NATURAL FATHERS OF EXTRAMARITAL CHILDREN SHOULD HAVE AN INHERENT RIGHT OF ACCESS TO THEIR CHILDREN!

by

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CONTENTS

1. INTRODUCTION

The story which I am about to relate is a true one. However, to protect the privacy of the parties concerned, their names have been changed.

I have a friend called Bob. Bob is the biological father of a five year old girl called Ethel. Avril is Ethel's mother. Five and a half years ago, Bob and Avril entered into a short sexual relation commonly known as a one-night stand. Eight months later and out of this brief encounter was produced a tiny baby girl which Avril claimed was Bob's child and which he unquestionably accepted. Bob thus acknowledged paternity of this child and formalised it by entering his name as the father on the birth register. He then proceeded to pay maintenance support every month without fail into Avril's bank account and continues to do so today. Bob also paid half of all Avril's lying-in expenses.

It became apparent during the pregnancy period that Avril wanted Bob to engage in a relationship with her and when he indicated to her in no uncertain terms that that was not what he wanted, she became particularly vindictive towards him. So began a nasty and sour relationship with Avril hurling verbal abuse as well as lawyers' letters demanding payments of money from Bob. When the child was eventually born one month before its alleged due date, Bob made his intentions very clear that he wanted to play a fatherly role in the child's life. However, Avril had another agenda: either Bob had a relationship with her or he could not see the child at all. Bob once again reiterated that he could not have a relationship with a woman whom he did not love and despite the fact that he was denied the opportunity to be a true father to his child, he unfailingly supported the child financially and gave whatever additional support he could in the form of clothes, doctors' bills, toys etcetera. Avril, on the other hand, despite her earlier protestations, allowed Bob to see the child when she felt like it but as soon as the realisation hit her that he was not going to get involved with her, she would deny him access for extended periods of time again.

Clearly the above scenario sketches an example of a desperate and malicious woman who is using her child to form a relationship with a man. In the meantime, the child has developed a staggered relationship with Bob and knows that he is her father - she calls him 'Daddy'.

Bob also has been unable to form a stable relationship with any other woman because Avril is intent on interfering in that area of his life and Bob lives daily with the fear that any precious time that Avril feels like giving him with his child could be snatched away in an instant as a result of her anger with his constant rejection of her. Yet Bob cannot in good conscience see how he could have an emotional involvement with Avril because that type of dishonesty would negatively affect the child. In other words, their relationship in a nuclear family situation would not be healthy for the development of the child when one of the parents does not love the other.

And what happens to Ethel in the meantime? She is being used as a pawn by her mother and gets dangled as bait in front of her father's nose. She sees her father time and again when her mother feels like it. How healthy could this be for a child and how could it possibly be in her best interests?

Bob loves this child with all his heart and simply wants to be the best father that he can be. How can he accomplish this when as a biological / natural father of a child born out of wedlock, he has no inherent rights in respect of his child. He needs to obtain a court order to have those rights conferred on him but Bob is unfortunately unable to afford this type of costly litigation. What other option does he then have? The answer is a very sad *none*. He and his poor child are therefore forced to remain captured in a tortuous cycle of pain, heartache and sorrow. However, this need not have been the case and great pain could have been prevented if Bob had had the same right of access which Avril as a mother has namely, an inherent right of access to their extramarital child.

This essay therefore seeks to explore the current South African legal position of natural fathers of children born out of wedlock. I shall attempt to argue that this position is not only unfair but also unconstitutional and that it would be in all the parties' interests to grant an inherent right of access to natural fathers in respect of their extramarital children. In light of the limited scope of this paper, I shall restrict my focus to the issue of access without looking at questions of custody and guardianship. Regard will be given to both common law and statutory perspectives, foreign law, international law and academic opinion. I shall also make reference to written submissions made by the public during public hearings which were jointly hosted by the Justice and Welfare and Population Development Portfolio Committees in 1997, in the course of their preparation for the final drafting of legislation pertaining to the subject matter under discussion.

2. DEFINITION OF LEGITIMATE AND ILLEGITIMATE ISSUE

The status of legitimacy accrues from the date of marriage, and not from the date of birth of the child[1] therefore in terms of South African law, a child is considered legitimate if his or her parents were validly married to each other at the time of his or her conception or birth or at any time between those two dates[2]. If the parents marry each other after the birth of their child, the child becomes legitimate as a result of that subsequent marriage[3]. Furthermore, a child who is born during the subsistence of his or her mother's marriage will be subject to the presumption 'pater est quem numptiae demonstrant' and is therefore presumed to be the child of the mother's husband even if not conceived by the latter[4]. This presumption is, however, rebuttable on a balance of probabilities[5].

On the other hand, South African law would consider the following categories of children to be illegitimate[6] namely, children whose biological parents were never married; children born

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[1]Section 4 Children's Status Act 82 of 1987

[2]*Ex Parte J* 1951 (1) SA 665 (O); Brigitte Clark and Belinda van Heerden "The legal position of children born out of wedlock" *Questionable Issue - Illegitimacy in South Africa* p36; Erwin Spiro "Legitimate and Illegitimate Children" *Acta Juridica* 1964 p55; Ph J Thomas "Paternity: Legal or Biological Concept?" *South African Law Journal* 1988 Vol 105 p239

[3]Erwin Spiro ibid at n 2 (referred to as 'legitimatio per subsequens matrimonium)

[4]Erwin Spiro supra, n 2 p56; Ph J Thomas supra, n 2 p239, p248

[5]Erwin Spiro supra, n 2 p57-58

[6]E Spiro "Outline" *Law of Parent and Child* Chapter 1 p447-448; Erwin Spiro supra, n 2 p62-63

before the marriage of the mother and a person other than the biological father; children born after the marriage of the mother and a person other than the biological father where the presumption 'pater est quem nuptiae demonstrant' has been rebutted; children born after the dissolution of the marriage between the mother and a person other than the biological father unless the presumption 'pater est quem nuptiae demonstrant' operates within the second marriage and is not rebutted or there is a legitimation by the subsequent marriage; children born before the marriage of the biological father and a person other than the biological mother; children born after the marriage of the biological father and a person other than the biological mother; and children born after the dissolution of the marriage between the biological father and a person other than the biological mother.

3. FOREIGN LAW

There is not a single foreign jurisdiction which recognises an inherent right of access for natural fathers of extramarital children. However, many foreign countries have moved in the direction of looking at the degree of commitment displayed by the natural father towards his extramarital child and on that basis granting his application for access bearing in mind the best interests of the child as a paramount consideration.

In **Canada**, the generally accepted view is that the natural father of an extramarital child has no inherent rights in respect of that child but the approach in this regard varies from province to province[7]. The province of Manitoba has held that the father of a child born out of wedlock does not have equal rights of custody[8] whereas in British Columbia, the unmarried parents are joint guardians of their child born out of wedlock as long as they are cohabiting[9]. However, if the parents in the latter instance separate, then the parent who usually has care and control of the child would assume full guardianship but if the parents have not cohabited, then the mother of the extramarital child would be the sole guardian[10]. Ontario, on the other hand, has adopted the view that there are numerous relevant considerations which a court must take cognisance of and that even if there is an existing relationship between the father and his extramarital child, the court can still intervene[11]. The general principle seems to remain that the welfare of the child is the paramount consideration[12] and that a natural father will be awarded access to his extramarital child unless it is clearly contrary to the child's welfare or access poses a potential danger to the child[13].

The **Irish** legal system adopts a conservative stance by emphasising the importance of promoting and protecting the institution of marriage as the basis of family life[14]. Thus, an automatic right of access is not recognised for unmarried fathers in respect of their extramarital

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[7] *Van Erk v Holmer* 1992 (2) SA 636 (W) at 645I-J, 646A-B
[8] *Wong v Graham* (1979) 1 Man. R (2d) 365
[9] Section 27 Family Relations Act RSBc 1979 c 121
[10] ibid at n 9
[11] *Reynolds v Toi* (1975) 21 RFL 171 (Ont SC)
[12] *Re Moores v Feldstein* (1974) 3 OR 921 (CA)
[13] Brigitte Clark and Belinda van Heerden supra, n 2 p53; *Van Erk v Holmer* supra, n 7 at 645I-J, 646A-B
[14] William Duncan "Ireland: The Status of Children and the Protection of Marriage" *Journal of Family Law* Vol 27 (1988-89) p163

children and it is also not presumed to arise in a situation where the parties are cohabiting [15]. The natural father therefore has to apply to court to have this right granted and his battle is more onerous since the Supreme Court has accepted that discrimination can be justified if its purpose is to safeguard the constitutionally protected right to a marriage-based family[16].

Although the **Australian** legal system does not recognise an inherent right of access for natural fathers of extramarital children, generally it is considered to be 'of benefit to the child to have continuing contact with each of his or her natural parents, (however), no order for access (will) be made where (the) benefit is outweighed by detrimental factors'[17]. Access is therefore seen to be in the interests of the child and not as the right of a parent[18]. 'Status of children legislation' has also been enacted to assimilate the position of unmarried parents to married parents although the paramount consideration being that of the welfare of the child is pervasive throughout[19].

In the **United Kingdom**, natural fathers of extramarital children continue to be regarded as non-parents for legal purposes which means that they are not possessed of any inherent rights in respect of those children including the right of access[20]. However, this country has sought to improve the position of natural fathers of children born out of wedlock through legislative reforms by allowing the father of such a child to obtain a 'parental rights order' on application to the court[21] or by entering into a private agreement in the form of a 'parental responsibility agreement' with the natural mother[22] so that provision can be made for the father to share parental responsibility of the child with the mother. English courts have held that the aim of the legislation was, in appropriate cases, to equate the position of unmarried fathers to married fathers[23]. These orders are nevertheless revocable by the court[24].

The emphasis of the legislation is on parenthood as a continuing commitment irrespective of the marital status of the natural father[25]. Thus, the term parental authority has been replaced by the term parental responsibility to highlight the fact that parents should exercise their powers so that they benefit the interests of the child[26]. The English legislation

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[15]William Duncan supra, n 14 p164-165

[16]William Duncan ibid at n 15; *O'B v S* [1984] I.R. 316 which refers to article 41 of the Irish Constitution.

[17]Access Sub-Committee of the Family Law Council 1987 at 1 (referred to in the *Van Erk v Holmer* case supra, n 7 at 645G-H)

[18]ibid at n 17

[19]Section 3(1) Victorian Act; section 6 NSW Act; *G v P* [1977] VR 44; Brigitte Clark and Belinda van Heerden supra, n 2 p52; Vivienne Goldberg "The Right of Access of a Father of an Extramarital Child: Visited Again" *South African Law Journal* 1993 Vol 110 p271

[20]Brigitte Clark and Belinda van Heerden supra, n 2 p51; section 2 Children Act 1989 which states that automatic parental powers and responsibilities vest solely with the mother of the extramarital child.

[21]Section 4 Family Law Reform Act 1987; section 4(1)(a) Children Act 1989

[22]Section 2(1)(b) Children Act 1989

[23]*Re H (Illegitimate Children: Father: Parental Rights)* (No 2) [1991] 1 FLR 214; *D v Hereford and Worcester County Council* [1991] FLR 205

[24]Brigitte Clark and Belinda van Heerden supra, n 2 p51

[25]Christina Sachs "The Unmarried Father" *Family Law* Vol 121 December 1991 p538

[26]Christa Wiertz-Wezenbeek "Visitation Rights of Nonparents and Children in England and the Netherlands" *Family Law Quarterly* Vol 31 No 2 Summer 1997 p365

applies to all parents, including natural fathers of extramarital children, but it distinguishes between the father with or without parental responsibility so that emphasis is placed on the fact of parenthood and not legitimacy[27]. Thus, section 2(3) of the Family Law Reform Act of 1987 reads:

'... references... to any relationship between two persons, shall ... be constued without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time'[28].

By taking due cognisance of the fact that unmarried partnerships are far commoner in present society than they used to be and that the social stigma that used to be attached to them has disappeared[29], the courts have emphasised that access is the right of the child and not the parent and that every child needs a father and should have contact with him and similarly, every father should have the opportunity of developing a relationship with his child, whether extramarital or not[30]. However, the welfare of the child remains the paramount consideration thus even though the courts would be more than willing to grant and recognise a 'parental rights order' and 'parental responsibility agreement' respectively, they would do so only if they were satisfied that it would be in the best interests of the child[31].

Furthermore, the court would also consider as a weighty factor, among others[32], the degree of responsibility shown by the father towards his extramarital child as well as the extent of contact that he had with the child prior to applying for the order[33]. In other words, the courts are not concerned with the fact of a biological link between the natural father and his extramarital child but rather whether or not the father has established or will establish a 'real family' with the child[34]. Thus, where the unmarried parents have cohabited with their child, the courts would be more inclined to treat them as they would a married couple[35].

American common law also did not award the biological father of an extramarital child any parental status. The father therefore had no inherent rights in respect of that child, only duties that is, the duty to support his child born out of wedlock[36]. However, the position of the

[27]Christina Sachs supra, n 25 p538
[28]ibid at n 27
[29]*Dyson Holdings Ltd v Fox* 1976 QB 503 at 512-513
[30]*Re B (a Minor) (Access)* (1984) FLR 648; *S v O (Illegitimate Child: Access)* (FD) (1982) 3 FLR 17; *M v M (Child: Access)* [1973] 2 All ER 81; *Re C (a Minor) (Access)* (FD) (1991) FCR 489; *A v C* [1985] FLR 445 (CA) at 456A-B
[31]*Re C (a Minor) (Access)* ibid at n 30; *A v C* ibid at n 30; *Re KD (a minor)(ward: termination of access)*[1988] 1 All ER 577 (HL); *M v M* supra, n30 at 88
[32]In *Re H (Illegitimate Children: Father: Parental Rights)* supra, n 23, Balcombe LJ suggested that the court would have to take into account a number of factors of which the following three would certainly be material: a) the degree of commitment shown by the father towards his child; b) the degree of attachment which exists between the father and the child and c) the reasons of the father for applying for the order.
[33]*S v O (Illegitimate Child: Access)* supra, n 30 at 18; *Re C (Minors: Parental Rights)* [1992] 1 FLR 1 at 3; *M v J (Illegitimate Child: Access)* (1977) 3 F.L.R. 19; *B v A (Illegitimate Children: Access)* (1981) 3 F.L.R. 27
[34]*D v Hereford and Worcester County Council* supra, n 23
[35]*B v T (Custody)* [1989] 2 FLR 31
[36]Brigitte Clark and Belinda van Heerden supra, n 2 p52

natural father has been greatly improved both statutorily [37] and by the United States Supreme Court[38]. American statutes and case law in this respect deal mainly with the issue of adoption but the principles espoused therefrom are nevertheless important for the purposes of access as well.

In situations where natural fathers have demanded equal protection of their parental rights, the United States Supreme Court has held that distinctions based on gender and illegitimacy cannot be upheld unless they are substantially related to important state interests such as '(the) promotion of family integrity and stability, the preservation of an established familial relationship, and the protection of the child from (the) permanent stigma and distress of illegitimacy'[39]. The United States Supreme Court has therefore recognised that a natural father of an extramarital child has a constitutionally protected right under the Due Process or Equality Clause to develop a relationship with his child as long as he manifests a willingness to accept his obligations and attempts to form a parental relationship with that child[40]. In other words, the courts have held that the mere existence of a biological relationship between the natural father and his extramarital child does not warrant constitutional protection but the biological link becomes significant because it offers the natural father an opportunity to establish a parental relationship with his child thus where the father displays a measure of responsibility and an interest in bonding with the child, his right to form continued contact with his child becomes constitutionally protected[41].

The Supreme Court has also recognised that a family relationship can be one which has not been solemnised by a formal legal ceremony[42] and it has also excluded the requirement that the natural father must live with the mother in order to earn that right[43]. The focal guideline for the court would be to determine what is in the best interests of the child[44].

4. SOUTH AFRICAN COMMON LAW POSITION

Parental power or parental authority consists of two elements namely, guardianship and

[37] Sections 1 and 2 Uniform Parentage Act 1973
[38] Brigitte Clark and Belinda Van Heerden supra, n 2 p52
[39] Vivienne Goldberg "The Right of Access of a Father of an Illegitimate Child: Further Reflections" *THRHR* 1996 Vol 59 p293; *Weber v Aetna Casualty and Surety Co* (1972) 406 US 164; *Levy v Louisiana* (1968) 391 US 68; *Glona v American Guarantee and Liability Insurance Co* (1968) 391 US 73; *Trimble v Gordon* (1977) 430 US 762
[40] *Stanley v Illinois* 405 US 645 (1972); *Quilloin v Walcott* 434 US 246 (1978); *Caban v Mohammed* 441 US 380 (1979); *Lehr v Robertson* 463 US 248 (1983); *Meyer v Nebraska* 262 US 479 (1965)
[41] *Lehr v Robertson* ibid at n 40; *Caban v Mohammed* ibid at n 40; *Meyer v Nebraska* ibid at n 40; *Ruben Pena v Edward Mattox* 84 F 3d 894 (1996); *Michael H v Gerald D* 491 US 110 (1989); *In re Raquel Marie* X76 NY 2d 387, 559 NE 2d 418, 559 NYS 2d 855 (1900), cert denied, 59 USLW 3386 (US Nov 27 1990) (No 90 - 597); *In re Petition of John Doe and Jane Doe, Husband and Wife, to Adopt Baby Boy Janikova* 159 Ill 2d 347, 638 NE 2d 181 (1994)
[42] *Stanley v Illinois* supra, n 40 at 651-652
[43] *In re Raquel Marie* supra, n 41
[44] *Quilloin v Walcott* supra, n 40

custody, and access is considered to be an incidence or consequence of parental authority[45]. The Guardianship Act 192 of 1993 removed the common law inequalities which existed between married partners with regard to their children born within wedlock by allowing parents to share equally both guardianship and custody of the children[46]. When a divorce occurs in practice, however, custody of young children is almost always awarded to the mother while guardianship stays with the father[47].

With regard to children born out of wedlock, the common law position has not been changed by the Guardianship Act 192 of 1993 so that the mother of an extramarital child alone has parental authority and therefore has sole guardianship and custody over the child[48]. The natural father, however, has no parental power or rights in respect of that child[49]. In other words, he has no inherent rights of guardianship and custody over the child[50]. In light of the fact that access is an incidence or consequence of parental authority, and since the natural father has no parental authority with regard to his extramarital child, the natural father also does not have an inherent right of access to that child[51].

This position is derived from the legal maxim 'eene moeder maakt geen bastaard' in terms of which the extramarital child is regarded as being related only to the mother and her relations and not to the natural father and his relations[52]. The consequence of this is that the extramarital child derives its name, domicile (where the child lives with the mother) and religion from the mother and not the natural father[53]. There is furthermore a reciprocal duty on the extramarital child to support the mother and her relations and vice versa but not vis-a-vis the natural father and his relations, nor do the relations of the natural father have to support the extramarital child[54]. Despite the denial of parental rights to the natural father in respect of his extramarital child, the natural father is under a duty, jointly with the mother, to maintain that child and this duty arises from the biological fact of his paternity[55].

5. SOUTH AFRICAN CASE LAW

Up until 1992, the various provincial divisions of the Supreme Court overwhelmingly reiterated the common law position that the natural father of a child born out of wedlock did not

[45] June Sinclair "Families in Transition under a New Constitution" *The Law of Marriage* Vol 1 Chapter 1 p112; *Docrat v Bhayat* 1932 TPD 125; *Douglas v Mayers* 1987 (1) SA 910 at 914C-D; *F v L and Another* 1987 (4) SA 525 at 527G-J

[46] June Sinclair supra, n 45 p112-113

[47] ibid at n 46

[48] June Sinclair supra, n 45 p114; Erwin Spiro supra, n 2 p64; E Spiro supra, n 6 p450, p457

[49] ibid at n 48

[50] June Sinclair ibid at n 49; Anne Palmer "Are Some Fathers of Extramarital Children in a Better Position than Others?" *South African Law Journal* 1996 Vol 113 p580

[51] *F v L Another* 1987 (4) SA 525 at 527G-J

[52] Erwin Spiro supra, n 2 p64; supra, n 6 p450

[53] Erwin Spiro supra, n 2 p64-65; supra, n 6 p450, p452

[54] Erwin Spiro supra, n 2 p65; supra, n 6 p450, p453, p458

[55] *Tate v Jurado* 1976 (4) SA 238 (W); *Lamb v Sack* 1974 (2) SA 67 (T); *Jacobs v Lorenzi* 1942 CPD394 at 400; Brigitte Clark and Belinda van Heerden supra, n 2 p41; Erwin Spiro supra, n 2 p65; E Spiro supra, n 6 p453, p457-458; June Sinclair supra, n 45 p114

have an inherent right of access to that child[56]. Three earlier cases[57] awarded the natural fathers of their extramarital children access and custody respectively. However, Muchechetere J, Harms J and Kirk-Cohen J all noted[58] that those rights had been granted in light of the circumstances of each case and because they were considered to be in the best interests of the children in each respective case. Those cases did not therefore recognise an inherent right of access nor custody on behalf of natural fathers of extramarital children in general. Some courts even adopted the view that a natural father of an extramarital child did not have locus standi to apply for a right of access nor was he entitled as of right to apply for such right[59]. Most courts have, however, accepted that a natural father of an extramarital child can apply to court to have a right of access to his child granted and that the Supreme Court in its exercise of its powers as upper guardian of all minor children would only award this right if it determined on the facts of the case that it would be in the child's best interests to do so[60].

Yet, at the same time, many courts reflected that they would not easily intervene with the parental authority of the mother and that special grounds would have to be established to show good cause for the diminution of her rights[61]. Other cases increased the burden of proof to such an extent that those courts would only have interfered if there was 'some very strong ground compelling [them] to do so'[62] or if there were 'exceptional cases in which considerations relating to the interests of the child compel[led] [them] to do so'[63]. Furthermore, Findlay AJ[64] remarked that "[w]here it is determined that the mother is the natural guardian and natural custodian of the child, then this acts as a much weightier and stronger factor on the scale in her favour in order to test the other evidence at a higher level so as to decide whether or not grounds are in fact established which can be classified as 'special' and which merit any deprivation of her rights as guardian and custodian".

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[56] *Edwards v Fleming* 1909 TH 232; *Docrat v Bhayat* supra, n 45 at 128; *Rowan v Faifer* 1953 (2) SA 705 (E) at 710E; *Short v Naisby* 1955 (3) SA 572 (D) at 575B-D; *September v Karriem* 1959 (3) SA 687 (C) at 689F, 688G; *Ex Parte Van Dam* 1973 (2) SA 182 (W) at 185A; *Douglas v Mayers* supra, n 45 at 914E; *F v L and Another* supra, n 45 at 526E, 527G-H; *F v B* 1988 (3) SA 948 at 949B, 950F-G; *W v S* 1988 (1) SA 475 (N); *D v L and Another* 1990 (1) SA 894; *B v P* 1991 (4) SA 113 (T) at 114E

[57] *Wilson v Eli* 1914 WR 34 where the court awarded the father access to his minor 'illegitimate' child born of a Muslim marriage; *Davids v Davids* 1914 WR 142 where the court awarded the father custody of his minor 'illegitimate' child born of a marriage concluded in accordance with 'Malay' rites and granted the mother access; *Matthews v Haswari* 1937 SA 110 where the court granted access of the 'illegitimate' child to the natural father.

[58] *Douglas v Mayers* supra, n 45 at 913F-J, 914A; *F v L and Another* supra, n 45 at 526G-I, 527A; *B v P* supra, n 56 at 114

[59] *Docrat v Bhayat* supra, n 45; *F v L and Another* supra, n 45 at 528A

[60] *Matthews v Haswari* supra, n 57; *Rowan v Faifer* supra, n 56 at 710E; *Short v Naisby* supra, n 56 at 575B-D; *September v Karriem* supra, n 56 at 689F-H; *Segal v Segal* 1971 (4) SA 317 (K) at 324B-C; *Ex Parte Van Dam* supra, n 56 at 185D; *Douglas v Mayers* supra, n 45 at 914E; *F v B* supra, n 56 at 950F-G; *J v O* 1990 at 19; *B v P* supra, n 56 at 115A, 117F; *W v S and Others* supra, n 56 at 487G, 489G

[61] *Edwards v Fleming* supra, n 56; *Matthews v Haswari* supra, n 57 at 112; *Short v Naisby* ibid at n 60; *September v Karriem* supra, n 56 at 688G; *Ex Parte Van Dam* ibid at n 60; *J v O* supra, n 60

[62] *Douglas v Mayers* supra, n 45 at 914E

[63] *F v B* supra, n 56 at 950F-G

[64] *W v S and Others* supra, n 56 at 490A-B

In 1991, Kirk-Cohen J[65] writing for the Full Bench of the Transvaal Provincial Division, recognised that these types of tests placed extramarital children in an unequal position to children born in wedlock. The court said that:

"It would be untenable to suggest that the Court, as upper guardian, will assist a legitimate child, whose parents are in the process of becoming divorced or are divorced, on the basis of what is in the best interests of that child, but an illegitimate child only if there is danger to life, health or morals"[66].

Thus, the court concluded that the applicant (natural father) would bear the onus of proving on a balance of probability that access would be in the best interests of the child and that such consideration was paramount in all these types of cases and would have to be determined on the facts of each and every case[67]. The court added that the natural father would also have to show that access would not unduly interefere with the mother's right of custody[68]. Therefore, although the court lightened the test on the natural father considerably, it still placed the mother's interests in higher regard than those of the natural father.

5.1. VAN ERK V HOLMER[69]

Suddenly South African case law undertook a brave departure from the old conservative views when in this case, Van Zyl J asserted that neither Roman nor Roman-Dutch legal sources constituting South African common law said anything about whether or not a father of an extramarital child had any rights of access with regard to that child[70]. The court indicated that the emphasis throughout those sources was on guardianship and parental power or parental authority and that the question of access seems simply not to have been considered[71]. The court then stated that this does not justify the inference that a right of access on behalf of a natural father of an extramarital child does not exist[72].

Furthermore, the court highlights the fact that the common law maxim[73] which prevents a mother from bastardising her extramarital child is based on her blood relationship with the child hence the reciprocal rights and duties between that mother and child[74]. Yet, the natural father of that child is denied any rights with regard to the child but still has the duty to maintain that child, which duty clearly arises from the fact of his paternity, that is, his blood relationship with the child[75]. Thus, this contradiction makes nonsense of the assumption that the natural father is not related to his extramarital child and therefore bears no rights in respect of that child[76]. This 'illogicality' is expressed even further by virtue of the fact that the natural father is subject to marriage impediments because he may not marry his extramarital child due to the

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[65] *B v P* supra, n 56 at 114E
[66] at 115J-116A
[67] at 117B-F
[68] at 117F
[69] 1992 (2) SA 636 (W)
[70] at 637H-J
[71] at 647B-C
[72] ibid at n 71
[73] 'eene moeder maakt geen bastaard'
[74] at 647D, 638A-C
[75] at 638G, 647D-E
[76] at 647D-E

existence of a blood relationship between them[77].

The court categorically agreed that the right of access is not a quid pro quo for the payment of maintenance but a gross injustice occurs when a natural father is forced to support a child whom he may never be able to visit or see even though he may be completely committed to the interests of his child[78]. The court also felt that the inequitable position of natural fathers placed an 'unfounded and unjustifiable burden of proof' upon them and that it would be no more burdensome for mothers to approach the court to limit the rights of natural fathers than it would be for the latter to apply for rights of access[79]. Van Zyl J furthermore argued that access should not always be regarded as an incidence of parental authority because in those cases where access is granted on the grounds of the child's best interests, the court does not necessarily also confer parental authority on the natural father[80].

The court then propounded the view that where the common law does not deal with the relevant legal issue, it falls to the court to decide the matter 'in accordance with the principles of reasonableness, justice, equity and the *boni mores* or public policy'[81]. The court stressed that it would be in the interests of the child if proper recognition were given to a natural father's need to form a relationship with that child so that the latter should have an unfettered opportunity to develop a normal and healthy relationship with both parents[82]. Moreover, the court noted that just as public policy dictates that there should be no distinction between 'legitimate' and 'illegitimate' children, so there is no justification for making a legal distinction between the fathers of those children[83]. The court therefore concluded that the time had arrived 'for the recognition ... of an inherent right of access by a natural father to his illegitimate child [and that this right is] amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy [and such right] ... should be removed only if the access should be shown to be contrary to the best interests of the child'[84].

5.2. POST VAN ERK

This great victory for natural fathers of extramarital children in South Africa was short-lived when the *Van Erk* decision was overwhelmingly overturned by its own Witwatersrand Local Division in two later cases[85] as well as the Appellate Division decisions in *B v S*[86] and *T v M*[87]. The Supreme Court of South Africa therefore re-aligned itself with the previous common law position by restating that a natural father of a child born out of wedlock does not have an

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[77] ibid at n 76
[78] at 649G
[79] at 649B-C
[80] at 647F-G
[81] at 648B
[82] at 649G-I
[83] at 649E
[84] at 649J-650A
[85] *S v S* 1993 (2) SA 200 (WLD); *Chodree v Vally* 1996 (2) SA 28 (W)
[86] 1995 (3) SA 571 (AD)
[87] 1997 (1) SA 54 (AD)

inherent right of access to that child[88].

The courts firstly based their decision on the principle of stare decisis which presupposes that a single Judge is bound by the decision of a Full Bench of his or her own Division unless she or he is fully convinced that the latter is clearly wrong[89]. The courts were thus not fully convinced that all the cases prior to *Van Erk* had been wrongly decided and therefore felt that they were not entitled to deviate from the Full Bench decision in *B v P*[90].

Secondly, the courts accepted the previous findings that access is an incidence of parental authority as being 'sound in logic and based on principle'[91] and since the common law does not place any form of parental authority on a natural father of an extramarital child, the clear implication is that the father is bereft of any power from which a right of access could have originated by law[92]. The duty of support and the marriage impediment also does not imply the existence of parental authority from which a right of access could have been derived[93]. Furthermore, since no authority could be found to show the existence of a natural father's right of access to his extramarital child, this was a strong indication that no such right indeed exists[94]. Finally, the courts held that it is the duty of a judge to apply the law as it is even if she or he believes such law to be undesirable and that only Parliament or the Appellate Division is in a position to alter it[95].

The Supreme Court, however, reiterated the fact that a natural father could nevertheless apply for access to be granted to his extramarital child and that such access would only be awarded if the court was satisfied that it would be in the best interests of the child[96]. The Appellate Division went even further by stating that it is actually the child's right to have access to or to be spared access from the non-custodian parent so that if an inherent entitlement is alluded to at all, it is that of the child and not that of the parent[97].

6. ARGUMENTS AGAINST AN INHERENT RIGHT OF ACCESS

Various academic writers have written widely on the subject of access in respect of natural fathers of children born out of wedlock. Some of them have expressed support for the recognition of an inherent right of access for those fathers whereas others have supported the status quo maintained by South African case law.

This section deals with the reasons advanced by the latter portion of writers. Their

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[88] *S v S* supra, n 85 at 204E-205A; *B v S* 1995 (3) SA 571 (AD) at 575I-576A, 583G; *Chodree v Vally* supra, n 85; *T v M* 1997 (1) SA 54 (AD) at 57H-J

[89] *S v S* supra, n 85 at 203I

[90] ibid at n 89 (referring to *B v P* supra, n 56)

[91] *S v S* supra, n 85 at 204A; *B v S* supra, n 88 at 575D

[92] *B v S* supra, n 88 at 575E, 575I-J, 579G-H

[93] *B v S* supra, n 88 at 575E

[94] *S v S* supra, n 85 at 205E

[95] *S v S* supra, n 85 at 206B, 207J; *B v S* supra, n 88 at 579I-J

[96] *S v S* supra, n 85 at 208C; *B v S* supra, n 88; *T v M* supra, n 88 at 58D

[97] *B v S* supra, n 88 at 581J-582A, 583G; *T v M* supra, n 88 at 57H-J; Also stated by Milne DJP in *Dunscombe v Willies* 1982 (3) SA 311 (D) at 315H-316B

arguments seem to be premised on two legs: firstly, the interests of the father versus the interests of the mother; and secondly, the interests of the child.

In the first instance, it is suggested that the granting of an inherent right of access to the natural father of an extramarital child would be to the detriment of the natural mother[98]. The authors argue that the ever-increasing number of extramarital children is becoming a worldwide phenomenon but as opposed to many other countries, the socio-economic conditions in South Africa prevent the rearing of those children in stable two-parent families[99]. Thus, since single mothers in South Africa are burdened with the maintenance of children in an environment of poverty and in which traditional support structures have broken down, the granting of an automatic right of access for natural fathers would only add to this burden[100]. Furthermore, it is purported that the granting of an inherent right of access would practically imply a shift of onus from the father to the mother which would add to the trauma that she has already undergone[101]. This would also place the mothers in a further burdensome position because they would then have to approach the court to show cause as to why the natural father should not be granted access and the authors submit that many mothers would find it extremely difficult to gain access to court given their current socio-economic circumstances[102].

In the second instance, the authors contend that the best interests of the child remain the paramount consideration[103]. This supercedes the interests of the community which aims to protect the institution of marriage, as well as the interests of the natural father[104]. In fact, it is suggested that the best interests of the child are not always the same as the interests of the natural father thus an automatic award of an access right would not necessarily always coincide with what is best for the child[105]. Furthermore, some of the authors argue that our law regards marriage as a permanent relationship whereas extramarital relationships vary widely in their nature and content as well as with regard to the intentions of the respective parties thereto[106]. As a result, an extramarital child could have been conceived during a single act of sexual intercourse or from a long-standing relationship unencumbered by the formalities of marriage [107]. The role of those natural fathers could similarly be varied, ranging from one who plays no role at all in the child's life to a completely committed role[108]. Thus, this type of diversity requires a degree of scrutiny by the court as upper guardian of all minor children so that the rights of the extramarital child should always prevail over the rights of the natural father[109].

Although the authors do not advocate an inherent right of access for those fathers, they

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[98]JC Sonnekus and A Van Westing "Faktore vir die erkenning van n sogenaamde reg van toegang vir die vader van n buite-egtelike kind" *TSAR* Vol 2 1992 p243
[99]Brigitte Clark and Belinda van Heerden supra, n 2 p36, p61
[100]Brigitte Clark and Belinda van Heerden supra, n 2 p61
[101]Brigitte Clark "Should the Unmarried Father Have an Inherent Right of Access to His Child?" *South African Journal of Human Rights* 1992 Vol 8 p569
[102]Brigitte Clark and Belinda van Heerden supra, n 2 p57; Vivienne Goldberg supra, n 19 p274
[103]JC Sonnekus and A Van Westing supra, n 98 p233
[104]JC Sonnekus and A Van Westing supra, n 98 p234-236
[105]JC Sonnekus and A Van Westing supra, n 98 p233, p246
[106]Brigitte Clark supra, n 101 p569
[107]Anne Palmer supra, n 50 p582
[108]ibid at n 107
[109]Brigitte Clark supra, n 101 p567, p569

do acknowledge that the parent / child relationship warrants protection and that, where possible, severance thereof should be prevented: thus, attempts should be made to encourage the involvement of fathers with their children[110]. In this context, three types of fathers are distinguished namely, 'those who cannot be identified'; 'those who refuse to establish a full relationship with their children'; 'and those who voluntarily undertake the duties of a father'[111]. The authors contend that it is the latter type of father who should be granted access to his extramarital child albeit via court intervention[112]. In other words, the onus would be on the natural father to show on a balance of probability that he has voluntarily accepted his parental responsibility in an existing parent-child relationship and that he has displayed a commitment to both the child and the mother as well as practically acknowledged his duty of support[113].

Finally, Vivienne Goldberg seems to adopt a half-way position by suggesting that once a natural father has established a prima facie case by adducing evidence to the effect that he is the biological father, that he has displayed an interest in and a commitment to the child born out of wedlock, and that he has made adequate maintenance payments, a rebuttable presumption should arise that it would be in the child's best interests for the father to have access to him or her unless the mother can thereafter prove the contrary[114].

6.1. SOUTH AFRICAN LAW COMMISSION

In 1993, the South African Law Commission proposed two alternatives to the question of access for natural fathers of extramarital children[115]. On the one hand, the more conservative suggestion was that the status quo be retained in that the natural father should not have an inherent right of access but should be able to make application to court for access to be granted. In this respect, the court would have to have regard to the best interests of the child and in reaching its decision could be guided by certain non-exhaustive guidelines such as the relationship between the affected parties, the child's attitude etcetera. On the other hand, the Law Commission proposed that all natural fathers of extramarital children with the exception of rapists and gamete donors, could be given an automatic right of access which could be limited by the court on application by the natural mother and again, in this respect, the court would have to reach its decision by having regard to the best interests of the child.

The following year, the South African Law Commission categorically put forward a position which opted for the retention of the status quo on the grounds that the mothers would be placed in an untenable position if natural fathers were granted an inherent right of access[116]. The Report reflects that the Commission was not influenced by constitutional considerations of

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[110]Brigitte Clark and Belinda van Heerden supra, n 2 p56
[111]ibid at n 110
[112]Brigitte Clark and Belinda van Heerden supra, n 2 p56; Brigitte Clark supra, n 101 p567; Anne Palmer supra, n 50 p582; JCSonnekus and A Van Westing supra, n 98 p241
[113]JC Sonnekus and A Van Westing supra, n 98 p241, p246; Brigitte Clark supra, n 101 p567-568; Brigitte Clark and Belinda van Heerden supra, n 2 p57
[114]supra, n 19 p274; supra, n 39 p283
[115]South African Law Commission *Working Paper 44, Project 79* (1993) "A Father's Rights in Respect of His Illegitimate Child"
[116]South African Law Commission *Report, Project 79* (July 1994) "Rights of a Father in Respect of his Illegitimate Child" at para 8.6

equality or how the father's right could be reconciled with the child's interests[117]. It was more concerned that a legal recognition of an automatic right of access for natural fathers would elicit spurious actions which would 'have no bearing on their true feelings and the best interests of the child'[118]. This Report therefore contained a draft bill which was designed to establish legal certainty in respect of the status quo[119]. The draft bill set out common-sense guidelines which a court would have to take cognisance of in reaching a decision whether or not to grant a natural father access to his extramarital child based on the latter's best interests[120], such as the relationship between the parents; the relationship of the child to its parents or a third party; the effect of separating the child from any of the interested parties; the child's own views; and any other relevant fact[121].

It is also interesting to note that prior to 1993 the South African Law Commission in 1984 actually recommended the granting of an inherent right of access to natural fathers of extramarital children[122]. Yet, only nine years later it reversed its position completely as a result of decisions which overturned the *Van Erk*[123] case. Despite the fact that the Law Commission is supposed to render independant proposals, these opposite stances seem to indicate a fickleness in terms of which recommendations are only made in line with the approach of the courts.

7. CURRENT STATUTORY POSITION

During the course of 1997 and emanating from the South African Law Commission's Report of 1994[124], the Department of Justice introduced the Natural Fathers of Children Born out of Wedlock Bill[125] which was later tabled and passed by Parliament as the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. This Act adopts the position set out by the Law Commission by simply codifying the common law. In other words, it does not grant natural fathers of extramarital children an inherent right of access in respect of those children.

Rather, it makes provision for a natural father to make application to court to have that right granted[126]. The court has the discretionary power to grant that order provided it is satisfied that it would be in the best interests of the child to do so and as long as it considered the report and recommendations of the Family Advocate if an enquiry is instituted by the latter[127]. The Act also sets out a lengthy list of circumstances which the court must, where applicable, take cognisance of before reaching its decision[128]. These include, among others[129]: the relationship

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[117]ibid at n 116
[118]supra, n 116 at para 8.6
[119]supra, n 116 at para 8.4
[120]Clause 2 of the draft bill
[121]Clause 2(3) of the draft bill
[122]South African Law Commission *Working Paper 7, Project 38* (October 1984) "Investigation into the Legal Position of Illegitimate Children"
[123]*Van Erk v Holmer* supra, n 7
[124]supra, n 116
[125]B68B - 97
[126]Section 2(1)
[127]Section 2(2)(a) and (b)
[128]Section 2(5)
[129]Section 2(5)(a) - (g)

between the natural father and the mother and in particular whether or not there was a history of violence between either party and in relation to the child; the relationship of the child with the natural father and the mother; the attitude of the child; the degree of commitment which the natural father has displayed towards the child, in particular the extent to which the natural father contributed to the lying-in expenses incurred by the mother as well as any maintenance payments that have been made by him; and any other fact which the court considers to be relevant. Thus, the list is not exhaustive.

8. ARGUMENTS IN FAVOUR OF AN INHERENT RIGHT OF ACCESS

Thus far, numerous reasons have been advanced why a natural father of an extramarital child should not be granted an inherent right of access in respect of that child. It is apparent that a whole host of factors combine to form a seemingly solid wall preventing the granting of such a right such as our common law, our recent statutory law, academic thought as well as foreign law. Indeed, they constitute a formidable opposition especially as this century has seen a relatively more liberal approach by allowing those fathers who have voluntarily acknowledged and accepted their parental responsibilities to have access to their extramarital children. Yet, I wish to submit that this is not sufficient. There are a number of learned authors[130] who advocate the opposite position and in line with their arguments, I submit that within the context of our constitutional dispensation, a denial of an inherent right of access to natural fathers of extramarital children can be considered unconstitutional.

The constitutional arguments in this respect can be based on four legs: firstly and secondly, that a denial of an inherent right of access violates the equality provision enshrined in section 9 of our Constitution[131] in that it amounts to unfair discrimination for natural fathers on the grounds of 'gender' and 'marital status' and it amounts to unfair discrimination for extramarital children on the grounds of 'birth' and 'social origin'; thirdly, it violates a child's right to 'family care or parental care'[132]; and fourthly, it violates the section which makes provision for the consideration of the 'best interests of the child' principle[133].

Before proceeding with the various constitutional arguments, I believe that it is important to first consider the genesis of the rule which denies natural fathers an inherent right of access and whether or not it is relevant for present-day society. It has already been mentioned that the

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[130] June Sinclair supra, n 45; JM Kruger, M Blackbeard, M de Jong "Die vader van die buite-egtelike kind se toegangsreg" *THRHR* 1993 Vol 56; JMT Labuschagne "Persoonlikheidsgoedere van n ander as regsobjek: opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind" *THRHR* 1993 Vol 56; Joan Church "Secundum ius et aequitatem naturalem: a note on the recent decision in *Van Erk v Holmer*" *Codicillus* 1992 Vol 33(1); PQR Boberg *The Law of Persons and the Family - with Illustrative cases*; PQR Boberg "The Would-Be Father and the intractable court" *Businessman's Law* 1988 Vol 17; PQR Boberg "The Sins of the Fathers - and the law's retribution" *Businessman's Law* (1988) Vol 18; Ohannessian and Steyn "To see or not to see? - that is the question (the right of access of a natural father to his minor illegitimate child)" *THRHR* (1991) Vol 54; JC Sonnekus and A Van Westing supra, n 98; B Eckhard "Toegangsregte tot buite-egtelike kinders - behoort die wetgewer in te gryp?" *TSAR* 1992 Vol 1

[131] The Constitution of the Republic of South Africa Act 108 of 1996

[132] supra, n 131 Section 28(1)(b)

[133] supra, n 131 Section 28(2)

common law authorities are silent on the question of access and Van Zyl J [134] contended that this was probably because in those days very few fathers of extramarital children wanted to publicise the fact of their fatherhood due to severe social constraints. It has also been argued that the concept of legitimacy was derived from the Christian notion of a civil marriage thereby excluding children who were born from religious, customary or other types of unions [135]. In other words, early societies may well have developed the institution of marriage to establish the relationship between a man and his offspring because even though motherhood could easily be proved, fatherhood at that time could not. Thus, a formal ceremony between the parties was the easiest method of establishing the link since any child born after the formal union was deemed to be the husband's progeny[136]. The classification of 'legitimacy' was therefore to encourage Christian civil marriages in the sense that 'illegitimacy' and the father's concomitant denial of any rights in respect of the extramarital child were imposed as a form of punishment for no marriage having taken place[137]. The father was punished for not having married the mother by being regarded as a non-parent bearing no rights and only duties in respect of his extramarital child while the latter was punished by being denied access to the father as a result of the 'sins' of the parents[138]. This perception has been reflected in our modern-day judgments with some of the South African Supreme Court Justices having said the following:

" ... if the natural father had really been interested in the best interests of the child, then he would have married the mother."[139]

"It may well have been a reaction of societies that the existing legal approach is the only means of putting pressure on the natural father to seriously consider the situation, also the plight of the mother and the totally helpless result. To destroy that pressure would then be a cut into the nerve system of the operation of society."[140]

" ... [W]hy should the father get a prize? For the joy brought by a drunken one night stand without any emotional involvement? For seduction? Or inadequate safety of technique?"[141]

Two writers have even suggested that the assimilation of cohabitation with marriage would be undesirable and would pose a threat to society because it would allow those 'men who beget illegitimate children the same rights as those who procreate within marriage'[142].

It is shocking that at this late stage of the century, South African judges and academic writers can still hold such archaic and outdated notions of relations between women and men. The birth of children outside the parameters of marriage is far more common these days and the same may be said of unmarried partnerships[143]. In fact, with reference to the latter, Bridge LJ noted as early in 1976 that the 'social stigma that once attached to them has almost, if not

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[134] *Van Erk v Holmer* supra, n 7 at 648-649
[135] T Ohannessian and M Steyn supra, n 130 p259
[136] Brenda Hoggett "Unmarried Parents" *Parents and Children* Chapter 2 p27
[137] B Eckhard supra, n 130 p124
[138] B Eckhard supra, n 130 p126
[139] *J v O* supra, n 60 at 19
[140] *S v S* supra, n 85 at 206I-J per Fleming DJP
[141] *S v S* supra, n 85 at 209F per Fleming DJP
[142] JC Sonnekus and A Van Westing supra, n 98 p241
[143] PQR Boberg supra, n 130 Vol 17 112; *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC) at 171D; *Van Erk v Holmer* supra, n 7 at 648-649

entirely, disappeared'[144]. The United States Supreme Court has also recognised the importance of familial relationships even where they are not legitimated by a formal marriage ceremony and has acknowledged that the bonds emanating from a non-marital situation are 'as warm, enduring, and important' as those arising from a formally sanctioned marital union[145].

It is a well noted fact that these days relationships cover a wide range of alternatives including cohabitation and single-parent families[146]. The average family has undergone an evolution from an extended family to a nuclear family to the present situation which encompasses a variety of individuals and relationships[147]. It is a sad fact that our courts have not reflected these changing norms and mores which permeate our present societal configuration. Even though they have acknowledged the increasing pervasiveness of cohabitational relationships in South Africa today and would therefore be more wont to award natural fathers in those live-in relationships a right of access to their extramarital children, the submission is that they would probably not be as lenient towards fathers who are not living with the mother and the child. I submit further that it is exactly these fathers who need access rights since they are not privy to their children within the confines of cohabitation.

Why must a father who does not love the mother of his extramarital child sufficiently to marry her be forced to do so just so that he can be placed in the priviliged position of having an inherent right of access to his own child? And because he chooses not to marry her, the law punishes him by withholding rights that he would have been naturally entitled to but for the legal status of marriage. The same arguments attach to the situation where the mother chooses not to marry the natural father. To conceive and bear a child outside marriage is no longer a societal sin and no longer bears the social stigma it once did, so why should half the members of society continue to be penalised for an act of nature during an age of enlightenment and progressiveness. The law needs to reflect a casting out of reactionary reasons which initially punished fathers and extramarital children by denying them access to each other, instead of what it is presently doing by protecting and promoting barbaric attitudes of a repressive society.

8.1. EQUALITY

The notion of equality occupies a central place in the South African Constitution[148] because its essence lies at the very heart therein[149]. It constitutes the very ethos upon which our Constitution is based and it permeates as a recurrent theme throughout[150] most notably in the Preamble, the sections dealing with rights[151], equality[152], limitations of rights[153] and the

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[144] *Dyson Holdings Ltd v Fox* supra, n 29 at 513-513
[145] *Stanley v Illinois* supra, n 40 at US 651-652
[146] Rebecca L Melton "Legal Rights of Unmarried Heterosexual and Homosexual Couples and evolving definitions of "family" " *Journal of Family Law* 1990-91 Vol 29 p497
[147] Samuel V Schoonmaker et al "Constitutional Issues Raised by Third Party Access to Children" *Family Law Quarterly* Spring 1991 Vol XXV No 1 p95
[148] supra, n 131
[149] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at 214G-H; *Fraser* supra, n 143 at 161F-162A
[150] ibid at n 149
[151] supra, n 131 Section 7
[152] supra, n 131 Section 9
[153] supra, n 131 Section 36

interpretation of the Bill of Rights[154]. Our equality clause came about as a product of South Africa's own history in that it renounces the systemic inequity and discrimination that was wreaked upon all black people through the policies of apartheid[155]. The economic and social damage caused by this repressive system is still very much alive today among the majority of the people in this country and it is in this light that the equality clause needs to be interpreted[156].

The adoption of the equality clause highlighted the acknowledgement that discrimination against members of disadvantaged groups may lead to group disadvantage which translates into unfair discrimination thus the purpose of the equality clause is to prohibit such discrimination and to remedy the results thereof[157]. However, it has been recognised that this prohibition on unfair discrimination does not only seek to prevent discrimination against members of a historically disadvantaged group[158]. As Goldstone J has pointed out:

" ... at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups"[159].

Furthermore, the principle of non-discrimination is not only reflected very specifically in our own Constitution but is also pervasive throughout a number of international conventions[160]. The American legal system has also struck down a New York statute as unconstitutional on the basis of discrimination against natural fathers of extramarital children on the ground of gender because the court felt, albeit in the context of adoption, that the difference in treatment between unmarried fathers and mothers arising out of the relevant statute did not bear a substantial relationship to the interests of the state which was the protection of extramarital children and that the latter did not warrant such disproportionate treatment[161].

In light of the fact that our Constitution includes a Bill of Rights[162] that entrenches the right to equal protection before the law, prohibits unfair discrimination and entrenches equality between women and men[163], the submission is that section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 violates the fundamental rights of natural fathers of extramarital children to be treated equally before the law and not to be unfairly discriminated

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[154]supra, n 131 Section 39
[155]*Brink v Kitshoff NO* supra, n 149 at 217A
[156]*Brink v Kitshoff NO supra,* n 149 at 217C; *Prinsloo v Van der Linde and Another* 1997(3) SA 1012 (CC)at 1023B-E
[157]*Brink v Kitshoff NO supra,* n 149 at 217E-F; *Fraser* supra, n 143 at 171I where the court noted that Parliament should be sensitive to the disadvantage suffered by single mothers and that their disadvantage should not be exacerbated.
[158]*President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at 22G
[159]*Hugo* case supra, n 158 at 22G-H, 23A
[160]Universal Declaration of Human Rights 1948 (article 7); International Covenant on Economic, Social and Cultural Rights 1966; International Covenant on Civil and Political Rights 1966 (article 26); United Nations Convention on the Rights of the Child 1989 (article 2.2); American Convention on Human Rights 1969; European Social Charter 1961; European Convention on the Legal Status of Children Born out of Wedlock 1975; United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 (article 5)
[161]*Caban v Mohammed* supra, n 40 at 388-394
[162]supra, n 131 Chapter 2
[163]supra, n 131 Sections 9(1) and (3); See also June Sinclair supra, n 45 p121-122

against in that they are unfairly discriminated against on the ground of 'gender' vis-a-vis mothers and on the ground of 'marital status' vis-a-vis married fathers and are not treated equally before the law vis-a-vis both those parties[164].

Since the distinctions between these parties are based on grounds listed in section 9(3) of the Constitution, it is presumed that the discrimination is unfair[165]. The further submission is that this violation of section 9 of the Constitution is prohibited because not only is the discrimination unfair but I will argue that it also cannot be reasonably and justifiably limited in 'an open and democratic society based on human dignity, equality and freedom'[166].

With regard to the unfair discrimination based on the ground of 'gender', the natural father of an extramarital child is placed in a grossly disadvantaged position as compared with that of the mother. She has inherent rights of guardianship and custody with the concomitant right of access by virtue of the biological truism of nature that she carried the child through nine months of pregnancy and gave birth to the child. The natural father is regarded as a non-parent with no legal rights in respect of his child, only the legal obligation to support and maintain the child jointly with the mother regardless of the fact that nature does not permit him to personally experience the pleasures and pain of pregnancy and birth. Yet, without the aid of his sperm, that child would not have been conceived in the first place.

The parental power constituting the rights of guardianship and custody which accrue to the mother is based on her cognate / blood relationship with the child yet the natural father is denied the incidental right of access because common law dictates that he does not possess any parental authority in respect of his extramarital child. However, at the same time, the law recognises his biological relationship with the child for the purpose of the duty to pay maintenance toward the child. Even though one should not regard the duty of support as a quid pro quo for a right of access, it is inherently unfair to expect a natural father to help support a child whom he may never be able to see because the mother wishes that to be the case[167]. Clearly the law has created a paraxodical situation which acknowledges the unmarried father-child bond only when it is convenient to do so[168]. The mother, although unmarried, also has the duty to support their child, but she, unlike the natural father, has inherent rights in respect of that child whereas the unmarried father, by virtue of his gender is denied the most basic right of access in respect of their child.

The contradiction is further highlighted by the court's acknowledgement that fathers of extramarital children could be in a better position than non-parents because 'the biological relationship and genetic factors must favour him over other "outsiders"'[169]. Yet, for all legal intents and purposes, the natural father himself is considered to be a non-parent save for his duty

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[164]supra, n 131 Sections 9(1) and 9(3); supra, n 131 Section 8(1) which applies to all law including statutory law and binds the legislature as well; See also Anne Palmer supra, n 50 p580; A Pantazis "Access between the Father and His Illegitimate Child" *South African Law Journal* 1996 Vol 113 p13-16; Vivienne Goldberg supra, n 39 p292

[165]supra, n 131 Sections 9(3) and (5); *Prinsloo* case supra, n 156 at 1025E-G

[166]supra, n 131 Section 36

[167]*Wilson v Eli* supra, n 57; *Van Erk v Holmer* supra, n 7 at 638G

[168]*Van Erk v Holmer* ibid at n 167

[169]*Bethall v Bland* 1996 (2) SA 194 (W) at 209G-H; See also Anne Palmer supra, n 50 p583

to pay support in respect of his extramarital child. It seems therefore that the courts themselves cannot decide when a natural father is a parent or not. In one instance his biological relationship and paternity is awarded recognition and in the next instance, it is denied. How can the law be so vague and unclear about an issue that is so pertinent especially when one of the functions of law is to maintain clarity and certainty about matters that are of fundamental importance to society and humankind.

Furthermore, the rule stems from a period which tried to enforce the entering of Christian-type civil marriages and penalised men who impregnated women but did not marry them. Again, it was the natural fathers by virtue of their gender and not the mothers who were punished for failing to adhere to societal norms[170]. Despite the fact that extramarital births are far commoner these days and that society is increasingly accepting births outside of wedlock[171], natural fathers continue to be punished by a legal system attempting to enforce an outdated and morally reprehensible law irrespective of the fact that a constitutional and democratic era has dawned upon us. As Albie Sachs has said: "Our starting point must ... be ... the actual lives that people lead today. There is no such thing as a 'typical South African family' and extramarital cohabitation is very prevalent"[172].

It is true that the notion of substantive equality, as opposed to formal equality, has been interpreted to prevent further disadvantage being suffered by already historically disadvantaged groups[173]. It is also true that the majority of black women in our country comprise a historically disadvantaged group because they have suffered triple oppression in the form of race, class / poverty and gender. However, the very men who have impregnated them would not usually come from rich, white and socially advantaged backgrounds. No, the majority of these men who are being discriminated against would also have suffered historical disadvantage[174] and by denying them an inherent right of access because of their gender would only add to their burden and oppression. Even if one were to argue that these men have to some degree suffered less disadvantage than the majority of women by virtue of the fact that they have only been doubly oppressed based on their race and class, I would remind the reader again of Justice Goldstone's words that everyone is entitled to 'be accorded equal dignity and respect regardless of their membership of particular groups'[175].

It is the very system of apartheid which marginalised groups of people and tore families apart[176] so that men who were forced to move away from home ended up in extramarital relations. It is submitted that substantive equality should seek to remedy those wrongs of the

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[170]A Pantazis supra, n 164 p15

[171]Brigitte Clark and Belinda van Heerden supra, n 2 p270

[172]See A Pantazis supra, n 164 at p16 where he refers to Albie Sachs "Protecting Human Rights in a New South Africa" (1990) at p65

[173]Sandy Liebenberg "Social and economic rights: A critical challenge" *The Constitution of South Africa from a Gender Perspective* Community Law Centre, University of Western of Cape, in association with David Phillip Publishers 1995 at p82

[174]B Eckhard supra, n 130 p132; Johannesburg Child Welfare Society in its written submission dated 12 September 1997 to the Justice and Welfare Portfolio Committees on the Natural Fathers of Children Born out of Wedlock Bill No B68B - 97

[175]*Hugo* case supra, n 158 at 22G-H, 23A; see also supra, n 159

[176]A Pantazis supra, n 164 p16

past and a denial of an inherent right of access for the majority of natural fathers does exactly the opposite and only serves to exacerbate the harm that they have already suffered.

Perhaps it is true that some fathers do not care for their children but this cannot be said of all natural fathers[177]. During 1997, public hearings were hosted jointly by the Justice and Welfare and Population Development Portfolio Committees to give the public an opportunity to comment on the Natural Fathers of Children Born out of Wedlock Bill[178]. The clause pertaining to the right of access in that bill is the same as the section reflected in the current statute[179]. Many fathers[180] from historically disadvantaged backgrounds, some of whom were in prison, wrote that they cared for and loved their extramarital children and they dearly wanted to see and visit with them except that the mothers were denying them access. In some cases, this was because the fathers did not want to marry them and in other instances, the mothers chose not to marry the fathers, opting instead to share their lives with some other persons so that the presence of the natural fathers was felt to constitute an intrusion in their lives. These fathers sent out a heartfelt cry, at grassroots level, that they felt that the bill would violate their constitutional right to equality and that a denial of an inherent right of access would amount to a grave injustice which betrayed the hard and long struggle that was fought in the name of democracy and equality. I submit that these men, in their crude writing, would not have made the effort to address the respective Portfolio Committees with their qualms if they were not serious about them and if they did not care enough about their extramarital children to do so. If men were given the opportunity to have access to their extramarital children without first having to apply to court, they would be able to show that they could also be good parents and contribute positively to their children's development and stability.

Furthermore, a denial of an inherent right of access to natural fathers of extramarital children encourages stereotyped assumptions that it is women who should care for and raise the children while the fathers have to work and support them[181]. Thus, a denial of an inherent right of access may reinforce women's inequality in parenting responsibilities[182]. This denial of an inherent right of access also encourages the assumption that fathers love and care for their children less than mothers do. This assumption arises from a discriminatory environment which has taught people to model their behaviour on stereotypes developed and imposed by society[183]. Thus, not all natural fathers are bad or uninterested parents who shirk their financial responsibilities. These negative attitudes based on stereotypes do not accord with reality[184].

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[177] *Fraser* supra, n 143 at 171D; *B v S* supra, n 88 at 579I-J

[178] B68B - 97

[179] Clause 2 of the Bill is the same as section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997

[180] Andrew P Jones (25/09/97); J Machado (10/09/97); Paulos Dlamini (10/09/97) - a prisoner; James Banda; MDM Magubane (15/09/97); Simon Maki (18/09/97); 'The Citizen' (26/08/97); Charles Khumalo; Andrew Morifi (10/09/97); Solomon Maila (11/09/97); Harry Terezakis (08/08/97); P du Plessis (10/09/97); Danny (10/09/97); Jacob (10/09/97); Mike Moloto; Anonymous

[181] June Sinclair supra, n 45 p125

[182] A Pantazis supra, n 164 p17

[183] June Sinclair supra, n 45 p120 footnote 321

[184] B Eckhard supra, n 130 p125; A Pantazis supra, n 164 p17; See also *Stanley v illinois* supra, n 40 at US 654-658

Furthermore, it has been suggested that a presumption of parental unfitness arising out of the aforementioned stereotypes is unconstitutional, because given the importance of the parent's interest, parental unsuitability has to be established on an individual basis[185]. It is not possible to show empirically that mothers care more for their extramarital children than do fathers and that the latter are unsuitable as parents[186]. It is also contradictory to deny a natural father an inherent right of access on the basis of an assumption of irresponsibility since the denial may reinforce such irresponsibility[187].

It is true that the sad reality is that most South African mothers of extramarital children are the ones who primarily care for those children[188] but how can natural fathers be expected to assist when they don't even have the right to see their children. Yes, those fathers who are in cohabitational relationships with the mothers and children have the opportunity to jointly care for the children but what about those natural fathers who choose not to form that type of alliance with the mother or vice versa? The courts seem to be more inclined to award access to those fathers who are in a live-in relationship with the mother and the child and to those fathers who have shown some commitment to building a relationship with the child[189] but it has been submitted that these situations presuppose some level of cooperation from the mother at one or other time[190]. There may be cases where the natural father desperately wants to see his child but the mother blocks access completely[191]. In this type of situation it would be difficult for the natural father to prove that he has built some type of relationship with the child hence the court in all likelihood would not be predisposed to award access to him[192].

In addition, it seems that the courts adopt a negative attitude towards natural fathers of extramarital children for instance, Howie JA's concern about natural fathers abandoning the mother and child and returning later to 'troublesomely insist on access to a child with whom he is a complete stranger'[193]. I am not saying that the judge's concern is not legitimate if it were true of a specific case. However, not all natural fathers are guilty of this and they should not all be denied an inherent right of access simply because of a stereotyped assumption that natural fathers of extramarital children are prone to abandonment of the latter and seek access only to further their own interests.

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[185] A Pantazis supra, n 164 p17

[186] ibid at n 185

[187] ibid at n 186

[188] Alfred Cockrell "The Law of Persons and the Bill of Rights: Extra-marital Birth ("Illegitimacy")" *Bill of Rights Compendium* Issue 1 p47; Sandra Burman "The category of the illegitimate in South Africa" *Questionable Issue: Illegitimacy in South Africa* p29

[189] *W v S* supra, n 56 at 491D-E; *Chodree v Vally* supra, n 85 at 32E-F; *T v M* supra, n 88 at 60C; See also B Eckhard supra, n 130 p128

[190] BEckhard ibid at n 189

[191] June Sinclair supra, n 45 p117

[192] B Eckhard supra, n 130 p128; JM Kruger et al supra, n 130 p704. The authors say that the argument that only fathers who acknowledge paternity and are already involved in the children's lives should be allowed to have access, will increase the burden already borne by the natural fathers and will worsen their position.

[193] *B v S* supra, n 88 at 582h; See also JM Kruger et al supra, n 130 at p701 where the authors criticise the decision in *S v S* supra, n 85 because the court assumes the attitude that most natural fathers of extramarital children are bad and uninterested parents. The authors argue that this is untrue and outdated.

Although the courts have held that the onus is on the applicant that is, the natural father, to prove on a preponderance of probability that his access in respect of his extramarital child would be in the best interests of the child[194], it has also been held that there is no real onus but only an evidentiary burden to adduce evidence in this regard[195]. With respect, my response, in line with academic opinion[196], is that the latter position cannot be practically true. The party who brings the application bears the burden of adducing evidence to convince the court to grant his or her prayers and ultimately this translates into an onus. This party would always be the natural father because it is he who is being denied the right of access.

The courts have also adopted the approach that not only must the father show that his access would be in the best interests of the child, he must also show that it will not interfere unduly with the mother's rights or interests[197]. At the outset, the court already assumes an unfairly favourable disposition towards the mother. An example of this is also portrayed in *Chodree v Vally*[198] where the court looked at the father's behaviour without considering that of the mother and concluded that the father did not have an 'aggressive or unstable temperament or that his behaviour or habits would render him unfit'.

Therefore, as has been mentioned already, the natural father's application for access will probably only be successful if a relationship already exists between him and the child and this depends on the mother's willingness to allow him access to build that relationship with the child[199]. Clearly, at the end of the day, the discretion of the court is dictated by the wishes of the mother and not the interests of the child because access only becomes possible when it does not conflict with the mother's decisions in respect of the child[200]. Again, this means that a natural father who has never been given the opportunity by the mother to form a relationship with the child will probably not succeed in his application[201].

Even though the Act[202] allows the court to open up an investigation by calling upon any person to appear before it and despite the fact that the courts themselves have adopted an investigative approach, it has been shown[203] that expert witnesses such as psychologists with the same or similar credentials appearing on behalf of the respective parties can deduce exactly opposite conclusions in respect of the same issue so that the court ultimately has the discretion to decide what to do but this discretion is unacceptably fettered by the wants of the mother[204]. It is therefore certainly questionable whether the wishes of the mother should be decisive because the best interests of the child ought ultimately to be the determining factor[205]. The

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[194] *B v P* supra, n 56 at 115F-G
[195] *B v S* supra, n 88 at 584I-J; *A v C* supra, n 30
[196] Vivienne Goldberg supra, n 39 p290; June Sinclair supra, n 45 p118
[197] *Douglas v Mayers* supra, n 45 at 914C-E; *W v S* supra, n 56 at 490A-B; *F v B* supra, n 56 at 953D, 953G; *B v P* supra, n 56 at 117C,117F
[198] supra, n 85 at 31G-H
[199] B Eckhard supra, n 130 p128
[200] ibid at n 199
[201] ibid at n 200
[202] Section 2(3) Natural Fathers of Children Born out of Wedlock Act 86 of 1997
[203] *F v B* supra, n 56 at 951E-J; 952A-C
[204] B Eckhard supra, n 130 p129
[205] Brigitte Clark and Belinda van Heerden supra, n 2 p57

father furthermore has to show that the mother is unfit or incapable of looking after the child properly[206] to increase his chances of success. Thus, the fact that it is always the natural father who bears this type of loaded onus adds to the unfair discrimination and burden suffered by him on the basis of his gender[207].

These types of applications also usually involve large cost implications especially as at present they can only be instituted in the High Court[208]. The argument that mothers would be burdened by having to go to court to make application to deny access to natural fathers if they were to be granted an automatic right rings true for natural fathers as well. At present, most extramarital births occur in disadvantaged communities[209] thus natural fathers who are economically and socially disadvantaged are additionally burdened by the huge costs of having to apply to the High Court for access in respect of their extramarital children. This is perhaps why many fathers possibly do not seek court intervention - not because they do not care about their children or do not want to see their children but simply because they cannot afford to approach the court to ask for what should have rightfully been theirs in the first place[210].

With regard to the argument that section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 violates the constitutional right of all unmarried natural fathers to equality because they are furthermore unfairly discriminated against vis-a-vis married fathers on the ground of marital status, the following reasons are advanced:

Even though marriage has been described as a more stable and permanent relationship while extramarital relations have been said to range variably in respect of degrees of commitment, the very same description may be attributed to a marital situation[211]. In other words, a married father may display the same type of varying commitment in respect of his child born within wedlock ranging from no interest at all to a deep commitment. Yet, upon dissolution of the marriage, the married father has an inherent right of access in respect of his child and as the courts have indicated, simply because a married or divorced father has displayed a lack of interest in the child, this would rarely justify a refusal of access based on the fact that he has an acknowledged right of access[212].

Furthermore, not all marital relationships are more stable than non-marital ones and they do not all provide healthy environments for the upbringing of a child[213]. A forced marriage only to confer legitimacy on the child while the parents do not care very much for each other provides the basis for an unhealthy and unstable environment and surely then this cannot be in the best interests of the child[214]. Yet, upon dissolution of that relationship, the married or divorced father would still have an inherent right of access and the mother would then have to show his unsuitability as a parent if she wishes to apply for a denial of his right of access.

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[206] *Douglas v Mayers* supra, n 45 at 915A-C; B Eckhard supra, n 130 p131
[207] June Sinclair supra, n 45 p119
[208] Johannesburg Child Welfare Society supra, n 174
[209] B Eckhard supra, n 130 p132
[210] ibid at n 209
[211] A Pantazis supra, n 164 p13
[212] ibid at n 211 (refers to the decision of *S v S* supra, n 85)
[213] A Pantazis supra, n 164 p15
[214] ibid at n 213

Also, the same problems which mothers of extramarital children claim to experience at the hands of natural fathers may be experienced through divorced husbands such as harassment and interference yet the divorced father would not necessarily be denied access to his child just because of his continued 'interference' in the mother's life[215]. At the same time, objections raised by a psychologist on behalf of an unmarried mother may be raised to a married father's claim for access as well yet the latter is still entitled to access notwithstanding[216]. In addition, arguments which are usually directed against an unmarried father can be raised in respect of married fathers as well thus acrimony between the parents and the child's possible problems with balancing a relationship with the natural father in a context where the parents are not together are commonplace after a divorce yet the court would not simply deny a married father access to his child as a result of those factors because his right is inherent whereas those factors would weigh heavily against an unmarried father in his application for access[217].

Howie JA avers that 'the practical reality [is] that the father of an illegitimate child is not unfairly discriminated against' because if a married mother refuses access to her ex-husband, he would in any event have to approach the court to have that right enforced just like an unmarried father[218]. However, unlike the natural father of an extramarital child who bears the heavy onus of proving that access would be in the best interests of the child and that it would not unduly interfere with the mother's interests, the married father does not bear this type of onus at all. In fact, there is a presumption in favour of his suitability as a parent[219] by virtue of the fact that he has an inherent right of access in respect of his child and if the mother wishes to deny him access then she must show the court that he is an unfit parent. In practice therefore the unmarried father is usually denied access because of the strong presumption regarding his parental unsuitability whereas the married father would not usually be denied access precisely because of the presumption favouring his suitability as a parent which arises directly from his legally acknowledged inherent right of access[220]. The married father is in this favourable position only because of his marital status and not as a result of his biological link to the child.

Married fathers therefore usually do not have to institute an application in court to have access to their children because as a result of their inherent right of access, mothers would not simply ask for their right to be denied upon dissolution of their marriage unless there are very real circumstances which indicate the unsuitability of the father as a parent[221]. Moreover, it has been argued that since mere opposition to access by a married mother is not considered a legitimate reason for refusal of access, the position should be the same if the child is born out of wedlock[222].

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[215]A Pantazis supra, n 164 p14; *Bethall v Bland* supra, n 169 at 60E
[216]PQR Boberg supra, n 130 Vol 18 p37
[217]PQR Boberg supra, n 130 Vol 18 p38
[218]*B v S* supra, n 88 at 582C-F
[219]A Pantazissupra, n 164 p19
[220]A Pantazis ibid at n 219; See also *W v S* supra, n 56 at 494B where Findlay AJ pointedly said: "An award of custody to third parties constituting a deprivation from the natural or legal custodian normally requires clear evidence or a stronger case possibly than that where two spouses compete on divorce for an award of custody".
[221]A Pantazis supra, n 164 p18
[222]Brigitte Clark and Belinda van Heerden supra, n 2 p57

The married father's inherent right of access is derived from the parental authority which is conferred on him by virtue of the child's legitimate birth which status exists as a result of a legally recognised marriage between the parents[223]. Thus, the unmarried father is denied parental authority with the resultant inherent right of access precisely because of his marital status that is, by virtue of the fact that he is not married to the mother of the extramarital child.

All three parties namely, the mother, the married father and the unmarried father have the duty to support their children which is based on their cognate relationship with the latter yet the rights of the married and unmarried fathers are defined not by the fact of their paternity but by their legal status. The mother, on the other hand, has those inherent rights irrespective of her marital status and whether or not she chooses to be married[224]. Again, the contradiction of the law is apparent and yet again, the natural father is punished for his legal status by being unfairly discriminated against on the basis of his marital status.

The Constitutional Court in the landmark case of *Fraser v Children's Court, Pretoria North and Others*[225] found that natural fathers of extramarital children were unfairly discriminated against on the grounds of gender and marital status. Although this case dealt with the issue of adoption, it is also important for the question of access because a natural father's denial of inherent rights in respect of his extramarital child formed an essential part of the judgment. The Court held that the natural father's constitutional right to equality had been violated, however, the Court did not confer any inherent rights on natural fathers but left it in the hands of Parliament to effect a remedy[226].

Nevertheless, the position of many learned authors[227] and one which I align myself with, is that the only way to equalise the situation of natural fathers of extramarital children as compared with that of the mothers and married fathers and to bring the former's position on par with the latters' is for section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 to be struck down as unconstitutional and instead for the law to grant at least an inherent right of access for all natural fathers with the exception of rapists and gamete donors.

This will mean that natural fathers of extramarital children will have the same rights as mothers and married fathers in respect of access. Therefore, their current burdensome position arising out of the present inequitable and unsatisfactory procedure prescribing the granting of access for them[228] will be alleviated because they won't bear the same heavy onus that attaches to them now and they will also not experience the same types of problems which they presently undergo with regard to access to court in terms of which many of them are barred as a result of the huge cost implications. In other words, both mothers and natural fathers of extramarital children would be in the same position where either of them would be able to approach the court to limit the other's right of access. Thus, mothers would not simply spuriously try to deny access

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[223]PQR Boberg supra, n 130 Vol 18 p38
[224]A Pantazis supra, n 164 p15, p17
[225]supra, n 143 at 161E, 163H, 164E
[226]at 171G-H, 173J
[227]A Pantazis supra, n 164 p18; JM Kruger et al supra, n 130 p703; Ohannessian and Steyn supra, n 130 p258, p263; B Eckhard supra, n 130 p126, p129
[228]B Eckhard supra, n 130 p122; Joan Church supra, n 130 p33-34

to natural fathers if they have an inherent right of access and would only approach the court if their claims were of a sufficiently serious nature[229]. It would also mean that it would not be necessary for natural fathers of extramarital children to resort to court application and the only time they would do so would be to limit the mother's right of access which would also not happen randomly given the cost implications of going to the High Court. Thus, it has been submitted that natural fathers would not abuse their inherent right of access if their position were to be brought into line with that of mothers and married fathers and that where they do abuse such right, they would not be protected by the law[230]. This position would also allow natural unmarried fathers to be treated equally before the law as compared with mothers and married fathers.

Furthermore, in response to Justice Goldstone's opinion that a more egalitarian society will only be achieved once responsibilities for child rearing are more equally shared[231], I submit that this can only happen if natural fathers of extramarital children are given the opportunity to build a relationship with their children and this will only realistically occur if they are granted an inherent right of access in respect of their children. One cannot expect a natural father to share in parental responsibilities when the mother blocks his access to the child and when he approaches the court for an order of access (for those who can actually afford it) so that he can assume some parental responsibility, his chances of success are minimal because he hasn't had the opportunity to show his level of commitment to the child. In addition, a denial of an inherent right of access for natural fathers of extramarital children would therefore only reinforce womens' inequality in parenting responsibilities[232].

An inherent right of access for natural fathers of extramarital children will also be an indication by the law of the respect shown for a natural father's right to choose whether or not he wishes to be married to the child's mother[233]. Her choice of marital status does not affect her legal rights in any way so why should his? Boberg also highlights an interesting question about how a mother can have the right to choose who to appoint as the father of her child since paternity is a biological fact and the child can surely only have one father[234].

The further submission is that within the context of the equality argument, section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 would not be able to withstand constitutional scrutiny by having regard to the limitation clause in the Constitution[235]. This is because section 2 is not 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

With regard to the factors which the court is enjoined to take account of[236]:
The nature of the right to equality is too fundamental to our new democratic order to be randomly limited given our historical experience under the apartheid regime which tore away

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[229]A Pantazis supra, n 164 p18
[230]Ohannessian and Steyn supra, n 130 p258, p263
[231]*Hugo* case supra, n 158 at 21H-I, 22A-B
[232]A Pantazis supra, n 164 p17
[233]June Sinclair supra, n 45 p125-126
[234]PQR Boberg supra, n 130 Vol 17 p113
[235]supra, n 131 Section 36
[236]supra, n 131 Section 36(1)(a)-(e)

the dignity of black men and women by treating them unequally as compared with the white minority. The purpose of the limitation is to enforce an outdated and archaic rule which attempts to pressurise men to accept their parental responsibilities by entering the institution of marriage or a cohabitational relationship with the mother. The nature and extent of the limitation has the effect of penalising natural fathers as non-parents without any rights in respect of their extramarital children thus stripping them of their human dignity. The limitation therefore impacts on the harm already suffered by these disadvantaged men by adding to the burdens which they already bear. The relation between the limitation and the purpose is an irrational one because the fact that mothers are also disadvantaged and that the limitation attempts to alleviate the harm that they have suffered does not justify nor does it detract from the disadvantage caused to natural fathers as well as the fact that the present system only serves to exacerbate their disadvantage. Furthermore, fathers do not only accept parental responsibilities if they are married or cohabiting with the mothers. However, a lack of an inherent right of access gives them a lesser opportunity to show commitment to their parental responsibilities. Finally, a less restrictive means is possible in the form of granting an inherent right of access to natural fathers of extramarital children because both natural fathers and mothers would then be entitled to approach the court asking for an order to limit the other's right and both would bear the same onus of having to prove that a limitation or denial of access would be in the best interests of the child. Thus, natural fathers of extramarital children would then have the same type of opportunity as mothers and married fathers to accept parental responsibility and to display their commitment to their children.

8.2. THE RIGHTS OF THE CHILD

The South African Constitution entrenches and protects every child's right 'to family care or parental care'[237]. For the purposes of the children's section as enshrined in section 28 of the Constitution, every child is regarded as a person under the age of eighteen years [238]. Furthermore, it has been argued that extramarital children have the right not to be unfairly discriminated against on the listed grounds of 'birth' and 'social origin'[239]. With regard to section 8(2) of the Interim Constitution[240], the technical committee on fundamental rights noted that 'social origin' is deemed to encompass 'birth', 'class' and 'status'[241]. Thus, there is support for the view that the two grounds namely 'birth' and 'social origin' include illegitimacy[242]. Extramarital children are therefore also protected by the equality section.

Every child's right to 'family care or parental care' covers extramarital children as well. This right has also received protection in a number of international conventions[243] where there has been recognition of the child's right to know and be cared for by both parents and to maintain

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[237]supra, n 131 Section 28(1)(b)
[238]supra, n 131 Section 28(3)
[239]supra, n 131 Section 9(3); Anne Palmer supra, n 50 p580; A Pantazis supra, n 164 p12
[240]The Constitution of the Republic of South Africa Act 200 of 1993
[241]In its tenth report during the transitional period; See also A Pantazis supra, n 164 p12; Anne Palmer supra, n 50 p580
[242]A Pantazis ibid at n 241
[243]United Nations Convention on the Rights of the Child 1989 (preamble, articles 7.1, 9, 9(3), 18(1); [European] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (article 8)

personal relations and direct contact with both parents on a regular basis even if the latter are not together except where it would not be in the best interests of the child[244]. However, the European Court of Human Rights and the European Commission of Human Rights have located the interpretation of these rights within the context of extramarital children by focusing on parental responsibility instead of parental authority to reflect the changing relationship between parents and children in present-day European society[245]. In other words, neither the international conventions nor the European Court and Commission have recognised any inherent rights in respect of natural fathers of extramarital children but they have acknowledged the existence and increase of alternative family structures as opposed to the traditional nuclear family confined to a marital situation[246]. Thus, even though the notion of family has not been defined as such, the European Court and Commission have been inclined to extend it to include situations of cohabitation or where the parents are not living together, the natural fathers must at least have displayed a degree of commitment towards the child[247].

With respect, the approach of international and foreign law to restrict the definition of family to cohabitational relations and situations where the father has shown some commitment towards the child does not accord with South African reality. In the South African context, extramarital births are far commoner than they used to be and they continue to increase at an alarming rate. Many of these extramarital children are conceived or are born in situations where the parents do not live together or are not in a relationship with each other. Thus, these changing social patterns make it difficult to define the term 'family'[248] given the diverse composition of South African households ranging from marital situations to single-parent homes. In this light, the notion of 'family' in South Africa cannot just be restricted to marriage or cohabitational relations - it must also include those situations where the unmarried parents are not living together as well as those who do not have a relationship with each other.

The simple truth of the matter is that the child is born with two parents and not just one that is, one mother and only one father[249]. Ross D Parke, a professor of psychology at the University of Illinois has stated that children need the nurturance provided by both fathering and mothering which are two distinct roles but are equally important[250]. There is therefore room in the life of every child for both parents who care for them and there should be no need for competition or exclusion of either parent irrespective of the circumstances[251]. The Appellate

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[244]United Nations Convention on the Rights of the Child 1989 (articles 7.1, 9, 9(3))
[245]A Pantazis supra, n 164 p16; Christa Wiertz-Wezenbeek supra, n 26 p368
[246]Ruth Deech "The Rights of Fathers: Social and Biological Concepts of Parenthood" *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* p27-28; A Pantazis supra, n 164 p12-13, p16. The authors refer to the following cases: *Abdulaziz*; *Marckx v Belgium* (1980) 2 EHRR 30; *B, R and J v Federal Republic of Germany* (1984) 27 Yearbook of the European Convention on Human Rights p102; *Johnston v Ireland* (1987) 9 EHRR 203 at 225-226
[247]Ruth Deech supra, n 246 p28; A Pantazis supra, n 164 p16
[248]Rebecca L Melton supra, n 146 p499
[249]Jerry W McCant "The Cultural Contradiction of Fathers as Nonparents" *Family Law Quarterly* Spring 1987 Vol XXI No 1 p130
[250]Referred to by Jerry W McCant supra, n 249 p132; See also B Eckhard supra, n 130 at p125 where the author says that children need a mother and a father for the development of their personality and identity.
[251]Jerry W McCant ibid at n 250

Division has also recognised the desirability of the father-child bond[252] and Milne DJP furthermore noted that it is generally in the interests of children, even when the family has broken up, to maintain a sound relationship with both parents[253].

To deny a natural father of an inherent right of access therefore means that the extramarital child is denied a right to 'family care' because the child is at the same time denied access to the father. In other words, the child is denied the right to know or be cared for by the father and to maintain direct contact and personal relations with the father on a regular basis. Since South Africa has ratified the United Nations Convention on the Rights of the Child[254], it is bound to conform to the principles espoused therein thus an extramarital child's denial of access to the natural father is in direct conflict with the objects of the Convention.

Furthermore, section 28(1)(b) of the Constitution refers to the child's right to 'parental care'. It does not state maternal care at all thus 'parental care' includes both maternal and paternal care[255]. This accords with Ormrod LJ's statement that " ... as a mere statement of common-sense, ... in present-day society as far as possible, both parents should be in contact with their children, even if not with each other"[256]. An extramarital child is therefore denied this right to 'parental care' as well because by denying the natural father an inherent right of access to his extramarital child, the latter is precluded from the right to 'parental care'. Even though it may be argued that the natural father should then take it upon himself to provide a form of family or paternal care, it is submitted that this is not always practically possible because in many instances the mother does not give him the opportunity to bond with his child and should the father, in those instances where he can afford it, approach the court to be granted this opportunity, he will invariably be unsuccessful because of a lack of any substantial relationship between himself and the child which situation arose in the first place due to the mother's lack of cooperation.

Thus, a denial of an inherent right of access for natural fathers of extramarital children by section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 translates into a violation of the latter's constitutional right to 'family care or parental care'. Special care therefore needs to be taken to prevent the possible severance of the parent-child relationship[257] and every measure should be undertaken to encourage that relationship including granting natural fathers an inherent right of access to their extramarital children to help facilitate the formation and strengthening of the father-child bond.

The argument regarding children's equality is that section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 violates the extramarital child's constitutional right not to be unfairly discriminated against on the grounds of 'social origin' and 'birth' and that it also violates the extramarital child's right to be regarded as equal before the law and to equal

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[252] *B v S* supra, n 88 at 586G-H per Howie JA

[253] *Dunscombe v Willies* supra, n 97 at 315H-316B

[254] Signed by South Africa on 29 January 1993 and ratified by South Africa on 16 June 1995 (See June Sinclair supra, n 45 p121 at footnote 321; Waheeda Amien and Paul Farlam *Basic human rights documents for South Africans* p64)

[255] June Sinclair supra, n 45 p122

[256] *A v C* supra, n 30 at 456A-B

[257] Brigitte Clark and Belinda van Heerden supra, n 2 p56

protection and benefit of the law[258]. These averments are based on denial of the natural father's inherent right of access to his extramarital child.

Extramarital children, unlike those born within wedlock, are denied access to their biological fathers precisely because those fathers do not have an inherent right of access to them. Extramarital children are therefore treated differently from children born within wedlock by virtue of their status of 'illegitimacy'. Had they been born to a legally recognised marriage, they would have had a right of access to their married fathers because the law confers such an inherent right on the latter.

Even though the courts[259] and academic opinion[260] have expressed the noble idea that access is actually the right of the child and not that of the parents, the law apparently does not see fit to adhere to this notion. If access were only the right of the child then why would the law confer inherent rights of access on mothers and married fathers? For there to be any consistency with this line of argument, none of the parents should then have any inherent rights in respect of their children, whether extramarital or not. On the other hand, the argument has been put forward that access as the right of the child is interrelated with the concept of access as the right of the parent - they are actually one and the same thing[261]. This seems to be closer to the practical reality than to only speak of access as the right of the child because if a natural father is denied an inherent right of access in respect of his extramarital child then how on earth can the child practically have access to the father? Furthermore, the Constitutional Court has acknowledged that the interest of the child cannot realistically be separated from the parental right to develop and enjoy a close relationship with the child and by the societal interest which recognises and seeks to accommodate both[262]. The effect of denying an inherent right of access to a natural father of an extramarital child is therefore to simultaneously deny that child an inherent right of access to her or his natural father.

As has been mentioned previously, the rule emanates from a period when society wished to encourage the bonds of marriage so that natural fathers of extramarital children were punished for failing to conform to societal pressure by not marrying the mother. Unlike children born within wedlock who are awarded for their status of 'legitimacy' by virtue of their parents' marriage, extramarital children end up being punished by the law by virtue of their 'illegitimate' status arising out of the 'sins' of their parents[263].

Not only are extramarital children denied access to their biological fathers but they also receive differential treatment from children born within wedlock on the basis of their 'illegitimacy' because their father's family does not have a reciprocal duty of support towards them whereas the family of married fathers bear a legal reciprocal duty of support in respect of

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[258]supra, n 131 Sections 9(1) and (3)
[259]*B v S* supra, n 88 at 581J-582A; *Dunscombe v Willies* supra, n 97 at 315H-316B; *B v P* supra, n 56; *S v O (Illegitimate Child: Access)* supra, n 30 at 118; *Re B (a Minor)(Acces)* supra, n 30; *Van Erk v Holmer* supra, n 7 at 647J; *T v M* supra, n 88 at 57H-J
[260]T Ohannessian and M Steyn supra, n 130 p258; B Eckhard supra, n 130 p123; Joan Church supra, n 130 p33-34
[261]A Pantazis supra, n 164 p15
[262]ibid at n 261
[263]ibid at n 262

those children born within wedlock[264].

Furthermore, despite the acknowledgement that the problems experienced by extramarital children as a result of the separation of their parents may also be experienced by children born within wedlock on dissolution of their parent's marriage[265], the submission is that the court would not consider those problems as factors to deny a married father his inherent right of access. Yet, those problems would certainly be regarded as factors to be taken into account by the court when faced with an application for access by a natural father of an extramarital child and they would probably weigh heavily against him. Thus, extramarital children suffer double the trauma that children born within wedlock endure - not only might their unmarried parents separation be problematic for them but they may well cause the court to deny them access to their natural fathers[266].

On the other hand, if the mother denies access to the natural father for a sufficiently long time so that it may seem as if the child has adjusted to having had no contact with the natural father, the mother may be able to successfully argue that a re-establishment of the father-child bond would be detrimental to the child[267]. This would not happen in the case of a child born within wedlock because even on separation of the parents, the mother would not be able to deny the married father access since the law confers an inherent right of access on him.

Moreover, in light of the heavy onus which is borne by the natural father during the course of his application for access in respect of his extramarital child, mere opposition by the mother might sway the court in her favour whereas mere opposition by a married mother in respect of her child born within wedlock would not be a legitimate reason for refusal of access to the married father by the court[268].

Although society has become more tolerant and accepting of extramarital births and the negative stigma which once attached to them is no longer there, the law continues to draw distinctions between extramarital children and children born within wedlock on the basis of their legal status. This flies in the face of international law which has prohibited any form of discrimination between those children based purely on their 'legitimacy' or 'illegitimacy'[269]. A denial of an inherent right of access for natural fathers of extramarital children which in turn implies a denial of an inherent right of access for those children in respect of their natural fathers quite clearly exacerbates the stigma of 'illegitimacy'.

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[264] Alfred Cockrell supra, n 188 p45

[265] *T v M* supra, n 88 at 60E-D

[266] *F v B* supra, n 56 at 952E-J. The court looked at the following factors as relevant to its decision: the time since the natural father last saw his child; the fact that the mother had remarried; new marriage was a stable one; bonding between child and natural father would have diminished by time of application; relationship between natural father and mother; attitude of new husband.

[267] PQR Boberg supra, n 130 Vol 18 p38

[268] Brigitte Clark and Belinda van Heerden supra, n 2 p57

[269] United Nations Convention on the Rights of the Child 1989 (article2.2); [European] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (article 14); European Convention on the Legal Status of Children Born out of Wedlock 1975; See also: *Weber v Aetna Casualty and Surety Co* supra, n 39; *Levy v Louisiana* supra, n 39; *Glona v American Guarantee and Liability Insurance Co* supra, n 39; *Trimble v Gordon* supra, n 39

The reason that our Constitution prohibits discrimination against extramarital children on the basis of 'illegitimacy' and that the South African legal system has removed most of the discriminatory laws against such children is because of the recognition of the unfairness of punishing children for the choices which their parents make[270]. Children will continue to be labelled 'illegitimate' as long as their parents are labelled 'illegitimate' and while this category of 'illegitimacy' remains, extramarital children will continue to be discriminated against simply because of the stigma of being categorised 'illegitimate'[271]. The child's interest to have access to her or his father, whether 'legitimate' or not, should therefore trump considerations of sexual morality[272]. The law therefore cannot claim to have improved the position of extramarital children by equalising their status to that of children born within wedlock when in the same breath it sends a message to extramarital children that they are indeed different from children born within wedlock and that because of this difference neither they nor their fathers have the same inherent rights as do children born within wedlock and their married fathers. The law is therefore telling extramarital children that because of their 'illegitimate' status, they are entitled to less rights than children born within wedlock. Thus, not only is the extramarital child's constitutional right not to be unfairly discriminated against violated by section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 but their right to be regarded as equal before the law and to equal protection and benefit of the law is also violated by the offending section.

The granting of an inherent right of access to natural fathers of extramarital children would remove the unfair discrimination which presently exists between extramarital children and those born within wedlock and would allow the stigma which the law presently attaches to those children whose parents for whatever reason did not marry, to be removed and would accord with the social reality that an extramarital situation or 'illegitimacy' is not pathological[273]. For as the United States Supreme Court has said: "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust[274].

The submission is that the denial of an inherent right of access to natural fathers of extramarital children is neither a reasonable nor a justifiable limitation 'in an open and democratic society based on human dignity, equality and freedom[275] thus the violation would be constitutionally impermissable. The nature of extramarital children's rights to 'family care or parental care' and not to be unfairly discriminated against on the basis of their 'illegitimacy' is fundamentally important to their healthy development as individuals and productive members of society and the removal of the stigma of 'illegitimacy' will contribute to this. Furthermore, their right to equality impacts significantly on their human dignity. The purpose of the limitation, on the other hand, is to enforce an archaic rule which seeks to pressurise natural fathers of extramarital children to accept their parental responsibilities by entering the confines

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[270]A Pantazis supra, n 164 p15
[271]ibid at n 270
[272]ibid at n 271
[273]June Sinclair supra, n 45 p125
[274]*Weber v Aetna Casualty and Surety Co* supra, n 39 at 175; *Levy v Louisiana* supra, n 39; *Glona v American Guarantee and Liability Insurance Co* supra, n 39; *Trimble v Gordon* supra, n 39
[275]supra, n 131 Section 36(1)(a)-(e)

of marriage or at the very least by forming a relationship with the mother. The limitation is extended in such a way that by denying natural fathers of extramarital children an inherent right of access in respect of those children, it also has the effect of denying those children an inherent right of access to their natural fathers thereby punishing the children for what was once regarded as the 'sins' of the parents and excluding them from the possibility of having a father-child bond which is necessary for their normal development. There is therefore no rational relation between the limitation and its purpose because natural fathers do not necessarily only accept their parental responsibilities within the auspices of marriage or cohabitational relationships with mothers. However, a denial of an inherent right of access gives them a lesser opportunity to display their commitment. Thus, a less restrictive means of achieving the purpose of the limitation would be to grant natural fathers of extramarital children an inherent right of access so that they have the same chance of bonding with their children and showing their commitment to them and so that their children simultaneously are given the opportunity to bond with their fathers.

8.3. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

"[The] overriding principle which runs like a golden thread through the fabric of our whole law relating to children, [is] namely, that the interests of the children are paramount"[276].

This view has been captured by our Bill of Rights which expressly states in the section dealing with children that '[a] child's best interests are of paramount importance in every matter concerning the child'[277]. It also resonates throughout the international convention dealing with children's rights[278] and is reflected in the judgments handed down by both South African and foreign courts as well as in the writings of academic opinion[279]. Most of the South African cases[280] (with the exception of *Van Erk v Holmer*[281]) dealing with matters regarding extramarital children in which a denial of an inherent right of access for natural fathers has been confirmed have also expressed the view that these fathers are entitled to approach the court with an application for access and that the court has the discretion to grant or deny access if it is in the best interests of the child.

Although the 'best interests of the child' is the only test that can be applied in matters

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[276] *Segal v Segal* supra, n 60 at 324B-C
[277] supra, n 131 Section 28(2)
[278] United Nations Convention on the Right of the Child 1989 (articles 9, 9(3))
[279] *B v P* supra, n 56 at 117C-F; *Van Erk v Holmer* supra, n 7 at 639D; *S v S* supra, n 85 at 208B-F; *B v S* supra, n 88 at 581J--582A, 583G; *Chodree v Vally* supra, n 85; *T v M* supra, n 88 at 60C; *Wilson v Eli* supra, n 57; *Davids v Davids* supra, n 57; *Docrat v Bhayat* supra, n 45; *Matthews v Haswari* supra, n 57 at 111; *Rowan v Faifer* supra, n 56 at 710E; *September v Karriem* supra, n 56 at 689H; *Segal v Segal* supra, n 60 at 324B-C; *Ex Parte Van Dam* supra, n 56 at 185D; *Douglas v Mayers* supra, n 45 at 914E; *W v S* supra, n 56 at 489G; *F v B* supra, n 56 at 949B; *D v L and Another* supra, n 56; *J v O* supra, n 60; *Re C (a Minor)(Access)* supra, n 30; *A v C* supra, n 30; Brigitte Clark and Belinda van Heerden supra, n 2 p56; JM Kruger et al supra, n 130 p704; June Sinclair supra, n 45 p125; T Ohannessian and M Steyn supra, n 130 p258; JC Sonnekus and A Van Westing supra, n 98 p234-235; B Eckhard supra, n 130 p125-126; A Pantazis supra, n 164 p13
[280] listed at n 279
[281] supra, n 7

affecting children because of their special vulnerability[282], it is not an easy one and has been described as vague and ambiguous[283] often yielding unpredictable, anomalous and imprecise results[284]. The test does not only reflect scientifically what would be in the best interests of the child but is also a result of political and social judgments about the type of society that is preferred by the law[285]. The standard has therefore not been clearly defined with the result that it becomes shaped by the views and perceptions of whoever is sitting on the bench for any particular case. What may be regarded as the best interests of the child by one judge or party to the application may not be considered the same by another[286]. The test is therefore very much a subjective one because it depends on which judge is presiding over a certain matter affecting a child that determines the eventual outcome of the case; thus the standard is open to abuse[287]. Critics have therefore regarded the test as too broad and discretionary which allows for overreaching, arbitrary and discriminatory decisions[288] and 'may lead to paternalistic infringement on the parent-child relationship in the name of the child's welfare'[289].

It has been demonstrated that the opinions of two experts in the form of psychologists can be completely divergent in respect of the issue of access for natural fathers regarding their extramarital children, and that where there is no conclusive evidence, the court has the discretion to decide whether or not access is in the best interests of the child, but the courts have done this by maintaining the discriminatory status quo vis-a-vis natural fathers of extramarital children because the test has been made subject to the interests of the mother which ultimately creates a no-win situation for the natural father who has not had the opportunity to bond with his child, which situation could be the sole result of the mother's resistance[290]. In other words, the burden borne by the natural father of an extramarital child to prove that access is in the best interests of his child becomes heavier, not only by virtue of the subjective nature of the test but also because South African case law has shown that to a great degree the courts have shaped the test by having special regard to the interests of the mother[291]. Therefore, instead of the 'best interests of the child' doctrine serving as protection for extramarital children, it has actually functioned to serve the best interests of the mother[292].

Yet, at the same time, social scientists have confirmed that it is not in the best interests

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[282]A Pantazis supra, n 164 p13
[283]Vivienne Goldberg supra, n 19 p273
[284]Vivienne Goldberg supra, n 39 p289. For example, in *W v S* supra, n 56 at 491D-E; *Chodree v Vally* supra, n 85 at 32E-F; and *Douglas v Mayers* supra, n 45 at 915F-H, the courts looked at the relationship between the parents as a factor shaping the principle of the 'best interests of the child', whereas in *Bethall v Bland* supra, n 169; *T v M* supra, n 88 at 59H-60E, the courts did not regard the relationship between the parents as being a factor determining what would in the 'best interests of the child'. Access was denied or allowed as a result of these different views.
[285]Vivienne Goldberg ibid at n 284
[286]Vivienne Goldberg supra, n 19 p273
[287]Vivienne Goldberg supra, n 39 p289
[288]ibid at n 287
[289]ibid at n 288
[290]ibid at n 289
[291]*B v P* supra, n 56 at 117C-F; See also *S v S* supra, n 85 at 209B-C where the court said: " ... the best interests of the child ... is the end of the day measure for the soundness of the decision of the parent". (It is submitted that 'the parent' in this regard is the mother of the extramarital child).
[292]Jerry W McCant supra, n 249 p137

of the child to be estranged from either parent[293]. It has been established that it is in the interests of the child to know and develop a relationship with her or his biological father because this contributes to the child's sense of self-worth and origin and that, furthermore, a child who grows up without bonding with her or his natural father will eventually develop a need to know who he is[294]. Thus, every child needs a father as well as a mother[295]. Special care therefore needs to be taken to prevent the possible severance of the parent- child relationship which requires protection and attempts need to be made to encourage the father-child bond[296].

Questions such as whether the parents were legally married to each other at some legally pertinent time or what the circumstances surrounding the breakdown of their relationship were should not be important to determine the best interests of the child and actually will not be able to determine what are the best interests of the child[297]. The legal approach to penalise children for the choices that their parents make by using a marriage certificate to determine the context of rights of access reflects the law's perceptions of 'illegitimacy' which are unjust and subversive of the true considerations of the best interests of children[298]. The determination of rights of access on a marital axis is therefore not useful to establish the best interests of the extramarital children involved in the application[299].

If the purpose of the law in respect of parent and child is to incorporate full sharing of parental responsibilities as being in the best interests of children, then this can be achieved by incorporating a full sharing of parental rights as well, irrespective whether the child is born within wedlock or not and South African law therefore needs to be reformed in this regard[300].

A granting of an inherent right of access for natural fathers of extramarital children will alleviate the disadvantage suffered by both natural fathers and extramarital children in respect of their denial of access to each other because their positions will be equalised to those mothers, married fathers and children born within wedlock respectively. One of the reasons for this is that fathers of extramarital children would not have the onus of proving that access will be in the best interests of the child while at the same time having to show that it will not cause undue interference with the mother's wishes. If both natural fathers and mothers of extramarital children have an inherent right of access in respect of those children, they would both be able to make application to court to limit the other's right by asking for an order for a denial of access. The party bringing this type of application would bear the onus of showing that a denial of access would be in the best interests of the child.

Thus, the submission is that natural fathers of extramarital children should have equal rights of access to those of mothers and married fathers, because then the best interests of the

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[293] A Pantazis supra, n 164 p13
[294] JC Sonnekus and A Van Westing supra, n 98 p234-235; A Pantazis ibid at n 293; B Eckhard supra, n 130 p125
[295] B Eckhard ibid at n 294
[296] Brigitte Clark and Belinda van Heerden supra, n 2 p56
[297] June Sinclair supra, n 45 p119
[298] T Ohannessian and M Steyn supra, n 130 p260
[299] T Ohannessian and M Steyn supra, n 130 p259
[300] June Sinclair supra, n 45 p124

child would be the only criterion to limit each other's rights[301] and not only would the standard not be hampered by the mother's interests, but the court's discretion would also not be fettered by the wishes of the mother[302]. Furthermore, more certainty could be brought into the decisions handed down in this area of the law[303].

9. ATTITUDES OF JUDICIAL OFFICERS

The Law, Race and Gender Research Unit at the University of Cape Town has conducted numerous workships and conferences with judicial officers throughout the country and what has emerged quite clearly is the fact that whoever sits on the bench takes along with them all their 'baggage'. The 'baggage' of a judicial officer consists of her or his views, perceptions, outlooks, experiences, background, prejudices and bias so that it cannot be said that a judicial officer is completely neutral or objective in respect of the decisions that are handed down by her or him. Those judicial officers who preside over applications by natural fathers for access rights to their extramarital children are no exception.

Support by those judges for the rule which denies natural fathers an inherent right of access with regard to their extramarital children displays an adherence to stereotyped assumptions about women and men - that only women can properly care for and love their children while men are only good enough to financially provide for them; that only married fathers will assume parental responsibility while unmarried fathers are 'bad and uninterested parents' who shirk their responsibilities; that unmarried fathers abandon their extramarital children and only return to cause trouble in the lives of the mothers and children; that only a marital or cohabitational situation will provide a healthy and stable environment for the development of the child; etcetera.

It has also been noted that fathers have long suffered cultural discrimination and bias in the role of parents in the United States of America[304] and the submission is that the same has prevailed in South Africa. Fathers have been stereotyped as 'social accidents' who, unlike mothers, are not equipped at all to be nurturant parents and except for the provision of economic support, they have no other role to play in the child's life[305]. This assumption has also been reflected in the attitudes of the South African judiciary. Yet, research has shown that fathers do have the potential for nurturance which is 'a learned set of social skills' and 'not an inherited behaviour pattern' and that children bond not only with mothers but with fathers as well[306]. Moreover, children need to bond with their fathers because the latter bear an important influence on the healthy development of the former[307].

An application of the rule denying natural fathers an inherent right of access to their extramarital children enhances those prejudicial assumptions, increases the inequitable

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[301] JM Kruger et al supra, n 130 p704
[302] B Eckhard supra, n 130 p129
[303] Vivienne Goldberg supra, n 39 p289
[304] Jerry W McCant supra, n 249 p127
[305] Jerry W McCant supra, n 249 p128-129
[306] Jerry W McCant supra, n 249 p130
[307] Jerry W McCant supra, n 249 p140-141

distribution of parental responsibilities, contributes to women's inferior position in society, causes disadvantage to be suffered by natural fathers of extramarital children, and adds to the harm already suffered by extramarital children due to the stigma attached to 'illegitimacy'. The courts are meant to reflect societal norms and mores yet the present attitude of society in respect of extramarital births is at variance with the approach of the courts. Society no longer views extramarital births in a negative light but rather has accepted it as well as changing family forms as a common occurrence which is not deserving of the stigma that was once attributed to it.

By enforcing the rule denying natural fathers of extramarital children an inherent right of access, the courts have furthermore displayed a flagrant disregard for the choices these fathers have made to marry or not to marry. As June Sinclair has so eloquently put it: "It is the arrogation of power to impose a particular lifestyle on a community and to punish those who do not comply that is objectionable[308].

Judicial officers need to discard their biases which are informed by various stereotypes and the law can assist in this regard by allowing natural fathers of extramarital children to have an inherent right of access in respect of those children. This will create the legal environment necessary to oust outdated, archaic and unjust assumptions and will instead create the space that natural fathers so desperately need to assume parental responsibility, to display their commitment to their children and to form and develop a father-child bond which is required for the well-being of the child.

10. CONCLUSION

The story of Bob which was related at the beginning of this paper is a common one. Many unmarried fathers have found themselves in either exactly the same or similar position as my friend - a situation in which the mothers, for whatever reason, choose to deny the natural fathers of their extramarital children access and block their access, perhaps in a piecemeal fashion, perhaps completely. Although there are some fathers who probably do not deserve to have access to their extramarital children, there are, on the other hand, those who are emotionally committed to the well-being of their children but have not been given the chance to prove it. They are completely at the mercy of the mothers and the law, both of which dictate the extent of their connection to their own biologically related children.

Our Constitution was the culmination of a battle hard fought for and won in the name of equality and democracy for all. But the war is not yet over if people are still being denied equal protection and benefit of the law and if they continue to be unfairly discriminated against. The Constitution includes in its categories of protection both men as fathers and in their unmarried capacity, as well as extramarital children. Yet, the courts and the legislature have seen fit to add to the burdens already suffered by them. The notion of substantive equality seeks to remedy the injustices that was wrought by apartheid. Yet, a continued denial of an inherent right of access will not contribute to substantive equality. It may seem that an award of an automatic right of access will increase the burden suffered by women and enhance gender inequality in society, but it is submitted that their inequitable position is as a result of political, social and economic

[308] June Sinclair supra, n 45 p116 at footnote 307, p125-126

deprivation caused by an unjust government during the pre-1994 period. Why then, must natural fathers, many of whom themselves have been politically, socially and economically disadvantaged, be punished for the situations of mothers which were initially caused by factors completely unrelated to those fathers? Two wrongs do NOT make a right. If that were the case, we would all be rooting loudly for the reinstatement of the death penalty.

Not only does the denial of an inherent right of access violate constitutionally protected rights of natural fathers and extramarital children, it increases women's inferior position in society and underscores stereotyped assumptions about women, men and 'illegitimacy' which do not accord with South African reality. It reflects prejudicial attitudes and bias that unfairly attack the human dignity of those natural fathers and their extramarital children.

The South African judiciary and legislature have let down the interests of society which they are supposed to reflect and the very people whom they are supposed to protect and they have subverted the true meaning of equality. It is unfortunate that the brave approach of Van Zyl J was not followed through by subsequent decisions. Despite the fact that his decision was overturned by his own Witwatersrand Local Division as well as the Appellate Division, it does not necessarily mean that his views were incorrect. On the contrary, Van Zyl J expressed a progressive line of thought which reflected the spirit of our Constitution even though, ironically, his decision was handed down during the pre-constitutional era.

The time is now long overdue for an intervention to give effect to the words, spirit, purport and objects of our Constitution. It is therefore up to the Constitutional Court to step in and oust an archaic, outdated and barbaric rule which has wreaked havoc in the lives of natural fathers and their extramarital children by allowing its unjust implications to filter through into their already burdened existences.

Natural fathers of children born out of wedlock should at the very least have an inherent right of access in respect of their extramarital children. This would place them and their extramarital children on an equal footing with mothers, married fathers and children born within wedlock respectively. Mothers and natural fathers would therefore both have the same inherent right of access and they would both be able to approach the court to limit the other's right. The court, at the end of the day, would have the discretion to grant or deny the order by having regard to the standard of the 'best interests of the child'. This standard would then not be hampered by the mother's wishes and the court's discretion could remain unfettered with due regard to the true interests of the child.

The law needs to give natural fathers and extramarital children the opportunity to establish and develop the father-child bond which is so necessary for the healthy development of the child and at the same time will allow the natural father to have a chance to assume his fair share of the parental responsibility and display his commitment to his child without legally sanctioned interference by the mother. For, after all, the legal status of marriage or non-marriage should not preclude a father from being able to get know his child and vice versa. Society has long stopped condemning 'illegitimacy' - it is now time for the law to properly follow suit.

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