

**THE ACQUISITION OF AND SUBSEQUENT JUDICIAL
INTERFERENCE WITH PARENTAL RESPONSIBILITIES AND
RIGHTS OF UNMARRIED PARENTS IN TERMS OF THE
CHILDREN'S ACT 38 OF 2005: LESSONS FROM CASE LAW,
SELECTED ANALOGOUS DIVORCE LAW AND ENGLISH LAW**

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CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTION

Heaton and Kruger¹ provide the following convenient starting point for this study when they state that:

“Internationally, the focus of the private-law rules regarding the parent-child relationship has increasingly shifted from the rights and powers of *parents* towards the rights and entitlements of *children*. In addition, international human-rights instruments and constitutional provisions have conferred specific rights on children. The emphasis on the rights of children is [also] evident in [South African] law.”

*Calitz v Calitz*² affirms that in South Africa, the common-law position was that a married father was the dominant parent from a legal point of view because, although he shared custody with the mother, his rights were superior, especially as only he exercised guardianship over his child(ren) as a core component of what was then known as “parental authority”.³ Mothers, however, steadily gained increased legal recognition as parents, especially after promulgating the *Matrimonial Affairs Act* 37 of 1953 and the *Guardianship Act* 192 of 1993.⁴ Crucially, at least as from 1948, the concept of “the best interests of the child” became the golden rule in matters relating to children⁵ following the judgment of the Appellate Division (the highest court in South Africa at the time), in *Fletcher v Fletcher*.⁶ Building on this, our common law has always recognised the High

¹ 2015:287.

² 1939 AD 56 61; Boezaart 2017:83-84; Spiro 1985:1.

³ See also Van Heerden *et al.* 1999:317 (at footnote 17).

⁴ *V v V* 1998 4 SA 169 (C) 176I-177A; Louw 2009:33.

⁵ See *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC):par. 18.

⁶ 1948 (1) SA 130 (A); Skelton & Carnelley (eds) 2010:238.

Court as the upper guardian of all minors within its jurisdiction,⁷ and thus permits the court to interfere with “parental responsibilities and rights” (that has replaced the concept of “parental authority”), if the best interests of a child require doing so.⁸ This power is reinforced by certain statutes, as will be discussed below.

The dawning of democracy in South Africa greatly facilitated the shift to a “child-centred approach”,⁹ as indicated by the extract from Heaton and Kruger quoted above. Section 28 of the *Constitution of the Republic of South Africa, 1996* (after this “the *Constitution*”) specifically deals with the fundamental constitutional rights of children. As Sachs J stated in *S v M (Centre for Child Law as Amicus Curiae)*,¹⁰ “[s]ection 28(1) provides for a list of enforceable substantive rights that go well beyond anything catered for by the common law and statute in the pre-democratic era.” However, this list is not exhaustive.¹¹ Furthermore, as Boezaart states, a “plethora of laws” have been passed over the last two decades that govern various aspects of the lives of children. This was an attempt to improve domestic law in such a way that it is aligned with the *Constitution* and the international legal framework and to recognise the rights of children that may be enforced against parents, but also against the State.¹² One of the most important of these is the *Children’s Act*,¹³ which was enacted (*inter alia*) to give effect to the constitutional rights of children¹⁴ and will feature throughout this study, particularly where the provisions or fundamental principles of this Act have been relied on by our courts to recognise, limit,

⁷ Van Heerden *et al.* 1999:500; *Vista University, Bloemfontein Campus v Student Representative Council, Vista University* 1998 (4) SA 102 (O): the case deals with how the court relied on the common-law powers it had as the upper guardian and the powers provided for by the *Constitution* in order to take on the duty of helping minor children who are listed as respondents in urgent application proceedings; *OM v MC* [2023] ZAGPJHC 254 (3 March 2023): the case deals with an application for the relocation of a minor child to Australia. The issue between the parents was deciding on a suitable format and timing of the reunification process that needed to take place in order to help with re-establishing a parent-child relationship between the father and daughter, with the primary aim of ensuring that the contact regime serves the best interests of the 12-year-old.

⁸ Heaton & Kruger 2015:329.

⁹ Bekink 2012:178.

¹⁰ 2008 3 SA 232 (CC):par. 21.

¹¹ *Minister of Welfare and Population Development v Fitzpatrick*:par. 17.

¹² Boezaart 2017:4.

¹³ *Children’s Act* 38/2005.

¹⁴ See the Long Title and the Preamble to the Act.

terminate or broaden parental responsibilities and rights. The *Children's Act* effectively codifies the South African law of parent and child.¹⁵

As such, this study focuses on the acquisition of parental responsibilities and rights by unmarried parents and the role of the judiciary in interfering with the same in terms of sections 28, 29 and 34(5) of the *Children's Act* and against the backdrop of the constitutional rights accorded to both children and their parents. While judicial interference will primarily be analysed in the specific context of unmarried parents, the fact that there is still relatively little case law dealing with such parents requires the study to draw on case law involving divorcing (or divorced) parents in which these provisions have featured. Having thus established the key legal principles regarding the application of these provisions, the study will identify certain lessons that can be learned when future courts are required to deal with the possible awarding, delineation, restriction or termination of unmarried parents' parental responsibilities and rights. In this regard, leading South African case law involving the possibility of awarding shared or joint care during or after divorce proceedings, as well as the potential restriction of separated parents' rights of contact based on their sexual orientation, will be considered. Furthermore, because this issue has featured in English law (while there is only one such case in South Africa), the study will seek to determine whether South African courts can benefit from case law in that jurisdiction involving the outright termination of the parental responsibilities and rights of unmarried parents.

1.2 MAIN RESEARCH QUESTION

The main question to be answered in this study is: What insights may be gained into the principles applicable to the acquisition and subsequent judicial interference with parental responsibilities and rights of unmarried parents in terms of the *Children's Act* 38 of 2005, based on an analysis of directly applicable and analogous case law, and the legal position in England?

¹⁵ Skelton & Carnelley (eds) 2010:238.

1.2.1 Research sub-questions

In addressing the main research question/objective set out above, the following secondary questions will be answered:

- a. How have the South African legal principles pertaining to the content and acquisition of parental responsibilities and rights developed over the years, specifically regarding unmarried parents?
- b. What legal principles can be distilled from case law in which parental responsibilities and rights have been interfered with in accordance with sections 28, 29 and 34(5) of the *Children's Act*?
- c. Does case law dealing with selected aspects of divorce law (namely shared or joint care after divorce and the possible restriction of parents' rights of contact based on their sexual orientation) provide any lessons that may be learned by future courts that may be tasked with awarding or interfering with the parental responsibilities and rights of unmarried parents?
- d. Does English (case) law provide lessons for South African courts that may be tasked with possibly outright terminating parental responsibilities and rights?

The study is of value because it seeks to establish and collate the legal principles regarding the acquisition of parental responsibilities and rights of unmarried parents (in particular), as well as those relating to their judicial interference in terms of the *Children's Act*. The study also seeks to determine whether analogous divorce law cases and English law can guide future South African courts facing these issues.

1.3 RESEARCH METHODOLOGY

To properly analyse the issues associated with the judiciary's role in recognising, curtailing or extending parental responsibilities and rights, this mini dissertation will

conduct a desktop analysis that employs a combination of legal, historical and comparative research methods through textual analyses. The legal historical approach will be used to trace South African law's development from the common law concept of "parental power" (or "parental authority") to the contemporary concept of "parental responsibilities and rights" and the content and acquisition of the latter. This will be followed by an in-depth analysis of case law dealing with judicial interference with parental responsibilities and rights in sections 28, 29 and 34(5) of the *Children's Act*, irrespective of whether unmarried or divorcing parents are involved. South African case law emanating from divorce law dealing with joint care awards and the potential limitation of parents' rights of contact based on their sexual orientation will then be analysed. The comparative component of the study will involve an analysis of English (case) law dealing with the termination of parental responsibilities and rights to determine whether South African courts can benefit from this analysis. English law is specifically chosen for this analysis because there is a significant body of case law in England, and its legislation has been in force for longer than its South African counterpart.

Sources that will be used in this mini-dissertation include primary sources such as the *Constitution* (as South Africa's supreme law); legislation (such as the *Children's Act*¹⁶ and the *Divorce Act*);¹⁷ leading South African case law (such as *FS v JJ* 2011 (3) SA 126 (SCA), *Ex parte Sibisi* 2011 (1) SA 192 (KZP), *GM v KI* 2015 (3) SA 62 (GJ), *BR v TM* 2016 (3) SA 417 (GJ), *PD v MD* 2013 (1) SA 366 (ECP), *EMD v MP* [2021] ZAGPPHC 740 (2 November 2021); *Marima v Lesele* [2022] ZAGPJHC 380 (6 June 2023); *Krugel v Krugel* 2003 (6) SA 220 (T), *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) and *V v V* 1998 (4) SA 169 (C)); and English case law (such as *Re P (Terminating parental responsibility)* [1995] 3 FCR 753] and *CW v SG* [2013] All ER (D) 117 (Apr)). Reliance will also be placed on secondary authority through scholarly books, textbooks, and journal articles by renowned authors in the field.

¹⁶ 38/2005.

¹⁷ 70/1979.

1.4 CHAPTER OUTLINE

As an outflow of what has been discussed above, this mini-dissertation will be structured as follows:

Chapter 2: The historical development, content and acquisition of parental responsibilities and rights in South Africa generally and in the context of unmarried parents in particular

This chapter will trace the evolution of the common law concept of “parental authority” to the contemporary notion of “parental responsibilities and rights”. Accordingly, in dealing with research sub-question (a) set out above, it will consider common law, relevant legislation and key case law.

Chapter 3: The judicial interference with parental responsibilities and rights in South Africa: General principles applicable to sections 28, 29 and 34(5) of the *Children’s Act* 38 of 2005 and selected lessons from divorce law

This chapter will analyse the judiciary's role in applying the relevant statutory provisions that allow the courts to delineate, extend, suspend, restrict, or terminate parental responsibilities and rights in South Africa as gleaned from case law involving unmarried and divorcing (or divorced) parents. In so doing, it will answer sub-question (b) posed above. The chapter will proceed to answer sub-question (c) by assessing the extent to which future courts dealing with unmarried parents may benefit from analogous divorce case law involving the selected contexts of joint care awards and the possible restriction of parents’ rights of contact with their children because of their sexual orientation.

Chapter 4: The judicial interference with “parental responsibility” in England: Legislative provisions and a selection of case law relating to the outright termination of parental responsibility

This chapter strives to provide an in-depth analysis of sections 1 – 7 of the *Children’s Act*, 1989 and how “parental responsibility” is acquired and lost in that jurisdiction. The aim is to answer sub-question (d) by determining whether South African courts could benefit

from the approach of the English courts in cases dealing with the complete termination of parental responsibilities and rights.

Chapter 5: Conclusion

This chapter will summarise the conclusions reached in this mini-dissertation and set out the recommendations made because of this study.

1.5 REFERENCING STYLE

The style guidelines prescribed for contributions published in the *Journal for Juridical Science* will be used throughout this study.¹⁸

1.6 ISSUES NOT CONSIDERED

As the possible circumstances in which the judiciary may interfere with parental responsibilities and rights are virtually unlimited, the study limits itself to the specific issues set out above. It does not, for example, consider this issue in the context of unmarried (or divorced) parents who wish to relocate (on which a substantial body of case law has appeared in recent times)¹⁹ and the vast range of lessons that may be learned from applying case law dealing with the application of section 6(3) of the *Divorce Act* to unmarried parents.²⁰

¹⁸ Available at: <https://journals.ufs.ac.za/index.php/jjs/about>

¹⁹ See e.g. *MH v OT* [2018]M ZAWCHC 191 (4 July 2018) and *CF v SG* [2022] ZAWCHC 204 (20 October (2022) to name but a few.

²⁰ Section 6(3) provides:

“(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent”.

CHAPTER TWO:

THE HISTORICAL DEVELOPMENT, CONTENT AND ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS IN SOUTH AFRICA, GENERALLY AND IN THE CONTEXT OF UNMARRIED PARENTS IN PARTICULAR

2.1 INTRODUCTION

The relationship between a child and a parent has always been one of the most distinctive and irreplaceable relationships, and due to its uniqueness, certain laws have been put into place to regulate this relationship using both a national and international context.²¹ Children are a vulnerable group in society,²² so much so that section 28 of the *Constitution* – in particular – serves as the protector and advancer of children's rights.²³ The *Children's Act* also now categorically stipulates that the best interests of a child are the paramount consideration in any matter concerning the child, and section 7 of the Act contains a “standard” to guide the application of this criterion. In the *Child Law* case, Justice Cameron provided an in-depth and context-specific meaning of the word “paramount”, meaning that although “the interests of the child are more important than anything else”, this does not mean that everything else is considered unimportant.²⁴ This view is supported by the case of *MH v OT*,²⁵ where the court held that the child’s best interests will not “always trump all other rights.” This is also what Article 3 of the *United Nations Convention on the Rights of the Child* echoes.²⁶

²¹ Bekink 2012:178.

²² Boezaart 2017:4.

²³ *Constitution of the Republic of South Africa* of 1996:sec. 28, as described by Bekink 2012:178.

²⁴ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC):par. 29.

²⁵ 2023 3 SA 159 (WCC):par. 47.

²⁶ Article 3 provides:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

As mentioned in Chapter 1, the common law provided parents with “parental authority” or “parental power” over their child(ren) and their property.²⁷ Parental power is “the complex of rights, powers, duties, and responsibilities vested in or imposed upon parents, by virtue of their parenthood, in respect of their minor child and his or her property”.²⁸ However, the recent global “re-ordering of the parent-child relationship” shifted the emphasis from the parents' rights and powers to the child's interests.²⁹ As such, the *Children's Act* introduced the concept of “parental responsibilities and rights”. Skelton asserts that this phraseology was deliberate, emphasising responsibility first, followed by rights.³⁰

This chapter will illustrate the development, content and acquisition of parental responsibilities and rights in South Africa, specifically emphasising the position of unmarried parents.

2.2 DEVELOPMENT OF PARENTAL RESPONSIBILITIES AND RIGHTS: FROM COMMON LAW TO THE CONSTITUTIONAL DEMOCRATIC ERA

According to Bekink, parental responsibilities and rights development may be divided into two eras.³¹ The first era was before 1994, and the second era – where we currently find ourselves – began on 27 April 1994 when the African National Congress (ANC) came into power at the outset of the democratic constitutional era.³² Following the adoption of the

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision”.

²⁷ Heaton & Kruger 2015:301; Skelton & Carnelley (eds) 2010:238.

²⁸ Van Heerden *et al.* 1999:313.

²⁹ *V v V*:176C-D; Kruger 2009:1.

³⁰ Boezaart *et al.* 2017:77.

³¹ Bekink 2012:180.

³² Bekink 2012:180.

interim *Constitution* of 1993³³ (the drafting of which had occurred while the National Party was still in power as a consequence of the CODESA³⁴ negotiations that took place from 1991 – 1993), an amended and supreme “final” *Constitution of the Republic of South Africa*, 1996 came into operation on 4 February 1997.³⁵ In the years preceding 1994, the common law and relevant statutes such as the *Matrimonial Affairs Act* 37 of 1953, the *Guardianship Act* 192 of 1993, the *Divorce Act* 70 of 1979, and the *Child Care Act* 74 of 1983 all dealt with various issues pertaining to parental responsibilities and rights (or, more correctly, “parental authority”).³⁶ A discussion of the two eras follows, the era before 1994 being the first.

2.2.1 The era before 1994: The acquisition and content of parental authority in terms of the common law and certain pre-1994 statutes

In the past, the parent-child relationship in South Africa was, in effect, a relationship pertaining to parental power or authority – which clearly illustrated what may be called a “paternalistic bias”.³⁷ This simply meant that children were obliged to respect their parents' control and authority, considering the accepted norm: parents knew what was best for their children.³⁸ The legal principles were largely contained in the common law (and thus were gleaned from case law and academic writings), with certain statutes regulating some specific issues.³⁹ Regarding the common law, the parent-child relationship was mainly expressed in the power a parent had over his or her minor child and the latter's property, as well as the mutual duty of support between the parent and the child.⁴⁰ As a result, parents could demand their children to obey their instructions and punish them in a manner that was not only moderate but also reasonable.⁴¹

³³ Act 200/1993.

³⁴ Conference for a Democratic South Africa.

³⁵ Bekink 2012:180-181.

³⁶ Bekink 2012:181; Skelton & Carnelley (eds) 2010:238.

³⁷ Bekink 2012:181.

³⁸ Bekink 2012:181.

³⁹ Boezaaart 2017:78; Skelton & Carnelley (eds) 2010:238.

⁴⁰ Bekink 2012:181.

⁴¹ Bekink 2012:181.

According to common law and certain pre-1994 statutes, the acquisition of parental power came into existence upon the birth of a legitimate child.⁴² Although the biological parents of a child could be determined, it still did not provide an answer to who exactly had parental responsibilities and rights over a child.⁴³ Spiro affirms that at common law, a parent acquired responsibilities and rights over a child at birth.⁴⁴ However, these responsibilities and rights could take effect before the child's birth with the provision that the child had already been conceived.⁴⁵ In this case, equal parental power over the child was accessible to both parents. Parental power was solely vested in the mother when the child was extra-marital.⁴⁶ An extra-marital child could be legitimised by the marriage of both his or her parents, which then qualified the father to have equal parental power as the mother from the time the marriage came into existence. As a result, the child was subsequently under the guardianship of both parents. Parental power could also be acquired through adoption. During this process, the adopted child became "for all purposes whatever...deemed in law to be the legitimate child of the adoptive parent, as if he [or she] was born of that parent during the existence of a lawful marriage".⁴⁷ The High Court was (and still is) considered the upper guardian of all minor children in its jurisdiction.⁴⁸ The court's authority outranked that of the guardian or parent – it could even overrule or prevent a parent's full power over the child(ren) where the interests of the minor(s) so required.⁴⁹

Should one parent of a legitimate or illegitimate minor child pass away, the surviving parent gains sole guardianship of the minor.⁵⁰ Suppose that both parents prepared themselves for their deaths. In that case, the first-dying parent was not eligible to appoint a testamentary guardian in his or her will, who would either remove or impose on the

⁴² Van Heerden *et al.* 1999:317; Visser & Potgieter 1998:180-185.

⁴³ Louw 2009:35.

⁴⁴ Spiro 1985:36-37.

⁴⁵ Spiro 1985:36-37.

⁴⁶ Van Heerden *et al.* 1999:317, 320; Robinson (ed) 1997:52.

⁴⁷ Van Heerden *et al.* 1999:320.

⁴⁸ Robinson (ed) 1997:52.

⁴⁹ Robinson (ed) 1997:52.

⁵⁰ Van Heerden *et al.* 1999:320.

surviving parent's parental power. The only exception to this was when a competent court awarded sole guardianship of a minor child to the former parent.⁵¹ A testamentary guardian could be appointed to succeed as a minor's guardian by a parent with sole guardianship of the minor child.⁵² This was not the only other option because the courts could award guardianship or custody to one of the parents or even a third party.⁵³ Where one of the parents did not have parental power over the minor child and the other parent did, parental power could not be conferred by the latter to the former by mere private agreement between them.⁵⁴ Correspondingly, no parent could transfer the parental power to a third party.⁵⁵ At common law, there no parental power was gained over a stepchild.⁵⁶

In terms of the common law, the content of the term(s) parental "power" or "natural guardianship" comprised two components: custody and guardianship.⁵⁷ The difference between the two is that custody pertains to a parent's right and duty to make daily choices concerning a child. Meanwhile, guardianship refers to a parent's right to gain authority over a child's property and the ability to support the minor child in carrying out legal actions.⁵⁸ Maintenance and access are features that also comprise the content of parental authority.⁵⁹ However, certain authors contend that the latter did not form part of parental authority but existed separately.⁶⁰

The preceding discussion shows that "parental authority" meant a parent had full control over a minor child.⁶¹ However, this was always subject to the authority of the High Court, which at common law acted (and today still acts) as the upper guardian of all minors within

⁵¹ Van Heerden *et al.* 1999:320.

⁵² Van Heerden *et al.* 1999:320.

⁵³ Van Heerden *et al.* 1999:321-322.

⁵⁴ Van Heerden *et al.* 1999:322.

⁵⁵ Van Heerden *et al.* 1999:322.

⁵⁶ Van Heerden *et al.* 1999:323; *Mentz v Simpson* 1990 4 SA 455 (A).

⁵⁷ Louw 2009:46.

⁵⁸ Louw 2009:47; Visser & Potgieter 1998:186.

⁵⁹ *Children's Act* 38/2005. sec: 18(2).

⁶⁰ Cronjé & Heaton 2004:280; Van Heerden *et al.* 1999:504 and 567; Van Schalkwyk 2009:296.

⁶¹ Bekink 2012:181.

its jurisdiction.⁶² Thus, when the court was required to do so, it could intervene in matters relating to parental authority.⁶³ By the mid-1950s, there was a shift from “special grounds” for intervention that were generally required to the need for doing so based on “the interests of the child”.⁶⁴ Special grounds included the potential danger that could take place in a child’s life, morals, or health. While the “best interests” approach that followed was more lenient, judicial intervention still seldom occurred and, if it did, was minimal.⁶⁵ As will be seen below, the advent of constitutional democracy in South Africa resulted in the parent-child relationship undergoing a major change – the *Constitution* and its Bill of Rights now recognised the individual rights of children. They put their best interests at the forefront.⁶⁶

2.2.2 The era post-1994: Children’s fundamental rights as independent human beings and the notion of the “constitutional child”

The advocacy for children’s rights by the so-called “children’s rights movement” was the “driving force” that led to the adoption of the different international instruments that deal with children – the most important being the *United Nations Convention on the Rights of the Child*.⁶⁷ This Convention was adopted after unanimous agreement in the General Assembly of the United Nations on 20 November 1989 – with South Africa later becoming a signatory to the Convention on 29 January 1993 – and the ratification hereof on 16 June 1995.⁶⁸ The enactment of both the interim *Constitution* of 1993 and the *Constitution of the Republic of South Africa, 1996* led to a dramatic change in the legal system in South Africa, which was now based on the core values of “human dignity, the achievement of equality and the advancement of human rights and freedoms”.⁶⁹ The legal system changed from parliamentary sovereignty – based on the Westminster system in which

⁶² Van Heerden *et al.* 1999:500. See e.g, *Calitz v Calitz* 1939 AD 56 at 63.

⁶³ Van Heerden *et al.* 1999:324; Bekink 2012:181.

⁶⁴ Bekink 2012:181.

⁶⁵ Bekink 2012:182.

⁶⁶ Bekink 2012:182.

⁶⁷ Van Heerden *et al.* 1999:314-315.

⁶⁸ Van Heerden *et al.* 1999:315.

⁶⁹ *Constitution*:sec. 1(a); Bekink 2012:183.

Parliament could pass any legislation it wished without courts having the power to overrule it⁷⁰ - to constitutional supremacy.⁷¹

Like everything else, the legal rules applicable to children were required to change, did change, and are continuously changing.⁷² In line with international trends, this change required a “child-centred approach”,⁷³ which necessitates “a close and individualised examination of the precise real-life situation of the particular child involved.”⁷⁴ These legal rules are, therefore, no longer limited to private law (which deals with the status and capacities of a child, minority, and parental responsibilities and rights) and public law (which concerns the law that applies to children who are regarded as victims or offenders in criminal law, the criminal capacity of children, and the sentencing of young offenders).⁷⁵ Children are now recognised as the bearers of rights, which are rights that can not only be enforced against parents but also against the state and other secondary parties.⁷⁶ Therefore, although the *Constitution* affords everyone basic human rights, independent recognition has been given to children’s constitutional rights in section 28, which primarily focuses on their needs and interests.⁷⁷ This provision states that:

28 Termination, extension, suspension or restriction of parental rights and responsibilities

“(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children’s court for an order-

- (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
- (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

⁷⁰ Currie & De Waal 2013:2.

⁷¹ Bekink 2012:183.

⁷² Boezaart 2017:4.

⁷³ Heaton & Kruger 2015:287; Bekink 2012:178.

⁷⁴ *S v M (Centre for Child Law as Amicus Curiae)*:par. 24.

⁷⁵ Boezaart 2017:4.

⁷⁶ Boezaart 2017:4.

⁷⁷ Bekink 2012:183.

(2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.

(3) An application for an order referred to in subsection (1) may be brought –

- (a) by a co-holder of parental responsibilities and rights in respect of the child;
- (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;
- (c) by the child, acting with leave of the court;
- (d) in the child's interest by any other person, acting with the leave of the court;
- (e) by a family advocate or the representative of any interested organ of state.

(4) When considering such application the court must take into account-

- (a) the best interests of the child;
- (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
- (c) the degree of commitment that the person has shown towards the child; and
- (d) any other fact that should, in the opinion of the court, be taken into account".

Although, as mentioned in chapter 1, this provision "provides for a list of enforceable substantive rights that go well beyond anything catered for by the common law and statute in the pre-democratic era", other pertinent constitutional rights also pertain to the interests of children. These include (1) the right to equality;⁷⁸ (2) the right to personal autonomy (that is construed from the right to privacy);⁷⁹ (3) the right to freedom of religion, belief and opinion;⁸⁰ (4) the right to freedom of expression;⁸¹ and (5) the right to freedom of association.⁸²

⁷⁸ *Constitution*:sec: 9.

⁷⁹ *Constitution*:sec: 14.

⁸⁰ *Constitution*:sec: 15.

⁸¹ *Constitution*:sec: 16.

⁸² *Constitution*:sec. 18.

A question in relation to the right to personal autonomy (as an ancillary right to the constitutional right to privacy) raised by Bekink and Brand (as referred to by Bekink in a later work) was whether children have the composite right to individual self-determination under the *Constitution*.⁸³ Writing before the enactment of the *Children's Act*, they argued that if this is the case, children would be able to be selective of their religion, friends, lifestyle, and opinion, despite the parental authority (as was the law at the time) that was accorded to parents in respect of their children.⁸⁴ They contended that although a parent has a duty of care and support towards a child that arguably limits a child's right to self-determination, that duty gradually diminishes so that it will increasingly become more difficult for the parent to insist on having the authority to limit his or her child's claims to self-determination.⁸⁵ Thus, the parent may have no other option but to respect the wishes and decisions of the child – failure to do so could result in an intrusion on the child's right to privacy and freedom of association, religion, belief, and opinion.⁸⁶ This view aligns with Van Heerden *et al.*'s view that children have increasingly become entitled to “the right to a certain degree of self-determination.”⁸⁷

In this regard, Bekink cites the *Milnerton* case, in which a 16-year-old Milnerton resident and schoolgirl in the Western Cape asked to be “emancipated” from her parents and live semi-independently of them because they were too strict. Reports indicated that she had attempted to seek assistance from her schoolteachers and social workers before deciding to approach the courts.⁸⁸ It was argued that her living reality at home was just too harsh, as her parents kept her under constant supervision – she could not even leave her home unsupervised, she was barred from visiting friends, was not allowed to have a cellular

⁸³ Bekink 2012:184.

⁸⁴ Bekink 2012:184.

⁸⁵ Bekink 2012:184.

⁸⁶ Bekink 2012:184.

⁸⁷ Van Heerden *et al.* 1999:314.

⁸⁸ Jones “Teen divorces strict parents”, <https://www.iol.co.za/news/south-africa/teen-divorces-strict-parents-488223> (accessed on 24 March 2023). The said case was not reported because it only involved a declaratory order. I have been in contact with the attorney who represented the girl, but she was unable to assist me with the legal documentation. The reasons given were that she no longer had access to the case files and that the attorney-client privilege remains in place. Therefore, I have had to rely solely on media reports.

phone, socially interact with boys, or even read the “Harry Potter” books she liked. An argument between her and her father about a cellular phone that she was not meant to have allegedly resulted in her father hitting her in the face. Bekink⁸⁹ argues that for the first time, South African courts were requested to use their discretion and interfere in the parent-child relationship based on the parents’ social and cultural beliefs. In the Western Cape High Court, the judge agreed to her request of living semi-independently with her parents and staying with a school friend and her family (referred to by the judge as the “host family”) until she completed grade 12 or until she reached the age of 18 – her majority age. Her parents were informed that they could contact her for two or three hours a week at a neutral venue and call her via cell phone between 8:00 and 08:30 p.m. on Tuesdays and Fridays. Holidays were to be shared between the host family and her own family, the first of which she would spend with her host family. Although she would not be in the physical care of her parents, her parents would be expected to maintain and support her needs and other expenses.⁹⁰

Although Sloth-Nielsen does not refer to the *Milnerton* case, it is my view that the latter case strengthens her argument that the legal recognition of the evolving maturity of a child that warrants his or her need for protection, *along with simultaneous awareness of his or her autonomy*, is a key theme in what herself and Kruuse have the “constitutional child”.⁹¹ An important building block in this regard is the following dictum by Sachs J in the Constitutional Court’s judgment in *S v M (Centre for Child Law as Amicus Curiae)*:⁹²

“Every child has his or her own dignity. If a child is to be *constitutionally imagined* as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them”.

⁸⁹ 2012:179.

⁹⁰ Jones “Teen divorces strict parents”, <https://www.iol.co.za/news/south-africa/teen-divorces-strict-parents-488223> (accessed on 24 March 2023).

⁹¹ Sloth-Nielsen 2019:504.

⁹² *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC):par. 18 (emphasis supplied).

The *S v M* case dealt with whether our courts paid sufficient attention to the paramountcy of (young) children’s best interests when considering the imposition of imprisonment on their primary caregiver. The case involved a 35-year-old single mother (hereafter referred to as “M”) of three boys aged eight, twelve, and sixteen, who was convicted of fraud in 1996 and sentenced to a term of imprisonment coupled with a fine that was suspended for five years.⁹³ In 1999, M was again charged with fraud but was released on bail. However, she committed fraud again. The Wynberg Regional Court convicted her on 38 counts of fraud and four counts of theft, which amounted to R29 158,69.⁹⁴ The court considered these counts to impose a suitable criminal sentence on her. Upon the court’s request for a correctional supervision report, there was a clear indication in the report that M would be a suitable candidate for a correctional supervision order. Despite impassioned pleas by her attorney not to have her sent to prison, the attorney was unsuccessful, and M was unfortunately sentenced to four years of direct imprisonment.⁹⁵ The magistrate also refused to grant M bail pending an appeal.⁹⁶ However, after three months of jail, the High Court granted M leave to appeal, and she was allowed to be released on bail. The High Court later held that M had been wrongly convicted on a count of fraud that involved an amount of R10 000,00 and, considering that this reduced the *quantum* of the remaining counts to R19 158,69,⁹⁷ M’s sentence was converted to imprisonment under section 276(1)(i) of the *Criminal Procedure Act*.⁹⁸ The change in M’s conviction meant that after serving eight months in prison, the Commissioner for Correctional Services could permit her to be released under correctional supervision.

⁹³ *S v M (Centre for Child Law as Amicus Curiae)*:par. 2.

⁹⁴ *S v M (Centre for Child Law as Amicus Curiae)*:par. 2.

⁹⁵ *S v M (Centre for Child Law as Amicus Curiae)*:par. 2.

⁹⁶ *S v M (Centre for Child Law as Amicus Curiae)*:par. 3.

⁹⁷ *S v M (Centre for Child Law as Amicus Curiae)*:par. 3.

⁹⁸ Section 276(1) provides:

- “(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –
- (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.”

M was denied leave to appeal against this sentence to the Supreme Court of Appeal (SCA).⁹⁹ M then directly approached the SCA for leave to appeal against the order of imprisonment, but her request was denied, with no reasons for this denial being provided. Consequently, M approached the Constitutional Court (CC) for leave to appeal against the refusal by the SCA to hear her oral argument and against the sentence imposed by the High Court.¹⁰⁰ M's application for leave to appeal based on the ground that the SCA did not provide any reasons for refusing to hear her oral argument was refused by the CC.¹⁰¹ However, the CC allowed her application for leave to appeal against the sentence. All the parties involved were required to deal solely with the following issues as per instruction by the Chief Justice:¹⁰²

“(i) What are the duties of the sentencing court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children?

(ii) Whether these duties were observed in this case.

(iii) If it was to hold that these duties were not observed, what order should this Court make, if any?”

The Registrar was instructed to serve a copy of these directions on the Minister for Social Development and the Minister for Justice and Constitutional Development, who were both allowed to file affidavits if they were so inclined.¹⁰³ The applicant, the curator *ad litem*, and the *amicus* all argued that the effect of section 28 of the *Constitution* was to call for sentencing courts – as a general principle of practice, to consider the effect on minor children of a custodial sentence imposed on a primary caregiver.¹⁰⁴

Writing for the majority of the court, Sachs J held that the question before him involved determining the reasonable limits that could be imposed on the emphatic language of

⁹⁹ *S v M (Centre for Child Law as Amicus Curiae)*:par. 3.

¹⁰⁰ *S v M (Centre for Child Law as Amicus Curiae)*:par. 4.

¹⁰¹ *S v M (Centre for Child Law as Amicus Curiae)*:par. 5.

¹⁰² *S v M (Centre for Child Law as Amicus Curiae)*:par. 5.

¹⁰³ *S v M (Centre for Child Law as Amicus Curiae)*:par. 5.

¹⁰⁴ *S v M (Centre for Child Law as Amicus Curiae)*:par. 7.

section 28, which indicated that law enforcement should (*inter alia*) always be gender- and child-sensitive and respectful of children's rights.¹⁰⁵ As the extract quoted above shows, Sachs J held that every child has his or her dignity and personality and that "[t]he unusually comprehensive and emancipatory character of s 28 presupposes that in our new dispensation, the sins and traumas of fathers and mothers should not be visited on their children."¹⁰⁶

Sachs J further explained that:¹⁰⁷

"Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the rights as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."

Sachs J proceeded to hold that despite a child's constitutionally-entrenched rights and all the orders a court could grant, none of those orders could isolate a child from the reality of harsh family members and the neighbourhood environment.¹⁰⁸ However, the law could create positive conditions that would assist in protecting children from abuse and improve their chances of leading productive and happy lives.¹⁰⁹ Section 28 of the *Constitution* thus required the least possible disruption of family life and parental care, but it should be as minimal as possible if this had to be done. Sachs J also formulated several guidelines for courts to consider in sentencing an offender who is a primary caregiver of young children. These included that where a custodial sentence was required, the court was required to determine whether alternative care for the children had to be facilitated; that where a custodial sentence was not required, the appropriate sentence had to take the children's

¹⁰⁵ *S v M (Centre for Child Law as Amicus Curiae)*:par. 15.

¹⁰⁶ *S v M (Centre for Child Law as Amicus Curiae)*:par. 18.

¹⁰⁷ *S v M (Centre for Child Law as Amicus Curiae)*:par. 19.

¹⁰⁸ *S v M (Centre for Child Law as Amicus Curiae)*:par. 20.

¹⁰⁹ *S v M (Centre for Child Law as Amicus Curiae)*:par. 20.

interests into account; and if various sentences were appropriate, the paramountcy of the child's best interests had to weigh heavily with the court.¹¹⁰

In applying these principles to the facts, Sachs J noted that M was a devoted mother who met all her children's basic needs.¹¹¹ If she were to be jailed, her children's needs would be threatened, and there would be a loss of income from her business. She would also default on her bond repayments, thus resulting in her children losing their family home. Although M had set a bad example, she was still considered the best person to ensure that her children continued attending school.¹¹² M had communicated that she intended to repay everyone she had defrauded. Although this might not be sufficient, she would need to do community service for the trauma and suffering she had imposed on the community.¹¹³ The court, therefore, made the following order:

- “1. Leave to appeal against the sentence imposed by the Cape High Court is granted.
2. The appeal is upheld.
3. The sentence imposed by the High Court is set aside and replaced by the following:
 - (a) The accused is sentenced to four years' imprisonment with effect from 29 May 2003.
 - (b) The 45 months of her imprisonment still to be served is suspended for four years on condition that she is not convicted of an offence which is committed during the period of suspension and of which dishonesty is an element, and further on condition that she complies fully with the order set out in paragraph (d) below.

The accused is placed under correctional supervision in terms of section 276(1)(h) of the *Criminal Procedure Act* 51 of 1977 for three years, which correctional supervision must include the following:

- (i) She performs service to the benefit of the community for ten hours per week for three years, the form of such service and the mode of supervision to be determined by the Commissioner for Correctional Services; and

¹¹⁰ *S v M (Centre for Child Law as Amicus Curiae)*:paras. 28-36.

¹¹¹ *S v M (Centre for Child Law as Amicus Curiae)*:par. 68.

¹¹² *S v M (Centre for Child Law as Amicus Curiae)*:par. 70.

¹¹³ *S v M (Centre for Child Law as Amicus Curiae)*:par. 73.

(ii) she undergoes counselling on a regular basis with such person or persons and at such times as is determined by the Commissioner for Correctional Services.

(d) The accused must repay to each of the persons or entities that she defrauded, as identified in the charges on which she was convicted, an amount equal to the value of goods she obtained. This must be done in the manner specified in a schedule to be determined by the Commissioner for Correctional Services on the basis of R4 000 bail money being immediately available and payment of the balance at a rate of no less than R1 500 per month. “

The *S v M* matter was heard before the first set of provisions of the *Children's Act* came into operation on 1 July 2007, although judgment was handed down shortly after that. However, the case makes it clear that the concept of the “constitutional child” had started to develop even before the enactment of the *Children's Act*.¹¹⁴ This conception of a child requires the child's individuality, autonomy and right to parental (or alternative) care to be recognised and his or her family life to be disrupted as little as possible. The judgment also points to the conclusion that even in criminal law, a court must consider a child's best interests and other constitutional rights when parental responsibilities and rights (such as the duty of care) are likely to be affected by a criminal sentence.

Against this background, enacting the *Children's Act* and its contribution to changing the common law position must be considered. The main aim of the Act is to give effect to certain rights of children as contained in the *Constitution*.¹¹⁵ As mentioned above, it also codifies the law of parent and child.¹¹⁶ Chapter 3 of the Act deals with parental rights and responsibilities, and the specific sections that this dissertation focuses on are sections 18-29, which deal with the acquisition and loss of parental responsibilities and rights; sections 30-32, which speak to the co-holders of parental responsibilities and rights; and sections 33-35 which deals with parenting plans.¹¹⁷

¹¹⁴ Sloth-Nielsen 2019:504.

¹¹⁵ *LB v YD* 2009 (5) SA 463 (T):par. 37.

¹¹⁶ Skelton & Carnelley (eds) 2010:238.

¹¹⁷ *Children's Act*.

2.3 THE CONTENT OF PARENTAL RESPONSIBILITIES AND RIGHTS IN TERMS OF THE *CHILDREN'S ACT 38 OF 2005*

Section 18 of the *Children's Act* lays the foundation for this discussion by providing that:

18 Parental responsibilities and rights

“(1) A person may have either full or specific parental responsibilities and rights in respect of a Child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –

- (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) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must –

- (a) administer and safeguard the child's property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including-
 - (i) consent to the child's marriage;
 - (ii) consent to the child's adoption;
 - (iii) consent to the child's departure or removal from the Republic;
 - (iv) consent to the child's application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child.

(4) Whenever more than one person has guardianship of a child, each one of them is competent to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.

(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).

In *WW v EW*,¹¹⁸ Rall J expressed the view that because section 1(2) of the *Children's Act* states that “[i]n addition to the meaning assigned to the terms ‘custody’ and ‘access’ in any law, and the common-law, the terms ‘custody’ and ‘access’ in any law must also be construed to mean ‘care’ and ‘contact’ as defined in this Act”, these common law concepts have not been abolished by the Act. This view is shared by Heaton¹¹⁹ and, in my view, is correct. While this may be so, Rall J also suggested that the new terms should be used to avoid confusion, which I also support.

It should be noted that the common law position of “parental power” that a parent had in respect of a child suggests that such a parent had total control of a child’s daily routine.¹²⁰ However, section 10 of the *Children's Act* now requires a child's views to be considered based on the child’s “age, maturity and stage of development.” This is also echoed in section 31 of the Act, which states that before taking any decisions in respect of a child, the person holding parental responsibilities and rights *must* consider the views and wishes that are expressed by the child and in doing this, the following factors concerning the child need to be considered: age, maturity and stage of development.¹²¹ These provisions reinforce the above conclusion that a certain degree of autonomy and independence is a core component of the “constitutional child”.

2.3.1 Care

In terms of section 1(1) of the *Children's Act*, “care”, in relation to a child is defined as:¹²²

“(a) within available needs, providing the child with-

(i) a suitable place to live;

(ii) living conditions that are conducive to the child’s health, well-being and development;

and

¹¹⁸ 2011 6 SA 53 (KZP); paras. 15–28.

¹¹⁹ Heaton 2017:5.

¹²⁰ Robinson *et al.* 2016:51.

¹²¹ *Children's Act*:sec. 31(1).

¹²² *Children's Act*:sec. 1(1).

- (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child"

As seen above, the common law concept of "custody" entailed that "the custodian parent has the right to regulate and control the child's day-to-day life, upbringing, and education. This includes the right to choose the child's residence, with whom he or she associates, and to direct the lines along which secular education should proceed".¹²³ The definition of "care" shows that many of the aspects of "custody" in terms of the common law feature in this definition,¹²⁴ as do some of what the common law referred to as "access" in the sense of sustaining a personal relationship with a child.¹²⁵ However, "care" in terms of the Act is broader than "custody" in terms of common law,¹²⁶ not only because it elaborates on this concept and also specifically refers to aspects such as furthering the child's

¹²³ *Krugel v Krugel* 2003 6 SA 220 (T):par. 9.

¹²⁴ See *Krugel v Krugel*:par. 9 above for this definition.

¹²⁵ Heaton 2017:5.

¹²⁶ Skelton & Carnelley (eds) 2010:242.

constitutional rights,¹²⁷ but also because it includes maintaining the child financially, which was not part of “custody” at common law.¹²⁸

According to Bekink, a parent has the primary duty of caring for a child.¹²⁹ If a parent fails to perform this duty, the duty is passed on to the State.¹³⁰ A “fit and proper” individual can be appointed via a will to be a child’s caregiver if sole care has been conferred on the testator.¹³¹

It also should be noted that the duty of care is not necessarily limited to what is set out in section 1 of the *Children’s Act*. For example, Heaton and Kruger argued that because the Act was silent on this issue, the caregiving parent was still entitled by the common law to impose discipline on a child reasonably and moderately.¹³² This view was, however, expressed before the Constitutional Court’s judgment in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*, where the court held that any kind of violence, with the inclusion of reasonable and moderate chastisement “has always constituted a criminal act known as assault”.¹³³ The court also held that the impact of depending on this common law defence was to excuse parents from being prosecuted in cases where they could face possible convictions. Additionally, the court provided that the identical conduct by any other person except the parent on the child would constitute “indefensible assault”.¹³⁴ The court concluded by providing that the High Court was correct in deciding that the common law defence of reasonable and moderate chastisement is constitutionally invalid.¹³⁵

¹²⁷ Boezaart 2017:4

¹²⁸ Heaton 2017:5.

¹²⁹ Bekink 2012:183.

¹³⁰ Bekink 2012:183.

¹³¹ *Children’s Act*:sec. 27(2).

¹³² Heaton 2017:79.

¹³³ 2020 1 SA 1 (CC):par. 72.

¹³⁴ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*:par. 72.

¹³⁵ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*:par. 73.

Although judicial interference with parental responsibilities and rights is discussed in greater detail in Chapter 3, Heaton and Kruger point out that our courts have hesitated to interfere with the decision-making of the person responsible for the duty of care. They cite the case of *Martin v Mason*,¹³⁶ where there was a disagreement between divorced parents regarding a school the child should attend. The court refused to interfere when asked to choose a suitable school for the child. The reason for refusing to interfere was that the duty to select a school does not fall upon the court because:

“[U]nless good cause was shown, [the court] did not arrogate to itself functions which ought normally to be performed by one or other of the parents. The duty to care for the child devolved in the first instance upon the custodian parent [that is, the care-giving parent], and it was only where that duty was not being properly performed that the Court would interfere”.¹³⁷

I believe this approach will still be followed because the words “only where that duty was not being properly performed” seem to be based on interfering only where the child’s best interests demand this.

2.3.2 Contact

As mentioned above, the common law concept of “access” was not completely replaced with what the *Children’s Act* now defines as “contact”.¹³⁸ Contact entails sustaining a personal relationship and regular communication with the child where he or she lives with someone else.¹³⁹ Such communication can occur in person via visitation to the child’s home, having the child visit the parent¹⁴⁰ or through postal or electronic communication, such as letters, telephone calls, social media, mobile phone text messages, video calls,

¹³⁶ 1949 (1) PH B9 (N)

¹³⁷ *Martin v Mason*:24.

¹³⁸ *Children’s Act*:sec. 1(2); *WW v EW*:paras.15–28.

¹³⁹ Bonthuys 2003:483.

¹⁴⁰ *Children’s Act*:sec. 1(1).

and electronic mail.¹⁴¹ A parent or guardian (or any other person) who exercises their right of contact is empowered to exercise the parental responsibilities and rights related to care for the time being.¹⁴²

2.3.3 Guardianship

At common law, “guardianship” has a wide and narrow meaning.¹⁴³ Guardianship is now regulated by section 18(3) of the Act, that stipulates as follows:

“(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must –

- (a) administer and safeguard the child’s property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including –
 - (i) consent to the child’s marriage;
 - (ii) consent to the child’s adoption;
 - (iii) consent to the child’s departure or removal from the Republic;
 - (iv) consent to the child’s application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child”.

Heaton states that this definition corresponds with the narrow meaning according to the common law, in that guardianship entails administering and safeguarding a child’s property and property interests, assisting or representing the child in administrative, contractual, and other legal matters, and consenting, or dissenting to issues that are legally required in respect of a child, such as a child’s marriage.¹⁴⁴ A “fit and proper” individual can also be appointed via a will to be a guardian if sole guardianship has been conferred on the testator.¹⁴⁵

¹⁴¹ *Children’s Act*:sec. 1(1).

¹⁴² Robinson *et al.* 2016:54; Heaton & Kruger 2015:303.

¹⁴³ Heaton 2017:5.

¹⁴⁴ *Children’s Act*:sec. 18(3).

¹⁴⁵ *Children’s Act*:sec. 27(1).

2.4 THE ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS IN CURRENT SOUTH AFRICAN LAW

The *Children's Act* makes it possible for the mother and father to acquire different parental responsibilities and rights depending on the circumstances, in that either can have more or less parental responsibilities and rights afforded to them than the other.¹⁴⁶ I will briefly discuss some of the different categories of biological parents who have (or may acquire) parental responsibilities and rights, namely the biological mother of a child (including where a child is born by surrogacy or artificial fertilization), a married biological father, and an unmarried biological father. I will also briefly comment on acquiring parental responsibilities and rights in other ways, such as by agreements, assignment by a court order and adoption.

Section 19(1) of the *Children's Act* affords the biological mother of a child, regardless of whether she is married, full parental responsibilities and rights in relation to her child(ren).¹⁴⁷ If the mother is herself still an unmarried minor who does not have guardianship of the child, *and* if the child's father also does not have guardianship of the child, the mother's parents or legal guardian will take the role of being a guardian to the child(ren) or children until the mother reaches the age of 18, when she is then considered as a major and the role of guardianship will automatically be transferred to her.¹⁴⁸ It must be noted that the mother has all other parental responsibilities and rights regarding the child.¹⁴⁹

In cases of valid surrogate motherhood agreements, section 19(3) of the Act excludes the application of section 19.¹⁵⁰ Although the surrogate mother's womb is used to develop

¹⁴⁶ Swart 2020:2

¹⁴⁷ *Children's Act*:sec. 19.

¹⁴⁸ *Children's Act*:sec. 19.

¹⁴⁹ *Children's Act*:sec. 19(1).

¹⁵⁰ *Children's Act*:sec. 19.

and grow the fetus, the surrogate mother has no rights “of parenthood or care” in respect of the child.¹⁵¹ Therefore, no parental responsibilities or rights are afforded to her because she is not eligible to acquire such rights. However, a surrogate mother is eligible to have contact with the child on the condition that the surrogacy agreement allows for this.¹⁵² Contrary to this, in cases where the surrogacy agreement is considered invalid, or the agreement is cancelled, the surrogate mother is regarded as the mother of the child. Thus, she acquires full parental responsibilities and rights with regard to the child. In the case of a child born to a married woman as a result of artificial fertilization (such as by using a donor’s ovum or the gametes of any other person) when there is no surrogacy,¹⁵³ full parental responsibilities and rights are acquired by such a woman and her spouse.¹⁵⁴ This rule is applicable on the condition that consent to the artificial fertilization was given by both spouses.¹⁵⁵ Where a donor’s ovum was used in the case of artificial fertilization of an unmarried mother without surrogacy taking place, the correct legal position appears to be that only the birth mother will automatically have full parental responsibilities and rights in respect of the child.¹⁵⁶ However, the donor could potentially have parental responsibilities and rights assigned to her by a court order (for example, where the donor was in an intimate relationship with the birth mother).

Section 20 of the *Children’s Act* automatically awards parental responsibilities and rights to the biological father if he is married to the child’s mother or if he was married to the child’s mother at the time the child was conceived, at birth, or any time between the

¹⁵¹ *Children’s Act*:sec. 297(1)(c).

¹⁵² Heaton 2017:82.

¹⁵³ *Children’s Act*:sec: 40(1)(a) “Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation”.

¹⁵⁴ Heaton 2017:82-83.

¹⁵⁵ Heaton 2017:82-83.

¹⁵⁶ Heaton 2017:82-83; *Children’s Act*:sec. 40(1)(a) “Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation”.

conception and birth of the child.¹⁵⁷ Heaton notes that because the section directly mentions “biological fathers”, it possibly qualifies or replaces the common law presumption *pater est quem nuptiae demonstrant* – which applies to all fathers.¹⁵⁸ (In terms of this presumption, a woman’s husband is deemed the father of all children born during their marriage). However, she argues that this would not be sensible because married fathers would then have to prove their paternity before section 20 would apply to them. Therefore, as much as this presumption still stands, the husband can rebut paternity on a balance of probabilities and provide evidence that he is not the child’s biological father.¹⁵⁹

If the child’s parents are unmarried, the biological father has no automatic parental authority at common law.¹⁶⁰ As mentioned above, this principle was later relaxed by the *Natural Fathers of Children Born out of Wedlock Act*,¹⁶¹ which allowed the High Court to award guardianship, custody or access to him if this was in the child’s best interests and subject to any conditions that the court deemed fit. However, since 1 July 2007, section 21 of the *Children’s Act* enables an unmarried father to acquire parental responsibilities and rights. According to section 21(1)(a), this will automatically occur if he lived with the child’s mother at birth. In the alternative, section 21(1)(b) allows the father to acquire parental responsibilities and rights if, even if he was not living with the child’s mother at the time of birth, he (1) consents (or successfully applies in terms of section 26¹⁶² of the

¹⁵⁷ *Children’s Act*:sec. 20.

¹⁵⁸ Heaton 2017:82-83.

¹⁵⁹ *R and Another v M* (42335/2014) [2015] ZAGPJHC 183; [2015] 4 All SA 280 (GJ); 2016 (3) SA 417 (GJ) (13 August 2015):par. 10.

¹⁶⁰ *KLVC v SDI and another* [2015] 1 All SA 532 (SCA) (12 December 2014):par. 18.

¹⁶¹ 86/1997.

¹⁶² Section 26 provides:

“(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 1 I(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 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.

Act) to be identified as the child's father or pays damages in terms of customary law; (2) he contributes (or has attempted in good faith to contribute) to the upbringing of the child for a reasonable period; (3) he contributes (or has attempted in good faith to contribute) to the expenses related to maintaining his child for a reasonable period. In the case that there is a dispute between the biological parents regarding any of the abovementioned requirements, the matter must be referred for mediation by a family advocate, social worker, social service professional or any other suitably qualified person, and this outcome may be taken on review to a court.¹⁶³ It is important to note that section 21 does not affect a biological father's duty to maintain his child. The provision also applies irrespective of whether a child was born before or after the Act was promulgated.¹⁶⁴

The case of *FS v JJ*¹⁶⁵ indicates the application of section 21(1)(a) of the Act. In this case – which is discussed in more detail in Chapter 3 – an opposite-sex couple living in Paarl had cohabited in an intimate life partnership for more than a year. They intended to marry one another. A daughter (C) was born to them in January 2006, before section 21 of the *Children's Act* came into operation. On the same day that C was born, her mother (who suffered from a congenital heart defect) underwent an operation but unfortunately passed away two months later. Although C originally lived with her father and mother, the first respondent (C's grandmother) took C with her to Keimoes shortly after C's mother's death. C lived with her grandparents for a few years after this.

Meanwhile, a legal battle for custody and guardianship over C developed, with litigation in the Western Cape High Court and the Northern Cape High Court. By the time the matter came before the Supreme Court of Appeal, this litigation had resulted in C living with her

(2) This section does not apply to –

(a) the biological father of a child conceived through the rape of or incest with the child's mother;
or

(b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.

¹⁶³ *Children's Act*:sec: 21(3)(a) and (b).

¹⁶⁴ *Children's Act*:sec: 21.

¹⁶⁵ 2011 (3) SA 126 (SCA).

father, his new wife and her half-brother for more than a year.¹⁶⁶ In the latter court, Lewis JA held that although C was born before section 21 of the *Children's Act* came into operation, her father had already automatically acquired parental responsibilities and rights with respect to her on 1 July 2007 because of his permanent life partnership with C's mother.¹⁶⁷

Unfortunately, there is still some doubt about the interpretation of section 21(1)(b) of the Act, specifically regarding whether all of the requirements listed in this provision must be met. In Louw's¹⁶⁸ view, they are cumulative. The Supreme Court of Appeal has so far been able to avoid deciding this issue.¹⁶⁹ Still, the case of *GM v KI*¹⁷⁰ seems to indicate that they need not all be present and that merely consenting to be identified as the child's biological father is sufficient. On the other hand, in the most recent case (*Marima v Lesele*),¹⁷¹ the High Court specifically stated that it was attempting to clarify this issue and held that the principles of statutory interpretation showed that all the requirements must be met. In my view, merely consenting to be identified as the child's father (as in the *GM* case) is not sufficient. The father's contribution to the child's maintenance and upbringing must also be considered. Still, I do not believe that *both* must always be required because, as was mentioned in *SDI*,¹⁷² the court may be faced with a situation where a father is simply unable to contribute financially but still meaningfully contributes to the child's upbringing.¹⁷³ This possibility was unfortunately not considered in the *Marima* case. In *BR v LS*,¹⁷⁴ Koen J appears to have believed that these requirements must indicate a satisfactory "level of commitment" to the child. In my opinion, this more flexible interpretation is to be supported because it avoids a strictly literal interpretation of the Act

¹⁶⁶ *FS v JJ*:paras. 2-20.

¹⁶⁷ *FS v JJ*:paras. 23-25, 33. See also *EMD v MP* [2021] ZAGPPHC 740 (2 November 2021):par. 3 along with par. 1 of the court's final order.

¹⁶⁸ 2009:123, 124.

¹⁶⁹ *KLVC v SDI* [2015] 1 All SA 532 (SCA):par. 14. Heaton 2017:12.

¹⁷⁰ 2015 3 SA 62 (GJ) par. 3 where the father's consent to being identified as such was sufficient for him to acquire full parental responsibilities and rights.

¹⁷¹ [2022] ZAGPJHC 380 (6 June 2022):paras. 17-19.

¹⁷² [2014] ZAKZDHC 11 (14 April 2014).

¹⁷³ See Heaton 2018:14-15.

¹⁷⁴ 2018 (5) SA 308 (KZD):par. 21.

and allows the child access to “parental care”¹⁷⁵ as far as possible, as one of the main purposes of the Act and of section 28 of the *Constitution*.¹⁷⁶ The Supreme Court of Appeal has clarified that compliance with section 21(1)(b) involves a purely factual enquiry and is not a matter of judicial discretion. The “contribution” referred to in section 21(1)(b) must be on-going and over a reasonable period considering, for example, the age of the child and the parties’ unique circumstances at the time.¹⁷⁷

There are other ways in which parental responsibilities and rights may be acquired.

- An unmarried biological father who does not have the automatic acquisition of parental responsibilities and rights can acquire these rights by entering into a parental responsibilities and rights agreement with the mother of the child or any other individual who has parental responsibilities and rights – this also applies to any other person (for example, the grandparents) who is interested in the well-being, development and care of the child.¹⁷⁸ The agreement only confers the responsibilities and rights set out in the parental responsibilities and rights agreement.¹⁷⁹ Therefore, no additional responsibilities and rights can be given to an individual other than the ones initially agreed upon. A High Court has jurisdiction in cases where the agreement relates to guardianship.¹⁸⁰ Before the registration of the agreement between the relevant parties, the court or the Family Advocate should be satisfied that the agreement is in the best interests of the child¹⁸¹ – the best interests of the child standard must be applied in accordance with section 7(1) of the Act.

Section 7(1) provides:

¹⁷⁵ See sec. 2(b)(i) of the Act.
¹⁷⁶ See also *KLVC v SDI*; par. 19.
¹⁷⁷ *KLVC v SDI*; paras. 21-22.
¹⁷⁸ Heaton & Kruger 2015:314.
¹⁷⁹ Heaton & Kruger 2015:314.
¹⁸⁰ Heaton & Kruger 2015:314.
¹⁸¹ Heaton & Kruger 2015:314.

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

- (a) the nature of the personal relationship between –
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards –
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child –
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child’s –
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

- (l) the need to protect the child &om any physical or psychological harm that may be caused by –
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child”.

- A person may also acquire parental responsibilities and rights by assignment by means of a court order.¹⁸² As the upper guardian of minor children, the High Court may confer parental responsibilities and rights on the individual.¹⁸³ Section 23 of the *Children’s Act* provides that a person may approach the High Court, the Children’s Court or the Regional Court if the person is interested in the child’s development, care and well-being. During the process of considering the application, the court needs to take into account the following factors:¹⁸⁴
 - The best interests of the child.
 - The relationship between the applicant and the child and between any other relevant person and the child.
 - The degree of commitment the applicant has shown towards the child.
 - The extent to which the applicant has contributed to the child’s birth and maintenance expenses.
 - Any other fact that should, in the opinion of the court, be taken into account.

¹⁸² Heaton & Kruger 2015:315.

¹⁸³ Heaton & Kruger 2015:315.

¹⁸⁴ Heaton & Kruger 2015:315.

A court can impose certain conditions when assigning a child's duty of contact or care to an individual.¹⁸⁵ Section 23(1) provides:

(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court 15 for an order granting to the applicant, on such conditions as the court may deem necessary-

- (a) contact with the child; or
- (b) care of the child

Section 23(4) provides:

(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.

An application for termination, extension, suspension or circumscription of parental responsibilities and rights can be combined with an application for the assignment of care and contact.¹⁸⁶ According to section 24 of the Children's Act:

24 Assignment of guardianship by court order

“(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.

2) When considering an application contemplated in subsection (1), the court must take into account –

- (a) the best interests of the child;
- (b) the relationship between the applicant and the child, and any other relevant person and the child; and
- (c) any other fact that should, in the opinion of the court, be taken into account.

¹⁸⁵ Heaton & Kruger 2015:315.

¹⁸⁶ *Children's Act*:sec. 28(2).

(3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child".

- Persons may also acquire parental responsibilities and rights by adoption. Adoption may be defined as "the formal legal process which [generally]¹⁸⁷ terminates the existing legal relationship between a child and his or her birth parents, and full parental responsibilities and rights are vested in the adoptive parent(s)".¹⁸⁸ The adoptive parent(s) is/are legally regarded as the child's parent(s) for all purposes, and vice versa.¹⁸⁹ Adoption is fully regulated by the *Children's Act*, which caters to adoption within South Africa and inter-country adoption.¹⁹⁰ Adoption can occur jointly (such as by spouses, civil union partners, unmarried persons in a permanent life partnership or other persons who share a common household as a permanent family unit)¹⁹¹ or individually. Examples of the latter include a person who has married the child's biological parent, a child's foster parent, and a widower, widow, divorced or unmarried person (such as the child's biological father or by a person whose life partner is the child's parent). Adoption can only occur if the child is "adoptable" in accordance with the Act¹⁹² as well as in the opinion of a social worker. Such adoption must be in the child's best interests, and the other adoption provisions of the Act must be complied with.¹⁹³

¹⁸⁷ The word "generally" is inserted into this definition because sec 242 of the Act allows for an adoption order or a post-adoption agreement confirmed by a court to deviate from this general rule.

¹⁸⁸ Bekker 2008:400.

¹⁸⁹ *Children's Act*:sec. 242(3).

¹⁹⁰ *Children's Act*:Ch. 16.

¹⁹¹ *Children's Act*:sec. 231(1)(a).

¹⁹² *Children's Act*:sec. 230(3) provides:

"(3) A child is adoptable if –

- (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;
- (b) the whereabouts of the child's parent or guardian cannot be established;
- (c) the child has been abandoned;
- (d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
- (e) the child is in need of a permanent alternative placement".

¹⁹³ *Children's Act*:sec. 230(1).

Finally, it should be noted that the preceding discussion shows that more than one person may have parental responsibilities and rights regarding a child,¹⁹⁴ such as because of marriage, acquisition of these by an unmarried father, a parental responsibilities and rights agreement, or assignment by a court order. Individuals who share the same parental responsibilities and rights with regard to a child are eligible to exercise those responsibilities and rights without receiving consent from the other co-holders unless otherwise provided by the *Children's Act*, by a court order, or by any other law.¹⁹⁵ Parental responsibilities and rights may not be surrendered by someone who holds them. Still, by agreement, they may be exercised by a co-holder on the holder's behalf without the former being divested.¹⁹⁶

2.5 CONCLUSION

This chapter has reviewed the historical development of parental responsibilities and rights in South Africa. It has shown how our law has – in line with international trends – evolved from the pre-constitutional common law notion of “parental authority” to the present-day concept of “parental responsibilities and rights” that recognises the emergence of the so-called “constitutional child”. Section 28 of the *Constitution* expressly states that such a child's best interests are the paramount consideration in all matters that may affect him or her, and he or she is today recognised as an independent individual with constitutional rights that are enforceable against his or her parents, other legal subjects and the State. This child has a far larger degree of autonomy. The *Children's Act* 38 of 2005 – which was enacted specifically to give effect to the child's constitutional rights – now also confirms that a child can express his or her views in matters that affect him or her and that they *must* be considered with due regard to the child's age, maturity, and stage of development.

¹⁹⁴ *Children's Act*:sec. 30(1).

¹⁹⁵ *Children's Act*:sec. 30(2).

¹⁹⁶ *Children's Act*:sec. 30(3), (4).

This progression is illustrated by the *Milnerton* case, which suggests that children are not required to reach the age of majority before they can make sufficient and mature decisions that will be beneficial in the foreseeable future. This chapter has also shown, in line with the Constitutional Court's judgment in *S v M (Centre for Child Law as Amicus Curiae)*,¹⁹⁷ that in as much as section 28 of the *Constitution* prioritises the child's best interests, this must be applied "in a meaningful way without unduly obliterating other valuable and constitutionally protected interests". Therefore, the child's best interests are not "absolute" and may be limited, as with any other constitutional right.¹⁹⁸

The chapter then considered the content and acquisition of parental responsibilities and rights in terms of the *Children's Act*. Although all major manners of acquisition were considered, particular attention was paid to the position of unmarried parents, where significant developments have taken place, especially in section 21 of the Act that deals with unmarried fathers. Regarding this provision, it was argued that contrary to the recent finding in *Marima v Lesele*,¹⁹⁹ section 21(1)(b) should not be interpreted as requiring all of the requirements to be strictly complied with. Instead, the more flexible interpretation of requiring an overall and on-going satisfactory "level of commitment"²⁰⁰ to the child's maintenance and/or upbringing is more in line with the purpose of the *Children's Act*.

Having therefore considered the content and acquisition of parental responsibilities and rights, the next chapter will investigate the principles regarding the judicial interference with parental responsibilities and rights as provided for in sections 28, 29 and 34(5) of the *Children's Act* as well as selected lessons from divorce law.

¹⁹⁷ Par. 25.

¹⁹⁸ *S v M (Centre for Child Law as Amicus Curiae)*:par. 26.

¹⁹⁹ [2022] ZAGPJHC 380 (6 June 2022).

²⁰⁰ See *BR v LS* 2018 3 SA 508 (KZD):par. 21.

CHAPTER THREE:

**THE JUDICIAL INTERFERENCE WITH PARENTAL RESPONSIBILITIES
AND RIGHTS IN SOUTH AFRICA: GENERAL PRINCIPLES
APPLICABLE TO SECTIONS 28, 29 AND 34(5) OF THE *CHILDREN'S
ACT 38 OF 2005 AND SELECTED LESSONS FROM DIVORCE LAW***

3.1 INTRODUCTION

The South African High Court has always had the common law jurisdiction to interfere with parental responsibilities and rights – in its capacity as the upper guardian of all minors within its jurisdiction - where the child's best interests require this.²⁰¹ This jurisdiction is also supplemented by various statutes, such as the *Children's Act 38 of 2005* and the *Divorce Act 70 of 1979*.²⁰² This chapter focuses on some of the powers conferred by these statutes.

Regarding the *Children's Act*, case law dealing with the court's powers in sections 28, 29 and 34(5) will be considered to identify key principles that apply when parental responsibilities are delineated, extended, suspended, or terminated. While these powers of judicial interference will primarily be analysed in the context of unmarried parents, the fact that there is still relatively little case law dealing with such parents requires case law involving divorcing (or divorced) parents in which these provisions have featured also to be discussed.

Following this, the chapter will consider whether case law dealing with selected aspects of divorce (namely shared or joint care after divorce and the possible restriction of parents' rights of contact based on their sexual orientation) provides any lessons that may be

²⁰¹ Van Heerden *et al.* 1999:500-501.

²⁰² Other acts that confer such powers include the *Domestic Violence Act 116/1998* and the *Marriage Act 25/1961* – see Heaton & Kruger 2015:330.

learned by future courts that may be tasked with awarding or interfering with the parental responsibilities and rights of unmarried parents.

3.2 JUDICIAL INTERFERENCE IN TERMS OF THE *CHILDREN'S ACT*

3.2.1 The content of the relevant statutory provisions

As a point of departure, particular note must be taken of sections 28 and 29 of the *Children's Act*. These provisions state the following:

28 Termination, extension, suspension or restriction of parental rights and responsibilities

“(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-

- (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
- (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

(2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.

(3) An application for an order referred to in subsection (1) may be brought –

- (a) by a co-holder of parental responsibilities and rights in respect of the child;
- (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;
- (c) by the child, acting with leave of the court;
- (d) in the child's interest by any other person, acting with the leave of the court; or
- (e) by a family advocate or the representative of any interested organ of state.

(4) When considering such application the court must take into account-

- (a) the best interests of the child;
- (b) the relationship between the child and the person whose parental responsibilities and

rights are being challenged;

(c) the degree of commitment that the person has shown towards the child; and

(d) any other fact that should, in the opinion of the court, be taken into account”.

29 Court proceedings

“(1) An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children’s court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.

(2) An application in terms of section 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child.

(3) the court hearing an application contemplated in subsection (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interests of the child.

(4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it.

(5) The court may for the purpose of the hearing order that-

(a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;

(b) a matter specified by the court must be investigated by a person designated by the court;

(c) a person specified by the court must appear before it to give or produce evidence; or

(d) the applicant or any party opposing the application must pay the costs of any such investigation or appearance.

(6) The court may, subject to section 55-

(a) appoint a legal practitioner to represent the child at the court proceedings; and

(b) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.

(7) If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation in terms of section 155(2)”.

Section 34 of the Act deals with the formalities pertaining to parenting plans. Subsection (5) provides as follows:

A parenting plan that was made an order of court may be amended or terminated only by an order of court on application-

- (a) by the co-holders of parental responsibilities and rights who are parties to the plan;
- (b) by the child, acting with leave of the court; or
- (c) in the child's interest, by any other person acting with leave of the court.

As this provision has also been featured in case law, it will be considered below.

3.2.2 Case law dealing with these statutory provisions

3.2.2.1 Unmarried parents

3.2.2.1.1 *Ex parte Sibisi*²⁰³

In this case, the applicant sought an order granting her “the sole full parental responsibilities and rights of care, contact, guardianship, and maintenance” in terms of section 18 of the *Children’s Act*. The application was initially made at the High Court but was declined by Patel J because the Act required the Children’s Court to deal with the issue of guardianship.²⁰⁴ This resulted in a written memorandum by the Presiding Officer in the Children’s Court, who contended that the latter court did not have jurisdiction to deal with matters regarding the guardianship of minor children.²⁰⁵ When the matter again went to the High Court, the competing contentions regarding the proper forum for determining matters of guardianship prompted Mnguni J to refer the matter to the Full Bench for adjudication.²⁰⁶

²⁰³ 2011 (1) SA 192 (KZP):par. 1.

²⁰⁴ *Ex parte Sibisi*:par. 2.

²⁰⁵ *Ex parte Sibisi*:par. 3.

²⁰⁶ *Ex parte Sibisi*:par. 5.

Swain J commenced his judgment by holding that the root of the uncertainty lay in section 29 of the Act (regarding court proceedings), which states that:

“(1) An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children’s court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.”

It became quite apparent that none of the relevant provisions of the Act (i.e. section 22(4) dealing with parental responsibilities and rights agreements; section 23 dealing with assignment of contact and care to a non-parent via a court order; or section 28) dealt with the subject of guardianship, although they all envisioned the relief which each contemplated to be provided by a High Court (generally and in divorce matters) and the Children’s Court.²⁰⁷ Section 24, however, expressly stipulated that the assignment of guardianship could occur following an application to the High Court.²⁰⁸ In addition, section 45(3) provides that when it comes to matters that the Children’s Court may adjudicate:

“(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:
(a) The guardianship of a child ...”.

As “family courts” had not yet been established, only the High Court had jurisdiction to adjudicate the awarding of guardianship to an individual.²⁰⁹ Swain J concluded that, based on the recommendations of the Family Advocate, the applicant was entitled to all of the parental responsibilities and rights that she sought in terms of section 18 of the Act because this was in the minor child's best interests.²¹⁰

²⁰⁷ *Ex parte Sibisi*:par. 9.

²⁰⁸ *Ex parte Sibisi*:par. 9.

²⁰⁹ *Ex parte Sibisi*:par. 12.

²¹⁰ *Children’s Act*.sec: 18.

3.2.2.1.2 *GM v KP*²¹¹

This case dealt with section 28(1)(a) of the *Children's Act*. Here, an unmarried mother (who had never cohabited with the father) brought an application for the termination of all the parental *rights* of the biological father of the child while retaining his parental *responsibilities*. Although the father had consented to be identified as the father of his child – so that he had acquired parental responsibilities and rights by this fact alone²¹² – he had not shown any commitment to the child nor contributed to the child's wellbeing or maintenance.²¹³ The court held that parental responsibilities and rights, as provided for in section 18 of the Act, are part and parcel of one another and generally coexist simultaneously.²¹⁴ It would not make sense to try to classify which of these are rights and which are obligations. As Fisher AJ stated:²¹⁵

“Parental responsibilities and rights are, for the most part, two sides of the same coin. *Thus on a purposive interpretation of s 28(1)(a), an order which terminated rights but left in place responsibilities, would be difficult, if not impossible, of application* [sic]. Such a result could never have been intended by the legislature.”

In addition, section 28(1)(a) of the Act provided that parental responsibilities and rights could be suspended, but this could not be an indefinite suspension. As such, it could be for a set period or last until some event occurred.²¹⁶ In the court's view, such a suspension would be appropriate until the father became involved in the child's life and contributed towards his maintenance, after which the way forward could be determined.²¹⁷ However, his duty to maintain would continue to be preserved even though his other parental responsibilities and rights were suspended.²¹⁸ Therefore, the court suspended the

²¹¹ 2015 3 SA 62 (GJ).

²¹² See *FS v JJ* 2011 3 SA 126 (SCA) in Chapter 2 for criticism of this finding.

²¹³ *GM v K*; par. 2.

²¹⁴ *GM v K*; par. 9.

²¹⁵ *GM v K*; par. 14 (emphasis supplied).

²¹⁶ *GM v K*; par. 16.

²¹⁷ *GM v K*; par. 16.

²¹⁸ *GM v K*; par. 16.

parental responsibilities and rights of the father until an application for maintenance was made by or on behalf of the child.²¹⁹ In addition, the mother was appointed as the sole guardian of the child during the period that the father’s responsibilities and rights were suspended.²²⁰

The court confirmed the finding regarding the impossibility of removing only rights but not responsibilities in the recent case of *SJF v TV*.²²¹ Matthias and Zaal have opposing views as to the correctness of this judgment. They contend that developing a law that encourages parent-child interactions where the parents are no longer together is already a challenge.²²² Additionally, the authors argue that it is costly for parents (specifically single parents) to battle it out in court on who should acquire or have their parental responsibilities and rights suspended.²²³ In assisting in reducing further difficulties that single parents face, the authors decided on two recommendations. Firstly, there needs to be an amendment to the Act to provide Children’s Courts with the platform to successfully issue guardianship orders instead of only parental responsibilities and rights.²²⁴ This would assist in improving the number of financially disadvantaged parents or guardians who would be more willing to approach courts because access would not be as costly.²²⁵ Secondly, the phrase “for a period” that is found in section 28(1)(a) needs to be altered to a phrase that is more accurate because, as it currently stands, the wording in the Act requires courts to set a future event and courts cannot guarantee whether an event will occur.²²⁶ The suggestion is that there needs to be an amendment to the Act to unburden the courts from the constant expectation to create an event.

²¹⁹ *GM v KI*;par. 18, 21, read with par. 1 of the order.

²²⁰ *GM v KI*;par. 21, read with par. 2 of the order.

²²¹ [2021] ZAWCHC 90 (28 April 2021);par. 21.

²²² Matthias & Zaal 2016:194.

²²³ Matthias & Zaal 2016:202. “A significant problem, however, is that only a small proportion of single parents in South Africa can afford the expense of high court proceedings.”

²²⁴ Matthias & Zaal 2016:202.

²²⁵ Matthias & Zaal 2016:202.

²²⁶ Matthias & Zaal 2016:202.

The authors reflect on how the court in *GM v KI* was easily willing to believe and accept the mother's evidence about how the father disappeared without being curious as to why there was no contesting.²²⁷ They suggest that courts should not be quick in solely relying on the evidence presented by the applicant's parent – as this can sometimes be falsifying and an exaggeration of the character and well-being of the other parent or guardian.²²⁸

Although the acquisition of parental responsibilities differs for parents, whether married or not, it is important to consider the child's best interests at all times. Matthias and Zaal's argument was mostly based on the choice of words that the Act contained and how courts needed to first reflect on any evidence presented by an applicant pertaining to a possible termination or suspension of the other parent's parental responsibilities and rights. *SJV v TV* agrees with *GM v KI* that it is impossible only to remove a parent's rights and not the responsibilities because that is not a result that the legislature could have intended. I cannot entirely agree with this. The most important issue here is the paramountcy of the best interests of a child. If one parent fails to prioritise this – whether it is regarding a child having to relocate to a country or place that will benefit them – the parent should have limited rights to the child. It would not be fair for the child(ren) to be still expected to make contact with a parent who does not prioritise their well-being and best interests. A parent responsible for the child can apply to court if he or she wants the court to terminate parental responsibility for the other parent.

3.2.2.1.3 *BR v TM*²²⁹

This is a bit of an unusual case, as it deals with an applicant who was in pending divorce proceedings with the defendant, where the former had subsequently remarried and sought a declaration of paternity and parental responsibilities and rights to be granted to her new spouse, who also happened to be the biological father of the minor child in

²²⁷ Matthias & Zaal 2016:203.

²²⁸ Matthias & Zaal 2016:203. The authors suggest that family advocates should be part of the role players in assisting the courts with all issues pertaining to children and the acquisition and loss of parental responsibilities and rights.

²²⁹ 2016 3 SA 417 (GJ).

question. Therefore, the case deals with the rights of an unmarried father and the legal principles that apply to divorce.

The court held that since the minor child was born *stante matrimonio*, it is safe to presume that the respondent is the father as a result of the legal presumption *pater est quem nuptiae demonstrant*, and that paternity could be proved on a balance of probabilities.²³⁰

The court also added:²³¹

“Until then, the child is regarded as ‘a child born of married parents’ and the husband will, together with the mother, have parental power or parental responsibilities and rights over the child concerned. Therefore, as things currently stand, the respondent is regarded by law as the father of LR”

The court referred to section 37 of the *Children’s Act*, which provides that:²³²

“If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party.”

The court found it inappropriate to issue the respondent with a warning concerning section 37 because issuing a warning of such nature was a function found for the divorce court to perform during the pending divorce action. No credibility finding could, therefore, be made at the current stage of the matter.²³³ In contrast to sections 20 and 21, the court observed that:²³⁴

²³⁰ *BR v TM*:par. 10.

²³¹ *BR v TM*:par. 10.

²³² *BR v TM*:par. 10. *Children’s Act*.sec: 37.

²³³ *BR v TM*:par. 11.

²³⁴ *BR v TM*:par. 15.

“Unlike an unmarried father, who must show that he contributes or attempted in good faith to contribute to the child’s upbringing and expenses in order to attain parental responsibilities and rights in terms of s 21(1) (b) of the *Children’s Act*, a married father is not required to contribute to the upbringing and expenses of his child in order to attain parental rights and responsibilities in terms of s 20 of the *Children’s Act*.”

Despite section 20 specifically referring to biological fathers, the court contended that the legislature intended to substitute or qualify the common law presumption of *pater est quem nuptiae demonstrant* – which applied to all fathers.²³⁵ The court emphasised how important it is to allow parties in a contested divorce action to testify on all matters raised for determination in the divorce action, such as the current case on the husband’s paternity and parental responsibilities and rights.²³⁶ Moreover, the court concluded that it was inappropriate to bring an application under section 28 of the *Children’s Act*, where a divorce action contemplated in section 1 of the *Divorce Act* was still pending.²³⁷ The court ruled that the first applicant was identified as the child’s biological father by paternity. Thus, he was eligible to acquire the full parental responsibilities and rights of the child (section 21(1)(b)).²³⁸ All other enquiries regarding the first applicant satisfying the requirements of section 21(1)(b) were referred to the divorce court in the pending divorce action.²³⁹

²³⁵ *BR v TM*:par. 14. “Not only would this interpretation be inconsistent with the common law presumption referred to above, but it would also imply that married fathers would first have to prove biological paternity before they could acquire parental responsibilities and rights in terms of the section. The logical corollary of this is that all mothers too, would have to prove biological maternity before they can acquire parental responsibilities and rights in terms of s 19 of the *Children’s Act*, as that section also refers specifically to “biological” mothers. Thus on a proper reading, s 20 of the *Children’s Act* must be interpreted as conferring parental responsibilities and rights to married fathers from the moment of the birth of the child. In other words, a married father will automatically have parental responsibilities and rights over a child, born during the marriage, from the moment of his or her birth – and would not have to prove biological paternity first.”

²³⁶ *BR v TM*:par. 18.

²³⁷ *BR v TM*:par. 21. “Where the issues of paternity and parental responsibilities and rights are raised in a divorce action in the High Court, those issues should not be contemporaneously raised in application proceedings, particularly in matters concerning the minor or dependent children of the marriage, because this will fetter the discretion of the court in the divorce proceedings to hear evidence concerning the child, and decide the issue in the best interests of the child.”

²³⁸ *BR v TM*:par. 32.

²³⁹ *BR v TM*:par. 33.

3.2.2.1.4 VN v MD²⁴⁰

This case dealt with parenting plans. VN (the mother) and MD (the father) were the biological parents of a minor child over whom they shared parental responsibilities and rights in accordance with section 21 of the *Children's Act*. As per section 33 of the Act, a parenting plan was agreed on by the parents in February 2014 and was made an order of court, in terms of which the child was placed in the primary care of the appellant (the mother). However, the father was dissatisfied with the rights of contact/access that was agreed on in the parenting plan and sought an order to have the plan reviewed by the Children's Court, where the presiding magistrate made a revised parenting plan with increased access/contact an order of court in 2015. The mother lodged an appeal against this decision in the High Court.

Eksteen J expressed dissatisfaction about the record of proceedings in the lower court, specifically by stating that “[t]he record of evidence is of no assistance at all and it certainly does not reveal any foundation for the order made”; that there was “a total absence of any reasoned judgment given by the court” and that “[i]n the present matter the court of appeal is left entirely in the dark as to the reasons which led the magistrate to come to the conclusions which she did.” The judge also identified other important failings in the magistrate’s considering of the evidence.²⁴¹

Over and above these problems, Eksteen J made two significant findings regarding section 34(5) of the Act that empowers a court to vary or terminate a parenting plan made an order of the court. The first is that the judge disagreed with counsel for the mother, who argued that this could only follow if all the parties to the original agreement applied to the court.²⁴² Therefore, such an application was permissible where only one party was dissatisfied with the order. Secondly, Eksteen J held that parties could only approach the court to vary an existing parenting plan once they have sought the services of a suitably

²⁴⁰ 2017 (2) SA 328 (ECG).

²⁴¹ VN v MD 2017 2 SA 238 (ECG); paras. 6-15.

²⁴² VN v MD 2017 2 SA 238 (ECG); par. 3.

qualified person (such as the family advocate or a social worker) and still failed to reach a mutual agreement during the process.²⁴³

3.2.2.1.5 *C v L (Children's Court) unreported case no 14/1/4-54/10 (10 February 2012)*

This case is discussed by Ramruch, who states that it was decided at the Newcastle Justice Centre and is, therefore, unreported. It is one of the only cases of which I am aware in which a biological parent's responsibilities and rights were terminated by section 28 of the *Children's Act*. The facts were the following, as summarized by Ramruch:

The applicant and the respondent had a three-year-old son. Their relationship lasted for two years, and they never married each other.²⁴⁴ Their separation came shortly after the applicant fell pregnant. The other factor contributing to the couple separating was that the applicant found out about the respondent's engagement with someone else. Moreover, the respondent was not pleased about the news of the pregnancy and pressured the applicant to have an abortion. Upon realising that the applicant had no intention of getting the abortion, the respondent became emotionally and psychically abusive towards the applicant.²⁴⁵

After the child was born, the respondent had a change of heart and would often visit the child in an attempt to start a parent-child relationship with him.²⁴⁶ The applicant became concerned when the respondent started to visit at unusual hours. Thus, she approached the Office of the Family Advocate to create a parenting plan. The respondent was not complying with the plan and was also not contributing financially towards maintaining the child.²⁴⁷ The court ordered a new report that the family advocate would devise, which would afford the respondent additional visitation rights.²⁴⁸ This new report was ordered in court, and a provisional date was provided to assess whether the respondent was complying.

²⁴³ VN v MD 2017 2 SA 238 (ECG):par. 22.

²⁴⁴ Ramruch:1.

²⁴⁵ Ramruch:1.

²⁴⁶ Ramruch:1.

²⁴⁷ Ramruch:1.

²⁴⁸ Ramruch:3.

The respondent breached the court order as he did not comply with the contact agreements.²⁴⁹ The family advocate recommended that the court terminate the respondent's parental responsibilities and rights.²⁵⁰ The respondent failed to attend court; therefore, the court ordered his parental responsibilities and rights to be terminated.

Ramruch reports that the court clarified that section 28 applications would not be granted lightly due to their drastic nature. This case is therefore important for that reason. Furthermore, the court held that although depriving a parent of his or her responsibilities and rights raised a constitutional issue, this could be done in the circumstances of the case because the emphasis was on a parent's responsibilities as opposed to his or her rights, and of course, provided that the child's best interests required doing so.²⁵¹

3.2.2.2 Divorcing (or divorced) parents

The case of *PD v MD*²⁵² ties up nicely with the discussion of *VN v MD*²⁵³ under a previous sub-heading. The core importance of this case is determining whether one parent can revise a parenting plan in the absence and without the other parent's consent, even if they are legally divorced. In this case, the two parties were previously married to each other and were divorced by an order of court on 1 March 2011.²⁵⁴ The respondent's minor child, AB, was not the applicant's biological child.²⁵⁵ During their marriage, the parties had a daughter, MD, who was now 12 years old.²⁵⁶ The parties entered into a consent paper, and the agreement was included in the final decree of divorce.²⁵⁷ The consent paper granted parental responsibilities and rights to the applicant in respect of AB, as provided for in section 22 of the *Children's Act*.²⁵⁸ The consent paper confirmed that the parties

249 Ramruch:3.
250 Ramruch:3.
251 Ramruch:3.
252 2013 1 SA 366 (ECP).
253 *PD v MD*.
254 *PD v MD*:par. 2.
255 *PD v MD*:par. 2.
256 *PD v MD*:par. 2.
257 *PD v MD*:par. 2.
258 *PD v MD*:par. 3.

were co-holders of parental responsibilities and rights in respect of both AB and MD.²⁵⁹ The parties also agreed to share these parental responsibilities and rights according to a parenting plan they agreed on, which was attached to the consent paper.²⁶⁰

According to the parenting plan, the children primarily resided with the respondent, and the applicant enjoyed contact with them.²⁶¹ The applicant lodged an application seeking an order that instructed the respondent to cooperate in appointing a clinical psychologist.²⁶² The appointment of the clinical psychologist would assist in conducting and making recommendations in relation to the two minor children.²⁶³ The relief sought was framed in two parts. In part A of the notice of motion, the assessment aimed to allow the psychologist to make recommendations in terms of contact and residency arrangements pertaining to the children.²⁶⁴ Part B aimed to have the parenting plan amended regarding the residency and contact agreements.²⁶⁵ Should it happen that facilitated consensual resolution was unsuccessful, the appointed facilitator should be vested with powers to make binding decisions in relation to the dispute in the children's best interests.²⁶⁶

Counsel for the respondent contended that the *Children's Act* did not envisage a unilateral amendment of the terms of a parenting plan, especially as conceived in relation to the dispute resolution mechanism in part B.²⁶⁷ Regarding the appointment of a psychologist, the respondent argued that there was no proper case for doing so and that having such granted would not be in the best interests of the minor children.²⁶⁸

²⁵⁹ PD v MD:par. 3.

²⁶⁰ PD v MD:par. 3.

²⁶¹ PD v MD:par. 3.

²⁶² PD v MD:par. 4.

²⁶³ PD v MD:par. 4.

²⁶⁴ PD v MD:par. 4.

²⁶⁵ PD v MD:par. 4.

²⁶⁶ PD v MD:par. 4.

²⁶⁷ PD v MD:par. 6.

²⁶⁸ PD v MD:par. 6.

The issue was whether it was competent to seek an amendment of the parenting plan as conceived in part B of the notice of intention.²⁶⁹ The respondent contended that section 34(5) of the *Children's Act* did not provide for a unilateral approach to court to change the terms of a parenting plan that had been entered into between the parties.²⁷⁰ Section 34(5) of the Act provides the following:²⁷¹

“(5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application —

- (a) by the co-holders of parental responsibilities and rights who are parties to the plan;
- (b) by the child, acting with leave of the court; or
- (c) in the child's interest, by any other person acting with leave of the court.”

It was argued that the phrase “by the co-holders” suggests that the co-holders of parental responsibilities need to jointly approach the court to have the parenting plan amended since the plan constituted a mutual agreement that had been concluded by the parties, which, in the absence of consensus, cannot be amended.²⁷² Contrary to section 34(5) of the Act, section 28 deals with the termination, extension, suspension or restriction of parental responsibilities and rights and provides that a co-holder may apply for such order.²⁷³ A co-holder's capacity to exercise parental rights and responsibilities independently of another co-holder is restricted by provisions of the Act (or any law) or an agreement.²⁷⁴ The agreement does not deprive the co-holder of such rights or the duty to exercise such responsibilities and rights.²⁷⁵ The Act conceived that the co-holders of parental rights and responsibilities must exercise these rights upon a mutual

²⁶⁹ *PD v MD*:par. 7.

²⁷⁰ *PD v MD*:par. 8.

²⁷¹ *Children's Act*:sec. 34(5)

²⁷² *PD v MD*:par. 9.

²⁷³ *PD v MD*:par. 9; *Children's Act*:sec. 28(3).

²⁷⁴ *PD v MD*:par. 17.

²⁷⁵ *PD v MD*:par. 17.

agreement.²⁷⁶ Although a parenting plan was not defined in the Act, section 33(1) provided that:

“The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.”

In terms of section 33(2):

“If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities in respect of the child.”

Where the co-holders of parental rights and responsibilities have agreed on a parenting plan to exercise such co-responsibility, the plan must comply with certain requirements.²⁷⁷ Firstly, the agreement must be in writing and either be registered (in the prescribed format) with the family advocate or an order made by the court.²⁷⁸ Section 34(5) should be read along with section 33.²⁷⁹ Section 33(2) does not restrict a court from intervening in cases where the co-holders have attempted to conclude a parenting plan but could not.²⁸⁰ Section 33(2) can, therefore, be relied on at any time when a co-holder is experiencing challenges in exercising parental responsibilities and rights, subject to the prerequisite that there should first be an attempt by the co-holder(s) to reach an agreement before approaching a court.²⁸¹

²⁷⁶ *PD v MD*:par. 17.

²⁷⁷ *PD v MD*:par. 22.

²⁷⁸ *PD v MD*:par. 23.

²⁷⁹ *PD v MD*:par. 25.

²⁸⁰ *PD v MD*:par. 25.

²⁸¹ *PD v MD*:par. 25.

Goosen J held that:

“The use of the definite article in section 34(5), as opposed to the indefinite article in section 28(3), does not suggest that it was intended in section 34(5) to limit variation or amendment of a parenting plan to those instances where the co-holders agree to such variation. Such an interpretation would give rise to an absurd result. Section 28 confers upon a co-holder of parental responsibilities and rights the right to seek the termination or restriction of the exercise of parental responsibilities and rights by a co-holder of such rights. That right is limited only by the requirement in section 33(2) that an attempt be made to first reach agreement before seeking the intervention of the court. Such an order may be sought even if the exercise of parental responsibilities is regulated by a parenting plan. Where the court grants such an order its effect will be to re-determine the exercise of such responsibilities and rights, effectively amending a parenting plan where such plan has been made an order of court.”

He also added that:

“I accordingly find that a co-holder of parental responsibilities and rights *is entitled to seek a variation or amendment of the terms of a parenting plan which has been made an order of court*, by way of application to a court for such order, provided that, prior to seeking the intervention of the court, a reasonable effort is made to reach agreement with the other co-holder(s) of such responsibilities and rights. *It follows that I am satisfied that the applicant is entitled to seek an appropriate amendment of the parenting plan.* I need not at this juncture consider whether the particular order sought may be made. It is sufficient for present purposes to conclude that seeking relief is not precluded by the terms of section 34(5) of the Act.”

In determining whether the applicant had managed to make out a case for the order sought in part A of the notice of motion, it was noted that at the time of the divorce being granted, he resided in Cape Town and was employed as the managing director of a company.²⁸² This position required him to travel abroad frequently. After the divorce, the applicant resigned from this company and secured a second home in Gqeberha

²⁸² PD v MD:par. 31.

(previously known as “Port Elizabeth”) to make contacting the children easier.²⁸³ The applicant had, on various occasions, attempted to resolve disputes between himself and the respondent regarding the children.²⁸⁴ This was done both directly and by way of mediation. However, he never succeeded in these efforts. Thus, he needed to approach the court to appoint a psychologist.²⁸⁵ The applicant alleged that he had numerous concerns about the respondent’s parenting of the children and the wellbeing of the children even before the divorce was finalised.²⁸⁶

Goosen J held that he did not consider it to be in the best interests of the children to have them subjected to psychological assessment simply because of the dispute between the parents and without there being any substantial grounds upon which it had been suggested that the current parenting plan does not serve the interests of the children.²⁸⁷ Moreover, he held that although the parents’ versions indicated conflict between them, having the parenting plan revisited was unnecessary. There were insufficient attempts to resolve these disputes, and they did not relate to “critical decisions”. As a result of this, an assessment by a clinical psychologist was not required. In conclusion, the applicant’s application was dismissed with costs.²⁸⁸

3.2.2.3 *Related legal principles – concurrent jurisdiction of High Courts*

The case of *FS v JJ*²⁸⁹ was discussed in Chapter 2 as it confirmed that an unmarried father living with the child’s mother in a permanent life partnership at the time of the child’s birth automatically acquires parental responsibilities and rights regarding that child. However, this case is also important because it provides insights into the jurisdiction of

²⁸³ *PD v MD*:par. 31.
²⁸⁴ *PD v MD*:par. 32.
²⁸⁵ *PD v MD*:par. 32.
²⁸⁶ *PD v MD*:par. 32.
²⁸⁷ *PD v MD*:par. 50.
²⁸⁸ *PD v MD*:par. 53.
²⁸⁹ 2011 (3) SA 126 (SCA).

the High Court when it comes to setting aside or suspending the operation of another High Court order.

In this case, the unmarried mother and father had lived together for more than a year when they were blessed with a daughter (C), born in early 2006. Two months later, the mother, who suffered from a congenital heart defect and underwent an operation on the same day their daughter was born, unfortunately, passed away.²⁹⁰ A legal battle ensued between the appellant (the biological father) and the first respondent (the maternal grandmother) regarding who would acquire care and guardianship of C.²⁹¹

Shortly after her mother's death, C was taken out of the appellant's care by her grandparents. They then instituted proceedings in the Children's Court to be awarded care and guardianship of C. When this matter was finalized two years later, C lived with them for two years. Meanwhile, the appellant brought an urgent application in the Northern Cape High Court for a declaratory order in terms of section 21 of the *Children's Act* (which had come into operation on 1 July 2007) confirming his full parental rights and responsibilities regarding his child.²⁹² However, the application was postponed. A continuous back-and-forth of applications by both the appellant and the first respondent followed in the two jurisdictions in question. For example, Lacock J in the Northern Cape High Court eventually managed to make an agreement between the parties and an order of the court. Upon further extension of this order, the child started living with her father and stepmother without interruption.²⁹³ However, the first respondent then applied to the Northern Cape High Court, leading to Kgomo J awarding all parental responsibilities and rights to herself and her husband with "reasonable" access for the appellant that was to be determined in accordance with recommendations made by the psychologists of the respective parties.²⁹⁴ (The Supreme Court of Appeal described this finding as "completely

²⁹⁰ *FS v JJ:par. 1.*

²⁹¹ *FS v JJ:par. 2.*

²⁹² *FS v JJ:par. 10.*

²⁹³ *FS v JJ:par. 15.*

²⁹⁴ *FS v JJ:par. 16.*

at odds” with previous orders of the High Courts in the Northern Cape and the Western Cape).²⁹⁵ During this time, both parties lodged further applications for leave to appeal, a variation order, a supplementary affidavit, and an order by the respondent holding the appellant in contempt of court. On appeal to the SCA, what needed to be determined was:²⁹⁶ (1) the best interests of the child; (2) the rights of unmarried fathers; (3) whether the Western and Northern Cape High Courts had concurrent jurisdiction during the time they made those respective orders; and (4) the extent of rights in respect of children when it came to the grandparents.

Regarding the jurisdiction of the two High Courts, Lewis JA confirmed that although one High Court did not have the jurisdiction to alter or set aside an order of another High Court, it still had the power to act in the child’s best interests by making any order necessary to protect the child. She concluded that:²⁹⁷

“That said, I would caution against a practice of forum-shopping, even in cases concerning disputes over parental rights and responsibilities. High Courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. And as a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests change over time, the court that made the initial order should be approached for a variation.”

Having thus set out the applicable principles, the SCA concluded that it was clearly in C’s best interests to continue living with her father (S), stepmother and her younger half-brother.²⁹⁸

²⁹⁵ *FS v JJ:par. 3.*

²⁹⁶ *FS v JJ:par. 5.*

²⁹⁷ *FS v JJ:paras. 36-38.*

²⁹⁸ *FS v JJ:paras. 49--53.*

3.2.2.4 Summary of applicable legal principles

It cannot be emphasised enough just how important children's rights are. We have seen how an unmarried father's parental responsibilities and rights differ. *Ex Parte Sibisi* highlighted how little provision was made for "guardianship". Although *GM v KI* could not grant an order terminating only the *rights* of a parent over a child, it was seen that if the legislature could be more clear about broadening the limitations, the courts would more easily be able to assist parents in need of the granting of such orders.

There is no such thing as a perfect parent, but the *Children's Act* does not negotiate on the kind of treatment a child or children should be exposed to; this is limited to not only biological parents but also grandparents who want to play an active role in the lives of their grandchildren. However, grandparents cannot expect to receive first preference over the biological parent when it is evident that living with their parent will be in the child's best interests. *FS v JJ* shed insight into this instance. In this case, it was also seen that different divisions of the High Court need to respect each other's orders. Should a litigant want to overturn a decision made by a High Court in a different region, *FS v JJ* provides that it is best to approach the original court for an order of variation.

3.3 SELECTED ISSUES THAT HAVE ARISEN IN DIVORCE LAW THAT MAY BENEFIT FUTURE COURTS DEALING WITH THE POSSIBLE JUDICIAL INTERFERENCE WITH THE PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED PARENTS

3.3.1 Introduction

Judicial interference with parental responsibilities and rights is a regular feature of divorce law. Section 6(3) of the *Divorce Act*²⁹⁹ allows a court in which a divorce action is instituted

²⁹⁹ 70/1979. Section 6(3) provides:

"(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the

(namely a High Court or a Regional Division of the Magistrates Court)³⁰⁰ to “make any order that it deems fit” regarding the maintenance of a dependent child of the marriage, the guardianship or care of a minor child, or contact with such a child. This could include an award of sole care or guardianship. (It should be noted that section 6(3) still makes use of the old terminology of “custody” and “access”). Section 8(1) of the Act allows a court to rescind, suspend or vary such an order if there is a sufficient reason.

It is not possible in a study of this nature to consider all the possible ways in which judicial interference with parental responsibilities and rights may occur during or after divorce.³⁰¹ For this reason, only two specific examples will be considered. The first is the possibility of an order for joint care being awarded. This example is chosen because there is a suggestion in recent case law (*EMD v MP*)³⁰² that the principles in divorce law may also apply where joint care is at issue where unmarried parents are involved. The second is case law dealing with the possible restriction of a parent's parental responsibilities and rights based on that parent's sexual orientation. It is hoped that considering these issues may guide future courts that may need to deal with them in the context of unmarried parents.

3.3.2 Joint custody or care orders

3.3.2.1 *Kastan v Kastan*³⁰³

The case deals with an application for the incorporation of the terms of a consent paper in a divorce order. In this case, the parties were divorced on 7 September 1984. They had three beautiful girls, aged eight, six and four.

power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent”.

³⁰⁰ *Divorce Act*.sec. 1 definition of “court”.

³⁰¹ For a comprehensive discussion of the position of children at divorce, see Heaton & Kruger 2015:171–192.

³⁰² [2021] ZAGPPHC 740 (2 November 2021).

³⁰³ 1985 3 SA 235 (C).

The main reservation was that although section 6(3) of the *Divorce Act* permits such orders due to its broad terms, orders for joint custody are scarce.³⁰⁴ The custody of the children involves daily decisions and decisions of a more permanent duration. It would certainly be disastrous to entrust divorced parents with joint decision-making in a divorce matter that was preceded by disharmony and acrimony.³⁰⁵ Accordingly, King AJ required substantial evidence to be placed before him to support such an order.³⁰⁶

Following the reservations above, the court agreed to the inclusion in a divorce order of a consent paper that would provide for the joint custody of the three children. The factors considered were that the parties were competent and experienced. They equally bonded with the children, who loved them so much, and the parents reciprocated. The children were satisfied with the arrangement, which the parents were more than willing to accept and implement – considering how it was in the children’s best interests. Also, it was significant that the relationship between the parents had improved in the six months since their divorce. This improvement had benefitted the children, who had become accustomed to their joint exercising of custody.³⁰⁷

In addition to his judgment, King AJ held that:³⁰⁸

“The alternative to an acceptance of the proposed arrangement is protracted litigation which can only have a destructive and polarising effect on the parties with a correspondingly adverse effect on the children. The prognosis is good, according to the experts. They have told me that this sort of arrangement is being resorted to with greater frequency overseas, more particularly in the United States of America and the United Kingdom, with marked success and that joint custody of children is more and more being regarded by experts in the field as a means of ensuring the continued relationship of both parents with their children. In all the circumstances I am satisfied that in this

³⁰⁴ *Kastan v Kastan*:236C-D.

³⁰⁵ *Kastan v Kastan*:236E-F.

³⁰⁶ *Kastan v Kastan*:236F.

³⁰⁷ *Kastan v Kastan*:236H-237B.

³⁰⁸ *Kastan v Kastan*:237B-D.

particular case it is in the interests of these children that I should make an order in terms of the consent paper and I do so.”

3.3.2.2 *Reasons for and against joint care*

In *V v V*,³⁰⁹ in an action for divorce and ancillary relief, the husband (plaintiff) sought an order for sole custody of the two children born of the marriage.³¹⁰ The wife (defendant) was involved in a lesbian relationship.

In his application, the plaintiff stated that he was prepared to permit the defendant only supervised access to the children, with a request that unsupervised access be granted only in cases where a psychiatrist certified that it was in the best interests of the children that the defendant should gain such access to the children and that the access is subject to the condition that there will be no third party who sleeps under the same roof as the children and the defendant.³¹¹ In addition to the plaintiff’s reasons for those mentioned above, he also wanted sole custody because he argued that the plaintiff still suffered from a condition known as “borderline personality disorder”.³¹² In response to this, the defendant contended that the condition was a result of a major post-traumatic stress situation.³¹³

As a result of the separation agreement, the parties had been exercising joint custody for two years. The agreement stated that the children would move between the plaintiff's and defendant's homes to allow them the chance to spend every week with each parent.³¹⁴ The defendant had no issue with an order of joint custody. According to the court,

³⁰⁹ 1998 4 SA 169 (C).

³¹⁰ *V v V*:189B-C.

³¹¹ *V v V*:189B-C.

³¹² *V v V*:189B-C.

³¹³ *V v V*:189B-C.

³¹⁴ *V v V*:189B-C.

children's rights were no longer restricted to the common law. Still, they had also been established in section 28 of the *Constitution* in various conventions.³¹⁵

Foxcroft J proceeded to engage on the question of joint custody by referring to English and Irish law. In the English case of *Dipper v Dipper*³¹⁶, Ormrod LJ had opined that:

“It used to be considered that the parent having custody had the right to control the children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing, or any other major matter in their lives, that disagreement has to be decided by the Court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.”

Ormrod LJ added that:³¹⁷

“The basis of the Judge's order giving custody to the father and care and control to the mother was, in my view, unsound. In any event, these split orders are not really desirable. There are cases where they serve a useful purpose, but care has to be taken not to affront the parent carrying the burden day-to-day of looking after the child by giving custody to the absent parent.”

Foxcroft J confirmed that a joint custody order was made in the *Dipper* case since it seemed appropriate to the court that the father intended to play an active role in the lives of his children.

³¹⁵ V v V:176D.
³¹⁶ [1980] 2 All ER 722 (CA) at 731.

Also, in the Irish case of *Best v Wellcome Foundation Ltd and Others*,³¹⁸ the Supreme Court had held that:

“It was not possible either for a Judge of trial or for an Appellate Court to take upon itself the role of a determining scientific authority resolving disputes between distinguished scientists in any particular line of technical expertise. The function which a Court could and must perform in the trial of the case in order to acquire a just result was to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of that kind.”

After citing the *Kastan* case (discussed above), which had at that point been the only other case in the Cape Provincial Division where an order for joint custody had been granted, Foxcroft J proceeded to comment as follows on the factors which had been indicated as serious disadvantages of joint custody:³¹⁹

- “1. The first objection harked back to the patriarchal legal past of South Africa and assumed that there would always be disagreement requiring resolution by one authoritarian parent.
2. The second objection had little to commend it since there were many situations where the parents could not abide to each other any longer, but continued to love their children in the same way as they had always done.
3. The so-called 'clean-break' principle seemed to have little to do with the best interests of the child.
4. It was obviously beneficial for joint custodian parents to live reasonably near to each other.
4. The last objection, relating to the perception of an abdication by the Court of its responsibilities might apply in some situations where a decision was reached in the Motion Court in an unopposed trial with a consent paper, but it could have no application to a situation like the present one, where a month had been spent grappling with the respective merits of sole custody or joint custody.”

³¹⁸ V v V:179C/D-F.

³¹⁹ V v V:179A-F.

The court in the current case held that the defendant's conduct, by how she presented herself during the proceedings, revealed how she had grown emotionally.³²⁰ Therefore, it was not necessary to determine the nature of her medical condition. Moreover, the court stipulated that it was common cause during the trial that the question of the sexual orientation of the defendant was not considered a problem between the professionals called by the parties. Although expert witnesses felt that the defendant's sexual orientation did not present an issue, this did not necessarily mean that the plaintiff was not entitled to believe that it was an issue. He was entitled to protect his children against a situation he perceived as being harmful regarding the impact it could have on the children. The court had to determine whether the defendant's fear was sensible.³²¹ The plaintiff referred the court to *Van Rooyen v Van Rooyen*.³²² In this case, the court was required to make a judgment on what was considered as being morally normal and correct in terms of sexuality. The court held that:³²³

“Part of the difficulty in dealing with this question is that, in a custody case, one is only indirectly dealing with the parents' rights. The child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights. To my mind, the right which a child has to have access to its parents is complemented by the right of the parents to have access to the child. It is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future. Access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to children is likely to be.”

The court had to determine whether it could limit the mother's rights using the limitation clause, section 33(1) of the interim *Constitution*.³²⁴ Although there was nothing wrong with

³²⁰ V v V:186D-H.

³²¹ V v V:181G/H-I and 182D-E.

³²² V v V:189A-B.

³²³ V v V:189C-E.

³²⁴ V v V:191D-G.

a lesbian relationship, a child could be a victim of social recrimination from society, and it might be in the child's best interests to discriminate against the mother.³²⁵ The court decided that in some situations, a child needed to understand who has the final say and that they should not be allowed to play one parent off against the other. This approach was beneficial in resolving conflicts and deadlocks that may occur in families without requiring the need to go to court.³²⁶ Moreover, the court held that in regard to the present case, no one could foresee the future or that a clash between the parties would arise. The parties had maintained a level of respect for each other, and the court was hopeful that the parties would be able to continue their lives after the trauma of the past two years had dissipated.³²⁷ There also was not any evidence to show that the parents used the children as weapons of war to spite each other – the possibility of that would have made joint custody inconceivable.³²⁸ The court held that limiting the mother's access to her children because of her lifestyle would be unfair to both her and the children. As a result, the court held that there could be no better protection against that than allowing the children to continue living with both parents and to eventually judge for themselves whether the lifestyle of their parents was more harmful than the other.³²⁹

For these reasons, the court decided that joint custody was in the children's best interests.

3.3.2.1 *Krugel v Krugel*³³⁰

The applicant and the respondent were married on 2 January 1993 and divorced in 1996.³³¹ The parties remarried in December of 1997 and divorced on 19 March 1999.³³² The couple was blessed with two children in their first marriage – a girl aged ten and a boy now aged eight. A settlement agreement was made an order of the court before the

³²⁵ V v V:191D-G.

³²⁶ V v V:191G/H-J.

³²⁷ V v V:192A-E.

³²⁸ V v V:192A-E.

³²⁹ V v V:179C.

³³⁰ 2003 6 SA 220 (T).

³³¹ *Krugel v Krugel*:par. 1.

³³² *Krugel v Krugel*:par. 1.

second divorce, which granted the parties joint custody of the children.³³³ However, the applicant was only granted joint physical custody of the children.

At the time of the application, the applicant resided in Cape Town. He applied for sole custody of the minor children while tendering certain access to the respondent.³³⁴ The respondent opposed the application because no grounds allowed the court to deprive her of joint custody of the minor children.³³⁵ She accepted that the present right of residence should remain with the applicant but lodged a counter-application wherein she sought extended access to the children, considering that they now resided in Cape Town.³³⁶

Previously, the parties had disputes regarding the custody of the children.³³⁷ As a result, the applicant contended that they are not in a position to share joint custody and that for an order of joint custody, the parties would need to work together and act in the children's best interests.³³⁸ However, this was not possible because of the hostility between the parties.³³⁹ In addition, the applicant argued that the fact that he now resided in Cape Town made it impossible for the parties to exercise joint custody of the minor children.³⁴⁰ The respondent contended that physical distance should not necessarily deprive her of the right to joint custody.³⁴¹ In addition, she also argued that with respect to the facts, the applicant moved to Cape Town with the intention of frustrating the respondent's exercising her rights regarding the children.³⁴² She also stipulated how the applicant wanted to disempower her by applying for sole custody.³⁴³ Moreover, It was argued that

333 *Krugel v Krugel*:par. 2.
334 *Krugel v Krugel*:par. 3.
335 *Krugel v Krugel*:par. 4.
336 *Krugel v Krugel*:par. 4.
337 *Krugel v Krugel*:par. 5.
338 *Krugel v Krugel*:par. 5.
339 *Krugel v Krugel*:par. 5.
340 *Krugel v Krugel*:par. 6.
341 *Krugel v Krugel*:par. 6.
342 *Krugel v Krugel*:par. 6.
343 *Krugel v Krugel*:par. 6.

the applicant sabotaged the process of joint custody by using the fact that the process was not working as a reason to have the order changed.³⁴⁴

De Vos J referred to the case of *Schlebusch v Schlebusch*,³⁴⁵ where Mullins J had reviewed the history of joint custody matters and said:³⁴⁶

“Nevertheless the interest of the child still remains paramount in deciding questions of custody after divorce. Judges claim no expert knowledge which exclude the possibility of a wrong decision in determining custody issues. Furthermore, the views of the parents themselves and the children must be given due weight. However, at the risk of being labelled a legal traditionalist . . ., I view with concern any trend towards the granting of joint custody orders.”

The *Schlebusch* court could not agree with Professor Schäfer's assessment that joint custody would have the obvious additional advantage of increased parental cooperation.³⁴⁷ Instead, the court found joint custody likely to cause increased parental disagreement.³⁴⁸ De Vos J, however, agreed with the views in *V v V* as discussed above.³⁴⁹

De Vos J concluded that “[j]oint custody has been seen as potentially contributing to the promotion of children's rights and the equality between the sexes”. According to Heaton and Kruger,³⁵⁰ this “more liberal approach to granting joint care might be appropriate in view of parents' changing roles and responsibilities and the concept of children’s rights”.

³⁴⁴ *Krugel v Krugel*:par. 6.

³⁴⁵ 1988 4 SA 548 (E).

³⁴⁶ *Krugel v Krugel*:par. 12.

³⁴⁷ *Krugel v Krugel*:par. 12.

³⁴⁸ *Krugel v Krugel*:par. 12.

³⁴⁹ *Krugel v Krugel*:par. 16.

³⁵⁰ 2015:182.

Furthermore, De Vos J conceded that it has been contended that a child has the right to know and to be cared for by both his or her parents and to maintain personal relationships with both parents regularly.³⁵¹ The argument in this case was that the ongoing conflict and hostility between the parties indicated that it would be suitable for the children if one parent were given authority over them.³⁵² De Vos J pointed out that she did not see how there could be any improvements in the hostility between the parents should the joint custody order be changed to a sole custody order.³⁵³ Parents should be fit and proper, and both should be entitled to equal say to any decisions pertaining to how the child is raised.³⁵⁴ As a result, the court decided to retain the joint custody order because it would be in the children's best interests to do so.³⁵⁵ De Vos J granted the following order:³⁵⁶

“1. The applicant's application is dismissed with costs.

2. The respondent should have reasonable access to the children which access shall include the following:

(i) every short school holiday;

(ii) half of every long school holiday;

(iii) daily telephonic access;

(iv) access on one weekend every two months;

(v) an order that the applicant will be responsible for paying one half of the travelling costs of the children to the respondent H every

³⁵¹ *Krugel v Krugel*:par. 19.

³⁵² *Krugel v Krugel*:par. 21.

³⁵³ *Krugel v Krugel*:par. 21. Awarding a parent sole custody does not guarantee that there will not be any conflict between the parties.

³⁵⁴ *Krugel v Krugel*:par. 22.

³⁵⁵ *Krugel v Krugel*:par. 23.

³⁵⁶ *Krugel v Krugel*:par. 24.

second month;

(vi) access to the children every other long weekend.

2. The applicant is ordered to pay the costs of the application including the costs of the counter-application.”

In my view, there is no doubt that the principles in *Krugel* can also be applied to unmarried parents who separate and wish to continue exercising joint care over their children.

3.3.2.2 *EMD v MP*³⁵⁷

The case focuses on an application concerning the determination of the residency and care regime that will be most suitable for the interests of a minor child.³⁵⁸ An interim contact arrangement and contact residency were granted while waiting for the Family Advocate’s final report.³⁵⁹ However, neither of the parties approached the court to have the order report dated 7 October 2020 finalised before August 2021.³⁶⁰ Research has indicated that “shared residence can be a positive outcome where parents can co-operate and where all decisions are centred around the child’s needs.”³⁶¹

There is a link between paragraph 10 of the case, as mentioned above and the principles derived from case law and academic authority involving divorce. This case showed that joint care is not only a possibility where divorce is involved – it can also be possible where unmarried parents have separated – and that the case is, therefore, valuable for future courts that may have to decide possible joint care awards involving unmarried parents.

³⁵⁷ 2021 ZAGPPHC 740 (2 November 2021).

³⁵⁸ *EMD v MP*;par 1.

³⁵⁹ *EMD v MP*;par 1.

³⁶⁰ *EMD v MP*;par 2.

³⁶¹ *EMD v MP*;par 10.

It can, therefore, be concluded that the principles that apply to joint care orders in divorce law are equally applicable to unmarried parents who have separated.

3.3.2 Lessons from divorce law involving the possible restriction of a parent's post-divorce parental responsibilities and rights based on that parent's sexual orientation

A decision made by a court when awarding care to a parent or a guardian has an important impact on the further development of a child. It can be an influential factor in their future, not only in the short but also in the long term.³⁶² Several problems come to the fore when the issue of the sexual orientation of a parent becomes a factor for consideration when it comes to being granted care of the child.³⁶³ Feldhaus and Van Heerden state that although there have been positive and negative debates on the issue of homosexuality, conducted surveys (although they are dated) have shown that the majority of the population in South Africa is uncomfortable with the idea of homosexuality.³⁶⁴ They cite the example of the late Zulu King, Goodwill Zwelithini, who described homosexuality as being “un-African” and urged the community to believe that it confuses children.³⁶⁵ It has further been argued that traditional family values are being destroyed, more especially homes in which persons of the same sex live together, and as such, are not considered an appropriate environment to raise children.³⁶⁶

Nevertheless, in terms of restrictions placed on post-divorce parental responsibilities and rights, South African case law shows a development from a homophobic and judgmental approach to one that is in line with the Bill of Rights. Thus, *Van Rooyen v Van Rooyen* deals with post-divorce contact with minor children by a non-custodian parent (the mother) who was involved in a lesbian relationship and shared a house and bedroom with

³⁶² Feldhaus & Van der Heever 2013:250-251.

³⁶³ Feldhaus & Van der Heever 2013:252.

³⁶⁴ Feldhaus & Van der Heever 2013:252.

³⁶⁵ Feldhaus & Van der Heever 2013:252.

³⁶⁶ Feldhaus & Van der Heever 2013:252.

her partner (described by the court rather scornfully as “her associate”).³⁶⁷ Two minor children were born to her during her marriage to the respondent. The marriage was dissolved by a decree of divorce that included an order to the effect that the respondent was to have sole custody of the children. Six years later, the applicant applied for an order that defined her rights of access (as contact was still then called) to her children (a son, then aged eleven and a daughter, aged nine). However, the issues that arose in court were the applicant’s style of living, her activities, behaviour and attitude towards living, and anything else that was involved in the context of living with regard to lesbianism.³⁶⁸ The court was in no way disputing the applicant’s choice of lifestyle or her fitness as a mother but rather was concerned about the best interests of the children in terms of ensuring protection from any exposure to videos, articles, photographs and personal clothing which could, in turn, translate to the curiosity of lesbianism or homosexuality in the children when they slept at the applicant’s residence.³⁶⁹ In particular, Flemming DJP remarked as follows:³⁷⁰

The signals are given by the fact that the children know that, *contrary to what they should be taught as normal or what they should be guided to as to be correct* (that it is male and female who share a bed), one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment. That signal comes from the fact that they know the bedroom is shared. *It is detrimental to the child because it is the wrong signal.* I must add that the family advocate did not touch upon any part of this detriment to the child and for that reason I make no further reference in this context to the report. The wrong signals are given when, if that is true, the applicant wears male underclothes, apart from male apparel. The signals come when there are signs of emotional attachment, not only by kissing and hugging as counsel argues, but by the way of speaking, the words of endearment used, the manner in which there is a glance. It would take a very inexperienced person to be unable to recognise two young people who are fond of each other or who do have a relationship. *The third aspect is taking cognisance of the inadvisability of wrong signals: what to do about it.* Counsel for the applicant suggested an undertaking that there will be no sexual behaviour in the presence of the children. It is not quite clear what 'sexual behaviour' is intended to be. My impression is that

³⁶⁷ 1994 (2) SA 325 (W).

³⁶⁸ *Van Rooyen v Van Rooyen*:329E.

³⁶⁹ Heaton & Kruger 2015:186.

³⁷⁰ *Van Rooyen v Van Rooyen*:329H-330D.

this refers to kissing and hugging, as counsel explained at one stage. But I think, having regard to his alternative, this probably refers to much more closeness in terms of intimacy. *Quite clearly this is not acceptable.*

Flemming DJP, therefore, held that although the applicant had the freedom to choose and practice her lifestyle, the best interests of the children could not be served if the children were to be exposed to their mother's lesbian relationship.³⁷¹ The applicant's right of access was granted but subject to severe restrictions. These included that her partner did not share a bedroom with her when the children visited over weekends and that her partner vacated the residence completely when they visited the applicant during school holidays.³⁷² The applicant was also ordered "to take all reasonable steps and do all things necessary in order to prevent the children being exposed to lesbianism or to have access to all videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approval of lesbianism".³⁷³

The *Van Rooyen* judgement was delivered before the Bill of Rights came into operation, and it is clear from the above that the court made harsh and judgmental remarks as to the abnormality of homosexual/lesbian relationships.³⁷⁴ Thus, academics, such as Van Heerden *et al.*, rightly criticised judgment at the time³⁷⁵ and described it as "disturbing". Indeed, these authors pointed out that:³⁷⁶

In the absence of any empirical evidence to support the conclusion that children raised by gay or lesbian parents are exposed to any greater dangers or are more likely to suffer from psychiatric, social gender-identity or other disorders than children raised by heterosexual partners in comparable circumstances, *this judgment smacks of blatant homophobia* and is, it is submitted,

³⁷¹ Heaton & Kruger 2015:186.

³⁷² Heaton & Kruger 2015:186.

³⁷³ *Van Rooyen v Van Rooyen*:331E-332C.

³⁷⁴ Heaton & Kruger 2015:186.

³⁷⁵ 1999:544.

³⁷⁶ Van Heerden *at al.* 1999:545.

clearly in conflict with the now constitutionally entrenched human right to non-discrimination on the grounds of sexual orientation.

Although the judgment in the *Van Rooyen* case was handed down during the pre-1994 era, this case has been under severe scrutiny – reasonably so. According to Robinson, the court decided to make a moral judgement on what was considered acceptable and normal when it came to the concern regarding homosexuality, in this case, the mother's.³⁷⁷ Moreover, the case was found to promote homophobic bias because most of its findings were centred around exaggerated stereotypes that perceived the community as being intolerant to these stereotypes and issues that generally pertain to an individual's sexuality.³⁷⁸

On the other hand, in *V v V*,³⁷⁹ it was held that the result of *Van Rooyen* deciding on the standards of what is morally acceptable and normal and that homosexuality was not considered as such entailed that the case is inconsistent with and infringes on a person's right to equality as section 9(3) provides that "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".³⁸⁰

*V v V*³⁸¹ involved the issue of joint custody between a divorced couple. After exercising such custody for the two years in which they had been separated, the plaintiff (father) sought sole custody of their two minor children with very limited rights of access to the defendant (the mother).³⁸² In his application, he stated that he was prepared to allow the defendant access to the children on the condition that the access would be supervised

³⁷⁷ Robinson 2005:109.

³⁷⁸ Mosikitsana 1996:118.

³⁷⁹ 1998 4 SA 169 (C).

³⁸⁰ *Constitution*:sec. 9(3).

³⁸¹ 1998 4 SA 169 (C).

³⁸² *V v V*:189B-C.

and occur at his residence.³⁸³ He further contended that the defendant could only be granted unsupervised access if a psychiatrist certified that it was in the children's best interests. Furthermore, any access would be made subject to the condition that the defendant would not have a third person sleep in the same room when the children come and visit.³⁸⁴ The applicant's reasoning for this was that the defendant was involved in a lesbian relationship and that, according to him, she still suffered from a condition commonly known as 'borderline personality disorder'.³⁸⁵ The defendant countered that the condition was a result of a major post-traumatic stress situation regarding her past that had been rekindled after she discovered that one of her children was being abused (as she had been as a child). She maintained that she had recovered from her adverse mental condition.³⁸⁶

The children's best interests had to be determined. The main issues before the court were, therefore, whether an order for joint custody should be made (that would allow this arrangement originally made between the parents to continue) and whether the mother's rights of access could be limited due to her sexual orientation. Regarding the first issue, it was mentioned above³⁸⁷ that the court analysed national and international case law and academic opinions in deciding whether, and if so, a joint custody order would be appropriate. The court concluded that joint custody should be awarded because, in the past, custody of young children was automatically granted to mothers despite them being able to care for the children properly. Instead, the current position advocates for fathers to be eligible to acquire sole or even joint custody over the child.³⁸⁸ Additionally, custody should not be given because of assumptions or preconceived notions. Instead, courts must thoroughly investigate whether a parent or guardian will uphold the best interests of a child in the highest regard.³⁸⁹

383 V v V:189B-C.

384 V v V:189B-C.

385 V v V:189B-C.

386 V v V:189B-C.

387 See V v V 1998 4 SA 169 C as discussed in terms of joint care orders above.

388 V v V:191D-G.

389 V v V:191D-G.

However, for current purposes, the more important issue is the court's findings as to whether a divorcing parent's rights of access could be limited because of the parent's involvement in a same-sex relationship. In this regard, Foxcroft J referred to Flemming DJP's judgment in *Van Rooyen* but cautioned that this judgment was delivered before the advent of constitutional democracy on 27 April 1994. Foxcroft J pointed out that Flemming J had made a "moral judgment" based on his personal views as to the "abnormality" of homosexuality; this was something which could not be done because of the equality clause in the *Constitution*. However, Foxcroft J cautioned that as much as this was an important issue:

Part of the difficulty in dealing with this question is that, in a custody case, *one is only indirectly dealing with the parents' rights*. The child's rights are paramount and need to be protected, *and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights*. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights. To my mind, the right which a child has to have access to its parents is complemented by the right of the parents to have access to the child. *It is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future*. Access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to children is likely to be.

The judge also emphasized that the defendant was considered a good and fit mother, that her children were not in the least embarrassed by her same-sex relationship, and it would be unfair on both her and the children if she were only allowed to exercise contact in the position of a visitor to her ex-husband's home; and that the children themselves should continue to be able to live with both parents to judge each parent's lifestyle for

themselves.³⁹⁰ Therefore, Foxcroft J held that a joint custody order was in the children's best interests.³⁹¹

One of the most prominent features of restructuring an individual's family life after a separation is prioritising the time shared among both parents to maintain the parent-child relationship.³⁹² Despite separation and divorce, there is a new wave of involvement from more fathers. They play a much more active role in the continuous upbringing of their children despite the nature of the relationship that exists or does not exist between the parents.³⁹³ As emphasized in the more recent case of *Ex parte CJD and Others*,³⁹⁴ the case of *V v V* makes it clear that although the constitutional rights of a parent may be at issue – for example, when such a parent faces discrimination from society based on his or her sexual orientation – these rights must be considered, but will if necessary be compromised if the best interests of the child(ren) require this.

In my opinion, there can be no doubt that the *V v V* case is the more acceptable in our constitutional democracy and that its approach should be followed by courts who may be called upon to decide this issue in the context of unmarried parents.

3.4 CONCLUSION

This chapter has considered the legal position pertaining to the judicial interference with parental responsibilities and rights in terms of the *Children's Act*. Various cases were discussed that have interpreted the applicable provisions of the *Children's Act*.

One of the most important of these is *GM v KI*³⁹⁵, which showed that an unmarried father could acquire parental responsibilities and rights simply by consenting to be identified as

³⁹⁰ *V v V* 189B-C and 192B-D.

³⁹¹ *V v V* 192G-H.

³⁹² Nilsen *et al.* 2022:1351.

³⁹³ Augustijn 2021:614.

³⁹⁴ 2018 3 SA 197 (GP);par 10. See also *R v H and Another* 2006 5 SA 535 (C);par 10.

³⁹⁵ 2015 3 SA 62 (GJ).

the child's father (this conclusion was questioned in chapter two). It was also seen from this case that it is impossible to obtain an order removing all of a parent's rights while leaving only that parent's responsibilities in place. This was confirmed in *SJF v TV*.³⁹⁶ Furthermore, suspending a parent's responsibilities and rights regarding a child could not be done indefinitely. Matthias and Zaal's³⁹⁷ comments on this case indicate that the latter issue needs to be clarified in the *Children's Act*. They also point out that the mother's evidence was perhaps considered too uncritically, which I believe is an issue that should be addressed because it does happen that one parent may try and get back at the other by vicariously causing a wedge between the child and the other parent, in hopes that the child will perceive her the former as the better parent.

The case of *C v L* (Children's Court), unreported case no 14/1/4-54/10 (10 February 2012), was also discussed, where *a parent's parental responsibilities and rights* were terminated via the application of section 28 of the Children's Act. The court made it clear that this will not be done lightly. This is the only South African case I am aware of where this was done. (As will be seen in the next chapter, there are various cases in English law where this has occurred).

This chapter also sought to investigate whether the legal principles of joint care orders at divorce may apply to unmarried parents. In this regard, it was shown that they could be, especially based on the case of *EMD v MP*,³⁹⁸ which indicates that a joint care order can be made in divorce cases and where unmarried parents have separated.

The issue of a(n) (unmarried) parent's sexual orientation was also considered. From the applicable case law in the divorce context (such as *V v V*),³⁹⁹ it is clear that a(n)

³⁹⁶ [2021] ZAWCHC 90 (28 April 2021):par. 21.

³⁹⁷ 2016.

³⁹⁸ 2021 ZAGPPHC 740 (2 November 2021).

³⁹⁹ 1998 4 SA 169 (C).

(unmarried) parent's sexual orientation cannot be used to restrict or interfere with his or her parental responsibilities and rights. A parent's constitutional rights may need to be compromised if the child's best interests demand this.

CHAPTER FOUR:

THE JUDICIAL INTERFERENCE WITH "PARENTAL RESPONSIBILITY" IN ENGLAND: LEGISLATIVE PROVISIONS AND A SELECTION OF CASE LAW RELATING TO THE OUTRIGHT TERMINATION OF PARENTAL RESPONSIBILITY

4.1 INTRODUCTION

In this chapter, a comparative study of English law will be undertaken, aiming to ascertain whether there are any lessons to be learned from this jurisdiction that could benefit South African law. The English *Children's Act* 1989 provides the statutory basis for courts to interfere with issues on the welfare of children. This chapter will, therefore, entail an in-depth analysis of sections 1-7 of the *Children's Act*, 1989 – particularly sections 1, 2, 3, and 4 - and the legal principles applicable to the restriction and/or loss of “parental responsibility”. This chapter will also consider case law relating to how a parent's responsibilities are terminated, primarily in the context of unmarried fathers.

4.2 THE CONTENT OF THE RELEVANT STATUTORY PROVISIONS IN TERMS OF THE *CHILDREN'S ACT*, 1989

According to section 1 of the *Children's Act* 1989:

1 Welfare of the child

"(1) When a court determines any question with respect to -

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to —

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge a section 8 order, and

the making, variation or discharge of the order is opposed by any party to the proceedings;
or

(b) the court is considering whether to make, vary or discharge [a special guardianship order or] an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

(6) In subsection (2A) "parent" means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned —

(a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(7) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother) " .

According to section 2 of the *Children's Act* 1989, the child's unmarried biological mother automatically has parental responsibility over the child.⁴⁰⁰ Meanwhile, section 2(1)(a) of the Act provides that the father automatically acquires parental responsibility for the child if he is married to or deemed to be married to the mother of the child when the child is born.⁴⁰¹ If the parents divorce, neither one loses the right to parental responsibility.⁴⁰² Section 2(1A) of the *Children's Act* 1989 makes provision for a second female parent, in that the second female parent automatically has parental responsibility for her child if she is either married or in a civil partnership with the mother of the child at the time the embryo or the sperm and eggs were placed in the mother of the child, or during the time of her artificial insemination.⁴⁰³ However, section 2(1A) of the Act denies the acquisition of parental responsibility if it is clearly shown that she did not give any consent to the placing of the embryo in the mother (or of the sperm and eggs) or of her artificial insemination.⁴⁰⁴

⁴⁰⁰ *Children's Act* 1989. sec: 2.

⁴⁰¹ *Children's Act* 1989. sec: 21)(a).

⁴⁰² Jarrett 2020:7.

⁴⁰³ Jarrett 2020:7. *Children's Act* 1989. sec: 4(1)(a).

⁴⁰⁴ Jarrett 2020:7.

The position of unmarried fathers (with regards to changes brought in from 1 December 2003) is that, at the time of the child's birth, unmarried fathers automatically acquire parental responsibility for the child if they are registered on the child's birth certificate.⁴⁰⁵ However, these changes do not apply to births registered before 1 December 2003.⁴⁰⁶ Once the formalities that are required by section 10A of the *Births and Deaths Registration Act* 1953 are complied with, an unmarried father (or second female parent who is not married or in a civil partnership with the mother of the child) can acquire parental responsibility by re-registering the birth of the child to include the father or second female parent on the birth certificate – and in the case of unmarried fathers, this also relates to a child/children born before 1 December 2003.⁴⁰⁷ Alternatively, the unmarried father or second parent can enter into a "parental responsibility agreement" with the child's mother, or they can successfully apply to the court for an order granting them parental responsibility.⁴⁰⁸

In terms of section 3 of the *Children's Act* 1989, "parental responsibility" is defined as:

3 Meaning of "parental responsibility"

"(1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities, and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers, and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

⁴⁰⁵ Jarrett 2020:7.

⁴⁰⁶ Jarrett 2020:8.

⁴⁰⁷ *Children's Act* 1989. sec: 4.

⁴⁰⁸ *Children Act* 1989. sec: 4-4ZA.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.

(5) A person who—

(a) does not have parental responsibility for a particular child; but

(b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare".

This, in turn, permits the parties with parental rights to make decisions relating to the child's schooling, religion, medical decisions and names.⁴⁰⁹ In situations where more than one party has parental responsibilities, it is important to remember that parental responsibility is shared equally – meaning that no party has more important parental responsibilities.⁴¹⁰ Therefore, decisions need to be made jointly by the two parties. The Children's Act 1989 provisions can still be applied to an individual who loves and cares for the child and has grown a strong bond with the child but does not have parental responsibilities.⁴¹¹

The most prominent duty of a parent with parental responsibilities is to provide a safe home for the child and to protect and maintain the child.⁴¹² Suppose a parent has parental responsibilities but does not live with the child. In that case, such a parent is not

⁴⁰⁹ Family Law Group 'When can parental responsibility be removed?', <https://www.familylawgroup.co.uk/site/blog/flg-news/when-can-parental-responsibility-be-removed> (accessed on 18 July 2022).

⁴¹⁰ Family Law Group 'When can parental responsibility be removed?', <https://www.familylawgroup.co.uk/site/blog/flg-news/when-can-parental-responsibility-be-removed> (accessed on 18 July 2022).

⁴¹¹ Jarrett 2020:4.

⁴¹² Gov.UK "Parental rights and responsibilities", <https://www.gov.uk/parental-rights-responsibilities> (accessed on 27 May 2022).

automatically granted the right to spend time with the child. However, the other parent still needs to keep the former informed and include him or her when making important decisions about the upbringing and development of the child.⁴¹³ The right to parental responsibility is not constant: it diminishes over the years as the child matures from a minority to becoming a major with sufficient knowledge and understanding that their decisions can sometimes have serious consequences. Parental responsibility comes to an end when the child turns eighteen.⁴¹⁴

4.2.1 Additional relevant statutory provisions

Articles 1 and 3 of Schedule 3D of the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children provide the following:⁴¹⁵

Article 1

- (1) The objects of the present Convention are –
 - (a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
 - (b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
 - (c) to determine the law applicable to parental responsibility;
 - (d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
 - (e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purpose of this Convention
- (2) For the purposes of this Convention, the term "parental responsibility" includes parental authority, or any analogous relationship of authority determining the rights, powers and

⁴¹³ Gov.UK "Parental rights and responsibilities", <https://www.gov.uk/parental-rights-responsibilities> (accessed on 27 May 2022).

⁴¹⁴ Jarrett 2020:4.

⁴¹⁵ Schedule 3D of the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 3

The measures referred to in Article 1 may deal in particular with –

- (a) The attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- (b) Rights of custody, including rights relating to the care of the person of the child and, in particular,
- (c) the right to determine the child's place of residence, as well as rights of access including the right to
- (d) take a child for a limited period of time to a place other than the child's habitual residence;
- (e) (c) guardianship, curatorship and analogous institutions;
- (f) (d) the designation and functions of any person or body having charge of the child's person or
- (g) property, representing or assisting the child;
- (h) (e) the placement of the child in a foster family or in institutional care, or the provision of care by
- (i) kafala or an analogous institution;
- (j) (f) the supervision by a public authority of the care of a child by any person having charge of the
- (k) child;
- (g) the administration, conservation or disposal of the child's property.

4.2.2 The removal of parental responsibilities and applicable case law

The laws governing the removal and termination of parental responsibility are quite intricate.⁴¹⁶ The case law pertaining to the removal of these parental responsibilities illustrates how courts can grant an order for the removal or termination of these responsibilities in cases where it is important to prioritise the child's welfare and provide the child with protection from physical or emotional harm.⁴¹⁷

⁴¹⁶ Family Law Group 'When can parental responsibility be removed?', <https://www.familylawgroup.co.uk/site/blog/flg-news/when-can-parental-responsibility-be-removed> (accessed on 18 July 2022).

⁴¹⁷ Family Law Group 'When can parental responsibility be removed?'

The termination of parental responsibility has taken place because of various reasons, namely sexual abuse, murder, non-accidental injury, surrogacy, and sperm donation. However, leading case law reveals how the removal of parental responsibility has been ordered by courts, specifically in instances where unmarried fathers had acquired the responsibility.⁴¹⁸ A brief discussion of some of these cases follows.

4.2.2.1 *Re P (Terminating parental responsibility)*⁴¹⁹

The case deals with a father who inflicted grievous bodily harm on the child. At only nine weeks, the minor child (P) was admitted to the hospital after she suffered serious injuries that included fractures to her ribs, skull, and leg.⁴²⁰ Shortly after the minor child was discharged from the hospital, she was placed into foster care. The child's parents entered into a parental responsibility agreement on the same day their minor child was discharged, and the two denied any responsibility for the injuries that the child suffered.⁴²¹

In the end, the father was charged with inflicting injuries to the child, and he eventually pleaded guilty to numerous offences of having caused grievous bodily harm. As a result, he was imprisoned. The mother lodged an application to have the parental responsibility agreement terminated and for an order stating that the father should not apply for contact or residence without being granted leave by the court.⁴²²

The court held that the application for the termination needs to be ruled by the principle advocating for the child's welfare and its importance. Moreover, the court stated that there is no way that the father could, in future circumstances, exercise parental responsibilities

<https://www.familylawgroup.co.uk/site/blog/flg-news/when-can-parental-responsibility-be-removed> (accessed on 18 July 2022).

⁴¹⁸ Family Law Group 'When can parental responsibility be removed?',

<https://www.familylawgroup.co.uk/site/blog/flg-news/when-can-parental-responsibility-be-removed> (accessed on 18 July 2022).

⁴¹⁹ 1994 WL 1061638 (1994).

⁴²⁰ 1994 WL 1061638 (1994).

⁴²¹ 1994 WL 1061638 (1994).

⁴²² 1994 WL 1061638 (1994).

in a manner that would benefit the child.⁴²³ Therefore, the court decided that it was best to prevent the father from lodging an application for contact or residence of the child because his application could also potentially unsettle the child's caregivers.

4.2.2.2 *Re DW (A Child) (Termination of Parental Responsibility)*⁴²⁴

In this case (also formally known as *CW v SG* [2013] All ER (D) 117 (Apr)), the two parties met and started a relationship in 2002. At this time, the mother already had five children aged between 7 and 1.⁴²⁵ She became pregnant again with D, born on 7 August 2004. The father's name appeared on D's birth certificate. At the end of 2005, the relationship between the parents became so unstable that they decided to separate.⁴²⁶ Subsequently, A and C (the mother's elder daughters), who were aged about ten and nine, informed their mother that the father had been sexually abusing them. However, they retracted the allegations they made shortly after this. The daughters then made the allegations again, and this time around, the police were informed. The girls were interviewed under the Achieving Best Evidence procedure. An arrest was made, and the father was charged with multiple offences that involved both girls.⁴²⁷

A consultant psychiatrist had to prepare psychiatric reports for the criminal proceedings.⁴²⁸ The psychiatrist found that the father had a history of depression and drug and alcohol abuse. Medical reports revealed that the father had alleged that a family member of his family had sexually abused him. The psychiatrist concluded that the father had not suffered from any kind of mental impairment.⁴²⁹ The criminal case went to trial on ten counts:⁴³⁰ "two counts of penetration, one of causing or inciting a child to engage in

⁴²³ 1994 WL 1061638 (1994).

⁴²⁴ 2013 WL 1563017 (2013).

⁴²⁵ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 2.

⁴²⁶ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 3.

⁴²⁷ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 3.

⁴²⁸ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 4.

⁴²⁹ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 4.

⁴³⁰ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 5.

penetrative sexual activity; two of having sexual activity with a child; two of causing or inciting a child to engage in sexual activity; and three sexual assaults". However, the father entered a guilty plea on the third day, right before the girls were scheduled to testify. A four-year prison sentence was imposed upon him as a result.⁴³¹ In the process of passing the sentence, the judge held:⁴³²

"When children are harmed in this way within a family, a grave breach of trust is always involved. However, the circumstances relating to C involve particularly despicable exploitation by you of the situation in which you found yourself. At the time when you sexually assaulted C, her mother was coping with the demands of your newborn son and suffering from depression. She was in no state to protect her daughters, which obviously provided you with opportunities to be alone with C."

It is quite evident that these attacks, which occurred over 20 months, caused both A and C to experience serious emotional harm.⁴³³ The mother was also profoundly impacted and began to hold herself responsible for the events. After that, she met and wed S, with whom she was at the time residing with the children.⁴³⁴ In July 2010, the father wrote from prison to the mother's previous attorneys, alluding to his parental rights concerning D and claiming that he wished to have contact with D but adding that he did not want any other connection with the family.⁴³⁵ The mother and her family left where they had been residing and relocated to a location unknown to the father. In June 2011, the father was released on licence. His licence expired on 24 June 2013 and prohibited any contact with D.⁴³⁶

The mother filed an application for an order terminating the father's request for parental responsibility on 16 July 2011. At the time of the hearing, the father stipulated that he was

⁴³¹ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 5.

⁴³² *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 5.

⁴³³ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 6.

⁴³⁴ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 6.

⁴³⁵ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 7.

⁴³⁶ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 8.

innocent of all the charges concerning A and C and stated that the sole reason he pled guilty was to spare the girls from having to provide evidence.⁴³⁷ It must be borne in mind that it is unusual to have the courts grant an order to terminate parental responsibility completely⁴³⁸ – reference can again be made to *Re P (Terminating Parental Responsibility)*.⁴³⁹ As will be recalled, the case dealt with unmarried parents of a child who had signed a parental responsibility agreement. At just nine weeks, the baby was admitted to hospital after suffering from serious injuries. This resulted in the baby being placed with foster parents.⁴⁴⁰ The father was charged with the offences in connection to the injuries suffered by the baby and was sentenced to a term of imprisonment. The mother lodged an application for an order to terminate the father's parental responsibility under section 4 of the *Children Act*.

In his judgment in *Re P*, Singer J held that:⁴⁴¹

"I start from the proposition that parental responsibility – both wanting to have it and its exercise – is a laudable desire which is to be encouraged rather than rebuffed. So that I think one can postulate as a first principle that parental responsibility once obtained should not be terminated in the case of a non-marital father on less than solid ground, with a presumption for continuance rather than for termination.

The ability of a mother to make such an application therefore should not be allowed to become a weapon in the hands of the dissatisfied mother of the non-marital child: it should be used by the court as an appropriate step in the regulation of the child's life where the circumstances really do warrant and not otherwise.

⁴³⁷ *DW (A Child) (Termination of Parental Responsibility)*, Re:paras. 9 and 10.

⁴³⁸ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 14.

⁴³⁹ [1995] 1 ELR 1048.

⁴⁴⁰ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 15.

⁴⁴¹ *Re P (Terminating Parental Responsibility)*:par. 1052.

I have been referred in outline to four authorities as to the circumstances in which a court will make an order for parental responsibility [here the learned judge identified the well-known authorities dealing with such applications].

Such applications for parental responsibility orders are governed by the considerations set out in section 1(1) of the Children Act, namely that the child's welfare is the court's paramount consideration. I can see no reason why that principle should be departed from in considering the termination of a parental responsibility order or agreement.

Key concepts to the consideration of the making of an order are evidence of attachment and a degree of commitment, the presumption being that other things being equal a parental responsibility order should be made rather than withheld in an appropriate case."

Additionally, in applying these principles to the case, Singer J stated that:⁴⁴²

"I have to say, notwithstanding the desirability of fostering good relations between parents and children in the interests of children, I find it difficult to imagine why a court should make a parental responsibility order if none already existed in this case. I think the continuation of a parental responsibility agreement in favour of the father in this case has considerable potential ramifications for future adversity to this child. I believe it would be a message to others that he has not forfeited responsibility, which to my mind it would be reasonable to regard him as having done. I believe that it might be deeply undermining to the mother and her confidence in the stability of the world surrounding (the child)."

Singer J concluded that:⁴⁴³

"I believe that there is no element of the band of responsibilities that make up parental responsibility which this father could in present or in foreseeable circumstances exercise in a way which would

⁴⁴² *Re P (Terminating Parental Responsibility)*:par. 1053.

⁴⁴³ *Re P (Terminating Parental Responsibility)*:par. 1054.

be beneficial for the child. I therefore conclude that it is appropriate to make an order as sought under section 4...bringing to an end the parental responsibility agreement entered into....”

Returning to the *DW* case, counsel for D's father (Miss Townsend) urged the court not to follow the case of *Re P's* as authority for the following reasons:⁴⁴⁴

1. It was an authority at first instance and dated to nearly twenty years before – which had been decided before the amendment of section 4, which was introduced by an Act of 2002. This provision states, "A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders." The father submitted that the amendment revealed how the importance of having parental responsibility for an unmarried father had become more acceptable since 1995. In these circumstances, the courts needed to be more wary about removing parental responsibility from the parents on whom the law had bestowed such a responsibility and a claim.
2. The father submitted that section 4(2A) is incompatible with articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the ECHR") because the discrimination it imposes on unmarried fathers is so intense that it infringes on a father's right to family life.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:

Right to respect for private and family life

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

⁴⁴⁴ *DW (A Child) (Termination of Parental Responsibility)*, Re: paras. 18, 19 and 20.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms deals with the prohibition of discrimination and stipulates that:

Prohibition of discrimination

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

3. The father contended that if *Re P* was still an authority on which courts could rely, it was distinguishable from the facts of the current case.

Justice Baker, however, held that:⁴⁴⁵

"Notwithstanding the articulate way in which Miss Townshend put her legal submissions, I am in no doubt that *Re P*, whilst not strictly binding on this court, *is a clear authority which points the way to be followed by the court considering its powers under what is now section 4(2A)*. Singer J held that there is a presumption that, once granted, parental responsibility should not lightly be withdrawn, that the burden of proof rests firmly with the applicant mother, and that, in considering such an application, the court should apply section 1 of the Children Act and give paramountcy to the child's welfare. Those principles seem to me to be unimpeachable. *Furthermore, I endorse Singer J's approach, when faced with an application to terminate parental responsibility, of considering the extent to which the well-established criteria for making parental responsibility orders would be satisfied*. I am not persuaded that the statutory changes introduced by the 2002 Act should be interpreted as narrowing the scope of the court's powers under what is now section 4(2A). On the contrary, it is, as I have already observed, notable that Parliament expressly

⁴⁴⁵ *DW (A Child) (Termination of Parental Responsibility), Re*: paras. 22 and 23 (emphasis supplied).

extended the existing court power to terminate parental responsibility to include those fathers who acquire parental responsibility via registration. In doing so, Parliament clearly decided to put such fathers into the same category as other unmarried fathers who have acquired parental responsibility by agreement or court order, rather than into the same category as married fathers. Finally, I am wholly unpersuaded that the decision in *Smallwood* is no longer good law. On the contrary, it seems to me that its conclusions remain firmly in line with the current legal and social context of unmarried fathers. Accordingly, I reject Miss Townshend's argument that section 4(2A) is incompatible with articles 8 and 14 of the Convention.

In my judgment, therefore, Singer J's judgment in *Re P* outlines the correct approach to be adopted on an application to terminate parental responsibility."

The evidence that Mr Shuttleworth, a clinical psychologist, provided revealed that the father had indeed suffered from various drug and alcohol-related problems over the years and a range of psychological disorders - a General Anxiety Disorder, Attention Deficit Hyperactivity Disorder and a Major Depression Disorder.⁴⁴⁶ In his conclusion, Mr Shuttleworth recommended that:⁴⁴⁷

"I do not believe that he would be a risk to a child from a sexual point of view. There may be more doubts if he was looking after a girl because of the convictions, however there is no indication that he ever had any particular interest in a male... While I do not believe there is any evidence that he is a risk, his recent behaviour, particularly in prison, indicates that he is fully willing to enter into any programme which might involve him proving his parental skills. He will obviously stop short of agreeing to claim responsibility for any alleged sexual crime in order to enter into any of those programmes.

My overall impression is that he has been amazingly tolerant and accepting of his ex-partner's fears in not demanding more contact, although I would presume that he would like to have this sometime in the future when his reputation has hopefully been rehabilitated."

⁴⁴⁶ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 27.

⁴⁴⁷ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 30.

During the oral evidence proceedings, Mr Shuttleworth brought the court's attention to the father's claim that his legal team advised him to plead guilty to avoid a longer sentence.⁴⁴⁸ He stated that he did not believe that the father was a sexual offender as he had been portrayed to be. Instead, he expressed his view on the grounds that he could challenge the reliability of the conviction based on the doubts he had about⁴⁴⁹ (1) the father's fitness to plead, (2) the failure to diagnose ADHD, and (3) the way the trial was conducted. Upon the court inviting him to consider the risk the father could pose to D, Mr Shuttleworth simply said:⁴⁵⁰

"Even if he's had sex with children, I've come across a lot of paedophiles who do not abuse their own children. There's an assumption that people who are paedophiles are unable to control their impulses."

He testified that he viewed the father to be a warm, caring man who genuinely cared for his children.⁴⁵¹

The court found that the father was properly convicted and that because he continued to deny the allegations, he had lied to the court and professionals regarding these matters.⁴⁵² The judge held that:⁴⁵³

"In my judgement, the magnetic factors in this case are D's emotional needs, the harm he has suffered, and the risk of future harm. As a result of the turbulence and disruption endured by this family during the mother's relationship with the father, and the period leading up to the father's

⁴⁴⁸ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 31.

⁴⁴⁹ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 31.

⁴⁵⁰ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 31.

⁴⁵¹ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 31.

⁴⁵² *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 47.

⁴⁵³ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 55.

criminal trial, all members of the family, including A, C, the mother and D have suffered harm of varying sorts and to a varying degree. So far as D is concerned, whether or not he witnessed the father perpetrating any abusive acts on A, I accept that he has suffered emotional harm as a result of the harm inflicted by the father on other members of his family. I accept that, because of his parentage, D's position in the family is difficult and that there is a risk of his suffering further harm and stigma if he continues to be perceived and treated in any way as the son of this man who perpetrated acts of sexual abuse on his older siblings."

He added:⁴⁵⁴

"I take into account D's expressed wish to have no involvement with his father. As he is only aged eight and a half, the weight to be attached to those wishes is limited. I accept that to a considerable extent his express wishes have been influenced by his mother and siblings. Nevertheless, I find that they are rooted in the reality of his life.

I also take into account the capacity of the mother to meet D's needs. I find that were the father to retain parental responsibility, she would be placed under very great strain, given the probability as I find that the father would subsequently apply for contact, and that he would seek to be further involved in D's life. Equally, given all the harm that the father has inflicted on the family, I accept that the mother would find it well-nigh impossible to send a regular report to him concerning D's progress. I find that imposing such an obligation on her would impinge on D's emotional security.

All these factors point towards an order terminating the father's parental responsibility and dismissing his application for a specific issues order. On the other side of the scales, I take into account the fact that, as part of his background, D is the biological child of the father, and that as an aspect of his emotional needs he, like every child, should grow up with some understanding of his origins and, whenever possible, a relationship with each biological parent. But in certain circumstances those needs must give way to more important considerations, in particular, the need for emotional security. I conclude that D's emotional security would be imperilled were the father to continue to have any further involvement in his life. Equally, whilst acknowledging that as an aspect on their respective Article 8 rights, both D and his father have a family life together, that aspect is

⁴⁵⁴ *DW (A Child) (Termination of Parental Responsibility)*, Re: paras. 56, 57 and 58.

in this case outweighed by D's overriding need, as part of his Article 8 rights, to security within his family."

The judge made an order under section 4(2A) terminating the father's parental responsibility for D.⁴⁵⁵ Moreover, after careful consideration of section 1 of the Children Act and Article 8 of ECHR, the judge refused the father's application for a specific order report that would require the mother providing an annual report pertaining to D's progress.⁴⁵⁶

4.2.2.3 A Mother v A Father⁴⁵⁷

This case dealt with the sexual abuse of a minor, C, by one of the parents – the father. There had previously been a legal dispute between the parents of C, and because of that, a child arrangement order was issued by the court.⁴⁵⁸ C, who was years five-years-old at the time of the allegations, had informed her mother that her father had done "bad things" to her during the time she would spend with him in his home after she was gradually reintroduced to her father after the granting of the child arrangement order.⁴⁵⁹ C described how the father would touch her genitalia unnecessarily in the bedroom at night and how when it was during bath time, he would pretend to wash her with a sponge; meanwhile, this was just a tactic to trick her because he would end up secretly rubbing her genitalia with his hand.⁴⁶⁰ The court had to determine whether the allegations against the father were true.⁴⁶¹

⁴⁵⁵ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 60.

⁴⁵⁶ *DW (A Child) (Termination of Parental Responsibility)*, Re:par. 61. See also paras 62-68.

⁴⁵⁷ Case No: ZW20P00148) [2023] EWFC 105, 2023 WL 04333629.

⁴⁵⁸ *A Mother v A Father*:par. 14. Also see paras. 16-20.

⁴⁵⁹ *A Mother v A Father*:par. 20.

⁴⁶⁰ *A Mother v A Father*:par. 16.

⁴⁶¹ *A Mother v A Father*:par. 15.

The mother alleged that between 2016 and 2017, the father had been sexually abusing C, and she additionally informed the court that the father had also been abusive towards her – the mother herself.⁴⁶² It was on 28 November 2019 that the event occurred. On 29 November 2019, the father was arrested for sexual abuse by way of digital penetration after the mother alleged that C had been a victim of sexual assault.⁴⁶³ On 14 January 2020, a series of applications were made by the father:⁴⁶⁴

- "1. For the enforcement of the 31 July 2018 child arrangements order (bundle B1-13);
2. A variation of that order (bundle 14-33);
3. A child arrangements order for C to spend time with him (ibid.);
4. Permission to disclose papers in the proceedings with the Metropolitan Police (ibid.);
5. Allocation of proceedings to the same judge, District Judge Marin (ibid.). "

The case came before the court as a fact-finding hearing on 7 December 2020 after the events of 27 November 2019. On the day in question, the mother had taken C to the hospital after she had been complaining about soreness that she was experiencing in her vagina. The medical staff who were examining C found redness in her vagina – before this incident, C was residing with her father.⁴⁶⁵ The mother claimed that C had informed her about how the father had been touching her vagina with his hand and finger.⁴⁶⁶ At the end of the fact-finding hearing, the court found that the father had sexually abused C on countless occasions. Subsequently, he denied these claims and tried to cover them up through what the court described as: "[mounting] a determined and forensically vitriolic attack on the character of the mother, and sought to question, fundamentally the account

⁴⁶² *A Mother v A Father*;par. 16.

⁴⁶³ *A Mother v A Father*;par. 21.

⁴⁶⁴ *A Mother v A Father*;par. 22.

⁴⁶⁵ *A Mother v A Father*;par. 23.

⁴⁶⁶ *A Mother v A Father*;par. 23.

of his daughter, a very young child".⁴⁶⁷ During the hearing for costs, the mother issued an application to remove the father's parental responsibility.⁴⁶⁸ In terms of the law, there is a difference between legal parenthood and parental responsibility. While parenthood exists throughout a child's life, parental responsibility is "a legal relationship which ends without further order when the child reaches maturity at the 18th birthday".⁴⁶⁹

As seen above, according to section 4 of the *Children Act 1989*, a person who has acquired parental responsibility under subsection (1) shall cease to have the responsibility only if the court orders. The court considered the following factors that were against the application:

- "(1) During the three years of these proceedings, the father has not sought to misuse his existing parental responsibility by interfering with the decisions about the child's life; that should be weighed in his favour in assessing his future intentions and conduct;
- (2) The CAFCASS⁴⁷⁰ report states that the father effectively wishes to move on and not interfere with child's upbringing;
- (3) A prohibited steps order offers significant restrictions on the father's parental responsibility and would protect the child without extinguishing his relationship with his daughter;
- (4) The father's previous connection to the child has been "a significant part of her life story" (D42);
- (5) Termination of parental responsibility will, it is submitted, "erase" the years that he has lived with and cared for his daughter".

Similarly, the court considered the following factors that supported the application:

⁴⁶⁷ *A Mother v A Father*; par. 76; Also see paras. 77 and 78.

⁴⁶⁸ *A Mother v A Father*; par. 103.

⁴⁶⁹ *A Mother v A Father*; par. 104.

⁴⁷⁰ CAFCASS stands for the Children and Family Court Advisory and Support Service.

- "(1) The CAFCASS report recommends that parental responsibility should be removed;
- (2) CAFCASS judges that a prohibited steps order would be insufficient to provide the protection the child needs;
- (3) The findings of fact made by the court document serious sexual abuse perpetrated by the father against his daughter;
- (4) The sexual abuse was committed under the cover of a child arrangements order sanctioned by the court that the father exploited for sexual gratification;
- (5) The father's conduct has inflicted serious harm on the child;
- (6) If there was an application by the father for parental responsibility following court findings of sexual abuse against her, it is submitted that the court would not grant such an order;
- (7) While the father previously had been present in the child's life and contributed to her care, that is rendered of secondary importance given that he used his allocated time to care for her to sexually abuse her."

The court considered the "no order" principle for section 1(5) of the *Children Act* 1989 (quoted above) and found that it would be better to order the child's removal of parental responsibility rather than not doing so.⁴⁷¹ Moreover, the court was satisfied that the factors that were in support of the removal of parental responsibility outweighed the factors that were against it.⁴⁷² The court held that the mother had proven on a balance of probabilities that the father's parental responsibility should be removed from the child's welfare interests in sections 1 and 4 of the *Children's Act* 1989.⁴⁷³ Therefore, the termination of the father's parental responsibility was granted.⁴⁷⁴

⁴⁷¹ *A Mother v A Father* 9:par. 136.

⁴⁷² *A Mother v A Father*:par. 137.

⁴⁷³ *A Mother v A Father*:par. 138.

⁴⁷⁴ *A Mother v A Father*:par. 136.

4.2.2.4 Local Authority v SB⁴⁷⁵

This case dealt with an application by the mother for the discharge of respondent's (K's) parental responsibility regarding her two-year-old daughter, N. The mother and K were unmarried at the time N was born. Although N's birth certificate had named K the father, a DNA test revealed that he was not the father and a non-parentage declaration was made.⁴⁷⁶

In 2002, N and the mother's older child moved into the care of M (the older child's father), who had a special guardianship order granted to him following the mother's inconsistent and neglectful parenting.⁴⁷⁷ The local authority had recommended that K must have contact with N three times a year – to reflect on the fact that there were risks associated with K's excessive alcohol use and exposure to cocaine. The evidence showed that N did not view K as a father figure but as an uncle.

The court held that there was not any logical principle to follow when distinguishing between the position of a biological father and that of a man who had been named as the father on the child's birth certificate and whose paternity had been disproved.⁴⁷⁸ Furthermore, the court held that it was best to conclude that the intention of Parliament was for section 4 also to provide a complete scheme for gaining and discharging parental responsibility with the inclusion of a parent who acquired the responsibility due to a false premise.⁴⁷⁹ M met all the needs of N, and K supported her placement with M because he was vested in her welfare. K acquired his parental responsibility on a false premise. Therefore, the termination of K's parental responsibility was in the child's best interests.

⁴⁷⁵ 2023 WL 03024677 (2023).

⁴⁷⁶ *Local Authority v SB*;par. 8.

⁴⁷⁷ *Local Authority v SB*;par. 3.

⁴⁷⁸ *Local Authority v SB*;par. 9.

⁴⁷⁹ *Local Authority v SB*;par. 9.

The local authority submitted that K had no obvious benefit in retaining his parental responsibility. The court, therefore, granted the application for the termination of parental responsibility.

4.2.2.5 *D v E*⁴⁸⁰

This case involved the mother of an eight-year-old girl who had applied for the following orders:⁴⁸¹

1. A “child arrangements order” for no contact between the child's father and the child.
2. A specific order to change the child's surname.
3. An order terminating the parental responsibility of the father.

In 2014, the parents of the child separated, and at the time, the child was 16 months old.⁴⁸² The mother had said that the father was controlling and violent towards her.⁴⁸³ However, there were no findings on her allegations, and a child arrangements order was granted, allowing the father to contact the child twice a week.⁴⁸⁴ In 2015, the father was under investigation for committing sexual offences, grooming, and threatening a 14-year-old girl.⁴⁸⁵ As a result, all communication between the father and child stopped after the mother and child moved home.⁴⁸⁶ In 2016, the father was convicted of the offences as well as dangerous driving and battery against a former partner of his.⁴⁸⁷

⁴⁸⁰ 2021 WL 01818728 (2021).

⁴⁸¹ *D v E*; par. 2.

⁴⁸² *D v E*; par. 8.

⁴⁸³ *D v E*; par. 9.

⁴⁸⁴ *D v E*; par. 9.

⁴⁸⁵ *D v E*; par. 10.

⁴⁸⁶ *D v E*; par. 10.

⁴⁸⁷ *D v E*; par. 11.

In terms of all three applications, the court provided a discussion on each one of the orders the mother applied for:

“Child arrangements order”⁴⁸⁸

It was in the child's best interests under s.1 of the 1989 Act to discharge the current child arrangements order and make an order for no contact between her and the father. That was the case notwithstanding the positive obligation on the court to promote contact, and the presumption that it was in the interests of a child of separated parents that they should have contact with the parent with whom they were not living.

First, the child had no relationship with and no recollection of the father, and he had taken no steps to facilitate a relationship. Any promotion of contact would involve a very significant change for the child and the need for challenging and potentially destabilising conversations with her to explain that change, without any guarantee that the father would thereafter engage with her or maintain any consistent involvement in her life.

Second, the father constituted a significant risk of sexual and emotional harm to the child and of emotional and physical harm to the mother. That risk remained entirely unmitigated given the father's lack of acknowledgement of his conduct, and the absence of any therapeutic or other intervention that would result from such an acknowledgement. The risk to the child was likely to increase as she reached adolescence, and the risk to the mother was likely to be significantly exacerbated if any difficulties or disagreements arose in respect of contact if an order for contact was made.

Third, there was no alternative to an order for no contact that would adequately protect the child from the risk of harm. Applying FPR PD 12J,⁴⁸⁹ the court was not satisfied that the physical and emotional safety of the child and mother could, as far as possible, be secured before, during and after contact. Further, it was not satisfied that the father would be motivated by a desire to promote the best interests of the child rather than use the contact process to continue a form of control over the mother."

⁴⁸⁸ *D v E*; paras. 40-46.

⁴⁸⁹ This is a Practice Direction that is issued by the President of the Family Division, acting in the capacity of the Lord Chief Justice, with the Lord Chancellor's approval.

Change of surname⁴⁹⁰

"It was in the child's best interests to change her surname so as to remove the part that incorporated the father's surname. Although she was registered with her current name and it represented an acknowledgement of the biological link she had with the father, those factors were not decisive. Her circumstances had very significantly changed since registration. In addition, she clearly identified as being only of her mother's surname. The father's lack of commitment to her and the absence of any contact or parental responsibility on his part for six years were further factors that pointed to a change of surname being in her best interests. It was also relevant to consider factors that were likely to affect her in the future. She lived in a rural community where the father's surname was not a common one, and the notorious nature of some of his crimes had been the subject of some publicity. Retaining a surname that incorporated his placed her at an appreciable risk of being stigmatised in association. Overall, the change would be an improvement from the perspective of her welfare and, applying s.1 of the 1989 Act, the specific issue order should be made."

Parental responsibility⁴⁹¹

"It was in the child's best interests to terminate the father's parental responsibility. If he were to apply for parental responsibility now, an order would not be granted. There was no evidence of an attachment between him and the child and no level of commitment that would support an order. He had engaged in offending behaviour that was entirely antithetic to his safe and consistent involvement in the child's upbringing, he had taken no steps to address that behaviour or the risk he posed, and he had failed to engage in the instant proceedings. If he continued to have parental responsibility, there was a significant risk he would use it to seek to control and harass the mother, impacting on the stability, safety and security of the child."

As a result, the court granted the applications.⁴⁹²

⁴⁹⁰ *D v E*:paras. 47-50.

⁴⁹¹ *D v E*:paras. 51-54.

⁴⁹² *D v E*:par. 59.

4.2.2.6 *A Local Authority v E*⁴⁹³

This matter involved an application by a mother to have the father's parental responsibility terminated under section 4(2A) of the *Children Act*.⁴⁹⁴

The father assaulted the child when he was a baby by shaking his head.⁴⁹⁵ As a result, he suffered injuries to his eyes, brain, and spine – which left him with minimal awareness of his surroundings; thus, he was unable to relate to situations or people.⁴⁹⁶ His life expectancy was reduced, and he was in constant need of care, and his mother was the sole provider.⁴⁹⁷ Although the father yearned to have his parental responsibility retained, he maintained that he was not going to take any precautionary steps to involve himself in the child's life, provided that he received an update on the health of the child and that he should be informed if the child passes away.⁴⁹⁸

The principles stemming from the following authorities were relevant to the mother's application:⁴⁹⁹

"(a) The significance of parental responsibility was the contribution to a child's welfare that status conferred on the adult concerned. The concept of parental responsibility described an adult's responsibility to secure the welfare of their child which was to be exercised for the benefit of the child, not the adult, DW (*A Child*) (*Termination of Parental Responsibility*), Re [2014] EWCA Civ 315, [2015] 1 FLR 166, [2014] 3 WLUK 751 applied.

(b) If the circumstances were such that the court would not conceivably make a parental responsibility order where one did not already exist then the circumstances were likely to indicate

⁴⁹³ 2019 WL 05102750 (2019).

⁴⁹⁴ *A Local Authority v E*; par. 3.

⁴⁹⁵ *A Local Authority v E*; par. 4.

⁴⁹⁶ *A Local Authority v E*; par. 5.

⁴⁹⁷ *A Local Authority v E*; par. 5.

⁴⁹⁸ *A Local Authority v E*; par. 9.

⁴⁹⁹ *A Local Authority v E*; par. 19.

that parental responsibility could properly be terminated, *P (Terminating Parental Responsibility)*, *Re* [1995] 1 FLR 1048, [1994] 12 WLUK 152 applied.

(c) The court should consider that it was appropriate to terminate parental responsibility where there was no element of the bundle of responsibilities that made up parental responsibility which the father could in present or foreseeable circumstances exercise in a way that would be beneficial for the child, *DW (A Child) (Termination of Parental Responsibility)*, *Re* [2013] EWHC 854 (Fam), [2013] 2 FLR 655, [2013] 4 WLUK 233 applied.

(d) Where the art.8 rights of a parent conflicted with the art.8 rights of a child, it was the rights of the child that took precedence, *Yusuf* [2013] 1 FLR 2010 applied (see para.19 of judgment)."

The court held that should the father's parental responsibility be retained; the child would not be advantaged. Thus, retaining the father's parental responsibility would contradict the child's welfare. The child's quality of life has been cut short due to his father's actions. The termination of the father's parental responsibility would not only set the mother at ease but the child as well because his health would not be at any possible threat of deteriorating. The court held that it would not impose any responsibility on the local authority or the mother to pass any information concerning the child's welfare or death to the father at any point.⁵⁰⁰ Therefore, the mother's application was granted.⁵⁰¹

4.2.2.7 Nottingham CC v Farmer⁵⁰²

This case concerned two teenage children who wanted to change their surnames after the father was given a life sentence for the murder of their mother.⁵⁰³ Before the relationship ended, the mother and father had been together for over fifteen years.⁵⁰⁴ The

⁵⁰⁰ *A Local Authority v E*:paras 20-24; 31-35.

⁵⁰¹ *A Local Authority v E*:par. 34.

⁵⁰² 2022 WL 02392495 (2022).

⁵⁰³ *Nottingham CC v Farmer*:par. 3.

⁵⁰⁴ *Nottingham CC v Farmer*:par. 5.

couple had two children – their son (T) was fifteen years old, and their daughter (M) was thirteen.⁵⁰⁵

The children's description of the father was that he had been abusive and controlling of the mother.⁵⁰⁶ It became evident that the father had not accepted that their separation was final. Thus, he started harassing, stalking, and intimidating the mother.⁵⁰⁷ Although he would often get charged with various offences, he chose to ignore the conditions of his bail and continued intimidating the family.⁵⁰⁸

In May 2021, the mother met her unfortunate death when the father murdered her by repeatedly stabbing her in their garden while the children watched from the window.⁵⁰⁹ The court sentenced him to a life sentence with a minimum term of 29 years.⁵¹⁰ The court agreed that the children's maternal grandmother be responsible for raising them. Local authorities supported all other applications. Meanwhile, the father opposed them. However, the court ordered that the children's surnames be changed to their mother's - the father's parental responsibility was terminated because it was in the children's best interests.⁵¹¹ Therefore, the applications were granted.⁵¹²

⁵⁰⁵ *Nottingham CC v Farmer*:par. 1.

⁵⁰⁶ *Nottingham CC v Farmer*:par. 5.

⁵⁰⁷ *Nottingham CC v Farmer*:par. 6.

⁵⁰⁸ *Nottingham CC v Farmer*:par. 7.

⁵⁰⁹ *Nottingham CC v Farmer*:paras. 10-11.

⁵¹⁰ *Nottingham CC v Farmer*:par. 13.

⁵¹¹ *Nottingham CC v Farmer*:par. 27.

⁵¹² *Nottingham CC v Farmer*:par. 31.

4.2.2.8 MacDougall v SW⁵¹³

This case dealt with an application for parental responsibility and child arrangements in respect of four children who were conceived by way of sperm donation to three different mothers.⁵¹⁴

For four years, the father (JM), aged 37, had been advertising himself on social media for lesbian women who were interested in and looking for sperm donors. He would be approached, and he successfully fathered no less than fifteen children through private arrangements.⁵¹⁵ However, he failed to disclose that he had a genetic, inheritable condition (Fragile X syndrome) that caused various developmental problems.⁵¹⁶ As a result, he also encountered learning difficulties and was on the autism spectrum.⁵¹⁷

Firstly, SW was a mother to two children (R and P), and EG was a mother to one child. Upon meeting with JM, SW and EG were in a relationship. JM provided them with an agreement that he would not acquire rights over the child(ren) and no right to contact – the couple cooperated and signed.⁵¹⁸ The agreement recorded that JM had Fragile X syndrome, but there was no explanation provided that would assist the couple in understanding what the syndrome entailed. SW had challenges reading and did not manage to read the entire agreement.⁵¹⁹

⁵¹³ 2022 WL 01797666 (2022).

⁵¹⁴ *MacDougall v SW*:par. 1.

⁵¹⁵ *MacDougall v SW*:par. 5.

⁵¹⁶ *MacDougall v SW*:par. 6.

⁵¹⁷ *MacDougall v SW*:par. 6.

⁵¹⁸ *MacDougall v SW*:par. 8.

⁵¹⁹ *MacDougall v SW*:par. 9.

On the other hand, EG read more of the agreement but took the reference to Fragile X syndrome lightly.⁵²⁰ The relationship between SW and EG ended after the birth of R.⁵²¹ JM and R had regular contact, including overnight stays at his parents' house where he stayed.⁵²² SW met a new partner, and M again agreed to be their sperm donor.⁵²³ There was an altercation between SW and JM – this led M not to have further contact with R. SW gave birth to P, whom JM had never met.⁵²⁴

Secondly, EG had requested a written agreement when she used JM as a sperm donor, and he insisted that there would be no contact with him and the child.⁵²⁵ It turned out that no agreement existed, and nothing was signed. EG's child had no contact with JM.⁵²⁶

KE (the third mother) also used JM as her sperm donor. Similarly, there was no agreement between her and JM.⁵²⁷ The two became involved in a relationship after the birth of their child in July 2018, and JM had contact with the child. In 2019, KE obtained a non-molestation order against JM, who chose not to contest the order.⁵²⁸ The District Judge made no findings in respect of the allegations KE had made against JM.⁵²⁹ As a result, the court granted JM a contact order once a week, overnight contact every second week, 50 per cent of the holidays and Christmas days, the parents had to be alternated.⁵³⁰ In the order, JM was also granted parental responsibility.⁵³¹ However, KE provided that JM had been pestering, harassing and controlling her since 2021.⁵³² Thus, she

⁵²⁰ *MacDougall v SW*:par. 9.

⁵²¹ *MacDougall v SW*:par. 12.

⁵²² *MacDougall v SW*:par. 13.

⁵²³ *MacDougall v SW*:par. 15.

⁵²⁴ *MacDougall v SW*:paras. 17-21.

⁵²⁵ *MacDougall v SW*:par. 23.

⁵²⁶ *MacDougall v SW*:par. 23.

⁵²⁷ *MacDougall v SW*:par. 27.

⁵²⁸ *MacDougall v SW*:par. 29.

⁵²⁹ *MacDougall v SW*:par. 28.

⁵³⁰ *MacDougall v SW*:par. 29.

⁵³¹ *MacDougall v SW*:par. 29.

⁵³² *MacDougall v SW*:par. 30.

suspended JM's contact with the child in January 2022.⁵³³ There were ongoing investigations regarding the non-accidental injuries the child had sustained during contact with JM, and there were cross-applications between the two parents. This resulted in the case being adjourned.⁵³⁴

The guardian opposed all the applications for contact and parental responsibility. In addition, the guardian applied for an order under the Children Act 1989 Pt XII s.19(14) to restrict JM from being able to make a further application for three years without permission and for the court to have JM's name published.⁵³⁵ In deciding on the outcome, the court looked at the following issues:

1. Contact and parental responsibility orders⁵³⁶

JM lacked insight into how his behaviour impacted other people. On the other hand, SW had difficulties learning and was vulnerable. She was also against JM having any role in R's life. Although section 1(2A) of the *Children's Act* presumes that having a child know both parents and have a relationship with them is positive, there were major concerns about why JM wanted contact and parental responsibility. JM was irresponsible in being a sperm donor while he knew very well that he had Fragile X syndrome; this was an important factor, and he knew that he would not be able to be a donor through a clinic due to his syndrome. He took advantage of SW and EG's desire and vulnerability to have children of their own and failed to take steps to ensure that they both understood his condition. JM having contact or parental responsibility would have a detrimental effect on SW, and this could also put R at risk, especially considering that she had difficulties regarding her development.

⁵³³ *MacDougall v SW*:par. 30.

⁵³⁴ *MacDougall v SW*:par. 34.

⁵³⁵ *MacDougall v SW*:par. 63.

⁵³⁶ *MacDougall v SW*:par. 83-89.

2. Section 91(14) order⁵³⁷

A section 91(14) order is a barring order. The order aims to enable courts to limit individuals (mostly parents) from lodging an application to the court without the court's approval. The granting of this order was appropriate because JM could not control his frustration due to not getting contact and parental responsibility. JM was very clear in his intention of re-applying until he got what he wanted, and without the restriction section 91(14) order would impose on him, it would be possible for him to re-apply. The result of this action would be detrimental to the interests of the children and traumatising for the mothers.

3. Naming JM⁵³⁸

JM had informed the court that he was no longer a sperm donor. However, in February 2022, a social media message suggested that he was still offering his services – this was a strong ground to name him, more especially because there was a specific benefit in naming him, in the hope that women would search him on the internet and read the court's judgment.

4.2.2.9 X v Z⁵³⁹

This matter concerned an adoption order pertaining to a child who had been born to a surrogate mother in Ukraine because of an agreement made with a British couple who later divorced.⁵⁴⁰

X lodged an application to adopt a child (B) who had been born to a woman (Z) via a surrogacy agreement in the Ukraine.⁵⁴¹ X had been nervous about being a mother and

⁵³⁷ *MacDougall v SW*;par. 90-91.

⁵³⁸ *MacDougall v SW*;par. 92-97.

⁵³⁹ 2018 WL 07078172 (2018).

⁵⁴⁰ *X v Z*;par. 1.

⁵⁴¹ *X v Z*;par. 2.

had become pregnant a few weeks after she met Y. Unfortunately, she miscarried.⁵⁴² X and Y married and travelled to Europe, intending to join a surrogacy programme. Initially, embryos were created using donated eggs and Y's gametes. A surrogate had been selected, but she later miscarried twins.⁵⁴³

X met with her second surrogate, Z.⁵⁴⁴ Y stated that his knowledge regarding the second egg transfer to Z was unclear because he and X separated before the second egg transfer occurred.⁵⁴⁵ However, X contended that the separation happened after the transfer of the second egg.⁵⁴⁶ B was born in Ukraine the same month that X and Y divorced.⁵⁴⁷ B was placed in X's care,⁵⁴⁸ but the divorce created problems regarding the registering of B's birth in Ukraine and bringing B to the UK.⁵⁴⁹

In an agreement between X and Y, Y had no problem with X registering B in her surname and went as far as giving her power of attorney to make decisions without him.⁵⁵⁰ The real problems began after X's father passed away,⁵⁵¹ and she had to apply for emergency travel documentation after her application for a British passport was refused. B experienced difficulty breathing, and the hospital X had taken B to make a referral to the local authority because of X's behaviour and inconsistencies in her account of B's medical history.⁵⁵² X brought an urgent application to the court due to her concerns about her status to consent to the treatment B would receive.⁵⁵³

542 X v Z;par. 11.
543 X v Z;par. 12.
544 X v Z;par. 12.
545 X v Z;par. 13.
546 X v Z;par. 13.
547 X v Z;par. 15.
548 X v Z;par. 15.
549 X v Z;par. 16.
550 X v Z;par. 16.
551 X v Z;par. 18.
552 X v Z;par. 18.
553 X v Z;par. 19.

The court held that she had parental responsibility under Ukrainian law and The Hague Convention on Parental Responsibility and Child Protection Article 16.⁵⁵⁴ Moreover, X was given parental responsibility after a child arrangements order was made.⁵⁵⁵ During this process, a guardian was appointed and notice about the proceedings was given to Y and Z.⁵⁵⁶ In a statement, Y signed to confirm that he had no intention of being party to the proceedings.⁵⁵⁷

B remained in X's care after the local authority assessed the family and child.⁵⁵⁸ According to Ukrainian law, X and Y were B's parents, and the two had unrestricted parental rights and responsibilities – Z, therefore, had no parental rights and responsibilities.⁵⁵⁹ The local authority supported X's adoption application.⁵⁶⁰ B's guardian received confirmation from Z that she had agreed with the adoption order being granted and recommended that the guardian be granted the adoption order.⁵⁶¹ Therefore, the adoption application by X was granted.⁵⁶²

4.2.2.10 Preliminary observation

In England, it appears to be easier for the courts to intervene in the removal of the parental responsibilities of an *unmarried* father because courts have often claimed that they do not have jurisdiction to grant an order for the termination of parental responsibilities of a father who was married during the time the child was born.⁵⁶³ However, the courts can restrict

⁵⁵⁴ X v Z;par. 19.

⁵⁵⁵ X v Z;par. 20.

⁵⁵⁶ X v Z;par. 22.

⁵⁵⁷ X v Z;par. 24.

⁵⁵⁸ X v Z;par. 25.

⁵⁵⁹ X v Z;par. 26.

⁵⁶⁰ X v Z;par. 30.

⁵⁶¹ X v Z;par. 35.

⁵⁶² X v Z;par. 84.

⁵⁶³ Family Law Group 'Disagreements and Decisions about your Children'
<https://www.familylawgroup.co.uk/news/disagreements-and-decisions-about-your-children>
(accessed on 21 September 2023).

the responsibilities of a father upon considering the following factors in relation to a child before it can grant the order:⁵⁶⁴

1. The wishes and feelings of the child;
2. The child's educational, emotional, and physical needs; and the
3. The child's gender, background, age and other relevant characteristics.

4.3 CONCLUSION: LESSONS THAT COULD BE BENEFICIAL TO SOUTH AFRICA

This chapter has reviewed the provisions set out in the English *Children Act* 1989 regarding interference by courts when dealing with the applicable legal principles in the restriction or the loss of parental responsibility.

Section 1 of the *Children Act* expressly states the importance of always prioritising the welfare of a child. As a means of showing progression in the legal provisions in this regard, *Re P* was used as a point of reference (considering that it was a court of first instance that now dates back to almost three decades years ago) regarding the position of unmarried parents who had signed a parental responsibility agreement and whether there could be termination of those parental responsibilities. However, *DW (A Child) (Termination of Parental Responsibility)*, *Re* held that this case was still to be followed in English law. The latter case also reveals the influence section 1 had when the court decided whether to grant the father a specific order report requiring the mother to update the father on the child's progress annually. The court ruled that granting this order would be detrimental to the child's welfare and was not in the child's best interests; thus, the application was refused.

⁵⁶⁴ Family Law Group 'Disagreements and Decisions about your Children'
<https://www.familylawgroup.co.uk/news/disagreements-and-decisions-about-your-children>
(accessed on 21 September 2023).

In Chapter 3, it was seen that in *GM v KI*,⁵⁶⁵ the court held that it was not possible to remove the rights of the parent but not the responsibilities because the two go hand-in-hand. In South Africa, there has, to the best of my knowledge, only been one case (the case of *C v L* (Children's Court) unreported case no 14/1/4-54/10 (10 February 2012)) that has terminated the parental responsibilities of a parent in terms of section 28 of the Children's Act. It is suggested that when South African courts are called upon to terminate the parental responsibilities and rights of a parent, the following approach that draws from English law should be borne in mind:

- First, as in England, our courts need to constantly cater for the best interests of the children – even though a parent may lose their parental responsibilities and rights in the process – because the child's best interests are always the overriding concern.
- Secondly, the unique facts of the matter are crucial to this assessment. The English case law discussed above shows that criminal conduct by one of the parents (especially towards the child, the other parent or the child's siblings) or broader unacceptable conduct (for example, drug or alcohol abuse) was often a crucial factor.
- As South African courts do not yet have the benefit of local per cent dealing with the termination of parental responsibilities and rights in terms of section 28, it is suggested that the English approach in the cases of *Re P (Terminating parental responsibility)*⁵⁶⁶ and *A Local Authority v E*⁵⁶⁷ could provide useful guidelines. These include:
 - A parent's wish to continue to have parental responsibilities and rights is "a laudable desire", so a presumption should apply that the same should not easily be terminated once obtained;⁵⁶⁸

⁵⁶⁵ 2015 (3) SA 62 (GJ).

⁵⁶⁶ 1994 WL 1061638 (1994).

⁵⁶⁷ 2019 WL 05102750 (2019).

⁵⁶⁸ *Re P (Terminating Parental Responsibility)*:par. 1052.

- The possibility of an order terminating a parent’s parental responsibilities and rights is not “a weapon” in the hands of one of the parents – the most important principle is the child’s best interests;⁵⁶⁹
- As held in the *Re P* case, “[k]ey concepts to the consideration of the making of an order are evidence of attachment and a degree of commitment, the presumption being that other things being equal a parental responsibility order should be made rather than withheld in an appropriate case”.⁵⁷⁰
- The court must consider whether there are “considerable potential ramifications for future adversity to this child” and the other parent;⁵⁷¹
- The court must consider whether the parent against whom the order is sought could either at the time of the application or in the future offer any possible benefit to the child in exercising his or her parental responsibilities and rights;⁵⁷²
- The wishes of the child, considering his or her age, maturity and stage of development, must be taken into account;⁵⁷³
- As held in the *A Local Authority* case,⁵⁷⁴ if the circumstances indicate that a court would not have granted parental responsibilities and rights to a parent in the first place, this could indicate that they should be terminated and
- In keeping with what has been stated above, where the rights of the child conflict with those of a parent, the child’s rights are paramount.⁵⁷⁵

The next chapter will reflect on the previous chapters and summarise the major conclusions reached in this study.

⁵⁶⁹ *Re P (Terminating Parental Responsibility)*:par. 1052.

⁵⁷⁰ *Re P (Terminating Parental Responsibility)*:par. 1052.

⁵⁷¹ *Re P (Terminating Parental Responsibility)*:par. 1053.

⁵⁷² *Re P (Terminating Parental Responsibility)*:par. 1054.

⁵⁷³ *Children’s Act*: sec. 10.

⁵⁷⁴ 2019 WL 05102750 (2019).

⁵⁷⁵ *A Local Authority v E* 2019 WL 05102750 (2019).

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

In chapter one, it was seen that although the best interests of the child criterion have been employed in South Africa since at least 1948, as evidenced by the judgment in *Fletcher v Fletcher*,⁵⁷⁶ South African children's law has shifted to a "child-centred approach",⁵⁷⁷ since the dawning of constitutional democracy in 1994. This shift is evident in section 28 of the *Constitution*, which provides for children's fundamental rights and various international instruments. This shift also included moving away from the common-law concept of "parental power" or "parental authority" to the concept of "parental responsibilities and rights" as provided for in the *Children's Act* 38 of 2005. The parent-child relationship is effectively codified and governed by the *Children's Act*,⁵⁷⁸ which contains various provisions that supplement the powers of the High Court – as upper guardian of all minors within its jurisdiction – to interfere with parental responsibilities and rights in appropriate circumstances. The most relevant are sections 28, 29 and 34(5) of the *Children's Act*. It was seen that there is still relatively little case law dealing with these provisions (especially as they relate to unmarried parents), so it is necessary to consider analogous case law dealing with certain issues, such as joint cases and a parent's sexual orientation in the context of divorce law. It was also mentioned that English law could be instructive as this jurisdiction has various judgments dealing with the outright termination of parental responsibilities and rights by virtue of a court order. It should also be noted that sections 28, 29 and 34(5) of the *Children's Act* are still fairly new. Thus, we can expect an increasing amount of case law to appear in the foreseeable future.

⁵⁷⁶ 1948 (1) SA 130 (A); Skelton & Carnelley (eds) 2010:238.

⁵⁷⁷ Heaton & Kruger 2015:329.

⁵⁷⁸ Skelton & Carnelley (eds) 2010:238.

Chapter two considered the historical development of the law relating to the content and acquisition of parental responsibilities and rights. There, it was again seen that South African law has - in line with international trends - evolved from the notion of “parental authority” in our common law to the present-day concept referred to as “parental responsibilities and rights” as contained in the *Children’s Act*. This development recognises the concept of the “constitutional child”, who is recognised as an independent individual with constitutional rights that are enforceable against his or her parents, other legal subjects and the State and has a degree of autonomy in line with his or her “age, maturity and stage of development”.⁵⁷⁹ In this regard, particular emphasis was placed on the unreported *Milnerton* case⁵⁸⁰ and *S v M (Centre for Child Law as Amicus Curiae)*.⁵⁸¹ The latter case makes it clear that the concept of the “constitutional child” had started to develop even before the enactment of the *Children’s Act*.⁵⁸² It was also shown that this case is important to the extent that it points to the conclusion that even in the context of criminal law, a court must consider a child’s best interests and other constitutional rights when parental responsibilities and rights (such as the duty of care) are likely to be affected by a criminal sentence imposed on a parent for a crime committed outside of that parent’s family environment.

Chapter two proceeded to discuss “care”, “contact”, and “guardianship” as key components of the concept of “parental responsibilities and rights. After this, the various ways a parent may acquire parental responsibilities and rights were considered.

It was noted that there had been significant developments regarding the legal position of unmarried fathers. Section 21 of the *Children’s Act* allows unmarried fathers to acquire parental responsibilities and rights in certain circumstances. Where the father has not lived with the mother in a permanent life partnership, there is uncertainty whether all the

⁵⁷⁹ See for example the *Children’s Act*: sec. 10.

⁵⁸⁰ See Bekink 2012:184.

⁵⁸¹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC):par. 18.

⁵⁸² Sloth-Nielsen 2019:504.

requirements in section 21(1)(b) must be complied with. Some interpret the Act as stating that it is mandatory to comply with all the requirements in this provision. In this regard, it was argued that contrary to the recent finding in *Marima v Lesele*,⁵⁸³ section 21(1)(b) should not be interpreted as requiring all of the requirements to be strictly complied with. Instead, the more flexible interpretation in *BR v LS*⁵⁸⁴ – namely requiring an overall and on-going satisfactory “level of commitment”⁵⁸⁵ to the child’s maintenance and/or upbringing – is more in line with the purpose of the *Children’s Act*. As such, it was argued that merely consenting to be identified as the child’s father (in terms of section 21(1)(a), as in the *GM v KI*⁵⁸⁶ is not sufficient. The father’s contribution to the child’s maintenance and upbringing must also be considered. Still, I do not believe that *both* must always be required because, as was mentioned in *SDI v KLVC*,⁵⁸⁷ the court may be faced with a situation where a father is simply unable to contribute financially but still meaningfully contributes to the child’s upbringing.⁵⁸⁸ This possibility was unfortunately not considered in the *Marima* case. It was also seen that the Supreme Court of Appeal has clarified that compliance with section 21(1)(b) involves a purely factual enquiry and is not a matter of judicial discretion. The “contribution” referred to in section 21(1)(b) must be on-going and over a reasonable period considering, for example, the age of the child and the parties’ unique circumstances at the time.⁵⁸⁹

In chapter 3, focus was given to the acquisition and loss of parental responsibilities and rights regarding children by judicial interference as provided for in the *Children’s Act*. The existing case law dealing with the applicable provisions was considered. A particularly important case is *GM v KI*⁵⁹⁰ (recently confirmed in *SJF v TV*)⁵⁹¹, which correctly held that a court may not deprive a parent of parental rights and only leave such a parent with

⁵⁸³ [2022] ZAGPJHC 380 (6 June 2022).

⁵⁸⁴ 2018 (5) SA 308 (KZD);par. 21.

⁵⁸⁵ See *BR v LS* 2018 3 SA 508 (KZD);par. 21.

⁵⁸⁶ 2015 3 SA 62 (GJ).

⁵⁸⁷ [2014] ZAKZDHC 11 (14 April 2014).

⁵⁸⁸ See Heaton 2018:14-15.

⁵⁸⁹ *KLVC v SDI*;paras. 21-22.

⁵⁹⁰ 2015 3 SA 62 (GJ).

⁵⁹¹ [2021] ZAWCHC 90 (28 April 2021);par. 21.

parental responsibilities. However, South African courts need to keep in mind the children's best interests because they take precedent over the loss of a parent's parental responsibilities and rights. In this chapter, it was also seen that case law indicates that any suspension of parental responsibilities and rights could also not occur indefinitely. However, authors such as Matthias and Zaal point out that the Act needs to be clarified.

Another important case was *C v L (Children's Court)*, unreported case no 14/1/4-54/10 (10 February 2012) where a parent's responsibilities and rights were in fact terminated; this is the only South African case of which I am aware in which section 28 of the *Children's Act* was applied to this end.

In terms of assessing whether divorce law could provide guidance in terms of the judicial interference with parental responsibilities and rights, two issues were considered, namely joint care awards and divorce case law dealing with the potential effect of a parent's sexual orientation on such a parent's parental responsibilities and rights. Regarding joint care, the cases of *Kastan v Kastan*,⁵⁹² *V v V*⁵⁹³ and *Krugel v Krugel*⁵⁹⁴ were considered. It was concluded that the benefits of joint care orders – as set out in the two latter cases – are equally applicable to unmarried parents who separate provided, of course, that doing so is in the children's best interests. Indeed, it was also shown that we have existing case law (*EMD v MP*)⁵⁹⁵ that confirms that the same principles that apply in divorce law can be used to determine whether joint care should be awarded when unmarried parents separate. This case will be influential when future courts are required to deal with issues pertaining to joint custody also involving unmarried mothers and fathers.

⁵⁹² 1985 (3) SA 235 (C).

⁵⁹³ 1998 (4) SA 169 (C).

⁵⁹⁴ 2003 (6) SA 220 (T).

⁵⁹⁵ 2021 ZAGPPHC 740 (2 November 2021).

Regarding a parent's sexual orientation, it was seen that a court's decision when awarding care to a parent or guardian has an impact on the further development of a child, and that such influence can undoubtedly have long-term implications. Although there have been positive and negative debates on the issue centered around homosexuality, some (possibly outdated) research suggests that the majority of South Africans are uncomfortable with the idea of homosexuality. *Van Rooyen v Van Rooyen*⁵⁹⁶ dealt with a parent who was involved in a lesbian relationship. When she applied for her rights of access to her two children to be determined, the court's main concern was that the best interests of the children would not be served by having the children exposed to an "abnormal" lifestyle.

Similarly, *V v V*⁵⁹⁷ also deals with a divorced couple, where one of the parents was involved in a lesbian relationship. Contrary to the *Van Rooyen* judgment (which was severely criticised by the court for not being in line with constitutional values and norms that cannot simply regard homosexuality as "abnormal")⁵⁹⁸, the court held that a parent should not be disqualified from being granted sole or joint custody simply because of their sexual orientation, and that the mother in this case was a good and fit parent. The court also held that it would be unfair on both the mother and children to restrict contact. Instead, the court suggested that the children should be able to live with both parents in order to properly assess each parent's lifestyle for themselves. However, the court did caution that the best interests of a child will at times need to trump the constitutional rights of a parent – an appropriate balance would therefore need to be sought. As such, a joint custody order was granted.

⁵⁹⁶ 1994 2 SA 325 (W).

⁵⁹⁷ 1998 4 SA 169 (C).

⁵⁹⁸ Heaton & Kruger 2015:186.

There can be no doubt that the *V v V* judgment will be followed by our courts should this issue arise in the context of unmarried parents.

In chapter 4, the provisions of section 1 of the English *Children Act* of 1989 pertaining to the acquisition of, and judicial interference with “parental responsibility” was considered. It was seen that, as in South African law, section 1 of the *Children Act* expresses just how important it is to prioritise the welfare of children. Various English case law was considered that has dealt with the outright termination of parental responsibility. Because South Africa has to date only one unreported case in which section 28 of the *Children’s Act* was applied to achieve this result (*C v L (Children’s Court)* unreported case no 14/1/4-54/10 (10 February 2012)), an approach was suggested by which South African courts can benefit from the lessons drawn from English law in adjudicating on this issue.

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LEGISLATION

South Africa

Child Care Act 74 of 1983

Children's Act 38 of 2005

Constitution of the Republic of South Africa of 1996

Criminal Procedure Act 51 of 1977

Divorce Act 70 of 1979

Domestic Violence Act 116 of 1998

Guardianship Act 192 of 1993

Interim Constitution Act 200 of 1993

Marriage Act 25 of 1961

Matrimonial Affairs Act 37 of 1953

Natural Fathers of Children Born out of Wedlock Act 86 of 1997

International

Births and Deaths Registration Act 1953

Children Act 1989 of the United Kingdom Act of Parliament.

INTERNATIONAL INSTRUMENTS

European Convention for the Protection of Human Rights and Fundamental Freedoms

Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation, 1996

United Nations Convention on the Rights of the Child