

**The effect of the acquisition of parental responsibilities and
rights on the realisation of the right to parental care of
children born to unmarried parents**



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ABSTRACT

Section 28(1)(b) of the Constitution guarantees every child the right to parental care. It is this right that forms the basis of the research. The content of the right to parental care in South African law is considered in order to identify the persons responsible for the realisation of this right, as well as to highlight what such right entails. The thesis also considers the content of the right to parental care in terms of international law, as the international law position arguably informs South Africa's interpretation of the right to parental care.

The primary aim of this thesis is to determine whether South African civil, customary and/or Muslim personal law limit the right to parental care of children born to unmarried parents. In order to determine this, the rules regulating the acquisition of parental responsibilities and rights are considered, as it is the exercise of such responsibilities and rights that ensures that the child's right to parental care is realised.

Section 28(2) of the Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child. Such matters include the child's right to parental care and the acquisition of parental responsibilities and rights. The right to parental care must, therefore, be interpreted in light of section 28(2) of the Constitution, resulting in the child being entitled to parental care that is in his or her best interests. This thesis, therefore, further aims to determine whether the manner in which the legal systems under consideration regulate the acquisition of parental responsibilities and rights is in the best interests of children born to unmarried parents.

It is argued that the failure of South African civil, customary and Muslim personal law to allow both unmarried biological parents to acquire parental responsibilities and rights automatically, limits the right to parental care of children born to unmarried parents, is not in accordance with the best interests of those children, and unfairly discriminates against such children. It is contended that both biological parents should automatically acquire parental responsibilities and rights, without qualification, and that such responsibilities and rights should only be interfered with if they are exercised in a manner which is contrary to the best interests of the child.

UITTREKSEL

Artikel 28(1)(b) van die Grondwet verskans die reg van elke kind op ouerlike sorg. Hierdie reg vorm die fundamentele vraagstuk van die tesis en daar word spesifiek ondersoek ingestel na die omvang en impak van hierdie reg, asook die identifisering van die persone wat verantwoordelik is vir die verwesenliking daarvan. Hierdie tesis ondersoek ook die inhoud van die reg op ouerlike sorg ingevolge internasionale reg, omdat die internasionale regsposisie 'n waarkynslike impak het op die interpretasie van die reg op ouerlike sorg in Suid-Afrika.

Die hoofdoel van hierdie navorsingstuk is om te bepaal of die Suid-Afrikaanse siviele reg gewoontereg, en / of Moslem persoonlike reg 'n beperking stel op die reg op ouerlike sorg van kinders gebore tot ongetroude ouerpare. Om dit te bepaal word die bepalings wat die verkryging van ouerlike verantwoordelikhede en regte reguleer oorweeg, spesifiek ook omdat dit die uitoefening van hierdie verantwoordelikhede en regte is wat verseker dat 'n kind se reg op ouerlike sorg gerealiseer word, al dan nie.

Artikel 28(2) van die Grondwet bepaal dat die beste belange van die kind van deurslaggewende belang is in elke aangeleentheid wat die kind raak. Hierdie bepaling vind beslis toepassing in aangeleenthede met betrekking tot die kind se reg op ouerlike sorg en die verkryging van ouerlike verantwoordelikhede en regte. Dit is duidelik dat reg op ouerlike sorg in die konteks van artikel 28(2) van die Grondwet oorweeg en geïnterpreteer moet word, en gevolglik is 'n kind dus geregtig op ouerlike sorg wat in sy of haar beste belang is. Hierdie tesis stel ten doel die evaluering van die huidige wyse waarop die regstelsels wat oorweeg word die verkryging van ouerlike verantwoordelikhede en regte reguleer, spesifiek ook om te bepaal of huidige wyse wel in die beste belang is van kinders gebore tot ongetroude ouerpare, al dan nie.

Daar word geargumenteer dat die mislukking van Suid-Afrikaanse siviele reg, inheemsereg en / of Moslem persoonlike reg om aan beide ongetroude biologiese ouers outomaties ouerlike regte en verantwoordelikhede toe te ken die reg op ouerlike sorg van kinders gebore tot ongetroude ouerpare beperk, en dat hierdie beperking nie in die beste belang van die betrokke kind / kinders is nie. Daar word beweer dat beide biologiese ouers outomaties ouerlike verantwoordelikhede en regte behoort te verkry en dat hierdie

regte en verantwoordelikhede slegs beperk moet word indien dit uitgeoefen word op 'n wyse wat strydig is met die beste belange van die betrokke kind / kinders.

LIST OF ABBREVIATIONS

ACRWC	<i>African Charter on the Rights and Welfare of the Child</i>
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
UNCRC/CRC	<i>United Nations Convention on the Rights of the Child</i>
UN	<i>United Nations</i>

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Chapter one: Introduction

1 1 Background to the research problem

1 1 1 The right to parental care

South African law regarding children's rights has undergone significant change since the advent of the country's democratic era. According to Bekink, the law now focuses on the rights of the child, whereas the focus was previously on the powers of the child's parents.¹ There has thus been a shift from "parental authority" to "parental responsibilities and rights" when dealing with children's rights.² Furthermore, South Africa now follows a child-centred approach when confronted by an issue that deals with children's rights.³

Section 28 of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution"), otherwise known as the children's rights clause, recognises and protects rights to which children are specifically entitled.⁴ The Constitution, in section 28(1)(b), provides every child with the right to family care or parental care, or to appropriate alternative care when removed from the family environment. By providing children with a right to parental care, the aforementioned section places a duty on the child's parents as well as the State.⁵ Section 28(1)(b) of the Constitution is therefore essentially aimed at the realisation of a situation in which every child is placed in the care of somebody whose responsibility it is to care for that child.⁶ The term "parental care," by its very nature, suggests that it is the responsibility of the biological parents (or parent, as the case may be) to care for their children. In *Heystek v Heystek* ("Heystek"),⁷ however, the court highlighted the fact that the duty of parental care is not only the responsibility of the child's

¹ 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. See also *V v V* 1998 (4) SA 169 (C) ("*V v V*") 176 para c; J Heaton "Parental responsibilities and rights" in T Boezaart *Child law in South Africa* 2 ed (2018) 77 77.

² Heaton "Parental responsibilities and rights" in *Child law in South Africa* 77. See also *V v V* 1998 para c.

³ A Boniface "Revolutionary changes to the parent-child relationship in South Africa" in J Sloth-Nielsen & Z Du Toit (eds) *Trials & Tribulations, Trends & Triumphs: developments in international, African and South African child and family law* (2008) 151 151.

⁴ A Skelton "Children" in I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 598 599. See also M Pieterse "Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements" (2003) 1 *TSAR* 1 6.

⁵ Skelton "Children" in *The Bill of Rights Handbook* 604. See also JA Robinson "Children's rights in the South African Constitution" (2003) 6 *PELJ* 1 25.

⁶ *Jooste v Botha* 2000 (2) SA 199 (T) ("*Jooste*") 208 para e-f.

⁷ 2002 (2) SA 754 (T).

biological parents, but that it can also, depending on the circumstances, extend to the stepparents, adoptive parents and foster parents of the child.⁸ While the duty to care for a child is generally that of the child's parent or guardian, the State has the responsibility to foster a situation that makes this possible.⁹ Lastly, it is important to note that while section 28(1)(b) of the Constitution places a number of duties on parents, in order to ensure the realisation of the child's right to parental care, the parents themselves do not derive any rights from the aforementioned section.¹⁰ The fact that parents don't derive any rights from section 28(1)(b) of the Constitution further emphasises the fact that section 28 is specifically aimed at the realisation and protection of children's rights.

There is no set definition of "parental care" in South African law. "Care" is, however, defined in section 1 of the Children's Act 38 of 2005 ("the Children's Act"), and this definition can be used as a guide to understand what the right to parental care entails. "Care," in terms of the Children's Act, includes, *inter alia*, ensuring that the child grows up in suitable and safe living conditions, promoting and protecting the well-being of the child, guiding and directing the child's education and upbringing, as well as protecting the child against abuse, maltreatment and discrimination.¹¹ According to Robinson, the constitutional recognition of the child's right to parental care highlights the fact that children are a vulnerable group in society who, because of their youth, lack the experience required to make mature and rational decisions.¹² The care that is thus given to children by their parents is supposed to help children overcome the difficulties that they experience

⁸ *Heystek* 757 para c. See also A Louw "The constitutionality of a biological father's recognition as a parent" (2010) 13 *PELJ* 156 188. A child can thus, depending on the circumstances, have a right to be cared for by someone other than his or her biological parents.

⁹ Skelton "Children" in *The Bill of Rights Handbook* 604. See also Jooste 208 para f; Robinson (2003) *PELJ* 25. Robinson similarly highlights the fact that the State has a role to play in ensuring that the right to parental care is recognised, stating that "[t]he right to family care or parental care requires the family or parents of a child, or the State, to provide care to that child". See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 15 & *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 79.

¹⁰ Skelton "Children" in *The Bill of Rights Handbook* 604. See also Pieterse (2003) *TSAR* 6.

¹¹ See s 1 of the Children's Act.

¹² Robinson (2003) *PELJ* 26. See also Bekink (2012) *PELJ* 178; *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C) para 22; *Bhe and Others v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR (CC) para 93 & 115.

as a result of this lack of maturity.¹³ Lastly, the right to parental care also includes providing for the basic everyday needs of the child, which the child, because of a variety of factors, is unable to provide for him or herself.

The court in *Jooste v Botha*¹⁴ (“*Jooste*”) elaborated on the content of the right to parental care, stating that one of the purposes of the aforementioned right is to ensure that a healthy parent-child relationship exists.¹⁵ The parent-child relationship is one of the most important relationships in which the child is involved during the beginning stages of his or her development. The right to parental care is thus entrenched in the Constitution to ensure the protection of a relationship that is integral to a child’s upbringing. Furthermore, according to the court in *Jooste*, the parent-child relationship consists of both a tangible and an intangible aspect.¹⁶ The tangible aspect deals with the monetary needs of the child, while the intangible aspect focuses on providing for the child’s emotional needs during the course of his or her development.¹⁷

In *Bhe and Others v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*¹⁸ (“*Bhe*”) it was stated that when interpreting section 28 of the Constitution, it is necessary to consider the provisions of international instruments.¹⁹ International law is thus an important interpretative tool for the provisions of the Bill of

¹³ Robinson (2003) *PELJ* 26.

¹⁴ 2000 (2) SA 199 (T).

¹⁵ *Jooste* 207 para i. See also Bekink (2012) *PELJ* 186. In *S v M (Centre for Child law as amicus curiae)* 2008 3 SA 232 (CC) para 20 it was held that in addition to ensuring the existence of a healthy parent-child relationship, one of the aims of section 28 of the Constitution is to prevent a breakdown of family or parental care.

¹⁶ *Jooste* 201 para e. See also Louw (2010) *PELJ* 187.

¹⁷ *Jooste* 201 para e; While it is accepted that the child’s right to parental care includes both the tangible and intangible aspects of care, the intangible aspects are difficult, if not impossible, to enforce. Thus, according to Robinson ((2003) *PELJ* 27), the right to parental care includes providing for the economic needs of the child, but does not include the right to be loved by one’s parents. The fact that the intangible aspects of the right to parental care are difficult to enforce, however, does not mean that the aforementioned aspects should not be recognised as being an integral part of the parent-child relationship. According to Louw (*Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 177) care, as defined in the Children’s Act, appears to place more emphasis on the intangible aspects of the right to parental care than the economic responsibilities of the parents.

¹⁸ 2005 1 BCLR (CC).

¹⁹ *Bhe* para 55.

Rights, which includes section 28 of the Constitution.²⁰ There are various international instruments which South Africa has signed and ratified that deal with aspects relating to the parent-child relationship and, more specifically, the right to parental care. Article 7 of the United Nations Convention on the Rights of the Child²¹ (“CRC”) provides that every child has “the right to know and be cared for by his or her parents”.²² In addition to the CRC, the African Charter on the Rights and Welfare of the Child²³ (“ACRWC”) also emphasises the importance of being cared for by one’s parents. The ACRWC states that “every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.”²⁴ It can therefore be seen that it is not only the Constitution that highlights the importance of the right to parental care, but also various international instruments which South Africa has signed and ratified.²⁵

1 1 2 The acquisition of parental responsibilities and rights

The provisions of the Children’s Act regulating the responsibilities and rights of parents came into operation on 1 July 2007, and brought about drastic changes to the law

²⁰ It is important to note that international law is not only of interpretative value in South Africa, as the country is bound by the provisions of international instruments that it has signed, ratified and domesticated. See 2 3 below for a discussion of international law in South Africa.

²¹ The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The CRC was signed and ratified by South Africa on 29 January 1993 and 16 June 1995 respectively. See 2 3 below for a discussion on what the signing, ratification and domestication of an international instruments entails, and the impact thereof.

²² According to Skelton, (“South Africa” in T Liefwaard & J Doek *Litigating the rights of the child: the UN Convention on the Rights of the Child in domestic and international jurisprudence* 14) the CRC is an important international instrument to consider when dealing with the rights of the child because of its influence in shaping the Constitution’s children’s rights clause. In addition to shaping the Constitution’s children’s rights clause, in *S v M* (para 16), Sachs J stated that: “since its introduction the CRC has become the international standard against which to measure legislation and policies.”

²³ The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49. The ACRWC was signed and ratified by South Africa on 10 October 1997 and 7 January 2000 respectively. See 2 3 below for a discussion on what the signing, ratification and domestication of an international instrument entails, and the impact thereof.

²⁴ Article 19 of the ACRWC.

²⁵ See 2 3 below.

governing, *inter alia*, the acquisition of parental responsibilities and rights by unmarried fathers.²⁶ In order to fully grasp the significance of the Children's Act, it is necessary to explore this part of South African law. By exploring this area of the law one will be able to ascertain whether the current position, as set out in the Children's Act, allows for the optimal realisation of the right to parental care of children born to unmarried parents.

1 1 2 1 The Children's Act

The Children's Act defines a child as "a person under the age of 18 years".²⁷ The Children's Act's definition of child is not qualified in any way, which makes it clear that the Act is applicable to all children under 18 years of age, irrespective of factors such as race, culture and religion. The Children's Act will therefore, in theory at least, apply to all children, and should override customary and religious laws regulating children's rights and the parent-child relationship.²⁸

The provisions of the Children's Act set out the legal position regarding the responsibilities and rights of both married and unmarried parents. The aforementioned responsibilities and rights are set out in section 18(2) of the Children's Act, and include caring for the child; having contact²⁹ with the child; acting as guardian³⁰ of the child; and lastly, providing the child with maintenance.³¹ The parental responsibilities and rights set out the duties that the child's biological parents or legal guardians have to fulfil in respect

²⁶ GN R13 in GG 30030 of 29-06-2007.

²⁷ S 1 of the Children's Act. S 17 further provides that a child becomes a major upon reaching 18 years of age.

²⁸ A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 122. See also discussion under 1 1 2 2 below.

²⁹ In terms of the Children's Act, contact refers to the ability of the parent to have a personal relationship with the child and, should the child reside with someone other than the parent in question, to communicate with the child either personally or electronically.

³⁰ J Heaton "Parental responsibilities and rights" in A Skelton & CJ Davel (eds) *Commentary on the Children's Act* (2012) 3 5. Heaton defines guardianship as "the capacity to administer a minor's estate on his or her behalf and to assist the minor in legal proceedings and the performance of juristic acts".

³¹ S 18 of the Children's Act provides that persons who are holders of parental responsibilities and rights must "contribute to the maintenance of the child". This means that parents, or persons other than the parents who are the holders of parental responsibilities and rights, must contribute to the costs associated with raising a child, according to their financial means. See C Matthias "Parental rights and responsibilities of unmarried fathers: court decisions and implications for social workers" (2015) 53 *Social Work* 96 96.

of the child. It is essentially the proper exercise of the aforementioned responsibilities and rights that ensures that the child's right to parental care is realised.

The Children's Act in section 19 provides for the automatic acquisition of parental responsibilities and rights of the biological mother, stating that the mother has full parental responsibilities and rights in respect of her children, irrespective of her marital status.³² In addition, the position of the married biological father is set out in section 20 of the Children's Act, and provides that a biological father will have full parental responsibilities and rights if he is married to the biological mother of the child, or was married to the biological mother at the time of conception, birth or anytime between the conception and birth of the child. The Children's Act also regulates the 'automatic' acquisition of parental responsibilities and rights by unmarried fathers in section 21. Section 21 of the Children's Act sets out the requirements with which an unmarried father must comply in order to acquire parental responsibilities and rights. The aim of section 21 is to provide unmarried fathers with the ability to acquire parental responsibilities and rights without having to approach the High Court.³³

It is important to note that in terms of the Children's Act, marriage is defined as "...a marriage recognised in terms of South African law or customary law; or [a marriage] concluded in accordance with a system of religious law subject to specified procedures".³⁴ The Children's Act recognises both customary and religious marriages, and, as a result, both married and unmarried fathers living in accordance with customary or religious laws should be entitled to rely on the provisions of the Children's Act, including section 21, in order to acquire parental responsibilities and rights.³⁵

³² Louw (2010) 13 *PELJ* 163. S 19 of the Children's Act does, however, provide an exception to the automatic acquisition of parental responsibilities and rights by biological mothers. S 19 provides that if the biological mother is an unmarried minor who does not have guardianship in respect of her child, and the biological father does not have guardianship, the guardian of the biological mother will assume the role of the child's guardian.

³³ In terms of 21 of the Children's Act, unmarried fathers will acquire parental responsibilities and rights automatically should the requirements set out in the aforementioned section be satisfied. These requirements are set out and discussed in detail in 3 2 3 2 below; Heaton ("Parental rights and responsibilities" in *Commentary on the Children's Act* 12) is of the opinion that the reason the legislature provided for this significant change from the common law position was because the common law position could have been deemed to infringe on sections 9 and 28 of the Constitution.

³⁴ S 1 of the Children's Act.

³⁵ See 1 1 2 2 & 1 1 2 3 below for a discussion.

Section 21 of the Children’s Act is, however, not the only way in which an unmarried father can obtain parental responsibilities and rights. Sections 22, 23 and 24 of the Children’s Act provide additional avenues through which an unmarried father can acquire parental responsibilities and rights, namely the conclusion of a parental responsibilities and rights agreement with the child’s biological mother or by court order granting the unmarried father care, contact and/or guardianship in respect of the child.³⁶ The acquisition of parental responsibilities and rights by unmarried fathers in terms of section 21 is, however, seen as being automatic, despite unmarried fathers having to comply with certain requirements before acquiring such responsibilities and rights, and is therefore deemed to be the least onerous avenue through which unmarried fathers can acquire parental responsibilities and rights.³⁷

It can therefore be seen that in terms of South African civil law,³⁸ mothers and married fathers automatically acquire parental responsibilities and rights, **while** unmarried fathers have to comply with certain requirements **before they ‘automatically’ obtain such responsibilities and rights.**³⁹ If a child is born to married parents, both parents automatically acquire parental responsibilities and rights and are, in theory at least, a part of the child’s life. This is different to the position in respect of a child born to unmarried parents, as only the mother automatically acquires parental responsibilities and rights at the time of the child’s birth. This raises the question of whether the Children’s Act’s failure to allow unmarried fathers to automatically acquire parental responsibilities and rights

³⁶ W Domingo ““For the sake of the children”: South African family relocation disputes” (2011) 14 *PELJ* 148 151. See also 3 2 3 2 2 below.

³⁷ See 3 2 3 2 2 below.

³⁸ In this dissertation, the term South African civil law refers not only to legislative provisions, but also to Roman-Dutch civil law and English common law. In other words, the aforementioned term refers to the country’s statutory law, as well the Western systems of law applicable in the country. The parent-child relationship was initially regulated in terms of the common law. It is, however, important to note that the provisions of the Children’s Act have supplemented and, to a certain extent, replaced the common law’s regulation of the parent-child relationship. While the Children’s Act now primarily regulates the parent-child relationship, certain common law rules are still applicable. It is for this reason that the aforementioned sources of law are referred to collectively under the umbrella term of South African civil law. See Heaton “Parental Responsibilities and Rights” in *Child law in South Africa* 77

³⁹ S 19 – 21 of the Children’s Act.

denies children born to unmarried parents the right to be raised by both of their parents, and as such limits their right to parental care.⁴⁰

1 1 2 2 South African customary law

South Africa is a multicultural society in which a number of different legal systems exist, but not all of which are officially recognised.⁴¹ In South Africa, it is only the Western and customary law systems that are recognised as official legal systems.⁴² Section 211(3) of the Constitution provides that “courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” Furthermore, in *Gumede v President of the Republic of South Africa*,⁴³ (“*Gumede*”) Moseneke DCJ stated that it is a legitimate object for African customary law to co-exist next to the common law and legislation.⁴⁴ Customary law has now been defined in section 1 of the Recognition of Customary Marriages Act 120 of 1998 as: “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.”

An important distinction exists in South African law between official customary law and living customary law. Official customary law refers to customary law as it is set out in legislation, textbooks and judicial precedent.⁴⁵ In other words, official customary law is essentially the codification of customary law. Living customary law, on the other hand, refers to the unwritten law actually adhered to by individuals who live according to

⁴⁰ Louw (2010) *PELJ* 184.

⁴¹ C Rautenbach “The Phenomenon of Legal Pluralism” in C Rautenbach *Introduction to Legal Pluralism in South Africa* 5 ed (2018) 5 5. See also WJ Hosten, AB Edwards, F Bosman & J Church *Introduction to South African law and legal theory* (1995) 1248-1249.

⁴² Rautenbach “The Phenomenon of Legal Pluralism” in *Introduction to Legal Pluralism* 5. See also *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) (“*Alexkor*”) para 51.

⁴³ 2009 (3) SA 152 (CC).

⁴⁴ *Gumede* para 22. See also Rautenbach “The Phenomenon of Legal Pluralism” in *Introduction to Legal Pluralism* 5.

⁴⁵ Rautenbach “The Phenomenon of Legal Pluralism” in *Introduction to Legal Pluralism* 5. See also 2 2 3 2 below.

customary law.⁴⁶ Living customary law constantly changes in accordance with the needs of the community, and is thus flexible in nature.⁴⁷

An important aspect of customary family law is that it operates on a different basis to its civil law counterpart, as the focus of customary law is on the customary group and extended family rather than the individual.⁴⁸ In terms of South African customary law, children belong to the community and, as a result, the responsibility for the upbringing of a child generally falls on the child's parents as well as members of the extended family.⁴⁹ Therefore, in terms of South African customary law, parental responsibilities and rights can be exercised by the child's parents, as well as other members of the family to which the child is affiliated.⁵⁰ According to Himonga, the recognition that African customary law grants to the extended family, allows children to look to family members, who do not form part of their nuclear family, to ensure that their right to parental care is realised.⁵¹ It is, however, important to note that South African customary law has neither specifically incorporated, nor directly referred to, the right to parental care. While the manner in which the civil law regulates the parent-child relationship is centred on the rights of the child,

⁴⁶ TW Bennet *Customary law in South Africa* (2004) 29; *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1074 para i; See also 2 2 3 2 below. According to Rautenbach, ("The Phenomenon of Legal Pluralism" in *Introduction to Legal Pluralism* 5) living customary law is "the law that is followed by traditional communities ... [which] often conflicts with the official customary law that is applied by the State courts or entrenched in legislation".

⁴⁷ *Alexkor* para 53.

⁴⁸ S Burman "Allocating parental rights and responsibilities in South Africa" (2005) 39 *Family Law Quarterly* 429 430. See also T Boezaart "Building bridges: African customary family law and children's rights" (2013) 6 *International Journal of Private Law* 395 398.

⁴⁹ R Songca "Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?" (2011) *XLIV CILSA* 340 352. The idea that the extended family is responsible, together with the child's parents, for raising the child is different to the traditional common law position, in terms of which the parents of the child were primarily responsible for the maintenance and upbringing of the child. See also C Himonga "African customary law and children's rights: intersections and domains in a new era" in J Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 73 77. The importance of the extended family in the raising of a child has, however, now been incorporated into the Children's Act. As a result of the recognition that the Children's Act gives the extended family, it can be argued that the primary responsibility for the welfare of the child no longer rests solely on the child's parents.

⁵⁰ Songca (2011) *XLIV CILSA* 354.

⁵¹ Himonga "African customary law and children's rights" in *Children's Rights in Africa* 79. See also P Martin & B Mbambo (Commissioned by Save the Children) *An exploratory study on the interplay between African customary law and practices and children's protection rights in South Africa* (2011) 36.

customary law centres, not on the rights of the child, but rather the rights of the family.⁵² This does not mean that South African customary law does not recognise the rights of children. It merely means that instead of focusing on the rights of children, customary law focuses on the responsibilities and rights that parents have in respect of their children.

In terms of customary law, biological mothers generally do not acquire parental responsibilities and rights in respect of their children.⁵³ If the child was born as a result of a customary marriage, the child would be deemed to belong to the family of the husband.⁵⁴ If the mother in question was unmarried, parental rights in respect of her child would vest in her father or his heir.⁵⁵ The effect of the customary law position is similar to that of the civil law position, as the unmarried father does not automatically acquire parental responsibilities and rights.⁵⁶ The natural father of a child born to unmarried parents, therefore, does not automatically acquire a right to care, contact or guardianship in respect of his child.⁵⁷ The unmarried father could, however, acquire parental responsibilities and rights by subsequently entering into a marriage with the biological mother of his child or, in certain circumstances, through the payment of *isondlo* damages.⁵⁸

⁵² C Himonga “Implementing the rights of the child in African legal systems: the *Mthembu* journey in search of justice” (2001) 9 *International Journal of Children’s Rights* 89 108.

⁵³ Bennet *Customary law in South Africa* 310-313. See also Boezaart (2013) *International Journal of Private Law* 402.

⁵⁴ Bennet *Customary Law in South Africa* 310-313. See also TW Bennet *A sourcebook of African customary law for South Africa* (1991) 291; Boezaart (2013) *International Journal of Private Law* 402.

⁵⁵ *Mthembu v Letsela and Another* 2000 3 All SA 219 (A) 229; Boezaart (2013) *International Journal of Private Law* 402. See also RLK Ozah & ZM Hansungule “Upholding the best interests of the child in South African customary law” in T Boezaart *Child law in South Africa* 2 ed (2018) 283 299.

⁵⁶ Boezaart (2013) *International Journal of Private Law* 402. See also Ozah & Hansungule “Upholding the best interests of the child in South African customary law” in *Child law in South Africa* 299.

⁵⁷ L Mofokeng *Legal pluralism in South Africa: aspects of African customary, Muslim and Hindu family law* (2009).

⁵⁸ J Sloth-Nielsen & L Mwambene “Talking the talk and walking the walk: how can the development of African customary law be understood?” (2010) 28 *Law in Context* 27 35; JC Bekker “Commentary on the impact of the Children’s Act on selected aspects of the custody and care of African children in South Africa” (2008) *Obiter* 395 401; Ozah & Hansungule (“Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* 299) describe *isondlo* as “an additional, consideration which signifies the bringing up or maintaining of a child”. See also 3 3 2 below.

It can thus be seen that in terms of South African customary law neither of the parents of children born to unmarried parents automatically acquire parental responsibilities and rights, as the aforementioned responsibilities and rights vest in the head of the mother's family. This is different to the position if the child is born of a valid customary marriage, as well as the position in terms of the Children's Act. Should a child be born of a legitimate customary marriage, his or her biological father will acquire parental responsibilities and rights, resulting in at least one of the child's biological parents exercising parental responsibilities and rights.⁵⁹ This is, however, not the case when the child in question is born to unmarried parents. Lastly, in terms of customary law, the biological mother, irrespective of her marital status, never acquires parental responsibilities and rights.⁶⁰ The mother may practically be responsible for raising her children, but in terms of the binding rules of her customary group, she has no legal responsibilities and rights in respect of her children.

There is a conflict between the manner in which South African civil and customary law regulate the acquisition of parental responsibilities and rights. The Children's Act, for example, sets out certain avenues through which an unmarried father can acquire parental responsibilities and rights, which are not provided by, or are contrary to, South African customary law. In this regard, it is generally accepted that the provisions of the Children's Act will override the customary law rules governing the acquisition of parental responsibilities and rights.⁶¹ The problem, however, is that persons living according to customary law adhere to the rules and norms of living customary law, rather than the provisions of the Children's Act. The reality is that the provisions of the Children's Act are only applied to persons living according to customary law when a matter is heard by a South African court. Often, in rural areas and cultural communities, it is the rules of living

⁵⁹ Bennet *Customary law in South Africa* 310,313. See also Bennet *A sourcebook of African customary law for South Africa* 291; Boezaart (2013) *International Journal of Private Law* 402.

⁶⁰ Bennet *Customary law in South Africa* 310-313. See also Boezaart (2013) *International Journal of Private Law* 402.

⁶¹ Louw (*Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 122) came across this conflict when considering the automatic acquisition of parental responsibilities and rights in terms of South African civil and customary law, and stated as follows:

"It is submitted that in such a case the provisions of the Children's Act will probably override customary law, provided the automatic acquisition of parental responsibilities and rights by the biological father is deemed to be in the best interests of the child."

customary law that are adhered to, rather than the provisions of the Children's Act. The research will thus aim to determine whether the manner in which South African customary law regulates the acquisition of parental responsibilities and rights limits the right to parental care of children born to unmarried parents, by allowing neither biological mothers nor fathers to automatically acquire parental responsibilities and rights.

1 1 2 3 Muslim personal law

Section 15 of the Constitution recognises and protects a right to religious freedom. Furthermore, section 15(3) of the Constitution allows for the implementation of legislation that recognises systems of religious, personal and family law.⁶² The aforementioned section provides as follows:

- “(a) This section does not prevent legislation recognising—
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution”⁶³

Despite the fact that the Constitution allows for the recognition and implementation of laws based on religious systems, personal religious laws have not yet been officially recognised in post-apartheid South Africa.⁶⁴ The fact that Muslim personal law has not been officially recognised raises an important issue, namely whether such non-recognition results in the laws of the aforementioned legal system not being subject to the Constitution. Section 8 of the Constitution provides that “[t]he Bill of Rights applies to all law.” It is therefore necessary to determine whether Muslim personal law falls within the

⁶² South African Law Commission *Islamic marriages and related matters Project 59* (2003) 1.

⁶³ S 15(3) of the Constitution.

⁶⁴ W Amien, N Moosa & C Rautenbach “Religious, Personal and Family Law Systems in South Africa” in C Rautenbach *Introduction to Legal Pluralism in South Africa* 5 ed (2018) 61 64; It is, however, important to note that the court in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2018 (6) SA 598 (WCC) (“*Women's Legal Centre Trust v President of the Republic of South Africa*”) (para 252) ordered that the executive, together with the legislature, enact legislation which recognises Muslim marriages as valid marriages. As a result of the aforementioned order, there will soon be legislation recognising marriages concluded under a system of religious law.

ambit of “all law,” considering the fact that it is not a legally recognised system of law in South Africa. According to Rautenbach, the fact that section 15 of the Constitution makes provision for the recognition of “systems of religious, personal or family law... is a clear indication that the [C]onstitution writers saw these systems as systems of ‘law’ and, as a result, it may be argued that ‘all law’ in section 8(1) of the 1996 Constitution also refers to the [aforementioned] law systems.”⁶⁵ Furthermore, South African courts have recently started giving legal recognition to certain aspects of Muslim marriages as a result of the provisions of the Constitution.⁶⁶ It can therefore be concluded that because the Constitution has been used to develop and give legal recognition to certain areas of Muslim personal law, such law is in fact subject to the Bill of Rights.

The rules regulating the parent-child relationship in Islamic law focus on the nuclear family.⁶⁷ Muslim personal law places a great deal of importance on the marital status of the child’s parents, and, as a result, it is an important factor in determining the persons who acquire parental responsibilities and rights.⁶⁸ The *Holy Qur’an* stipulates that the upbringing of children is primarily the responsibility of the parents of such children, provided such children are born to married parents.⁶⁹ Children who are born of Muslim marriages therefore have the right to be raised by both of their biological parents in an environment that is suitable for their upbringing.⁷⁰

Parental authority in Muslim personal law includes the right to custody and guardianship, and is essentially the same as parental authority in terms of South Africa’s

⁶⁵ C Rautenbach “Muslim personal law and the meaning of “law” in the South African and Indian Constitutions” (1999) 2 *PER* 1 4

⁶⁶ See *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) para 40 & *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC) para 57; As a result of the judgment in *Women’s Legal Centre Trust v President of the Republic of South Africa*, legislation which recognises Muslim marriages as a valid marriages will soon be enacted.

⁶⁷ M Rajabi-Ardeshiri “The rights of the child in the Islamic context: the challenges of the local and the global” (2009) 17 *International Journal of Children’s Rights* 475 479. See also UM Assim *In the best interests of children deprived of a family environment: a focus of Islamic Kafalah as alternative care option* University of Pretoria: LLM Dissertation (2009) 36.

⁶⁸ E Moosa “The child belongs to the bed: illegitimacy and Islamic law” in S Burman & E Preston-Whyte (eds) *Questionable issue: illegitimacy in South Africa* (1992) 171 172-175.

⁶⁹ D Olowu “Children’s rights, international human rights and the promise of Islamic legal theory” (2008) 12 *Law, Democracy & Development* 62 68.

⁷⁰ N Moosa “Muslim personal law affecting children: diversity, practice and implications for a new Children’s Code for South Africa” (1998) *SALJ* 488. See also Olowu *Law, Democracy & Development* 68.

common law.⁷¹ Should a child be born of a valid Muslim marriage, both of the child's biological parents acquire different elements of parental authority. In terms of Muslim personal law, a child has a right to custody and, according to Moosa, the custody of a child is generally seen as the responsibility of the child's biological mother.⁷² This right, however, only vests in the mother until her children reach a certain age, which is generally the age of puberty.⁷³ Upon reaching this age, the right to the custody of the child is transferred from the mother to the father of the child.⁷⁴ Unlike the custody of the child, guardianship vests in the child's biological father, provided the child is born to married parents.⁷⁵ Islamic law generally recognises only the biological father as the child's guardian.⁷⁶

An important element of the parent-child relationship in Muslim personal law is the right of access of the non-custodian parent. The right of access in Muslim personal law is different to the customary law position as well as the position in terms of the Children's Act. In terms of Muslim personal law, the non-custodian parent always has a right of access to his or her biological children.⁷⁷ It is therefore not necessary for the non-custodian parent to initiate any legal or formal proceedings, in theory at least, as the custodian parent is under a duty to give the other parent access.⁷⁸ Furthermore, the child has the right to be maintained by his or her biological father, with the mother only having

⁷¹ N Moosa *An overview of post-divorce support for Muslim children in the context of South African law, Islamic law and the proposed 2010 Muslim Marriages Bill* 288. According to Moosa, ((1998) SALJ 490) "Islamic law defines custody as the caring of the infant during the early years of life". See also 2 2 1 below.

⁷² Moosa (1998) SALJ 489. Olowu ((2008) *Law, Democracy & Development* 69), however, provides that if the parents of the child reside together, the right to custody is shared between those parents. Olowu thus concludes that the mother only has sole custody if her marriage is terminated, either through the death of her husband or divorce.

⁷³ Olowu (2008) *Law, Democracy & Development* 69. See also Moosa (1998) SALJ 489.

⁷⁴ Moosa (1998) SALJ 489.

⁷⁵ Olowu (2008) *Law, Democracy & Development* 69. See also A Rafiq "Child custody in classic Islamic law and laws of contemporary Muslim world (An Analysis)" (2014) 14 *International Journal of Humanities and Social Science* 267 268; Moosa (1998) SALJ 489-490. The guardianship of the child's biological father includes control of the property of the child, as well as other aspects such as the child's education.

⁷⁶ Moosa (1998) SALJ 490. In this regard, Moosa argues that the fact that the biological father is seen as the natural guardian of the child has prevented mothers from being able to raise their children together with the child's father in an equal manner

⁷⁷ Moosa (1998) SALJ 490.

⁷⁸ 490.

to contribute to the maintenance of the child if the father is unable to do so himself.⁷⁹ By exercising the responsibilities of custody, maintenance and guardianship, and thereby ensuring that the basic necessities of the child are provided for, parents will, in theory, give effect to the child's constitutionally entrenched right to parental care.

In the case of children born of Muslim marriages, the different elements of parental authority are split between the biological parents of such children. This is, however, not the case if children are born to unmarried parents. If a child is born to unmarried parents, it is only the biological mother of that child that acquires parental authority, and she is therefore responsible for the maintenance, custody and guardianship of her child.⁸⁰ **The acquisition of parental responsibilities and rights in terms of Muslim personal law is different to the position set out in the Children's Act.⁸¹ Due to the fact that the Children's Act applies to all children in South Africa, it is generally accepted that Muslim personal law is subject to the provisions of the Children's Act, and in the event of a conflict between the two, the Children's Act will prevail.⁸² However, similar to the position regarding living customary law, the reality of the situation is that people living according to Muslim personal law will often adhere to rules of Muslim personal law, rather than the provisions of the Children's Act. It is arguably only when the conflict reaches a South African court, that the Children's Act will prevail. An enquiry into the effect of the acquisition of parental responsibilities and rights on the realisation of the right to parental care of children born to unmarried parents will thus be conducted in light of the Muslim personal law rules governing the acquisition of parental responsibilities and rights. This will be done in order to determine whether the Muslim personal law rules governing the acquisition of parental responsibilities and rights limits the right to parental care of children born to unmarried parents.**

⁷⁹ 490.

⁸⁰ Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable issue: illegitimacy in South Africa* 175.

⁸¹ See chapter 3 below for a discussion of the acquisition of parental responsibilities and rights in terms of the Children's Act and Muslim personal law.

⁸² Louw (*Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 122). See also 1 1 2 2 above.

1 1 3 The best interests of the child

The best interests of the child principle is contained in section 28(2) of the Constitution, which provides that: “a child’s best interests are of paramount importance in every matter concerning the child.” In terms of section 28(2) of the Constitution the best interests of the child principle has a wide range of application, and a child’s best interests must therefore be considered in every matter concerning the child, including the child’s right to parental care. The best interests of the child is not only a principle of South African law, but is also a right in itself which, like the other rights in the Bill of Rights, can be limited.⁸³ The Constitutional Court in *Minister of Welfare and Population Development v Fitzpatrick*⁸⁴ (“*Fitzpatrick*”) stated that section 28(2) of the Constitution goes beyond the rights of the child set out in section 28(1) of the Constitution, and thus creates an independent, constitutionally recognised right.⁸⁵ While there is no legally recognised definition of the best interests of the child, section 7 of the Children’s Act does expand on the best interests of the child standard, by listing factors that should be considered whenever a provision of the Children’s Act requires that the best interests of the child be taken into account.⁸⁶

An important relationship exists between section 28(2) of the Constitution and international children’s rights instruments. The best interests of the child standard is contained in a number of international instruments, including the CRC and the ACRWC.⁸⁷ The ACRWC, in article 4, highlights the fact that the best interests of the child should be the primary consideration in every matter concerning the child.⁸⁸ Article 3(1) of the CRC contains a similar provision, stipulating that the best interests of the child should be a primary consideration in all actions concerning the child.⁸⁹ It is thus the Constitution, as

⁸³ Skelton “Children” in *The Bill of Rights Handbook* 619-620. See also *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 17; *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC).

⁸⁴ 2000 (3) SA 422 (CC).

⁸⁵ *Fitzpatrick* para 17. See also Skelton “Children” in *The Bill of Rights Handbook* 620.

⁸⁶ *Fitzpatrick* para 18; B Mezmur “The United Nations Convention on the Rights of the Child” in T Boezaart *Child law in South Africa* 2 ed (2018) 403 414. See also 4 4 1 2 below.

⁸⁷ The international perspective of the best interests of the child is extensively discussed in 4 2 below.

⁸⁸ Article 4(1) of the ACRWC. See also 4 2 below.

⁸⁹ See 4 2 below.

well as international instruments that South Africa has signed and ratified, that recognise the importance of the best interests of the child.

Customary law and Muslim personal law, like all law in South Africa, are subject to the Constitution as the supreme law of the country. Thus, the best interests of the child principle should be applicable to children born as a result of customary and Muslim relationships in the same way as it is applicable to children born of civil marriages and permanent life-partnerships. The application of the best interests of the child principle to children living according to customary law was confirmed in *Hlophe v Mahlalela and Another* (“*Hlophe*”).⁹⁰ In *Hlophe*, the court held that “the best interests of the child... prevailed over the application of customary rules that allocated paternal powers or responsibilities and rights in accordance with the payment of bride wealth upon the marriage of the child’s parents.”⁹¹ The *Hlophe* case emphasised the fact that the best interests of the child is of paramount importance in all matters concerning the child, irrespective of the legal system in question. While the *Hlophe* case dealt with the issue of custody after the death of the mother of the child, the principle of the case can be relevant to all aspects of the parent-child relationship in customary law, including the right to parental care.

While *Hlophe* only deals with the application of the best interests of the child principle in South African customary law, it is also relevant to Muslim personal law. This is because it shows the attitude of South African courts to the application of the best interests of the child principle in legal systems other than the civil law system. The manner in which the best interests of the child principle was applied in *Hlophe* suggests that in any matter involving a child, the best interests of the child principle is applicable irrespective of the legal system in question. The principle will by extension apply to cases involving children born to parents living in accordance with Muslim personal law in the same way as it is applicable to children living in accordance with civil and customary law.

The Constitution provides all children with a right to parental care but, according to Louw, the best interests of the child principle qualifies the child’s right to parental care,

⁹⁰ 1998 1 SA 449 (T).

⁹¹ Himonga “African customary law and children’s rights” in *Children’s rights in Africa: a legal perspective* 83.

thereby ensuring that the child is entitled to committed parental care.⁹² It can thus be seen that the best interests of the child is of paramount importance in all matters concerning a child, which includes the child's right to parental care. The research will therefore aim to determine whether the acquisition of parental responsibilities and rights in terms of South African civil, customary and Muslim personal law is in line with the best interests of children born to unmarried parents, as is required by section 28(2) of the Constitution.

1 1 4 The right to equality

The preamble of the Constitution states that South Africa is a democratic state founded on various values, one of which is the achievement of equality. The right to equality is entrenched in section 9 of the Constitution, and is one of the values that forms the basis of post-apartheid South Africa.⁹³ In addition to providing that everyone has the right to equal protection and benefit of the law, section 9 of the Constitution lists a variety of grounds, including birth, upon which discrimination is prohibited.⁹⁴ In terms of section 9(5) of the Constitution, discrimination on any of these listed grounds is presumed to be unfair, unless the contrary is proven. The possible limitation of the right to parental care of children born to unmarried parents, but not children born to married parents, may raise another issue, namely discrimination against children born to unmarried parents. Should it be found that South African civil, customary and/or Muslim personal law limit the right to parental care of children born to unmarried parents, a further constitutional investigation will need to be conducted in order to determine whether the rules, of the aforementioned legal systems, regulating the acquisition of parental responsibilities and rights unfairly discriminate against children born to unmarried parents, resulting in the limitation of their right to equality.

⁹² Louw (2010) *PELJ* 184. See also D Adams *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?* University of the Western Cape: LLM mini-thesis (2016) 39.

⁹³ F T Endoh "Democratic constitutionalism in post-apartheid South Africa: the interim constitution revisited" (2015) 7 *Africa Review* 67 71. See also *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) para 49.

⁹⁴ See s 9(3) & (4) of the Constitution.

1 1 5 Can a limitation of the child's rights be justified?

The rights in the Bill of Rights are not absolute and can be limited in terms of section 36 of the Constitution.⁹⁵ The limitation clause provides that the rights set out in the Bill of Rights can be limited by a law of general application, as long as the limitation in question is deemed to be reasonable and justifiable in an “open and democratic society based on human dignity, equality and freedom.”⁹⁶ Section 36 furthermore lists certain factors that must be taken into account when making the aforementioned determination. The factors are: “(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.”⁹⁷

The right to parental care is not absolute and can therefore be limited in terms of section 36 of the Constitution. Should it, for example, be in the child's best interests that he not have contact with either his mother, father or both of his parents, his right to parental care can be justifiably limited.⁹⁸ In order to determine whether the limitation of the child's rights in terms of section 28 of the Constitution can be justified, “the purpose, effect and importance of the denial of automatic parental responsibilities and rights ... must be weighed up against the nature and effect of the impairment caused to the [child's] rights.”⁹⁹ Should it be found that the section 28 rights **of children born to unmarried parents** have been limited, the aforementioned balancing exercise will need take place in order to determine whether such limitation is justifiable. **Furthermore, in the event that such limitation, should it exist, is found to be unjustifiable, it will need to be determined whether the possible differentiation between children born to married and unmarried parents amounts to discrimination and, if such discrimination is found to be unfair, whether it is justifiable.**

⁹⁵ K Iles “A fresh look at limitations: unpacking section 36” (2007) 23 *SAJHR* 68 80. See also G Carpenter “Internal modifiers and other qualifications in bills of rights – some problems of interpretation” (1995) 10 *South African Public Law* 260 260.

⁹⁶ S 36 of the Constitution.

⁹⁷ S 36 of the Constitution.

⁹⁸ Louw (2010) *PELJ* 189.

⁹⁹ A Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 176.

1 2 Research Questions

The primary research questions to be asked are: do the civil, customary and/or Muslim personal law positions regulating the acquisition of parental responsibilities and rights limit the right to parental care of children born to unmarried parents, and if so can such limitation be justified in terms of section 36 of the Constitution? Secondly, are the rules governing the acquisition of parental responsibilities and rights in South African civil, customary and Muslim personal law in line with the best interests of children born to unmarried parents? Lastly, does the South African civil, customary and/or Muslim personal law positions regulating the acquisition of parental responsibilities and rights unfairly discriminate against children born to unmarried parents?

1 3 Research aims

In order to answer the research questions, the following have been identified as the main research aims

- To analyse what the child's right to parental care entails in South African and international law.
- To set out the manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities and rights by married as well as unmarried biological parents. Furthermore, to comparatively analyse the acquisition of parental responsibilities and rights in the different legal systems, in order to determine which systems, if any, properly realise and protect the right to parental care of all children.
- To determine whether the position set out in the Children's Act, which does not automatically vest parental responsibilities and rights in unmarried biological fathers, limits the right to parental care of children born to unmarried parents. Furthermore, to determine whether the manner in which the acquisition of parental responsibilities and rights is regulated in South African customary law and Muslim personal law, limits the right to parental care of children born to unmarried parents.
- To determine whether the rules governing the acquisition of parental responsibilities and rights in terms of South African civil, customary and Muslim personal law, irrespective of whether or not the aforementioned legal systems limit

the child's right to parental care, are in line with the best interests of children born to unmarried parents, as is required by section 28(2) of the Constitution.

- Lastly, to determine whether the rules regulating the acquisition of parental responsibilities and rights in terms of South African civil, customary and/or Muslim personal law, by limiting the right to parental care, should such limitation exist, discriminate against children born to unmarried parents, and if so whether such discrimination is unfair.

1 4 Methodology

The starting point of the research will be to describe the development of the parent-child relationship in South African law, from the common law up to the enactment of the Children's Act, in order to compare the historical position regarding the child's right to parental care and the acquisition of parental responsibilities and rights by the child's biological parents, to the position after the commencement of the Children's Act. Furthermore, the status of South African customary law and Muslim personal law will be discussed, and thereafter the manner in which the aforementioned legal systems regulate the acquisition of parental responsibilities and rights will be set out. Once the legal position of the three systems under consideration have been discussed, a comparative analysis of the aforementioned legal positions will take place in order to highlight the similarities and differences between the legal systems regarding the realisation of the child's right to parental care and the acquisition of parental responsibilities and rights. This will be done in order to determine the extent to which the different legal systems recognise and protect the child's right to parental care. A further comparative analysis will take place in order to highlight the similarities and/or differences between South African law and international instruments governing the parent-child relationship. The goal of the comparison is to determine the extent to which international law informs the manner in which South African civil, customary and Muslim personal law regulate the parent-child relationship.

A constitutional inquiry into the acquisition of parental responsibilities and rights in terms of the Children's Act, as well as the customary law and Muslim personal law positions, will take place in order to determine whether the respective positions limit certain children's rights entrenched in the Constitution. In other words, the aim of the

constitutional inquiry is to determine whether the manner in which the acquisition of parental responsibilities and rights is regulated in terms of South African civil, customary and Muslim personal law limits the right to parental care and/or **is not in accordance with the best interests of children born to unmarried parents. Should it be found that the right to parental care of children born to unmarried parents is unjustifiably limited, a further constitutional inquiry will be conducted. This constitutional inquiry will be conducted in order to determine whether the limitation of the right to parental care of children born to unmarried parents (but not children born to married parents), should such limitation exist, unfairly discriminates against children born to unmarried parents.** Should it be found that the rights to parental care and/or **equality** of children born to unmarried parents have been limited, it will need to be determined whether such limitations can be justified in terms of section 36 of the Constitution.

1 5 Outline of study

Chapter two will set out, discuss and analyse what the constitutionally entrenched right to parental care entails. This chapter is going to identify the persons responsible for ensuring that the child's right to parental care is realised, as well as the role that the State plays in ensuring that the right to parental care is, firstly, protected and, secondly, effected. This will be done in order to determine the extent to which the different legal systems currently recognise, and give effect to, the child's right to parental care. Furthermore, there are various international instruments which South Africa has signed and ratified that recognise the child's right to parental care. Chapter two will thus set out what the right to parental care entails in terms of international law, in order to determine whether the international position has informed South Africa's domestic position.

Chapter three will set out the position regarding the acquisition of parental responsibilities and rights in terms of South African civil, customary and Muslim personal law. The acquisition of parental responsibilities and rights will be set out and discussed, as it is essentially the exercise of those responsibilities and rights by the child's parents that determines whether or not the child's right to parental care is realised.

All children in South Africa have a constitutionally entrenched right to parental care, which is qualified by section 28(2) of the Constitution. In other words, a child is entitled to

parental care that is in his or her best interests. Chapter four will therefore discuss what the best interests of the child principle entails in terms of both South African and international law. This chapter will then set out the extent to which the best interests of the child principle is recognised and applied in South African civil, customary and Muslim personal law, in order to determine the impact that the aforementioned principle has on the child's right to parental care.

In chapter five, the rules regulating the acquisition of parental responsibilities and rights in South African civil, customary and Muslim personal law will be evaluated in light of section 28(1)(b) of the Constitution. A constitutional enquiry will be conducted in order to determine whether the respective legal systems limit the right to parental care of children born to unmarried parents. Should the different legal systems limit the right to parental care of children born to unmarried parents, the next step will be to determine whether such limitation can be justified in terms of section 36 of the Constitution. **In the event that the limitation of the right to parental care of children born to unmarried parents is unjustifiable, a further constitutional enquiry will take place to determine whether the limitation of the right to parental care of children born to unmarried parents, but not children born to married parents, unfairly discriminates against children born to unmarried parents and, as a result, limits their right to equality.** Furthermore, this chapter will also aim to determine whether the legal positions of the different legal systems, regarding the child's right to parental care and the acquisition of parental responsibilities and rights, are in accordance with the best interests of children born to unmarried parents.

In chapter six, a summary of the child's right to parental care and the rules governing the acquisition of parental responsibilities and rights in South African civil, customary and Muslim personal law will be provided. Thereafter, a conclusion will be drawn as to whether the **rights to parental care and equality** of children born to unmarried parents **are** being limited by the rules governing the acquisition of parental responsibilities and rights, **and whether the current legal positions are in the best interests of children born to unmarried parents.** Lastly, proposed solutions to the aforementioned problems surrounding the parent-child relationship will be discussed.

Chapter two:

The child's right to parental care in South African law

2 1 Introduction

The Constitution of the Republic of South Africa, 1996 (the “Constitution”) is the supreme law of post-apartheid South Africa, and has brought about significant change to the manner in which the rights of children are regulated and protected in the country.¹⁰⁰ The Constitution recognises that children are a vulnerable group in society, whose rights, because of this vulnerability, require special protection.¹⁰¹ As a result, the Constitution makes provision, in section 28, for certain rights that apply specifically to children, in addition to the other rights in the Bill of Rights to which they are already entitled.¹⁰² In *V v V*¹⁰³ the court stated that “children’s rights are no longer confined to the common law, but also find expression in section 28 of the Constitution, not to mention a wide range of international instruments”.¹⁰⁴ Section 28(1)(b) of the Constitution provides that every child has the right to family, parental and, in certain circumstances, appropriate alternative care.¹⁰⁵ While the constitutionally entrenched right to parental care will form the backbone of this research, the right to family and alternative care will also be considered during the course thereof. This is due to the fact that there is a link between the right to family and parental care in certain culture and, as a result, the aforementioned rights can, in certain circumstances, be realised in conjunction with one another.

As stated above, the Constitution is now the supreme law of South Africa, and, as a result, all of the various religions, cultures and legal systems that co-exist within South Africa’s multicultural society are subject to, and must be in accordance with, the

¹⁰⁰ 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.

¹⁰¹ J Robinson “Children’s rights in the South African Constitution” (2003) *PELJ* 1 11. See also Bekink (2012) *PELJ* 178.

¹⁰² Robinson (2003) *PELJ* 12. See also A Skelton “Children” in I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 598 599; Bekink (2012) *PELJ* 178.

¹⁰³ 1998 (4) SA 169 SA (C).

¹⁰⁴ *V v V* 176 para c-d. See also M Nonyane-Mokabane *Children in need of care and protection and their right to family life* University of Pretoria: LLD thesis (2013) 245.

¹⁰⁵ In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (para 77) it was stated that children are entitled to appropriate alternative care in the event that there is an absence of family or parental care. According to Skelton (“Children” in *The Bill of Rights Handbook* 607) appropriate alternative care includes state provided care, foster care and adoptive care.

provisions of the Constitution, which includes the children's rights clause.¹⁰⁶ Due to the multicultural nature of South Africa's society, the country's legal system is made up of various systems of law, which co-exist in, what has been described as, a hybrid legal system.¹⁰⁷ The research will thus focus on the country's recognised legal systems, as well as certain legal systems that, although not officially recognised, have received limited recognition.¹⁰⁸ This chapter will set out what the constitutionally entrenched right to parental care entails in terms of South African civil, customary and Muslim personal law. Thereafter the content of the right to parental care in terms of international law will be considered. The purpose thereof is to use the international law perspective of the child's right to parental care to inform the interpretation of South Africa's domestic position.¹⁰⁹

¹⁰⁶ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) para 49. See also J Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" (2009) 34 *Journal for Juridical Science* 1 11.

¹⁰⁷ C Rautenbach "The Phenomenon of Legal Pluralism" in C Rautenbach *Introduction to Legal Pluralism in South Africa* 5 ed (2018) 3 5. The term "hybrid legal system" is often used interchangeably with "mixed legal system". According to C Van Der Merwe, ("The origin and characteristics of the mixed legal systems of South Africa and Scotland and their importance in globalisation" (2012) 18 *Fundamina: A Journal of Legal History* 91 101) South Africa is one of the world's truly mixed legal systems. South Africa's legal system is referred to as a mixed or hybrid legal system as it recognises, and is made up of, various legal systems. The composition of South Africa's legal system is often referred to as "deep legal pluralism", as various official and unofficial legal systems operate within the country's legal framework; See also WJ Hosten, AB Edwards, F Bosman & J Church *Introduction to South African Law and Legal Theory* (1995) 1248-1249; C Rammutla *The 'official' version of customary law vis-à-vis the living Hananwa family law* University of South Africa: LLD thesis (2013) 34.

¹⁰⁸ According to Rautenbach, ("The Phenomenon of Legal Pluralism" in Rautenbach *Introduction to Legal Pluralism* 5) it is only the common, civil and customary law that are officially recognised in South Africa. Religious legal systems are, however, now receiving greater protection than was previously the case.

¹⁰⁹ P Marbery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" in T Boezaart *Child Law in South Africa* (2009) 309 324. In terms of s 231 of the Constitution, South Africa is bound by an international instrument after it has been signed and ratified by the executive and parliament. The instrument, however, only becomes binding in South Africa once it has been domesticated into the country's national legislation. For a more in depth discussion of the impact of the ratification of international instruments see 2 3 1 below.

2 2 The right to parental care

2 2 1 Parental care: a constitutionally entrenched right

Section 2 of the Constitution highlights the supremacy of the Constitution, stating that it “is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. The Children’s Act, South African customary law and Muslim personal law are all therefore subject to the Constitution. In this regard, in *Mabuza v Mbatha*¹¹⁰ (“*Mabuza*”) the court stated that “any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny”.¹¹¹ This statement was made in relation to African customary law, but the principle is applicable to both the Children’s Act and Muslim personal law, as it emphasises that all law, which includes the law regulating children’s rights, is subject to the Constitution and must meet certain constitutional standards.

Traditionally, children in South Africa were not recognised as individuals who were capable of being the holders of rights. This has, however, changed since the beginning of South Africa’s constitutional dispensation, as the Constitution emphasises the importance of the rights of children by ensuring that they have an extra layer of protection, which is provided through rights that apply specifically to them, in addition to the general rights to which they are already entitled.¹¹² According to Currie & De Waal children are entitled to all of the rights set out in the Bill of Rights, including the rights in the children’s rights clause.¹¹³

South African common law saw the parent-child relationship as the parent having authority or power over his/her child. Parental authority is defined as “the rights, powers, duties and responsibilities parents have in respect of their minor children and those

¹¹⁰ *Mabuza v Mbatha* [2003] 1 All SA 706 (C).

¹¹¹ *Mabuza* para 30.

¹¹² Bekink (2012) *PELJ* 178. See also Robinson (2003) *PELJ* 16. The rights in the Bill of Rights apply to all persons in the country, which includes children. S 28 of the Constitution then goes further by setting out rights that are specifically aimed at protecting children. In *Grootboom* (para 81) the court highlighted that, in the context of shelter, health care and basic nutrition, section 26 and 27 of the Constitution applies to all persons, which naturally includes children, while section 28 applies to children alone.

¹¹³ I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 43. There are, however, certain rights which children, because of their age, are unable to exercise. An example of a right to which children are not entitled is the right to vote. It is only South African citizens that have reached the age of majority that can exercise the right to vote in free and fair elections.

children's property."¹¹⁴ The definition of parental authority made it clear that the focus was traditionally on the rights and powers of the parent, rather than the rights of the child. The focus of the parent-child relationship is no longer on the authority of parents, but rather on the rights to which children are entitled and the responsibilities that parents must fulfil.¹¹⁵ This is made clear by section 28(1)(b) of the Constitution, which is centred on a right to which children are entitled, with the child's parents, despite having a role to play in the realisation of that right, not themselves acquiring any rights in relation to their children from the section in question.¹¹⁶

2 2 2 South African civil law

2 2 2 1 The persons responsible for the care of children

The child's right to parental care is entrenched in section 28(1)(b) of the Constitution. The aforementioned section provides as follows:

"Every child has the right ... (b) to family care, parental care, or to appropriate alternative care when removed from the family environment."¹¹⁷

According to the court in *Jooste v Botha*¹¹⁸ ("*Jooste*") section 28(1)(b) of the Constitution envisages three possible situations. Firstly, a situation where the child is part of a family, which can include the child's nuclear family, but can also be extended to include family members such as grandparents, aunts and uncles.¹¹⁹ Secondly, where a child is cared for by a single-parent in the absence of the traditional idea of a family environment.¹²⁰ Lastly, where the child has been removed from his or her family and has,

¹¹⁴ D Cronje & J Heaton *South African Family Law* 2 ed (2004) 265. The law now focuses on the rights and welfare of the child. While the parents of a child still have an important role to play, the child is seen as the central figure in the parent-child relationship, with the law emphasising the recognition and protection of children's rights.

¹¹⁵ *V v V* 176 para c.

¹¹⁶ M Pieterse "Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements" (2003) 1 *TSAR* 1 6.

¹¹⁷ **The Children's Act 38 of 2005 (the "Children's Act") reaffirms the importance of the s 28(1)(b) of the Constitution, stating that one of the objects of the Act is *inter alia* the realisation of the child's rights in section 28(1)(b).**

¹¹⁸ 2000 (2) SA 199 (T).

¹¹⁹ *Jooste* 208 para d-e. The nuclear family refers to a person's immediate family, which generally consists of the mother, father and their children. The extended family, on the other hand, includes, *inter alia*, a person's grandparents, aunts and uncles.

¹²⁰ *Jooste* 208 para e.

as a result, been placed in appropriate alternative care.¹²¹ The manner in which the court in *Jooste* described the rights set out in section 28(1)(b) of the Constitution suggests that it is only care by a single parent that constitutes parental care.¹²² This is, however, not the case, as the right to parental care entitles children to care from both biological parents, should this be possible.¹²³ While it can be argued that care by both the mother and father creates more of a family environment than care by a single parent, both of the aforementioned situations still constitute parental care.

The court in *Minister of Police v Mboweni and Another* (“*Mboweni*”)¹²⁴ held that section 28(1)(b) sets out three different rights that operate in the alternative, in the sense that if one of the rights is realised, a child does not acquire the remaining two rights.¹²⁵ It is important to distinguish between the different types of care set out in section 28(1)(b) of the Constitution, as different persons are responsible for providing parental, family and appropriate alternative care. Section 28(1)(b), by setting out a right to family and parental care, envisages a situation in which a child is cared for by members of his or her family within the family environment. In other words, the aforementioned section is aimed at the realisation of a situation where children are cared for by their biological parents or, should that not be possible, by members of their family.¹²⁶ The term parental care, by its very nature, suggests that the responsibility for the realisation of the right is that of the child’s biological parents. In *Heystek v Heystek*¹²⁷ (“*Heystek*”), however, the court held that it is not only the biological parents that are responsible for giving effect to the child’s right to parental care, but that such responsibility extends to a child’s stepparents, adoptive

¹²¹ *Jooste* 208 para e.

¹²² *Jooste* 208 para e. The court in *Jooste* seems to suggest that care by the nuclear family, which is essentially care by the child’s biological parents, constitutes family care rather than parental care.

¹²³ Skelton “Children” in *The Bill of Rights Handbook* 606. While parental care usually refers to care by the child’s biological parents, it is possible that the legal parents of the child are not biologically related to the child. This can be seen in the case of adoption, for example, as the child’s adoptive parents are the legal parents of the child, and are therefore responsible for the care of the child, despite not being biologically related to the child.

¹²⁴ 2014 (6) SA 256 (SCA).

¹²⁵ *Mboweni* para 10.

¹²⁶ *Mboweni* para 10.

¹²⁷ 2002 (2) SA 754 (T).

parents and foster parents.¹²⁸ Furthermore, with regards to the right to family care, the preamble of the Children's Act 38 of 2005 (the "Children's Act") recognises that it is not feasible to protect the rights of South African children in isolation from the family of the child.¹²⁹ Due to the fact that South Africa is a multicultural society within which various legal systems operate, families take different forms. Trying to rigidly define the persons who form part of South African families is thus an almost impossible task. The Children's Act, recognising that the composition of South African families differs from family to family, defines "family member" in a rather wide manner. This definition includes members of the child's extended family, as well as anyone that has developed a relationship with the child which is similar to a family relationship.

In addition to providing children with a right to family and parental care, section 28(1)(b) of the Constitution further grants children the right to appropriate alternative care, should there be an absence of the other two forms of care. The right to appropriate alternative care essentially operates as a last resort. In *Government of the Republic of South Africa and Others v Grootboom and Others* ("Grootboom")¹³⁰ the court stated that section 28(1)(b) of the Constitution envisages a situation where children first have a right to family or parental care, and only have a right to appropriate alternative care in the absence of family or parental care.¹³¹ The aforementioned approach in *Grootboom* was echoed by

¹²⁸ *Heystek 757* para c. The reasoning of the court in *Heystek* is supported by the provisions of the Children's Act, as an adoptive parent is included in the definition of parent in the Children's Act. While there are instances in which persons other than the child's biological parents are responsible for the realisation of the child's right to parental care, this study focuses on the child's biological parents.

¹²⁹ In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 31, the court held as follows:

"The importance of the family unit for society is recognised in the international human rights instruments ... when they state that the family is the 'natural' and 'fundamental' unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."

¹³⁰ 2001 (1) SA 46 (CC).

¹³¹ *Grootboom* para 77. In *Mboweni* (para 10) the court stated the right to appropriate alternative care operates on the basis that the child's family or parental care is absent. The constitutional right to appropriate alternative care envisages a situation in which children are either removed from the care of their parents or family, or do not have parents or family members to care for them. The removal of children from the care of their parents or family came under scrutiny in *C and Others v Department of Health & Social Development, Gauteng and Others* 2012 (2) SA 208

the court in *Minister of Health and Others v Treatment Action Campaign and Others* (“TAC”).¹³² The court in TAC emphasised that the state has a duty to ensure that children receive adequate care, in the event that there is an absence of family or parental care.¹³³ While the primary responsibility for the child’s care lies with the parents and family of the child, it is important to note that the state has a responsibility to foster a situation where children can be adequately cared for within the family environment. The court in TAC emphasised that merely because children are in the care of their parents, does not mean that the state has no obligations to fulfil in relation to those children.¹³⁴ The state therefore not only has the responsibility to foster a situation in which children can be cared for in a family environment, but also has additional responsibilities towards children who are cared for by uncommitted and/or indigent parents. If the parents or family of the child have not fulfilled their primary responsibility, or the fulfilment of such responsibility is not in the child’s best interests, the state is responsible for the child’s care.¹³⁵ Section 28(1)(b) is thus aimed at ensuring that the parent-child relationship is not interfered with by the

(CC) (“C”). In this case children were removed from the care of their parents because it was thought that the care those children received from their parents was inadequate and not in their best interests. At the time, it was possible, in terms of ss 151 and 152 of the Children’s Act 38 of 2005, to remove children from the care of their parents, without such decision being subject to automatic judicial review. The court in C emphasised the fact that because the right to family and parental care are the primary rights of s 28(1)(b) of the Constitution, with the right to appropriate alternative care being the secondary right, the limitation of the former rights requires proper consideration.

¹³² 2002 (5) SA 721 (CC).

¹³³ TAC para 78.

¹³⁴ TAC paras 76-79.

¹³⁵ In *Grootboom* (para 77) the court stated that it is the primary responsibility of the child’s parents to provide shelter for the child, and only if the child’s parents or family are unable to provide such shelter does the state incur the responsibility to ensure that the aforementioned right is realised. It is, however, important to note that the state always has a responsibility to foster a situation where children can be adequately cared for within the family environment.; See also *South Africa’s periodic country report on the United Nations Convention on the Rights of the Child* 43. According to the court in C, s 150 of the Children’s Act is aimed at the realisation of the right to appropriate alternative care. The aforementioned section sets out the circumstances in which a child is in need of care and protection, and includes, *inter alia*, situations where the child has been subjected to maltreatment and degradation from a parent or guardian, and where being in the custody of a parent or family member poses a serious risk to the mental and physical well-being of the child. The aforementioned situations are examples of situations where the child’s right to family or parental care has not been realised, and the state is thus required to intervene in order to provide appropriate alternative care.

different branches of government, unless such interference would be in the child's best interests.¹³⁶

2 2 2 2 The content of the right to parental care

The Children's Act confirms the importance of section 28(1)(b) of the Constitution, stating that one of its main objectives is to give effect to the constitutional rights of children, specifically the right to parental care.¹³⁷ There is, however, no precise definition of the right to parental care in either the Constitution or the Children's Act, but the term "care" has been defined in section 1 of the Children's Act, and this definition can be used as a guide to understanding the content of the term parental care.¹³⁸ The definition of care in the Children's Act envisages a situation in which the persons responsible for the care of a child provide for, *inter alia*, the child's financial and emotional well-being, education and shelter, as well as ensure that the child is protected from maltreatment and abuse. Many of the aspects that fall under the definition of care in the Children's Act are themselves constitutional rights of the child, separate from the child's right to parental care, for example section 28(1)(c) and (d) of the Constitution provides that every child has the right to *inter alia* basic nutrition, shelter and health care services,¹³⁹ as well as the

¹³⁶ See 4 5 below.

¹³⁷ S 2 of the Children's Act.

¹³⁸ In *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) (para 20) the court stated that the definition of care in the Children's Act adumbrates the concept of family and parental care. Care is defined in s 1 of the Children's Act as follows:

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

See 3 2 4 1 1 below for a full discussion of care in terms of the Children's Act.

¹³⁹ S 28(1)(c) of the Constitution.

right to be protected from maltreatment, neglect, abuse or degradation.¹⁴⁰ According to the court in *Grootboom*, section 28(1)(b) and (c) of the Constitution should be read together, as the former sets out the person(s) who is entrusted with the responsibility of caring for a child, while the latter sets out what such care entails.¹⁴¹ Robinson is similarly of the opinion that the right to parental care must be understood in conjunction with these sections/paragraphs of section 28 as they give content to the right to parental care.¹⁴²

It is generally accepted that the right to parental care consists of both a tangible and an intangible aspect, with the former providing for the financial, and otherwise tangible, needs of the child, and the latter referring to the emotional and psychological support and guidance that a child requires during his or her development.¹⁴³ The fact that the right to parental care goes beyond mere monetary support from the child's parents was confirmed in *M and Another v Minister of Police* ("M"),¹⁴⁴ where the court stated as follows:

"...From the time of the birth of a child there are numerous duties which parents have to perform and where money is not a factor. These would include teaching the child to eat, to put on clothes, to tie shoes, to use ablution facilities, to walk, to talk, to respect, to express appreciation, to do homework and perform house chores, and to be present and supportive of the child during his/her participation in sport and art activities... These parental care duties are performed to assist the child in preparing for life's challenges. They could be referred to as parental guidance, advice, assistance, responsibility, or simply parenting or child nurturing."¹⁴⁵

It is important to note that the Constitution provides children with a right to parental care, and not merely paternal or maternal care. The term parental care does not heighten the status of either biological parent, and one parent should therefore not be favoured over another based on the gender and/or marital status of that parent.¹⁴⁶ The right to

¹⁴⁰ S 28(1)(d) of the Constitution.

¹⁴¹ *Grootboom* para 76.

¹⁴² Robinson (2003) *PELJ* 26.

¹⁴³ *Jooste* 201 para e. See also A Louw "The constitutionality of a biological father's recognition as a parent" (2010) 13 *PELJ* 156 187.

¹⁴⁴ 2013 (5) SA 622 (GNP).

¹⁴⁵ *M* para 22.

¹⁴⁶ Louw (2010) *PELJ* 188.

parental care thus envisages a situation where both of the child's parents are entrusted with the responsibility to care for the child, should this be possible.¹⁴⁷

2 2 3 South African customary law

2 2 3 1 The recognition of customary law in post-apartheid South Africa

For many years, customary law in South Africa was viewed as subordinate to the Western systems of law that operated in the country.¹⁴⁸ Before the commencement of South Africa's democratic era, customary law was recognised, but the common law was seen as the basic, dominant, law of the country.¹⁴⁹ Since the commencement of the Constitution, however, customary law has received greater recognition and protection than was previously the case. The Constitution, in section 30, recognises the right of an individual to participate in the cultural life of his or her choice, as long as the manner in which the aforementioned right is exercised is consistent with, and does not infringe upon, the other rights set out in the Bill of Rights.¹⁵⁰ Furthermore, section 31 of the Constitution provides as follows:

¹⁴⁷ In *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 605 (D) (para 20) the court stated that, more often than not, it is in a child's interests that he or she is cared for by two parents (or guardians), rather than only one. According to the court, two parents or guardians is preferable, because, in the case of an emergency, for example, should one parent or guardian be unavailable, the other parent or guardian can be approached.

¹⁴⁸ T W Bennet "Legal pluralism and the family in South Africa: lessons from customary law reform" (2011) 25 *Emory International Law Review* 1029 1034. See also JC Bekker, C Rautenbach & A E Tshivhase "Nature and Sphere of African Customary Law" in C Rautenbach, *Introduction to Legal Pluralism in South Africa* 5th ed (2018) 19 19.

¹⁴⁹ Bennet (2011) *Emory International Law Review* 1034. An example of the recognition of customary law during the apartheid era was the application of the repugnancy clause, which was included in various pieces of legislation dealing with customary law pre-1994. The Black Administration Act 38 of 1927, in section 11, provided that "it shall be in the discretion of the Commissioner's Courts in all suits or proceedings between Blacks... to decide such questions according to Black law... provided that such Black law shall not be opposed to the principles of public policy or natural justice"; See also JC Bekker & IA Van der Merwe "Proof and ascertainment of customary law" (2011) 26 *SAPL* 115 116. The repugnancy clause made the application of customary law subject to the rules of natural justice, equity and morality. The purpose of this was to ensure that customary law rules were not contrary to the accepted standards of the dominant Western legal systems.

¹⁵⁰ TW Bennet *Customary Law in South Africa* (2004) 78. S 30 of the Constitution provides as follows:

"Everyone has the right...to participate in the cultural life of their choice, but no one exercising [this] right may do so in a manner inconsistent with any provision of the Bill of Rights."

“(1) Persons belonging to a cultural...community may not be denied the right, with other members of that community –
 (a) to enjoy their culture, practise their religion and use their language; and
 (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society”

Sections 30 and 31 of the Constitution operate in conjunction with one another, with the former providing for an individually recognised right to culture, while the latter recognises the right in a group and community context.¹⁵¹ The right to culture is further recognised in various international instruments that South Africa has signed and ratified. The International Covenant on Civil and Political Rights (“ICCPR”)¹⁵² provides, in article 1, that “[a]ll peoples have the right of self-determination. By virtue of that right they [may]...freely pursue their economic, social and cultural development.” Article 27 of the ICCPR further recognises and protects an individual’s right to culture, providing as follows:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

Bennet is of the opinion that because article 27 of the ICCPR refers to minorities, it may not be relevant in the context of customary law in South Africa.¹⁵³ This is due to the fact that a large portion of South Africa’s black population lives according to customary law, and is thus not necessarily an ethnic or cultural group that can be classified as a minority.¹⁵⁴ It has, however, been argued that the inclusion of the right to culture in the

¹⁵¹ Bennet *Customary Law in South Africa* 87.

¹⁵² The International Covenant on Civil and Political Rights (adopted on 19 December 1966, and entered into force on 23 March 1976) A/RES/2200. The ICCPR was signed and ratified by South Africa on 3 October 1994 and 10 December 1998 respectively.

¹⁵³ Bennet *Customary Law in South Africa* 84.

¹⁵⁴ Bekker, Rautenbach & Tshivhase “Nature and Sphere of African Customary Law” in *Introduction to Legal Pluralism* 21, 23. It can be argued that the group of persons living according to customary law can be sub-divided because they form part of smaller cultural groups. There are, however, general characteristics that apply across all of the different cultural groups, resulting in there not always being a massive distinction between these groups.

Constitution was done to give effect to article 27 of the ICCPR.¹⁵⁵ Furthermore, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹⁵⁶ protects the right of an individual to take part in cultural life.¹⁵⁷ The right to culture is thus not only a constitutionally recognised right in South Africa, but it is also a right that is recognised in various international instruments that the country has ratified.

The right to participate in the culture of one’s choice is important for the purposes of recognising customary law, as customary law is regarded as an expression of the culture of the persons, groups of persons and communities who follow it.¹⁵⁸ Furthermore, the Constitution now specifically recognises and envisages a place for customary law in post-apartheid South Africa.¹⁵⁹ In *Alexkor Ltd and Another v Richtersveld Community and Others* (“*Alexkor*”)¹⁶⁰ the Constitutional Court stated that the force and validity of customary law in post-apartheid South Africa, unlike in the past, is derived specifically from the Constitution.¹⁶¹ In this regard, section 211(3) of the Constitution provides as follows:

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

In addition, section 39(3) provides that the Constitution recognises the rights and freedoms that are conferred on individuals by customary law, as long as such rights and freedoms are consistent with the provisions of the Bill of Rights. As a result of the constitutional recognition that customary law receives in post-apartheid South Africa, it now **operates together with the** common and civil law within the country’s legal

¹⁵⁵ E Grant “Human Rights, Cultural Diversity and Customary Law in South Africa” (2006) 50 *JAL* 24.

¹⁵⁶ The International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, and entered into force on 3 January 1976) E/C/12/GC/20. The ICESCR was signed and ratified by South Africa on 3 October 1994 and 12 January 2015 respectively.

¹⁵⁷ Article 15 of the ICESCR. See also Grant (2006) *JAL* 4.

¹⁵⁸ ES Nwauche “Affiliation to a new customary law in post-apartheid South Africa” (2015) 18 *PELJ* 569 569.

¹⁵⁹ *Bhe and Others v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) BCLR (CC) para 42.

¹⁶⁰ 2004 (5) SA 460 (CC).

¹⁶¹ *Alexkor* para 51.

framework.¹⁶² In *Alexkor* it was stated that “the Constitution acknowledges the originality and distinctiveness of [customary law] as an independent source of norms within the legal system.”¹⁶³ In other words, customary law is now, in theory at least, recognised, protected, applied and subject to the Constitution in the same way as the common and civil law are.

2 2 3 2 Official and living customary law

Even though customary law is now an officially recognised legal system, the various elements of customary law are not comprehensively regulated through legislation in the same way as the country’s civil law is.¹⁶⁴ This is due to the fact that there are various systems of customary law that exist within South Africa, and while there are general principles that apply irrespective of the customary group in question, the content of certain aspects differ depending on the rule, issue or African cultural group being considered.¹⁶⁵ In *Mabena v Letsoalo*¹⁶⁶ (“*Mabena*”) the court stated that customary law does not only consist of the rules that have been codified by the drafters of legislation, but also consists of living customary law, which is the law actually observed by African communities.¹⁶⁷ South African customary law can thus be split into official customary law and living customary law.¹⁶⁸ Official customary law refers to the aspects of customary law that have been codified in textbooks and legislation, for example, while living customary law, on the other hand, refers to the unwritten law adhered to by individuals who live according to

¹⁶² Bennet (2011) *Emory International Law Review* 1035. It is, however, generally accepted that if there is a conflict between customary law and the provisions of the Children’s Act, the Children’s Act will prevail; See A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 122 & 1 1 2 2 above.

¹⁶³ *Alexkor* para 51.

¹⁶⁴ Bekker & Rautenbach, Tshivhase “Nature and Sphere of African Customary Law” in *Introduction to Legal Pluralism* 19.

¹⁶⁵ 19.

¹⁶⁶ 1998 (2) SA 1068 (T).

¹⁶⁷ *Mabena* 1074 para h-i. See also *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) para 46.

¹⁶⁸ Bekker, Rautenbach & Tshivhase “Nature and Sphere of African Customary Law” in *Introduction to Legal Pluralism* 30-31. See also Bennet *Customary Law in South Africa* 29.

customary law.¹⁶⁹ Living customary law constantly changes over time in order to adapt to the needs of the community, and is thus a lot more flexible than official customary law.¹⁷⁰

2 2 3 3 Customary family law and the right to parental care

While South Africa's common and civil law have traditionally focused on the nuclear family, customary law views society, and to a certain extent the law, from the perspective of the cultural group and extended family, rather than the individual.¹⁷¹ In many customary law systems it is the cultural group that is seen as a legal entity, not the individual as is the case in terms of South Africa's civil law.¹⁷² The civil law's focus on the nuclear family has resulted in the raising of a child being solely the responsibility of the child's biological parents. In customary law, however, it is the child's parents, as well as members of the extended family, that are seen as being responsible for the child's upbringing.¹⁷³

It is submitted by Boezaart that the emphasis that South African customary law places on the family creates the impression that children do not always receive adequate care and protection because of the fact that the primary concern is the welfare of the family, and not the welfare of the child.¹⁷⁴ While the parent-child relationship in terms of the country's civil law is centred around the rights of the child, Boezaart is of the opinion that in terms of South African customary law the focus is on the rights that the family has in

¹⁶⁹ Bennet *Customary Law in South Africa* 29.

¹⁷⁰ *Alexkor* para 53. Determining the exact content of living customary law often proves problematic for South African courts. Langa DCJ perfectly summarised the problem that may arise when dealing with living customary law in *Bhe* (para 109), where he stated that "[t]he difficulty lies not so much in the acceptance of the notion of "living" customary law...but in determining its content"

¹⁷¹ S Burman "Allocating parental rights and responsibilities in South Africa" (2005) 39 *Family Law Quarterly* 429 430. See also Bennet *Customary Law in South Africa* 296.

¹⁷² Bekker, Rautenbach & Tshivhase "Nature and Sphere of African Customary Law" in *Introduction to Legal Pluralism* 27. See also T Boezaart "Building bridges: African customary family law and children's rights" (2013) 6 *International Journal of Private Law* 395 398.

¹⁷³ R Songca "Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?" (2011) 44 XLIV *CILSA* 340 352. The importance of the extended family in relation to children, which is so integral to South African customary law, has now been incorporated into the Children's Act.

¹⁷⁴ RLK Ozah & ZM Hansungule "Upholding the best interests of the child in South African customary law" in T Boezaart *Child Law in South Africa* 2 ed (2018) 283 283-284.

relation to the child, rather than the other way around.¹⁷⁵ In this regard, it is important to note that there is no express recognition of the right to parental care in South African customary law. The mere fact that the right to parental care is not expressly recognised does not, however, mean that children are not entitled to, and do not receive, the care that they require for their development. Children are not only seen as the responsibility of their parents in terms of customary law, as they are deemed to belong to the community into which they are born.¹⁷⁶ Children therefore often receive care from their parents, their extended family and members of the community.¹⁷⁷

The Constitution sets out the right to family and parental care as two distinct rights, separate from one another.¹⁷⁸ It appears, however, that the aforementioned separation does not exist in customary law. The right to family and parental care do not operate as alternatives to one another, as it is generally accepted that parents and their family members will care for children.¹⁷⁹ Children may thus look to members of their nuclear and extended families to give effect to their constitutional right to parental care.¹⁸⁰ By incorporating the extended family, the right to family care is realised in conjunction with the right to parental care.¹⁸¹ It could thus be argued that children living according to customary law, in theory, receive greater, or more extensive, care and protection than is envisaged by the Constitution.¹⁸²

¹⁷⁵ Ozah & Hansungule “Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* (2018) 284. See also Boezaart (2013) *International Journal of Private Law* 398; Bennet *Customary Law in South Africa* 295.

¹⁷⁶ Songca (2011) *XLIV CILSA* 352.

¹⁷⁷ 352.

¹⁷⁸ *Mboweni* para 10.

¹⁷⁹ C Himonga “African customary law and children’s rights: intersections and domains in a new era” in J Sloth-Nielsen *Children’s Rights in Africa: A Legal Perspective* (2008) 73 77

¹⁸⁰ 79.

¹⁸¹ 79.

¹⁸² See *Bhe* para 42; *Alexkor* para 51. As previously mentioned, customary law is expressly recognised by, and is subject to, the Constitution. It therefore seems logical that children living according to the customary law are entitled to the rights set out in the Constitution to the same extent as, for example, children born from civil marriages. Should a child living according to customary law experience an absence of family and/or parental care, the state has the responsibility to ensure that the child receives appropriate alternative care, as is provided for by s 28(1)(b) of the Constitution.

2 2 4 Muslim personal law

2 2 4 1 The right to religious freedom: a constitutionally recognised right

The Constitution specifically recognises a right to religious freedom in post-apartheid South Africa.¹⁸³ Currie and de Waal describe the right to freedom of religion as containing two components, namely “an equal treatment component and a free exercise component.”¹⁸⁴ Section 9(3) of the Constitution recognises and protects the equality component of the right to religious freedom, by providing that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... religion”.¹⁸⁵ The equality component prevents, or attempts to prevent, government practices that, *inter alia*, prejudice a specific religion, or favour one religion over, or to the detriment of, another.¹⁸⁶ Section 31 of the Constitution similarly recognises the right to religious freedom and provides that “[p]ersons belonging to a...religious...community may not be denied the right, with other members of that community to...practice their religion”. Section 31 of the Constitution sets out the right of an individual, and a community, to practise the religion of its choice, but highlights the fact that the manner in which the right is exercised must be consistent with the other rights in the Bill of Rights.

Furthermore, section 15(3) of the Constitution also allows for the implementation of legislation that recognises systems of religious, personal and family law.¹⁸⁷ Section 15(3) provides as follows:

- “(a) This section does not prevent legislation recognising—
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution”

¹⁸³ S 15 of the Constitution.

¹⁸⁴ Currie & de Waal *The Bill of Rights Handbook* 315. See also G Du Plessis “Apartheid, religious pluralism, and the evolution of the right to religious freedom in South Africa” (2016) 40 *Journal of Religious History* 237 248.

¹⁸⁵ Du Plessis (2016) *Journal of Religious History* 40. S 9 of the Constitution specifically prohibits unfair discrimination on the basis of religion, thereby protecting the equal treatment component of the right to religious freedom.

¹⁸⁶ Du Plessis (2016) *Journal of Religious History* 40.

¹⁸⁷ South African Law Reform Commission *Islamic marriages and related matters* Project 59 (2003) 1.

It must be noted that even though the Constitution allows for the recognition and implementation of laws based on religious systems, personal religious laws are not officially recognised in South Africa.¹⁸⁸ In order for Muslim personal law to be officially recognised, it must comply with the provisions of the Bill of Rights.¹⁸⁹ Despite the fact that Muslim personal law is not an officially recognised legal system, courts have changed the attitude they had regarding Muslim personal law during apartheid and, as a result, have granted certain aspects of Muslim personal law legal recognition.¹⁹⁰

A question that must be considered is whether the non-recognition of Muslim personal law results in the laws of the aforementioned legal system not being subject to the Constitution and, as a result, the Bill of Rights. In this regard, section 8 of the Constitution provides that “[t]he Bill of Rights applies to all law.” It must, therefore, be determined whether Muslim personal law falls within the definition of “all law”, considering the fact that it is not legally recognised. Rautenbach strongly disagrees with the point of view that Muslim personal law does not fall within the scope of “law” and is thus not subject to the provisions of the Bill of Rights, as that point of view, according to her, fails to recognise

¹⁸⁸ W Amien, N Moosa & C Rautenbach “Religious, Personal and Family Law Systems in South Africa” in C Rautenbach, *Introduction to Legal Pluralism in South Africa* 5 ed (2018) 61 64. See also C Rautenbach, F Janse Van Rensburg & GJ Pienaar “Culture (and Religion) in constitutional adjudication” (2003) 6 *PELJ* 13-14; In *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* 2018 (6) SA 598 (WCC) (para 252) (“*Women’s Legal Centre Trust*”) the court held “that the state is obliged by s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in ss 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation ... legislation to recognise marriages solemnised in accordance with the tenets of Sharia law (Muslim marriages) as valid marriages”. According to the court, the executive failed to fulfil their constitutional obligations and, as a result, the court ordered that the President and cabinet together with parliament, enact legislation recognising Muslim marriages as valid marriages.

¹⁸⁹ N Moosa “Muslim personal laws affecting children: diversity, practice and implications for a new Children’s Code for South Africa” (1998) *SALJ* 479 482.

¹⁹⁰ C Rautenbach “Some comments on the current (and future) status of Muslim personal law in South Africa” (2004) 7 *PELJ* 96 97. See also W Amien “The recognition of religious and customary marriages and non-marital domestic partnerships in South Africa” in J Eekelaar & R George (eds) *Routledge Handbook of Family Law and Policy* (2014) 26 27. During apartheid potentially polygynous marriages were denied recognition and, as a result, Muslim marriages were not legally recognised. Muslim marriages have, however, now received limited legal recognition and, as a result of the *Women’s Legal Centre Trust* case, will soon be legislatively recognised as valid marriages

the importance of the Constitution as the supreme law of post-apartheid South Africa.¹⁹¹ According to Rautenbach, the fact section 15 of the Constitution makes provision for the recognition of “systems of religious, personal or family law...is a clear indication that the [C]onstitution writers saw these systems as systems of “law” and, therefore, it may be argued that “all law” in section 8(1) of the 1996 Constitution also refers to the [aforementioned] law systems”.¹⁹²

Courts have started giving legal recognition to certain aspects of Muslim marriages, as a result of the provisions of the Bill of Rights. In *Daniels v Campbell NO and Others* (“*Campbell*”)¹⁹³ the Constitutional Court held that the surviving spouse in a *de facto* monogamous Muslim marriage was included in the word “spouse” and “survivor” in the Intestate Succession Act 81 of 1997 and the Maintenance of Surviving Spouses Act 27 of 1990 respectively.¹⁹⁴ Similarly, in *Hassam v Jacobs NO and Others* (“*Hassam*”)¹⁹⁵ the court extended the application of the provisions of the Intestate Succession Act to spouses in a polygynous Muslim marriage.¹⁹⁶ Furthermore, in *Moosa No and Others v Harneker and Others*¹⁹⁷ (“*Moosa* (HC)”) the court held that section 2C(1) of the Wills Act 7 of 1953 (the “Wills Act”) fails to recognise the right of a surviving spouse, in a polygamous Muslim marriage, to benefit from the will of her deceased husband and, as a result, is constitutionally invalid.¹⁹⁸ This declaration of constitutional invalidity was confirmed by the Constitutional Court in *Moosa NO and Others v Minister of Justice and Others*¹⁹⁹ (“*Moosa* (CC)”).²⁰⁰ The provisions of the Bill of Rights played a significant role

¹⁹¹ C Rautenbach “Muslim personal law and the meaning of “law” in the South African and Indian Constitutions” (1999) 2 *PER* 1 3.

¹⁹² 4.

¹⁹³ 2004 (5) SA 331 (CC).

¹⁹⁴ *Daniels* para 40.

¹⁹⁵ 2009 (5) SA 573 (CC).

¹⁹⁶ *Hassam* para 57. Furthermore, as recently as 2018, in *Women’s Legal Centre Trust* (para 252) the court ordered that legislation recognising Muslim marriages as valid marriages be enacted.

¹⁹⁷ 2017 (6) SA 425 (WCC).

¹⁹⁸ *Moosa* (HC) para 39.

¹⁹⁹ 2018 (5) SA 13 (CC).

²⁰⁰ *Moosa* (CC) para 21. The Constitutional Court, confirming the order of the Western Cape Division of the High Court, held as follows:

“Section 2C(1) of the Wills Act 7 of 1953 is to be read as including the following italicised words:

‘If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. *For the purposes of this subsection, a*

in the aforementioned cases. It thus seems unlikely that, despite the fact that the Constitution can be used to develop and give legal recognition to areas of Muslim personal law, Muslim personal law is not regarded as law that is subject to the Constitution. It thus appears that South African courts treat Muslim personal law, like all law in the Republic, as being subject to the provisions of the Constitution.

2 2 4 2 The parent-child relationship in terms of Muslim personal law

The parent-child relationship in terms of Muslim personal law is not specifically centred on the rights of the child.²⁰¹ This does not, however, mean that the rights of children are not recognised. Muslim personal law sees the parent-child relationship as a relationship that is complementary in nature, in the sense that both parents and children have rights and duties in respect of one another.²⁰² It is important to note that Muslim personal law, like customary law, does not expressly recognise the child's constitutionally entrenched right to parental care. Despite the lack of express recognition of the right to parental care, it is generally accepted that children raised in accordance with Muslim personal law have the right to be cared for by both of their parents, provided that such children are born to married parents.²⁰³ With regards to the care that children born to married parents receive in terms of Muslim personal law, Moosa provides that "[c]hildren in Islam are ideally ... for mothers as home-makers to love and nurture and fathers to provide for materially, presumably without any distinction between male and female children."²⁰⁴ In the event that a child is born to unmarried parents, however, it is only the biological mother that has

"surviving spouse" includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.'

²⁰¹ Moosa (1998) SALJ 483. See also UM Assim *In the best interest of children deprived of a family environment: A focus on Islamic Kafalah as an alternative care option* University of Pretoria: LLM dissertation (2009) 36.

²⁰² Moosa (1998) SALJ 479. See also UM Assim *In the best interest of children deprived of a family environment: A focus on Islamic Kafalah as an alternative care option* University of Pretoria: LLM dissertation (2009) 36.

²⁰³ Moosa (1998) SALJ 489.

²⁰⁴ Moosa (1998) SALJ 481. See also South African Law Commission *The Review of the Child Care Act* Project 110.

parental authority over the child, and she is therefore solely responsible for the child's care.²⁰⁵

The term parental authority is still used in Muslim personal law, and consists of custody, guardianship and maintenance.²⁰⁶ Although it is generally accepted that children born to married parents have the right to be raised by both of their parents, the parents acquire different elements of parental authority. The biological father is responsible for the maintenance and guardianship of the child, while custody is generally seen as the responsibility of the child's mother.²⁰⁷ The responsibility of the father to provide for the maintenance of the child includes providing for the basic necessities of the child, such as, *inter alia*, food, clothing and shelter.²⁰⁸ These necessities which the father is obligated to provide for are not only a responsibility that the father has in terms of Muslim personal law, but is also a right to which the child is entitled in terms of section 28(1)(c) of the Constitution.²⁰⁹ As previously mentioned, the court in *Grootboom* held that section 28(1)(c) sets out the content of the care envisaged by section 28(1)(b) of the Constitution.²¹⁰ Therefore, the fact that the father has the responsibility to provide, and the child conversely has the right to be provided with, *inter alia*, food, clothing and shelter, goes some way to ensuring that the child's right to parental care is realised. Furthermore, the mother, by having custody of the child, is entrusted with the care of the child on a daily basis, which includes seeing to the emotional development of the child.²¹¹ It thus appears that the parents of children who are the product of a marriage are both responsible, albeit separately, for providing for the financial and emotional well-being of their children.

²⁰⁵ E Moosa "The child belongs to the bed: illegitimacy and Islamic law" in S Burman & E Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 171 175.

²⁰⁵ 175.

²⁰⁶ Moosa (1998) SALJ 490. See also N Moosa *An overview of post-divorce support for Muslim Children in the context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill* (2012) 283 288.

²⁰⁷ Moosa (1998) SALJ 489-490.

²⁰⁸ Moosa (1998) SALJ 490. Although the child's maintenance is seen as the responsibility of the father, should he be unable to fulfil this obligation, it is generally accepted that the mother has a duty to step in.

²⁰⁹ Moosa (1998) SALJ 490.

²¹⁰ *Grootboom* para 76.

²¹¹ Moosa (1998) SALJ 490.

It can thus be concluded that even though Muslim personal law does not expressly recognise the constitutionally entrenched right to parental care, the realisation of the aforementioned right is still possible. The parents of children born of a recognised Muslim marriage, by properly fulfilling the responsibilities that Muslim personal law envisages for them, provide for the financial and emotional needs of their children, thereby ensuring the realisation of the constitutionally entrenched right to parental care. In the case of children born to unmarried parents, however, it is only the mother that has parental authority over her child and, as a result, all the aspects of parental care must be provided for by the child's mother.²¹² It therefore appears that children born to unmarried parents only ever receive a right to maternal care, as they are deemed to have no legal relationship with their father, and he conversely has no responsibilities towards them.²¹³

2 3 The right to parental care in international law

2 3 1 International law in South Africa

During the apartheid era, international law received little to no legal recognition in South Africa, with the apartheid government often violating the accepted standards of the international community.²¹⁴ According to Olivier, the fact that international law now receives constitutional recognition signifies that South Africa has accepted the standards of the international community.²¹⁵ The Constitution now emphasises the important role that international law has to, can and will play in post-apartheid South Africa. In this regard, section 39(2) of the Constitution places an obligation on courts to consider international law when interpreting the provisions of the Bill of Rights.²¹⁶ Furthermore,

²¹² Moosa "The child belongs to the bed: Illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* (1992) 173.

²¹³ 173.

²¹⁴ M Olivier "Interpretation of the constitutional provisions relating to international law" (2003) 6 *PELJ* 26 26. See also J Dugard "International law and the South African constitution" (1997) 8 *European Journal of International Law* 77 77; B Meyersfeld "Domesticating international standards: the direction of international human rights law in South Africa" 5 *Constitutional Court Review* 399 399-401

²¹⁵ Olivier (2003) *PELJ* 26. According to Dugard, ((1997) *European Journal of International Law* 77) international law is one of the pillars of post-apartheid South Africa.

²¹⁶ In *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) (para 35) it was stated that both binding and non-binding international instruments have interpretative value in South Africa.

section 233 of the Constitution, signifying an acceptance of the standards of the international community, provides as follows:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

Section 231 of the Constitution sets out the process through which international treaties become binding in South Africa. According to Section 231, an international instrument binds the Republic after it has been ratified by the executive, and the National Assembly and National Council of Provinces have subsequently approved it. It must be noted that once the National Assembly and National Council of Provinces have approved an international instrument, it only binds the Republic at international level.²¹⁷ The fact that international treaties bind South Africa internationally means that those international instruments do not provide the citizens of the country with enforceable rights. In order for an international instrument to become law in the Republic, it must be domesticated into the country’s national legislation.²¹⁸ In this regard, Marbery states that individuals cannot hold the state liable for the failure to realise the rights set out in an international instrument, unless the international instrument has been incorporated into South Africa’s domestic law.²¹⁹

International children’s rights law has played a significant role in ensuring that the rights of South African children are recognised and protected. In *Bhe and Others v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa (“Bhe”)*²²⁰ the court highlighted the important interpretive value of the international law on children’s rights when the rights set out in section 28 of the Constitution are considered.²²¹

²¹⁷ Marbery “The United Nations Convention on the Rights of the Child: maintaining its value in international and South African child law” in *Child Law in South Africa* 324.

²¹⁸ S 231(4) of the Constitution. Meyersfeld (*Constitutional Court Review* 406) provides that the provisions of international instruments do not become domestic law in South Africa until they are enacted as such by the legislature.

²¹⁹ Marbery “The United Nations Convention on the Rights of the Child: maintaining its value in international and South African child law” in *Child Law in South Africa* 324.

²²⁰ 2005 (1) BCLR (CC).

²²¹ *Bhe* para 55.

Furthermore, in *Jooste* the court stated that the children's rights clause should be interpreted in terms of the provisions of international instruments dealing with the rights of the child.²²² The United Nations Convention on the Rights of the Child ("CRC")²²³, for example, has played an important role in shaping the Constitution's children's rights clause and, having been signed, ratified and domesticated, its provisions are binding on the Republic, resulting in it being an international instrument that must be strongly considered when dealing with the enforcement or realisation of children's rights in South Africa.²²⁴ The court in *Grootboom* highlighted the relationship between the CRC and the children's rights clause, stating as follows:

"The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon State parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the State to take steps to ensure that children's rights are observed."²²⁵

Furthermore, the Children's Act lists the fulfilment of the obligations regarding the welfare of children, arising from international instruments that South Africa has ratified, as one of its primary objectives.²²⁶ It can thus be seen that since the emergence of South Africa's democratic era, international law has played, and continues to play, an integral role in South Africa's jurisprudence, especially when dealing with the rights of children. For this reason, various international instruments pertaining to children's rights will be scrutinised.

2 3 2 The right to parental care in international law

In order to properly understand the constitutionally entrenched right to parental care, it is necessary to consider the international instruments from which the aforementioned right was arguably derived. Doing so will allow for the determination of whether the current

²²² *Jooste* 202 para i-j.

²²³ The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The CRC was signed and ratified, by South Africa, on 29 January 1993 and 16 June 1995 respectively.

²²⁴ A Skelton "South Africa" in T Liefwaard & J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 13 14.

²²⁵ *Grootboom* para 75.

²²⁶ S 2 of the Children's Act.

recognition and protection that South Africa affords the child's right to parental care is in line with the standard set out in the international instruments that the country has ratified.

While the CRC does not explicitly reference the child's right to parental care, the African Charter on the Rights and Welfare of the Child ("ACRWC"),²²⁷ just like the Constitution, expressly recognises the child's right to parental care in article 19(1).²²⁸ The CRC does, however, in article 7, provide that each child has the right to be cared for by his or her parents, should this be possible. Similarly, the ACRWC views the parents of the child as having the primary obligation to see to the development and upbringing of the child.²²⁹ The CRC further sets out the responsibility that the state has in relation to the care and well-being of children in articles 18 and 20. These articles set out the circumstances under which the state is to take responsibility for the child's care, as well as the assistance with which the state is required to provide parents or guardians. Should a child not be cared for in a family environment or should continued care in the family environment not be in the child's best interests, the state has a duty to step in.²³⁰ Furthermore, article 18 sets out that states must provide parents with the assistance and tools that they require in order to properly fulfil their parental responsibilities and rights. In other words, it is the responsibility of states to provide the infrastructure that parents require in order to raise and adequately care for their children.²³¹ It is thus clear that both the CRC and ACRWC recognise the responsibility of the child's parents as well as that of the state in relation to the care of children. South African courts have recognised the importance of the aforementioned international instruments. The court in *Grootboom*, for

²²⁷ The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49. The ACRWC was signed and ratified, by South Africa, on 10 October 1997 and 7 January 2000 respectively

²²⁸ Article 19(1) of the ACRWC states that "every child shall be entitled to the enjoyment of parental care and protection".

²²⁹ Article 20(1) of the ACRWC. Both the CRC and ACRWC view the primary responsibility of caring for a child as the responsibility of the child's parents.

²³⁰ Article 20(1) of the CRC states:

"A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

²³¹ Article 18(2) of the CRC provides as follows:

"States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children."

example, specifically referred to the CRC in order to determine the extent of the state's obligations in terms of section 28 of the Constitution.²³² The court stated that the extent of the state's obligations must be interpreted in light of the international instruments binding upon South Africa, which includes both the CRC and the ACRWC.²³³

The South African position, regarding who bears the primary and secondary responsibility to care for the child, more or less mirrors the international law position. Both South African domestic law and the aforementioned international instruments view the child's parents or family members, as the case may be, as the persons primarily responsible for the child's care, with the state only having such responsibility in the absence of the aforementioned care. South Africa's legal position is thus *prima facie* in line with the standard of care envisaged by the aforementioned international instruments. In the event, however, that only one parent acquires parental responsibilities and rights, as a result of factors completely out of the control of the child, it becomes less clear if South Africa recognises a right to parental care for all children, as is envisaged by international law, or only a right to maternal care.

2 4 Conclusion

Children, because of their age, are a vulnerable group in society, who require special care in order to facilitate their growth and development during the early years of their life.²³⁴ The right to family, parental and appropriate alternative care ensures that children are entitled to receive at least some form of care, whether that care is from their parents, family members, or state provided care.²³⁵ Section 28(1)(b) of the Constitution envisages the right to family and parental care as the primary rights to which children are entitled, with the parents and/or the family members of those children bearing the primary responsibility for the care of those children.²³⁶ The right to appropriate alternative care operates as a secondary right, that is applicable in the event that there is an absence of

²³² *Grootboom* para 75.

²³³ *Grootboom* para 75. See also 2 3 1 above.

²³⁴ Robinson (2003) *PELJ* 11. See also Bekink (2012) *PELJ* 178.

²³⁵ For an in depth discussion on the care envisaged by section 28(1)(b) of the Constitution see 2 2 above.

²³⁶ *Grootboom* para 77; *TAC* para 7.

family or parental care, or if the family or parental care that the child receives is not in his or her best interests.²³⁷ It is the state that bears the responsibility for providing a child with appropriate alternative care, should such care be necessary.²³⁸

Despite the fact that not all three of the legal systems under consideration expressly recognise the right to parental care, they do all give, or at the very least attempt to give, effect to section 28(1)(b) of the Constitution. All three legal systems set out the parties responsible for the care of children, which care includes the provision of the basic financial necessities of the child as well as the emotional and psychological support that a child requires.²³⁹ It must, however, be noted that the mere fact that South African civil, customary and Muslim personal law provide the tools required for the realisation of the right to parental care, does not mean that in reality all children receive the care envisaged by section 28(1)(b) of the Constitution.

²³⁷ See 2 2 2 1 above.

²³⁸ *Grootboom* para 77.

²³⁹ See 2 2 above for a discussion on the persons entrusted with the care of a child, as well as what such care entails.

Chapter three: The acquisition of parental responsibilities and rights in South African law

3 1 Introduction

South African civil, customary and Muslim personal law all *prima facie* recognise, in one way or another, the child's right to parental care set out in section 28(1)(b) of the Constitution.²⁴⁰ All three of the aforementioned legal systems regulate the parent-child relationship in such a way that the persons tasked with caring for a child are identifiable, and that what such care entails is clearly set out. This does not, however, mean that the right to parental care is practically realised for all children in South Africa. In terms of South African civil, customary and Muslim personal law, both of the child's biological parents do not always automatically acquire parental responsibilities and rights in respect of their children.²⁴¹ The failure to allow certain biological parents to acquire parental responsibilities and rights is based on *inter alia* the gender, sex and/or marital status of those parents.²⁴² The fact that there are parents who do not acquire, and thus cannot exercise, parental responsibilities and rights in respect of their children, raises the question of whether the right to parental care of those children is properly realised. This chapter will thus set out the manner in which parental responsibilities and rights are acquired in terms of South African civil, customary and Muslim personal law. This will be done in order to determine whether the failure to allow unmarried parents to automatically acquire parental responsibilities and rights, based on factors completely out of the control of their children, limits the constitutionally entrenched right to parental care of those children. Should it be found that the right to parental care of children born to unmarried parents is limited, the next step is to determine whether such limitation can be justified.

²⁴⁰ For a discussion on the right to parental care in South African civil, customary and Muslim personal law see Chapter two above.

²⁴¹ A Louw "The constitutionality of a biological father's recognition as a parent" (2010) 13 *PELJ* 156 156; T Boezaart "Building bridges: African customary family law and children's rights" (2013) 6 *International Journal of Private Law* 395 402. See also RLK Ozah & ZM Hansungule "Upholding the best interests of the child in South African customary law" in T Boezaart *Child Law in South Africa* 2 ed (2017) 283 299-300; E Moosa "The child belongs to the bed: illegitimacy and Islamic law" in S Burman & E Preston-White (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 171 175.

²⁴² Louw (2010) *PELJ* 169.

3 2 South African civil law

3 2 1 Introduction

South African law on the responsibilities and rights of parents has undergone significant change since the introduction of the Children's Act 38 of 2005 (the "Children's Act"). The Children's Act now regulates the responsibilities and rights of the parents of children born to married as well as unmarried parents.²⁴³ The acquisition of parental responsibilities and rights was not always regulated in the manner in which the Children's Act currently regulates it. This part of the chapter will therefore attempt to give an adequate description of the manner in which South African civil law regulates the parent-child relationship. The starting point will be the common law position, with a brief description of the various stages of development up to and including the current legal position as set out in the Children's Act.

3 2 2 The common law position

In order to fully grasp the rationale behind the provisions of the Children's Act, it is necessary to understand the development of this area of South African law. Prior to the commencement of the Children's Act it was primarily the common law that regulated the parent-child relationship. The common law did not make use of the term "parental responsibilities and rights" to describe the parent-child relationship, but rather set out the aforementioned relationship as the parent having parental authority (or power) over his or her children.²⁴⁴ Parental authority consisted of two branches, namely custody and guardianship.²⁴⁵ Guardianship allowed the parent to control and administer the property of the child, while the custodian parent controlled the child's life on a day-to-day basis.²⁴⁶

²⁴³ Ss 19-21 of the Children's Act.

²⁴⁴ D Cronje & J Heaton *South African Family Law 2* ed (2004) 265. Parental authority is defined as "the rights, powers, duties and responsibilities parents have in respect of their minor children and those children's property". The definition of parental authority makes it clear that the focus was on the rights and powers of the parent, rather than the rights of the child.

²⁴⁵ J Sinclair "Family Rights" in D Van Wyk, J Dugard, B de Villiers & D Davis *Rights and Constitutionalism: The new South African legal order* (1994) 502 533. See also FM Mahlobogwane "Parenting plans in terms of the Children's Act: serving the best interests of the parent or the child?" (2013) 34 *Obiter* 218 219.

²⁴⁶ Sinclair "Family Rights" in *Rights and Constitutionalism: The new South African legal order* 533. See also J Heaton "Parental responsibilities and rights" in T Boezaart *Child Law in South Africa*

The acquisition of parental authority was relatively straightforward if the child in question was legitimate.²⁴⁷ In the case of a legitimate child, both the biological mother and father acquired parental authority in respect of their children.²⁴⁸ The parents of children born from a legally recognised marriage were treated equally, and shared the responsibility of raising their children. In the case of children born out of wedlock, only the biological mother was recognised as a parental figure and she alone acquired parental authority in respect of her children.²⁴⁹ The biological father of a child born out of wedlock was not deemed to be related to his child in any way, resulting in him not acquiring parental authority.²⁵⁰ The father of an illegitimate child could, however, obtain parental authority by entering into a valid marriage with the mother of the child *ex post facto*.²⁵¹ Moreni correctly states that the common law position simply ignored the blood relationship that existed between an unmarried father and his biological children.²⁵²

2 ed (2017) 77 81; E Bonthuys “Parental rights and responsibilities in the Children’s Bill 70D of 2003” (2006) 3 *Stell LR* 482 483.

²⁴⁷ A child born to unmarried parents was previously referred to as an illegitimate child, with a child born to married parents termed a legitimate child. The aforementioned terms are not used in the Children’s Act, and thus no longer form part of the law. According to Boezaart, ((2013) *International Journal of Private Law* 402) the Children’s Act only distinguishes between parents based on their marital status (i.e married or unmarried) but this distinction has no impact on children.

²⁴⁸ A Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 63 & 84.

²⁴⁹ A Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 63. See also A Beyl *critical analysis of section 21 of the Children’s Act 38 of 2005 with specific reference to the parental responsibilities and rights* University of Pretoria: LLM dissertation (2013) 11. Similarly, to legitimate and illegitimate children, the term ‘born out of wedlock’ is generally no longer used in South African law. It must, however, be noted that the Children’s Act does use the aforementioned term in s 36, on the issue of the presumption of paternity in respect of a child born to unmarried parents.

²⁵⁰ I D Schafer *The law of access to children* (1993) 37.

²⁵¹ E Spiro *Law of parent and child* 4th ed (1985) 450. See also F du Bois & G Wille Wille’s *Principles of South African Law* 9th ed (2007); N Moreni *A critical analysis of the Constitution on the legal position of unmarried fathers in South African law* North-West University: LLD thesis (2008) 1. The phrase used to describe the position of the parents of an illegitimate child, in terms of the common law, was *een moeder maakt geen bastard*. According to this phrase, a mother is incapable of conceiving and subsequently giving birth to a bastard child. A child born out of wedlock was thus deemed to have no lawful father, but with regards to the mother and her relations was treated as a legitimate child would have been.

²⁵² N Moreni *The impact of the constitution on the legal position of unmarried fathers in South Africa* North-West University: LLD thesis (2008) 1.

3 2 2 1 The right of access

The common law, as a point of departure, did not grant unmarried fathers a right of access to their children born out of wedlock.²⁵³ This, however, changed, albeit for only a short period of time, due to *Van Erk v Holmer* (“*Van Erk*”).²⁵⁴ In the 1992 *Van Erk* case, the biological father of a child born out of wedlock brought an application to be granted reasonable access to his child, which was being denied by the mother of the child.²⁵⁵ According to the court, there was no justification for distinguishing between the fathers of legitimate and illegitimate children.²⁵⁶ It was thus concluded that the time had arrived for the recognition of a father’s inherent right of access to his child born out of wedlock.²⁵⁷

The decision in *Van Erk* was heavily criticised and deviated from in subsequent cases.²⁵⁸ It was said in subsequent case law that the precedent that should have been followed was set out in *B v P*.²⁵⁹ In *B v P* it was held that an unmarried father does not have an inherent right of access to his children.²⁶⁰ In order to acquire reasonable access the unmarried father would have to satisfy the court that such access would be in the child’s best interests, and that it would not interfere with the mother’s custody rights in respect of the child.²⁶¹ The biological link between unmarried fathers and their children

²⁵³ *B v S* 1995 (3) SA 571 (A) 575 para i-j & 579 para g-h. There was previously a misguided view that unmarried fathers did have a right of access to their children in terms of the common law. Cases such as *Wilson v Ely* 1914 WR 34 (“*Wilson*”) and *Matthews v Haswari* 1937 WLD 110 (“*Matthews*”) created the impression that fathers have an inherent right of access. Howie JA put an end to the confusion in *B v S*, (576 para b-c) stating that the aforementioned cases are of no assistance when dealing with an inherent right of access to an illegitimate child by an unmarried father. According to Howie JA, access was granted in *Wilson* on the erroneous basis that it was a *quid pro quo* for the payment of maintenance, while the court in *Matthews* granted access based on the fact that it was in the child’s best interests. Howie JA thus concluded that neither of these cases were authority for the view that unmarried fathers have an inherent right of access to their children in terms of the common law.

²⁵⁴ 1992 (2) SA 636 (W).

²⁵⁵ *Van Erk* 636 paras h-i.

²⁵⁶ *Van Erk* 649 para e.

²⁵⁷ *Van Erk* 649 para i.

²⁵⁸ In *S v S* 1993 (2) SA 200 (W) (205 paras a-b) it was held that the judge in *Van Erk* failed to follow the *stare decisis* principle on the matter, which was set out in previous cases such as *F v L and Another* 1987 (4) SA 525 (W) and *B v P* 1991 (4) SA 113 (T).

²⁵⁹ 1991 (4) SA 113 (T).

²⁶⁰ *B v P* 114 para e.

²⁶¹ *B v P* 117 paras e-f.

was thus ignored, with unmarried fathers deemed to be nothing more than interested third parties.²⁶²

3 2 2 2 The common law duty of maintenance

Despite the fact that the common law did not grant unmarried fathers parental authority over their children, they still had an obligation to maintain their children.²⁶³ The duty to maintain thus existed independently of parental authority in terms of the common law.²⁶⁴ In *F v L and Another*²⁶⁵ (“*F v L*”) the court held that the biological father of an illegitimate child has a duty to maintain his child and that the child has a right to such maintenance.²⁶⁶ The biological father of an illegitimate child was thus liable together with the mother for the child’s maintenance, despite him not acquiring parental authority in the same way as the mother did.²⁶⁷ The common law only recognised the importance of the unmarried father’s financial resources, ignoring the possible positive impact his parenting could have on his child.

The maintenance obligation does not only rest on the child’s parents, but also, in certain circumstances, on the grandparents of the child.²⁶⁸ Traditionally, in terms of the common law, if the parents of a child born out of wedlock could not maintain their child, such duty to maintain would extend to the child’s maternal grandparents.²⁶⁹ In *Petersen v Maintenance Officer, Simons Town Maintenance Court, and Others*²⁷⁰ (“*Petersen*”) the court extended the duty of support of the maternal grandparents of children born to

²⁶² This approach to the unmarried father-child relationship was confirmed in *Townsend-Turner and Another v Morrow* 2004 (2) SA 32 (C) (41 para c & 44 para b), where it was held that the common law only grants the parents of a legitimate child a right of access to such child, and that aside from the blood relationship between the unmarried father and his illegitimate child, an unmarried father is in the same position as an interested third party

²⁶³ Spiro *Law of Parent and Child* 458.

²⁶⁴ H Kruger “Maintenance for children” in T Boezaart *Child Law in South Africa* 2 ed (2017) 38 39.

²⁶⁵ 1987 (4) SA 525 (W).

²⁶⁶ *F v L* 526 para d-e.

²⁶⁷ Spiro *Law of parent and child* 458.

²⁶⁸ Kruger “Maintenance for children” in *Child Law in South Africa* 45.

²⁶⁹ See *Motan and Another v Joosub* 1930 AD 61; *Petersen v Maintenance Officer, Simons Town Maintenance Court, and Others* 2004 2 SA 56 (C). See also Kruger “Maintenance for children” in *Child Law in South Africa* 45.

²⁷⁰ 2004 (2) SA 56 (C).

unmarried parents to the paternal grandparents.²⁷¹ The common law thus obliges the maternal as well as the paternal grandparents to support their grandchildren, should their parents be financially unable to do so themselves.

3 2 3 The Children's Act

3 2 3 1 The principles and objectives of the Children's Act

While the Children's Act brought significant changes to the law governing the parent-child relationship in South Africa, even before the commencement thereof, gradual changes had started taking place. In *V v V*²⁷² the court confirmed that the dynamic of the parent-child relationship has changed from one of parental power to one of parental responsibilities and rights.²⁷³ This change is reflected in the provisions of the Children's Act.²⁷⁴ The law now places a greater emphasis on the rights and welfare of children, than the authority and/or rights of their parents.²⁷⁵ **In this regard, the Children's Act sets out certain objects that the Act seeks to achieve, as well as general principles that must guide the interpretation and application of the provisions of the Act.**²⁷⁶ S 2 of the Children's Act

²⁷¹ *Petersen* para 1-27. In *Petersen* the court held that the common law position, which only extended the duty of maintenance to the maternal grandparents, if the unmarried parents were unable to maintain their child, needed to be developed in accordance with the values of the Constitution. The court held that the position violated the child's rights to equality and dignity, and was furthermore not in the extra-marital child's best interests. As a result of the judgement in *Petersen*, paternal grandparents are now also required to maintain their extra-marital grandchildren, should the parents be unable to do so.

²⁷² 1998 (4) SA 169 (C).

²⁷³ *V v V* 176 para c; A Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 44. See also A Skelton & M Carnelley *Family Law in South Africa* (2010) 238.

²⁷⁴ A Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 44. See also JA Robinson, S Human, BS Smith & M Carnelley *Introduction to South African Family Law* 5th ed (2012) 66. According to Mahlobogowane ((2013) *Obiter* 219 & 222) the change in terminology emphasises that parents no longer have power or authority over their children, but rather responsibilities towards them.

²⁷⁵ Louw (2010) 13 *PELJ* 158. Section 28(1)(b) of the Constitution arguably reflects this change, as the right to parental care is seen as a right of only the child. The child's parents don't acquire any rights from the aforementioned section. This highlights the fact that the emphasis is now on the rights of the child, rather than the rights or powers of the parents; See also A Boniface "Revolutionary changes to the parent-child relationship in South Africa" in J Sloth-Nielsen & Z Du Toit (eds) *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* (2008) 151 153.

²⁷⁶ **Ss 2 & 6 of the Children's Act.**

explicitly states that one of its objectives is “to give effect to the ... constitutional rights of children, namely family or parental care or appropriate alternative care when removed from the family environment”. Furthermore, section 6 of the Children’s Act 38 of 2005 (the “Children’s Act”) sets out the general principles that must guide all proceedings, decisions and actions affecting children.²⁷⁷ Section 6 provides as follows:

- “(2) All proceedings, actions or decisions in a matter concerning a child must—
- (a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child’s inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
 - (e) recognise a child’s need for development and to engage in play and other recreational activities appropriate to the child’s age; and
 - (f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.”

Both sections 2 and 6 reaffirm the importance of the rights set out in the Constitution’s children’s rights clause, which includes the right to parental care. This shows that the Children’s Act has committed itself, in theory at least, to ensuring the realisation of the children’s rights set out in section 28(1)(b) of the Constitution, which is arguably done through the acquisition and subsequent exercise of parental responsibilities and rights.

²⁷⁷ S 6 of the Children’s Act provides as follows:

- (2) All proceedings, actions or decisions in a matter concerning a child must—
- (a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child’s inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
 - (e) recognise a child’s need for development and to engage in play and other recreational activities appropriate to the child’s age; and
 - (f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.

3 2 3 2 The parent-child relationship: parental responsibilities and rights

The Children's Act, in section 18, defines that which the responsibilities and rights of a parent entail. In terms of the Children's Act the responsibilities and rights that parents have or may have over their biological children, or children in respect of whom they are a legal guardian, are to care for the child;²⁷⁸ to maintain contact with the child;²⁷⁹ to act as guardian of the child;²⁸⁰ and to contribute to the maintenance of the child.²⁸¹ These aspects will be discussed separately in order to provide greater clarity as to what they entail, as well as how they have changed and/or elaborated on the common law position.

3 2 3 2 1 Care

The term "care" replaced, but also expanded on, the common law concept of "custody."²⁸² The term "care" is much broader than its predecessor, as it sets out the various elements of what caring for a child entails.²⁸³ Care includes *inter alia* ensuring that the child is taken care of financially, that the child lives and grows up in conditions that are not harmful to his or her well-being, and protecting the child from the evils of the world.²⁸⁴ It is important to note that in the case of unmarried parents who are co-holders of parental responsibilities and rights, the parent who sees to the child's needs on a daily basis must consider the child's wishes before that parent makes any decision which may affect the child's contact with the co-holder of parental responsibilities and rights.²⁸⁵ In terms of the common law, in the case of unmarried parents it was generally accepted that only one parent acquired custody and thus controlled the child's life on a daily basis.²⁸⁶ It

²⁷⁸ S 18(2)(a) of the Children's Act.

²⁷⁹ S 18(2)(b) of the Children's Act.

²⁸⁰ S 18(2)(c) of the Children's Act.

²⁸¹ S 18(2)(d) of the Children's Act.

²⁸² S 1(2) of the Children's Act. See Bonthuys (2006) *Stell LR* 483.

²⁸³ Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 66. Care is defined in s 1 of the Children's Act. For the full definition of care see 2 2 2 2 above.

²⁸⁴ S 1(1) of the Children's Act; Heaton ("Parental responsibilities and rights" in CJ Davel & A Skelton *Commentary on the Children's Act* (2009) 3 5) is of the opinion that the Children's Act's definition of care has subsumed certain aspects of the common law right of access. See 2 2 2 2 above for a discussion on the relationship between the definition of care in the Children's Act and the content of the right to parental care.

²⁸⁵ J Heaton *South African Family Law* 3 ed (2010) 284-285.

²⁸⁶ Robinson (*et al*) *Introduction to South African Family Law* 67.

can, however, be argued that in terms of the Children's Act both unmarried parents are responsible for the care of their children, provided they have both acquired parental responsibilities and rights. While it may practically be easier for the parent with whom the child resides to fulfil the responsibilities set out under the definition of care, there are certain aspects that are applicable to both holders of parental responsibilities and rights.²⁸⁷ For example, a parent who is a co-holder of parental responsibilities and rights still has the responsibility to ensure that the child receives financial support, that the well-being of the child is safeguarded, and furthermore has a say in the educational, religious and cultural upbringing of the child.²⁸⁸

3 2 3 2 2 Contact

Contact has replaced the concept of access, but is arguably a lot broader than its common law predecessor.²⁸⁹ Contact is generally thought to be aimed at ensuring that a relationship exists between a parent who has acquired parental responsibilities and rights and his or her child, in the event that such child resides with someone other than the parent in question.²⁹⁰ While contact is generally thought to only apply to (what was traditionally referred to as) the "non-custodian" parent, it is in fact also relevant to the parent with whom the child resides. The Children's Act's definition of contact emphasises the importance of ensuring that there is a genuine personal relationship between parent and child.²⁹¹ Ensuring the existence of a personal relationship is a responsibility of the parent with whom the child resides as well the other parent who is a co-holder of parental responsibilities and rights. The mere fact that a child lives with a particular parent does not mean that a personal relationship automatically exists between that parent and his or

²⁸⁷ According to Skelton & Carnelley, (*Family Law in South Africa* 242) the responsibilities set out under the definition of care apply to the parent with whom the child lives, as well as the parent who is a co-holder of parental responsibilities and rights. While both parents may not simultaneously fulfill all of the responsibilities that the definition of care sets out, they both have the responsibility to see to the care of their child.

²⁸⁸ All of the above-mentioned responsibilities form part of what constitutes care in terms of s 1 of the Children's Act.

²⁸⁹ S 1(2) of the Children's Act. See Bonthuys (2006) *Stell LR* 483. According to Mahlobogwane, ((2013) *Obiter* 219) the common law right of access essentially granted the non-custodian parent visitation rights. The right of contact, however, goes beyond mere visitation rights.

²⁹⁰ S 1(1) of the Children's Act.

²⁹¹ See s 1(1) of the Children's Act for the definition of contact.

her child. To establish a personal relationship is something that a parent must continuously work at, regardless of whether or not the child resides with him or her.

In terms of the Children's Act, contact between parent and child is a right of the child rather than a right of the parent.²⁹² Section 1(1) of the Children's Act provides that if the child lives with someone other than the parent seeking contact, contact with such parent, who is a co-holder of parental responsibilities and rights, should consist of personal visits as well as electronic communication.²⁹³ A parent to whom the court has granted contact, but who does not have any other parental responsibilities and rights, has the power to perform the functions normally associated with the parent who has care of the child, while exercising his or her right of contact.²⁹⁴ In *Roodt v Scrazzolo*²⁹⁵ it was stated that courts must be guided by what is in the best interests of the child when determining the extent of contact to be granted.²⁹⁶

3 2 3 2 3 Guardianship

Prior to the introduction of the Children's Act guardianship was regulated by the Guardianship Act 192 of 1993 (the "Guardianship Act"). The Guardianship Act was, however, repealed with the commencement of the Children's Act. In its simplest form guardianship grants the parent, or whoever the legal guardian of the child may be, the capacity to perform juristic acts for, and administer the estate of, the minor child on his or her behalf.²⁹⁷ It is the responsibility of the guardian to provide consent for certain acts which the child does not have the capacity to perform on his or her own, and to represent

²⁹² Skelton & Carnelley *Family Law in South Africa* 243.

²⁹³ See Mahlobogwane (2013) *Obiter* 223.

²⁹⁴ Heaton *South African Family Law* (2010) 285.

²⁹⁵ 2018 JDR 0813 (KZD)

²⁹⁶ *Roodt v Scrazzolo* para 34. The best interests of the child principle is extensively discussed in chapter four below.

²⁹⁷ S 18(3)(a) of the Children's Act. See also Heaton "Parental responsibilities and rights" in *Commentary on the Children's Act* 5; Heaton *South African Family Law* (2010) 283; Heaton "Parental responsibilities and rights" in *Child Law in South Africa*; The parent must administer the minor's estate as a *bonus et diligens paterfamilias* – in other words, as a reasonable or diligent person would.

the child in legal, contractual or administrative matters.²⁹⁸ If two or more individuals have guardianship over a child, the general rule is that each may exercise his or her rights as guardian without notifying or obtaining the consent of the other guardian.²⁹⁹ There are, however, exceptions to the aforementioned rule, where the consent of all persons who have guardianship is required.³⁰⁰ The exceptions are set out in section 18(3)(c) of the Children's Act, which provides that the guardian of a child must give or refuse consent that is legally required in respect of the child, which includes consent to the child's marriage,³⁰¹ adoption,³⁰² departure or removal from the Republic,³⁰³ application for a passport,³⁰⁴ and the alienation of any immovable property of the child.³⁰⁵

3 2 3 2 4 Maintenance

In terms of the common law, maintenance was regarded as the responsibility of a parent irrespective of whether or not such parent had acquired parental authority.³⁰⁶ While maintenance was not considered an element of parental authority in terms of the common law, the Children's Act has changed this by including maintenance in the responsibilities and rights of parents.³⁰⁷ In this regard, it is important to note that a father is required to maintain his child even if he, for example, does not have contact with the child.³⁰⁸ The Children's Act failed to set out a concise definition of what maintenance entails and, as a

²⁹⁸ S 18(3)(b)-(c) of the Children's Act. S 18(3)(c) sets out the circumstances in which a guardian is required to provide consent. See also Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 8; Robinson (*et al*) *Introduction to South African Family Law* 69.

²⁹⁹ Robinson *South African Family Law* 70.

³⁰⁰ S 18(5) of the Children's Act. See also Skelton & Carnelley *Family Law in South Africa* 243; Robinson (*et al*) *Introduction to South African Family Law* 69.

³⁰¹ S 18(3)(c)(i) of the Children's Act.

³⁰² S 18(3)(c)(ii) of the Children's Act.

³⁰³ S 18(3)(c)(iii) of the Children's Act.

³⁰⁴ S 18(3)(c)(iv) of the Children's Act.

³⁰⁵ S 18(3)(c)(v) of the Children's Act

³⁰⁶ Spiro *Law of Parent and Child* 458; *F v L* 527 para b. See also Kruger "Maintenance for children" in *Child Law in South Africa* 39.

³⁰⁷ Skelton & Carnelley *Family Law in South Africa* 286; Robinson (*et al*) *Introduction to South African Family Law* 71. See also Kruger "Maintenance for children" in *Child Law in South Africa* 39.

³⁰⁸ *F v L* 527 para b.

result, the common law understanding of maintenance is still applicable.³⁰⁹ According to Kruger, maintenance includes the provision of food, clothing, accommodation, medical care and a suitable education.³¹⁰ Kruger further provides that the extent of the duty of maintenance depends on a variety of factors, which can include the child's age and needs, as well as the income and social status of the person responsible for the child's maintenance.³¹¹

3 2 3 3 The acquisition of parental responsibilities and rights

3 2 3 3 1 The mother and married father

The Children's Act sets out the current legal position regarding the acquisition of parental responsibilities and rights by the mother and father. The acquisition of parental responsibilities and rights by the mother is regulated by section 19 of the Children's Act, which provides that the mother automatically acquires full parental responsibilities and rights in respect of her biological children, irrespective of her marital status.³¹² A father similarly acquires full parental responsibilities and rights in respect of his child if he is married to the biological mother of the child, or if he was married to the mother at the date of conception or birth, or any time in between the two aforementioned dates.³¹³

In terms of the Children's Act, a marriage is defined as a marriage concluded in terms of South African law, customary law or a system of religious law.³¹⁴ As a result, the section applicable to married fathers includes fathers married according to customary law and Muslim personal law. Married fathers living according to customary law and Muslim personal law would therefore also in terms of section 20 of the Children's Act automatically acquire parental responsibilities and rights.

³⁰⁹ Robinson (*et al*) *Introduction to South African Family Law* 71. See also Kruger "Maintenance for children" in *Child Law in South Africa* 39. See 3 2 2 2 above for the discussion on maintenance in terms of the common law.

³¹⁰ Kruger "Maintenance for children" in *Child Law in South Africa* 39.

³¹¹ 42.

³¹² There is an exception to the biological mother obtaining full parental responsibilities and rights. S 19(2) of the Children's Act provides that if the mother is an unmarried minor who does not have guardianship, the guardianship of such a child will vest in the guardian of the biological mother.

³¹³ S 20 of the Children's Act. See also Schafer *Child Law in South Africa* (2011) 236.

³¹⁴ S 1 of the Children's Act. See also 1 1 2 1 above.

3 2 3 3 2 The unmarried father

The Children's Act altered the position regarding the acquisition of parental responsibilities and rights by the unmarried father, presumably in an attempt to bring it in line with the Constitution's equality clause.³¹⁵ The automatic acquisition of parental responsibilities and rights by the unmarried father is regulated by section 21 of the Children's Act.³¹⁶ Section 21(1)(b)(i)-(iii) of the Children's Act provides as follows:

“(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, acquires full parental responsibilities and rights in respect of the child

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

There has been a significant amount of uncertainty regarding whether all three of the requirements listed in section 21(1)(b) of the Children's Act must be complied with in order for an unmarried father to acquire parental responsibilities and rights, or whether compliance with one or two of the requirements is sufficient. The practical application of section 21(1)(b) of the Children's Act was considered in *RRS v DAL*³¹⁷ and *KLVC v SDI*.³¹⁸ Both of the aforementioned cases dealt with the removal from South Africa of a child born to unmarried parents, without the consent of the biological father.³¹⁹ In both cases the

³¹⁵ Heaton “Parental responsibilities and rights” in *Commentary on the Children's Act* 11-12. See also *KLVC v SDI* (2014) ZASCA 222 para 19.

³¹⁶ The Children's Third Amendment Bill (draft) has proposed certain amendments to section 21 of the Children's Act. These proposed changes will be highlighted during the course of the discussion of section 21 of the Children's Act.

³¹⁷ *RRS v DAL* (22994/2010) [2010] ZAWCHC 618 (10 December 2010) (unreported) *SAFLII* <<http://www.saflii.org/za/cases/ZAWCHC/2010/618.pdf>> (accessed 10-08-2018).

³¹⁸ (2014) ZASCA 222.

³¹⁹ In *RRS v DAL* (2) the applicant, who resided in Cape Town, approached the court for an order declaring the respondent's removal of their child from South Africa wrongful in terms of Article 3 and 5 of the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980, Hague XXVII (The Hague Convention was adopted on 25 October 1980, and entered into

court had to consider whether the unmarried father had automatically acquired parental responsibilities and rights in terms of section 21(1)(b) of the Children's Act, in order to determine whether the consent of the father was required before the child could be removed from the country. In *RRS v DAL*, the court, in assessing whether an unmarried father had acquired parental responsibilities and rights, stated that unmarried fathers must comply with all three of the requirements set out in the section 21(1)(b) of the Children's Act.³²⁰ The same question came before the court in *KLVC v SDI*, where it was held that determining whether an unmarried father had complied with the requirements of section 21(1)(b) of the Children's Act was a purely factual enquiry.³²¹ The court in *KLVC v SDI*, however, deemed it unnecessary to definitively answer whether compliance with all three requirements is a prerequisite for the automatic acquisition of parental responsibilities and rights.³²² Bosman-Sadie and Corrie submit that all three requirements must be complied with in order for unmarried fathers to automatically acquire parental responsibilities and rights.³²³ Skelton is of the opinion that it can be assumed that the legislature would not have included the word "and" in section 21(1)(b) if it did not intend for the requirements to be cumulatively fulfilled.³²⁴ A reading of section 21(1)(b) of the Children's Act together with the aforementioned authority suggests that all of the requirements set out in section 21(1)(b) must be complied with in order for an unmarried father to automatically acquire parental responsibilities and rights.

force 1 December 1983)). Similarly, in *KLVC v SDI* (para 1) the applicant (the mother) relocated with her child to England, while the first respondent (the father) was on a short trip to the United States. The child was thus taken to England without the consent of the biological father.

³²⁰ *RRS v DAL* (accessed 10-10-2018) 11. See also A Louw "Revisiting the limping parental condition of unmarried fathers" (2016) 49 *De Jure* 193 201; Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 85.

³²¹ *KLVC v SDI* para 14. This means that all relevant factual considerations must be taken into account when determining whether the provisions of s 21(1)(b) of the Children's Act have been complied with. In other words, reaching a conclusion regarding whether an unmarried father has automatically acquired parental responsibilities and rights is based on fact rather than judicial discretion.

³²² *KLVC v SDI* para 14. See also Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 85.

³²³ H Bosman-Sadie & L Corrie *A Practical Approach to the Children's Act* 2 ed (2013) 46.

³²⁴ A Skelton "Parental responsibilities and rights" in T Boezaart *Child Law in South Africa* (2009) 62 76. See also Heaton "Parental responsibilities and rights" in *Commentary on the Children's Act* 13; JC Bekker "Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa" (2008) *Obiter* 395 401.

The first way in which an unmarried father can automatically acquire parental responsibilities and rights is if he is living with the mother of his child in a permanent life partnership, at the time of the child's birth.³²⁵ It would appear that this provision aims to protect the unmarried father who is in a relationship akin to marriage with the child's mother. The problem, however, is that "permanent life partnership" has not been defined in the Children's Act.³²⁶ This makes it easy for the mother, should she not want the biological father to be involved in the child's life, to allege that she never intended for the relationship to be a permanent life partnership.³²⁷ The failure to define "permanent life partnership" in the Children's Act can leave the unmarried father, and more importantly his child, in a precarious position, should the mother allege that she never intended for their relationship to be permanent.³²⁸ The draft Children's Third Amendment Bill (the "draft Children's Amendment Bill") proposes that "permanent life-partnership" be removed from the wording of section 21(1)(a) of the Children's Act. Furthermore, the draft Children's Amendment Bill proposes that an unmarried biological father automatically acquires parental responsibilities and rights if he lives with the mother at the time of the child's conception, birth or any time between the child's conception and birth. This would arguably solve the problems surrounding the failure to define permanent life-partnership in the Children's Act.

Secondly, in terms of section 21(1)(b) of the Children's Act, an unmarried father can acquire parental responsibilities and rights if he complies with certain requirements, namely if he: consents to be identified as the father of the child or pays damages in terms of customary law; contributes or has attempted in good faith to contribute to the upbringing of the child; and lastly, contributes, or has attempted in good faith to contribute, to the maintenance of the child.³²⁹ The first aspect of section 21(1)(b) deals with whether the father has consented or successfully applied in terms of section 26 of the Children's Act

³²⁵ S 21(1)(a) of the Children's Act.

³²⁶ Heaton "Parental responsibilities and rights" in *Commentary on the Children's Act* 13. According to Heaton, the phrase "permanent life partnership" was traditionally used to describe what now constitutes a civil union.

³²⁷ Skelton & Carnelley *Family Law in South Africa* 247.

³²⁸ 247.

³²⁹ S 21(1)(b) of the Children's Act.

to be identified as the child's father, or has paid damages in terms of customary law.³³⁰ The legislature appears to have attempted to integrate, or at the very least recognise, customary law in section 21(1)(b) of the Children's Act.³³¹ According to Sloth-Nielsen and Mwambene, the only purpose that the payment of customary damages serves in the context of section 21 is to identify the person making the payment as the father of the child in question.³³² The aforementioned authors, however, highlight that the general payment of customary damages does not serve an identification purpose, nor does it transfer parental responsibilities and rights to the unmarried father.³³³ In this regard Nkosi correctly submits that the legislature incorporated the payment of customary law damages in section 21 of the Children's Act, but failed to give any context to the understanding or practical application of such damages in terms of living customary law.³³⁴

The second and third requirements could be mistaken to be one-and-the-same, as they both deal with the father's commitment to his child. They are, however, distinct, as they require different types of involvement from the unmarried father in his child's life. Section 21(1)(b)(ii) requires the father to contribute to his child's upbringing, which requires the father to have played a role in his child's life aside from his financial contributions.³³⁵ Section 21(1)(b)(iii), on the other hand, requires the unmarried father to contribute, or have attempted to contribute, to the expenses related to the maintenance of the child. The latter sub-section requires the father to contribute financially to the costs normally associated with raising a child. In *KLVC v SDI* the court highlighted that section 21(1)(b)(ii) and (iii) of the Children's Act does not set out the extent to which an unmarried father

³³⁰ In terms of s 26 of the Children's Act, a person who is or claims to be the biological father of a child, but who is not married to the child's mother, may apply to have the child's registration of birth amended in order to identify him as the child's father. The mother is, however, required to consent to such amendment. Should the mother either refuse or be unable to consent to the amendment, s 26(2) allows the unmarried father to apply to court for an order confirming his paternity; See Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 85.

³³¹ Boezaart (2013) *International Journal of Private Law* 404. See also Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 86.

³³² J Sloth-Nielsen & L Mwambene "Talking the talk and walking the walk: how can the development of African customary law be understood?" (2010) *Law in Context* 27 35.

³³³ 35.

³³⁴ G Nkosi "A perspective on the dichotomy of acquisition of parental responsibilities and rights by fathers in terms of the Children's Act and customary law" (2018) 39 *Obiter* 197 201. See 3 3 2 below for further discussion.

³³⁵ Skelton "Parental responsibilities and rights" in *Child Law in South Africa* 76.

must contribute, or attempt to contribute, to the maintenance and upbringing of his child.³³⁶ The court was of the opinion that the legislature purposely failed to state that the aforementioned contributions must be of a significant or material nature.³³⁷ In this regard, the court in *KLVC v SDI* held that the fact that the unmarried father's financial contributions only covered 11.5 percent of the expenses related to his child did not mean that such contributions were not in accordance with section 21(1)(b) of the Children's Act.³³⁸ South African courts will thus take into account all relevant considerations when determining whether a contribution, or good faith attempt at a contribution, was made.

The draft Children's Amendment Bill proposes that the words "good faith" and "reasonable period of time" be removed from section 21(1)(b)(ii) and (iii) of the Children's Act.³³⁹ If this proposed change were to take place, unmarried fathers would still be required to contribute, or attempt to contribute, to both the upbringing and maintenance of the child, but such contribution would not necessarily have to be made for a reasonable period of time.³⁴⁰ Furthermore, an unmarried father's attempt to contribute would no longer have to be made in good faith. It does not appear that this change in the wording of section 21(1)(b)(ii) and (iii) of the Children's Act would have a drastic impact on the practical application of the provision, as unmarried fathers would still be required to contribute, or attempt to contribute, to both the maintenance and upbringing of the child, in order to automatically acquire parental responsibilities and rights.³⁴¹

As previously mentioned, marriages concluded in terms of customary law and Muslim personal law are recognised as marriages in terms of the Children's Act.³⁴² Fathers who are not married according to South African law, customary law or Muslim personal law, are therefore unmarried for the purposes of the Children's Act, and are thus entitled to rely on section 21 of the Children's Act in order to acquire parental responsibilities and rights.³⁴³ It is, however, important to note that while fathers living according to

³³⁶ *KLVC v SDI* para 21.

³³⁷ *KLVC v SDI* para 21.

³³⁸ *KLVC v SDI* para 32.

³³⁹ Para 13 of the draft Children's Amendment Bill. See also J Heaton "Notes on the proposed amendment of section 21 of the Children's Act 38 of 2005" (2019) 22 *PELJ* 2 10.

³⁴⁰ See Heaton (2019) *PELJ* 10.

³⁴¹ 10.

³⁴² S 1 of the Children's Act. See also 3 2 3 2 1 above.

³⁴³ See 1 1 2 1 above.

customary or Muslim personal law may be entitled to rely on the Children's Act, cultural and religious groups often function according to their own rules rather than the provisions of the Children's Act. It is usually only when a matter reaches court, that the Children's Act will be applied.³⁴⁴

Section 21 of the Children's Act is deemed to confer automatic parental responsibilities and rights on unmarried biological fathers. It is, however, arguable whether the acquisition of parental responsibilities and rights in terms of section 21 is in fact automatic, as unmarried fathers have to comply with the requirements of the aforementioned section before acquiring such responsibilities and rights. It seems that the acquisition of parental responsibilities and rights in terms of section 21 is deemed to be automatic simply because unmarried fathers do not, in theory, have to approach a court for a declaratory order confirming their parental responsibilities and rights.³⁴⁵ This does not, however, change the fact that unmarried fathers have to comply with certain requirements, with which mothers and married fathers do not have to comply, before acquiring parental responsibilities and rights. In this regard, Louw is of the opinion that the Children's Act "has retained the status quo to the extent that it still does not confer automatic, inherent parental [responsibilities and] rights on biological fathers on the same basis as mothers".³⁴⁶

While an unmarried father can automatically acquire parental responsibilities and rights in terms of section 21 of the Children's Act, it is not the only avenue through which he can acquire parental responsibilities and rights. In terms of section 22 of the Children's Act, an unmarried father can acquire parental responsibilities and rights in respect of his child by entering into a parental responsibilities and rights agreement with either the child's biological mother or any other person who is the holder of parental responsibilities and rights in respect of the child.³⁴⁷ It is, however, important to note that a parental

³⁴⁴ See 1 1 2 2 above.

³⁴⁵ See C Matthias "Parental rights and responsibilities of unmarried fathers: Court decisions and implications for social workers" (2015) 53 *Social Work* 96 97.

³⁴⁶ Louw (2010) 13 *PELJ* 156. See also Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 44.

³⁴⁷ S 22(1) of the Children's Act. See also Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 87. It is not only the unmarried father that can acquire parental responsibilities and rights in terms of s 22 of the Children's Act. Section 22(1)(b) provides that any person who has an interest in the care, well-being and development of a child may enter into a parental

responsibilities and rights agreement only becomes enforceable once it has been registered with a family advocate, or has been made an order of the High court, divorce court (in a divorce matter) or the children's court.³⁴⁸ Furthermore, section 23 of the Children's Act provides that any person who has an interest in the care, well-being or development of a child may apply to the High Court, children's court or the divorce court (in divorce matters) for an order granting him or her care and/or contact in respect of the child.³⁴⁹ Section 24 of the Children's Act similarly allows a person interested in the care, well-being and development of a child to apply to the High Court for an order granting him or her guardianship in respect of the child.³⁵⁰ Should an unmarried father have failed to automatically acquire parental responsibilities and rights in terms of section 21 of the Children's Act, sections 22 to 24 provide alternative avenues through which he can acquire those responsibilities and rights. The acquisition of parental responsibilities and rights in terms of sections 22 to 24 of the Children's Act, however, requires a court order, which arguably makes it **less accessible as well as more onerous and expensive for unmarried fathers** than compliance with the requirements of section 21(1)(b).³⁵¹

responsibilities and rights agreement in order to acquire parental responsibilities and rights in respect of the child.

³⁴⁸ S 22(4) of the Children's Act.

³⁴⁹ According to the court in *CM v NG* 2012 (4) SA 452 (WCC) (para 41-42), a person seeking care or contact in terms of s 23 of the Children's Act may be awarded either care or contact, or both care and contact, in terms of the aforementioned section; See also Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 89; Skelton "Children" in *The Bill of Rights Handbook* 606.

³⁵⁰ **W Domingo "For the sake of the children": South African family relocation disputes" (2011) 14 PELJ 148 151.**

³⁵¹ **Section 29(4) of the Children's Act provides that when dealing with an application in terms of sections 22 to 24, the High Court, Divorce Court or Children's Court, as the case may be, "... must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it". These principles include *inter alia* promoting and protecting the best interests of the child and protecting the child from discrimination on any ground.**

3 3 South African customary law: the acquisition of parental responsibilities and rights

3 3 1 The mother and married father

In terms of South African customary law, the biological mother is not automatically vested with parental responsibilities and rights.³⁵² If the child in question is born to unmarried parents, it is the guardian of the mother, who is usually her father or, should he be deceased, his heir, who acquires parental responsibilities and rights, **including guardianship**, in respect of the child.³⁵³ Should the child have been born of a legitimate customary marriage, the mother would also not acquire parental responsibilities and rights, as such responsibilities and rights would vest in her husband.³⁵⁴ Bennet sets out the position regarding the parental responsibilities and rights in respect of children born from a valid customary marriage as follows:

“In Customary law the husband and his family have full parental rights to any children born to the wife during the marriage, provided that they have fulfilled their obligations under the bridewealth agreement.”³⁵⁵

It is thus the payment of bridewealth³⁵⁶ by the husband or his family group that transfers the woman’s child bearing capacity to the husband.³⁵⁷ It would not matter if the child was not in the husband’s custody immediately after birth, or if the husband had not had any contact with the child since birth, as his parental rights are protected if he married the biological mother and paid the necessary *lobola*.³⁵⁸ According to Bennet, a husband will have parental rights over any child that his wife bears during their marriage, irrespective

³⁵² Boezaart (2013) *International Journal of Private Law* 402.

³⁵³ *Mthembu v Letsela and Another* [2000] 3 All SA 219 (A) 229g. See also Boezaart (2013) *International Journal of Private Law* 402; Ozah & Hansungule “Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* 287.

³⁵⁴ 402.

³⁵⁵ TW Bennet *A Sourcebook of African Customary Law for South Africa* (1991) 291.

³⁵⁶ S Burman & N van der Werff “Rethinking customary law on bridewealth” (1993) 19 *Social Dynamics* 111 111. A bridewealth agreement is an agreement in terms of which the family of the prospective husband undertakes to transfer *inter alia* money, property or cattle to the family group of the prospective wife; See also South African Law Commission *Harmonisation of the common law and the indigenous law* Project 90 (1996) 27. The payment of bridewealth is seen as an integral part of obtaining a woman’s hand in marriage in terms of living customary law.

³⁵⁷ Bennet *A Sourcebook of African Customary Law for South Africa* 365.

³⁵⁸ 365.

of whether or not he is the child's actual biological father.³⁵⁹ Therefore, should a child be born of an adulterous relationship in which the mother was involved, such child would be deemed to be the child of the mother's husband, unless the contrary is proven.³⁶⁰

3 3 2 The unmarried father

In terms of South African customary law, an unmarried father does not automatically acquire parental responsibilities and rights in respect of his biological child.³⁶¹ The child is deemed to belong to the family group of the mother, even though the mother herself does not have parental responsibilities and rights in respect of the child.³⁶² A child born to unmarried parents is thus not associated with his/her father or the father's family group in any way.³⁶³ The unmarried father only acquires parental responsibilities and rights if he subsequently marries the biological mother or, in certain circumstances, depending on the customary group, through the payment of *isondlo* damages.³⁶⁴ The payment of *isondlo* is of relevance where a child has been raised and maintained by someone other than the person, or persons, vested with parental responsibilities and rights. Should the head of a family group raise a child who is not his own, he (the family head) is entitled to claim *isondlo* from that child's guardian when the guardian eventually attempts to take the

³⁵⁹ 365.

³⁶⁰ Bennet *A Sourcebook of African Customary Law for South Africa* 365. Any child born during the course of a marriage is presumed to be the child of the parties to the marriage (a legitimate child).

³⁶¹ Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 299.

³⁶² Nkosi (2018) *Obiter* 199. See also *Zondi v President of the Republic of South Africa and Others* [1999] JOL 5537 (N) at 5.

³⁶³ Bennet *A Sourcebook of African Customary Law for South Africa* 362. See also Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 299.

³⁶⁴ Bekker (2008) *Obiter* 401; According to Ozah & Hansungule, ("Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 299) "*Isondlo* is an additional consideration which signifies the bringing-up or maintaining of a child; it is not, however, equal to the common-law concept of maintenance". Bennet (*A Sourcebook of African Customary Law for Southern Africa* 365) states that the payment of *isondlo* is meant to compensate the person who raised the child, for the costs associated with raising the child. Furthermore, Bekker (*Seymour's Customary Law in Southern Africa* 5 ed (1989) 242) states that the payment of *isondlo* is generally in the form of cattle, but payment in the form of money is now also deemed acceptable.

child into his or her care.³⁶⁵ It must be noted that there is authority for the view that the payment of *isondlo* transfers parental rights, as well as authority for the view that *isondlo* is merely a form of maintenance.³⁶⁶

While the maintenance and upbringing requirements set out in section 21(1)(b) of the Children's Act may be compared to the payment of *isondlo*, the position in terms of the Children's Act appears more favourable to the unmarried father than the customary law position. This is because the Children's Act merely requires an unmarried father to attempt to contribute in good faith to the maintenance and upbringing of the child.³⁶⁷ Should the unmarried father be financially unable to contribute to the child's maintenance to the extent that the mother deems sufficient, all that he is required to do is contribute to the child's maintenance to the best of his ability.³⁶⁸ In terms of South African customary law, however, once the *isondlo* amount is set, that is the amount that must be paid in order for there to be a transfer of parental responsibilities and rights to the unmarried father.

As stated above, section 21(1)(b) of the Children's Act attempted to add a customary law dimension to the manner in which unmarried fathers acquire parental responsibilities and rights in terms of South Africa's civil law.³⁶⁹ To satisfy the first requirement of section 21(1)(b), an unmarried biological father must either identify his paternity or pay damages in terms of customary law. In terms of customary law, however, a general payment of damages does not signify an admission of paternity.³⁷⁰ The type of damages that signifies

³⁶⁵ Bekker *Seymour's Customary Law in Southern Africa* 242. The unmarried father would thus be liable to pay *isondlo* to whoever has reared the child from birth until such time as he (the father) decided to take the child into his care.

³⁶⁶ Bennet (*South African Customary Law* 243) states that the court in *Stamper v Nqolobe* 1978 AC 147 (S) viewed *isondlo* as an avenue through which parental rights could be obtained by the unmarried biological father, while *Hlengwa v Maphumulo* 1972 BAC 58 treated *isondlo* merely as a form of maintenance. According to Bekker (*Seymour's Customary Law in Southern Africa* 241), while the payment of *isondlo* damages may transfer parental responsibilities and rights to the unmarried father, the payment of seduction damages to the biological mother or her family group does not.

³⁶⁷ See s 21(1)(b) of the Children's Act.

³⁶⁸ Louw (2016) *De Jure* 208-209; Heaton "Parental responsibilities and rights" in *Child Law in South Africa* 86. See also 3 2 4 2 2 above.

³⁶⁹ This was arguably done because of the fact that the provisions of the Children's Act apply to all children and, as a result, section 21 applies to all unmarried fathers, including those living according to African customary law. See 1 1 2 1 & 1 1 2 2 above.

³⁷⁰ See 3 2 3 2 2 above.

an admission of paternity is referred to as a *vimba beast* or the *nquthu beast*.³⁷¹ If proof of paternity was the purpose of including the customary law aspect in section 21 of the Children's Act, the legislature should have clearly indicated the specific type of customary damages that had to be paid. Furthermore, the legislature's failure to make any sort of reference to *lobolo*, the crucial factor in determining the house to which a child belongs, in the provisions of section 21(1)(b) of the Children's Act, shows a lack of understanding or a complete disregard of customary family law.³⁷² The inclusion of customary law damages in section 21 but not *lobolo* is thus confusing to say the least. Sloth-Nielsen and Mwambene argue that the incorporation of customary law into section 21 of the Children's Act, which results in it becoming official customary law, allows unmarried fathers to circumvent the requirements of living customary law in their quest to acquire parental responsibilities and rights.³⁷³ If the intention of the legislature was to ensure that section 21 of the Children's Act recognises and gives effect to the rules of customary law relevant to the acquisition of parental responsibilities and rights, then the legislature should not alter the purpose of an aspect of customary law, in this case the general payment of damages, to fit its needs.³⁷⁴

3 3 3 Maintenance

In terms of South African customary law a child will always be affiliated with either the mother or natural father's house, depending on whether such child was born to married or unmarried parents.³⁷⁵ In the case of a child born to unmarried parents, the natural father is not liable to maintain his child unless he has subsequently acquired parental

³⁷¹ Boezaart (2013) *International Journal of Private Law* 403. See also Bennet *Customary Law in South Africa*.

³⁷² Nkosi (2018) *Obiter* 200. See also Sloth-Nielsen & Mwambene (2010) *Law in Context* 34-35.

³⁷³ Sloth-Nielsen & Mwambene (2010) *Law in Context* 35. See 2 2 3 2 above for the discussion on the distinction between official and living customary law.

³⁷⁴ Sloth-Nielsen & Mwambene ((2010) *Law in Context* 35) highlight the fact that the purpose that the legislature wants to achieve by incorporating the payment of customary damages into s 21 of the Children's Act (an identification purpose and/or the transfer of parental responsibilities and rights) is not the same purpose that it fulfils in terms of living customary law.

³⁷⁵ Nkosi (2018) *Obiter* 199. See discussion under 3 3 1 & 3 3 2 above.

responsibilities and rights.³⁷⁶ In *Stamper v Nqolobe*,³⁷⁷ it was held that only once an unmarried father had paid *isondlo*, and subsequently obtained parental rights, was he liable to maintain his child.³⁷⁸ Therefore, in terms of customary law, an unmarried biological father is not required to maintain his child in the same way as the Children's Act requires an unmarried father to do.³⁷⁹ In terms of the country's civil law, not only does the unmarried father have a duty to contribute to the child's maintenance, irrespective of whether or not he has acquired parental responsibilities and rights, but the child also has a right to such maintenance.³⁸⁰ This is, however, not the case in terms of South African customary law.

3 4 Muslim personal law

Contrary to the position set out in the Children's Act, Muslim personal law has not yet shifted its emphasis from parental authority to parental responsibilities and rights.³⁸¹ With that being said, Muslim personal law does not regard the rights and duties of the parents as taking precedence over the rights of the child and *vice versa*. The aforementioned legal system rather aims to find a balance between the rights of parents and their children.³⁸² In terms of Muslim personal law, similar to the common law position, parental authority consists of custody, guardianship, maintenance and access.³⁸³ Custody

³⁷⁶ Bekker (2008) *Obiter* 402. See 3 3 2 above for the discussion on how an unmarried father acquires parental responsibilities and rights in terms of South African customary law.

³⁷⁷ 1978 AC 147 (S).

³⁷⁸ Bennet *Customary Law in South Africa* 317.

³⁷⁹ See 3 2 2 2 & 3 2 4 1 4 above.

³⁸⁰ *F v L and Another* 1987 (4) SA 525 (W) 526 paras d-e.

³⁸¹ N Moosa "Muslim personal law affecting children: diversity, practice and implications for a new Children's Code for South Africa" (1998) *SALJ* 479 483. See also N Moosa *An overview of post-divorce support for Muslim Children in the context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill* (2012) 283 288.

³⁸² Moosa (1998) *SALJ* 479 483; See also UM Assim *In the best interest of children deprived of a family environment: A focus on Islamic Kafalah as an alternative care option* University of Pretoria: LLM dissertation (2009) 36. Islam has always placed a great deal of importance on the rights as well as the responsibilities of children. It could be argued that the responsibilities that children have towards their parents are of greater importance than the rights of the children.

³⁸³ Moosa (1998) *SALJ* 490. In this regard, Moosa (*An overview of post-divorce support for Muslim Children in the context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill* 288) highlights the fact that, contrary to the provisions of the Children's Act, terms such as "custody" and "access" are still used in various Muslim countries, as well as Muslim personal law in South Africa.

essentially entails having control of the child, as well as making decisions affecting the child, on a day to day basis, while guardianship refers to the care of a child's person and property.³⁸⁴ Maintenance is aimed at providing children with the basic necessities they require in order to live, which includes *inter alia* food, clothing and shelter.³⁸⁵

In terms of Muslim personal law, the marital status of the biological parents plays an important role in regulating the parent-child relationship.³⁸⁶ The fact that a child is born to unmarried parents has certain implications for the child, including the persons vested with parental authority in relation to the child.³⁸⁷ While South African customary law and, to a lesser extent, civil law recognise the important role that the extended family can play in a child's upbringing, Muslim personal law generally views the responsibility of raising a child as the responsibility of the child's parents, provided that such child is born in wedlock.³⁸⁸ It is generally accepted that children born to married parents have the right to be cared for by both parents in an environment that is conducive to their upbringing.³⁸⁹ This right to be cared for by both parents within a family structure stems from Islam's prohibition on sex out of wedlock.³⁹⁰

³⁸⁴ A Rafiq "Child custody in classic Islamic law and laws of contemporary Muslim world (an analysis)" (2014) 14 *International Journal of Humanities and Social Science* 267 268. In terms of the Arabic language, custody and guardianship are referred to as *Hidhanat* and *Wilayat* respectively, which directly translates to "upbringing of the child" and "to protect". According to Rafiq, despite the fact that custody is exercised by a child's parents, it is a right of the child rather than a right of the parents. See also Moosa (1998) *SALJ* 489.

³⁸⁵ Moosa (1998) *SALJ* 490.

³⁸⁶ E Moosa "The child belongs to the bed: illegitimacy and Islamic law" in S Burman & E Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 171 172-175.

³⁸⁷ 175.

³⁸⁸ D Olowu "Children's rights, international human rights and the promise of Islamic legal theory" (2008) 12 *Law, Democracy & Development* 62 68. See also Bekker (2008) *Obiter* 396.

³⁸⁹ Moosa (1998) *SALJ* 488; According to Rafiq, ((2014) *International Journal of Humanities and Social Science* 268) "[the] [r]ights and duties of the spouses have been prescribed in a manner to keep an ideal balance". Furthermore, children have a right to know their maternity as well as paternity in terms of Muslim personal law; See also Olowu (2008) *Law, Democracy & Development* 68.

³⁹⁰ M Rajabi-Ardeshiri "The rights of the child in the Islamic context: The challenges of the local and the global" (2009) 17 *International Journal of Children's Rights* 475 479. See also UM Assim *In the best interest of children deprived of a family environment: A focus on Islamic Kafalah as an alternative care option* University of Pretoria: LLM dissertation (2009) 36.

In terms of Muslim personal law, the guardianship of a child born to married parents vests solely in the child's biological father.³⁹¹ In addition to guardianship, the responsibility for maintaining the child is also the responsibility of the child's natural father, with the mother only having to bear such responsibility in the event that the father is unable to do so.³⁹² Should the father, for example, be financially unable to fulfill his duty, the mother would have to step in and see to the maintenance of the child. According to Moosa, at the time of the child's birth the mother acquires custody of the child, and is thus entrusted with managing the child's life on a daily basis, usually until such time as the child reaches the age of puberty.³⁹³ The final element that makes up parental authority is the right of access. Should the child's parents be living separately, for whatever reason, the custodian parent is obliged to give the non-custodian parent access to his/her child.³⁹⁴

While both married parents play a role in the upbringing of their children, the same is not the case where children are born to unmarried parents.³⁹⁵ In the case of a child born to unmarried parents, the mother acquires sole parental authority and, as a result, is responsible for the custody, guardianship and maintenance of her child.³⁹⁶ The child is thus deemed to have a legally recognised relationship with neither the father, nor members of the father's family.³⁹⁷ According to Moosa, the Roman Law maxim *legitimatio per subsequens matrimonium*, which loosely translates to the legitimation of a child born to unmarried parents through marriage by the parents after birth, has never been recognised by Islamic law.³⁹⁸ If biological parents thus entered into a marriage after the

³⁹¹ Olowu (2008) *Law, Democracy & Development* 69. See also Moosa (1998) SALJ 490; Rafiq (2014) *International Journal of Humanities and Social Sciences* 267.

³⁹² Moosa (1998) SALJ 490.

³⁹³ Moosa (1998) SALJ 489. See also Olowu (2008) *Law, Democracy & Development* 69.

³⁹⁴ Moosa (1998) SALJ 490.

³⁹⁵ Moosa (1998) SALJ 488. See also Rajabi-Ardeshiri (2009) *International Journal of Children's Rights* 479; Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* 175.

³⁹⁶ Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* (1992) 175. Despite the fact that parental authority in relation to children born to unmarried parents vests in the biological mother, according to Moosa it is almost second nature for this authority to be transferred to, and subsequently exercised by, a male family member.

³⁹⁷ Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* 173.

³⁹⁸ 174.

birth of their child, the father would still not acquire parental authority. With no involvement from the unmarried father, it can be argued that children born to unmarried parents have a right to receive only maternal care in terms of Muslim personal law.

3 5 Conclusion

While great strides have been made regarding the protection of children's rights in South Africa, it is questionable whether the right to parental care of all children is currently being realised. From the above discussion, it can be seen that all three of the legal systems under consideration determine who acquires parental responsibilities and rights based on the marital status, sex and/or gender of the child's parents, all of which are factors outside of the child's control. Children born of a marriage are generally cared for by both of their parents, thus giving effect to their right to parental care. This is, however, not necessarily the case where children are born to unmarried parents. In terms of both South African civil and Muslim personal law, it is only the mother that automatically acquires responsibilities and rights in respect a child born to unmarried parents, while neither unmarried biological parent automatically acquires parental responsibilities and rights in terms of South African customary law.³⁹⁹ As a result, children born to unmarried parents, more often than not, receive either a right to maternal or paternal care, but not a right to parental care. This raises the question of whether the right to parental care of children born to unmarried parents is limited and, should it be found to be limited, whether such limitation is justifiable.

³⁹⁹ See 3 2 3 3 1, 3 3 2 & 3 4 above.

Chapter four: The best interests of the child and the right to parental care in South Africa

4 1 Introduction

The best interests of the child has for a long time been recognised as a principle of South African law, as well as international law.⁴⁰⁰ It is generally accepted that the best interests of the child principle was formally introduced into South African law in *Fletcher v Fletcher* (“*Fletcher*”).⁴⁰¹ Since its introduction into the country’s domestic law, the best interests of the child has become an integral part of South African law. The court in *Kaiser v Chambers* (“*Kaiser*”)⁴⁰² described the best interests of the child as a “golden thread which runs throughout the whole fabric of our law relating to children”.⁴⁰³ The principle initially formed part of South Africa’s common law, but is now entrenched in section 28(2) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”).⁴⁰⁴ The Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child. Section 9 of the Children’s Act 38 of 2005 (the

⁴⁰⁰ See R Taylor “Putting children first: children’s interests as a primary consideration in public law” (2016) 28 *Child and Family Law Quarterly* 45 46.

⁴⁰¹ 1948 (1) SA 130 (A). In *Fletcher* (134) the court considered who acquired custody of minor children upon the divorce of the parents of those children. Traditionally, the most important consideration in assigning custody was the ‘innocent spouse’. It was traditionally accepted that the innocent spouse would acquire custody after divorce. The court in *Fletcher*, however, held that although determining who the innocent spouse is is relevant, the most important consideration is the interests of the child. Furthermore, Moosa (“South Africa” in N Yassari, LM Moller & I Gallala-Arndt *Parental Care and the Best Interests of the Child in Muslim Countries* (2017) 219 230) highlights the fact that although *Fletcher* introduced the best interests of the child to South African law, the court did not set out factors that could be considered in determining what is in a child’s best interests or what exactly the best interests of the child entails; See also A Skelton “Children” in I Currie & J de Waal *The Bill of Rights Handbook* 6th ed (2013) 598 619; JA Robinson, S Human, BS Smith & M Carnelley *Introduction to South African Family Law* 5th ed (2012) 63; FM Mahlobogwane “Parenting plans in terms of the Children’s Act: serving the best interests of the parent or child” (2013) *Obiter* 218 220.

⁴⁰² 1969 (4) SA 224 (C).

⁴⁰³ *Kaiser* 228 para f. See also J Heaton “An individualised, contextualised and child-centred determination of the child’s best interests, and the implications of such an approach in the South African context” (2009) 34 *Journal for Juridical Science* 1 1; RLK Ozah & ZM Hansungule “Upholding the best interests of the child in South African customary law” in T Boezaart *Child Law in South Africa* 2 ed (2017) 283 283.

⁴⁰⁴ TW Bennet “Re-introducing African customary law to the South African legal system” (2009) 57 *The American Journal of Comparative Law* 1 19; Ozah & Hansungule “Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* 286. See also E Bonthuys “The best interests of children in the South African Constitution” (2006) 20 *International Journal of Law, Policy and the Family* 23 24. See 4 3 below for a discussion on whether the best interests of the child is a constitutionally recognised right or only a principle of interpretation in South African law.

“Children’s Act”) confirms the paramount importance of the best interests of the child principle by giving legislative effect thereto.⁴⁰⁵ **In this regard, not only does the Children’s Act emphasise that the best interests of the child must *inter alia* be respected, protected and promoted in all actions, decisions and proceedings concerning the child, but also states that ensuring that the child’s best interests are of paramount importance in every matter concerning the child is one of its primary objectives.**⁴⁰⁶

Initially, in terms of the common law, the application of the best interests of the child principle was limited to family law matters.⁴⁰⁷ According to Heaton, despite the fact that the best interests of the child formed part of South African law prior to it being constitutionally entrenched, the constitutional recognition of the best interests of the child has raised its importance.⁴⁰⁸ The fact that the best interests of the child is now a consideration of paramount importance in all matters concerning children, and is not limited to matters related to the care, contact and guardianship of children, has resulted in section 28(2) of the Constitution having an extensive range of application.⁴⁰⁹ This was confirmed in *Minister of Welfare and Population Development v Fitzpatrick and Others*⁴¹⁰ (“*Fitzpatrick*”), where the court stated that the application of the best interests of the child

⁴⁰⁵ Ozah & Hansungule “Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* 298. S 9 of the Children’s Act provides as follows:

“In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied”

⁴⁰⁶ S 6(2)(a) of the Children’s Act; S 9 of the Children’s Act creates the impression that the best interests of the child is only taken into account in matters concerning the care, protection and well-being of a child. S 6(2)(a) of the Children’s Act, however, makes it clear that the best interests of the child must be considered in all decisions, actions and proceedings concerning the child.

⁴⁰⁷ Moosa “South Africa” in *Parental Care and the Best Interests of the Child in Muslim Countries* 231. See also A Skelton “Constitutional protection of children’s Rights” in T Boezaart *Child Law in South Africa* 2 ed (2017) 327 345.

⁴⁰⁸ Heaton (2009) *Journal for Juridical Science* 2. See also Ozah & Hansgule “Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* 283; RD Mawdsley, JL Beckmann, E de Waal & CJ Russo “The best interest of the child: A United States and South African perspective” (2010) *Journal for Juridical Science* 1 6.

⁴⁰⁹ Heaton (2009) *Journal for Juridical Science* 4. See also D Mailula “Taking children’s rights seriously: access to, and custody and guardianship of, a child born out of wedlock” (2005) 46 *Codicillus* 15 26.

⁴¹⁰ 2000 (3) SA 422 (CC).

was not limited to the rights set out in the children's rights clause.⁴¹¹ In this regard, Reyneke provides as follows:

“The best interests of the child standard is applicable to the implementation of all legislation applicable to a child, children, a specific group of children or children in general, as well as to any proceedings, actions and decisions instituted or taken by an organ of state concerning children.”⁴¹²

It is therefore clear that the best interests of the child must be taken into account in all matters concerning children, which *prima facie* includes the right to parental care and the acquisition of parental responsibilities and rights. This chapter will thus set out what the best interests of the child entails in terms of South African civil, customary and Muslim personal law. Furthermore, the international perspective of the best interests of the child principle will be discussed, in order to determine the extent to which the international law standard informs South Africa's interpretation and application of the principle.⁴¹³ The focus of the chapter will be to set out the relationship between the best interests of the child and the right to parental care.

4 2 An international perspective of the best interests of the child

The best interests of the child is a well-established principle of both South African law and international law. The Cape Provisional division confirmed this in *R v H and Another*⁴¹⁴ (“*R v H*”), stating that the best interests of the child “is a universal principle that is found in most of the international instruments or conventions dealing with the rights of a child”.⁴¹⁵ Similar to the position in South Africa, there is no internationally recognised

⁴¹¹ *Fitzpatrick* para 17. See also Moosa “South Africa” in *Parental Care and the Best Interests of the Child in Muslim Countries* 223.

⁴¹² M Reyneke “Realising the child's best interests: lessons from the Child Justice Act to improve the South African Schools Act” (2016) 19 *PELJ* 2 4. See also M Couzens “Procurement adjudication and the rights of children: *Freedom Stationery (PTY) LTD v MEC for Education, Eastern Cape* 2011 JOL 26927 (E)” (2012) 15 *PELJ* 392 399.

⁴¹³ S 2 of the Children's Act explicitly states that it is an objective of the Act to give effect to the provisions of international instruments concerning the well-being of children.

⁴¹⁴ 2005 (6) SA 535 (C).

⁴¹⁵ *R v H* para 9. See also Mawdsley, Beckmann, de Waal & Russo (2010) *Journal for Juridical Science* 9.

and accepted definition of the best interests of the child.⁴¹⁶ Supaat, however, submits that the best interests of the child generally concerns the welfare of the child.⁴¹⁷ According to the United Nations Committee on the Rights of the Child (the “Committee on the Rights of the Child”) “[t]he principle of best interests ...requires active measures to protect [children’s] rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realising children’s rights”.⁴¹⁸

The United Nations Convention on the Rights of the Child⁴¹⁹ (“CRC”) sets out the best interests of the child principle in article 3(1), which states:

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

The best interests of the child is referenced in a number of articles in the CRC, but article 3(1) is seen as the umbrella provision that is, more often than not, used in conjunction with other CRC articles.⁴²⁰ According to the Committee on the Rights of the Child, the best interests of the child serves a number of purposes.⁴²¹ The Committee on the Rights of the Child provides that the best interests of the child is not only a substantive right, but is also an interpretative principle used to determine what is in the best interests of the child, and a procedural rule.⁴²² This interpretation of article 3(1) of the CRC makes

⁴¹⁶ D I Supaat “Establishing the best interests of the child rule as an international custom” (2014) 5 *International Journal of Business, Economics and Law* 109 110. See also B Mezmur “The United Nations Convention on the Rights of the Child” in T Boezaart *Child Law in South Africa* 2 ed (2017) 403 414.

⁴¹⁷ Supaat (2014) *International Journal of Business, Economics and Law* 109.

⁴¹⁸ UN Committee on the Rights of the Child *General Comment No 7: Implementing child rights in early childhood* UN Doc CRC/C/GC/7Rev.1 6

⁴¹⁹ The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The CRC was signed and ratified by South Africa on 29 January 1993 and 16 June 1995 respectively.

⁴²⁰ See articles 18 & 20 of the CRC. See also Taylor (2016) *Child and Family Law Quarterly* 47; M Freeman *Article 3: The Best Interests of the Child* (2007) 1.

⁴²¹ The UN Committee on the Rights of the Child *General Comment No 14: the right of the child to have his or her best interests taken as a primary consideration* UN Doc CRC/C/GC/14 4. See also Mezmur “The United Nations Convention on the Rights of the Child” in *Child Law in South Africa* 414.

⁴²² The UN Committee on the Rights of the Child *General Comment No 14: the right of the child to have his or her best interests taken as a primary consideration* UN DOC CRC/C/GC/14 4;

it possible for the best interests of the child to be a primary consideration in all matters concerning children, as is required by the aforementioned article. Furthermore, rather than the best interests of the child being the paramount consideration, the CRC makes it a primary consideration.⁴²³ This arguably highlights the importance of the best interests of the child, while at the same time recognising that it is not the only important consideration when dealing with matters concerning children.⁴²⁴

Article 3(1) of the CRC emphasises that in all actions concerning children, the executive, legislature and judiciary all have a responsibility to give effect to, or at the very least consider, the best interests of those children. In terms of the CRC, giving effect to the best interests of the child is not solely the responsibility of the child's parents, but is also a responsibility of the State. The African Charter on the Rights and Welfare of the Child⁴²⁵ ("ACRWC") goes a step further than the CRC, making the best interests of the child the primary consideration, rather than a primary consideration, in all actions concerning the child.⁴²⁶ The fact that the ACRWC makes the best interests of the child the primary consideration suggests that the child's interests override all other considerations.⁴²⁷ While the wording of section 28(2) of the Constitution does not directly correspond with the wording of either article 3(1) of the CRC or article 4 of the ACRWC, the best interests of the child standard in South Africa is arguably derived from, and formulated in accordance with, the aforementioned international instruments.⁴²⁸

4 3 The best interests of the child: A constitutional right or principle?

Since the inclusion of the best interests of the child in the Constitution there has been uncertainty regarding whether section 28(2) merely sets out a principle of South African

Mezmur "The United Nations Convention on the Rights of the Child" in *Child Law in South Africa* 414; Taylor (2016) *Child and Family Law Quarterly* 47. See also the discussion of Fitzpatrick in 4 3 below.

⁴²³ Article 3(1) of the CRC. See also Supaat (2014) *International Journal of Business, Economics and Law* 109.

⁴²⁴ Freeman *Article 3: The Best Interests of the Child* 5.

⁴²⁵ The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49. The ACRWC was signed and ratified by South Africa on 10 October 1997 and 7 January 2000 respectively.

⁴²⁶ Article 4 of the ACRWC.

⁴²⁷ M Gose *The African Charter on the Rights and Welfare of the Child* (2012) 26.

⁴²⁸ Skelton "Constitutional protection of children's rights" in *Child Law in South Africa* 345.

law, or whether it creates an independently recognised constitutional right.⁴²⁹ Bonthuys argues that the general manner in which section 28(2) of the Constitution has been applied by South African courts suggests that it is not really a self-standing constitutional right.⁴³⁰ For example, in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*⁴³¹ (“*Du Toit*”) the court refers to the best interests of the child as a principle, rather than a right.⁴³² According to Bonthuys, it is not necessary for the best interests of the child to be recognised as an independent right as there are generally other children’s rights that can be relied on.⁴³³ She further highlights a variety of cases in which a decision was reached on the basis of the best interests of the child, when it could have been decided on the basis of other constitutional rights.⁴³⁴ Skelton, however, is of the opinion that section 28(2) of the Constitution fulfils multiple functions in South Africa.⁴³⁵ The court in *Fitzpatrick* confirmed that the best interests of the child is not only a principle, but also a recognised constitutional right which exists independently from the other rights in the children’s rights clause.⁴³⁶

⁴²⁹ According to Moosa, (“South Africa” in *Parental Care and the Best Interests of the Child in Muslim Countries* 230) the failure to provide a rigid definition of what the best interests of the child entails, has resulted in different interpretations of the principle by South African courts.

⁴³⁰ Bonthuys (2006) *International Journal of Law, Policy and the Family* 26.

⁴³¹ 2003 (2) SA 198 (CC).

⁴³² *Du Toit* para 20. See also Bonthuys (2006) *International Journal of Law, Policy and the Family* 26. Mahlobogwane ((2013) *Obiter* 221) similarly refers to the best interests of the child as a principle or criterion that is used by courts when making a decision regarding children.

⁴³³ Bonthuys (2006) *International Journal of Law, Policy and the Family* 27.

⁴³⁴ Bonthuys ((2006) *International Journal of Law, Policy and the Family* 27) refers to *inter alia* *Fitzpatrick* and *Du Toit*. The court in *Fitzpatrick* (paras 1 & 13) had to determine the constitutionality of legislation which prevented persons, who were not South African citizens, from adopting South African children. Bonthuys is of the opinion that this case could have been decided on the basis of section 28(1)(b) of the Constitution, rather than the best interests of the child.

⁴³⁵ Skelton “Children” in *The Bill of Rights Handbook* 619; Skelton “Constitutional protection of children’s rights” in *Child Law in South Africa* 346. She argues that the best interests of the child is not only an established principle of South African law that aids the interpretation of other constitutionally entrenched rights, but is also itself an independently recognised right. Reyneke ((2016) *PELJ* 4) supports Skelton’s view on the best interests of the child. According to Reyneke, section 28(2) of the Constitution sets out a principle as well as constitutionally entrenched right; See also 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* 178 191; Couzens (2012) *PELJ* 399.

⁴³⁶ *Fitzpatrick* para 17. The idea that section 28(2) of the Constitution sets out an interpretative principle as well as a constitutional right is in line with the Committee on the Rights of the Child’s

4 4 The application of the best interests of the child

4 4 1 South African civil law

4 4 1 1 The paramount importance of the best interests of the child

Section 28(2) of the Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child. According to the Oxford dictionary, something that is paramount is seen as being more important than anything else.⁴³⁷ This *prima facie* suggests that in all matters concerning a child, the best interests of that child is the most important consideration, and overrides all other considerations. The court in *De Reuk v Director of Public Prosecutions, Witwatersrand Local Division and Others*⁴³⁸ (“*De Reuk (HC)*”) was of a similar opinion, stating as follows:

“The fact that the Constitution regards a child's best interests of paramount importance must be emphasised. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable.”⁴³⁹

According to the court in *De Reuk (HC)*, in every matter concerning a child, the best interests of the child is the most important consideration and almost always overrides all other considerations or constitutional rights.⁴⁴⁰ This approach was, however, not followed by the Constitutional Court in *De Reuk v Director of Public Prosecutions, Witwatersrand Local Divisions and Others*⁴⁴¹ (“*De Reuk (CC)*”). In *De Reuk (CC)* the Constitutional Court held that the best interests of the child does not automatically override all other constitutional rights and relevant considerations, and that section 28(2) can be limited in the same way as other constitutionally entrenched rights.⁴⁴² This was confirmed by the

interpretation of the best interests of the child. See 4 2 above for a discussion on the Committee on the Rights of the Child's interpretation of the best interests of the child.

⁴³⁷ A Stevenson *Oxford Dictionary of English* 3 ed (2010); Oxford “English Oxford Living Dictionaries” *Oxford* <<https://en.oxforddictionaries.com/definition/paramount>> (accessed 01-11-2018). See also Heaton (2009) *Journal for Juridical Science* 4.

⁴³⁸ 2003 (3) SA 389 (W).

⁴³⁹ *De Reuk (HC)* para 10.

⁴⁴⁰ *De Reuk (HC)* para 10.

⁴⁴¹ 2004 (1) SA 406 (CC).

⁴⁴² *De Reuk (CC)* para 55. The court in *De Reuk (CC)*, in showing that section 28(2) of the Constitution can be limited, referred to *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC). See also Skelton “Constitutional protection of children's rights” in *Child Law in South Africa* 348; Skelton “Children” in *The Bill of Rights Handbook* 622; Bekink (2012) *PELJ* 191.

Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)*⁴⁴³ (“*S v M*”), in which it was stated that the fact that the Constitution makes the best interests of the child of paramount importance, does not mean that the child’s best interests can never be limited.⁴⁴⁴ The court in this case highlighted the fact that situations may arise where the best interests of the child must be limited in order for other constitutional rights to be realised.⁴⁴⁵ Cameron J eloquently set out the manner in which the best interests of the child should operate in *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)*⁴⁴⁶ (“*Centre for Child Law v Minister of Justice and Constitutional Development*”), stating that the paramountcy of the best interests of the child means that the child’s interests are one of the most, if not the most, important considerations, but not that all other considerations are irrelevant or unimportant.⁴⁴⁷

In *Sonderup v Tondelli and Another*⁴⁴⁸ (“*Sonderup*”) a young girl was brought to South Africa by her mother in contravention of an order made by the Supreme Court of British Columbia.⁴⁴⁹ The court had to determine whether the mother’s removal of her daughter violated the provisions of the Hague Convention on Civil Aspects of International Abduction (the “Hague Convention”).⁴⁵⁰ According to the mother, the Hague Convention on the Civil Aspects of International Abduction Act 72 of 1996, which gives statutory recognition to the Hague Convention, failed to give effect to the paramountcy of the best interests of the child principle, as is required by section 28(2) of the Constitution.⁴⁵¹ The court had to determine whether the Hague Convention’s limitation of a child’s short term

⁴⁴³ 2008 (3) SA 232 (CC).

⁴⁴⁴ *S v M* para 25.

⁴⁴⁵ *S v M* para 25.

⁴⁴⁶ 2009 (2) SACR 477 (CC).

⁴⁴⁷ *Centre for Child Law v Minister of Justice and Constitutional Development* para 29. See also Bekink (2012) *PELJ* 192; Skelton “Constitutional protection of children’s rights” in *Child Law in South Africa* 349-350.

⁴⁴⁸ 2001 (1) SA 1171 (CC).

⁴⁴⁹ *Sonderup* para 6.

⁴⁵⁰ The Hague Convention on Civil Aspects of International Abduction, 25 October 1980, Hague XXVII (The Hague Convention was adopted on 25 October 1980, and entered into force 1 December 1983); *Sonderup* para 1.

⁴⁵¹ *Sonderup* para 26.

interests, in order to give effect to the long-term interests of the child, was justifiable.⁴⁵² The court concluded that the best interests of the child could be justifiably limited because of the important purpose that the Convention seeks to achieve in the protection of children.⁴⁵³ The decision in *Sonderup* shows that the best interests of the child is not absolute and can be limited in certain circumstances.⁴⁵⁴

4 4 1 2 The factors relevant to best interests of the child

The court in *Fitzpatrick* highlighted the fact that a concise definition of the best interests of the child does not exist in either South African or international law.⁴⁵⁵ In *McCall v McCall*⁴⁵⁶ (“McCall”) the applicant and respondent had two children during the course of their marriage, before they separated from one another.⁴⁵⁷ The applicant (the father) claimed custody of his son, who was in the custody of the respondent (the mother).⁴⁵⁸ The court held that the most important consideration in determining custody is the best interests of the child, and listed factors to be taken into consideration when determining what is in a child’s best interests.⁴⁵⁹ The factors listed by the court, which are relevant to the child’s right to parental care, are as follows:

“(a) the love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child;

⁴⁵² *Sonderup* para 28.

⁴⁵³ *Soderup* para 10; article 3 of the Hague Convention; Skelton “Children” in *The Bill of Rights Handbook* 621; Skelton “Constitutional protection of children’s rights” in *Child Law in South Africa* 348. The Hague Convention seeks to protect children from being subjected to unlawful movement across international borders, as well as the negative effects thereof. The Convention states that the removal of a child is wrongful if it is *inter alia* in breach of the rights of the person who has custody of the child (the term custody is used in the Convention). More often than not, it is the child’s parents that have custody of the child. The purpose that the Hague Convention seeks to achieve is thus linked to ensuring that the child’s right to parental care is protected against unlawful interference.

⁴⁵⁴ Bekink (2012) *PELJ* 192. See also Skelton “Constitutional protection of children’s rights” in *Child Law in South Africa* 346.

⁴⁵⁵ *Fitzpatrick* para 18.

⁴⁵⁶ 1994 (3) SA 201 (C). *McCall v McCall* was a 1994 case, and was thus decided prior to the commencement of the Children’s Act.

⁴⁵⁷ *McCall* 203 para d.

⁴⁵⁸ *McCall* 204 para a. The term custody is used above as *McCall* was decided before the commencement of the Children’s Act. The change in terminology from custody to care had therefore not yet taken place.

⁴⁵⁹ *McCall* 204 para h. See also Mahlobogwane (2013) *Obiter* 220.

- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (...) should be placed in the custody of his father;"⁴⁶⁰

The Children's Act similarly sets out an extensive list of factors to be taken into account when considering the best interests of the child.⁴⁶¹ These factors are set out in section 7 of the Children's Act. The factors which are relevant to the child's right to parental care are as follows:

- "(a) the nature of the personal relationship between— (i) the child and the parents, or any specific parent;
- (b) the attitude of the parents, or any specific parent, towards— (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from— (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to

⁴⁶⁰ *McCall* 205 paras a-g.

⁴⁶¹ S 7 of the Children's Act. See also Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 223.

maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child— (i) to remain in the care of his or her parent, family and extended family;

(g) the child's— (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by— (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child⁴⁶²

The factors in section 7 of the Children's Act are based on a number of the factors set out by the court in *McCall*.⁴⁶³ It must, however, be noted that the list of factors set out in section 7 of the Children's Act are not exhaustive.⁴⁶⁴ The aforementioned factors must be taken into account where they are of relevance, but they are not the only factors that the court can take into consideration when determining what is in the best interests of a particular child.⁴⁶⁵ While the factors set out in *McCall* and the Children's Act don't exactly constitute a definition of the best interests of the child, they have given content to an otherwise open-ended principle.

As a result of the fact that the best interests of the child is not rigidly defined in the Constitution or the Children's Act, it has been argued that the principle is indeterminate and that it gives decision makers too wide a discretion to determine what is in a child's

⁴⁶² S 7 of the Children's Act.

⁴⁶³ Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 230. See also Mahlobogwane (2013) *Obiter* 221.

⁴⁶⁴ Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 223.

⁴⁶⁵ Heaton (2009) *Journal for Juridical Science* 227; Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 223.

best interests.⁴⁶⁶ It must, however, be noted that each child is an independent individual, who has different characteristics and personality traits. It is therefore nearly impossible to create a rigid pre-determined formula to adequately assess what is in each individual child's best interests. The principle must thus be flexible enough to cater for all possible eventualities that may arise.⁴⁶⁷ According to the court in *Fitzpatrick*, the indeterminate and flexible nature of the best interests of the child principle allows the principle to cater to the needs of all children.⁴⁶⁸ Similarly, in *S v M* the court recognised that the flexibility of the best interests of the child principle, together with the fact that it operates in a contextual manner, is what gives the principle its strength.⁴⁶⁹

4 4 2 South African customary law and Muslim personal law

In *Prince v President, Cape Law Society and Others*⁴⁷⁰ (“*Prince*”) the court stated that the country's diverse society is made up of people that come from various religious and cultural backgrounds.⁴⁷¹ As a result of the multicultural composition of South African society, it would be unreasonable to provide a set standard against which all matters concerning children should be measured.⁴⁷² There has, however, been a tendency to view the best interests of the child from an individualistic, Western perspective. To constantly determine the best interests of the child in terms of a Western understanding of what is in a child's best interests, fails to recognise and protect South Africa's diversity.⁴⁷³ According to Moosa, such an individualistic approach to the best interests of

⁴⁶⁶ *S v M* para 23. See also Heaton (2009) *Journal for Juridical Science* 7; Taylor (2016) *Child and Family Law Quarterly* 58.

⁴⁶⁷ According to Glasser, (“Can the family advocate adequately safeguard our children's best interests” (2002) 65 *THRHR* 74 80) the determination of what is in a child's best interests is a question of fact, and, as a result, there cannot be a rigid list of criteria.

⁴⁶⁸ *Fitzpatrick* para 18.

⁴⁶⁹ *S v M* para 24; The UNHCR: The UN Refugee Agency “UNHCR Guidelines on Determining the Best interests of the Child” (2008) 14 similarly highlights that the best interests of the child is determined by circumstances related to the individual child, such as the age of the child, the environment in which the child grew up and the child's personal experiences.

⁴⁷⁰ 2002 (3) BCLR 231 (CC).

⁴⁷¹ *Prince* para 49.

⁴⁷² JC Bekker “Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa” (2008) *Obiter* 397. See also Moosa “South Africa” in *Parental Care and the Best Interests of the Child in Muslim Countries* 226-227.

⁴⁷³ Moosa “South Africa” in *Parental Care and the Best Interests of the Child in Muslim Countries* 227. See also Heaton (2009) *Journal for Juridical Science* 9. According to the court in *Prince*

the child would be contrary to South African customary law, where the emphasis is on the interests of the family group as a whole, rather than the interests of the children of that family.⁴⁷⁴ Heaton is of the opinion that an individual-orientated and contextual approach to the best interests of the child is not only the most suitable approach, but would also recognise, promote and protect South Africa's diversity.⁴⁷⁵ According to Heaton, this would allow factors such as the culture and religion of the child to be taken into account when determining what is in that child's best interests.⁴⁷⁶

South African customary law has always emphasised the importance of the family group, which suggests that the interests of the family often take precedence over the interests of the individual.⁴⁷⁷ The welfare of children is thus not given any specific attention, as their welfare is viewed in the context of the family's welfare.⁴⁷⁸ In other words, what is in the best interests of the family is seen as being in the best interests of the children of that family.⁴⁷⁹ Customary law does not hold the interests of children in a higher regard than the interests of other family members or the interests of the family as a whole.⁴⁸⁰ As a result of this approach to the welfare of children, there was uncertainty regarding the extent to which the best interests of the child was recognised, protected and applied in South African customary law. According to Heaton, a contextual and individual-orientated approach to the best interests of the child does not mean that cultural or religious considerations must always be the determining factor, but rather that courts can, at the very least, take into account the cultural or religious upbringing of the child when determining what is in his or her best interests.⁴⁸¹ The court in *Hlophe v Mahlalela*

(para 79), proper recognition and protection of South Africa's diversity requires that, where possible, the practices of different cultures be tolerated.

⁴⁷⁴ Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 227.

⁴⁷⁵ Heaton (2009) *Journal for Juridical Science* 12 & 15.

⁴⁷⁶ Heaton (2009) *Journal for Juridical Science* 12. See also T Boezaart "Building bridges: African customary family law and children's rights" (2013) 6 *International Journal of Private Law* 395-398.

⁴⁷⁷ Boezaart (2013) *International Journal of Private Law* 395-398. See also Heaton (2009) *Journal for Juridical Science* 10; Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 284-286; Glasser (2002) *THRHR* 81.

⁴⁷⁸ Heaton (2009) *Journal for Juridical Science* 10. See also Boezaart (2013) *International Journal of Private Law* 398.

⁴⁷⁹ Boezaart (2013) *International Journal of Private Law* 398.

⁴⁸⁰ TW Bennet *Customary Law in South Africa* (2004) 295.

⁴⁸¹ Heaton (2009) *Journal for Juridical Science* 12.

and Another⁴⁸² (“*Hlophe*”) followed a similar approach to the one advocated by Heaton when confirming the application of the best interests of the child in South African customary law.

In *Hlophe* the court had to determine who should get custody of a minor child after the death of the child’s mother. The applicant, the child’s father, had entered into a marriage with the child’s mother, the daughter of the respondents.⁴⁸³ During the conclusion of the marriage, a *lobolo* agreement had been entered into, wherein it was stipulated that the applicant would transfer a certain number of cattle or a monetary sum to the family of the respondents.⁴⁸⁴ The child’s mother passed away in June 1994 before the applicant had fulfilled his responsibilities in terms of the *lobolo* agreement. After the death of his wife, the applicant sought custody of his child as he wanted to raise her himself, but this was opposed by the respondents.⁴⁸⁵ The court had to determine who acquired custody of a minor in the event that a party has not properly performed in terms of the bride-wealth agreement. Both the applicant and respondents called experts in Swazi-law and custom to testify as to whether the failure to pay *lobolo* had an impact on who acquired custody. According to the applicant’s witness, the payment of *lobolo* is an irrelevant consideration, as a married father always acquires custody in terms of Swazi law and custom.⁴⁸⁶ The witness of the respondent, however, was of the opinion that the failure to pay *lobolo* resulted in the maternal grandmother acquiring custody of a minor upon the death of the mother.⁴⁸⁷ The court, taking into account all of the relevant considerations, decided that the best interests of the child was the appropriate avenue to take in order to determine who should be granted custody.⁴⁸⁸ The court thus held that “the best interests of the child... prevailed over the application of customary rules that allocated paternal powers or responsibilities and rights in accordance with the payment of bride wealth upon the marriage of the child’s parents.”⁴⁸⁹

⁴⁸² 1998 (1) SA 449 (T).

⁴⁸³ *Hlophe* 451 para h.

⁴⁸⁴ *Hlophe* 451 para i.

⁴⁸⁵ *Hlophe* 452 para f.

⁴⁸⁶ *Hlophe* 454 para i.

⁴⁸⁷ *Hlophe* 456 para g.

⁴⁸⁸ *Hlophe* 459 para f.

⁴⁸⁹ C Himonga “African customary law and children’s rights: intersections and domains in a new era” in J Sloth-Nielsen *Children’s Rights in Africa: A Legal Perspective* (2008) 73 83.

The best interests of the child was again the crucial factor in reaching a decision in *Metiso v Padongelukfonds*⁴⁹⁰ (“*Metiso*”). This case concerned an adoption in terms of customary law, with the court having to decide whether the failure to inform the estranged biological mother of the proposed adoption of her children rendered such adoption invalid.⁴⁹¹ Based on the fact that the biological mother had shown no interest in her children for an extended period of time, the court concluded that it would not be in the best interests of the children if the adoption was invalidated simply because the biological mother was not notified of such adoption.⁴⁹² Furthermore, the court in *Maneli v Maneli*⁴⁹³ (“*Maneli*”) emphasised that South African customary law must be developed in a way that promotes the best interests of the child.⁴⁹⁴ All of the aforementioned cases illustrate that the best interests of the child principle is of paramount importance in all customary law matters concerning children, as is required by section 28(2) of the Constitution.

Contrary to the customary law position, South African courts have not yet had the opportunity to engage decisively with the application of the best interests of the child principle in Muslim personal law. This does not, however, mean that the aforementioned principle has never been recognised and applied in Islamic law. If one considers pre-modern Islamic discourse, it becomes clear that the best interests of the child is not an idea that is foreign to Islamic law.⁴⁹⁵ In pre-modern Islamic legal discourse, the best interests of the child principle was recognised, but different terms were used to refer to

⁴⁹⁰ 2001 (3) SA 1142 (T).

⁴⁹¹ *Metiso* 1145 para a.

⁴⁹² *Metiso* 1145 paras a-b. See also Bennet (2009) *The American Journal of Comparative Law* 19.

⁴⁹³ 2010 (7) BCLR 703 (GSJ).

⁴⁹⁴ *Maneli* para 24. See also Ozah & Hansungule “Upholding the best interests of the child in South African customary law” in *Child Law in South Africa* 287.

⁴⁹⁵ According to Amien, (“A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context” (2010) *International Journal of Law, Policy and the Family* 362) there are elements of Islamic law which form part of Muslim personal law. This includes elements which are relevant to children, such as custody, guardianship and access. As a result of this correlation between Islamic law and Muslim personal law, insight into the recognition and application of the best interests of the child in terms of Islamic law may provide an understanding of the best interests of the child in terms of Muslim personal law; According to Ibrahim, (“The best interests of the child in pre-modern Islamic juristic discourse and practice” (2015) 63 *American Journal of Comparative Law* 859 860) pre-modern Islamic discourse refers to “juristic discourse written prior to the early nineteenth century”.

the interests or welfare of the child.⁴⁹⁶ Despite the fact that different terminology was used, this illustrates that the best interests of the child principle was, at the very least, referenced in pre-modern Islamic law.⁴⁹⁷ The manner in which the best interests of the child was understood and applied in pre-modern Islamic legal discourse cannot, however, be equated to the modern day interpretation and application of the principle. In considering whether the best interests of the child constituted a universal overriding principle in pre-modern Islamic law, similar to the current legal position in South Africa, Ibrahim identified both a narrow and broad approach to the best interests of the child that was used in pre-modern Islamic discourse.⁴⁹⁸ According to the narrow approach, it was the basic interests of the child that was seen as the priority, while the broad approach focused on the best interests of the child.⁴⁹⁹ According to Ibrahim, it was the best, rather than the basic, interests of the child that was often the determining factor when dealing with issues concerning the custody or guardianship of children.⁵⁰⁰ It can thus be seen that the best interests of the child is not a concept that is new to Islamic law. This does not mean that the best interests of the child is automatically applicable in terms of Muslim personal law. What it does, however, suggest is that section 28(2) of the Constitution and Muslim personal law are not necessarily in conflict with one another.

⁴⁹⁶ According to Ibrahim, ((2015) *American Journal of Comparative Law* 860) in pre-modern Sunni legal discourse, the best interests of the child was *inter alia* referred to as either: “the benefit of the child”; “the welfare of the child”; or “the good fortune of the child”.

⁴⁹⁷ Ibrahim (2015) *American Journal of Comparative Law* 860.

⁴⁹⁸ 860.

⁴⁹⁹ According to Ibrahim, ((2015) *American Journal of Comparative Law* 860) prioritising the basic interests of the child meant that the well-being of the child was the most important consideration only where there was a conflict between the child’s right to care and the guardian’s right to exercise such care.

⁵⁰⁰ Ibrahim (2015) *American Journal of Comparative Law* 861 & 890. The best interests of the child was thus applied as an overriding universal principle similar to way it is applied in South Africa today. However, contrary to the modern approach, the best interests of the child was applied in a rigid manner in pre-modern Islamic law. In other words, the principle was seen to represent the best interests of all children, and, as a result, the principle did not vary in order to cater to the best interests of a particular child. The manner in which the best interests of the child principle is applied today is set out in *inter alia* *S v M* (para 24) & *Fitzpatrick* (para 18). In the aforementioned cases, the court emphasised that the principle needs to be flexible enough to cater to the needs of all children, and therefore cannot be rigidly applied; See also Glasser (2002) *THRHR* 80 & 4 4 1 above.

While South African courts have yet to adjudicate on the application of the best interests of the child in Muslim personal law, the aforementioned authority suggests that the application of the best interests of the child is not limited to a particular legal system. It can therefore be argued that section 28(2) of the Constitution recognises, promotes and protects the best interests of all children, irrespective of the culture and/or religion of those children.⁵⁰¹ As a result of the fact that South African courts continue to recognise and protect South Africa's diversity, it is unlikely that the courts will deviate from this approach when dealing with the application of the best interests of the child in terms of Muslim personal law.⁵⁰² The approach taken by the court in *Hlophe* suggests that courts will consider the applicable rules of the cultural or religious legal system in question, but will ultimately make a decision based on the best interests of the child, irrespective of whether or not such decision is in accordance with that child's culture or religion.⁵⁰³

⁵⁰¹ Heaton (2009) *Journal for Juridical Science* 11-13. The application of s 28(2) of the Constitution is not dependent on the culture or religion of the child. See also *Hlophe* 459; Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 284.

⁵⁰² In this regard, Vahed ("Should the question: 'what is in a child's best interest?' be judged according to the child's own cultural and religious perspectives? The case of the Muslim child" (1999) 32 *CILSA* 364 366) states that South African law takes precedence over Muslim personal law, in the event that they contradict one another. S 28(2) of the Constitution should therefore, in theory, override the rules of Muslim personal law which are not in accordance with the best interests of the child.

⁵⁰³ An approach where the individual factors relating to a particular child are considered when determining what is in that child's best interests, is exactly the individualised and contextual approach to the best interests of the child that Heaton ((2009) *Journal for Juridical Science* 227) is an advocate of.

4 5 The relationship between the best interests of the child and the child's right to parental care

As an over-arching principle and standard of South African law, as well as being a constitutionally entrenched right,⁵⁰⁴ the best interests of the child is of paramount importance in all matters concerning children, including the right to parental care and, by implication, the acquisition **and exercise** of parental responsibilities and rights.⁵⁰⁵ **Louw** points out that, currently, the relationship between the best interests of the child and parental responsibilities and rights is understood as the acquisition of parental responsibilities and rights by a parent and the subsequent exercise of those responsibilities and rights in accordance with the best interests of the child.⁵⁰⁶ The Constitution, however, makes it clear that the best interests of the child are of paramount importance in every matter concerning the child.⁵⁰⁷ It is submitted that the acquisition of parental responsibilities and rights is a matter that concerns the child as it is a precursor to the exercise of those responsibilities and rights, and the best interests of the child must therefore play a role in determining both who acquires parental responsibilities and rights and who does not and the way in which such parental responsibilities and rights are acquired. The best interests of the child is therefore a relevant consideration in both the acquisition and exercise of parental responsibilities and rights, as envisaged by section 28(2) of the Constitution. Section 28(2) of the Constitution results in the child not only **being** entitled to parental care, but **being** entitled to parental care that is in his or her best interests.⁵⁰⁸ The child's right to parental care can thus be limited in the event that the care received is not in his or her best interests.⁵⁰⁹ The rules regulating the acquisition and subsequent exercise of parental responsibilities and rights ensure, or attempt to ensure, that the child's right to parental care is properly effected, **as envisaged by section 2 of the Children's Act**. Because South African civil, customary and Muslim personal law do not

⁵⁰⁴ See 4 3 above for a discussion on the different functions that section 28(2) of the Constitution fulfills in South African law.

⁵⁰⁵ Mahlobogwane (2013) *Obiter* 222. See also s 2 of the Children's Act.

⁵⁰⁶ A Louw *Acquisition of parental rights and responsibilities* University of Pretoria: LLD thesis (2009) 10. See also Boezaart (2013) *International Journal of Private Law* 398.

⁵⁰⁷ See s 28(2) of the Constitution.

⁵⁰⁸ A Louw "The constitutionality of a biological father's recognition as a parent" (2010) 13 *PELJ* 156 189.

⁵⁰⁹ 189.

automatically grant both of the unmarried biological parents parental responsibilities and rights,⁵¹⁰ the rules regulating the acquisition of parental responsibilities and rights in terms of these legal systems can be seen to *prima facie* limit the right to parental care of children born to unmarried parents. It is, therefore, necessary to investigate whether such limitation can be justified, as well as whether the manner in which the acquisition of parental responsibilities and rights is regulated is in accordance with the best interests of children born to unmarried parents.⁵¹¹

South African courts have often used the best interests of the child principle to inform their interpretation of the right to parental care.⁵¹² Courts have arguably done this to ensure that the interpretation and realisation of the child's right to parental care is in line with the best interests of the child.⁵¹³ For example, the court in *Bannatyne v Bannatyne*⁵¹⁴ ("*Bannatyne*") created the impression that the best interests of the child requires that children are properly cared for by their parents.⁵¹⁵ Furthermore, the court in *S v M*, in considering the sentence of a primary care-giver and the impact that such sentence would have on the right to family and parental care of the primary care-giver's children, stated that section 28(1)(b) and (2) of the Constitution should be read together.⁵¹⁶ According to the court, reading these sections together ensures that the interests of the children, who stand to be affected by the sentence given to their primary care-giver, are adequately considered before a decision is reached.⁵¹⁷ These cases illustrate the manner in which the best interests of the child principle has been used to inform the interpretation of the right to parental care in South African law.

⁵¹⁰ See Chapter three above for a discussion on the acquisition of parental responsibilities and rights in terms of South African civil, customary and Muslim personal law.

⁵¹¹ This investigation takes place in chapter five below.

⁵¹² See *S v M* para 32-33; Skelton "Constitutional protection of children's rights" in *Child Law in South Africa* 351.

⁵¹³ Skelton "Children" in *The Bill of Rights Handbook* 619. See also Skelton "Constitutional protection of children's rights" in *Child Law in South Africa* 345-346.

⁵¹⁴ 2003 (2) SA 363 (CC).

⁵¹⁵ *Bannatyne* para 24. See also Skelton "Children" in *The Bill of Rights Handbook* 620; Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 231.

⁵¹⁶ *S v M* paras 32, 33 & 42.

⁵¹⁷ *S v M* para 42. See also Moosa "South Africa" in *Parental Care and the Best Interests of the Child in Muslim Countries* 231.

The best interests of the child should be a relevant consideration in the acquisition of parental responsibilities and rights in the same way as it is when dealing with the **exercise of those responsibilities and rights and the** right to parental care.⁵¹⁸ It is, however, uncertain whether section 28(2) of the Constitution is adequately considered in the way in which parental responsibilities and rights are acquired in any of the legal systems under investigation.⁵¹⁹ In all three of the legal systems under consideration, parental responsibilities and rights appear to be acquired based on the marital status, gender and sex of the child's biological parents, rather than on the basis of the best interests of the child. It must, however, be noted that regulating the acquisition of parental responsibilities and rights in a manner that caters to every child's best interests is extremely challenging. Louw correctly submits that it would be impractical to suspend the acquisition of parental responsibilities and rights upon the birth of every child in order to determine whether such acquisition would be in the child's best interests.⁵²⁰ According to Louw, in order to combat such difficulty, the law makes certain basic assumptions regarding what is generally in a child's best interests.⁵²¹ In other words, the acquisition of parental responsibilities and rights in respect of children born to unmarried parents is based on the legislature's prediction of what may be in the children's best interests in general.⁵²² The Children's Act **currently** assumes that it is in the best interests of children born to unmarried parents that only their biological mothers automatically acquire parental responsibilities and rights, resulting in the limitation of their right to parental care.⁵²³ **Louw submits that this assumption seems to be based on the fact that mothers are the parent that give birth.**⁵²⁴ **The ability to give birth is, however, not an indication that a parent will act in the best**

⁵¹⁸ Mahlobogwane (2013) *Obiter* 221.

⁵¹⁹ S 21 of the Children's Act, for example, makes no reference to the best interests of the child when setting out the manner in which unmarried fathers can automatically acquire parental responsibilities and rights.

⁵²⁰ Louw (2010) *PELJ* 189. See also Mahlobogwane (2013) *Obiter* 222.

⁵²¹ Louw (2010) *PELJ* 189.

⁵²² Mahlobogwane (2013) *Obiter* 222.

⁵²³ According to Mailula ((2005) *Codicillus* 26) the common law position created the impression that it was always in the best interests of a child born to unmarried parents that the biological mother be vested with parental authority, even though this is not necessarily the case. It can be argued that the same impression is created by the provisions of the Children's Act.

⁵²⁴ **Louw (2010) *PELJ* 164.**

interest of the child. Furthermore, the court in *Van der Linde v Van der Linde*⁵²⁵ (“*Van der Linde*”) made it clear that “mothering”, which requires a parent to see to various needs of the child, is not a gender specific function, and can be performed by both mothers and fathers.⁵²⁶ If it is accepted that both parents are able to perform the functions that cater to the needs of the child, it is unclear why the current position assumes that the acquisition of parental responsibilities and rights by only the biological mother is in the best interests of children born to unmarried parents. While there may be instances in which the limitation of the child’s right to parental care is in the child’s best interests, there are also instances in which that is not necessarily the case.⁵²⁷

The Children’s Act, by allowing only the unmarried mother to acquire parental responsibilities and rights automatically, creates the impression that the best interests of a child born to unmarried parents is furthered by the automatic acquisition of parental responsibilities and rights by the child’s mother, but not the father.⁵²⁸ It could, however, be argued that the automatic acquisition of parental responsibilities and rights by both unmarried biological parents will not only ensure that the right to parental care of those children is effected, but that such automatic acquisition may also give effect to the best interests of those children.⁵²⁹ If this approach were to be followed, South African courts would be able to determine, based on the actual experiences of the child, whether being cared for by both biological parents is in fact in the best interests of the child. Should a parent exercise his or her parental responsibilities and rights in a manner inconsistent with the best interests of the child, the responsibilities and rights of that parent can simply be suspended or terminated by the courts. Such an approach to the acquisition of parental responsibilities and rights *prima facie* ensures that the right to parental care of children

⁵²⁵ 1996 3 SA 509 (O).

⁵²⁶ *Van der Linde* 510 paras g-h. See also Louw (2010) *PELJ* 171 and 5 2 3 2 below.

⁵²⁷ Louw (2010) *PELJ* 190.

⁵²⁸ Mailula ((2005) *Codicillus* 26), in relation to the common law position, was of the opinion that allowing unmarried biological mothers, but not unmarried fathers, to automatically acquire parental responsibilities and rights suggested that mothers are better parents than fathers. This argument similarly applies to the current legal position. In this regard, Freeks (“Responding to the challenge of father absence and fatherlessness in the South African context: A case study involving concerned fathers from the North West Province” (2017) 3 *Stellenbosch Theological Journal* 89 90) submits that South African society no longer attaches a great deal of importance to the impact that fathers can have on their children.

⁵²⁹ Louw (2010) *PELJ* 194.

born to unmarried parents is realised and protected, and furthermore appears to be in accordance with the best interests of those children to a greater extent than in terms of the current legal position.⁵³⁰ Should it be found that the manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities and rights violate the best interests of children born to unmarried parents, the aforementioned approach could prove to be a viable alternative.

4 6 Conclusion

The best interests of the child principle is not only internationally recognised,⁵³¹ but has also been entrenched in section 28(2) of South Africa's Constitution and domesticated in the Children's Act.⁵³² The decision of the court in *Hlophe* made it clear that the application of the best interests of the child is not limited to a particular legal system, but applies to all children in South Africa, irrespective of their religious or cultural background.⁵³³ In terms of the Constitution, the best interests of the child is of paramount importance in every matter concerning the child, which includes the child's right to parental care and the acquisition of parental responsibilities and rights. South African courts have made it clear that a relationship exists between the best interests of the child and the right to parental care, and have often interpreted section 28(1)(b) in light of 28(2) of the Constitution.⁵³⁴

⁵³⁰ In this regard, Centre for Social Development in Africa & Sonke Gender Justice Network ("*So we are ATM fathers*": a study of absent fathers in Johannesburg, South Africa (2013) 1 3) provide as follows:

"Responsible and engaged fathers, who do their share of parenting work, are beneficial to the development of children and to building families and societies that better reflect gender equity and protect child rights."

Freeks ((2017) *Stellenbosch Theological Journal* 90-91) is of the opinion that the absence of a father causes a wide array of problems for children, including "... problems such as broken families, aggressive behaviour among children, financial and social problems and poverty". Father absence is an increasing problem in South Africa and can in certain instances negatively affect children. It is therefore submitted that making provision for the equal acquisition of parental responsibilities and rights may not only positively impact the lives of children who would otherwise have been raised by a single parent, but could also encourage fathers to play a more active role in the lives of their children.

⁵³¹ See article 3(1) of the CRC & article 4 of the ACRWC; *R v H* para 9. See also 4 2 above for a discussion on the international recognition of the best interests of the child.

⁵³² See 4 1 above.

⁵³³ See 4 4 2 above for a discussion of *Hlophe v Mahlalela*.

⁵³⁴ See *Bannatyne* para 24; *S v M* para 32-33. See also 4 5 above for a discussion on the relationship between the right to parental care and the best interests of the child.

The best interests of the child principle has thus been used by South African courts to inform both the interpretation and realisation of the child's right to parental care.⁵³⁵ As a result of section 28(2) of the Constitution, children are not only entitled to parental care, but are entitled to parental that is in their best interests.⁵³⁶

⁵³⁵ See 4 5 above.

⁵³⁶ See 4 5 above.

**Chapter five: The effect of the
acquisition of parental
responsibilities and rights on the
realisation of the right to parental
care of children born to unmarried
parents**

5 1 Introduction

South African civil, customary and Muslim personal law all differ in the manner in which they regulate the parent-child relationship.⁵³⁷ While South African civil and Muslim personal law focus on the care that children receive from the nuclear family (specifically the parents), South African customary law provides that biological parents as well as members of the extended family have a role to play in the upbringing of children.⁵³⁸ All three legal systems under consideration therefore recognise that children are entitled to be cared for by their parents and/or members of the extended family, should this be possible.⁵³⁹ The fact that these systems set out the persons responsible for the care of children, as well as what such care entails, does not, however, mean that all South African children receive the care to which they are entitled in terms of section 28(1)(b) of the Constitution. This becomes clear when one considers the manner in which these legal systems regulate the acquisition of parental responsibilities and rights, as they all fail to allow both parents of children born to unmarried parents to acquire parental responsibilities and rights automatically.⁵⁴⁰ As a result, rather than receiving a right to parental care, children born to unmarried parents often receive either a right to maternal or paternal care in terms of these legal systems.⁵⁴¹

The purpose of this chapter is, firstly, to determine whether the civil, customary and/or Muslim personal law positions regulating the acquisition of parental responsibilities and rights limit the right to parental care of children born to unmarried parents. In the event that such limitation exists, it will need to be determined whether it can be justified in terms of section 36 of the Constitution. Secondly, it will be investigated whether the rules governing the acquisition of parental responsibilities and rights in these legal systems are

⁵³⁷ The manner in which South African civil, customary and Muslim personal law regulates the parent-child relationship is set out in chapter two and three above.

⁵³⁸ See chapter three above.

⁵³⁹ See *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA) (“*Mboweni*”) para 10; R Songca “Evaluation of children’s rights in South African law: the dawn of an emerging approach to children’s rights?” (2011) 44 *XLIV CILSA* 340 352; N Moosa “Muslim personal laws affecting children: diversity, practice and implications for a new children’s code for South Africa” (1998) *SALJ* 479 482.

⁵⁴⁰ The manner in which South African civil, customary and Muslim personal law regulates the parent-child relationship is set out in chapter three above.

⁵⁴¹ See 3 5 above.

in accordance with the best interests of children born to unmarried parents. Should it be found that South African civil, customary and/or Muslim personal law limit the right to parental care of children born to unmarried parents, but not children born to married parents, it will further need to be determined whether the aforementioned limitation unfairly discriminates against children born to unmarried parents, resulting in an infringement on their right to equality. This chapter will take the form of a constitutional analysis of the right to parental care, with the primary aim of determining whether South African civil, customary and Muslim personal law limit the right to parental care of children born to unmarried parents.

5 2 A constitutional analysis of the effect of the acquisition of parental responsibilities and rights on the realisation of the right to parental care of children born to unmarried parents

5 2 1 The limitation of the right to parental care of children born to unmarried parents

Prior to the coming into operation of the Children's Act 38 of 2005 (the "Children's Act"), unmarried fathers were not given parental authority in respect of their children, despite being recognised as a parent of the child.⁵⁴² Mailula submits that the common law's failure to allow children born to unmarried parents access to, as well as guardianship and custody from, their unmarried fathers, limited the right to parental care of those children.⁵⁴³ According to Mailula, section 28(1)(b) of the Constitution provides children with a right to be cared for by both of their biological parents, irrespective of the sex, gender and/or marital status of their parents.⁵⁴⁴ The aforementioned argument was made in relation to the common law position, but is equally relevant in terms of the current civil position, because, as Louw points out, the Children's Act has essentially retained the

⁵⁴² I D Schafer *The Law of Access to Children* (1993) 37. See 3 2 2 for a brief discussion on the manner in which the parent-child relationship is regulated in terms of the common law.

⁵⁴³ D Mailula "Taking children's rights seriously: access to, and custody and guardianship of, a child born out of wedlock" (2005) 46 *Codicillus* 15 17-25. Elaborating on the limitation of the right to parental care of children born to unmarried parents, Mailula provides as follows:

"It is regrettable that the law supports and promotes the myth that a woman is a better parent than a man, especially if the man is unmarried. This is evident from the fact that married mothers, their husbands and unmarried mothers of both legitimate and extra-marital children are given inherent rights to their children's care, while biological fathers of extra-marital children are denied the same right"

⁵⁴⁴ Mailula (2005) *Codicillus* 25.

former position regarding the unmarried father-child relationship.⁵⁴⁵ In terms of the Children's Act, mothers and married fathers automatically acquire parental responsibilities and rights, while unmarried fathers do not.⁵⁴⁶ As a result, children born to married parents are automatically in a position to have their right to parental care realised, while the same right to parental care of children born to unmarried parents is dependent on factors outside of their control.⁵⁴⁷ Therefore, despite having a constitutionally entrenched right to parental care, children born to unmarried parents, in theory, only have an automatic right to maternal care recognised upon their birth, as the father has to comply with certain requirements before he acquires parental responsibilities and rights. South African civil law thus *prima facie* limits the right to parental care of children born to unmarried parents.

In South African customary law, if a child is born to unmarried parents, neither the mother nor father of that child automatically acquire parental responsibilities and rights.⁵⁴⁸ The responsibilities and rights in respect of that child vest in the guardian of the biological mother and as a result, the child is deemed to be affiliated with the family group of the mother.⁵⁴⁹ Despite being affiliated with the family group of the mother, it is generally accepted that the mother does not acquire, and has no prospects of acquiring, parental responsibilities and rights in respect of her child.⁵⁵⁰ The position of the biological mother in terms of South African customary law is thus remarkably different to that set out in the

⁵⁴⁵ A Louw "The constitutionality of a biological father's recognition as a parent" (2010) 13 *PELJ* 156 156.

⁵⁴⁶ S 19-21 of the Children's Act. The acquisition of parental responsibilities and rights in terms of the Children's Act is discussed in 3 2 3 3 above.

⁵⁴⁷ The acquisition of parental responsibilities and rights in all three of the legal systems under consideration is dependent on *inter alia* the gender, marital status and/or sex of the child's parents, which are factors that the child cannot control.

⁵⁴⁸ RLK Ozah & ZM Hansungule "Upholding the best interests of the child in South African Customary Law" in T Boezaart *Child Law in South Africa* 2 ed (2017) 283 299; T Boezaart "Building bridges: African customary family law and children's rights" (2013) *International Journal of Private Law* 395 402-403; TW Bennet *A Sourcebook of African Customary Law for Southern Africa* 402. See also 3 3 above.

⁵⁴⁹ Boezaart (2013) *International Journal of Private Law* 402; G Nkosi "A perspective on the dichotomy of acquisition of parental responsibilities and rights by fathers in terms of the Children's Act and Customary law" (2018) 39 *Obiter* 197 199. See also 3 1 above.

⁵⁵⁰ Nkosi (2018) *Obiter* 199; Boezaart (2016) *International Journal of Private Law* 403; Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 299; See also 3 1 above.

Children's Act. In terms of the Children's Act, a biological mother automatically acquires parental responsibilities and rights, irrespective of her marital status, as South African civil law regards the biological mother as the child's primary care-giver.⁵⁵¹ While a mother living according to customary law may, in practice, be her child's primary care-giver, the (customary) law does not recognise her as such. The unmarried father on the other hand may acquire parental responsibilities and rights by either marrying the biological mother *ex post facto* or through the payment of *isondlo*.⁵⁵² Similar to the position set out in section 21 of the Children's Act, an unmarried father must show a form of commitment to his child through the payment of *isondlo*, before he acquires parental responsibilities and rights.⁵⁵³

In terms of South African customary law, it is generally accepted that parents, the extended family and members of the community have a role to play in raising children, but the fact that unmarried biological parents do not automatically acquire parental responsibilities and rights *prima facie* limits the right to parental care of children born to unmarried parents.⁵⁵⁴ By setting out a right to family care and appropriate alternative care in addition to the right to parental care, section 28(1)(b) of the Constitution highlights the fact that the functions associated with parenthood can be performed by persons other than the child's biological parents. It must, however, be noted that in a variety of cases, the Constitutional Court has held that the right to family and parental care are the primary rights of section 28(1)(b).⁵⁵⁵ According to the Constitution, parents should, in theory, bear the primary responsibility of caring for their children, and only if such responsibility is not properly fulfilled, should alternative care be required.⁵⁵⁶ The customary law position is

⁵⁵¹ S 19 of the Children's Act. See also 3 2 4 2 1 above.

⁵⁵² Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 299; Bennet *A Sourcebook of African Customary Law for Southern Africa* 365. See also 3 3 2 above.

⁵⁵³ 3 3 2 above contains a detailed explanation of what *isondlo* is and the function it fulfils in South African customary law. See also Ozah & Hansungule "Upholding the best interests of the child in South African Customary Law" in *Child Law in South Africa* 299; Bennet *A Sourcebook of African Customary Law for Southern Africa* 365.

⁵⁵⁴ Songca (2011) XLIV CILSA 352. The importance of the extended family in South African customary law is set out in 2 2 3 3 above.

⁵⁵⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 77; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 77; *C and Others v Department of Health & Social Development, Gauteng and Others* 2012 (2) SA 208 (CC) para 24. See also 2 2 2 1 above.

⁵⁵⁶ *Grootboom* para 77; *TAC* para 78. See also 2 2 2 1 above.

thus problematic, as it does not give biological parents the opportunity to fulfil their primary responsibility, which, it could be argued, limits the right to parental care of children born to unmarried parents.

In terms of Muslim personal law, if the child is the born of a recognised marriage, the biological father is responsible for the guardianship and maintenance of the child, with the custody of the child vesting in the biological mother.⁵⁵⁷ By allowing both biological parents to acquire different elements of parental authority, Muslim personal law tries to ensure the involvement of both parents, and thus *prima facie* realises the right to parental care of children born to married parents.⁵⁵⁸ Furthermore, both parents always have a right of access to their children, and children to their parents.⁵⁵⁹ This ensures, or tries to ensure, that contact between parent and child is always possible, irrespective of which parent has custody. Muslim personal law attempts to ensure that married parents play an equally balanced role in the upbringing of their children within the family environment.⁵⁶⁰ However, when a child is born to unmarried parents, it is only the mother that acquires and subsequently exercises parental authority, with the unmarried father deemed to have no legal relationship with his biological child.⁵⁶¹ The impact of this is that children born to unmarried parents are not cared for by their father, resulting in the limitation of their right to parental care.

5 2 2 The influence of international law on the Bill of Rights

In terms of section 39(2) of the Constitution, courts must consider international law when interpreting the rights (including the right to parental care) set out in the Bill of

⁵⁵⁷ Moosa (1998) *SALJ* 490; D Olowu “Children’s rights, international human rights and the promise of Islamic legal theory” (2008) 12 *Law, Democracy & Development* 62 69. See also 3 4 above.

⁵⁵⁸ Olowu (2008) *Law, Democracy & Development* 68. See also Moosa (1998) *SALJ* 488; A Rafiq “Child custody in classic Islamic law and laws of contemporary Muslim world (an analysis)” (2014) 14 *International Journal of Humanities and Social Science* 267 268.

⁵⁵⁹ Moosa (1998) *SALJ* 490.

⁵⁶⁰ Rafiq (2014) *International Journal of Humanities and Social Science* 268. See also Moosa (1998) *SALJ* 488-490. Moosa has argued that the fact that the biological father is seen as the natural guardian of the child has prevented mothers from being able to raise their children together with the child’s father in an equal manner.

⁵⁶¹ E Moosa “The child belongs to the bed: illegitimacy and Islamic law” in *Questionable Issue: Illegitimacy in South Africa* (1992) 173-175. See also 3 4 above.

Rights. At first glance, the term parental care appears to be a gender neutral one, in the sense that neither the biological mother nor father is given a heightened status by the aforementioned term in relation to child care.⁵⁶² The term parental care, by its very nature, envisages a situation where, should it be possible, both mothers and fathers play a role in their child's upbringing.⁵⁶³

The United Nations Convention on the Rights of the Child ("CRC")⁵⁶⁴ provides that children should be cared for by both of their parents.⁵⁶⁵ The African Charter on the Rights and Welfare of the Child ("ACRWC")⁵⁶⁶ similarly provides that children are entitled to the enjoyment of parental care, which presupposes care by both of the child's parents.⁵⁶⁷ It is important to note that the aforementioned rights of the child are not qualified in any way. In other words, the realisation of these rights is not dependent on the marital status, gender and/or sex of the child's parents as, it could be argued, is currently the case in South Africa. The fact that leading international children's rights instruments, which the country has signed and ratified, advocate for shared parental responsibility, suggests that the possibility of implementing such shared responsibility in South Africa must be strongly considered.

5 2 3 The limitation clause

The rights set out in the Bill of Rights are not absolute and may be limited in certain circumstances.⁵⁶⁸ There must, however, be strong and compelling reasons for the

⁵⁶² Louw (2010) *PELJ* 188.

⁵⁶³ A Skelton "Children" in I Currie & J de Waal *The Bill of Rights Handbook* (2013) 6 ed 598 606.

⁵⁶⁴ The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The CRC was signed and ratified by South Africa on 29 January 1993 and 16 June 1995 respectively.

⁵⁶⁵ See article 7 of the CRC.

⁵⁶⁶ The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49. The ACRWC was signed and ratified by South Africa on 10 October 1997 and 7 January 2000 respectively.

⁵⁶⁷ Article 19(1) of the ACRWC.

⁵⁶⁸ K Iles "A fresh look at limitations: unpacking section 36" (2007) 23 *SAJHR* 68 80. See also G Carpenter "Internal modifiers and other qualifications in bills of rights – some problems of interpretation" (1995) 10 *South African Public Law* 260 260; E Mureinik "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10 *SAHJR* 31 33; Currie & de Waal *The Bill of Rights Handbook* 151.

proposed limitation of a constitutionally entrenched right.⁵⁶⁹ Section 36 of the Constitution provides that a fundamental, constitutionally entrenched right may be limited by a law of general application in a manner that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. A two-staged approach is followed when considering the limitation of a constitutionally entrenched right.⁵⁷⁰ The first stage of the analysis investigates the nature and scope of the right, which engages with the content of the right, as well as what that right aims to protect.⁵⁷¹ Should a law of general application limit the right in question, the next issue to consider is whether such limitation can be justified.⁵⁷²

As stated above, a constitutionally entrenched right can only be justifiably limited in terms of a law of general application.⁵⁷³ In order to determine what constitutes a law of general application, it is first necessary to determine what constitutes “law”. In *August and Another v Electoral Commission and Others* (“*August*”),⁵⁷⁴ the court was tasked with deciding whether the Electoral Commission’s failure to allow prisoners to vote violated their constitutionally entrenched right to vote. The court in *August* stated as follows:

“In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners’ rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so.”⁵⁷⁵

The above-mentioned statement in *August* creates the impression that the minimum requirement for something to be considered “law” for the purposes of section 36 is that there must be a legislative provision authorising the decision or conduct in question.⁵⁷⁶

⁵⁶⁹ Currie & de Waal (*The Bill of Rights Handbook* 151) state that the “limitation must serve a purpose that most people would regard as compellingly important”.

⁵⁷⁰ Iles (2007) SAJHR 71.

⁵⁷¹ Currie & De Waal *The Bill of Rights Handbook* 165. See also Iles (2007) SAJHR 71.

⁵⁷² Iles (2007) SAJHR 71.

⁵⁷³ S 36 of the Constitution. See also Iles (2007) SAJHR 76; Currie & de Waal *The Bill of Rights Handbook* 155.

⁵⁷⁴ 1999 (3) SA 1 (CC).

⁵⁷⁵ *August* para 23.

⁵⁷⁶ Iles (2007) SAJHR 77. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC) para 56 it was stated that the rule of law, which is a fundamental principle of a constitutional democracy, requires the exercise of power to be lawful. In other words, there must, for example, be an empowering legislative provision authorising a particular decision, in order for that decision to be lawful. Requiring an empowering legislative provision (a law of general application) that authorises the limitation of a constitutional right is in

Furthermore, it is not only required that the right be limited by “law”, but also that such law must be “of general application”. According to Mokgoro J, in her concurring minority judgement in *President of the Republic of South Africa and Another v Hugo* (“Hugo”),⁵⁷⁷ the phrase “law of general application” in section 36 of the Constitution emphasises the fact that the law in question should apply generally, rather than only to specific individuals.⁵⁷⁸ The law of general application requirement is the first obstacle that must be overcome in order for the limitation clause to be applicable.⁵⁷⁹ In other words, should the law in question not apply generally there is no need for the enquiry to go any further as there cannot be a justifiable limitation of the constitutionally entrenched right.

In addition to requiring that a limitation be made in terms of a law of general application, the limitation clause sets out a variety of factors to be taken into consideration when determining whether the limitation is reasonable and justifiable in an open and democratic society based on the foundational values of human dignity, equality and freedom.⁵⁸⁰ These factors are: the nature of the right;⁵⁸¹ the importance of the purpose of limitation;⁵⁸² the nature and extent of the limitation;⁵⁸³ the relation between the limitation and its purpose;⁵⁸⁴ and less restrictive means to achieve the purpose.⁵⁸⁵ The consideration of these factors results in a proportionality enquiry, where the purpose, effect and importance of the legislation infringing the specific right is weighed against the nature and effect of the infringement caused by such legislation.⁵⁸⁶ In other words, the harmful effects caused by the infringement of the right are weighed against the purpose of the

line with the rule of law. If there is no empowering provision authorising the limitation of a right, the limitation of the right cannot be justified in terms of s 36 of the Constitution. See also I Currie & J de Waal *The New Constitutional and Administrative Law* (2001) 77.

⁵⁷⁷ 1997 (1) SACR 567 (CC).

⁵⁷⁸ *Hugo* para 102.

⁵⁷⁹ *Hugo* para 96. It must be noted that Mokgoro J made the above statement in relation to s 33 of the Interim Constitution, but it is equally applicable to s 36 of the final Constitution, as both provisions refer to a “law of general application”.

⁵⁸⁰ S 36 of the Constitution. See also Currie & de Waal *The Bill of Rights Handbook* 164.

⁵⁸¹ S 36(1)(a) of the Constitution.

⁵⁸² S 36(1)(b) of the Constitution.

⁵⁸³ S 36(1)(c) of the Constitution.

⁵⁸⁴ S 36(1)(d) of the Constitution.

⁵⁸⁵ S 36(1)(e) of the Constitution.

⁵⁸⁶ Currie & de Waal *The Bill of Rights Handbook* 164.

infringement.⁵⁸⁷ These factors will be considered separately in relation to the right to parental care, in order to ensure that a thorough analysis takes place.

5 2 3 1 The nature of the right

According to Iles, the first factor listed in section 36 considers whether the right in question can be limited in a society based on human dignity, equality and freedom.⁵⁸⁸ Iles is of the opinion that this factor is not merely concerned with the importance of the right in question, but rather emphasises “the importance of the values that a particular right advances in the context in which the right is sought to be applied”.⁵⁸⁹ In other words, it must be determined whether the right to parental care, or the limitation of that right, furthers the fundamental values of the Constitution. To limit the right to parental care of children born to unmarried parents, but not do the same in the case of children born to married parents, appears to be in conflict with the Constitution’s fundamental values of equality and human dignity.

According to the court in *Jooste v Botha*⁵⁹⁰ (“*Jooste*”), the constitutional right to parental care is comprised of a financial as well as an emotional component.⁵⁹¹ The right to parental care thus encompasses, *inter alia*, the love, nurturing and financial support that children require during the beginning stages of their lives.⁵⁹² It would be untrue to state that, in all cases, a child requires two parents to ensure that the various aspects that form part of the right to parental care are effected. It must, however, be noted that being a single parent can be financially difficult, as well as incredibly time consuming. These difficulties could prevent the effective realisation of the child’s right to parental care, as single parents may not always be able to provide children with the standard of care envisaged by section 28(1)(b) of Constitution. In most cases it would arguably be more

⁵⁸⁷ 164.

⁵⁸⁸ Iles (2007) SAJHR 80. See also Currie & De Waal *The Bill of Rights Handbook* 164.

⁵⁸⁹ Iles (2007) SAJHR 80.

⁵⁹⁰ 2000 (2) SA 199 (T).

⁵⁹¹ *Jooste* 201 paras d-e; Louw (2010) PELJ 187. See also 2 2 2 2 above.

⁵⁹² *Jooste* 201 paras d-e. See also Louw (2010) PELJ 187; *M v Minister of Police* 2013 (5) SA 622 (GNP) (“*M*”) para 22. See 2 above for a full discussion of the right to parental care.

advantageous to the child, and to the benefit of each parent, if two committed parents played a role in raising their child.⁵⁹³

5.2.3.2 The importance of the purpose of limitation

In order for the limitation of a constitutionally entrenched right to be considered reasonable and justifiable, as is required by section 36 of the Constitution, there must be a purpose which that limitation seeks to achieve.⁵⁹⁴ The right to parental care of children born to unmarried parents is *prima facie* limited, because, in certain circumstances, the aforementioned children receive only maternal or paternal care. There is no qualification of the right to parental care in section 28(1)(b) of the Constitution and children are thus, in theory at least, entitled to care from both of their biological parents.⁵⁹⁵ This view is supported by Article 18 of the CRC, which advocates for shared responsibility between biological parents in relation to their children. Furthermore, the aforementioned article does not make this shared common responsibility between parents dependent on the sex, gender and/or marital of the child's parents.

There are differing opinions regarding the purpose that the Children's Act seeks to achieve by excluding unmarried fathers from automatically acquiring parental responsibilities and rights. In *Fraser v Children's Court, Pretoria North and Others*⁵⁹⁶ ("*Fraser*") it was stated that the common law's exclusion of unmarried fathers from automatically acquiring parental authority was to encourage the procreation of children within the family unit and thereby discourage irresponsible procreation.⁵⁹⁷ While the aforementioned purpose stated in *Fraser* appears to be out of touch with the reality in South

⁵⁹³ According to Freeks, ("Responding to the challenge of father absence and fatherlessness in the South African context: A case study involving concerned fathers from the North West Province" (2017) 3 *Stellenbosch Theological Journal* 89-90) growing up without a father figure can adversely affect children. See Chapter four above for the statistics, set out by Freeks, on the impact that growing up without a father is having on American society.

⁵⁹⁴ Currie & de Waal *The Bill of Rights Handbook* 166. See also Iles (2007) *SAJHR* 82.

⁵⁹⁵ Currie & de Waal *The Bill of Rights Handbook* 606. See also Louw (2010) *PELJ* 159.

⁵⁹⁶ 1997 (2) SA 218 (T) 234.

⁵⁹⁷ *Fraser* 234. See also Louw (2010) *PELJ* 178; A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 167.

Africa,⁵⁹⁸ it still appears to be the purpose behind Muslim personal law's failure to allow both parents to automatically acquire parental authority in respect of their children born out of wedlock. Muslim personal law has strict prohibitions on extra-marital sexual relations, as it views procreation as one of the fundamental purposes of the institution of marriage.⁵⁹⁹ In this regard, the court in *Dawood v Minister of Home Affairs and Others: Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*⁶⁰⁰ ("*Dawood*") stated that South African families come in different shapes and sizes, and that certain family forms should not be held in a higher regard than others.⁶⁰¹ Based on this, the purpose behind Muslim personal law's failure to allow both unmarried parents to acquire parental responsibilities and rights automatically cannot be seen as being important enough to justify the limitation of the right to parental care of children born to unmarried parents.

Louw summarises the aim behind the Children's Act's failure to allow unmarried fathers to acquire parental responsibilities and rights automatically as follows:

"The purpose of preventing uncommitted fathers from automatically acquiring parental responsibilities and rights is mainly to protect the stability of the relationship between children and their mothers as the primary caretakers of children."⁶⁰²

⁵⁹⁸ See *Dawood v Minister of Home Affairs and Others: Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 31.

⁵⁹⁹ Moosa (1998) SALJ 481; M Rajabi-Ardeshiri "The rights of the child in the Islamic context: The challenges of the local and the global" (2009) 17 *International Journal of Children's Rights* 479. See also 3 4 above.

⁶⁰⁰ 2000 (3) SA 936 (CC).

⁶⁰¹ *Dawood* para 31.

⁶⁰² Louw (2010) *PELJ* 190; In 1994, prior to the coming into operation of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, the South African Law Commission (*Report on the Rights of a Father in Respect of his Illegitimate Child Project 29* (1994)) ("SALC") opposed the idea that unmarried fathers should be granted automatic parental rights. According to the SALC, it was possible that manner in which unmarried fathers exercised their parental rights would interfere with established relationships (including the mother-child relationship). There thus seems to be a correlation between the reasons that the SALC were opposed to automatically granting unmarried fathers parental rights, and the purpose which the Children's Act seeks to achieve by failing to allow unmarried fathers to automatically acquire parental responsibilities and rights: See also A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 93-94.

While it could be argued that this purpose is important, it could similarly be argued that it is inherently problematic. This purpose, firstly, presupposes that the involvement of the child's unmarried father is inherently negative if he has not satisfied the requirements of section 21(1)(b) of the Children's Act, and, secondly, assumes that unmarried mothers are better parents than unmarried fathers.⁶⁰³ While there are unmarried fathers whose involvement in the lives of their children will be prejudicial to those children, there are also numerous fathers whose involvement would benefit their children. Furthermore, there is no evidence to suggest that a mother is automatically a better parent than the father merely because she carries and gives birth to the child. In *Van der Linde v Van der Linde*⁶⁰⁴ ("Van der Linde") the court held that "mothering" is not a function that only mothers can perform, but that it is a concept that describes a function that can be performed regardless of the sex or gender of the parent in question.⁶⁰⁵ According to the court, mothering requires a parent to see to the nutrition, love, physical care and various other needs of the child.⁶⁰⁶ Mothering thus entails a psychological bond that is formed and continues to exist between parent and child.⁶⁰⁷ If "mothering" is considered a gender-neutral function, the fact that parental responsibilities and rights are automatically conferred on mothers and married fathers, but not unmarried fathers, is somewhat confusing.⁶⁰⁸ There are functions that mothers perform which fathers are biologically unable to, however, the failure to breastfeed, for example, does not make fathers any less of a parent than their female counterparts. Despite being biologically incapable of fulfilling certain functions, fathers are still capable of providing their children with the love and care that they require. Furthermore, if one considers that both married and unmarried fathers are biologically incapable of performing certain functions in relation to their children, the fact that the Children's Act only fails to grant unmarried fathers automatic parental responsibilities and rights seems somewhat irrational. There thus seems to be no valid basis for the differentiation between, firstly, mothers and unmarried fathers, and,

⁶⁰³ Mailula (2005) *Codicillus* 26

⁶⁰⁴ 1996 3 SA 509 (O).

⁶⁰⁵ *Van der Linde* 510 paras g-h. See also Louw (2010) *PELJ* 171.

⁶⁰⁶ *Van der Linde* 510 para h.

⁶⁰⁷ *Van der Linde* 510 para h.

⁶⁰⁸ See 3 2 3 2 above.

secondly, married and unmarried fathers, in relation to the automatic acquisition of parental responsibilities and rights. The effect of this differential treatment is that the right to parental care of children born to unmarried parents is limited. Furthermore, as a result of the problems surrounding the purpose which the Children's Act seeks to achieve by excluding unmarried fathers from the automatic acquisition of parental responsibilities and rights, such purpose cannot be said to be compelling enough to justify the limitation of the right to parental care of children born to unmarried parents.⁶⁰⁹

Determining the purpose behind South African customary law's failure to allow biological parents to automatically acquire, and subsequently exercise, parental responsibilities and rights in respect of children born to unmarried parents proves to be a significantly greater challenge than the position in terms of the Children's Act. The purpose of the rules regulating the acquisition of parental responsibilities and rights in South African customary law is not necessarily to ensure that the child's right to parental care is effected, but rather to determine the house to which a child is affiliated.⁶¹⁰ Determining the house to which children are affiliated is important, as it is generally accepted that the welfare of children is connected to the welfare of the family to which they belong.⁶¹¹ Traditionally, in many legal systems, the rules governing the acquisition of parental authority in relation to a child born to unmarried parents were aimed at determining the person(s) responsible for the child's development and upbringing.⁶¹² Customary law is, however, different, as the aim is to determine the household to which a child is affiliated. As previously mentioned, the payment of *lobola* is integral in determining the house to which a child is affiliated, as it transfers the child-bearing capacity of a woman from the house of her father, to the house of her husband.⁶¹³ Should

⁶⁰⁹ See also 5 2 3 4 below.

⁶¹⁰ TW Bennet *Customary Law in South Africa* (2004) 296. See also JC Bekker "Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa" (2008) *Obiter* 395 402.

⁶¹¹ Songca (2011) *XLIV CLISA* 353.

⁶¹² Bennet *Customary Law in South Africa* 307.

⁶¹³ Bennet *Customary Law in South Africa* 309; Nkosi (2018) *Obiter* 200; J Sloth-Nielsen & L Mwambene "Talking the talk and walking the walk: how can the development of African customary law be understood?" (2010) *Law in Context* 27. See also 3 3 1 above.

lobola have been paid, the child belongs to the father's family, while the failure to pay *lobola* results in the child forming part of the mother's family.⁶¹⁴

5 2 3 3 The nature and extent of the limitation

As a result of the fact that unmarried parents do not always automatically acquire parental responsibilities and rights, children born to unmarried parents often only automatically receive a right to maternal or paternal care.⁶¹⁵ Should an unmarried father, for example, wish to be involved in his child's life in a manner that goes beyond mere financial contribution, such involvement would more often than not require the mother's assistance. A mother can facilitate, or detrimentally interfere with, an unmarried father's compliance with the requirements of section 21 of the Children's Act, as she can, for example, prevent contact with the child for the purposes of a good faith attempt to contribute to the child's upbringing. The involvement of the mother makes the father's compliance with section 21(1)(b) of the Children's Act more difficult, which, it can be argued, makes the limitation of the right to parental care more extensive. **While it is accepted that an unmarried father may acquire parental responsibilities and rights by entering into a parental responsibilities and rights agreement with the child's mother, or by obtaining a court order granting him care, contact and/or guardianship in respect of his child, these avenues are arguably even more onerous than the requirements of section 21(1)(b) and can place a heavy financial burden on the father.**⁶¹⁶ It is therefore submitted that the mere existence of these avenues does not lessen the extent of the limitation of the right to parental care of children born to unmarried parents.

According to Louw, certain remarks made by the court in *J and Another v Director General: Department of Home Affairs and Others*⁶¹⁷ ("J") are applicable when dealing with the equal acquisition of parental responsibilities and rights.⁶¹⁸ This case concerned two female permanent life partners, one of whom gave birth to twins by means of *in vitro*

⁶¹⁴ Bekker (2008) *Obiter* 402. See also Bennet *Customary Law in South Africa* 307; Nkosi (2018) *Obiter* 200.

⁶¹⁵ The circumstances in which unmarried parents do not automatically acquire parental responsibilities and rights are set out in chapter three above.

⁶¹⁶ **Sections 22, 23 & 24 of the Children's Act. See also 3 2 3 3 2 above.**

⁶¹⁷ 2003 (5) SA 605 (D).

⁶¹⁸ Louw (2010) *PELJ* 192.

fertilisation, using the gametes of the first applicant (her partner) and a male donor.⁶¹⁹ The Department of Home Affairs refused to register both applicants as the parents of the children, because the females in question were not legally married and neither could be regarded as the father of the children.⁶²⁰ The court, in determining whether the failure to allow the first applicant to be registered as a parent was unconstitutional, highlighted the advantages of having two parents, as well as the disadvantage that the parent not registered is subjected to.⁶²¹ Firstly, if the relationship between the first and second applicant comes to an end, the first applicant, because she is not recognised as a parent, will have no right of access to her child.⁶²² Furthermore, should there be an emergency in which the consent of a parent is required, and the second applicant is unavailable or unable to give such consent, there is no other parent from which the required consent can be obtained.⁶²³ In the case of an emergency, a delay in obtaining consent could be extremely detrimental to the child's health or well-being. Lastly, the court stated that, in most cases, it is more beneficial for the child if he or she has two parents or guardians.⁶²⁴

While the observations made in *J* were made in relation to the registration of two females as the parents of twins, the aforementioned observations apply with equal force when one considers the limitation of a child's right to parental care. The fact that an unmarried father does not automatically acquire parental responsibilities and rights results in the child having no automatic right to contact with his or her father, as well as the father not being able to provide his child with consent in the case of an emergency, for example, should it be required. While a father is required to contribute to his child's maintenance irrespective of whether or not he has acquired parental responsibilities and

⁶¹⁹ *J* para 2.

⁶²⁰ *J* para 2.

⁶²¹ It is important to note that there is a difference between being registered as a parent and acquiring parental responsibilities and rights. The fact that an individual is registered as a parent does not necessarily mean that that individual is a holder of parental responsibilities and rights. For example, an unmarried father may be legally registered as the father of his child, but that does not mean that he has acquired parental responsibilities and rights in terms of section 21 of the Children's Act. Furthermore, the registration of a parent in terms of South African civil law is governed by the Births and Deaths Registration Act 51 of 1992, while the acquisition of parental responsibilities and rights is regulated by the Children's Act.

⁶²² *J* para 20. See also Louw (2010) *PELJ* 192.

⁶²³ *J* para 20. See also Louw (2010) *PELJ* 192.

⁶²⁴ *J* para 20.

rights, parental care consists of more than merely providing for the monetary needs of the child.⁶²⁵

In terms of South African customary law, children born to unmarried parents receive neither maternal nor paternal care, as it is the guardian of the mother that acquires parental responsibilities and rights.⁶²⁶ It is, however, possible for the unmarried biological father to acquire parental responsibilities and rights, by either entering into a marriage with the mother after the child's birth or through the payment of *isondlo*.⁶²⁷ In this regard, it could be argued that the maternal aspect of the right to parental care will never be realised, as it is generally accepted that mothers never acquire parental responsibilities and rights in terms of customary law.⁶²⁸ Furthermore, the manner in which the unmarried father acquires parental responsibilities and rights does not necessarily take the child's best interests into consideration. The avenues through which an unmarried father acquires parental responsibilities and rights involve him either committing himself to the child's mother or providing financial compensation for the costs associated with child's upbringing.⁶²⁹ Should the unmarried father not wish to commit himself to the biological mother through marriage, or should he be financially unable to compensate the guardian for the costs incurred in raising the child, the role that the father can play in his child's life is simply disregarded.

If one considers, firstly, the fact that biological mothers never acquire parental responsibilities and rights, and, secondly, the difficulties that fathers could face in their quest for the acquisition of the aforementioned responsibilities and rights, it seems that South African customary law's limitation of the right to parental care is extensive. The role that customary law attributes to members of the extended family as well as members of the community, in relation to the upbringing of children, must, however, be taken into account. In terms of customary law, the care of a child is entrusted to the biological

⁶²⁵ *Government of the Republic of South African and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 76; *Jooste* 201 paras d-e; *M* para 22. See also 2 2 2 2 & 2 2 4 1 4 above.

⁶²⁶ Boezaart (2013) *International Journal of Private Law* 402; Nkosi (2018) 199. See also 3 3 1 & 3 3 2 above.

⁶²⁷ Ozah & Hansungule "Upholding the best interests of the child in South African Customary Law" in *Child Law in South Africa* 299; Bekker (2008) *Obiter* 401. See also 3 3 2 above.

⁶²⁸ Boezaart (2013) *International Journal of Private Law* 402. See also 3 3 1 above.

⁶²⁹ Ozah & Hansungule "Upholding the best interests of the child in South African customary law" in *Child Law in South Africa* 299; Bekker (2008) *Obiter* 401. See also 3 3 2 above.

parents of that child, the members of the community in which that child is born and the members of that child's extended family.⁶³⁰ While a particular parent may not have acquired parental responsibilities and rights, and as a result does not bear the responsibility for his or her child's care, the child may still be cared for by members of his or her extended family. In this regard, Himonga argues that the rights to family and parental care are recognised in conjunction with one another, due to the fact that customary law recognises various persons as being responsible for a child's care.⁶³¹ The fact that South African customary law does not vest the responsibility for a child's care in a single individual, it could be argued, makes the limitation of the right to parental care of children born to unmarried parents less extensive.

In terms of Muslim personal law a marriage concluded between parents after the birth of their child does not legitimise the child *ex post facto*.⁶³² Based on the fact that Muslim personal law does not make it possible for a child to be legitimised *ex post facto*, it seems reasonable to assume that the subsequent marriage would not create a legal bond between the unmarried father and his child, and that such father would not acquire parental authority. It is thus questionable whether a child born to unmarried Muslim parents would ever receive a right to paternal care. In other words, Muslim personal law extensively limits the right to parental care of children born to unmarried parents, as there can never be a legally recognised relationship between the unmarried father and his child.

5 2 3 4 The relation between the limitation and its purpose

According to Currie and de Waal, the relation between the limitation and its purpose considers whether there is any correlation between the limitation of the right in question and the purpose which the aforementioned limitation seeks to achieve.⁶³³ The right to parental care is limited due to the fact that unmarried parents do not automatically acquire

⁶³⁰ Songca (2011) XLIV *CILSA* 352. See also Boezaart (2013) *International Journal of Private Law*. The importance of the extended family in terms of South African customary law is set out in chapter 2 above.

⁶³¹ C Himonga "African customary Law and children's rights: intersections and domains in a new era" in J Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 77.

⁶³² Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* (1992) 174. See also 3 3 4 above.

⁶³³ Currie & de Waal *The Bill of Rights Handbook* 169.

parental responsibilities and rights and, as a result, children born to unmarried parents generally only receive a right to maternal or paternal, rather than parental, care.⁶³⁴ As previously mentioned, the purpose behind the Children's Act's exclusion of unmarried fathers from automatically acquiring parental responsibilities and rights is to protect the mother-child relationship from interference by unmarried fathers, on the basis that such interference is unwanted and prejudicial to the child.⁶³⁵ The mother's relationship with the child is protected because the law, and society, see the mother as the child's primary care-giver. There is, without a doubt, a correlation between the limitation of the right to parental care and the protection of the relationship between the mother and child against negative influence from uncommitted unmarried fathers. The problem, however, is not necessarily the link between the Children's Act's limitation of the right to parental care and the purpose it seeks to achieve, but rather the purpose itself, as there is no rational basis behind the assumption that the involvement of an unmarried father in the life of his child is inherently negative or that mothers are automatically better parents.⁶³⁶ Furthermore, the law's point of view that the mother is the child's primary care-giver is based on the fact that, biologically, mothers are the parent that carry and subsequently give birth to their children.⁶³⁷ The fact that mothers are biologically the parent carrying the pregnancy is not, however, necessarily an indication that they will be more committed to their children than fathers.

The right to parental care of children born to unmarried parents is always limited in terms of South African customary law, as it is generally accepted that neither the mother nor the father automatically acquire parental responsibilities and rights.⁶³⁸ Customary law is not as concerned with giving effect to the child's right to parental care, as with determining the family to which a child is affiliated.⁶³⁹ Determining the family to which a

⁶³⁴ Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* (1992) 175. See also Boezaart (2013) *International Journal of Private Law* 402; Nkosi (2018) 199; S 21 of the Children's Act.

⁶³⁵ Louw (2010) *PELJ* 190. See also 5 2 3 2 above.

⁶³⁶ Mailula (2005) *Codicillus* 25.

⁶³⁷ Louw (2010) *PELJ* 164. See also *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC) para 25.

⁶³⁸ Boezaart (2013) *International Journal of Private Law* 402; Nkosi (2018) 199. See also 3 3 1 & 3 3 2 above.

⁶³⁹ Bekker (2008) *Obiter* 403. See also Nkosi (2018) *Obiter* 200.

child belongs is the rationale on which the payment of *lobola* is based.⁶⁴⁰ This creates two problems: firstly, the persons responsible for raising children are determined by the payment or non-payment of bride-wealth, rather than the best interests of the child, and secondly, it *prima facie* limits the child's right to parental care. It would be a stretch to say that there is a relationship between the limitation of the right to parental care and the aforementioned purpose. The only purpose which the limitation of the right to parental care achieves is determining the family to which a child belongs. There should, however, be a way in which this can be achieved without limiting the child's right to parental care. A possible solution can be found in *Hlophe v Mahlalela and Another*⁶⁴¹ ("*Hlophe*"), where the court held that "the best interests of the child... prevailed over the application of customary rules that allocated paternal powers or responsibilities and rights in accordance with the payment of bride wealth upon the marriage of the child's parents."⁶⁴²

Muslim personal law's failure to allow unmarried fathers to acquire parental authority is aimed at ensuring that children are born of a recognised marriage.⁶⁴³ In the past, children born to unmarried parents were stigmatised and discriminated against.⁶⁴⁴ Times have, however, since changed and so has the attitude of society towards children born to unmarried parents. This is reflected in *Dawood* where the court highlighted the fact that there is no longer a single accepted family form and that certain forms of family should not be seen as better or worse than others.⁶⁴⁵ While there may thus be a link between Muslim personal law's limitation of the right to parental care and the purpose it seeks to achieve, the purpose itself is an out-dated one.

⁶⁴⁰ Nkosi (2018) *Obiter* 200. See also Bennet *Customary Law in South Africa* 309; Sloth-Nielsen & Mwambene (2010) *Law in Context* 27.

⁶⁴¹ 1998 (1) SA 449 (T).

⁶⁴² Himonga "African customary law and children's rights: intersections and domains in a new era" in *Children's Rights in Africa: A Legal Perspective* 83.

⁶⁴³ Rajabi-Ardeshiri (2009) *International Journal of Children's Rights* 479. See also UM Assim *In the best interests of children deprived of a family environment: A focus on Islamic Kafalah as an alternative care option* University of Pretoria: LLD thesis (2009).

⁶⁴⁴ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for gender equality as amicus curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

⁶⁴⁵ *Dawood* para 31.

5 2 3 5 Less restrictive means to achieve the purpose

Should both biological parents automatically acquire parental responsibilities and rights without any qualification, in terms of all three of the legal systems under consideration, the issue that must be considered is the protection of children from disinterested and unsuitable parents, who are not concerned with the well-being of their children. The solution to this problem can be found in section 28(2) of the Constitution, in terms of which the child's best interests must be an integral factor in reaching a decision in any matter concerning the child.⁶⁴⁶ Children born to unmarried parents would thus still be protected from unwanted, arbitrary and inconsistent interference by an unmarried father, through the application of the best interests of the child principle. In other words, both parents would automatically acquire parental responsibilities and rights, but those responsibilities and rights could be taken away if the parents exercise them in a manner that is inconsistent with the best interests of the child. One can, therefore, determine, based on actual factual evidence, whether the involvement of both parents is in the child's best interests, rather than predicting the positives or negatives of such involvement, as is currently happening. Furthermore, not only could the involvement of a father-figure in the child's life be incredibly beneficial to that child, but such an approach would also challenge the stereotypical assumption that mothers are the primary care-givers of children. Lastly, this approach would be in line with the idea that mothering is a function that can be performed by either of the child's parents, as held by the court in *Van der Linde*.⁶⁴⁷ This approach would be compatible with South African civil, customary and Muslim personal law, and would ensure that the right to parental care of children is not limited based on factors such as the culture, religion, sex or marital status of the child's parents.

⁶⁴⁶ *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)* 2009 (2) SACR 477 (CC) para 29; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 17; M Reyneke "Realising the child's best interests: Lessons from the Child Justice Act to improve the South African Schools Act" (2016) 19 *PELJ* 2 4. See also 4 1 above.

⁶⁴⁷ *Van der Linde* 510 paras g-h.

5 3 Discrimination against children born to unmarried parents: an equality perspective

5 3 1 Introduction

While the right to parental care of children born to unmarried parents is limited in all three of the legal systems under consideration, such limitation raises another issue. It could be argued that the limitation of the right to parental care of children born to unmarried parents, but not children who are born from a legitimate marriage, unfairly discriminates against children born to unmarried parents. While the Constitution guarantees the right to equality to all persons, differentiation and/or discrimination may still take place, provided that it is not unfair.⁶⁴⁸ This part of the chapter will, therefore, aim to determine whether South African civil, customary and Muslim personal law not only limit the right to parental care of children born to unmarried parents, but also unfairly discriminate against them, thereby infringing on their right to equality.

5 3 2 Formal and substantive equality

Section 1(a) of the Constitution states that “[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”. Equality is one of the foundational values of South Africa’s post-apartheid democratic society, and is entrenched as a right in section 9 of the Constitution.⁶⁴⁹ As a result of the country’s discriminative past, coupled with the fact that, at the beginning of the democratic era,

⁶⁴⁸ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) (“*Prinsloo*”) para 17. See also *Harksen v Lane* 1998 (1) SA 300 (CC).

⁶⁴⁹ Section 9 of the Constitution provides as follows:

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

South Africa was one of the most unequal countries in the world, the realisation of the right to equality for all citizens often presents unique challenges.⁶⁵⁰

It is generally accepted that there are two different ways in which equality can be understood, namely as formal equality and as substantive equality.⁶⁵¹ Formal equality stems from the premise that all persons should be treated equally, irrespective of factors such as race, gender, religion, culture and/or past living experiences.⁶⁵² It is based on the idea that all human beings are born equal and should be treated as such. Substantive equality, on the other hand, takes factors such as race, religion and past living experiences of individuals into consideration when giving effect to the right to equality.⁶⁵³ According to Smith, substantive equality aims to ensure that people or groups of people that were previously subjected to discrimination are not further prejudiced by laws or policies aimed at achieving equality.⁶⁵⁴ In a South African context, the law is generally aimed at achieving substantive equality, by taking into account the past living experiences of women, people of colour and other groups which have experienced discrimination in the past.⁶⁵⁵

5 3 3 The right to equality of children born to unmarried parents

The judgment of the Constitutional Court in *Harksen v Lane*⁶⁵⁶ (“*Harksen*”) is regarded as a landmark decision in the country’s equality jurisprudence, as it is the case in which the court set out the test for unfair discrimination. The test for unfair discrimination was

⁶⁵⁰ See *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 40; Currie & de Waal *The Bill of Rights Handbook* 141-142. While there have been attempts to bridge the gap between the white minority and black majority in post-apartheid South Africa, South Africa remains one of the most financially unequal countries in the world.

⁶⁵¹ A Smith “Equality constitutional adjudication in South Africa” (2014) 14 *AHRLJ* 609 611-613. See also Currie & De Waal *The Bill of Rights Handbook* 213.

⁶⁵² Smith (2014) *AHRLJ* 611. See also Currie & de Waal *The Bill of Rights Handbook* 213.

⁶⁵³ Currie & de Waal *The Bill of Rights Handbook* 213.

⁶⁵⁴ Smith (2014) *AHRLJ* 613. Substantive equality can also be seen as equality of outcome. In this regard, see the European Institute for Gender Equality’s definition of equality of outcome. <<https://eige.europa.eu/rdc/thesaurus/terms/1108>>

⁶⁵⁵ A Louw *Acquisition of parental responsibilities and rights* LLD thesis University of Pretoria (2009) 150. The importance of the achievement of substantive equality is highlighted by section 9(2) of the Constitution, as the aforementioned sub-section allows for the implementation of measures that are intended to advance the interests of persons or groups of persons who have been disadvantaged by unfair discrimination.

⁶⁵⁶ 1998 (1) SA 300 (CC).

set out in terms of section 8 of the Constitution of the Republic of South Africa, Act 200 of 1993 (the “Interim Constitution”). The aforementioned test is, however, equally applicable in terms of section 9 of the Final Constitution as there is hardly any difference in the substance of the two provisions.⁶⁵⁷ The *Harksen* test will be used to determine whether the limitation of the right to parental care of children born to unmarried parents, but not children born to married parents, amounts to unfair discrimination.

When dealing with the constitutionality of a legislative provision in terms of section 9 of the Constitution, the first consideration is whether the provision in question differentiates between persons or groups of persons.⁶⁵⁸ It is generally accepted that there are two different types of differentiation, namely legitimate differentiation and constitutionally impermissible differentiation.⁶⁵⁹ The court in *Prinsloo v Van der Linde and Another*⁶⁶⁰ (“*Prinsloo*”), in highlighting the importance of drawing a distinction between the different types of differentiation, stated the following:

⁶⁵⁷ S 8 of the Interim Constitution provides as follows:

“(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”

While there is a difference in the wording of s 8 of the Interim Constitution and s 9 of the Constitution, the substance of the aforementioned provisions are essentially the same. Both sections guarantee equality before the law, prohibit unfair discrimination, and allow for the implementation of measures designed to advance the interests of persons or groups of persons disadvantaged by unfair discrimination. The main difference between the aforementioned provisions is that s 8 of the Interim Constitution contains a subsection which deals with the restitution of land rights, while s 9 of the Constitution does not.

⁶⁵⁸ *Harksen* para 42.

⁶⁵⁹ Currie & de Waal *The Bill of Rights Handbook* 219. See also *Prinsloo* para 17; *Harksen* para 44.

⁶⁶⁰ 1997 (3) SA 1012 (CC).

“If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33,⁶⁶¹ or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct ... Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense.’⁶⁶²

The first step is to determine whether the law or conduct in question does, in fact, differentiate between persons or groups of persons. If there is no differentiation, then there can be no violation of the right to equality.⁶⁶³ Differentiation will also not be regarded as unconstitutional if it does not prevent individuals from enjoying the equal protection and benefit of the law.⁶⁶⁴ In order for differentiation to be regarded as constitutionally permissible there must be a rational connection between such differentiation and a legitimate governmental purpose that it is designed to achieve.⁶⁶⁵ The fact that a rational connection exists between the differentiation and a legitimate governmental purpose does not, however, mean that such differentiation cannot amount to unfair discrimination.⁶⁶⁶ In other words, while the differentiation in question may not violate section 9(1) of the Constitution, it may still fall foul of section 9(3). In the case of the child’s right to parental care, the differentiation takes place as a result of the manner in which parental responsibilities and rights are acquired, and amounts to differentiation on the basis of birth.

⁶⁶¹ S 36 of the final Constitution.

⁶⁶² *Prinsloo* para 17. See also *Harksen* para 44; Currie & de Waal *The Bill of Rights Handbook* 219.

⁶⁶³ Smith (2014) *AHRLJ* 616.

⁶⁶⁴ S 9(1) of the Constitution; Currie & de Waal *The Bill of Rights Handbook* 219. See also *Harksen* para 43; Smith (2014) *AHRLJ* 616.

⁶⁶⁵ *Harksen* para 43. See also Currie & de Waal *The Bill of Rights Handbook* 216; Smith (2014) *AHRLJ* 616. S 9(1) of the Constitution will, however, be violated if differentiation exists without a rational connection to a legitimate governmental purpose.

⁶⁶⁶ *Harksen* para 43-44. According to the court in *Harksen*, a constitutional investigation in terms of s 9(3) of the Constitution, the equivalent of s 8(2) of the Interim Constitution, is aimed at determining whether despite the existence of a rational connection between the differentiation and a legitimate governmental purpose, the differentiation in question is of an unfairly discriminatory nature. See also R Kruger “Equality and unfair discrimination: refining the Harksen test” (2011) 128 *South African Law Journal* 479 481; Currie & de Waal *The Bill of Rights Handbook* 216.

The test for unfair discrimination is two-fold. The first part of the test asks the question: does the differentiation in question amount to discrimination?⁶⁶⁷ Section 9(3) of the Constitution sets out various grounds upon which discrimination is prohibited, and discrimination on those grounds is presumed to be unfair.⁶⁶⁸ Should the differentiation in question be on a ground listed in section 9(3), discrimination will be presumed.⁶⁶⁹ The grounds listed in section 9(3) of the Constitution are, however, not exhaustive, and there exists the possibility of discrimination on unlisted grounds.⁶⁷⁰ The manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities and rights differentiates between children born to married and unmarried parents on the basis of birth. This differentiation therefore amounts to discrimination, as birth is a ground listed in section 9(3) of the Constitution. The second part of the test is aimed at determining whether the discrimination in question is unfair.⁶⁷¹ As stated above, unfairness is presumed if the discrimination is on a ground listed in section 9(3) of the Constitution.⁶⁷² As birth is a listed ground, the differentiation in question amounts to discrimination that is presumed to be unfair.

South African courts have previously dealt with unfair discrimination against children on grounds listed in section 9(3) of the Constitution.⁶⁷³ In *Bhe and Others v Magistrate*,

⁶⁶⁷ *Harksen* para 45. See also Kruger (2011) *South African Law Journal* 481; Smith (2014) *AHRLJ* 616.

⁶⁶⁸ S 9(5) of the Constitution sets out a presumption of unfairness where there is discrimination on a ground listed in s 9(3).

⁶⁶⁹ *Harksen* para 47. See also Smith (2014) *AHRLJ* 616; Kruger (2011) *South African Law Journal* 481.

⁶⁷⁰ *Harksen* para 16.

⁶⁷¹ *Harksen* para 47.

⁶⁷² S 9(5) of the Constitution. The court in *Harksen* (para 51) set out a list of non-exhaustive factors to be taken into consideration when determining the unfairness of discrimination on an unlisted ground. These factors include: the position of the complainant in society, and whether the complainant or others in a similar position have previously been the subjects of discrimination, whether the law or conduct in question is aimed at achieving an important goal in South African society, and lastly, whether the discrimination in question has impaired the fundamental human dignity or any other protected rights of the complainant.

⁶⁷³ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for gender equality as amicus curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC), *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C) & *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC). See also Skelton "Constitutional protection of children's rights" in *Child Law in South Africa* (2017) 342-343.

*Khayelitsha, and Others (Commission for gender equality as amicus curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*⁶⁷⁴ (“*Bhe*”) the court held that the rule of male primogeniture, which prevented female children and children born to unmarried parents from inheriting from the estate of their deceased father, violated section 9(3) of the Constitution, as it unfairly discriminated against the aforementioned children based on the listed grounds of gender and birth.⁶⁷⁵ Similarly, in *Petersen v Maintenance Officer, Simon’s Town Maintenance Court, and Others*⁶⁷⁶ (“*Petersen*”) the court held that the common law rule that only maternal grandparents have a duty to support their grandchildren born to unmarried parents, while both sets out grandparents have a duty of support if their grandchildren are born to married parents, differentiates between children born to married and unmarried parents, and furthermore unfairly discriminates against children born to unmarried parents, on the listed ground of birth.⁶⁷⁷ In both *Bhe* and *Petersen*, the court emphasised the fact that children are a vulnerable group in society, whose rights require special attention and protection.⁶⁷⁸ These cases illustrate how South African courts have dealt with discrimination against children, specifically on the listed ground of birth. According to Louw, the aforementioned cases illustrate that South African courts have adopted an approach which does not make the existence or non-existence of a parent-child relationship dependent on factors such as gender, sex and marital status.⁶⁷⁹

⁶⁷⁴ 2005 (1) SA 580 (CC).

⁶⁷⁵ *Bhe* para 93. According to the court in *Bhe* (para 59) the fact that birth is listed as a ground in s 9(3) of the Constitution must be interpreted to prohibit unfair differentiation and discrimination against children based on the marital status of the parents of those children. See also A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 174-175; Skelton “Constitutional protection of children’s rights” in *Child Law in South Africa* 342-343.

⁶⁷⁶ 2004 (2) SA 56 (C).

⁶⁷⁷ *Petersen* para 16. See also Skelton “Constitutional protection of children’s rights” in *Child Law in South Africa* 343; Louw (2010) *PELJ* 186.

⁶⁷⁸ *Bhe* para 93 & 115; *Petersen* para 22.

⁶⁷⁹ A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 175. See also Louw (2010) *PELJ* 186.

In addition to the Constitution, the CRC and the ACRWC recognise the importance of the right to equality and the prevention of unfair discrimination.⁶⁸⁰ The principle of non-discrimination is set out in article 2 of the CRC, which provides as follows:

“State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

Similar to the Constitution, the CRC prohibits discrimination based on birth and factors related to the child’s parents, which includes the marital status of the biological parents. According to the African Committee of Experts on the Rights and Welfare of the Child (“ACERWC”) the right to non-discrimination is one of the fundamental pillars of the ACRWC.⁶⁸¹ The right to non-discrimination is set out in article 3 of the ACRWC, and prohibits discrimination based on the birth or other status of the child and/or the child’s biological parents.⁶⁸² Sloth-Nielsen is of the opinion that even though the marital status of the biological parents is not specifically listed in article 3 of the ACRWC, it can be regarded as being included in the provision.⁶⁸³ It can thus be concluded that discrimination against children born to unmarried parents on the ground of birth is not in accordance the accepted norms of international law.⁶⁸⁴

⁶⁸⁰ Article 2 of the CRC & article 3 of the ACRWC. See also B Mezmur “The United Nations Convention on the Rights of the Child” in T Boezaart *Child Law in South Africa 2* ed (2017) 403 410. The United Nations Human Rights Committee (UN Human Rights Committee *CCPR General Comment No.18: Non-discrimination* UN Doc 10/11/1989) defined discrimination as “...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

⁶⁸¹ African Committee of Experts on the Rights and Welfare of the Child *States Parties Reporting Guidelines 3* <Available at <http://www.acerwc.org/download/acerwc-state-parties-reporting-guidelines/?wpdmdl=8694>>. See also J Sloth-Nielsen “The African Charter on the Rights and Welfare of the Child” in T Boezaart *Child Law in South Africa 2* ed (2017) 426 431.

⁶⁸² Article 3(1) of the ACRWC provides as follows:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

⁶⁸³ Sloth-Nielsen “The African Charter on the Rights and Welfare of the Child” in *Child Law in South Africa* 431.

⁶⁸⁴ *Petersen* para 21.

In terms of South African civil law and Muslim personal law, it is only the biological mother of children born to unmarried parents that automatically acquires parental responsibilities and rights, while neither parent automatically acquires parental responsibilities and rights in terms of South African customary law if the child is born to unmarried parents.⁶⁸⁵ The rules regulating the acquisition of parental responsibilities and rights in all three of the legal systems under consideration therefore limit the right to parental care of children born to unmarried parents, but the same is not done in the case of children who are born of a legitimate marriage. As a result of the fact that such differentiation is based on the listed ground of birth, it amounts to discrimination which is presumed to be unfair.⁶⁸⁶ It has been argued that the fact that the Children's Act provides unmarried fathers with an avenue, other than marriage, through which parental responsibilities and rights can be acquired, has lessened the extent of such discrimination as it is no longer based solely on birth.⁶⁸⁷ It must, however, be noted that while the marital status of the child's parents is no longer the sole basis of the discrimination, discrimination on that basis does still exist.

The next stage of the enquiry is to determine whether this limitation can be justified. As stated above, the right to equality is one of South Africa's foundational constitutional values, and there thus needs to be compelling reasons in order for it to be justifiably limited.⁶⁸⁸ In this regard, the court in *Petersen* held that the differentiation between children born to married and unmarried parents regarding the duty of support by paternal grandparents unfairly discriminated against children born to unmarried parents.⁶⁸⁹ According to the court, the nature and extent of the limitation of, *inter alia*, the right to

⁶⁸⁵ In terms of South African customary law, a father automatically acquires parental responsibilities and rights if he is married to, or subsequently marries, the child's biological mother. See Boezaart (2016) *International Journal of Private Law* 402; S 21 of the Children's Act; Louw (2010) *PELJ* 190; Moosa "The child belongs to the bed: illegitimacy and Islamic law" in *Questionable Issue: Illegitimacy in South Africa* (1992) 173-175.

⁶⁸⁶ S 9(3) & (5) of the Constitution. See also *Petersen* para 16.

⁶⁸⁷ A Louw *Acquisition of parental responsibilities and rights* University of Pretoria: LLD thesis (2009) 173. See also Louw (2010) *PELJ* 184.

⁶⁸⁸ In *President of the Republic of South Africa and Another v Hugo* (para 41) & *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC) (para 20) the court highlights the importance of the achievement of equality in post-apartheid South Africa

⁶⁸⁹ *Petersen* para 21. See also Skelton "Constitutional protection of children's Rights" in *Child Law in South Africa* 343.

equality far outweighed any possible purpose that the common-law rule was designed to achieve.⁶⁹⁰ The same can arguably be said regarding the violation of the right to equality, as a result of the limitation of the right to parental care of children born to unmarried parents. The purpose behind the various legal systems' differential treatment of children born to unmarried parents is *inter alia* the protection of the existing parent-child relationship, ensuring that procreation takes place within a family structure, and determining the house to which a child is affiliated.⁶⁹¹ These purposes are either outdated, particularly in light of South Africa's constitutional dispensation, or are not compelling enough to justify the limitation of the fundamental right to equality. The court in *Bhe* emphasised the fact that children born to unmarried parents have, for many years, been the subjects of differential and discriminatory treatment, but also highlighted that one of the main purposes of the right to equality and the prohibition on unfair discrimination is to remove such patterns of discrimination from South African society.⁶⁹² The continued differentiation between children born to married and unmarried parents, through the limitation of the right to parental care and the infringement of the right to equality of children born to unmarried parents, merely perpetuates the traditional stereotype that children born to unmarried parents are inferior to children born from a recognised marriage. Discrimination against children based on birth or other status is further contrary to the provisions of the CRC and ACRWC.⁶⁹³ If one considers the aforementioned case law, as well as South Africa's constitutional and international obligations, it seems that the only reasonable conclusion that can be drawn is that the limitation of the right to equality of children born to unmarried parents cannot be justified.

⁶⁹⁰ *Petersen* para 21.

⁶⁹¹ See 5 2 3 2 above for a discussion on the purpose behind the limitation of the right to parental care of children born to unmarried parents.

⁶⁹² *Bhe* para 59. See also Currie & de Waal *The Bill of Rights Handbook* 235. In *Petersen* (para 22) the court also emphasised that extra-marital children constitute a vulnerable group in society and that their rights should thus be protected where possible.

⁶⁹³ Refer to article 2 of the CRC & 3 of the ACRWC. See also Sloth-Nielsen "The African Charter on the Rights and Welfare of the Child" in *Child Law in South Africa* 432; *Bhe* para 55.

5 4 Recommendation

A possible solution to the limitation of the right to parental care of children born to unmarried parents is to allow both parents to automatically acquire parental responsibilities and rights irrespective of their marital status.⁶⁹⁴ The protection of children from unsuitable and uncommitted parents is, however, an important concern and must, therefore, be taken into account when considering the equal acquisition of parental responsibilities and rights. This protection can, however, be achieved without preventing a parent from automatically acquiring parental responsibilities and rights. Firstly, should both biological parents automatically acquire parental responsibilities and rights, the exercise of those responsibilities and rights will be subject to the best interests of the child, in the same way as it currently is.⁶⁹⁵ The best interests of the child will thus provide children with a layer of protection, in the event that parental responsibilities and rights are either acquired by an unsuitable parent or exercised in an unsuitable manner. Secondly, section 30 of the Children's Act provides that "each of the co-holders [of parental responsibilities and rights] may act without the consent of the other co-holder ... when exercising those responsibilities and rights".⁶⁹⁶ Therefore, should an unmarried father, who has automatically acquired parental responsibilities and rights, act in a manner that either negatively affects his child or is not in the child's best interests, the biological mother would be able to exercise/fulfil her responsibilities and rights without the consent of the unmarried father.⁶⁹⁷ Not only could these approaches ensure the realisation of the right to parental care of children born to unmarried parents, but it could also ensure that children born to unmarried parents are not unfairly discriminated against.

Allowing both parents to automatically acquire parental responsibilities and rights does not, of course, come without its challenges. An argument that can be raised in response

⁶⁹⁴ The acquisition of parental responsibilities and rights by both biological parents, irrespective of their marital status, is not unheard of. It is the current position in both Australia and Ghana. In this regard see South African Law Commission *Review of the Child Care Act* Project 110 (2002) 1 185 & 228. See also Y P Paizes *The position of unmarried fathers in South Africa: an investigation with reference to a case study* University of South Africa LLM dissertation (2006) 43 and 5 2 3 5 above.

⁶⁹⁵ See chapter four above for a discussion on the relationship between the right to parental care and the best interests of the child.

⁶⁹⁶ S 30(2) of the Children's Act. See also Louw (2010) *PELJ* 180.

⁶⁹⁷ Louw (2010) *PELJ* 180.

to this recommendation is that requiring a parent to approach a court in order to suspend or terminate the parental responsibilities and rights of the other biological parent not only unnecessarily burdens the parent in question, but also ignores practical challenges such as access to courts and the costs associated with such court proceedings. That argument is, however, equally applicable to the current position. Currently, an unmarried father who has complied with the requirements of section 21 of the Children's Act, but who is prevented from having contact with his child by the child's mother, for example, has to approach a court for an order establishing or assigning parental responsibilities and rights, and bear the costs associated with such proceedings. Should both biological parents automatically acquire parental responsibilities and rights, the parent seeking to terminate the responsibilities and rights of the other parent would bear no greater burden than that which unmarried fathers currently bear. Furthermore, this approach could arguably, in certain instances, lessen the burden of parents having to approach courts for an order establishing or assigning parental responsibilities and rights. In this regard Louw provides as follows:

“The advantage of vesting parental responsibilities and rights in both parents at birth is that should the mother die or for some reason disappear the father could automatically act as caretaker and guardian. The present dispensation would necessitate a High Court application with its attendant costs.”⁶⁹⁸

Mothers have traditionally been deemed the child's primary care-taker, and this point of view is confirmed by the Children's Act.⁶⁹⁹ This point of view, and the subsequent raising of children as a single parent, can negatively influence career prospects and decisions of single mothers. In this regard the court in *Hugo* held as follows:

“For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment.”⁷⁰⁰

⁶⁹⁸ Louw (2010) *PELJ* 180.

⁶⁹⁹ See 5 2 3 2 above.

⁷⁰⁰ *Hugo* para 38. See also Louw (2010) *PELJ* 165.

It is therefore submitted that allowing both parents to automatically acquire parental responsibilities and rights would challenge, and possibly eradicate, the stereotypical view that mothers are the primary care-takers of children, and may encourage fathers, both married and unmarried, to play a more active role in the lives of their children.⁷⁰¹ Not only could this lessen the burden of single parenthood on mothers, but it could also be a step towards lessening the inequality experienced by women in modern South African society,

5 5 Conclusion

South African civil, customary and Muslim personal law all limit the constitutionally entrenched right to parental care of children born to unmarried parents **and, as a result, unfairly discriminate against such children**. The justification for the limitation of the right to parental care differs according to the legal system under consideration. The purpose behind the Children's Act's limitation of the right to parental care is the protection of the relationship between the mother and child against interference by uncommitted fathers, on the basis that the mother is the child's primary care-giver.⁷⁰² The basis behind **the** Children's Act's view that mothers are the primary care-givers of children seems to be the fact that they are the parents who are biologically capable of giving birth. The fact that mothers are the parents who are biologically capable of giving birth does not, however, necessarily mean that mothers are more suitable parents than unmarried fathers. South African customary law and Muslim personal law, on the other hand, limit the right to parental care of children born to unmarried parents in order to determine the house to which a child is affiliated, and to ensure that procreation takes place within the family unit, respectively.⁷⁰³ With regards to South African customary law, **it is submitted that** the realisation of the right to parental care and the best interests of the child should be deemed more important than determining the house to which a child is affiliated. Furthermore, while the emphasis of Muslim personal law on procreation during marriage may be in accordance with the legal convictions of the Muslim community, it seems to be out of date with the norms of South Africa's constitutional dispensation, within which

⁷⁰¹ See Louw (2010) *PELJ* 190 & 5 2 3 2 above.

⁷⁰² Louw (2010) *PELJ* 190. See also 5 2 3 2 above.

⁷⁰³ Moosa (1998) *SALJ* 481. See also Rajabi-Ardeshiri *International Journal of Children's Rights* 479; Bennet *Customary Law in South Africa* 296; Bekker (2008) *Obiter* 395 402.

Muslim personal law functions and to which it is subject. Society no longer views the institution of marriage as a pre-requisite for reproduction, with individuals often getting married without ever procreating. The purpose behind South African customary law and Muslim personal law's limitation of the right to parental care cannot be regarded as an adequate one, resulting in the effect and extent of the limitation outweighing the purpose that it seeks to achieve. While it could be argued that the limitation of the right to parental care is not extensive as the Constitution sets out a right to family care in addition to the right to parental care, being cared for by members of one's extended family is arguably different to being cared for by one's parents. Furthermore, there is no guarantee that the envisaged family care will be adequate and in the child's best interests. In a healthy parent-child relationship, a special bond exists between parents and their children which is difficult to substitute. This bond should therefore be protected where possible, provided it is in the child's best interests.

Chapter six: Conclusion

6 1 Introduction

The Constitution of the Republic of South Africa, 1996 (the “Constitution”) significantly changed South Africa’s law on children’s rights.⁷⁰⁴ The main focus of the parent-child relationship has shifted from the authority of parents, to the rights of children and the responsibilities that parents have in relation to their children.⁷⁰⁵ As a result of the fact that children constitute a vulnerable group in society, section 28 of the Constitution sets out rights to which only children are entitled, one such right being the right to family, parental or alternative care.⁷⁰⁶ It is the child’s right to parental care that has formed the basis of this research, the focus of which has been to determine whether the manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities and rights limit the right to parental care of children born to unmarried parents and/or are not in accordance with the best interests of such children. Once it was determined that the aforementioned legal systems, by failing to allow both biological parents to acquire parental responsibilities and rights automatically, *prima facie* limit the right to parental care of children born to unmarried parents, a further issue needed to be considered, namely whether the limitation of the right to parental care of children born to unmarried parents, but not children born to married parents, unfairly discriminates against children born to unmarried parents.

The preceding chapters have, *inter alia*, set out the development of South African children’s rights law, the content of the right to parental care and the best interests of the child, as well as the manner in which the legal systems under consideration regulate the acquisition of parental responsibilities and rights.⁷⁰⁷ The aforementioned theoretical discussions culminated in a constitutional analysis of the right to parental care of children born to unmarried parents. This chapter will thus recap what has been discussed in the chapters preceding this one, in order to give context to the findings of the aforementioned constitutional analysis, which will be discussed thereafter. Once the findings of the constitutional analysis have been set out, a possible solution to the problems surrounding

⁷⁰⁴See 2 1 above.

⁷⁰⁵See 3 2 3 1 above.

⁷⁰⁶Section 28(1)(b) of the Constitution. See also 2 1 above.

⁷⁰⁷See chapters 2-5 above

the acquisition of parental responsibilities and rights and the right to parental care of children born to unmarried parents will be discussed.

6 2 The parent-child relationship in South Africa

6 2 1 The right to parental care

In order to determine whether the right to parental care of children born to unmarried parents was limited, it was necessary to engage with South African children's rights law and the content of the right to parental care. As South Africa now follows a child-centred approach to children's rights, emphasis is placed on the rights to which children are entitled and the responsibilities that parents are obligated to fulfil.⁷⁰⁸ In terms of section 28(1)(b) of the Constitution, all children have a right to family care, parental care or to appropriate alternative care. According to the court in *Minister of Police v Mboweni and Another*,⁷⁰⁹ ("Mboweni") children are not entitled to all of the rights set out in section 28(1)(b), as those rights operate in the alternative.⁷¹⁰ In other words, the realisation of the right to parental care, for example, results in the child not being entitled to family care or appropriate alternative care.⁷¹¹ It is important to note that the right to family care and parental care are the primary rights of section 28(1)(b) of the Constitution, with the right to appropriate alternative care only operating in the absence of the aforementioned forms of care.⁷¹² The child's parents and family are therefore primarily responsible for the child's care, with the State only having to provide the child with appropriate alternative care in the event that the primary responsibility has not been fulfilled or is not in the child's best interests.⁷¹³ The United Nations Convention on the Rights of the Child⁷¹⁴ (the "CRC") and the African Charter on the Rights and Welfare of the Child⁷¹⁵ (the "ACRWC") similarly see

⁷⁰⁸See 3 2 3 1 above.

⁷⁰⁹2014 (6) SA 256 (SCA).

⁷¹⁰See 2 2 2 1 above.

⁷¹¹See 2 2 2 1 above.

⁷¹²See 2 2 2 1 above.

⁷¹³See 2 2 2 1 above.

⁷¹⁴The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The CRC was signed and ratified by South Africa on 29 January 1993 and 16 June 1995 respectively.

⁷¹⁵The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49. The ACRWC was signed and ratified by South Africa on 10 October 1997 and 7 January 2000 respectively.

the child's parents and/or family members as being primarily responsible for the care of the child, with the State only having to take on the responsibility for the child's care in the absence of family or parental care.⁷¹⁶

It is important to note that section 28(1)(b) of the Constitution provides children with a right to parental, rather than merely maternal or paternal, care. According to Louw, the term parental care is a gender neutral term, which presupposes care by parents of both genders, rather than one parent being favoured over another.⁷¹⁷ Furthermore, section 28(2) of the Constitution, which sets out the best interests of the child principle, qualifies the child's right to parental care, resulting in the child being entitled to parental care that is in his or her best interests.⁷¹⁸ There is no rigid definition of the right to parental care in the Constitution or the Children's Act 38 of 2005 (the "Children's Act"). According to the court in *M and Another v Minister of Police*⁷¹⁹ ("M"), the Children's Act's definition of care can be used to understand what the right to parental care entails.⁷²⁰ Furthermore, in *Government of the Republic of South Africa and Others v Grootboom and Others*⁷²¹ ("Grootboom") the court stated that, while section 28(1)(b) of the Constitution sets out the persons responsible for the care of a child, section 28(1)(c) sets out what such care entails.⁷²² In terms of section 28(1)(c) of the Constitution, children have the right to basic nutrition, shelter, health care services and social services, and, according to the court in *Grootboom*, it is the responsibility of the parents and/or family members of those children, or the State, to ensure that those rights are realised. Parents are, therefore, generally responsible for the financial and otherwise tangible needs of the child, as well as the emotional support and guidance that a child needs during his or her upbringing.⁷²³

South African customary law, unlike the country's civil law, tends to focus on the cultural group and extended family, rather than the individual.⁷²⁴ Furthermore, contrary to the country's civil law, South African customary law is not primarily concerned with the

⁷¹⁶See 2 3 2 above.

⁷¹⁷See 5 2 2 above.

⁷¹⁸See 4 5 above.

⁷¹⁹2013 (5) SA 622 (GNP).

⁷²⁰*M* para 20. See also 2 2 2 2 above.

⁷²¹2001 (1) SA 46 (CC).

⁷²²See 2 2 2 2 above.

⁷²³See 2 2 2 2 above.

⁷²⁴See 2 2 3 3 above.

rights of the child, but rather focuses on the rights that the family have in respect of the child.⁷²⁵ As a result of the importance that South African customary law places on the cultural group and extended family, the care of children is regarded as the responsibility of the child's parents, extended family and members of the community.⁷²⁶ Therefore, despite the fact that the right to parental care is not expressly recognised in customary law, children are still, in theory, entitled to care from a variety of people.⁷²⁷

Rather than focusing solely on the rights of the child, Muslim personal law regards the parent-child relationship as being complementary in nature.⁷²⁸ In terms of Muslim personal law, children born to married parents have the right to be cared for by both of their biological parents, while children born to unmarried parents receive only a right to maternal care.⁷²⁹ The child's biological parents (or mother, if the child is born to unmarried parents) are thus responsible for the care of the child on a day to day basis, as well providing for the necessities of the child.⁷³⁰ It has become clear that, despite the lack of express recognition of the right to parental care, the fulfilment of the responsibilities that Muslim personal law envisages for the care of children can result in the realisation of the right to parental care.

6 2 2 The acquisition of parental responsibilities and rights

After setting out the content of the right to parental care, the acquisition of parental responsibilities and rights in terms of South African civil, customary and Muslim personal law was considered, as it is arguably the **acquisition and exercise** of the aforementioned responsibilities and rights that gives effect to the child's right to parental care. All three legal systems under consideration, by providing that children are entitled to some form of care from their parents and/or family members, in one way or another give effect to section 28(1)(b) of the Constitution. When the manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities

⁷²⁵See 2 2 3 3 above.

⁷²⁶See 2 2 3 3 above.

⁷²⁷See 2 2 3 3 above.

⁷²⁸See 2 2 4 2 above.

⁷²⁹See 2 2 4 2 & 3 4 above.

⁷³⁰See 2 2 4 2 & 3 4 above.

and rights was considered, it became clear that the right to parental care of children born to unmarried parents is often not realised. None of the three aforementioned legal systems allow both of the biological parents of children born to unmarried parents to acquire parental responsibilities and rights automatically, which results in the aforementioned children receiving either maternal or paternal care, rather than parental care.⁷³¹

In terms of South African civil law and Muslim personal law, both parents of children born to married parents automatically acquire responsibilities and rights in respect of their children.⁷³² In terms of these legal systems, however, if a child is born to unmarried parents, it is only the biological mother of the child that acquires parental responsibilities and rights or parental authority.⁷³³ In terms of Muslim personal law, a child born to unmarried parents is not legally deemed to be related to his father, and, as a result, his father does not acquire, and has no prospect of acquiring, parental responsibilities and rights.⁷³⁴ Unlike Muslim personal law, South African civil law does provide unmarried fathers with an avenue through which they can acquire parental responsibilities and rights in section 21 of the Children's Act. In terms of section 21 of the Children's Act, an unmarried father acquires parental responsibilities and rights if he is living in a permanent life partnership with the child's biological mother at the time of the child's birth. Should an unmarried father not be in a permanent life partnership with the mother of the child, he can acquire parental responsibilities and rights in terms of section 21 of the Children's Act if he: consents to be identified as the father of the child or pays damages in terms of customary law, and contributes, or has made a good faith attempt at contributing, to the maintenance and upbringing of his child.

In terms of South African customary law, it is only where a child is born as a result of a customary marriage that a biological parent of the child acquires parental responsibilities and rights.⁷³⁵ Should the child be born of a valid marriage, it is the husband of the biological mother (who is usually, but not necessarily, the child's biological father)

⁷³¹See 3 2 3 3, 3 3 & 3 4 above.

⁷³²See 3 2 3 3 1 & 3 4 above.

⁷³³See 3 2 3 3 1 & 3 4 above.

⁷³⁴See 3 4 above.

⁷³⁵ See 3 3 1 above.

whom acquires parental responsibilities and rights.⁷³⁶ In the event that the child is born to unmarried parents, neither of the child's biological parents automatically acquire parental responsibilities and rights, as the aforementioned responsibilities and rights vest in the mother's guardian.⁷³⁷ While the unmarried father may subsequently acquire parental responsibilities and rights by either marrying the child's biological mother or through the payment of *isondlo* damages, it is generally accepted that the biological mother has no prospect of acquiring parental responsibilities and rights.⁷³⁸

All three of the legal systems under consideration fail to allow for both of the biological parents of children born to unmarried parents to acquire parental responsibilities and rights automatically, which results in the aforementioned children receiving either a right to maternal or paternal care, rather than their constitutionally entrenched right to parental care. A constitutional enquiry was therefore necessary to determine whether the respective positions limit the right to parental care of children born to unmarried parents.

6 3 The limitation of the constitutional rights of children born to unmarried parents

6 3 1 The right to parental care

Once the legal position regarding the acquisition of parental responsibilities and rights had been set out, it became clear that all three legal systems under consideration, by failing to allow both of the biological parents of children born to unmarried parents to acquire parental responsibilities and rights, *prima facie* limit the right to parental care of children born to unmarried parents. The purpose behind the limitation of the right to parental care of children born to unmarried parents differs according to the legal system in question. South African civil law's limitation of the right to parental care is aimed at protecting the mother-child relationship from interference by the unmarried father, while Muslim personal law limits the aforementioned right in order to ensure that procreation takes place within a recognised marriage.⁷³⁹ While it can be argued that there is a link between South African civil law's limitation of the right to parental care and the purpose

⁷³⁶ See 3 3 1 above.

⁷³⁷ See 3 3 1 & 3 3 2 above.

⁷³⁸ See 3 3 1 & 3 3 2 above.

⁷³⁹ See 5 2 3 2 above.

that it seeks to achieve, namely protection of the mother-child relationship from negative interference by uncommitted unmarried fathers, the purpose itself is problematic. South African civil law bases the aforementioned purpose on the assumption that involvement by the child's unmarried father is inherently negative, but provides no rational basis for this view point. Furthermore, Muslim personal law's purpose behind the limitation of the right to parental care of children born to unmarried parents, which is to ensure that children are the product of a legitimate marriage, is not only out-dated, but also appears to favour a particular family form over another, which is contrary to judgement of *Dawood v Minister of Home Affairs and Others: Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* ("Dawood").⁷⁴⁰ The purpose of the acquisition of parental responsibilities and rights in terms of South African customary law is not to ensure that the child's right to parental care is effected, but rather to determine the house with which a child is affiliated.⁷⁴¹ While the determination of the family with which a child is affiliated is of significant importance in terms of South African customary law, it can surely be achieved without limiting child's right to parental care.

Once the avenues through which unmarried biological parents can acquire parental responsibilities and rights were set out, it became clear that the limitation of the right to parental care of children born to unmarried parents is, or can be, quite extensive.⁷⁴² While section 21 of the Children's Act does provide unmarried fathers with an avenue through which they can acquire parental responsibilities and rights, the fulfilment of the requirements of section 21 of the Children's Act often presupposes the involvement of the biological mother.⁷⁴³ Should the biological mother not want the father to be involved in the life of his child, she could take steps to prevent the unmarried father from satisfying the requirements of section 21(1)(b) of the Children's Act.⁷⁴⁴ Similarly, in terms of South African customary law and Muslim personal law, the mother, and unmarried biological father, respectively, do not acquire, and have no prospects of acquiring, parental

⁷⁴⁰ 2000 (3) SA 936 (CC); See 5 2 3 2 above.

⁷⁴¹ See 5 2 3 2 above.

⁷⁴² See 5 2 3 3 above.

⁷⁴³ See 5 2 3 3 above.

⁷⁴⁴ See 5 2 3 3 above.

responsibilities and rights.⁷⁴⁵ It was therefore concluded that, in terms of South African customary law and Muslim personal law, children born to unmarried parents may never have their right to parental care realised. During the course of the constitutional analysis, it became clear that the effect and extent of the limitation of the right to parental care of children born to unmarried parents, outweighs the purpose that the limitation seeks to achieve.

6 3 2 The right to equality

The limitation of the right to parental care of children born to unmarried parents, but not children born to married parents, raised a further issue that required consideration, namely whether the aforementioned legal position unfairly discriminates against children born to unmarried parents, resulting in the limitation of their right to equality. The court in *Harksen v Lane*⁷⁴⁶ (“*Harksen*”) set out the test for unfair discrimination, and it was this test that was used to determine whether the limitation of the right to parental care of children born to unmarried parents, but not children born to married parents, amounts to unfair discrimination.⁷⁴⁷

The manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities and rights differentiates between children born to married and unmarried parents based on the birth status of those children. This differentiation amounts to discrimination that is presumed to be unfair, because of the fact that birth is a ground listed in section 9(3) of the Constitution.⁷⁴⁸ Once it was established that the aforementioned legal systems unfairly discriminate against children born to unmarried parents, it needed to be determined whether the limitation of their right to equality could be justified. The constitutionally entrenched right to equality is one of the fundamental values on which post-apartheid democratic South Africa is based. As a result, the limitation of the right to equality requires strong and compelling justification.⁷⁴⁹ As previously mentioned, the purpose behind the differential treatment of children born to

⁷⁴⁵ See 3 3 1, 3 4 & 5 2 3 3 above

⁷⁴⁶ 1998 (1) SA 300 (CC).

⁷⁴⁷ See 5 3 3 above.

⁷⁴⁸ S 9(5) of the Constitution; See 5 3 3 above

⁷⁴⁹ See 3 3 2 above.

unmarried parents is the protection of the mother-child relationship, ensuring that protection takes place within marriage, or determining the house with which a child is affiliated.⁷⁵⁰ In light of South Africa's constitutional dispensation, it was concluded that these purposes were not compelling enough to justify the limitation of the fundamental right to equality of children born to unmarried parents.

6 4 Recommendation

Once it became clear that the right to parental care of children born to unmarried parents was unjustifiably limited, possible solutions to the problem needed to be considered. It is submitted that the ideal legal position would be to allow both of the child's biological parents to acquire parental responsibilities and rights automatically, without any qualification.⁷⁵¹ This could, in theory, ensure the realisation of the right to parental care of all children and, by doing so, similarly ensure that children born to unmarried parents are not unfairly discriminated against. This proposition, however, raises an important issue, namely the protection of children from disinterested and unsuitable parents, who are not concerned with the welfare of their children.⁷⁵² The solution to this problem can be found in section 28(2) of the Constitution, which sets out the best interests of the child principle. This approach, as a whole, would allow both biological parents, irrespective of their marital status, to acquire parental responsibilities and rights automatically. Should a parent, however, exercise those responsibilities and rights in a manner contrary to the best interests of the child, the responsibilities and rights of that parent could be suspended or even terminated. Furthermore, pending the suspension or termination of the responsibilities and rights of a particular parent, the other parent would be able to continue exercising his/her responsibilities and rights without the consent of the other parent.⁷⁵³ In terms of this approach, there would be actual factual evidence as to whether the exercise of parental responsibilities and rights by both of the child's biological parents is in the child's best interests.⁷⁵⁴ Furthermore, the practical challenges that may arise as a result

⁷⁵⁰ See 5 2 3 2 above.

⁷⁵¹ See 5 2 3 5 & 5 4 above.

⁷⁵² See 5 4 above.

⁷⁵³ See 5 4 above.

⁷⁵⁴ See 5 2 3 5 above.

of the implementation of this proposition, namely access to court and the costs of court proceedings, have been noted, it is submitted that these challenges would constitute no greater obstacles than those currently faced by unmarried fathers.⁷⁵⁵ In fact, allowing both biological parents to acquire parental responsibilities and rights automatically could diminish the need to approach a court for an order establishing or assigning parental responsibilities and rights in certain instances.⁷⁵⁶

6 5 Conclusion

While section 28(1)(b) of the Constitution sets out a right to family, parental or alternative care, it is the right to parental care that formed the basis of the research. The research set out to determine whether the manner in which South African civil, customary and Muslim personal law regulate the acquisition of parental responsibilities and rights limit the constitutionally entrenched right to parental care of children born to unmarried parents. During the course of the research, it became clear that all three of the aforementioned legal systems fail to allow both biological parents of children born to unmarried parents to acquire parental responsibilities and rights automatically, often resulting in children born to unmarried parents receiving either maternal or paternal care, rather than parental care. Furthermore, the purpose behind the aforementioned legal systems' limitation of the right to parental care was either out-dated, without rational basis or inadequate, resulting in the reasons for the limitation not being strong and compelling enough to justify such limitation. It was thus concluded that South African civil, customary and Muslim personal law unjustifiably limit the right to parental care, and, as a result, unfairly discriminate against children born to unmarried parents.

⁷⁵⁵ See 5 4 above.

⁷⁵⁶ See 5 4 above.

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