THE CHALLENGES THAT UNMARRIED FATHERS FACE IN RESPECT OF THE RIGHT TO CONTACT AND CARE OF THEIR CHILDREN: CAN AMENDMENTS TO THE CURRENT LAW MAKE ENFORCEMENT OF THESE RIGHTS MORE PRACTICAL?

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DECLARATION

I declare that 'The Challenges that unmarried fathers face in respect of the right to contact and care of their children: can amendments to the current law make enforcement of these rights more effective?' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

Full name: Delecia Leigh Adams

Signed: _____

11 March 2016

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KEYWORDS / PHRASES

- Unmarried Father
- Biological mother
- Parental Rights & Responsibilities
- Best Interests of the child
- Equality
- Parenting Rights and Responsibilities Agreements
- Children's Court
- Contact
- Care
- Access

ACRONYM

- SALRC South African Law Reform Commission

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CHAPTER 1: INTRODUCTION: HISTORICAL BACKGROUND

Historically, unmarried fathers had no rights in respect of their children born out of wedlock. “Until 1998, the unmarried father had obligations to his child under common law, but did not have any inherent rights with regard to the child.”[1] This position changed when they were awarded limited rights in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.This position has further been developed by the Children’s Act 38 of 2005. Section 21 of the Children’s Act (hereafter the Act) now provides for the acquisition parental rights and responsibilities in respect of unmarried fathers if certain requirements are met.

This section, although it seems enforceable on paper, brought along its own set of rules and challenges. Challenges include, amongst others, inequality between unmarried biological fathers and biological mothers of the children born out of wedlock. The children are affected insofar as their right to a family, or to have contact with both parents, can be substantially infringed.

The Children’s Act makes provision for both full or specific parental responsibilities and rights in respect of a child. The Act clearly defines parental responsibilities and rights in Section 18 (2)[2] thereof.

[1] Boezaart *T “Child Law in South Africa”* (2009) 71

[2] Section 18 (2) of Act 38 of 2005 reads as follows:
‘*18 (2) the parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right-*
(a) to care for the child;
(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child.’

2. ACQUISITION OF PARENTAL RIGHTS AND RESPONSIBILITIES

The Act draws a clear distinction between the acquisition of parental responsibilities and rights of married and unmarried fathers. In respect of married fathers, the acquisition of parental responsibilities and rights are automatic if they fulfil one of the requirements mentioned in section 20.[3]

This section places the father on an equal footing with the biological mother. Hence in the event of divorce or separation of the biological parents after the birth of the child, or during the pregnancy, the father retains his full parental responsibilities and rights, provided for by section 20 of the Act.

In the event where the father does not fall within the categories mentioned in section 20 of the Act, provision is made for him in section 21 of the Act.

Interpretation of section 21 remains a challenge, not only to unmarried fathers, but also to our courts. Our courts have attempted to interpret these provisions and many different approaches have been used. In 2013 the KZN High Court[4] considered all the factors of section 21 in determining whether or not the biological father of the child had indeed acquired parental responsibilities and rights. One of the big challenges with the section, is the word "and" between 21 (b) (ii) and (iii). The question that arises is

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[3] Section 20 of Act 38 of 2005 reads as follows:
'The biological father of a child has full parental responsibilities and rights in respect of the child-
(a) if he is married to the child's mother
(b) if he was married to the child's mother at-
(i)the time of the child's conception;
(ii) the time of the child's birth; or
(iii) any time between the child's conception and birth'

[4] *I v C and Another* [2014] ZAKZDHC 11

whether the requirements of either subsections (ii) or (iii) should be satisfied or whether the requirements of both subsections must be satisfied to acquire parental rights and responsibilities. In 2014, the North West High Court only looked at section 21 (b) (ii) to determine whether the biological father had indeed acquired parental responsibilities and rights.[5] Beyl[6] agrees with Boezaart[7] that the requirements of section 21 (b) (ii) and (iii) are cumulative and that an unmarried father must fulfil all three requirements of the section to automatically acquire parental rights and responsibilities.[8] Davel and Skelton in their Commentary are of the opinion that the word "and" connects the two subsections and therefore all the requirements of the section must be satisfied to enable an unmarried father to qualify for automatic parental rights and responsibilities.[9]

3. DISPUTE RESOLUTION

The Act makes provision for mediation in the event of disputes arising between the biological parents of a child.[10] The Act prescribes that the matter should be referred to the Office of the Family Advocate, a social worker or any other suitably qualified social service professional for mediation to be attempted. This provision can be found in the latter part of section 21 of the Act**.**

[5] *R v S* [2014] ZANWHC 3
[6] Beyl A, Critical *Analysis of Section 21 of the Children's Act 38 of 2005 with specific reference to the Parental Responsibilities and Rights of unmarried fathers* (LLM Dissertation 2013 University Pretoria)
[7] Boezaart *T Child Law in South Africa* (2009) p74
[8] Beyl A, (2013)138
[9] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-11
[10] S21(3) of Act 38 of 2005

4. PARENTAL RIGHTS AND RESPONSIBILITIES AGREEMENTS

The Act added another segment to the rights of unmarried fathers. Unmarried fathers can now, in terms of section 22 of the Act, enter into a parental rights and responsibilities agreement with the biological mother of the minor child. Such agreement must be drafted in a prescribed form. It is also a requirement that before registration of the agreement, the Offices of the Family Advocate or the relevant court must be satisfied that such agreement is in the best interests of the child.[11] Further, the Act prescribes that such agreement only takes effect if it is registered with the Offices of the Family Advocate or if it had been made an order of court by the High Court, Divorce Court (Regional Court) or the children's court.[12] It is clear that the law has indeed been developed to give parental responsibilities and rights to some unmarried fathers.[13]

Implementation of section 21 of the Children's Act is however still a challenge. As a result of the criterion set out in section 21 of the Children's Act, not all unmarried fathers can automatically acquire parental rights and responsibilities. Beyl[14] focusses on the commitment of the unmarried father and believes that the unmarried father's commitment towards the child should be considered as opposed to his commitment towards the child's mother. Hence the question as to whether the position of unmarried fathers has changed or not still remains in limbo.[15]

[11] S22(5) of Act 38 of 2005
[12] S22(4)(a) and(b) of Act 38 of 2005
[13] Beyl in her thesis critically analyses section 21 with specific reference to parental rights and responsibilities of unmarried fathers.
[14] Beyl A, (2013)21
[15] Beyl in her thesis specifically discusses the transformation of rights of unmarried fathers as well as the fact that their position in respect of their biological children remains practically unchanged.

The thesis will discuss the challenges faced by unmarried fathers, starting with enforcing the provisions of the Act up to the point of enforcement of a court order, where one has been obtained.

5. RIGHT TO EQUALITY

Another aspect that this thesis will consider is the right to equality as is enshrined in the Constitution.[16] The Constitution in section 9 thereof, provides for equal and fair treatment of all citizens of the republic. However, section 21 of the Act does not seem to comply with the provision of the Constitution.[17] The Act draws a clear distinction between married and unmarried fathers in respect of the acquisition of parental responsibilities and rights. In the case of unmarried fathers, the Act provides that certain requirements must be met before an unmarried father can acquire parental rights and responsibilities and in the case of married fathers, the acquisition is automatic. This is on the face of it discriminatory; an unmarried father should not be treated differently because of his marital status. These requirements of the Act do not amount to equal treatment. However, the question is whether the limitation of the rights of unmarried fathers is justifiable? The research will aim to reflect how the rights of unmarried fathers in respect of access to their children are limited. An unmarried father, even while having the status of a biological father, must undergo many challenges to acquire parental rights and responsibilities. Whereas in the case of married fathers, irrespective of the relationship between the parents of the child or the best interests of the child, the

[16] The Constitution of the Republic of South Africa

[17] Skelton is of the opinion that the section clearly indicates that unmarried fathers are not on equal footing as unmarried mothers who acquire full parental rights and responsibilities simply because she gave birth to the child irrespective of her marital status. Skelton A "*Family Law in South Africa*"(2010) 246

biological father acquires parental responsibilities, by virtue of being married to the biological mother.

The inequality could have an effect on the children involved in these disputes. All children have a right to parental care and the best interests of a child are of paramount importance when it comes to any decisions being made where a child is a subject. This is provided for in the Constitution, the Children's Act as well as international instruments to which South Africa is a state party. The aforesaid legislation and instruments do not draw a distinction between children born in or outside of wedlock. Therefore the question as to why section 21 of the Children's Act omitted the best interests of the child remains unanswered.

6. RESEARCH QUESTION(S):

1. How enforceable are the rights of unmarried fathers, as they are entrenched in section 21 of the Children's Act 38 of 2005? Should more unmarried fathers be awarded automatic rights? Are the criteria for determining which fathers acquire rights fair and just?
2. Can the challenges as discovered in question one be remedied by the legislator?

7. OBJECTIVES:

The objectives of this study are firstly to examine academic literature on the enforcement of parental rights and responsibilities of unmarried fathers. In addition to the aforesaid, the legislation in its current form will be examined and a critical analysis of the implementation thereof will be done. Lastly, the writer will make proposals and

recommendations to amend the current legislation so as to accommodate the needs of unmarried fathers in general.

8. SIGNIFICANCE OF RESEARCH

The study will contribute to the current literature on parental rights and responsibilities of unmarried fathers. Emphasis will be placed especially on those individuals who are not in a position to litigate further than the lower courts due to income restraints. Further, the study will look at the contribution of all the role-players in the application process towards the realisation of the rights of unmarried fathers. Proposals to change or amend the legislation will be made so as to accommodate all unmarried fathers with a view to enforcing their parental rights and responsibilities. This will be done by considering the South African Law Reform Commission's Issue Paper no 31,[18] released two weeks before the submission of this dissertation.

9. RATIONALE FOR THE RESEARCH

In terms of our common law, unmarried fathers had absolutely no rights in respect of their children. The position has since changed as is clear from the background of the study. The law has developed so as to accommodate some unmarried fathers, but to date many unmarried fathers find themselves in the same position as they were in before 2007. Implementation of the law in relation to unmarried fathers and enforcing their rights are still challenging. The rationale of this research is to attempt to make recommendations to the legislature in respect of amending the Children's Act in an attempt to make enforcement of these rights more effective. As a legal practitioner, the

[18]SALRC Issue Paper *Family Disputes Resolution : Care of and Contact with Children*, 2015 (Project 100D)

author of this thesis has been practicing law for approximately 7 years after the implementation of the Act, thus she has experienced the challenges faced by unmarried fathers. It is important to the author to contribute to the realisation and enforcement of the rights of unmarried fathers as contained in the Children's Act. The aim is to have this enforcement effected as practically and speedily as possible.

10. LITERATURE REVIEW

A substantial amount of articles have been written on the subject. However, different approaches have been used. The review starts with looking at the criticism of the terminology introduced in the Children's Bill of 2003 until analysis of section 21 of the Act and more specifically the actual enforcement of the section and the challenges relating to such enforcement.

The following authors have approached the topic as follows:

Bonthuys[19] first examined the Bill (as it then was) in respect of the terminology as well as the position of unmarried fathers without the financial means to give effect to their rights.

She was of the opinion that irrespective of the good intentions of the drafters of the Bill to give unmarried fathers the opportunity to automatically obtain parental rights and responsibilities, that equality would become an issue. Another important aspect that she addressed in her article is the fact that the best interests of the child were not specifically mentioned in the Bill as well the failure to make provision for domestic

[19] Bonthuys,E 'Parental Rights and Responsibilities in the Children's Bill 70D of 2003' 2006 *Stell LR* 482

violence between the parents of the child.[20] She further noted that because full parental rights could only be given to a married father, the Bill only applies to a heterosexual couple and thus lesbian partners would not be able to automatically acquire parental rights and responsibilities. She also believed that the specific sections of the Bill that deal with parental rights and responsibilities could be subjected to constitutional challenge on the basis of discrimination on sexual orientation.[21] Bonthuys concluded with the issue of finances, and was of the opinion that a parent's financial situation will have an effect on his or her parental obligations.[22]

Mailula's[23] opinion, written before the Children's Act of 2005, argues that the lack of children's inherent rights to access, custody and guardianship of the natural fathers disregards the children's rights, specifically their rights to parental care, dignity, equality and their best interests. This article is written from a children's rights perspective.

Zaal & Couzens[24] in their article analyse the judgment handed down in Wheeler v Wheeler (2011) 2 ALL SA 459(KZP) by looking at the nature of the difficulties caused by the conceptualising of parental rights and responsibilities and the reasoning of the court.

Mahlobogwane,[25]in his article looks at the effectiveness of the parenting plan and whether it in fact promotes the best interests of the child more specifically, whether it promotes the child's right to grow up with a close relationship with both parents. This

[20] Bonthuys,E (2006) 487
[21] Bonthuys,E (2006) 489
[22] Bonthuys,E (2006) 493
[23] Mailula, D 'Taking children's rights seriously: Access to, and custody and guardianship of, a child born out of wedlock' 2005 *Codicillus* 15
[24] Zaal, F Noel and Couzens, M 'Articulating Common Law and Statutory Responsibilities' 2012 *TSAR* 188
[25] Mahlobogwane, M ' Parenting Plans in terms of the Children's Act: Serving the best interest of the parent or the child?' 2013 *Obiter* 218

article relates to the current provisions of the legislation and the effectiveness of parenting plans will be considered when making recommendations to render the legislation more effective.

Sloth-Nielsen, Wakefield and Murungi[26] discusses the acquisition of parental responsibilities in Kenya, South Africa and Namibia. They also looked at whether the current domestic laws of the aforesaid countries comply with international demands.

Beyl,[27] in her critical analysis of section 21 of the Children's Act, in the chapter on parental rights and responsibilities, questions the commitment of unmarried fathers, specifically with reference to their automatic acquisition of parental rights and responsibilities. She further criticises section 21, in that it does not provide for the best interests of the child and also that the section focusses on the relationship between the biological mother and the unmarried father, and not on the relationship between the unmarried father and the child. She is further of the opinion that the child's best interests should be considered when decisions are made to allow the unmarried father to acquire parental rights and responsibilities or not. [28]

In chapter 5 (five) of her thesis she focusses on the application of section 21 in practice. Specific reference is made to, amongst others, mediation, permanent life partnerships, "reasonable period" and "good faith". She makes recommendations to assist with the interpretation of section 21 of the Act in chapter six of her thesis.

[26] Sloth-Nielsen, J, Wakefield,L and Murungi, N 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' 2011 *Journal of African* Law 203
[27] Beyl A,(2013)
[28] Beyl A,(2013) 23

This thesis will differ from that of Beyl, in that it will attempt to assist unmarried fathers in their quest to make the realisation of their rights possible, in other words to find more effective ways of enforcing their rights in a practical manner.

11. METHODOLOGY

The methodology utilised will be mainly desktop research, including primary sources such as case law and legislation, international instruments and secondary sources such as books, internet sources and articles of South African and foreign academics. The writer conducted interviews with a number of role-players involved in the section 21 application processes. The people who participated in the research come from different professions, but share a common interest; they deal or have dealt with the enforcement of parental rights and responsibilities of unmarried fathers on a daily basis. Ninety percent of the informants has been in practice before the promulgation of the Act and have been involved in litigation relating to the Act. Amongst these individuals are a High court judge, a Children's Court Magistrate, two family advocates, three practising attorneys, three advocates, a mediator and a clinical psychologist. The snowball research method was used with these interviews, with the view to obtain details of other experts in the field.

12. LIMITATIONS OF STUDY

This study will be limited to the legislation and procedures applicable to South Africa and recommendations will be made specifically in respect of the challenges faced by unmarried fathers in South Africa.

13. CHAPTER OUTLINE

Chapter 1: This chapter will introduce the background to the study as well as the significance of the research.

Chapter 2: This chapter will provide the history of the parental rights and responsibilities of unmarried fathers in South African law.

Chapter 3: This chapter will focus on the Children's Act 38 of 2005 and the challenges faced by unmarried fathers in respect of exercising their parental rights and responsibilities, as well as the current measures and remedies available to assist unmarried fathers to exercise their parental rights and responsibilities with specific reference to access to justice.

Chapter 4: This chapter will provide recommendations to the study and draw conclusions.

CHAPTER 2: THE HISTORY OF PARENTAL RIGHTS AND RESPONSIBILITIES OF UNMARRIED FATHERS IN SOUTH AFRICAN LAW

1. INTRODUCTION

South African law had seen many developments in respect of the rights and responsibilities of unmarried fathers before the current regime introduced by the Children's Act 38 of 2005. This chapter will discuss the different phases of legal development, starting first with the position under the common law and concluding with the current position under the Children's Act.[29]

2. PARENTAL AUTHORITY UNDER COMMON LAW

"At common law an unmarried father had no relationship with his children born out of wedlock except that he was obliged to maintain them, in effect, he had no parental rights…"[30]

Common law defined parental power[31] as the rights, powers, duties and responsibilities of parents.[32] The relationship between fathers and their children was defined by labelling the children as 'legitimate' and 'illegitimate'.[33]

[29] Act 38 of 2005
[30] Morei, NL *'A Critical Analysis of the impact of the Constitution on the legal position of unmarried fathers in South African law'* (LLD Dissertation 2008 North-West University, Mafikeng Campus) 11
[31] Today also known as parental rights and responsibilities
[32] Boberg PQR "*Law of Persons and the Family"* (1999) 312
[33] Boezaart T "*Child Law in South Africa"* (2009) 70

Parental authority and powers consisted of guardianship, custody and access.[34] It was said that there existed no relationship between the unmarried father and his child except for his duty to maintain the child.[35]

Unmarried fathers thus did not have an automatic right to guardianship and custody. Guardianship and custody automatically vested in the mother of a child born out of wedlock. In a situation where the mother of the child was herself a minor, guardianship automatically vested in her guardian or parent.[36] A father of a child born out of wedlock was considered a stranger; hence he had no parental power.[37] Neither the unmarried father nor his parents had parental power over the minor child even if the biological mother died.[38] The biological father assumed the role of a third party and did not have any automatic rights to the child born out of wedlock.[39] Unmarried fathers could only exercise these rights if it was in the best interests of the child and only by way of a court order granted by the High Court.[40]

Parental authority was governed by the common law until the birth of the Guardianship Act.[41] The Guardianship Act[42] came into operation in 1993 and granted shared guardianship to both parents of a child born in wedlock; but guardianship vested only in

[34] Sloth-Nielsen, J, Wakefield, L and Murungi, N 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' 2011 *JAL* 203
[35] Mailula, D 'Taking children's rights seriously: Access to, and custody and guardianship of, a child born out of wedlock' 2005 *Codicillus* 15
[36] Boberg PQR (1999) *395*
[37] Paizes JP, *The Position of Unmarried Fathers in South Africa: An Investigation with Reference to a Case Study* (LLM Dissertation 2006 University of South Africa) 21
[38] Paizes JP (2006) 21
[39] Morei, NL (2008) 11
[40] Mailula,D (2005) 18
[41] *Fraser v Children's Court Pretoria North and Others* 1996 (BCLR) 1085 (CC)
[42] 192 of 1993

the mother of a child born out of wedlock leaving the position of unmarried fathers unchanged.[43] The different components of parental authority shall now be discussed.

2.1 GUARDIANSHIP

Guardianship was referred to in a narrow and a wide sense.[44] In a narrow sense it referred to the capacity of a parent to act on behalf of a child in respect of administering his or her estate as well as acting on his or her behalf in judicial matters.[45] Hutchison gave a detailed definition of guardianship in the broader sense and referred to it as "the authority which one person has over the person and/or property of another who suffers from an incapacity to manage his own affairs and/or person (such as a minor, insane person or prodigal) to the advantage of the latter".[46]

In the wider sense, guardianship can include elements of custody. Davel and Skelton referred to guardianship in the wider sense as custody and opined that it referred to a parent's actual physical possession of a child and included caring for and supporting the child on a daily basis.[47]

2.2 CUSTODY

Cronje defines custody as: "…a person's capacity physically to have the child with him or her and to control and supervise the child's daily life."[48] The term custody was also inclusive of, amongst others, the following: possession of the child, physical welfare of a

[43] Sloth-Nielsen, J, Wakefield, L and Murungi, N (2011) 203
[44] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-5
[45] Cronje D, Heaton J "*South African Family Law"* (2004) 162
[46] Malete,MD *Custody and Guardianship of children: A comparative perspective of the Bafokeng customary law and South African common law* (LLM Dissertation 1997 Rand Afrikaans University) 27
[47] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-5
[48] Cronje D, Heaton J (2004) 163

child which entails the right and duty to nurture, maintain and raise the child as well as the duty to provide the child with adequate accommodation, food, clothing, medical support, and education and to support the child.[49]

2.3 ACCESS

Access was the second component of parental authority and was referred to as the right to maintain a personal relationship with the child as well as regular communication with the child.[50] Cronje and Heaton defined access as "…the right and privilege to see, visit, spend time with, have contact with and enjoy the company of the child."[51] This means that the parent, who has access to the child at the time, is able to exercise those powers that the custodial parent would have exercised when the child is in the care of the custodial parent.[52] These powers were deemed to include the right to make decisions regarding the health, safety, education and daily routine of the child.[53]

The legal position of unmarried fathers became more troublesome and resulted in the need for legislation.[54] A greater number of unmarried fathers wanted to exercise parental authority in respect of their children born out of wedlock and the common law did not make provision for this, hence the unanswered question was whether an unmarried father had an inherent right to access in respect of his child. Important court decisions brought to an extent a measure of relief for unmarried fathers. The significant decisions in these cases will now be discussed.

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[49] Malete,MD (1997) 25
[50] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-5
[51] Cronje D, Heaton J (2004) 280
[52] Cronje D, Heaton J (2004) 280
[53] Cronje D, Heaton J (2004) 280
[54] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-9

3. JUDICIAL INTERVENTION AND INTERPRETATION OF LEGISLATION

3.1 *F V L AND ANOTHER*

In *F V L and Another*,[55] the first and second respondents entered into marriage in December 1978. In January 1979, the child was born. The applicant alleged that he is the father of the child as he had sexual intercourse with the first respondent during April 1978. The relationship between the applicant and the first respondent was terminated in May 1978. The second respondent confirmed that he too had sexual intercourse with the first respondent and accepted that he is the father of the child. The applicant brought an application to the court for an order declaring that he is the natural father of the child and also that he is entitled to reasonable access to the child. The Court considered the legal relationship between a natural father and an illegitimate child and said the following: "The natural father has a duty to maintain his illegitimate offspring and the child has a right of maintenance against the father. That is trite. It is also trite that in common law no other rights and duties between them were recognised." The Court held that a father can only acquire parental authority in three ways which included birth from a valid marriage, legitimation and adoption. The Court found that the applicant did not acquire parental authority in any of the aforementioned ways and therefore had no prima facie rights of access to the child.

[55] *F v L and Another* [1987] 4 ALL SA 308 (W)

3.2 *F V B*

In the case of *F v B*[56] the parties to the dispute had a child out of wedlock. The applicant has been a part of the child's life since birth until the age of two years and four months, when the respondent entered into a marriage with another man. At the time of the marriage the respondent prevented the applicant's access to the child. The applicant brought and application to the court for an order allowing him access to the child. The fact that the applicant did not have an inherent right of access with his child was not in dispute. The court however was of the opinion that the applicant does not have a right of access to the child, and that he will only be granted such access if strong compelling grounds exists that indicates that access would be in the best interests of the child. The expert evidence confirmed the child may suffer psychological harm should the applicant be allowed to have access to the child. The court held that allowing the applicant access with the child would not be in the child's best interests and refused the application.

3.3 *B V P*

In *B v P*,[57] the applicant had a long relationship with his child and thus has been a part of the child's life since the child's birth. In 1989, the respondent refused to allow the applicant access to the child. The trial court referred to the principles applied in the cases of *F v L*[58] and *F v B*[59] and held that the reasons provided by the applicant were not compelling enough to convince the court to grant an order allowing the applicant access to the child.

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[56] *F v B* [1988] 4 ALL SA 397 (D)
[57] *B v P* [1991] 4 ALL SA 421 (T)
[58] [1987] 4 ALL SA 308 (W)
[59] [1988] 4 ALL SA 397 (D)

3.4 *VAN ERK V HOLMER*

In *Van Erk v Holmer*,[60] the applicant brought an application to the court granting him reasonable access to his child born out of wedlock. At the first appearance the matter was referred to the Family Advocate for an investigation and recommendation. The recommendation was that the applicant should be granted certain defined rights of access to the child. The court accepted the recommendation and the agreement was made an order of court. Van Zyl J held that no distinction should be made between legitimate and illegitimate children and that access should only be denied if it would be in violation of the best interests of the child. The court considered the preceding cases that dealt with the same issue and said the following: "In view of the aforegoing considerations I believe the time has indeed arrived for the recognition by our courts of an inherent right of access by a natural father to his illegitimate child. That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy. It should be removed only if the access should be shown to be contrary to the best interests of the child."

Subsequent to this court decision, the enactment of the Interim Constitution took place in 1993 and the Final Constitution in 1996. The Constitution introduced many changes to our law, with the most significant change being the implementation of the Bill of Rights. Section 28[61] of the Constitution gives independent recognition to the needs and

[60] *Van Erk v Holmer* [1992] 4 ALL SA 345 (W)
[61] Section 28 of Act 108 of 1996 reads as follow:
28.(1) Every child has the right—
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;

best interests of children.[62] Even though the rights contained in the Bill of Rights are not absolute and are subjected to the limitation clause, section 36[63], it is applicable to all law.[64] As a result of this development in South Africa, the courts placed great emphasis on the best interests of the child when faced with litigation regarding children. This application is illustrated in the following court case discussions.

3.5 *S V S* [65]

In this case the applicant applied to the court for an order granting him rights of access to the child born out of a relationship between him and the respondent. The respondent was not in favour of the application as she believed that allowing the applicant access

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(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
(i)kept separately from detained persons over the age of 18 years; and
(ii)treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) In this section "child" means a person under the age of 18 years.

[62] Bekink, M "Child Divorce" : A Break from Parental Responsibilities and Rights Due to the Traditional Socio-Cultural Practices and Beliefs of the Parents 2012 *PER* (15)(1) 183

[63] Section 36 of Act 108 of 1996 reads as follows:
36.(1)The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[64] Bekink, M (2012) 183

[65] *S v S* [1993] 3 ALL SA 754 (W)

would not be in the best interests of the child. The applicant informed the court that the he is asking for access, only, because he is paying maintenance for the child. The court disagreed with Justice Van Zyl in the *Van Erk* case. The court referred to the *Van Erk* judgment and held that: "The father's duty to maintain stands whether it is good or bad that he has contact with the child. It is widely accepted that that neither the law nor the child or its mother owes the father anything in return."[66] The court held that it was not convinced that the scepticism of the respondent about what is in the child's best interests was wrong. The application was dismissed.

3.6 *B V S*

In the case of *B v S*,[67] the appellant applied to the High Court for an order granting him access to his child. After hearing the evidence, the trial court held that the appellant had no inherent rights of access. The trial court was of the opinion that the appellant's papers did not quite make out a case indicating that compelling circumstances existed to convince the court that an order granting him access would be in the best interests of the child. The court confirmed the views of Spiro[68] and Boberg [69] in that it upheld the view that because the unmarried father does not have parental power, and access is a component of such parental power, there exists no inherent right of access in respect of an unmarried father.[70] As was the case with parental authority, an unmarried father could make an application to the High Court for an order authorising his right of access. The court was further of the opinion that access would be granted to an unmarried

[66] *S v S* page 764
[67] *B v S* [1995] 4 SA ALL 392 (AD)
[68] Spiro E *Law of Parent and Child* 485
[69] Boberg PQR (1999) 334
[70] Mailula, D,(2005) 19

father but he had to prove on a balance of probabilities that such access would be in the best interests of the child and that it would not interfere with the mother's right to custody. The decisive factor would however be the best interests of the child.[71] The trial court dismissed the application. Two years after the judgment of the trial court, the appellant lodged an appeal to the Appellate division against the judgment of the trial court. The Appellate division, upon assessing the evidence, upheld the appeal in that it found that the trial court's evaluation of the evidence was incorrect. The court was of the opinion that the "…it may well be that access will be in the child's best interests and that he should not be disadvantaged by respondent's refusal of access (if unjustified) or by the inadequacies inherent in forensic procedure."[72] The court referred the matter back to the trial court for oral evidence to be heard as well as the necessary investigations to be completed.

3.7 *Fraser* v *Children's Court, Pretoria North and Others*

The first post-constitution matter before the Constitutional Court was *Fraser* v *Children's Court, Pretoria North and Others,*[73] Fraser had a child from a relationship that had ended at the time that the child was born. The mother of the child had decided to give the child up for adoption. Section 18(4)(d) of the Child Care Act[74] then in force provided that the adoption could take place without the consent of the unmarried father.

Fraser applied to the High Court for an interdict preventing the child from being handed to the adoptive parents and seeking an order handing the child over to him. His

[71] Mailula, D,(2005) 19
[72] *B v S* 406
[73] 1996 (BCLR) 1085 (CC)
[74] Act 74 of 1983

applications were dismissed due to his lack of parental authority under the common law. After not receiving an opportunity to be heard by the Children's Court, Fraser applied to have the identities of the adoptive parents disclosed, so that he could apply for an interdict preventing the removal of the child from South Africa.[75] This application was also unsuccessful. Fraser started review proceedings in the High Court and sought an order for the following relief: setting aside the adoption order, that he be allowed to be heard and participate in the adoption proceedings, and an order declaring the common law rule vesting guardianship in the mother of the child born out of wedlock inconsistent with the Constitution.

The court held that the Children's Court commissioner had acted grossly irregularly by not affording Fraser a proper hearing and the order was set aside. Section 18(4)(d) was found to be inconsistent with the interim constitution[76] and the matter was referred to the Constitutional Court for determination.

Section 18(4)(d) of the Child Care Act,[77] was declared unconstitutional because it discriminated unfairly against unmarried fathers on the basis of their gender and marital status and it was declared inconsistent with the Interim Constitution in that it dispensed with the consent of the unmarried father for the adoption of an illegitimate child in all instances. Parliament was ordered to draft legislation that acknowledged the rights of unmarried fathers within two years of handing down the judgment.[78]

[75] *Fraser v Naude and Others* 1997(2) SA 82 (W)
[76] Act 200 of 1993
[77] Act 74 of 1983
[78] *Fraser v Children's Court Pretoria North and Others* 1996 (BCLR) 1085 (CC)

Naude, the biological mother of the child, took the matter on appeal to the Supreme Court of Appeal on the basis that the court a *quo* erroneously set aside the order granted by the Children's Court. The Supreme Court of Appeal agreed with the court a *quo* in respect of the anonymity of the adoptive parents for purposes of preventing ongoing disputes even after the adoption. The court held that at the time of the application, the proposed amendment was not done yet and therefore section 18(4)(d) was in force and applicable to the case. The court further found no fault with the commissioner's conduct and upheld the appeal, setting aside the order made by the court a quo, except the order in relation to the determination of the unconstitutionality of section 18(4) (d).[79]

Fraser then applied to the Constitutional Court for special leave to appeal against the Supreme Court of Appeal's decision or alternatively, direct access to the Constitutional Court. The court considered the best interests of the child and the possible consequences, should the appeal be granted. The court refused the application as sought by Fraser.

The above court decisions reflects how the courts have dealt with the developments in respect of parental authority, the best interests of the child and the Constitutional rights related to children and parents, specifically unmarried fathers. However, not all individuals possess the capability to approach the courts and tribunals for assistance when disputes arise. Therefore, the *Fraser* decision resulted in the promulgation of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 and the Adoption Matters Amendment Act 56 of 1998.

[79] *Naude and Another v Fraser* 1998 (BCLR) 945 (SCA)

4. LEGISLATION REGULATING THE PARENT AND CHILD RELATIONSHIP

4.1 CHILD CARE ACT 74 OF 1983

This Act provided that in the event that the parents of a child are married, the consent of both parents was necessary for making the child available for adoption. In the situation where the child was "illegitimate", only the consent of the mother, or her guardian/parent, where she was a minor, was required to put the child up for adoption.[80] Unmarried fathers had no say whatsoever, whether they had acknowledged paternity or not. This was based on the common law rule relating to guardianship outlined in the preceding section, as an unmarried father had no parental authority in respect of his child born out of wedlock. On the other hand, the same section placed the married father on equal footing as the child's mother.[81]

This Act was amended in 1996 to provide for the consent of the unmarried father in the adoption of his child.[82] The purpose of the amendment was to give effect to the order granted in the *Fraser* decision as discussed in 3.7 above.

A clear distinction was drawn between married and unmarried parents. In the event where the child was born in wedlock, the consent of both parents was required for the adoption to proceed. The Act[83] also dispensed with the parental consent of a parent of a child born out of wedlock if the father failed to acknowledge himself as the father or if he failed to perform his parental duties in respect of the child and could not show good

[80] S 18(4)(d) of Act 74 of 1983
[81] Section 18 (4)(d) of the Child Care Act
[82] *Fraser v Naude and Another* 1998 (11) BCLR 1357 (CC)
[83] Child Care Act 74 of 1983

cause for such failure.[84] The consent of an unmarried father was also not required if he failed to respond to a section 19A[85] notice within 14 days of receiving such notice.[86]

4.2 NATURAL FATHERS OF CHILDREN BORN OUT OF WEDLOCK ACT 86 OF 1997

The South African Law Commission (now known as the South African Law Reform Commission) had been requested to do an investigation in 1994[87] with a view to drafting new legislation on the issue. The result of the investigation confirmed the correctness of the common law position, but the new proposals which emanated formed the basis of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, (hereinafter referred to as the Natural Father's Act).[88] This Act came into operation in 1998.

The Natural Father's Act specifically dealt with procedural fairness insofar as it related to the application procedures to be followed by an unmarried father who wanted to exercise his right to guardianship, access or custody in respect of his child born out of wedlock.[89] In order for an unmarried father to exercise any rights in respect of his child, the Act provided for an application to a High Court for access, custody or guardianship, and for that court to make the final decision based on the best interests of the child. This Act was intended to improve the position of unmarried fathers in that it provided unmarried fathers an opportunity to seek the assistance of the court. The High Court was authorised to cause investigations to be done by the Office of the Family Advocate,

[84] Boberg PQR (1999) 445
[85] Section 19A of Act 74 of 1983
[86] Section 19A of Act 74 of 1983
[87] SALRC (Project 38) *Report on the rights of a father in respect of his illegitimate child*, 1994
[88] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-9
[89] Cronje, D & Heaton, J (2004) 266

where it was deemed necessary and in the best interests of the child, and to further act upon the recommendations of the Office of the Family Advocate, where a matter was referred to their offices for a formal investigation.[90] The factors that the court were to consider in an application included amongst others, the relationship between the father and the child as well as the father's commitment to the child in respect of the child's well-being and maintenance.[91]

The Act further authorised the court to make various orders including granting sole or joint guardianship to either parent, as well as to institute inquiries by the Office of the Family Advocate into the welfare of the child.[92] However, this Act still did not place unmarried fathers on the same footing as mothers and married fathers.[93] In fact '[t]he Act did not reverse the existing legal position pertaining to guardianship, care and contact. Basically, what it did was to definitively establish that such fathers did not have any rights or powers over children born out of wedlock.'[94]

The Act failed to address the right of equality and the automatic acquisition of parental rights and responsibilities of unmarried fathers and placed greater emphasis on the best interests of the child, a factor which is of paramount importance. The consequence is that if the unmarried father failed to prove that his right to access, custody or guardianship in respect of his child was in the child's best interests, he was not able to exercise this right.

[90] S 2 (1)–(4) of Act 86 of 1997
[91] S 2(2) of Act 86 of 1997
[92] S 2(6) of Act 86 of 1997
[93] Boezaart T (2009) 74
[94] Morei, NL (2008) 15

4.3 THE ADOPTION MATTERS AMENDMENT ACT 56 OF 1998

The Adoption Matters Amendment Act[95] was promulgated in 1998. The purpose of the Act was: 'To amend the Child Care Act 74 of 1983, so far as to simplify the procedure for the granting of legal representation for children in children's court proceedings; to provide for the rights of certain natural fathers where the adoption of their children born out of wedlock has been proposed and for notice to be given (notice was only given to those fathers who acknowledged themselves as the natural fathers and whose whereabouts were made known by the biological mother of the child);[96] to amend the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, so as to consolidate the law on adoption under the Child Care Act 74 of 1983; and to amend the Births and Deaths Registration Act 1992, so far as to afford a father of a child born out of wedlock the opportunity to record his acknowledgement of paternity and his particulars in the birth registration of the child; and to provide for matter connected herewith.'[97] The Act addressed procedural issues as well as issue of consent in respect of the adoption of a child born out of wedlock.[98]

The amendments required that the consent of both parents be given when a child is given up for adoption, irrespective of whether the child was born out of wedlock or not.[99]

In 1997 the legislator recognised that the law in its current form contained no provision for the constitutional right to dignity and equality. This led to the investigation conducted

[95] Act 56 of 1998
[96] Morei, NL (2008) 14
[97] Preamble of Act 56/1998
[98] Schäfer L, *The Legal Position of Unmarried Fathers in the Adoption after Fraser v Children's Court Pretoria North No 1997 (2) SA 26(CC): Towards a Constitutionally Sound Adoption Statute* (LLM Dissertation 1999 Rhodes University) 133
[99] Morei, NL (2008) 14

by the South African Law Reform Commission (hereinafter referred to as the SALRC).The SALRC had to review the Child Care Act and make recommendations to reform this area of the law.[100] The investigation was done by way of research papers in specific areas of the law and included amongst others the parent and child relationship.

4.4 RECOMMENDATIONS OF THE SOUTH AFRICAN LAW COMMISSION

In December 2002, after extensive research, opinions and workshops, the SALRC presented its final recommendations and findings as well as a draft Children's Bill to the Minister of Social Development and the Parliamentary Portfolio Committee.[101] The SALRC made a number of recommendations in respect of the rights and duties of unmarried fathers. These recommendations will be discussed briefly to give a short summation with regard to what steered the birth of the Children's Act 38 of 2005.

4.4.1 ACQUISITION OF PARENTAL RIGHTS AND RESPONSIBILITIES

The SALRC recommended that the statute provide for a procedure to enable an unmarried father to acquire parental responsibilities by entering into an agreement with the mother of the child.[102] Such agreement was to be done in a prescribed form and registered with the appropriate forum in the prescribed manner.[103]

[100] SALRC (Project 110) *Report on the Review of the Child Care Act 2002* 1
[101] SALRC (2002) 2
[102] SALRC (2002) 65
[103] SALRC (2002) 65

Further it was recommended that exceptional cases should exist wherein this would not be possible and open to unmarried fathers. These circumstances included a situation where the child was conceived as a result of rape or incest.[104]

In the event where the agreement was not possible, the SALRC recommended that the father without parental rights and responsibilities be given an opportunity to obtain parental responsibilities by making an application to the court, and satisfying the court, that granting such parental responsibilities will be in the best interests of the child.[105]

Another recommendation was that certain categories of fathers automatically obtain parental rights and responsibilities. These categories were:

"(a) the father who has acknowledged paternity of the child and who has supported the child within his financial means;

(b) the father who, subsequent to the child's birth, has cohabitated with the child's mother for a period or periods which amount to not less than one year;

(c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than one year, whether or not he has cohabitated with the mother of the child."[106]

The SALRC received various comments in respect of the above recommendations. Included in these comments were views that no unmarried father should automatically have parental rights and responsibilities and another organisation was of the view that

[104] SALRC (2002) 65
[105] SALRC (2002) 65
[106] SALRC (2002) 65

no distinction should be made between mothers and unmarried fathers.[107] While acknowledging that these various points of views would continue to exist, the SALRC was of the belief that its recommendation was pragmatic, and legally and constitutionally sound. Its final recommendations in respect of married fathers were:

"the unmarried father of a child should in certain defined circumstances automatically obtain parental rights and responsibilities in respect of his child. The defined circumstances are where the father has lived with the mother for at least one year after the child's birth, where the father has cared for the child with the mother's consent for at least a year, upon confirmation by a court of a parental rights and responsibilities agreement, or where so ordered by the court."[108]

"Where the biological father does not have parental rights and responsibilities in respect of a child, provision is made for the father to obtain parental rights and responsibilities by agreement with the mother or another person who has such parental rights and responsibilities in respect of the child concerned. Other categories of persons such as the partner in a domestic relationship will have to follow the court application route and will not be able to simply conclude agreements to this effect with the mother of the child."[109]

4.4.2 PARENTAL RESPONSIBILITIES AND RIGHTS AGREEMENTS

As was discussed under paragraph 4.4.1, the SALRC recommended that unmarried fathers acquire parental rights and responsibilities by entering into an agreement with

[107] SALRC (2002) 70
[108] SALRC (2002) 71
[109] SALRC (2002) 71

the mother of the child. Provision was also made in the discussion paper for partners in a domestic relationship. These agreements were referred to as parental rights and responsibilities agreements.[110] The form of the agreement was to be prescribed in the regulations to the statute and termination would only be possible by means of a court order. No submissions were received from the stakeholders on this recommendation. The SALRC, after reconsidering, decided that only the father of the child should be allowed to enter into such an agreement and not just any person with an interest in the child. The possible abuse by interested parties of the guardianship provisions to avoid the adoption requirements was the purpose of making these agreements exclusive to fathers.[111]

These agreements were to be registered with the registrar of the Children's and Family Court.[112] The abovementioned recommendations formed the basis of the Children's Bill which was introduced to Parliament. However, the proposals were changed quite substantially during the Parliamentary process.

The Draft Bill was generally welcomed by the public.[113] To give effect to the provisions of the Draft Bill required the cooperation of other governmental departments, with the Department of Social Development as the principal Department.[114] In 2003 the Department of Social Development commenced negotiations with the other affected Departments.[115] This was shortly before the general elections and this affected the

[110] SALRC (2002) 72
[111] SALRC (2002) 72
[112] SALRC (2002) 73
[113] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-13
[114] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-13
[115] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-13

abilities of the Departments to effectively give their required attention to the negotiations. The result of these negotiations was a new Draft Bill that was significantly different to the draft of the SALRC in that many provisions and complete chapters were removed and some diluted.[116] The second Draft Bill was published for comments and many of the submissions received asked for the deleted versions to be re-inserted. The Draft Bill was sent to the State Law Advisers before reading the submissions or incorporating it into the Bill. The Draft Bill was certified by the State Law advisers.[117] The failure of the Department to consider the submissions received from the public resulted in a long and complicated Parliamentary process. The State Law Advisers certified the Draft Bill into two bills.[118] The first Draft Bill was finally passed by the National Assembly in December 2005 and passed by the President as the Children's Act 38 of 2005.[119] The next discussion will focus on the provisions contained in the Children's Act 38 of 2005 that ultimately were adopted.

4.5. CHILDREN'S ACT 38 OF 2005

The Children's Act 38 of 2005 (hereinafter referred to as the Act) brought about drastic changes to the position of unmarried fathers and their rights in respect of their children. The Act makes provision for either full or specific parental responsibilities or rights in respect of a child. The Act clearly defines parental responsibilities and rights in Section 18(2).[120]

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[116] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-13
[117] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-13
[118] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-13
[119] Davel CJ,Skelton A "*Commentary on the Children's Act"* 1-15
[120] Section 18 (2) of Act 38 of 2005 reads as follows:

The Act draws a strong distinction between the acquisition of parental responsibilities and rights of married and unmarried fathers. In respect of the married fathers, acquisition of parental responsibilities and rights is automatic if they fulfil one of the requirements mentioned in section 20[121] which are that he either is married to the mother of the child or alternatively has been married to the mother of the child at the time of conception, birth or any time between conception and birth.

Section 20 of the Act places the married father on an equal footing with the biological mother. Hence in the event of divorce or separation of the biological parents after the birth of the child, or during the pregnancy, the father retains his full parental responsibilities and rights.

On the other hand, unmarried fathers need to fulfil the requirements set out in section 21 before they can acquire parental responsibilities and rights. In the event where the father does not fall within the categories mentioned in section 20 of the Act, provision is made for him in section 21.

Section 21 of the Act was aimed at improving the position of unmarried fathers in relation to their parental rights and responsibilities. The objective was to move closer towards equal treatment between married and unmarried fathers. As discussed in this chapter earlier, under Common law, unmarried fathers had no inherent rights of access

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'18 (2) the parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right-

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

[121] Section 20 of Act 38 of 2005

with their children. Beyl[122] opined that the Act provided unmarried fathers with a leap towards improved rights. The court in *Bosch v Van Vuuren*[123] referred to Davel and Skelton's Commentary on the Children's Act and stated: "the section is based on the premise that if a child's unmarried father meets certain requirements, he acquires exactly the same parental responsibilities and rights as the child's mother…"[124]

Section 21 of the Act reads as follows:

'21. (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20 (1), acquires full parental responsibilities and rights in respect of the child-

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother –

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

[122] Beyl A, *Critical Analysis of Section 21 of the Children's Act 38 of 2005 with specific reference to the Parental Responsibilities and Rights of unmarried fathers* (LLM 2013 University Pretoria) 42
[123] *Bosch v Van Vuuren* 06504/2012(SGCH)(unreported judgment)
[124] *Bosch v Van Vuuren* para 9

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) this section does not affect the duty of a father to contribute towards the maintenance of the child.'

An unmarried father that does not automatically acquire parental rights and responsibilities in terms of section 21(1) (a) of the Act, needs to prove that he satisfies all the requirements of section 21(1) (b). The onus is placed on the unmarried father to prove compliance. Initially when the Act came into operation, the requirements of section 21(1) (b) raised many questions. These related to whether all the requirements contained in the section should be satisfied for an unmarried father to acquire parental rights and responsibilities. The question was subsequently interpreted by the courts to include all three requirements.

The court in *Botha v Dreyer* [125] stated:

"This provision is a significant advance upon the common law and the provisions of the Natural Fathers of Children Born out of Wedlock Act 86 of 1987 (which the Act repeals), neither of which afforded an unmarried father any automatic rights in respect of the child. Under the previous dispensation an unmarried father could obtain parental responsibilities and rights only if a court determined that it was in the best interests of the child. That has now changed. The unmarried father has automatic rights provided he meets the requirements of section 21(1) (a) or (b)."

[125] *Botha v Dreyer* [2008] ZAGPHC 395 (unreported judgment)

The author is thus in agreement with the court in *Botha v Dreyer* in that the position of the unmarried father has been ameliorated to the extent that unmarried fathers can now acquire full parental rights and responsibilities automatically in certain circumstances,[126] as opposed to the position under the Natural Fathers Act, where automatic acquisition was not allowed at all and all decisions rested on the courts.

In addition to the provisions of section 21 of the Act, in the event that an unmarried father do not qualify for acquisition in terms of section 21, he can make an application to the court to confer contact, care[127] or guardianship[128] upon him[129] and have certain rights and responsibilities conferred upon him by means of a parental responsibilities and rights agreement as provided for in section 22 of the Act.[130]

In terms of section 22 of the Act, unmarried fathers can enter into a parental responsibilities and rights agreement with the biological mother of the child. Such agreement must be drafted in a prescribed form. It is also a requirement that before registration of the agreement, the Office of the Family Advocate or the relevant court must be satisfied that such agreement is in the best interests of the child.[131] Further, the Act prescribes that such agreement only takes effect if it is registered with the Office of the Family Advocate or if it had been made an order of court by the High Court, Regional Court or the Children's Court.[132]

[126] Boezaart T (2009) 74
[127] S 23 of Act 38 of 2005
[128] S 24 of Act 38 of 2005
[129] Boezaart T (2009) 78
[130] Boezaart T (2009) 78
[131] S22(5) of Act 38 of 2005
[132] S22(6)(a) of Act 38 of 2005

A clear distinction should also be drawn between acquisition and exercise of parental rights and responsibilities. The Act does not specifically indicate or prescribe how the exercise of parental rights and responsibilities should take place after such rights have been acquired by an unmarried father. The most imperative factor, "the best interest of the child", does not feature when dealing with the acquisition part, but only comes into consideration with the exercising of some aspect of these rights.[133]

5. CONSTITUTIONALITY OF THE CHILDREN'S ACT

5.1 RIGHT TO EQUALITY

Sloth Nielsen, Wakefield and Murungi opined that "Section 21 of the Children's Act attempts to promote a greater level of formal equality between married and unmarried parents, provided that certain criteria are met".[134] These requirements were set out in the discussion on the Act in the preceding section. However, irrespective of the increased recognition of the beneficial role that an unmarried father can play in his child's life, the common law position remains unchanged in that many unmarried fathers still do not automatically acquire parental rights and responsibilities like the mother of the child.[135] This raises the question as to whether the Act is in fact aimed at equality in respect of both parents. The right to equality is provided for in section 9 of the Constitution. Section 9(3) specifically provides that the: "state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including

[133] Boezaart T (2009) 79
[134] Sloth-Nielsen, J, Wakefield, L and Murungi, N (2011) 220
[135] Louw, A 'The Constitutionality of a Biological Father's Recognition As A Parent' (2013) 13 *PER* 156

race, gender, sex, pregnancy, marital status…including birth."[136]The acquisition of parental rights and responsibilities constitutes an infringement on the right to equality of both parents in that it discriminates against both parents on the basis of sex, gender and marital status in terms of section 9(3) of the Constitution.[137] All constitutional rights are subject to the limitation clause contained in section 36 of the Constitution. According to Louw, "it would seem as though the limitation of the parents' right to equality is currently justified by the child's overriding right to parental care, which in terms of the best interests' standard is currently limited to committed parental care…"[138] She further opined that the arbitrary automatic acquisition of parental rights and responsibilities of mothers and the fact that unmarried fathers must still prove their worth is a serious weakness of the Act.[139] In *Fraser v The Children's Court*, *Pretoria North and Others*[140] the Constitutional Court had to determine the constitutionality of section 18(4)(d) of the Child Care Act. At the time the Interim Constitution was the applicable law. The court stated the following with regard to the limitation of fundamental rights:

"Consistent with this repeated commitment to equality are the conditions upon which there can be any justifiable limitation of fundamental rights in terms of section 33 of the Constitution. In order for such a limitation to be constitutionally legitimate it must be "justifiable in an open and democratic society based on freedom and equality".[141] Therefore, the author agrees with Louw in that the Act is indeed aimed at equality. The

[136] Louw AS, *Acquiring Parental Responsibilities and Rights* (LLD Dissertation 2009 University Pretoria) 476
[137] Louw, A (2013) 161
[138] Louw, A (2013) 195
[139] Louw, A (2009) 476
[140] 1997 (2) SA 261 (CC)
[141] 1998 (11) BCLR 1357 (CC) para 20

limitation on the parents' right to equality is justifiable, because, their right to equality is justified by the child's prevailing constitutional right to parental care as contained in section 28(1)(b) of the Constitution.[142]

5.2 UNFAIR DISCRIMINATION AGAINST UNMARRIED FATHERS

Section 9 of the Constitution[143] is not aimed at achieving formal equality.[144] Section 9 (2) of the Constitution allows for remedial equality.[145] In other words, the section allows for measures to be taken to promote the achievement of equality. These measures are also referred to as restitutionary measures, better known as affirmative action.[146] The court in *Minister of Finance and Other v Van Heerden* (2004) (6) SA 121 (CC) stated that the enquiry into whether the measure falls within the ambit of section 9 (2) of the Constitution is threefold and described the test as follows: " The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality." These measures are designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination.[147]

The court in *Harksen v Lane NO and Other* (1998) (1) SA 300 (CC) outlined the questions to be answered to determine unfair discrimination as the following:

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[142] Louw, A (2013) 195
[143] The Constitution of the Republic of South Africa
[144] Louw, A (2009) 150
[145] *Harksen v Lane NO and Other* (1998) CC 324
[146] *Minister of Finance and Other v Van Heerden* (2004) para 28
[147] Louw,A (2009) 150

1. does the discrimination amount to discrimination?
2. If so, was it unfair?
3. If so, can it be justified in terms of section 36[148] of the Constitution?[149]

Various authors have different opinions with respect to the applicability of the limitation clause. However the Constitutional Court has nevertheless on each occasion when it has found a violation of the equality clause, also considered the effect of the limitation clause.[150]

Louw is of the opinion that due to a mother's ability to give birth, she is assigned with parental rights and responsibilities and is also presumed to act in the best interests, of the child.[151] On the other hand, fathers are assessed on their level of commitment to the mother or the child.

She further draws a clear distinction between the discrimination on grounds of gender and sex in relation to mothers, and discrimination on the basis of lack of commitment in respect of mothers and fathers.[152] This discrimination according to Louw is deemed to be unfair unless it can be justified in terms of section 36[153] of the Constitution.[154] She

[148] Section 36 of the Constitution reads as follows:
36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
[149] Louw,A (2009) 151
[150] Louw,A (2009) 152
[151] Louw,A (2009) 153
[152] Louw,A (2009) 156
[153] Section 36 of Act 108 of 1996

further argues that the discrimination based on lack of commitment is an unspecified ground and therefore will have to be established as unfair.[155]

In applying the test on whether the remedial measures fall within the ambit of section 9(2) and the test to determine whether the discrimination is fair as discussed above, it can be concluded that by granting unmarried fathers parental rights and responsibilities, remedial measures were used to achieve equality between mothers and unmarried fathers, but not between married and unmarried fathers. Married fathers automatically acquire parental rights and responsibilities as opposed to unmarried fathers who need to comply with certain requirements. Hence, the author agrees with Louw, but is of the opinion that the discrimination against unmarried fathers on the basis of marital status is also unfair.

6. LEGAL IMPLICATIONS OF SECTION 21

The fact that the provisions of section 21 do not confer parental rights and responsibilities on all fathers probably satisfies those who advocate for the automatic rights of unmarried fathers, however those that believe that mothers and unmarried fathers should not be treated equally because of the child care burden on the mother, remain disgruntled.[156] Section 21(1) (b) contains three subsections with the word “and” linking subsection (ii) and (iii). Skelton is of the view that the three subsections have a cumulative effect and therefore the unmarried father must comply with all the

[154] Louw,A (2009) 156
[155] Louw, A (2009) 164
[156] Davel CJ,Skelton A “*Commentary on the Children’s Act”* 3-11, See also Beyl, A (2013) 31

requirements of the section.[157] The court in *KLVC v SDI* stated the following in respect of the interpretation of section 21(b): "…we know that an interpretation of the section requires a consideration of the language, read in context and having regard to the purpose of the provision and the background to its emergence and incorporation in law."[158] The court thus confirmed Skelton's view that the subsections have a cumulative effect.

Potential problems were pointed out by Davel and Skelton.[159] The first one is the phrase "permanent life partnership" used in section 21(1)(a) and secondly the phrase "reasonable period" used in section 21(1)(b) (ii) and (iii). The Act does not give definitions or express meanings of these two terms.[160] Life partnership in the traditional sense refers to parties living together and not being married.[161] The word "permanent" is open to interpretation and can mean that the relationship is either stable or everlasting. No time period is used to define the word "permanent", hence it might be difficult to determine whether the relationship is permanent or not.

The second problematic phrase is "reasonable period". To determine what a reasonable period is can be very problematic, and might be viewed differently by the parties involved.[162] Consequently, how the phrase is interpreted will differ from one set of parents to another.

[157] Skelton A "*Family Law in South Africa*" (2010) Oxford University Press South Africa 247
[158] *KLVC v SDI* [2015] 1 ALL SA 532 (SCA) para 18
[159] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-11
[160] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-11
[161] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-11
[162] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-11

The third problem is the fact that the section speaks about "a contribution towards the maintenance of the child". This contribution need not be regular, and in the event where the unmarried father only contributes on an occasional basis, he would still be entitled to qualify for parental rights and responsibilities.[163]

Fourthly, with respect to the payment of damages in terms of customary law as referred to in section 21(1) (b)(i), no clarity is given as to what type of payment is acceptable.[164] In view of the uncertainty, payment can be made by means of money or cattle.

Fifthly, section 21(3)(b) provides for mediation when a dispute arises between the biological mother and the unmarried father.[165] By interpreting the section it can be assumed that the parties thus do not have a choice but to attempt mediation first, before resorting to the court for assistance.[166] The High Court, as the upper guardian of all minors, can however still be approached before mediation, if such action is in the best interests of the child.[167]

In assessing the problems as mentioned above, it can be assumed that unmarried fathers could still be experiencing difficulties in exercising their rights contained in section 21 of the Act.

[163] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-12
[164] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-12
[165] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-12
[166] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-12
[167] Davel CJ,Skelton A "*Commentary on the Children's Act"* 3-12

7. CONCLUSION

The developments in South African law as reflected in this chapter provide a clear indication as to how the status of unmarried fathers has changed from a position of no rights to a position of conditional rights. The law now provides for the automatic acquisition as well as conditional acquisition in respect of unmarried fathers. The emphasis of the courts' reasoning still founded upon the best interests of the child. The question that remains unanswered is how parental rights and responsibilities, once acquired, are to be exercised? How do the legal implications of section 21 of the Children's Act affect this process? Is it now practically possible for unmarried fathers to indeed exercise their parental rights and responsibilities? The following chapter will explore the practical challenges that unmarried fathers are experiencing in an attempt to exercise their parental rights and responsibilities, once acquired.

CHAPTER 3: RESEARCH INTO THE EFFECTIVENESS AND ENFORCEABILITY OF SECTION 21

1. INTRODUCTION

Unmarried fathers have been battling to acquire parental rights and responsibilities for decades. This however changed seven years ago with the promulgation of the Children's Act[168] (hereinafter referred to as the Act). As discussed in chapter two, the Act provides for automatic acquisition of parental rights and responsibilities by unmarried fathers who were living with the mother at the time of a child's birth as well as acquisition if the requirements of section 21 (b)[169] are complied with. Acquisition, whether automatic or by means of the requirements of section 21(b), has been researched and written on comprehensively, but enforceability remains challenging. The author is of the opinion that the battle for most unmarried fathers starts with the quest to establish their parental rights and responsibilities and continues long after the acquisition of such rights and responsibilities. The exercise of these rights seems to be as challenging as the actual acquisition. The purpose of this research is to investigate the pre- and post-acquisition phase from a practical perspective. This chapter will explore what the challenges are that unmarried fathers face in an attempt to acquire and effectively enforce their rights as provided for in the Act. Answers to this can only be provided by people who are actively involved in these types of disputes. Therefore, the author conducted interviews and circulated questionnaires to legal practitioners, presiding officers and other role-players involved in parental rights and responsibilities

[168] Children's Act 38 of 2005
[169] See heading no 4.5 of Chapter two

disputes. The questions posed during the interviews related to the acquisition of parental rights and responsibilities, enforcement of such rights after acquisition, the effectiveness of parental rights and responsibilities agreements as well as difficulties relating to the interpretation of the Act. The recurring challenges were amongst others, interpretation of the legislation, access to justice as well as the role of the mother of the child specifically in relation to parental alienation. The methodology utilised to obtain this information will now be discussed.

2. METHODOLOGY

The research is aimed at exploring the enforceability of parental rights and responsibilities. Therefore, qualitative research was the best method of obtaining the necessary information. The author made use of organised interviews and questionnaires to achieve this goal. The questionnaire will be attached to this dissertation as an appendix. The people who participated in the research come from different professions, but share a common interest; they deal or have dealt with the enforcement of parental rights and responsibilities of unmarried fathers on a daily basis. Ninety percent of the informants has been in practice before the promulgation of the Act and have been involved in litigation relating to the Act. In addition the author considered secondary sources consisting of books, internet sources, academic and journal articles. The author obtained ethical clearance from the University of the Western Cape Research Committee at the end of May 2015.The research was done over a period of three months. A total of six interviews were done. These interviewees also completed the questionnaire. Approximately 15 questionnaires were sent to role-players.

Unfortunately only six were completed and returned to the author. The majority of the persons who were contacted did not display an interest in the topic at all. Twelve individuals participated in the research. Amongst these individuals are a High Court judge, a Children's Court Magistrate, two family advocates, three practising attorneys, three advocates, a mediator and a clinical psychologist. The research was conducted with practitioners mainly practising in the Cape Town CBD area. As the research neared completion, the South African Law Reform Commission released an Issue Paper on 23 February 2016, which confirmed the author's findings as will be discussed in this chapter.[170] A discussion on the challenges as obtained through the interviews will follow in the next paragraph.

3. CHALLENGES FACED BY UNMARRIED FATHERS TO ENFORCE THEIR PARENTAL RIGHTS AND RESPONSIBILITIES

3.1 INTERPRETATION OF LEGISLATION

In assessing and compiling the information obtained from the informants, the author can confirm that the majority of the informants agree that certain sections in the Act create confusion. A discussion on these sections will now follow to illustrate how their interpretation contributes to the challenges experienced by unmarried fathers.

As legislation is more often than not written in ways that is not understood by the lay person, unmarried fathers often depend on the assistance of legal practitioners and the courts to assist them with enforcing their rights. Section 21 of the Act provides for

[170] SALRC Issue Paper (Project 100D) *Family Disputes Resolution : Care of and Contact with Children*, 2015

automatic and conditional acquisition of parental rights and responsibilities. A full discussion of the section appears in chapter two and will thus not be repeated herein. The following discussion will focus on the problematic terms found in section 21 of the Act, as elicited during the interviews.

3.1.1 INTERPRETATION OF "LIFE-PARTNERSHIP"

Heaton[171] defines "life partnership" in the narrow sense as: "A permanent life relationship, analogous to marriage, comprising two persons who, even though they are legally competent to marry one another, live together without : a) having ever attempted to marry one another in terms of the Marriage Act, the Recognition of Customary Marriages Act 120 of 1998 or the Civil Union Act;…"[172]

The term "permanent life partnership" as contained in Section 21(a) of the Act is one of the greatest issues and challenges that courts and legal practitioners are struggling with. A great uncertainty exists as to what "permanent life-partnership" means.[173] The Act does not provide a definition of the term; therefore the burden is on the courts to make a determination on facts which are presented to them. The legislator's failure to define what a "permanent life-partnership" is places the burden on the unmarried father to prove to the court that the relationship or life-partnership he had with the mother of the child qualifies as a "permanent life-partnership". As a result the matter is often postponed numerous times before a conclusion is found. The court is then faced with an extra task of determining the status of the relationship between the mother and the

[171] Heaton J, " The Law of Divorce and Dissolution of Life Partnerships in South Africa" (2014) Juta, Cape Town
[172] Heaton J (2014) 406
[173] SALRC (2015) 94

unmarried father. This absorbs court hours that could have been utilised to assist other unmarried fathers with similar problems. Boezaart[174] is of the opinion that the "permanent life-partnership" is a subjective matter. She opined that the claim by the unmarried father that the relationship was indeed a "permanent life partnership" may be disputed by the mother who might say that the parties had no intention that the relationship would be permanent.[175] The court in *FS v JJ* 2011 (3) SA 126 (SCA), in determining the existence of a permanent life partnership, held that because the unmarried father and the child's deceased mother lived together and had the intention of entering into a marriage, there was enough proof that they were involved in a permanent life partnership.

The failure of the legislator to include a definition of "permanent life-partnership" leads to different interpretations of the term. The consequence is that there will never be a uniform definition or description of what the term stands for, as the interpretation will differ from one court to another. In the absence of a statutory definition of "permanent life-partnership", the term will continuously be misinterpreted or individuals will add their own meaning to it. This not only frustrates the rights of the unmarried father, but it also adds to the already overburdened court systems.

3.1.2 INTERPRETATION OF "CONTRIBUTION FOR A REASONABLE PERIOD"

In respect of terminology, another term that creates confusion is "reasonable period" of contribution towards the maintenance or upbringing of the child in terms of Section 21 (b) (ii) and (iii). The meaning of "reasonable period" is open to interpretation. A

[174] Boezaart T *Child Law in South Africa* (2009)
[175] Boezaart T (2009) 75

reasonable period can be anything from two days to two years. It can be interpreted to be contribution in respect of the last few months before the child's birth until six months thereafter, or it could be contribution only after the child's birth. What is reasonable will depend on the circumstances and the needs of the child. The contributions made by an unmarried father are often viewed differently by the parties involved. It is possible for the mother of the child to dispute how and when the unmarried father contributed. She could also argue that any contributions were only paid in respect of her own maintenance and not towards the upbringing of the child. One informant is of the view that the term "reasonable period" in the context of the Act is vague and is the cause of many disputes. Once again, the onus of proof lies on the unmarried father. These complications often cause the unmarried father to abandon the battle and suspend all attempts until the child reaches an age at which he or she can decide whether or not he or she want contact with him. These disputes are time consuming and expensive.

In *I v C and Another*,[176] the mother of the child left the country without communicating this decision with the father of the child. On receiving an application in terms of the Hague Convention, the English Court wanted to know whether it was lawful of the mother to change the child's residence to Wales without the father's consent. The South African Court considered the conduct and contributions by the unmarried father before the child was removed from the country to determine whether he complied with the requirements of section 21 (b) of the Act. The court referred to the terms "good faith contributions", contributions and upbringing for a reasonable period as follows: "These are elastic concepts and permit a range of considerations culminating in a value

[176] *I v C and Another* [2014] ZAKZDHC 11

judgment as to whether what was done could be said to be a contribution or a good faith attempt at contributing to the child's upbringing over a period which, in the circumstances is reasonable." The court held that the father met each of the requirements in section 21 (b) in the four months before the child left the country and therefore acquired parental rights and responsibilities.

The court in *Steadman v Landman*[177] considered the conduct of the unmarried father to determine whether his contribution was reasonable. In this case the parties were cohabiting in both England and South Africa. The applicant left London shortly after he was informed of the pregnancy. He was reluctant to become a father and urged the respondent to terminate the pregnancy. He undertook to go back to London when the child was born. The respondent came back to South Africa after the child was born. During this period the child's paternal grandparents and extended family had regular contact with the child. The applicant however only saw the child intermittently. After the birth of the child the applicant emphasised to the respondent that he wanted to play an active role in the child's life. He asked for a list of expenses of the child but never contributed towards maintenance at any stage. The respondent then left South Africa for London, but informed the applicant that she was going to Thailand. This resulted in an application before the court to prevent the removal of the child from South Africa in terms of the Hague Convention. In assessing whether the applicant has acquired parental rights and responsibilities in terms of section 21(b) of the Act, the court found that he hardly contributed towards the child's upbringing and also that his alleged

[177] *Steadman v Landman* 229994/2010 (WCHC) (unreported judgment)

contribution towards maintenance was less convincing. This was based on the fact that the applicant had the banking details of the respondent but still did not pay anything in respect of maintenance. The court referred to the Davel and Skelton Commentary on the Children's Act and quoted the following: "where the father has contributed to the child's upbringing for a reasonable period is not a straightforward matter. For the point at which a period becomes reasonable is a relative matter on which the child's parents' view may differ."[178] The court was not convinced that the applicant contributed towards the child's maintenance in good faith and held that the applicant did not acquire parental rights and responsibilities in terms of section 21(b) of the Act.

"Unmarried fathers are, despite section 21, still forced to go to court to get a court order stating that they automatically acquired rights. This is because they need something physical to show that they have rights."[179] The fact that all the requirements of section 21(1) (b) must be complied with contributes to the frustration of many unmarried fathers. Proving compliance is the most difficult part of the procedure.[180] This is necessary in instances where there is no dispute,[181] and also in a situation where the mother of the child does not want the father to obtain parental rights and responsibilities. The extent to which an unwilling mother might go to prevent the unmarried father from obtaining parental rights and responsibilities is illustrated in the case of *MM v AV*.[182]

[178] 229994/2010(WCHC) (unreported judgment), See also Davel CJ and Skelton A "*Commentary on the Children's Act*" (Revision Service 6, 2013) 3-12
[179] SALRC (2015) 94
[180] SALRC (2015) 94
[181] SALRC (2015) 94
[182] *MM v AV* (2011) ZAWCHC 425

In *MM v AV*, the child was conceived while both parties were intoxicated. During the pregnancy, they did not have much contact as the alleged father disputed the paternity of the child. After the child's birth and after paternity was confirmed, the now confirmed father started playing an active role in the child's life. The parties co-parented without any issues or disputes. The position stayed the same for nine years until the mother of the child entered into a marriage with another man. The result was that the mother and her husband then unilaterally made changes to the arrangements that the parties had in place. The mother went as far as alleging that the child was conceived as a result of rape and therefore the unmarried father did not have parental rights and responsibilities. She argued that he did not fall within the definition of a "parent" as provided in section 21(4) of the Act. The father approached the court for interim relief which included amongst others, his care and contact with the child as well as an order preventing the mother from removing the child from the Republic of South Africa. The interim order was granted in February 2010. In November 2010, the points in *limine* were that the mother was entitled to rely on the exclusionary provision in regard to the definition of "parent" in section 1 of the Act and if the father is found to be a "parent" in terms of the Act, whether she could be compelled to enter into a parenting plan with the father. The court found that the mother could not rely on the exclusionary rule and also that she could be compelled by the court to enter into an agreement. The court further held that the father had always played an active role in the child's life and that the parties had been co-parenting successfully for a long time. The court said the following: "M is a child who, unlike others in our society, has two parents who are equally devoted to him. To deprive M of his father's continued involvement in his life because of the respondent's recently

acquired dislike for him would result in a miscarriage of justice."[183] The court considered the oral evidence and held that granting the father contact and care, as the situation was in the past, would be in the child's best interests.

3.1.3 COMPULSORY MEDIATION

In the event that an unmarried father fails to prove that he complies with all the requirements as set out in section 21(b) of the Act, a dispute surfaces. The dispute with regard to whether the unmarried father has indeed acquired parental rights and responsibilities must now first be mediated as provided for in Section 21(3).[184] The unmarried father cannot approach the court for assistance unless an attempt has been made to resolve the issue by means of mediation. The Act fails to provide for a tool to inform the court of the attitudes of the parties in respect of mediation.[185] The result is that the parties to the dispute can enter the mediation in order to comply with the statutory requirement and not because they really want to.[186] The Office of the Family Advocate is inundated with work which prevents them from doing mediation on an urgent basis. The Act however specifically provides for a family advocate as one of the persons to conduct mediation should a dispute arise. Mediation conducted by Office of the Family Advocate somehow differs from the conventional mediation. The mediation process in the conventional sense is subject to specific requirements, which is not the case with the Office of the Family Advocate. These requirements are: voluntariness,

[183] *MM v AV* (2011) ZAWCHC 97
[184] Section 21(3) of Act 38 of 2005 reads as follows:
3(a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social services professional or other suitably qualified person.
[185] SALRC (2015) 250
[186] SALRC (2015) 250

confidentiality, without prejudice, non-binding outcome and a neutral third party that conduct the mediation.[187] These requirements are definitely not applicable to the Office of the Family Advocate, as the Family Advocate plays an active role in determining the final result. Confidentiality is also somehow flawed in that the Family Advocate may be called to give evidence against the parties to the dispute or even to cross-examine one of the parties. The report of the Family Advocate's report in most instances becomes binding, as the courts are often guided by it. The role of the Office of the Family Advocate is more of an investigatory nature than a mediation nature.

An alternative to the Office of the Family Advocate would be to appointment a private mediator or family law facilitator. This is a costly process and often only available to parties who have the financial means to appoint a private expert. In the majority of the cases the parties involved in these disputes do not have the financial means. Disputes arise as to who will be responsible for payment of the mediation fees; further, either party might have a preference to appoint a specific mediator. The same problems exist with the appointment of a private social worker. The costs involved is often exorbitant and not an option for many. This results in a further delay for the unmarried father's acquisition of his rights.

The SALRC's proposal is that professional mediators be asked to do some pro bono hours as part of their accreditation process and to assist with staff shortages at the

[187] Patelia E & Chicktay M "*Appropriate Dispute Resolution: A Practical Guide to Negotiation, Mediation and Arbitratio"* 2nd ed (2015) Lexis Nexis, Johannesburg 27

Office of the Family Advocate.[188] Further to this they are also of the opinion that trained mediators should be appointed to do mediations.[189]

An additional proposal by the SALRC is that the Office of the Family Advocate be split into two divisions. The one division should deal exclusively with mediations and the other with investigations and litigation. This will ensure objectivity in the sense that if mediation is not successful, the matter can then be referred to the other division for the investigation and litigation. In this manner the staff of the Office of the Family Advocate can focus on a particular function and allocate the necessary time and resources.[190]

In the event that mediation was done and an agreement reached between the parties, Section 21(3) (b) provides for the result to be reviewed by a court. The review process might slow down the process and some of the informants to this study are of the opinion that review proceedings should be limited to judicial decisions only. The provision places an extra burden on the courts to now spend time on a matter that has already gone through the whole mediation process. These resources can be utilised for other matters.

As a consequence, the unmarried father's access to his is child frustrated again. Family Law practitioners allege that in many instances, the mother of the child exploits these delays to prevent any access to the child or to restrict contact with the child. Mediation itself has its own challenges which include the following: availability of the mediator,

[188] SALRC (2015) 277
[189] SALRC (2015) 277
[190] SALRC (2015) 275

who to appoint as the mediator, financial constraints of the parties involved and disputes as to who would be responsible for the costs of mediation. It must be kept in mind that the purpose of mediation is not to determine how the unmarried father is going to exercise his parental rights and responsibilities, but whether he can acquire such rights.

3.1.4 MIXED JURISDICTION OF THE CHILDREN'S COURT

The Children's Act further provides for rules in terms of Civil law as well as Criminal Law. The Children's Court has a comparable status to that of the Magistrate's Court at district level and derives its jurisdiction from section 45(1) of the Act.[191] The Children's Court's jurisdiction is limited to matters relating to children as well as criminal matters in certain instances. Section 35 (2) (a) and (b) of the Act reads as follows:

> "(2) (a) A person having care or custody of a child whereby another person has access to that child or hold parental rights and responsibilities in respect of that child in terms of a parental rights and responsibilities agreement as contemplated in section (1) must upon any change in his or her residential address forthwith in writing notify such other person of such change.
>
> (b) A person who fails to comply with paragraph (a) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year."

This section contains a criminal law component. In the event that one of the parents are guilty of such offence as provided for in section 35 (2), the presiding officer of the

[191] SALRC (2015) 254

Children's Court cannot adjudicate on the matter accurately. The presiding officer's involvement in the civil matter might influence his or her objectivity in making a decision in the criminal matter. According to the informants, in most instances, the mother of the child does not notify the unmarried father of anything relating to the child. This includes amongst others, information regarding the child's health, education or residence. The unmarried father may then approach the Children's Court for assistance in respect of the mother's non-compliance with section 35(2) (b). This enquiry converts the proceedings into a criminal matter. Essentially this requires the services of a prosecutor and other court officials involved in criminal proceedings. Due to the fact that the Children's Court is not equipped to hear criminal matters, the matter is referred to the Criminal Court. This process naturally causes another delay in the proceedings as the matter before the Children's Court can then only continue upon finalisation of the Criminal case.

The provision contained in section 35 of the Act should be read together with section 45 (2) of the Act for clarity. Section 45 (2) reads as follows:

> "(2) A children's court-
>
> (a) may try or convict a person for non-compliance with an order of a children's court or contempt of court;
>
> (b) may not try or convict a person in respect of a criminal charge other than in terms of paragraph (a); and

(c) is bound by the law as applicable to magistrate's courts when exercising criminal jurisdiction in terms of paragraph (a)."

In considering the jurisdiction provided to the Children's Court, the pragmatism involved in mixing civil law and criminal law must be considered. The reality is that the Children's Court is not equipped to deal with criminal matters, even though they have the powers to do so. Their standard operational mode is that of a civil court. Zaal confirmed this and responded to section 45(2) as follows: "…[c]hildren's courts must utilise the law 'applicable to magistrates' courts when exercising criminal jurisdiction. A children's court usual jurisdictional status of civil courts would, for this purpose, be converted to that of a criminal court. This would evidently require the court to move from a balance of probabilities evidential onus to the beyond reasonable doubt standard when conducting a s45 (2) hearing."[192] This switch from civil court jurisdiction to criminal court jurisdiction emphasises the author's view that the objectivity of the presiding officer might be altered.

The following discussion will focus on the challenges that exist in the pre-acquisition stage of parental rights and responsibilities. In order for an unmarried father to acquire parental rights and responsibilities, he needs to comply or fulfil the requirements of Section 21(1) (b) of the Act. The burden rests completely on the unmarried father to prove compliance.[193]

[192] Zaal, F Noel 'Paper Tigers no More: The New Penalties Jurisdiction For Children's Courts' (2010) 127 *SALJ* 407

[193] This paragraph should be read together with page 36 of chapter two for ease of reference.

3.1.5 PROOF OF CONSENT TO BEING IDENTIFIED AS THE FATHER

In respect of Section 21(1)(b)(i) in order for the unmarried father to acquire parental rights and responsibilities he needs to prove that he consented to being identified as the as the father of the child or that he has paid damages in terms of customary law. The section does not provide a prescribed manner in which the consent must be given or obtained. Further, it fails to stipulate exactly what kind of customary damages are acceptable. In practice, this is very difficult to prove. The majority of the informants are of the opinion that even if the father consented to being identified as the father of the child, the mother who is aware of the provisions of the section could do everything possible to dispute that the father consented or that he has paid damages. In an attempt to prove compliance, the unmarried father might have to go through great lengths and incur huge financial implications. One informant is of the strong view that the existence of maternal preference by experts involved in many of these disputes contributes to the difficult task of the unmarried father to establish his claim.

3.2. PROVISIONS OF SECTION 22

Section 22 of the Act provides for parental rights and agreements[194] to be acquired by the unmarried father by way of a parental rights and responsibility agreement. The agreement is entered into between the mother who has parental rights and responsibilities and the unmarried father. The agreement must be drafted in a specific manner, something that the parties as lay persons cannot do themselves. These

[194] A parental rights and responsibilities agreement is an agreement whereby the mother of the child enters into an agreement with the unmarried father to enable him to acquire parental rights and responsibilities in respect of his child.

agreements must be registered by the Office of the Family Advocate or made an order of court. The fact that the Office of the Family Advocate is inundated with work and the lengthy court rolls makes it almost impossible for these agreements to be registered on an urgent basis, which sets back the unmarried father once again.

In considering the challenges as discussed above, it can be assumed that the acquisition of parental rights and responsibilities is not free from problems. Many unmarried fathers and their children suffer as a result of all the bridges that the unmarried fathers must cross to acquire their parental rights and responsibilities as the legislator intended them to have. The challenges that exist after parental rights and responsibilities have been acquired will now be discussed.

3.3 POST-ACQUISITION OF PARENTAL RIGHTS AND RESPONSIBILITIES

As soon as the unmarried father's parental rights and responsibilities are confirmed, as was discussed under heading 3.2 above, he finds himself in the same position as any other holder of parental rights and responsibilities. However, it is not the end of the battle for him. Even though he now has parental rights and responsibilities, he may continue to encounter problems in relation to exercising his rights. The most recurring problems identified by informants will now be discussed.

3.3.1 PARENTAL ALIENATION

"Parental alienation (PA) refers to the wide variety of symptoms that may result from or be associated with a child's alienation from a parent. Children may become alienated from a parent because of physical abuse, with or without sexual abuse. Children's

alienation may be the result of parental emotional abuse, which may overt in the form of verbal abuse or more covert in the form of neglect…Children may become alienated as the result of parental abandonment."[195]

Gardner[196] defines Parental Alienation Syndrome as "… a childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child's campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent." Parental alienation syndrome is a common challenge for unmarried fathers. As defined above, a mother who is aware of the unmarried father's parental rights and responsibilities, but refuses to accept the status *quo*, will do almost anything to prevent the unmarried father from exercising his rights. An informant indicated that in her experience this is often a result of the non-payment or short payment of maintenance on the unmarried father's part. The majority of mothers involved in these disputes confidently believe that an unmarried father's failure to pay maintenance for his child validates that his contact should be restricted.

Another factor that contributes to parental alienation syndrome is the fact that many mothers want to be in control when the actual visitation takes place, or they want the visitation to take place under supervision. This is not always possible. Supervision as a factor will be discussed later in this chapter. Many mothers brainwash the child to the extent that the child believes that the father is bad and that it is not in his or her best interests to have contact with him.

[195] Gardner, R 'Parental Alienation Syndrome vs Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?' (2002) *The American Journal Of Family Therapy* 94
[196] Gardner,R (2002) 95

The courts consider the child's best interests to be of paramount importance. Therefore, in the event that parental alienation occurs, the unmarried father will rely on expert evidence to prove that contact with the child will indeed be in the best interests of the child. The unmarried father thus has no choice but to appoint a psychologist or someone suitable to do an assessment on his contact with the child. The appointment of these experts does not come at a low cost hence the option is then only available to unmarried fathers who are financially able.

3.3.2 SUPERVISION

Another existing problem is supervision of contact between the unmarried father and his child. In many instances the mother falsely alleges that the unmarried father might harm the child if access is not supervised. This often stems from false allegations of sexual molestation, neglect and drug or alcohol abuse by the father. All the institutions linked to this process, such as the Office of the Family Advocate and the courts; consider such allegations as very serious. This often results in the proceeding being suspended pending the outcome of the investigation by the Office of the Family Advocate, social workers or the Criminal Court if a criminal charge was made. Subsequent to this investigation, the court may make an order granting the unmarried father access to the child but on condition that such access is supervised. The appointment of the supervisor poses more problems and delays in terms of the enforcement of the father's parental rights and responsibilities.

The Office of the Family Advocate is the only institution where the services are not charged for, but they are also the only body that do not offer supervision by their

experts. The alternative route for the unmarried father is then, at his own cost, to appoint a private social worker to supervise his contact with the child. The costs involved will differ from one case to another and may become exorbitant especially if supervision is to be done after hours or over weekends. As in the case of the appointment of a psychologist, this route is only an option if the unmarried father is financially able.

3.3.3 ENFORCING PARENTAL RIGHTS AND RESPONSIBILITIES AGREEMENTS

The existence of a parental rights and responsibilities agreement as provided for in section 22 of the Act often creates the impression that all disputes between the parties are now resolved. These parental rights and responsibilities agreements are often confused with parental plans[197] as provided for in section 33 of the Act. This should be distinguished from parental rights and responsibilities agreements in that section 33 becomes operative where the father is already a co-holder of parental rights and responsibilities.

The informants have divided opinions on the effectiveness of parental rights and responsibility agreements. This relates to the role that the courts and the Office of the Family Advocate have in respect of registering the agreements as well as the drafting of the agreements. As section 22(3) regulates the format of these agreements, the parties as lay persons are not in a position to draft agreements themselves and are thus dependant on the assistance of people in the legal profession.

[197] A parental plan is used in divorce or separation proceedings where the parties determine the contact and care of the child or children.

One informant is of the opinion that in some cases the parental rights and responsibilities agreement takes the form of a standard consent paper, which is often vague and the content thereof difficult to give effect to. These agreements often contain provisions that provide for the best interests of the child but are not practical in relation to the circumstances and needs of the child and the unmarried father. This often results in the need for facilitation. Facilitation is also known as private case management,[198] or as Professor De Jong refers to it as "Parenting coordination…is a child focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists the high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court sanctioned, private forum." [199] In the Western Cape it is referred to as facilitation and in Gauteng it is referred to as case management.[200] Facilitation becomes a part of the proceedings when a dispute arises in respect of the parental rights and responsibilities agreement signed by the parties. It is ordered by the court with or without the consent of the parties.[201] A facilitator is a neutral third party who has decision-making authority, and who intervenes to help the parties reach a common decision or goal. The impartial facilitator guides the process, manages conflict, identifies and solves problems, and makes decisions."[202] In the event that the parties cannot agree on who to appoint as the facilitator, the court may appoint a facilitator and also make an order as to how the costs of the facilitator will be paid.[203] The costs involved in

[198] SALRC (2015) 234
[199] De Jong, M 'Is parenting coordination arbitration?' July 2013:38 *De Rebus* 127
[200] SALRC (2015) 234
[201] SALRC (2015) 240
[202] SALRC (2015) 233
[203] *CM v NG* 2012 (4) SA 452 (WCC)

the facilitation process also contribute to the frustration of unmarried fathers and often makes it impossible for an agreement to even exist. As soon as an agreement has been reached by the parties involved, the Office of the Family Advocate must confirm that the agreement is in the child's best interests. Only upon confirmation of this can the parental rights and responsibilities agreement be registered by the Office of the Family Advocate or made an order of court. After registration of these parental rights and responsibilities agreements, the enforcement thereof is influenced by the approach of the parties.

The difficulty arises where the parties cannot reach an agreement and the facilitator or the court consequently makes an order that is in the child's best interests. This was illustrated in the case of *MM v AV* [204] where the mother did not want to enter into a parental rights and responsibilities agreement with the father of the child. She also refused to have the matter mediated and this refusal brought the father to approach the court for relief.

The court said the following:

"Section 21 of the Children's Act similarly makes provision for parents of children born out of wedlock to agree upon a parenting plan. Where the parties are not able to agree either directly or through mediation then either party has the right to approach court in order to determine how their parental rights and responsibilities are to be exercised. Accordingly, the provisions of s21 of the Children's Act are nothing new: they simply serve to *codify* the legal position which previously pertained. What is important to note is

[204] *MM v AV* (2011) ZAWCHC 425

that this is entirely consistent with the 'best interests of the child' principle enshrined in the Constitution of the Republic of South Africa. Section 28 of the Constitution stipulates that in all matters concerning a child it is the *child's best interests* which are paramount and that every child has the right to parental care. In my view those provisions recognise and moreover dictate that a court as upper guardian of all minor children must place the best interests of the child and the rights of the child above those of his parents."[205]

The court, as the upper guardian of all minors, ordered that the parties shall exercise their parental rights and responsibilities in accordance with the parental plan ordered by the court.

This type of order is often unsatisfactory to either or both parents. Even if it is the desired outcome, it is often frustrated by one party's non-compliance with the court order or the agreement made between the parties.[206] The failure by either party to comply with the provisions of the parental rights and responsibilities agreement which is made an order of court may result in a charge of contempt of court. In practice, the guilty party is often the mother, who even after signing the parental rights and responsibilities agreement, still feels that the unmarried father is not worthy of his parental rights and responsibilities. None of informants could confirm that they had experienced instances where a mother was arrested because of a charge of contempt of court. The opinion is that this option is not often pursued due to the fear of traumatising the child when the mother is arrested and also the fear that this could

[205] *MM v AV* (2011) ZAWCHC 30-31
[206] SALRC (2015) 246

contribute to the parental alienation that is already in existence. Presiding officers are also not likely to convict a parent on a charge of contempt of court.[207] As a result of this many unmarried fathers elect to summarily abandon the battle and wait until the child is of an age to render his or her opinion. The unmarried father often finds himself stuck in this vicious circle and remains at the mercy of the mother.[208] The research indicates that an unmarried father needs to get past a number of stumbling blocks to reach the point of exercising his parental rights and responsibilities. The challenges related to access to justice will now be discussed.

3.4 ACCESS TO JUSTICE

Access to justice by the parties to a dispute in relation to parental rights and responsibilities is one of the greatest challenges. The problems occur either as a result of the procedures in place or it is attributed to the parties' financial positions. The different aspects of access to justice will now be discussed.

3.4.1 LITIGATION IN THE HIGH COURT

The legal practitioners that were interviewed have experience in both High Court and Children's Court litigation. However, a preference for litigation relating to parental rights and agreements in the High Court was observed. They are of the opinion that relief can be sought almost instantly by litigating in the High Court. This is possible because the High Court Rules, specifically Rule 43,[209] provides for the court to make an Interim

[207] SALRC (2015) 249
[208] SALRC (2015) 249
[209] Rule 43 of the Supreme Court Rules reads as follows:
(1) This rule shall apply whenever a spouse seeks relief from the court in

Order in respect of access and custody. In view of the urgent nature of an application for the acquisition of parental rights and responsibilities, the High Court Rules also provide for matters to be heard on an urgent basis.[210] Even though the court may still order that investigations should be done by various experts and that the matter will not be finalised immediately, the unmarried father can get some form of relief in the form of an interim order.

The down side of litigation in the High Court is that although speedy in respect of seeking interim relief, it is expensive and not all unmarried fathers can afford it. Some practitioners indicated that they have attended to parental rights and responsibilities applications on a pro bono basis, but this is not a regular occurrence. The reality is that such an application can cost approximately R50 000,00. This is not the kind of money that everyone has at their disposal. Some unmarried fathers often depend on the assistance of Legal Aid because they cannot afford to pay the costs for a private attorney and not to mention advocate's fees. Thus, the costs involved in litigation in the High Court is the one thing that prevents most unmarried fathers from benefitting from

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respect of one or more of the following matters:
(a) Maintenance pendente lite;
(b) a contribution towards the costs of a pending matrimonial action;
(c) interim custody of any child;
(d) interim access to any child.

[210] Rule 12 (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
(b)In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.
(c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.

the interim relief which can be sought from the High Court. The consequence is that they have no option but to approach the Children's Court at no cost to them.

3.4.2 LITIGATION IN THE CHILDREN'S COURT

The majority of unmarried fathers approach the Children's Court for assistance due to the fact that it does not cost them anything. The existing challenges related to litigation in the Children's Court are amongst others the delay in finalisation of matters and the limited jurisdiction that the Children's Court has.

As lay persons, many unmarried fathers are not familiar with the terminology used and the legal processes contained in the Children's Act. In practice, the informants alleged that this often results in them being referred to the High Court. An example of this is when an unmarried father approaches the clerk of the Children's Court to apply for parental rights and responsibilities. His enquiry is often misinterpreted in that he might enquire about an application for custody or guardianship, but actually only want to apply for contact. The Children's Court's jurisdiction is limited to "matters involving the well-being of a child including the care of, or contact with a child"[211] and may not adjudicate in applications for custody or guardianship. This falls within the exclusive jurisdiction of the High Court[212] as the upper guardian of all minors. The unmarried father is instantaneously sent away. The Clerk of the Court as the first port of call often does not have the time to make further enquiries as to the actual relief sought by the unmarried father. The result is that the unmarried father is sent from pillar to post and a few weeks or even months later still has not achieved anything. An informant indicated that he

[211] SALRC (2015) 255
[212] Section 45(3) of Act 38 of 2005

assesses all applications personally before referring the person to the High Court. In order to obtain clarity in respect of the application, he would request that the unmarried father file an affidavit to stipulate the relief sought by him and in addition to that he allows the unmarried father to come to court and explain what it is that he wants. This, however, does not happen at all Children's Courts. "The lack of experience of the rotating magistrates results in procedural difficulty and irregularity in the application of the Act and causes undue delays."[213]

The Children's Court rolls are encumbered. Matters are frequently postponed for the following reasons: to afford the party against whom the application is made an opportunity to come to court or obtain legal representation, final reports of the Office of the Family Advocate are not completed timeously when the court orders an enquiry or investigation, and reports from social workers or psychologists as well reports from mediators and facilitators are also delayed for lengthy periods. Many of these experts are often inundated with work and therefore are not in a position to finalise their reports or recommendations on an urgent basis. On the other hand, if private experts are appointed, the much needed reports and recommendations will almost be available immediately, but as mentioned before, this is only an option for the financially able unmarried father. Thus, frequently matters cannot be finalised speedily. The Children's Act also does not provide for urgent applications like the High Court Rules.

[213] SALRC (2015) 263

3.4.3 OFFICE OF THE FAMILY ADVOCATE

The office of the Family Advocate is the one institution which offers mediation to parties at no cost. However, their experts do not become involved in the absence of an application for parental rights and responsibilities before either the High Court or the Children's Court. The Office of the Family Advocate, as is the case with the Children's Court, services hundreds of clients and is responsible for all disputes related to children. Their Offices do not have the time to investigate each settlement agreement sent to them.[214] As a result of this, appointments for mediation are scheduled a few months after the initial application is made. The investigations and reports often also do take a long time to be finalised. Due to a lack of resources, their Offices can only investigate matters that are before the court, even though their scope of duties includes assisting with the protection of the best interests of the child involved in a contact and care dispute.[215] The Act however specifically provides for a family advocate as one of the persons to conduct mediation should a dispute arise. Mediation conducted by Office of the Family Advocate somehow differs from the conventional mediation. The mediation process in the conventional sense is subject to specific requirements, which is not the case with the Office of the Family Advocate. These requirements are: voluntariness, confidentiality, without prejudice, non-binding outcome and a neutral third party that conduct the mediation.[216] These requirements are definitely not applicable to the Office of the Family Advocate, as the Family Advocate plays an active role in determining the final result. Confidentiality is also somehow flawed in that the Family Advocate may be

[214] SALRC (2015) 278
[215] SALRC (2015) 278
[216] Patelia E & Chicktay M "*Appropriate Dispute Resolution: A Practical Guide to Negotiation, Mediation and Arbitration"* 2nd ed (2015) Lexis Nexis, Johannesburg 27

called to give evidence against the parties to the dispute or even to cross-examine one of the parties. The report of the Family Advocate's report in most instances becomes binding, as the courts are often guided by it. The role of the Office of the Family Advocate is more of an investigatory nature than a mediation nature. Once again, by no fault of the unmarried father, the process is delayed. If he had the financial ability, he could take the alternative route of appointing or approaching private experts.

3.4.4 SOUTH AFRICAN POLICE SERVICES

An unmarried father will in most cases only approach the South African Police Services (hereinafter referred to as SAPS) as a last resort. In the circumstance that the unmarried father entered into a parental rights and responsibility agreement, and such agreement is now registered and made an order of the court, the mother sometimes then decides that she does not want to comply with the order and restricts or refuses the father's contact to the child completely. The unmarried father then approaches SAPS for assistance in either enforcing the parental rights and responsibilities agreement or to lay a charge of contempt of court. The officers of SAPS, due to inexperience and lack of education, immediately refer the unmarried father to other legislation such as the Domestic Violence Act,[217] and more specifically they are often referred to the Domestic Violence Court. According to the informants in this study, in some instances SAPS refuse to assist the unmarried father with laying a charge of contempt of court and simply advise that they do not get involved in family related issues. In the event that the complaint of contempt of court is lodged with SAPS, the

[217] Act 116 of 1998

prospects of a proper investigation are slim.[218] Again the unmarried father walks right into a brick wall and the whole process is almost repeated as he must now go back to the Children's Court or the High Court to apply for variation of the court order or for a contempt of court order.

4. CONCLUSION

The main challenges faced by unmarried fathers can briefly be summarised as misinterpretation or confusion of the Act, the costs involved in litigation in the High Court and the financial implications of appointing private experts in attempt to expedite the process. In addition to this, the workloads of the staff and presiding officers of the Children's Court, the Offices of the Family Advocate play a significant role. Lastly, the inexperience and reluctance of SAPS members to assist in disputes relating to parental rights and responsibilities contributes to the unmarried father's challenges. As was mentioned in the introduction of this chapter, the law has been reformed to afford unmarried fathers parental rights and responsibilities. By assessing these challenges, the question as to whether these rights are enforceable can be answered in the negative. Beyl[219] is of the opinion that the position of unmarried fathers has only changed *prima facie*. The responses to the questionnaires in this research confirmed the existence of serious challenges to enforcement on the ground. Therefore it can be concluded that the position of unmarried fathers has not necessarily changed for the better, not if the enforcement of their rights are practically impossible. The following

[218] SALRC (2015) 249
[219] Beyl A, *Critical Analysis of Section 21 of the Children's Act 38 of 2005 with specific reference to the Parental Responsibilities and Rights of unmarried fathers* (LLM 2013 University Pretoria)ii

chapter will be giving recommendations on how to ensure that the enforcement of parental rights and responsibilities of unmarried fathers become more accessible and practical.

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

The purpose of this research was to firstly to determine how enforceable the rights of unmarried fathers as contained in section 21 of the Act are, and, secondly, how the enforceability can be made more effective and practical. Having explored some of the challenges in the previous chapters, this chapter now provides some recommendations.

The objective of chapter one was to determine the research question and to set out the framework for the chapters contained within this dissertation. It was proposed that attempts have been made by the legislator to change the position of unmarried fathers, but the question of practical difficulties and enforceability remained unanswered.

The aim of chapter two was to outline the development of the rights of unmarried fathers from the ancient times where the common law was applicable until today where we have the Children's Act 38 of 2005 that regulates the parent-child relationship. It was concluded that irrespective of the attempts made by the legislator to provide for an improved position for unmarried fathers, their position remains to some extent unchanged. Section 21 unfairly discriminates against some unmarried fathers on the basis of their marital status. Furthermore the procedures providing for the acquisition of parental rights and responsibilities are not fair and just.

The aim of chapter three was to conduct research to determine the practical challenges faced by unmarried fathers attempting to give effect to their rights as contained in section 21 of the Act. The following challenges proved to be most problematic:

Interpretation of the legislation, jurisdiction of the Children's Court and most importantly access to justice.

While compiling the information obtained from the research conducted, it became evident that indeed there are a number of challenges that prevent or restrict unmarried fathers from effectively enforcing their rights as contained in section 21 of the Children's Act. It can now be confirmed that neither the acquisition nor exercising of parental rights and responsibilities is problem free. The legislator's intention when promulgating the Act was to afford unmarried fathers the much needed rights that they have been struggling to obtain for years. As with all laws, there may be teething problems and the enforceability may be tested over the years. Suffice to say, the teething process for the Children's Act has now passed and it is time to admit that that the Act is not flawless.

The purpose of this concluding chapter is to make proposals and recommendations in respect of the legislation as well as to make the enforcement of the rights in section 21 of the Act more practical.

2. RECOMMENDATIONS IN RESPECT OF LEGISLATION

2.1 "PERMANENT LIFE-PARTNERSHIP"

The uncertainty in respect of what a "permanent life-partnership" is places a burden on our courts to determine and interpret the meaning thereof. One manner in which this can be remedied is by providing a definition for the term in the Act. This will assist the courts with interpretation and will also speed up the proceedings. The following proposals could possibly assist with the interpretation of the term.

The Oxford definition of "permanent" speaks about "lasting indefinitely". The Collin's dictionary defines "life- partner" as either party to a long term relationship. "Partnership" is defined by the Oxford dictionary as a union. In considering all of these meanings and definitions of the term "permanent life-partnership", it can be assumed that the focus is on the intentions of the parties involved.

A permanent life-partnership is similar to a universal partnership. The similarity lies in the requirements to prove the existence of a universal partnership. The courts consider the conduct and intentions of the parties to the partnership to determine the existence of a universal partnership.[220] The partnership does not have to be entered into expressly.[221] "It can come into existence tacitly or by conduct of the parties."[222] The author is of the opinion that the same factors as is required to prove the existence of a universal partnership, with the emphasis on the intentions of the parties, should be considered when determining the existence of a permanent life-partnership for purposes of the Children's Act.

In relation to the intention of the parties, both might not have the same intentions; hence the commitment of the unmarried father could be questioned. This issue might only surface when the relationship has come to an end. "Thus a father may find his claim that he was living with the mother in a permanent life partnership at the time of the

[220] The court in *Schrepfer v Ponelat* [2010] ZAWCHC 193, referred to the two types of universal partnerships described by Pothiers as follows: "*universom quae ex quaestu venuint*" means : " The parties thereby contract a partnership of all that they may acquire during its continuance, from every kind of commerce. They are considered to enter into this kind of partnership when they declare that they contract together a partnership without any further explanation." and "The partnership *universorum bonorum* is that by which the contracting parties agree to put in common all their property, both present and future." Para 5

[221] *Schrepfer v Ponelat* [2010] ZAWCHC para 6

[222] *Schrepfer v Ponelat* [2010] ZAWCHC para 6

child's birth is refuted by the mother who may say that there was never an intention for the relationship to be permanent."[223] Therefore, in providing a definition of the term, the inclusion of certain subjective elements may make it easier to interpret. An example of this definition would be the following:

"Permanent life-partnership" for purposes of the Act means: the relationship between the biological parents of the child who possess or prove to have the necessary intention to be involved in a permanent relationship. The intention component could become difficult to prove, but this can be remedied with regulations to the Act. An effective way to prove intention on the part of a person is by assessing his or her conduct during the existence of the relationship. The proposed regulations to the Act should contain or provide a list of factors that should be considered in assessing whether the conduct or contribution of the parties to the dispute indicates any form of intention or consent to be part of a permanent relationship. These factors should also include the assessment of the commitment levels of the parties to each other.[224]

2.2 PROOF OF CONSENT TO BEING IDENTIFIED AS THE FATHER

The Act in section 21(1) (b) (i) provides for the acquisition of parental rights and responsibilities if the unmarried father consented to be identified as the father of the

[223] Boezaart T "Child Law in South Africa" (2009) 74

[224] *Butters v Mncoro* 2012 ZASCA 29 at para 18 the court referred to the requirements of a universal partnership as formulated by Pothier as: "…2. A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement that is by an agreement derived from the conduct of the parties.
3. The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general.
4. Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement." had been reached."

child. Section 26 of the Act further allows for an unmarried father to apply for an amendment in terms of the Births and Deaths Registration Act 51 of 1992 and subsection (b) provides for an application to the court in the event that the mother refuses to give her consent for such amendment. This creates a challenge for the unmarried father. In the event that the unmarried father indeed consented to being identified as the father of the child, the mother can dispute such consent. Thus, the burden is then on the father to prove that he had indeed consented. The author's proposal in this regard is that the burden of proof be shifted to the mother of the child. The onus should be on her to prove that the unmarried father did not consent, or has no interest in being identified as the father of the child. This could be done by way of a regulation stipulating the manner in which she should prove non-consent. In addition to this, a statement or affidavit deposed to by the mother confirming that the unmarried father did not give consent should be produced upon registration of the child's birth.

2.3 "CONTRIBUTION FOR A REASONABLE PERIOD"

The interpretation of "contribution for a reasonable period" contributes to many disputes. Once again, the Act does not provide a definition. As discussed in chapter three, "contribution for a reasonable period" will depend on the circumstances of the child. What is reasonable for one child will differ from another child. The phrase is often differently interpreted by the parties to the disputes. In order for an unmarried father to prove that he contributed for a reasonable period, he will require physical proof. Once again, to add to the enforceability of the section, the term must be clearly defined or regulated by the Act. Gabriel AJ referred to the term as an elastic concept and that it

allows for a range of considerations of circumstances to make a value judgment.[225] The court in *Steadman and Landman*,[226] as discussed in chapter 3, leaned towards the parties' interpretation of a "contribution for a reasonable period". The Supreme Court of Appeal in *KLVC v SDI* stated: "… what constitutes a reasonable period in the circumstances must be determined with reference to inter alia the age of the child and the circumstances of the parties at the time the determination is made."[227] The court considered the contributions that the appellant made towards the child's expenses up to the time that the child was removed from South Africa and held that it could not be described as insubstantial in relation to the maintenance of the child over a period of four months.[228]

The SALRC in their latest issue paper is of the opinion that because of the uncertainty with regard to the meaning of the "permanent life-partnership" and the requirements of section 21(b), the words contained in the section that may lead to unnecessary factual disputes should be removed.[229] The author does not agree with this proposal of the SALRC. The reason for the disagreement is that removing the aforementioned terms will lead to even more uncertainty and interpretation problems. The inclusion of these terms in the section offers some kind of guideline with regard to applying the section.

[225] *I v C* [2014] ZAKZDHC para 35
[226] 229994/2010(WCHC) (unreported judgment)
[227] *KLVC v SDI* [2015] 1 ALL SA 532 (SCA) para 21
[228] *KLVC v SDI* [2015] 1 ALL SA 532 (SCA) para 32; In determining the contribution of the appellant, the court stated : " It is not in dispute that the first respondent purchased certain items for S including a heater, a pram, a car seat, clothing as well as nappies and other necessities. He also built a changing table for S with his own hands as he wanted him to have something special and personal from his father…"
[229] SALRC Issue Paper *Family Disputes Resolution : Care of and Contact with Children*, 2015 (Project 100D) 94

Another proposal put forward by the SALRC in respect hereof was that the section should provide space for the promulgation of regulations to guide and provide what factors or considerations should be taken into account when determining whether the requirements of section 21(b) have been complied with.[230]

In light of the fact that proving a "contribution for a reasonable period" is based on the age of the child, the interpretation of the term by the parties, as well the circumstances of the parties, the best way in which to determine what the term really means is by way of regulations to the Act. The regulations should contain a list or a set of factors to assist the court with interpreting what conduct and contribution by the unmarried father would fall under the definition of a "contribution for a reasonable period". These factors should include consideration of the circumstances of the child as well as the parents.

The author's proposal is that the term "contribution for a reasonable period" remains as is, but becomes guided by regulations to the Act, as proposed by the SALRC.

2.4 SECTION 21(3)

The term "mediation" appears in section 21(3) (a) of the Act with no clear definition of it contained anywhere else in the Act. "The processes described in the Act, furthermore, do not accord with the usual (if somewhat muddled) understanding of what mediation entails. It has, therefore been argued that Family advocates and Family Councellors are not authorised to conduct mediations per se in terms of the Act, but rather to conduct enquiries and investigations."[231] The author's proposal in this regard and especially in relation to amendments of section 23(b) is to remove the word "family advocate" and

[230] SALRC (2015) 94
[231] SALRC (2015) 272

replace it with the word “registered mediator”. This will allow the Office of the Family Advocate to continue doing investigations into the best interests of the child with their available time and resources. Section 21(3) (b) provides for a review process in the event that the parties are not happy with the outcome of the mediation. Review proceedings are applicable to judicial proceedings exclusively. Mediation on the other hand is an alternative dispute resolution mechanism. The section places the burden on the courts to now consider an issue that has already be decided on. The proposal in this regard is that section 21(3) (b) is removed from the section as mediation is not a judicial procedure. Further, if professional mediators are appointed, the mediators and the disputing parties will be bound by all the characteristics of mediation, hence if an agreement is reached and signed after the mediation process, such agreement becomes binding and can be made an order of court.

3. RECOMMENDATIONS IN RESPECT OF PRACTICE AND PROCESS

3.1 SECTION 22

Section 22 provides for the acquisition of parental rights and responsibilities by an unmarried father by way of a parental rights and responsibilities agreement. The Act clearly stipulates that these agreements are only effective if they have been registered by the Office of the Family Advocate or if they are made an order of court. The author is of the view that these agreements would be more effective if they are made a court order from the onset. In other words, the Office of the Family Advocate should still play a role in the proceedings, but not as a decision making body. The proposal is that all parental rights and responsibilities agreements should be made an order of court.

Hence, section 22(4) (a) of the Act should be removed. The Office of the Family Advocate should conduct an investigation into the best interests of the child, and upon their recommendation, the agreement should be made a court order. This would make the enforceability of these agreements more effective in that non-compliance can automatically be dealt with in terms of section 45(2) of the Act. The Act should also provide for a mechanism that monitors the compliance of parental rights and responsibilities agreements and also provide a procedure to be followed should non-compliance occur.

3.2 SECTION 45

Section 45(1) of the Act stipulates that the Children's Court can adjudicate on any matter that relates to the well-being of the child. The adjudication of guardianship applications is excluded from the scope of the Children's Court and falls within the exclusive jurisdiction of the High Court. The author's proposal is that the jurisdiction of the Children's Court be broadened to include applications for guardianship.

The provision in section 45(2) of the Act adds a criminal component to the jurisdiction of the Children's Court. As discussed in chapter 3, this creates challenges for the presiding officers as well as the unmarried father. One of these challenges is that if a charge of contempt is brought before the court; the court must convert to a criminal court. Due to the fact that the Children's Court is not equipped to be a criminal court, the matter is referred, causing delays and limiting access to justice on the part of the unmarried father. The proposal in this regard is that section 45(2) of the Act is removed in its entirety. This section creates confusion and also places an extra burden on the courts.

In the event that the section is removed, all contempt of court matters will be dealt with by the criminal court as it should be in terms of the jurisdiction of the criminal court.

3.3 PROVISION FOR INTERIM ORDERS, URGENT APPLICATIONS AND SUMMARY ENQUIRIES

An application for parental rights and responsibilities is often done by an unmarried father who has done whatever he could to gain access to his child. Upon considering the enforcement of the unmarried father's section 21 rights and the child's best interest, these applications are often done on an urgent basis. The Act does not contain a specific section that allows the court grant Interim Orders. It further does not make provision for matters to be heard on an urgent basis as opposed to the jurisdiction of the High Court where both urgent applications as well as interim orders can be sought. The author's proposal is that these two procedures be included in the Act. The consequence will be that unmarried fathers, who do not have the financial means to approach the High Court for assistance, will be able to go to the Children's Court. This will contribute to the workload of Children's Court staff and presiding officers, but this can be remedied by appointment of more staff and presiding officers. The proposed amendment is to be done in section 46 of the Act and should read as follows: "A Children's Court may hear matters on an urgent basis, only if such hearing is in the best interests of the child." and "A Children's Court may hear make interim orders insofar as it relates to interim contact or care of any child." In respect of procedural uniformity, the same procedures as contained in Rule 12 in respect of urgent applications of the High Court Rules can be utilised. Another proposal is to implement a summary enquiry system with a panel of appropriately qualified experts. The outcome of this enquiry can assist the presiding

officer with making a decision. Hence, this will shorten the time spent by the court in making the enquiry itself and also reduce conflict and the paperwork that presiding officers are faced with when dealing with these matters.

3.4 PRESIDING OFFICERS AND CHILDREN'S COURT STAFF

The research conducted indicated that many unmarried fathers are referred to the High Court due to the misinterpretation of the legislation. This is a common occurrence. This can be remedied by educating the administrative staff of the Children's Courts. Training should be provided to the staff to enable them to make adequate enquiries before referring a person to another court. Training should also be given to presiding officers. A magistrate often works in different courts and sometimes has limited knowledge in respect of family law. The author's proposal is that the Minister of Justice appoints a presiding officer with the necessary expertise and qualifications in children's matters for each Children's Court. This will ensure that we have competent presiding officers hearing the matters and this will contribute to finalising matters in a minimum time period. In having competent presiding officers and court staff, unmarried fathers are sure to be assisted in enforcing their rights within shorter time periods.

The SALRC's proposal is that the presiding officers appointed for the Children's Courts should fit the following criteria: "a) be a specialist in family law and the Children's Act; b) receive specialist training on the Children's Act, the Bill of Rights and international instruments that deal with children; c) hold the position on a permanent basis; and d) not be rotated."[232]

[232] SALRC (2015) 264

3.5 APPOINTMENT OF EXPERTS

In the past presiding officers were guided by common sense and their right to use their discretion in making complex decisions. Today, the Act provides for the input of different experts that results in the postponement of matters for long periods and matters not reaching a conclusion. The great challenge that does exist is the costs involved in appointing private experts to conduct assessments and investigations. The majority of the unmarried fathers cannot afford to pay these experts and therefore their rights cannot be enforced. The proposal in this regard is that a special body consisting of social workers, mediators and facilitators is created in the Act. The Act should contain provisions defining their respective duties as well as procedures and timeframes that should be followed by the experts in assisting the courts. These experts should be dedicated to children's rights matters exclusively. Their most important function should be to make sure that the courts are placed in receipt of whatever reports are required as speedily as possible. These reports could relate to an investigation by a social worker, court ordered facilitation or reports where the services of a mediator is required. These experts should also be available to conduct court ordered supervision. This will take the pressure off the Office of the Family Advocate as well and will allow access to every unmarried father in need of expert assistance. The aim of this proposal is to ensure that all unmarried fathers, irrespective of their standing in society and their financial means, have access to these experts to assist with enforcing their rights.

4. GENERAL RECOMMENDATIONS TO SUPPORT ENFORCEMENT

4.1 EDUCATION OF UNMARRIED FATHERS

Unmarried fathers should be educated as to what their rights are and how to give effect to such rights. The only way in which this can occur is to have workshops within the communities. The workshops should cover information regarding their rights and also the remedies available to them in the event that they need to apply for parental rights and responsibilities. Clarity with regard to the terminology involved in these applications is also important. This will prevent unmarried fathers from being sent from pillar to post, as they will know what relief they are seeking and they will be in a position to communicate their needs to the court officials. The best possible way to reach out to these unmarried fathers is to partner with the community advice offices and various NGO's and legal professionals to bring this information to society.

4.2 EDUCATION OF MOTHERS

It is important to note that in most instances the mothers, as the other party to these disputes, are responsible for the growing numbers of disputes relating to parental rights and responsibilities. Mothers should be educated on the provisions of the Act. The most important issue that needs to be communicated with them is the fact that the best interests of the child is of paramount importance. Their feelings towards the father are not considered as a determining factor. Further, they need to understand that non-payment or short payment of maintenance does not justify their refusal of the unmarried father's contact with his child. The child has a constitutional right to parental care, which includes both parents and not just the parent providing for the child on a daily basis.

They need to be explained that contribution towards the child's upbringing does not just entail financial means. The fact that the unmarried father wants to play a role in the child's life also is also a form of contribution.

4.3 SOUTH AFRICAN POLICE SERVICES

The SAPS is often the last resort for these unmarried fathers. The fact that the staff members are not educated enough to assist the unmarried fathers with enforcing parental rights and responsibilities is a grave concern and detrimental to society. The author's proposal is that all SAPS members should receive training on the Children's Act, specifically insofar as it relates to the enforcement and breach of parental rights and responsibilities agreements. The assistance of the SAPS in respect of a breach of an agreement or contempt of court charges may deter mothers from restricting or limiting the parental rights and responsibilities of unmarried fathers who have acquired such rights.

5. OVERALL CONCLUSION

The rights of unmarried fathers have indeed been ameliorated over the years. This dissertation, with the assistance of the primary research conducted, has outlined the challenges that still inhibit unmarried fathers from exercising their rights as contained in section 21 of the Children's Act. The proposals made by the author are done with the view of making the rights of unmarried fathers more enforceable and effective in practice. Legislation is of no use if it is not enforceable. This is what unmarried fathers have been battling with for years. Their parental rights and responsibilities were provided for in the Act, but due to the problems related to the interpretation of the Act,

access to justice and in most instances, financial considerations, their rights are practically defeated. In addition to this, the current procedures involved in applying for parental rights and responsibilities are time consuming. The aim of this dissertation is also to promote the insertion or adoption of an effective, less time consuming and inexpensive procedure for unmarried fathers to perfect their rights as contained in section 21 of the Act. The time has come to give all qualifying unmarried fathers the opportunity and assistance to claim their rights within the shortest time possible.

25429 WORDS

Annexure A

The challenges that unmarried fathers face in respect of the right to contact and care of their children: can amendments to the current law make enforcement of these rights more effective?

The law in its current form makes provision for unmarried fathers, but implementation of the law and enforcement of their rights is still very challenging. The rationale of this research is to make recommendations to the legislature in respect of amending the Children's Act in an attempt to make enforcement of these rights more effective.

The questions will be directed at the different role players in applications made in respect of Section 21 of Act 38 of 2005. The purpose is to ascertain the extent of the existing impediments as far as they relate to acquiring and exercising parental rights and responsibilities by unmarried fathers.

1. In your experience, what are the challenges faced by unmarried fathers in (a) acquiring and (b) exercising their rights as contained in section 21 of the Children's Act 38 of 2005?

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2. Do these challenges mentioned in question 1 relate to a) the legislation b) access to justice or c) enforcement of the rights contained in section 21 of the Act? Please elaborate?

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3. Does the issue of automatic acquisition in section 20 of the Act pose more or less challenges than the conditional acquisition provided for in section 21 of the Act? Explain?

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4. Please specify and elaborate on any challenges that you have encountered with working towards a parental rights and responsibility agreement and explain the effectiveness of these agreements.

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5. What in your opinion, should be done by the a) legislature and b) courts to make the application of section 21 of the Act more effective and/or practical?

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