



Parental Responsibilities and Rights of South African parents

Introduction:

The relationship between a parent and child is one of the most unique and intimate relationships that the law attempts to regulate, both within a national and international context. Prior to the inclusion of chapter 3 in the Children's Act¹ dealing with parental responsibilities and rights, South Africa followed the common law which conferred parental authority on parents.² This power was automatically conferred on a mother and father of a legitimate child and on a mother of an illegitimate child.³ It can therefore be said that the Children's Act brought about significant change due the fact that the act makes no mention of any type of parental authority, but rather gives parents parental responsibilities and rights towards their children.⁴

¹ 38 of 2005.

² CR Matthias "Parental responsibilities and rights of unmarried fathers: court decisions and implications for social workers" (2017) 53 *Social Work* 95 96.

³ A child is considered a legitimate child if his or her parents were married to each other at the conception, birth or any time in between. An illegitimate child is born out of unmarried parents.

⁴ M Bekink ""Child Divorce": A break from Parental Responsibilities and Rights due to the traditional socio-cultural practices and beliefs of the parents" (2012) 15 *PELJ* 178 178.

It is important to highlight the fact that in the Children's Act responsibilities is mentioned before parental rights, and one can assume that the legislature did this in order to **emphasize** the importance of the responsibilities of parents in respect of their children. Thus, the focus is no longer on what rights parents have, but rather what their responsibilities in regards to their children are.

Acquisition of parental responsibilities and rights:

The acquisition of parental responsibilities and rights is not limited to the parents of a child as it is also possible for third parties to acquire and lose parental responsibilities and rights. It is of utmost importance that parental responsibilities and rights are exercised in order to promote the best interests of the child. Furthermore, section 28(2) of the Constitution of the Republic of South Africa, 1996 confirms this by stating that *"the child's best interest **are** of paramount importance in every matter concerning the child."*

Section 18(2) of the Children's Act identifies four main parental responsibilities and rights, which includes caring for the child, having contact with the child, contributing to the maintenance of the child and acting as the guardian of a child. Parents of a child or any other person can either acquire full or specific parental responsibilities and rights with regards to a child. Chapter 3 of the Children's Act grants automatic parental responsibilities and rights to some people by operation of law, while others must make use of legal mechanisms in order to acquire parental responsibilities and rights.⁵ It is possible for parents to have different parental responsibilities and – one parent can have more or less parental responsibilities and rights than the other

⁵ DSP Cronje & J Heaton *South African Family Law* 4ed (2015) 285.

As a result of Section 19 of the Children's Act, the biological mother of a child, irrespective of whether she is married or not, has full parental responsibilities and rights with regards to her child/children. In the instance where a mother is still under the age of 18, her guardian will also be the guardian of the child until she reaches majority as she can only be regarded as the guardian of her child/children when she reaches the age of majority. Section 20 of the Children's Act grants automatic responsibilities and rights to a father in two instances - if he is married to the child's mother, or if he was married to her at the time of conception, birth or any time in between. In our law a rebuttable presumption exists which regards the husband of the child's mother as the father of that child, unless paternity can be disproved.⁶ This usually occurs by way of blood or DNA tests. This section in effect places the father of the child on equal footing with the biological mother of the child.

The position prior to the Children's Act was that a father of a child born out of wedlock had no parental authority.⁷ The current position is that an unmarried father has Section 21 of the Children's Act available to assist him. In terms of Section 21 an unmarried father can automatically obtain responsibilities and rights in one of two ways. Section 21(a) of the Children's Act states that an unmarried father can acquire these responsibilities and rights if he lived with the mother in a permanent life partnership at the time of the child's birth. Even if the father has never been in a permanent life partnership with the child's mother, he can also obtain responsibilities and rights if he meets the three requirements which is set out in Section 21(b) of the Children's Act. These requirements include that he has to: (1) Consent or apply to be identified as the father or pay damages in terms of the customary law; (2) Contributes or attempt in good faith to contribute to expenses

⁶ S Ferreira "Determination of Paternity: LB v YD 2009 5 SA 463 (T) and YD v LB (A) 2009 5 SA 479 (GNP)" (2011) 74 *THRHR* 145 148.

⁷ J Heaton "Parental Responsibilities and Rights" in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* 2012 3-5.

in connection with the maintenance of the child for a reasonable period; and (3) contributes or attempt in good faith to contribute to the upbringing of the child for a reasonable period.⁸

Conclusion

From the above discussion it is clear that mothers and fathers do not acquire parental responsibilities and rights on the same basis. It would seem like the rationale of allocating automatic responsibilities and rights to a mother is due to the fact that she is able to birth children. Fathers on the other hand would have to satisfy either section 20 or 21 of the Children's Act in order to acquire parental responsibilities and rights.

Karla Swart (LLB) – Candidate Attorney

This article is a general information sheet and should not be used or relied on as legal or other professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Always contact your legal adviser for specific and detailed advice.

⁸ There is no consensus in academic literature and in case law on whether an unmarried father must comply independently or conjunctively with all the requirements listed in section 21(1)(b) in order to obtain responsibilities and rights in respect of his child.