

**The General Responsibilities and Rights of an Unmarried Father in terms of the
Children's Act 38 of 2005**

Research report submitted for partial fulfilment of the requirements for
the degree *Magister Baccalaureus Legum* at the North West University (Potchefstroom
Campus)

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6 May 2011

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ABSTRACT

This thesis explores the impact of the new *Children's Act*, Act 38 of 2005 on the acquisition by unmarried fathers of parental responsibilities and rights. The research has shown that the *Children's Act* has fundamentally transformed the way in which parental responsibilities and rights are acquired.

Parental responsibilities and rights can now be automatically acquired by a committed unmarried father. Although the Act has undergone major changes, unmarried fathers must still satisfy many more requirements than mothers, and thus it is asserted that the Act is deemed not to have been progressive enough.

Granting full parental responsibilities and rights to both parents, based on their biological link to the child, would meet the constitutional demands of sex and gender equality. This would also place the focus on the child, and the best interests of the child. The importance in securing these best interests that the presence of both parents has in the life of the child is emphasised.

OPSOMMING

Hierdie proefskrif ondersoek die impak wat die nuwe Kinderwet, Wet 38 van 2005, het op ongetroude vaders wat betref die verkryging van ouerlike verantwoordelikhede en regte.

Navorsing toon dat die manier waarop ouerlike verantwoordelikhede en regte verkry word, fundamenteel verander het vandat die nuwe Kinderwet in werking getree het.

Ouerlike verantwoordelikhede en regte kan nou outomaties verkry word deur 'n toegewyde ongetroude vader. Alhoewel die Wet groot veranderinge ondergaan het, moet ongetroude vaders steeds aan baie meer vereistes voldoen as moeders, en daar word dus beweer dat die Wet nie progressief genoeg is nie.

Toekenning van volle ouerlike verantwoordelikhede en regte aan beide ouers, op grond van hul biologiese verwantskap teenoor hul kind, sal voldoen aan die grondwetlike vereistes van geslag en geslagsgelykheid. Dit sal ook die fokus op die kind en die kind se beste belang plaas.

KEYWORDS

Rights

Responsibilities

Unmarried

Father

Child

Children's Act

LIST OF ABBREVIATIONS

| | |
|-------|--|
| ACRWC | African Charter on the Rights and Welfare of the Child |
| CRC | Convention on the Rights and Welfare of the Child |

1 Introduction and problem statement

The purpose of this dissertation is to answer the question: Does the *Children's Act*, Act 38 of 2005 contravene the *Constitution of the Republic of South Africa* 1996?

The *Children's Act*, Act 38 of 2005¹ defines the responsibilities and rights of parents. This Act sets up a group of co-holders² (people sharing the responsibility of caring for the child) of parental responsibilities and rights regarding children and states that a person may have either full or specific parental responsibilities or rights in respect of a child.³ These include the responsibilities and the rights to care⁴ for the child, to maintain contact⁵ with the child, to act as guardian⁶ of the child and to contribute to the maintenance⁷ of the child.

The biological mother of a child, married or unmarried, has full parental responsibilities and rights in respect of a child.⁸ The biological father of a child also have full parental responsibilities and rights in respect of the child if he is married to the child's mother, or if he was married to the child's mother at any time between conception and birth.⁹ But, according to section 21 of the *Children's Act*, an unmarried father of a child only acquires full parental responsibilities and rights in respect of the child if he lives with the mother in a permanent life-partnership, or if he consents to be identified as the child's father and contributes in good faith to the upbringing and maintenance of the child for a reasonable period. An unmarried father can also acquire full parental responsibilities and rights when he marries the mother.

When interpreting the responsibilities and rights of parents it is important to keep in mind that section 39(1) of the *Constitution of the Republic of South Africa*, 1996¹⁰

¹ *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

² S 30 of the *Children's Act*.

³ S 18(1) of the *Children's Act*.

⁴ S 18(2)(a) of the *Children's Act*.

⁵ S 18(2)(b) of the *Children's Act*.

⁶ S 18(2)(c) of the *Children's Act*.

⁷ S 18 (2)(d) of the *Children's Act*.

⁸ S 19 of the *Children's Act*.

⁹ S 20 of the *Children's Act*.

¹⁰ *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

states that a court, tribunal or forum must consider international law. Section 39(1)(b) of the *Constitution* does not only compel a court to consider international law when interpreting the Bill of Rights, but it also serves as a valuable source of interpretation for children's rights as contained in the Bill of Rights in the *Constitution*.¹¹ International instruments, such as the *Convention on the Rights of the Child*, 1989¹² and the *African Charter on the Rights and Welfare of the Child* 1990,¹³ may serve as valuable guidelines in developing a framework of laws about children on a domestic level. South Africa ratified the *CRC* on 16 June 1995 and the *ACRWC* on 7 January 2000 and, by so doing, assumed an international legal obligation to transform international law into domestic legislation and, more particularly, the *Children's Act*.¹⁴

Section 9 of the *Constitution* states that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Sections 20 and 21 of the *Children's Act* differentiate between married and unmarried parents. This comes down to differential treatment on the ground of marital status, sex and gender. This discussion aims to address the question as to whether this differentiation results in unfair discrimination. In other words, does section 21 of the *Children's Act* infringe the rights guaranteed in section 9 of the *Constitution* when it comes to the differential treatment of unmarried fathers and married fathers or biological mothers? The constitutionality of section 21 of the *Children's Act* will be tested against the *Harksen* test, formulated by the

¹¹ See *inter alia* section 28 of the *Constitution* and Sloth-Nielsen and Mezmur 2008 *The International Journal of Children's Rights* 1.

¹² Convention on the Rights of the Child, 1989 (hereafter the *CRC*)

¹³ African Charter on the Rights and Welfare of the Child, 1990 (hereafter the *ACRWC*).

¹⁴ *S v Kwalase* 2000 2 SACR 135 (C); *Fitschen v Fitschen* 1997 JOL 1612 (C); S 231 of the *Constitution* and Sloth-Nielsen and Mezmur 2008 *The International Journal of Children's Rights*.

Constitutional Court in *Harksen v Lane NO and Others* 1997 11 BCLR 1489 (CC); 1998 1 SA 300 (CC).¹⁵

The Constitutional Court in *Harksen v Lane* set out the different stages necessary to determine whether the rights guaranteed in section 9 of the *Constitution* are infringed or not. The test firstly enquires whether the implicated provision differentiates between people or categories of people.¹⁶ If it does differentiate, the next step is an inquiry as to whether this differentiation has a rational connection to a legitimate government purpose.¹⁷ Under circumstances where there is no rational connection, there will be violation of section 9(1) of the *Constitution* present. If there is a rational connection the next step is to enquire whether the differentiation amounts to “discrimination” and, if so, does the “discrimination” amount to “unfair discrimination”.¹⁸ Section 21 of *the Children’s Act* will be analysed according to the above mentioned test and a conclusion will be reached as to whether or not it is constitutional.

The research question posed above will be discussed critically by means of a literature review of case law, legislation and other measures. Emphasis will be placed on the responsibilities and rights of an unmarried father. It will be argued that, although the responsibilities and rights of an unmarried father have improved over the past few years, little has been done to place him on the same level as a married father. The development of an unmarried father’s right will subsequently be analysed and it will be compared to the responsibilities and rights of married parents.

2 History and development

The Roman and Roman-Dutch law, which constitute South African common law, regarded the biological unmarried father of a child as a stranger to his child.¹⁹ Except for the duty to provide maintenance, no legal relationship was recognised between

¹⁵ *Harksen v Lane NO and Others* 1997 11 BCLR 1489 (CC); 1998 1 SA 300 (CC), hereafter *Harksen v Lane*).

¹⁶ *Harksen v Lane* 42 and Currie and de Waal 2005 *The Bill of Rights Handbook* 235.

¹⁷ *Harksen v Lane* 42 and Currie and de Waal 2005 *The Bill of Rights Handbook* 235.

¹⁸ Currie and de Waal 2005 *The Bill of Rights Handbook* 235.

¹⁹ *Van Erk v Holmer* 1992 2 SA 636 (W) (hereafter *Van Erk v Holmer*).

the father and his child.²⁰ An illegitimate child automatically fell under the parental power and guardianship of his or her mother, “as a mother does not bastardise her own children.”²¹ In Roman family law the relationship between a father and a child was seen as the basis of the father’s *patria potestas*.²² The relationship between a mother and her child was based on the blood relation between them regardless of whether the child was legitimate or illegitimate.²³ Illegitimate children did not fall under their father’s *patria potestas*.²⁴

Before the *Child Care Act*, Act 74 of 1983²⁵ the common law defined the relationship between fathers and their children by labelling the children as “legitimate” or “illegitimate”.²⁶ The *Children’s Act*, Act 31 of 1937²⁷ which preceded the *Child Care Act* of 1983 created a statutory definition of a parent which was framed around legitimacy:

A parent was the father or the mother of a child born of or legitimated by a lawful marriage, or the mother of an illegitimate child.²⁸

These concepts (legitimacy and illegitimacy) are no longer used in South African law. The *Child Care Act*, Act 74 of 1983, *Natural Fathers of Children Born out of Wedlock Act*, Act 86 of 1998²⁹ and, more recently, the *Children’s Act*, Act 38 of 2005 replaced the 1937 *Children’s Act*. Until 1998, South African law provided that unmarried fathers only had obligations towards their children but had no inherent rights with regard to them.³⁰ The mother of an “illegitimate” child had parental authority over her child, except in circumstances where the mother was still a minor.³¹ The unmarried father had no parental authority even if he was living with the mother. The unmarried father was in the same position as a third party and had the right to claim

²⁰ *Van Erk v Holmer* 346.

²¹ Or in Dutch *een moeder maakt geen bastaard*. See *Van Erk v Holmer* 346.

²² *Van Erk v Holmer* 346.

²³ *Van Erk v Holmer* 346.

²⁴ *Van Erk v Holmer* 346.

²⁵ *Child Care Act* 74 of 1983 (hereafter the *Child Care Act*).

²⁶ Skelton “Parental Responsibilities and Rights” 70.

²⁷ *Children’s Act* 31 of 1937 (hereafter the 1937 *Children’s Act*).

²⁸ Skelton “Parental Responsibilities and Rights” 45

²⁹ *Natural Fathers of Children Born out of Wedlock Act* 86 of 1998 (hereafter the *Natural Fathers Act*).

³⁰ Skelton “Parental Responsibilities and Rights” 71.

³¹ Heaton *The South African Law of Person* 65.

responsibilities and rights at the High Court (upper guardian of a minor child).³² The unmarried father of the child had to prove that it would be in that child's best interest before the court granted access or custody to him.³³

Section 18(4)(d) of the *Child Care Act* stated the following:

A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied- that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known as contemplated in section 19A ...

The position of an unmarried father was changed by the courts in *Fraser v Naude and Others*³⁴ and *Fraser v Children's Court, Pretoria North, and others*.³⁵ In the latter case the Constitutional court declared section 18(4)(d) of the *Child Care Act* invalid and recognized the responsibilities and rights of an unmarried father. Legislative changes were made to give effect to this judgment in the *Natural Fathers of Children Born out of Wedlock Act*, Act 86 of 1998 and the most recent development is section 21 of the *Children's Act*, Act 38 of 2005, which came in full effect on 01 April 2010.

3 Parental responsibilities and rights

3.1 Introduction

Traditionally the common law concept of parental authority included custody, access and guardianship.³⁶ The *Guardianship Act*, Act 192 of 1993 came into operation at a later stage and governed all guardianship matters. This act conferred equal and joint guardianship status on parents of children born in wedlock.³⁷ Custody and access

³² Heaton *The South African Law of Person* 65.

³³ Skelton "Parental Responsibilities and Rights" 71 and *Rowan v Faifer* 1953 2 SA 705 (E) 184 – 185.

³⁴ *Fraser v Naude and Others* 1997 2 SA 82 (W) (hereafter *Fraser v Naude*).

³⁵ *Fraser v Children's Court, Pretoria North, and others* 1997 2 SA 218 (T) (hereafter *Fraser v Children's Court*).

³⁶ Skelton "Parental Responsibilities and Rights" 63.

³⁷ Skelton "Parental Responsibilities and Rights" 63.

were still governed by the common law. Chapter 3 of the *Children's Act* was the first form of legislation that codified these responsibilities and rights of parents.

In *V v V*³⁸ the judge stated the following:

There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parent to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s28 of the *Constitution*, not to mention a wide range of international conventions.³⁹

The *Children's Act* makes it clear that parental rights and responsibilities could be shared between several people, even though there may be no biological or legal relationship between the adult and the child.⁴⁰ According to section 18(2) of the *Children's Act* the concept of parental rights and responsibilities includes the following elements:

- (a) to care for the child;
- (b) to maintain contact with the child;
- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child.

3.2 Married and unmarried mothers

The biological mother of a child, married or unmarried, has full parental responsibilities and rights in respect of a child.⁴¹ These responsibilities and rights granted to the mother are solely based on her biological relationship with the child.⁴² In cases where the mother of the child is still a minor and unmarried, the unmarried minor's guardian is also the guardian of the child.⁴³ However, this is only in cases where the father of the child does not have guardianship in respect of the child.⁴⁴

³⁸ *V v V* 1998 4 SA 169 (C), (hereafter *V v V*).

³⁹ *V v V* para 6.

⁴⁰ Skelton "Parental Responsibilities and Rights" 65 and *Kleingeld v Keins and Another* 2007 5 SA 559 (T) and *Bethell v Bland and Others* 1996 2 SA 194 (W).

⁴¹ S 19(1) of the *Children's Act*.

⁴² Skelton "Parental Responsibilities and Rights" 69.

⁴³ S 19(2)(a) of the *Children's Act*; Louw *Acquisition of Parental Responsibilities and Rights* 80 and Bonthuys 2006 *Stellenbosh Law Journal* 486.

⁴⁴ S 19(2) of the *Children's Act*.

3.3 Married and divorced fathers

The biological father of a child also has full parental responsibilities and rights in respect of the child if he is married to the child's mother or if he was married to the child's mother at any time between conception and birth.⁴⁵ Section 20 of the *Children's Act* makes it clear that a father requires a biological link as well as marriage to obtain his rights.⁴⁶ The fact that a biological link is necessary differs from the common law, under which it was assumed that the man married to the mother of the child was the child's father until the contrary was proven, as uttered in the Latin maxim *pate rest quem nuptiae demonstrant*.⁴⁷

3.4 Unmarried fathers

3.4.1 Children's Act 38 of 2005

Section 21(1) of the *Children's Act* sets out the circumstances under which unmarried fathers automatically qualify for full parental responsibilities and rights:

The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

- (a) if at the time of the child's birth he is living with the mother in a permanent life partnership; or
- (b) if he, regardless of whether he has lived or is living with the mother-
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
 - (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.⁴⁸

Section 21(1)(a) has been interpreted that, in circumstances where the mother and father live together in a permanent life-partnership at the time of the child's birth, the father acquires full parental responsibilities and rights.⁴⁹ However several difficulties arise when it comes to the interpretation of a "permanent life-partnership".⁵⁰ A life

⁴⁵ S 20 of the *Children's Act*.

⁴⁶ Skelton "Parental Responsibilities and Rights" 70.

⁴⁷ Skelton "Parental Responsibilities and Rights" 70.

⁴⁸ Bonthuys 2006 Stellenbosh Law Journal 486.

⁴⁹ Paizes *The position of unmarried fathers in South Africa* 45.

⁵⁰ Heaton *The South African Law of Person* 70 vn 170.

partnership could be defined as a relationship where two people live together outside marriage, but which relationship has the characteristics of a civil marriage.⁵¹ Louw argues that the core quality of a permanent life-partnership is the presence of a

...*consortium omnis vitae*, ie, an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage, include intangibles such as loyalty and sympathetic care as well as the more material needs in life.⁵²

A father of a child could claim that he was living with the mother in a permanent life-partnership at the time of the child's birth, but the mother can refute it by saying that they had never any intention of the partnership being permanent.⁵³ It is difficult to decide when a partnership is permanent, especially in circumstances where the relationship has ended, proving that there was no intention of a permanent life-partnership.⁵⁴ It would thus be better to examine the seriousness of the relationship at the time of birth of the child.⁵⁵

In circumstances where the unmarried father was not living with the mother in a permanent-life partnership at the time of the child's birth, he must now comply with the requirements set out in section 21(1)(b) to acquire full parental rights and responsibilities towards his child.⁵⁶ The father must fulfil all of three requirements, which relate to the commitment of the father towards the child,⁵⁷ for example, he must (a) acknowledge his parenthood, (b) demonstrate his commitment to contributing to the upbringing of the child and (c) prove his willingness to contribute to the maintenance of the child.

Section 21(1)(b)(i) states that a father must consent:

... 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.

⁵¹ Heaton *The South African Law of Person* 70 vn 170.

⁵² Louw *Acquisition of Parental Responsibilities and Rights* 117.

⁵³ Skelton "Parental Responsibilities and Rights" 75.

⁵⁴ Skelton "Parental Responsibilities and Rights" 75.

⁵⁵ Skelton "Parental Responsibilities and Rights" 75.

⁵⁶ Skelton "Parental Responsibilities and Rights" 76.

⁵⁷ Skelton "Parental Responsibilities and Rights" 76 and Louw *Acquisition of Parental Responsibilities and Rights* 118.

The *Children's Act* does not give any indication in section 21 of how a father should "consent to be identified". After studying section 236(4)⁵⁸ of the *Children's Act* one could assume that a father could consent to be identified by acknowledging in writing that he is the father or by paying voluntary maintenance towards the child. Section 10(1)(b) of the Births and Deaths Registration Act 51 of 1992⁵⁹ states that a child born out of wedlock could be registered under the surname of his biological father (with consent of the biological mother and biological father) in the presence of a third person or if the biological father acknowledge himself in writing to be the father of the child.⁶⁰ The second option is where the father "successfully applies in terms of section 26 to be identified as the child's father."⁶¹ Section 26(1) states the following:

- (1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may-
 - (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11 (4) of the Births and Deaths Registration Act, 1992, identifying him as the father of the child, if the mother consents to such amendment; or
 - (b) apply to a court for an order confirming his paternity of the child, if the mother-
 - (i) refuses to consent to such amendment;
 - (ii) is incompetent to give consent due to mental illness;
 - (iii) cannot be located; or
 - (iv) is deceased.

This section will be used in circumstances where the mother refuses to consent to the father being identified or where paternity is in dispute.⁶² The third option regarding identification of the father is by paying damages in customary law.⁶³ This is related to pregnancy outside the marriage. But paying damages does not confer any

⁵⁸ S 236(4) of the *Children's Act* - A person referred to in subsection (3)(a) [unmarried father] can for the purposes of that subsection acknowledge that he is the biological father of a child- (a) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court before the child reaches the age of six months, (b) by voluntarily paying maintenance in respect of the child, (c) by paying damages in terms of customary law, or (d) by causing particulars of himself to be entered in the registration of birth of the child.

⁵⁹ *Births and Deaths Registration Act* 51 of 1992 (hereafter the *Birth and Deaths Registration Act*)
⁶⁰ *Louw Acquisition of Parental Responsibilities and Rights* 125.

⁶¹ Skelton "Parental Responsibilities and Rights" 76 and *Louw Acquisition of Parental Responsibilities and Rights* 125.

⁶² Skelton "Parental Responsibilities and Rights" 76 and *Louw Acquisition of Parental Responsibilities and Rights* 125.

⁶³ Skelton "Parental Responsibilities and Rights" 76. Customary law is the written and unwritten rules which have developed from the customs and traditions of communities. For customs and traditions to become law, they must be known to the community, followed by the community and enforceable. People are free to choose which to use if the dispute can be decided by both customary and common law. The Constitution says that customary law is protected but the rules of customary law must be in line with the principles in the Bill of Rights.

rights of care or contact to the unmarried father; this right is conferred by the payment of *lobolo*.⁶⁴

If the unmarried father complies with this requirement, he can move on to the second requirement which states that the unmarried father must contribute to the child's upbringing.⁶⁵ And the third requirement states that the unmarried father must contribute to the maintenance of the child. Maintenance of the child includes financial support as well as involvement in the child's life.⁶⁶ The term "in good faith" could eliminate situations where the mother rejects any attempts at contribution by the father or where the father could not contribute because of poverty or unemployment.⁶⁷ A problem arises when looking at the words "for a reasonable time".⁶⁸ A father must contribute to the child's upbringing and maintenance for a period of time before he can acquire full parental responsibilities and rights.⁶⁹ This means that a father could not acquire parental responsibilities and rights immediately after the birth of his child.⁷⁰ This could create many disputes in relation to section 21(1).⁷¹ In section 21(3) the *Children's Act* makes provision for any disputes between the mother and the unmarried father of the child and states the following:

(a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person. (b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

The purpose of the mediation mentioned in section 21(3) is to settle whether or not the unmarried father acquires full parental responsibilities and rights towards his child.⁷² It is not about whether or how the unmarried father will exercise his rights.⁷³

⁶⁴ Skelton "Parental Responsibilities and Rights" 76 and Louw *Acquisition of Parental Responsibilities and Rights* 126.

⁶⁵ Skelton "Parental Responsibilities and Rights" 76 and Louw *Acquisition of Parental Responsibilities and Rights* 130.

⁶⁶ Skelton "Parental Responsibilities and Rights" 77.

⁶⁷ Skelton "Parental Responsibilities and Rights" 77.

⁶⁸ Skelton "Parental Responsibilities and Rights" 77.

⁶⁹ Skelton "Parental Responsibilities and Rights" 77.

⁷⁰ Skelton "Parental Responsibilities and Rights" 77.

⁷¹ Paizes *The position of unmarried fathers in South Africa* 45 and Bonthuys 2006 *Stellenbosh Law Journal* 486.

⁷² Paizes *The position of unmarried fathers in South Africa* 45.

⁷³ Skelton "Parental Responsibilities and Rights" 78, also see s 6(4) of *Children's Act* In any matter concerning a child – (a) an approach which is conducive to conciliation and problem solving

The best interest of the child is not considered in situations where parental responsibilities and rights are acquired by parents, but it is the central consideration in situations where such responsibilities and rights are exercised.⁷⁴ Before an unmarried father can exercise his parental responsibilities and rights acquired according to section 21 of the *Children's Act* the best interest of the child should be considered.⁷⁵ The *Children's Act* is not explicit about the next step after acquiring parental responsibilities and rights.⁷⁶ The following conclusion could be drawn: Once an unmarried father has complied with all the requirements in section 21 he is a co-holder of parental responsibilities and rights.⁷⁷ Then by the use of a parenting plan (according to section 33 of the *Children's Act*) the responsibilities and rights of the co-holders could be decided and defined.⁷⁸

It is clear that section 21 of the *Children's Act* advances the rights of unmarried fathers, but unmarried fathers are still not placed in a position equivalent to married fathers and biological mothers.⁷⁹

3.4.2 Access/Contact

For many years the debate about a parent's right of access to his or her child revolved mainly around the situation where the parents had divorced and the non-custodian parent sought to establish a right of access.⁸⁰ The scope of the debate has been broadened by the increasing attention given to the notion that the unmarried or biological father could have a far stronger claim to access, as a result of constitutional considerations, than he had ever had before.⁸¹

should be followed and a confrontational approach should be avoided and (b) a delay in any action or decision to be taken must be avoided as far as possible.

⁷⁴ Skelton "Parental Responsibilities and Rights" 78 and Louw *Acquisition of Parental Responsibilities and Rights* 97.

⁷⁵ Skelton "Parental Responsibilities and Rights" 78 and Louw *Acquisition of Parental Responsibilities and Rights* 97.

⁷⁶ Skelton "Parental Responsibilities and Rights" 78.

⁷⁷ Skelton "Parental Responsibilities and Rights" 78.

⁷⁸ Skelton "Parental Responsibilities and Rights" 78.

⁷⁹ Skelton "Parental Responsibilities and Rights" 74.

⁸⁰ Carpenter G *Constitutionally protected rights for parents?* 402.

⁸¹ Carpenter G *Constitutionally protected rights for parents?* 402.

It may be argued that, like a divorced parent, an unmarried father may claim a right of access to his child, but the standard approach has been that the father has no inherent right of access, and that the court would interfere with the *status quo* only if it is in the best interest of the child.⁸² Since the decision made in *Fletcher v Fletcher* 1948 1 SA 130 (A),⁸³ the best interest of a child became the paramount consideration in matters concerning children when it comes to disputes between their parents.

This approach was for the first time seriously challenged in *Van Erk v Holmer* 1992 2 SA 636 (W).⁸⁴ An unmarried father brought an application granting him reasonable access to his child. Van Zyl J held that an unmarried father has an inherent right of access towards his minor child. He stated that this is an inherent right which can be denied only if this is not in the best interests of the child.⁸⁵ Van Zyl J justified his decision by focusing on the public policy. His view of public policy is that there should be no distinction between unmarried and married fathers⁸⁶ because many unmarried fathers want to be part of their children's lives and form an "emotional bond" with their children.⁸⁷

This judgment came under severe criticism and scrutiny from other judges. In *S v S* 1993 2 SA 200 (W)⁸⁸ Judge Flemming held that he was not bound by Van Zyl's decision made in *Van Erk v Holmer*, because he (Van Zyl) did not follow the *stare decisis* rule.⁸⁹ Flemming held that he could not deviate from the decision made by Kirk Cohen J in *B v P* 1991 4 SA 113 (T)⁹⁰ and held that the decision delivered by Van Zyl J was incorrect. Kirk Cohen J held that an unmarried father does not have an inherent right of access toward his minor child; the unmarried father must prove

⁸² Carpenter G *Constitutionally protected rights for parents?* 402.

⁸³ *Fletcher v Fletcher* 1948 1 SA 130 (A).

⁸⁴ Carpenter G *Constitutionally protected rights for parents?* 403.

⁸⁵ *Van Erk v Holmer* H-I.

⁸⁶ *Van Erk v Holmer* J.

⁸⁷ *Van Erk v Holmer* H-I.

⁸⁸ *S v S* 1993 2 SA 200 (W).

⁸⁹ *Stare decisis* rule applied to the judicial decision made by the courts and applies that the decision made by a court is binding upon the court which actually pronounced the judgement as well as on all courts subordinate to that court.

⁹⁰ *B v P* 1991 4 SA 113 (T), (hereafter *B v P*).

that the access would be in the best interest of the child and that the right to access would not interfere with the mother's parental rights.⁹¹

The matter concerning the inherent right of access to an unmarried father was finally settled by the Supreme Court of Appeal in *B v S* 1995 3 SA 571 (A).⁹² Howie J held that an unmarried father did not enjoy an inherent right of access and that:

...if there are sound sociological and policy reasons for affording such father an inherent access right, in addition to the right they already have to be granted access where it is in the best interests of their children, then that is a matter that can only be dealt with legislatively.⁹³

Howie J stated that an unmarried father has the *locus standi* to apply for access toward his minor child,⁹⁴ but this access would only be granted in situations where it is in the best interest of the child. The question of discrimination against the unmarried father also came forward in this case. Howie J felt that the unmarried father was not unfairly discriminated against because of the fact that a "legitimate" father of a child will also have to approach the court if the mother of the child refuses access to the father.⁹⁵

The position of an unmarried father was previously regulated by the *Natural Fathers of Children born out of Wedlock Act*.⁹⁶ This Act gave the court the power to grant parental authority to a father if he complied with certain criteria.⁹⁷ The Act inadequately protected the rights of an unmarried father and the best interests of children.⁹⁸ The Act has been repealed and replaced by the *Children's Act*. The *Children's Act* changed the "right to access" to the "right to contact" and broadened the meaning of "access".⁹⁹ Contact is defined as all forms of communication with the child and it is not limited to physical access.¹⁰⁰ The concept of contact focuses more on the rights of a child to have contact with his or her parents, rather than the rights

⁹¹ *B v P F-G*.

⁹² *B v S* 1995 3 SA 571 (A), (hereafter *B v S*).

⁹³ *B v S* 579I-J.

⁹⁴ *B v S D-E*.

⁹⁵ *B v S C-E*.

⁹⁶ De Witt 2008 <http://www.eversheds.co.za>.

⁹⁷ De Witt 2008 <http://www.eversheds.co.za>.

⁹⁸ De Witt 2008 <http://www.eversheds.co.za>.

⁹⁹ De Witt 2008 <http://www.eversheds.co.za>.

¹⁰⁰ S 1 of *Children's Act*.

of the parents to have access to their child.¹⁰¹ Section 1 of the *Children's Act* defines "contact" as follows:

contact, in relation to a child, means - (a) maintaining a personal relationship with the child; and (b) if the child lives with someone else - (i) communication on a regular basis with the child in person, including- (aa) visiting the child; or (bb) being visited by the child; or (ii) communication on a regular basis with the child in any other manner, including- (aa) through the post; or (bb) by telephone or any other form of electronic communication;

3.4.3 Adoption

Before 01 April 2010 adoption was regulated in terms of the *Child Care Act* 74 of 1983. The *Children's Act* repealed the *Child Care Act* and made new provision for adoption of children. Adoption is dealt with in terms of chapter 15 of the *Children's Act*.

Before the judgement in the case of *Fraser v Children's Court, Pretoria North*¹⁰² adoption required only the consent of the mother of a child born out of wedlock.¹⁰³ The Constitutional Court declared section 18(4)(d) of the *Child Care Act* unconstitutional, because it discriminated against an unmarried father on the basis of gender and marital status and infringed upon his right to equality guaranteed in section 8¹⁰⁴ of the *Interim Constitution*.¹⁰⁵ The Court held that this above mentioned discrimination violated the right to equality. Section 18(4)(d) was amended by the *Adoption Matters Amendment Act* 56 of 1998 and made provision for such cases.

¹⁰¹ Skelton "Parental Responsibilities and Rights" 67.

¹⁰² *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 1357 (CC); 1997 2 SA 261 (CC).

¹⁰³ S 18(4)(d) of *Child Care Act* - A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied - that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known as contemplated in section 19A.

¹⁰⁴ S 8(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

¹⁰⁵ Cronje and Heaton *Casebook on the Law of Persons* 137.

It is clear that sections 18 and 21 of the *Children's Act* had an impact on the law of adoption in circumstances where consent is concerned, before chapter 15 of the *Children's Act* came into effect.¹⁰⁶ If an unmarried father acquires full parental responsibilities and rights according to section 21 of the *Children's Act*, he obtains guardianship over the child.¹⁰⁷ In terms of section 18(3)(c) of the *Children's Act* the consent of all guardians of a child is necessary for adoption.¹⁰⁸ This means the consent of the unmarried father with full parental responsibilities and rights is also necessary for the child's adoption in terms of the *Child Care Act*.¹⁰⁹

The position of the unmarried father, when it comes to adoption of his child, is similar to what it was in the *Child Care Act*.¹¹⁰ Section 231(1)(d) of the *Children's Act* states that an unmarried father can adopt his child¹¹¹ and section 233(1)(a) states that consent from both parents is required.¹¹² Section 236(3)(a) further states that the consent of the unmarried father is not necessary in situations where the unmarried father does not acknowledge that he is the biological father of the child. Such acknowledgement takes place by acknowledging in writing that he is the father of the child, by paying maintenance voluntarily, by paying damages in terms of the customary law or by registering his particulars at the child's birth.¹¹³ The parental responsibilities and rights in respect of the child terminate immediately before adoption.¹¹⁴

4 International Instruments and the Constitution of the Republic of South Africa

Section 39(1)(b) of the Constitution states that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law." Two international treaties that are of significant importance when it comes to children and rights concerning

¹⁰⁶ Heaton *The South African Law of Persons* 76.

¹⁰⁷ Heaton *The South African Law of Persons* 76.

¹⁰⁸ Heaton *The South African Law of Persons* 76.

¹⁰⁹ Heaton *The South African Law of Persons* 76.

¹¹⁰ Paizes *The position of unmarried fathers in South Africa* 56.

¹¹¹ S 17(d) of the *Child Care Act*.

¹¹² S 18(d) of the *Child Care Act*.

¹¹³ S 237(4) of the *Children's Act*.

¹¹⁴ S 242(1) of the *Children's Act*.

children are the United Nations Convention on the Rights of the Child, 1989¹¹⁵ and the African Charter on the Rights and Welfare of the Child, 1990.¹¹⁶ The *CRC* and the *ACRWC* are binding documents and the *Constitution* requires that these documents should be translated into legislation.

4.1 United Nations Convention on the Rights of the Child

The *CRC* brought about major changes to how a child's rights are perceived and protected.¹¹⁷ Before the introduction of the *CRC* in 1989, children were seen as "mere property" of their parents and were not viewed as the bearers of rights.¹¹⁸ The *CRC* was ratified by the South African government on 16 June 1995.¹¹⁹ Article 4 of the *CRC* states that all States Parties who have signed and ratified the *CRC* shall

... undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

By signing and ratifying the *CRC*, the South African government agreed to obey the obligations and responsibilities set out in the *CRC*. It implemented domestic legislation which recognizes these new rights and responsibilities.¹²⁰

One of the *CRC*'s main focuses is the fact that children have the right to have a family life.¹²¹ Article 3 states that the best interest of a child should be the primary consideration in all actions concerning the child. Article 7(1) states that a child has "the right to know and be cared for by his or her parents" while article 7(2) places a

¹¹⁵ *United Nations Convention on the Rights of the Child*, 1989.

¹¹⁶ *African Charter on the Rights and Welfare of the Child*, 1990

¹¹⁷ Paizes *The position of unmarried fathers in South Africa* 36.

¹¹⁸ Paizes *The position of unmarried fathers in South Africa* 36.

¹¹⁹ Paizes *The position of unmarried fathers in South Africa* 36.

¹²⁰ Paizes *The position of unmarried fathers in South Africa* 37 and s 39 of the Constitution – When the courts are deciding a case on the Bill of Rights, they must promote the values of an open and democratic society based on freedom and equality. They must look at international laws and at the way courts in other countries have decided similar cases.

¹²¹ A 5 of the *CRC* - States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

duty on States Parties to make sure that the right in terms of article 7(1) is implemented.¹²² Article 9(1) states that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Article 9 of the CRC refers to the separation between child and parents. After the adoption of this article, the Chairperson made the following comment for the report:

It is the understanding of the Working Group that article 9 of this Convention is intended to apply to separations that arise in domestic situations, whereas article 10 is intended to apply to separations involving different countries and relating to cases of family reunification. Article 10 is not intended to affect the general rights of States to establish and regulate their respective immigration laws in accordance with their international obligations.¹²³

Article 9 and 10 are closely related. Under article 9(1) States Parties should ensure that a child shall not be separated from his or her parents against their will, except when the separation is necessary for the best interest of the child.¹²⁴

4.2 The African Charter on the Rights and Welfare of the Child

The *ACRWC* came into force on 29 November 1999 and it was ratified by South Africa government on 7 January 2000. The *ACRWC* is a regional treaty that specifically focuses on the rights of children in Africa.¹²⁵ Similar to the *CRC*, the *ACRWC* also focuses on the importance of the family unit. This is already acknowledged in the preamble which states:

... that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.

¹²² A 7 of the *CRC* – (1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

¹²³ Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 122.

¹²⁴ Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 123.

¹²⁵ Paizes *The position of unmarried fathers in South Africa* 37.

Article 4 states that the best interest of the child are the primary consideration in all actions concerning the child.

Article 18(1) points out that the important role of the family and states that “the family shall be the natural unit and basis of society.” Article 19(1) states that:

... every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child.

Article 19(2) further states that:

... every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.

4.3 Section 28 of the Constitution

Section 28 of the *Constitution* guarantees children’s rights. This section was significantly influenced by the *CRC* and the *ACRWC*.¹²⁶ Two important sub-sections in relation to this dissertation are section 1(b) and section 2.

Section 1(b) guarantees that:

... every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

And section 2 states that:

... a child’s best interests are of paramount importance in every matter concerning the child.

It is clear from these two subsections that every child has the right to be cared for by their parents or family if it is in the best interest of that child. Parental care, guaranteed in this section, includes the right to be cared for by both parents.¹²⁷ In South African common law, unmarried fathers have no right to care for their children

¹²⁶ Paizes *The position of unmarried fathers in South Africa* 38.

¹²⁷ Paizes *The position of unmarried fathers in South Africa* 38.

and only have the duty to support.¹²⁸ The *Children's Act* changed this position of the unmarried father. An unmarried father will be given automatic parental responsibilities and rights if he complies with the criteria set out in section 21 of the *Children's Act*.

Paizes argues that the meaning of parental care in section 28(1)(b) is wrongfully interpreted in case law.¹²⁹ In *Jooste v Botha*¹³⁰ the High Court held:

...in the subsection the word 'parental' must necessarily be read as pertaining to a custodian parent. To interpret it otherwise would not make sense. Thus interpreted the non-custodian legitimate parent and the natural father of an illegitimate child (who does not have custody) fall outside the scope of section 28(1)(b).¹³¹

In *Heystek v Heystek*¹³² the same court did not agree with the judgement in *Jooste* and stated that a child's right to parental care is not limited to natural custodian parents, but it also includes parents such as step-parents, adoptive parents and foster parents.¹³³ *Government of the Republic of South Africa v Grootboom*¹³⁴ further included non-custodian parents in the description.¹³⁵ In *Allsop v McCann*¹³⁶ the court included non-custodian parents as part of parental care.¹³⁷

5 Equality

5.1 Introduction

Regardless of the increased recognition of the positive role that fathers can play in the lives of their children, by allowing married fathers as well as some unmarried father's full parental responsibilities and rights, the *Children's Act* still does not confer automatic parental rights to unmarried fathers on the same basis as mothers.¹³⁸ The

¹²⁸ Paizes *The position of unmarried fathers in South Africa* 39.

¹²⁹ Paizes *The position of unmarried fathers in South Africa* 40.

¹³⁰ *Jooste v Botha* 2000 2 BCLR 187 (T); 2000 JOL 5943 (T), (hereafter *Jooste v Botha*).

¹³¹ *Jooste v Botha* 19-20.

¹³² *Heystek v Heystek* 2002 2 All SA 401 (T); 2002 2 SA 754 (T).

¹³³ Paizes *The position of unmarried fathers in South Africa* 40.

¹³⁴ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

¹³⁵ Paizes *The position of unmarried fathers in South Africa* 40.

¹³⁶ *Allsop v McCann* 2001 2 SA 705 (C).

¹³⁷ Paizes *The position of unmarried fathers in South Africa* 40.

¹³⁸ Louw *Acquisition of Parental Responsibilities and Rights* 133.

question is whether this continued differential treatment may be justified in light of the *Constitution*.

The *Constitution* makes provision for the equality clause in section 9. Equality is defined as “people in similar situations should be treated the same”.¹³⁹ Section 9 reads as follow:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Differentiation between mothers and fathers, in relation to parental responsibilities and rights, may possibly infringe the following constitutional grounds listed in section 9(3) of the *Constitution*: Marital status, sex and gender.¹⁴⁰

Section 21 of the *Children’s Act* differentiates in the first instance between biological mothers and biological fathers. All mothers, irrespective of their marital status, automatically acquire full parental responsibilities and rights toward their children, whereas a biological father must comply with certain criteria before he acquires full parental responsibilities and rights towards his children.¹⁴¹ A mother acquires these responsibilities and rights based exclusively on her biological link with the child.¹⁴² Discrimination comes down to the fact that only females are capable of bearing children; the discrimination on the grounds of sex seems to have less to do with the law’s discrimination than with nature’s discrimination against men.¹⁴³ Discrimination against fathers arises out of their parenting roles in the past, and is thus based on

¹³⁹ Currie and De Waal *The Bill of Rights Handbook* 230.

¹⁴⁰ Louw *Acquisition of Parental Responsibilities and Rights* 148.

¹⁴¹ Louw *Acquisition of Parental Responsibilities and Rights* 157.

¹⁴² Louw *Acquisition of Parental Responsibilities and Rights* 157.

¹⁴³ Louw *Acquisition of Parental Responsibilities and Rights* 157.

gender.¹⁴⁴ As sex and gender are both listed grounds in section 9(3) of the *Constitution*, it is clear that the discrimination on one of these grounds would be deemed unfair, unless the violation of the father's right to equality can be justified in terms of section 36 of the *Constitution*.¹⁴⁵ In *Fraser v Children's Court, Pretoria North and Others*¹⁴⁶ the judge felt that discrimination on the ground of gender could be justified, but only in the early stages after the child is born. But in *Madiehe (born Ratlhogo) v Madiehe* 1997 2 ALL SA 153 (B)¹⁴⁷ the court held that it would only "in case of doubt favour the mother rather than the father." The court further held that:

Custody 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.¹⁴⁸

The "maternal preference rule" is also criticized in the *Van der Linde v Van der Linde* 1996 3 SA 509 (O)¹⁴⁹ case, where the court held that a father is as capable of "mothering" a child as a mother. By looking at these judgements it is clear that the court is willing to re-evaluate the gender stereotyping of parental roles.

Currie & De Waal favour a system where parental rights are conferred on the primary caretaker of the child. The reason for this is to overcome the gender discrimination challenge. It is as follows:

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 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 ... In this way, gender-neutral rules may exacerbate the actual disadvantage experienced by women in the family. Perhaps a gender neutral solution which award parental rights on the basis of actual childcare work, like primary caretaker standard, could avoid this problem.¹⁵⁰

¹⁴⁴ Louw *Acquisition of Parental Responsibilities and Rights* 157.

¹⁴⁵ Louw *Acquisition of Parental Responsibilities and Rights* 157.

¹⁴⁶ *Fraser v Children's Court, Pretoria North and Others* 274.

¹⁴⁷ *Madiehe (born Ratlhogo) v Madiehe* 1997 2 ALL SA 153 (B) 157.

¹⁴⁸ *Madiehe (born Ratlhogo) v Madiehe* 1997 2 ALL SA 153 (B) 157.

¹⁴⁹ *Van der Linde v Van der Linde* 1996 3 SA 509 (O) 515.

¹⁵⁰ Currie & De Waal *Bill of Rights Handbook* par 27.2(b)(ii).

Sinclair¹⁵¹ strives to transform the law so that it reflects a “fundamental premise of equality between parents.”¹⁵² Sinclair makes a good point raising the fact that women demand equal treatment, but they still insist that it would be unfair to vest unmarried fathers with inherent parental responsibilities and rights.¹⁵³ Sinclair states that shared parental responsibilities and rights should only be interfered with “where the interests of the child demand judicial intervention.”¹⁵⁴

Stereotyped assumption 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] the law would be sending the signals that conform to the letter and spirit of the Bill of Rights.”¹⁵⁵

Discrimination on the grounds of sex and gender often overlaps discrimination on the ground of marital status.¹⁵⁶ Discrimination on the ground of marital status, in situations where the parent-child relationship is concerned, is not constitutionally justifiable.¹⁵⁷ Discrimination on this ground also constitutes discrimination against a child’s rights on the grounds of social origin and birth (out of wedlock).¹⁵⁸ Discrimination against fathers who lack the commitment foreseen in section 21 of the *Children’s Act* is based on an unspecified ground, and thus should the unfairness be established.¹⁵⁹ The test for unfairness in such situations primarily focuses on the impact the discrimination might have on the complainant and others in his situation.¹⁶⁰ The Constitutional Court in *Harksen v Lane* laid down the following factors that need to be considered to determine whether the discrimination has had an unfair impact on the complainant. Firstly, the position of the complainant in the society and whether he or she has been a victim of past discrimination.¹⁶¹ Secondly, the nature of the discriminating law and the purpose sought to be achieved by it.¹⁶² And lastly, 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.¹⁶³

¹⁵¹ Sinclair in Van Wyk et al Rights and Constitutionalism.
¹⁵² Louw *Acquisition of Parental Responsibilities and Rights* 162.
¹⁵³ Louw *Acquisition of Parental Responsibilities and Rights* 162.
¹⁵⁴ Louw *Acquisition of Parental Responsibilities and Rights* 162.
¹⁵⁵ Louw *Acquisition of Parental Responsibilities and Rights* 162.
¹⁵⁶ Louw *Acquisition of Parental Responsibilities and Rights* 162.
¹⁵⁷ Louw *Acquisition of Parental Responsibilities and Rights* 163.
¹⁵⁸ Louw *Acquisition of Parental Responsibilities and Rights* 163.
¹⁵⁹ Louw *Acquisition of Parental Responsibilities and Rights* 162.
¹⁶⁰ Louw *Acquisition of Parental Responsibilities and Rights* 163.
¹⁶¹ Louw *Acquisition of Parental Responsibilities and Rights* 165.
¹⁶² Louw *Acquisition of Parental Responsibilities and Rights* 167.
¹⁶³ Louw *Acquisition of Parental Responsibilities and Rights* 172.

When it comes to the first factor, the court in *President of the Republic of South Africa and Another v Hugo* found that in society fathers are not a vulnerable group affected by discrimination.¹⁶⁴ When it comes to the second factor it is important to consider whether the primary purpose of the law is to achieve an important common goal. In *Frazer v Children's Court, Pretoria North and Others* the rule (that natural unmarried fathers do not automatically acquire full parental responsibilities and rights in respect of their children) may have been based on a desire to protect and promote the structure of family unity or, alternatively, it was designed to punish reckless fathers.¹⁶⁵ And when it comes to the last factor, the limitation of the father's right to be treated equally as a parent may be an infringement on his right to dignity.¹⁶⁶ This applies especially in cases where the father is not aware of his paternity, or where the mother refuses him an opportunity to develop a relationship with his child.¹⁶⁷

Inequality in situations concerning parental responsibility and rights may have a harmful effect on the constitutional rights of a child.¹⁶⁸ Denying a child the right to have both of his or her parents present on an equal basis could be seen as unfair discrimination.¹⁶⁹ Discrimination against children on the ground of social origin and birth is based on the differentiation between children born to parents with a committed relationship and children born to parents not so committed.¹⁷⁰ In the case of section 21 of the *Children's Act*, the discrimination is against children with an unmarried father, a father who is not in a permanent life-partnership with the biological mother of the child and an uncommitted father (requirements of section 21 of the *Children's Act*).¹⁷¹

The Constitutional Court in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South Africa Human Rights Commission v President of the Republic of South Africa* 2005 1

¹⁶⁴ *President of the Republic of South Africa and Another v Hugo* 52.

¹⁶⁵ *Frazer v Children's Court, Pretoria North and Others* 234.

¹⁶⁶ Louw *Acquisition of Parental Responsibilities and Rights* 172.

¹⁶⁷ Louw *Acquisition of Parental Responsibilities and Rights* 172.

¹⁶⁸ Louw *Acquisition of Parental Responsibilities and Rights* 173.

¹⁶⁹ Louw *Acquisition of Parental Responsibilities and Rights* 173.

¹⁷⁰ Louw *Acquisition of Parental Responsibilities and Rights* 173.

¹⁷¹ Louw *Acquisition of Parental Responsibilities and Rights* 173.

SA 580 CC¹⁷² held that section 23 of the *Black Administration Act* 38 of 1927¹⁷³ and the customary-law rule (primogeniture) is unconstitutional, because it discriminates against children (females) born out of wedlock.¹⁷⁴ This rule infringes the *Constitution's* equality provision (section 9), the right to human dignity (section 10) and the rights guaranteed in section 28. The court held that children may not be subjected to discrimination on the grounds of birth and sex.¹⁷⁵ The court concluded its judgement in connection with the position on children born out of wedlock as follows:

...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 s 9(3) prohibits unfair discrimination on the ground of 'birth', it 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.¹⁷⁶

Although this case only focuses on the right of children and not on the rights of unmarried fathers, these decisions support the approach which disregards marital status and sex in the determination of the parent-child relationship.¹⁷⁷

To determine whether the differentiation between mothers and fathers, concerning the acquisition of parental responsibilities and rights, infringes on the constitutional rights of a child guaranteed in section 28(1)(b) (parental care), one should look to whether such infringement can be justified in terms of section 36 of the *Constitution*.¹⁷⁸ It is also important to see whether the right to parental care can be considered as giving paramountcy to the best interests of a child under section 28(2) of the *Constitution*.¹⁷⁹ When considering section 36 of the *Constitution*, one should balance the purpose, effect and importance of the rejection of automatic parental

¹⁷² *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South Africa Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 CC (hereafter the *Bhe* case)

¹⁷³ *Black Administration Act* 38 of 1927.

¹⁷⁴ Louw *Acquisition of Parental Responsibilities and Rights* 174 and Bonthuys 2008 *Heinonline* 14.

¹⁷⁵ Louw *Acquisition of Parental Responsibilities and Rights* 174.

¹⁷⁶ *Bhe* case 59.

¹⁷⁷ Louw *Acquisition of Parental Responsibilities and Rights* 175.

¹⁷⁸ Louw *Acquisition of Parental Responsibilities and Rights* 176.

¹⁷⁹ Louw *Acquisition of Parental Responsibilities and Rights* 176.

responsibilities and rights of an unmarried father against the nature and effect of the infringement of the child's right guaranteed in section 28 of the *Constitution*.¹⁸⁰

In conclusion, it is clear that the differentiation between mothers and fathers, when the acquisition of parental responsibilities and rights are concerned, is unjustifiable discrimination.¹⁸¹ By giving both parents full parental responsibilities and rights based on their biological link, the constitutional demands of equality will be met; and also the focus will be placed on the best interest of the child, which emphasises the importance of both parents for the child.¹⁸²

5.2 *Harksen v Lane: Stages of enquiry*

The Constitutional Court in *Harksen v Lane* laid out different stages of enquiry into a violation of the equality clause, as follows:¹⁸³

- (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) and (4).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

¹⁸⁰ Louw *Acquisition of Parental Responsibilities and Rights* 177.

¹⁸¹ Louw *Acquisition of Parental Responsibilities and Rights* 185.

¹⁸² Louw *Acquisition of Parental Responsibilities and Rights* 185.

¹⁸³ Currie and De Waal *The Bill of Rights Handbook* 234 and *Harksen v Lane* 53.

5.2.1 *Does the challenged law or conduct differentiate between people or categories of people?*

Before answering the research question posed in the introduction, it is important to know what the word “differentiation” means. Differentiation means that some persons, or categories of person, will be treated differently to others.¹⁸⁴ The equality clause does not require that the government treat everyone the same, but indeed that people in similar situations should be treated the same.¹⁸⁵ The reason for differentiation should be a legitimate reason, and it is thus important to identify the criteria that separate “legitimate differentiation” from “constitutionally impermissible differentiation”.¹⁸⁶ These criteria are the listed grounds of unfair discrimination guaranteed in section 9(3) of the *Constitution* as well as grounds not listed in this section, but which come down to unfair discrimination.¹⁸⁷

The Constitutional Court described ‘differentiation’ as follows:

It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element.¹⁸⁸

5.2.2 *If so, does the differentiation bear a rational connection to a legitimate government purpose?*

It is important to look at the reason why this legislation is constituted and whether or not the differentiation bears a rational connection to a legitimate governmental purpose. In circumstances where there is no rational connection, there is a violation of section 9(1), but it is also not guaranteed that in all circumstances where there is a rational connection, that there is no discrimination.

¹⁸⁴ Currie and De Waal *The Bill of Rights Handbook* 239.

¹⁸⁵ Currie and De Waal *The Bill of Rights Handbook* 239.

¹⁸⁶ Currie and De Waal *The Bill of Rights Handbook* 239.

¹⁸⁷ Currie and De Waal *The Bill of Rights Handbook* 239.

¹⁸⁸ *Harksen v Lane* 43.

Differentiation between groups of people will be valid in circumstances where these people still enjoy equal protection or benefit of the law and where this differentiation does not amount to unequal treatment in violation of section 9(1) of the *Constitution*.¹⁸⁹

The Constitutional Court in *Prinsloo v van der Linde*¹⁹⁰ states the following:

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.... Accordingly, before it can be said that mere differentiation infringes s 8 of the *interim Constitution* [now section 9 of the *Constitution*] it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8 [section 9 of the *Constitution*].¹⁹¹

When it comes to the "rational connection" test, the court will firstly evaluate the government's reason for the differentiation in the law to determine whether the purpose of the law is legitimate.¹⁹² Then the court will consider whether there is a rational relationship between this differentiation imposed by the law and the purpose of the law.¹⁹³

5.2.3 Does the differentiation amount to unfair discrimination?

This question consists out of a two-stage analysis:

5.2.3.1 Firstly, does the differentiation amount to "discrimination"?

Before it can be established what constitutes discrimination it is necessary to understand the definition of discrimination. Currie and De Waal defines discrimination as follows:

¹⁸⁹ Currie and De Waal *The Bill of Rights Handbook* 239.

¹⁹⁰ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC), (hereafter *Prinsloo v Van der Linde*).

¹⁹¹ Currie and De Waal *The Bill of Rights Handbook* 240 and *Prinsloo v Van der Linde* 25.

¹⁹² Currie and De Waal *The Bill of Rights Handbook* 240.

¹⁹³ Currie and De Waal *The Bill of Rights Handbook* 240

Discrimination is a particular form of differentiation. Unlike 'mere differentiation', discrimination is differentiation on illegitimate grounds. There is a list of illegitimate ground of differentiation in s 9(3) and the Constitutional Court has held that differentiation on ground that are analogous to those listed in s 9(3) will constitute discrimination.

An analogous ground is a ground based

...on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.¹⁹⁴

From what has been said it is clear that the equality clause does not prohibit discrimination, but rather unfair discrimination.¹⁹⁵ When it comes to distinguishing between legitimate and illegitimate discrimination, fairness is the moral concept.¹⁹⁶ Unfair discrimination basically means treating people differently in such way that prejudices their fundamental dignity as human beings, who are inherently equal in dignity.¹⁹⁷ The value of one's dignity is thus of central importance.

5.2.3.2 If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"?

During this enquiry the court must establish what constitutes unfair discrimination. The determining factor in such circumstances is the impact such discrimination has on its victims. The Constitutional Court held that the following factors must be taken into account in determining whether discrimination has an unfair impact:

- (1) 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 burdens placed on those who are relatively well-off.
- (2) 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.
- (3) 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.¹⁹⁸

This is not a closed list, because our equality jurisprudence continues to develop.¹⁹⁹ It is important to place a difference between differentiation on the listed grounds and

¹⁹⁴ *Harksen v Lane* 46.

¹⁹⁵ Currie and De Waal *The Bill of Rights Handbook* 244.

¹⁹⁶ Currie and De Waal *The Bill of Rights Handbook* 244.

¹⁹⁷ Currie and De Waal *The Bill of Rights Handbook* 244.

¹⁹⁸ Currie and De Waal *The Bill of Rights Handbook* 244 and *Harksen v Lane* 52.

the unspecified grounds (grounds not part of the listed grounds in section 9(3) but analogous to the listed grounds).²⁰⁰ If there is differentiation on one of the listed grounds in section 9(3) it is presumed to be unfair discrimination. In circumstances where there is differentiation on an analogous ground, unfair discrimination should be established and proven by the applicant.²⁰¹ When differentiation on one of the listed grounds is present, the applicant is required to prove that the discrimination prejudices his or her fundamental right, human dignity.²⁰² When discrimination is assumed, it does not mean that the discrimination is unfair.²⁰³ The respondent then has the opportunity to prove that the discrimination is in fact not unfair.²⁰⁴ In the case of an analogous ground, the applicant should prove that the discrimination is unfair, by proving that this discrimination impairs his or her human dignity.²⁰⁵

5.2.3.3 *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.*

If the unfair discrimination is justifiable under the limitation clause, section 36 of the *Constitution*, no infringement toward section 9(3) of the *Constitution* would be present.

This will involve 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.²⁰⁶

5.3 Application on section 21 of the Children's Act

5.3.1 *Does the challenged law or conduct differentiate between people or categories of people?*

¹⁹⁹ Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰⁰ Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰¹ Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰² Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰³ Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰⁴ Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰⁵ Currie and De Waal *The Bill of Rights Handbook* 245.

²⁰⁶ *Harksen v Lane* 52.

The answer to this question is positive in this matter. The *Children's Act* differentiates between married mothers and fathers and unmarried fathers, but it is important to determine whether the reason for this differentiation is a legitimate one or not. Differentiation takes place on the following grounds specified in section 9(3) of the Constitution; sex, gender and marital status.

Sex is a biological term and refers to the biological difference between a man and a woman.²⁰⁷ The law differentiates between an unmarried father (man) and an unmarried or married mother (woman). An unmarried or married mother automatically acquires full parental responsibilities and rights, whereas an unmarried father only acquires full parental responsibilities and rights after he complies with the requirements set out in section 21 of the *Children's Act*. Gender is more a social term and refers to the roles ascribed to men and women.²⁰⁸ It is socially as well as culturally accepted that a mother of a child is the dominant parent when it comes to the care of the child. This is also clear when it comes to responsibilities and rights of parents guaranteed in the *Children's Act*. Discrimination on the ground of marital status is where differentiation between married and unmarried people takes place.²⁰⁹ This differentiation is made very clear in the *Children's Act*.

5.3.2 *If so, does the differentiation bear a rational connection to a legitimate government purpose?*

It is clear that the *Children's Act* differentiates between married mothers and fathers and unmarried fathers. The following step is an enquiry as to whether there is a rational connection to a legitimate government purpose. When it comes to the "rational connection" test, the court will firstly evaluate the government's reason for the differentiation in the law to determine whether the purpose of the law is legitimate. And then the court will consider whether there is a rational relation between this differentiation imposed by the law and the purpose of the law. Differentiation between groups of people will be valid in circumstances where these people still enjoy equal protection or benefit of the law and where this differentiation

²⁰⁷ Currie and De Waal *The Bill of Rights Handbook* 250.

²⁰⁸ Currie and De Waal *The Bill of Rights Handbook* 250.

²⁰⁹ Currie and De Waal *The Bill of Rights Handbook* 254.

does not amount to unequal treatment in violation of section 9(1) of the *Constitution*.²¹⁰

It is important to consider the primary purpose of the law. According to Preiss J in Fraser:

...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.²¹¹

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 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 interest of the child.²¹²

5.3.3 Does the differentiation amount to unfair discrimination?

This question requires a two-stage analysis:

5.3.3.1 Firstly, does the differentiation amount to "discrimination"?

The *Children's Act* differentiates on more than one of the specified grounds guaranteed in section 9(3) of the *Constitution*. It is thus clear that discrimination is presumed.

5.3.3.2 If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"?

²¹⁰ Currie and De Waal *The Bill of Rights Handbook* 239.

²¹¹ Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 24.

²¹² Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 25.

Because discrimination is assumed, the next step is an enquiry as to whether the discrimination amounts into unfair discrimination. To determine this, one should look at the following factors set out in the Constitutional court:

- (1) 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 burdens placed on those who are relatively well-off.
- (2) 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.
- (3) 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.²¹³

As stated previously, in the introduction to this chapter, when it comes to the first factor the court in *President of the Republic of South Africa and Another v Hugo* found that in society fathers are not a vulnerable group affected by discrimination.²¹⁴ When it comes to the second factor it is important so consider whether the primary purpose of the law is to achieve an important common goal. In *Frazer v Children's Court, Pretoria North and Others* the rule (that natural unmarried fathers do not automatically acquire full parental responsibilities and rights in respect of their children) may have been based on a desire to protect and promote the structure of family unity or, alternatively, it was designed to punish reckless fathers.²¹⁵ When it comes to the last factor, the limitation of the father's rights to be treated equally as a parent may be an infringement on his right to dignity.²¹⁶ This applies especially in cases where the father is not aware of his paternity, or where the mother refuses him an opportunity to develop a relationship with his child.²¹⁷ It is thus clear that there is unfair discrimination present.

5.3.3.3 If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

²¹³ Currie and De Waal *The Bill of Rights Handbook* 244 and Harksen v Lane 52.

²¹⁴ *President of the Republic of South Africa and Another v Hugo* 52.

²¹⁵ *Frazer v Children's Court, Pretoria North and Others* 234.

²¹⁶ *Louw Acquisition of Parental Responsibilities and Rights* 172.

²¹⁷ *Louw Acquisition of Parental Responsibilities and Rights* 172

It is clear that section 21 of the *Children's Act* amounts to unfair discrimination when it comes to the differentiation between mothers, married fathers and unmarried fathers. Now one should see if this unfair discrimination can be justifiable under section 36 of the *Constitution*.

This will involve 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.²¹⁸

It is also important to see whether the right to parental care can be considered as giving paramountcy to the best interests of a child under section 28(2) of the *Constitution*.²¹⁹ When considering section 36 of the *Constitution*, one should balance the purpose, effect and importance of the rejection of automatic parental responsibilities and rights of an unmarried father against the nature and effect of the infringement of the child's right guaranteed in section 28 of the *Constitution*.²²⁰

Section 36 of the *Constitution*:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

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

The *Constitution* provides a general limitation clause in section 36, and applies to all the rights guaranteed in the *Bill of Rights* according to the same set of criteria.²²¹

Authors such as Cockrell²²² feel that gender discrimination when it comes to the automatic allocation of parental responsibilities and rights is indeed justified in deep notion of substantive equality and should not be seen as a violation of the father's

²¹⁸ *Harksen v Lane* 52.

²¹⁹ *Louw Acquisition of Parental Responsibilities and Rights* 176.

²²⁰ *Louw Acquisition of Parental Responsibilities and Rights* 177.

²²¹ Currie and De Waal *The Bill of Rights Handbook* 165.

²²² Cockrell *The Law of Persons and the Bill of Rights* para 3E25.

constitutional right to equality.²²³ To help overcome the gender discrimination challenge, Currie and De Waal²²⁴ favour a system that confers parental rights on the de facto parent or primary caretaker:

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 on 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. 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.²²⁵

On the other hand, Sinclair²²⁶ suggests transforming the law so that it reflects a "fundamental premise of equality between parents."²²⁷ Sinclair questions women's demands for constitutional equality, while they still insist that it will be unfair to vest unmarried fathers with inherent parental responsibilities and rights.²²⁸ According to Sinclair:

...a preference for shared parental responsibilities and rights should only be interfered with where the interests of the child demand judicial intervention. In this way, it is argued that stereotyped assumptions that child care is a 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 the law would be sending the signals that conform to the letter and spirit of the Bill of Rights.²²⁹

It is clear that different writers responded differently and it is a moot point whether the unequal treatment of unmarried fathers to mothers can be justified in terms of Section 36(1) of the Constitution.

In conclusion, this analysis indicates that the differentiation between mothers and fathers, when the acquisition of parental responsibilities and rights are concerned, is unjustifiable discrimination.²³⁰ By giving both parents full parental responsibilities and

²²³ Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 19.

²²⁴ Currie and De Waal *The Bill of Rights Handbook* para 27.2(b)(ii).

²²⁵ Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 19.

²²⁶ Sinclair *Family Rights* 540.

²²⁷ Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 20.

²²⁸ Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 20.

²²⁹ Louw A *The Constitutionality of a Biological Father's Recognition as a Parent* 2010 "PER" 20.

²³⁰ Louw *Acquisition of Parental Responsibilities and Rights* 185.

rights based on their biological link, the constitutional demands of equality will be met; and also the focus will be placed on the best interest of the child, which emphasises the importance of both parents for the child.²³¹

6 Conclusion

According to section 21 of the *Children's Act*, an unmarried father of a child only acquires full parental responsibilities and rights in respect of the child if he was living with the mother in a permanent life-partnership, or if he consents to be identified as the child's father and contributes in good faith to the upbringing and maintenance for a reasonable period. An unmarried father can also acquire full parental responsibilities and rights when he marries the mother. Sections 20 and 21 of the *Children's Act* differentiate between married and unmarried parents. This comes down to differential treatment on the ground of marital status, sex and gender.

The aim of the discussion throughout this dissertation was to address the question whether this differentiation results into unfair discrimination. In other words, does section 21 of the *Children's Act* infringe the rights guaranteed in section 9 of the *Constitution* when it comes to the differential treatment of unmarried fathers and married fathers of biological mothers?

This dissertation followed the criteria set out in *Harksen v Lane* to answer the above mentioned question. The following conclusion was reached: In respect of the acquisition of parental rights and responsibilities, the differentiation between mothers and fathers amounts to unjustifiable discrimination. However, the constitutional demands of equality will be met if both parents are treated equally in the giving of rights and responsibilities, based on their biological link to the child. Furthermore, such treatment shifts the focus to the best interests of the child, in accordance with international instruments.

²³¹ Louw *Acquisition of Parental Responsibilities and Rights* 185.

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