspective" 2022 20 *Gender and Behaviour* 20375 20390.

¹³⁸ Nordien-Lagardien *et al* 2021 *Social Work* 159.

¹³⁹ South Africa has improved the mortality and morbidity rates for mothers, newborns, and children over the last ten years. The "first 1000 days" from conception to a child's second birthday have received much attention since it is thought to be a crucial time for the long-term health outcomes of both mother and child. This offers a possible forum for enhancing understanding and increasing awareness of single parents' rights, especially about their parental duties and legal obligations. Interventions may be developed to better educate single parents about their rights by taking advantage of this crucial window, which would increase parental engagement equity and improve child welfare in South Africa (English, Peer, Honikman, Tugendhaft and Hofman "First 1000 Days' Health Interventions in Low- and Middle-Income Countries: Alignment of South African Policies With High-Quality Evidence" 2017 10 *Global Health Action* 1340396; Bamford "The First 1,000 Days: Ensuring Mothers and Young Children Thrive" *South African Child Gauge* (2019) 71 75; Pedro, Batweni, Bradfield, Dare, Nyman, Petersen and Truskey "First 1000 Days: First-Time Mothers' Understanding and Experiences of Nutritional Care" 2022 192 *Early Child Development and Care* 1561 1564.

¹⁴⁰ Wasserman *Life Orientation Teachers' Experience of Context in the Implementation of the Curriculum* (doctoral thesis, University of Stellenbosch) 2014 41.

¹⁴¹ Makhanya 2022 *Gender and Behaviour* 20389.

¹⁴² The age group where teenagers frequently become unmarried fathers. In South Africa, although specific ages can vary, research indicates that young fatherhood is more prevalent

attitudes necessary to make informed decisions and take appropriate actions in various aspects of life.¹⁴³ One topic covered emphasises the importance of raising awareness about contemporary social and environmental issues.¹⁴⁴ Life Orientation lessons in South Africa incorporate lessons on parental rights of married and unmarried mothers and fathers. This inclusion is essential for promoting a comprehensive understanding of family dynamics and responsibilities. By educating students about parental responsibilities, including legal aspects and societal expectations, Life Orientation can contribute to fostering respect for diverse family structures and promoting healthy parent-child relationships. Understanding parental responsibilities can also empower students to advocate for themselves and their families, fostering a more inclusive and informed society.

6 CONCLUSION

As in most family-law matters involving children, a sensitive, holistic, individualised and nuanced approach is needed – one that focuses on the welfare of the children born of unmarried parents and their unique circumstances. A distinction should be drawn between the acquisition and exercise of PRR.¹⁴⁵ Bestowing automatic PRR on all fathers would be in line with constitutional imperatives¹⁴⁶ and international law.¹⁴⁷ The Children's Court now has jurisdiction with regard to guardianship.¹⁴⁸ This means that, in relation to the father's legal position in the exercise of PRR, the unmarried mother would be able to apply to the Children's Court for a relatively inexpensive and more easily accessible remedy – namely, that the court limit or remove the father's PRR, if it were necessary. This would arise, for instance, where the father has never been involved or shown any commitment to the child (whether financial or emotional), and it is not in the child's best interests, nor the mother's, for the unmarried father to have guardianship rights and responsibilities over the child. The criteria of the best interests of the child, along with the wishes and feelings of the more mature child,¹⁴⁹ should be applied to the exercise of PRR by parents, but not necessarily to its acquisition.¹⁵⁰ This approach may encourage unmarried fathers to become more involved in the lives of their children from birth. The positive influence of recent cases on parental leave, birth registration and access to the Office of

among adolescents and young adults, typically between the ages of 15 and 24 (Makamu *Young Fathers in South Africa: An Analysis of the Demographic and Socioeconomic Determinants* (doctoral thesis, University of the Witwatersrand) 2019).

¹⁴³ Department of Basic Education "National Curriculum and Assessment Policy (NCS) Life Orientation Grades 7–9" (2011) <https://www.education.gov.za/Portals/0/CD/National%20Curriculum%20Statements%20and%20Vocational/CAPS%20SP%20%20LIFE%20ORIENTATION%20%20WEB.pdf> (accessed 2024-10-12).

¹⁴⁴ Wasserman *Life Orientation Teachers' Experience of Context in the Implementation of the Curriculum* 41.

¹⁴⁵ *Ibid.*

¹⁴⁶ Louw 2016 *De Jure Law Journal* 196.

¹⁴⁷ For example, art 18(1) of the CRC.

¹⁴⁸ The Children's Amendment Act 17 of 2022 amends s 45 of the Children's Act by inserting s 45(3A) and (3B) to enable the Children's Court to assign, extend, restrict, suspend or terminate the guardianship rights of any person in relation to a child.

¹⁴⁹ S 10 of the Children's Act; art 9(3) of the CRC.

¹⁵⁰ Louw 2016 *De Jure Law Journal* 195.

the Family Advocate in cases of separation is in line with this approach. The way is now open for the amendment of section 21 of the Children's Act, and for government adoption of educational and awareness-raising initiatives to highlight the importance of positive social and economic parental involvement in children's lives in line with parents' constitutional and international-law rights and the best interests of their children.